
(1968) 04 BOM CK 0026

In the Bombay High Court

Case No : Special Civil Application No. 1452 of 1964

Mansing Surajsingh Padvi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 03-04-1968

Acts Referred:

Constitution of India, 1950 — Article 10, 12, 123, 13, 14
General Clauses Act, 1897 — Section 3
Government of India Act, 1935 — Section 42, 62, 91, 92, 99

Citation : (1968) 70 BOMLR 654

Hon'ble Judges : Tarkunde, J;Nathwani, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

This Judgment has been overruled by : State of Maharashtra and Others Vs. Man Singh Suraj Singh Padvi and Others, AIR 1978 SC 916 : (1978) 1 SCC 615 : (1978) 2 SCR 856 : (1978) 10 UJ 177

Tarkunde, J.—The petitioner is a member of the Padvi tribe in the West Khandesh District, There are in that District six estates of tribal Chiefs called Mehwasssi Estates. The petitioner is the owner of one such estate. His estate is known as Kathi Estate and it comprises of 99 villages in Maharashtra and 2 villages in Gujarath. The cultivable lands in the 99 villages comprised in Maharashtra are in the possession of about 7,000 cultivators.

2. The Mehwasssi estates are a scheduled area under Article 244 and Schedule V of the Constitution. On 24th February 1962, the Governor of Maharashtra issued a Notification under sub-para. (1) of para. 5 of the Fifth Schedule. At about the same time, in exercise of his powers under sub-para. (2) of para. 5 of the Fifth Schedule, the Governor made a Regulation called the West Khandesh Mehwasssi Estates (Proprietary Rights Abolition, etc.) Regulation, 1961. The petitioner challenges the validity of the said Notification and the said Regulation and prays that a writ or direction should be issued under Article 226 of the Constitution

requiring the respondents to refrain from enforcing the Notification and the Regulation. The Notification and the Regulation will hereafter be referred to as "the impugned enactments".

3. Originally the respondents to the petition were the State of Maharashtra and certain Revenue Officers from the West Khandesh District. By an amendment four types of cultivators, who are in possession of the agricultural lands in the Kathi Estate, were added as respondents Nos. 5 to 8 to the petition as representing themselves and the class of cultivators to which each of them belongs.

4. The Mehwasssi estates in the West Khandesh District were a "partially excluded area" u/s 91 of the Government of India Act, 1935. By Section 92 of the said Act the power to legislate in respect of excluded or partially excluded areas was vested in the Governor of the Province in which the areas were comprised. Sub-section (1) of Section 92 provided that, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area unless the Governor by public notification so directs, and that the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit. Sub-section (2) of Section 92 laid down that the Governor may make regulations "for the peace and good government" of any area in a Province which is for the time being an excluded area or a partially excluded area, and that any regulations so made may repeal or amend any Act of the Federal Legislature or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to such area.

5. In exercise of the powers conferred by Sub-sections (1) and (2) of Section 92 of the Government of India Act, 1935, the Governor of Bombay made on 31st January 1950 a regulation called the West Khandesh Mehwasssi Estates Regulation, 1949. The Regulation applied to the six Mehwasssi estates, including the petitioner's Kathi Estate, in the West Khandesh District. By Section 3 of the Regulation the Bombay Land Revenue Code, 1879, was made applicable to the Mehwasssi Estates subject to certain modifications. By Section 4 the Regulation laid down that all other Acts passed by the Central or Provincial Legislature which were in force in other parts of the West Khandesh District shall come into force in the territory of the Mehwasssi Estates.

6. By virtue of the application of the Bombay Land Revenue Code to the Mehwasssi Estates the petitioner became an occupant of the agricultural lands in his estate and the persons who were cultivating the lands under him became his tenants. Moreover, one of the Acts which became applicable to the Mehwasssi estates as a result of Section 4 of the Regulation was the Bombay Tenancy and Agricultural Lands Act, 1948. The relations between the petitioner and his tenants in the Estate were regulated by the provisions of that Act.

7. Extensive amendments in the Bombay Tenancy and Agricultural Lands Act, 1948, were brought about by the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1955, being Bombay Act 13 of 1956, which came into force on 1st August 1956. A provision in the amending Act added Clause 10A to Section 2 of the parent Act in order to provide a definition of the term "permanent tenant". By that clause permanent tenant was defined to mean a person who held land as Mulgenidar or Mirasdar, or who held land permanently, or the commencement or duration of whose tenancy could not be satisfactorily proved by reason of antiquity. Sections 32 to 32R were added to the parent Act in order to provide for compulsory purchase by the tenants of the lands which they were cultivating under their landlord. Subject to certain exceptions with which we are not concerned in the present case, the tenants became the owners by purchase of the lands in their possession on the "tillers" day" i.e. on 1st April 1957. Sub-section (1) of Section 32H provided for the purchase price which was to be paid by the tenants to their landlords in respect of the land deemed to have been purchased by them. In the case of permanent tenants the purchase price was to be an amount equal to "six times the rent of the land". In the case of other tenants the purchase price was to be determined by a Tribunal, but it was provided that the price shall not be "less than 20 times the assessment and not more than 200 times the assessment". By Sub-section (2) of Section 32H, the State Government was empowered to fix different minima and maxima for determining the purchase price in the case of land held by tenants in any backward area. In exercise of the powers conferred by Section 32H(2), the Bombay Government issued on 31st March 1957 an order fixing the maximum purchase price payable by ordinary (non-permanent) tenants in certain backward areas in the West Khandesh District. The order applied to several villages in the West Khandesh District including all the villages belonging to the six Mehwassi Estates. In the case of these backward areas the maximum price payable by ordinary tenants was fixed at 80 times of the assessment, the minimum price remaining unchanged.

8. The combined effect of the amending Bombay Act 13 of 1956 and the aforesaid order dated 31st March 1957 was that the petitioner ceased to be the owner of the lands in possession of his tenants from 1st April 1957 and became entitled to get from his permanent tenants a purchase price equal to six times the rent of the lands and from his ordinary tenants a purchase price between 20 and 80 times the assessment.

9. The impugned enactments were passed nearly five years after the petitioner was thus deprived of ownership of the said lands. Before dealing with the nature of the impugned enactments it is desirable to refer to the Constitutional provisions under which they were made. Article 244 of the Constitution provides for the administration of Scheduled Areas and Scheduled Tribes. Clause (1) of Article 244 says that the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled tribes in any State other than the State of Assam. Clause (2) of Article 244 says that the

provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam. In the Fifth Schedule para. 5 deals with the law applicable to Scheduled Areas. Sub-para. (7) and the material part of sub-para. (2) of para. 5 run as follows:

5. Law applicable to Scheduled Areas :-

(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

The impugned Notification dated 24th February 1962, was issued by the Governor of Maharashtra in exercise of his powers under sub-para. (1) of para. 5 of the Fifth Schedule. It purported to modify the amending Bombay Act 13 of 1956 in its application to agricultural lands comprised in the Mehwasssi Estates. By Section 48 of the amending Act, Section 88 of the parent Act (The Bombay Tenancy and Agricultural Lands Act, 1948) was substituted by other sections which were numbered as 88, 88A, 88B, 88C and 88D. The Notification added Section 88DD to Section 48 and this additional Section 88DD laid down that, save as otherwise provided in any other enactment for the time being in force, nothing in Sections 32 to 32R (both inclusive) shall apply to any Mehwasssi land. It was further laid down in the said Notification that "the directions as given above shall have retrospective effect from 1st August 1956."

10. At about the same time the Governor of Maharashtra issued the impugned Regulation called the West Khandesh Mehwasssi Estates (Proprietary Rights Abolition, etc.) Regulation, 1961. The impugned Regulation was issued in exercise of powers conferred by sub-para. (2) of para. 5 of the Fifth Schedule. By Section 2(1) of the Regulation the term "appointed day" was defined to mean the date on which this Regulation came into force. (The Regulation was brought into force on 1st April 1962). By Section 2(1) the word "Mehwasssi" was defined to mean a holder of a Mehwasssi Estate. Section 2(5) defined an "inferior holder" to mean, in substance, a person who was not a permanent tenant but who had a heritable and transferable right in the Mehwasssi land held by him, whether such right had been acquired by purchase or otherwise, or a person who had acquired a heritable right in that land on payment of Nazarana to the Mehwasssi. The term "permanent tenant" was defined in Section 2(10) in these terms:

"permanent tenant" means a person who, not being an inferior holder, holds any Mehwasssi land from a Mehwasssi as a permanent tenant, within the meaning of that term as defined by clause (10) of Section 2 of the Bombay Tenancy and

Agricultural Lands Act, 1948, and includes a person -

(i) who on the appointed day holds as tenant any Mehwassi land from a Mehwassi, and

(ii) who immediately before the appointed day, was holding (or who and whose predecessors-in-title were holding) for a continuous period of twelve years or more (or for such periods as aggregate to a total continuous period of twelve years or more), the same Mehwassi land or any other Mehwassi land as tenant, from the same Mehwassi;...

Section 2(12) provided that the word "tenant" meant a person who held any Mehwassi land from a Mehwassi or an inferior holder as tenant, within the meaning of that term as defined in the Bombay Tenancy and Agricultural Lands Act, 1948, but did not include a permanent tenant. Section 5 laid down that, on and after the appointed day, every inferior holder became the occupant of the land in his possession and that "" any right or interest of the Mehwassi in that land as superior holder thereof shall be deemed to be extinguished". No compensation whatever was payable to the Mehwassi for the extinguishment of his rights in lands held by inferior holders. Section 6 provided for the extinguishment of the rights of the Mehwassi in lands which were in the possession of permanent tenants, ordinary tenants, and sub-tenants of permanent tenants. It was provided by Sub-section (3) of Section 6 that a permanent tenant was to pay to the Mehwassi as purchase price a sum equal to three times the amount of full assessment, that an ordinary tenant was to pay to the Mehwassi as purchase price a sum equal to six times the amount of full assessment, and that a sub-tenant of a permanent tenant was to pay as purchase price a sum equal to three times the amount of full assessment to the permanent tenant and three times the amount of full assessment of the Mehwassi.

11. There can be no doubt that the impugned enactments were integral parts of a single legislative scheme. As a result of the impugned Notification the petitioner lost the right to get the purchase price from his tenants as provided in Section 32H of the Bombay Tenancy and Agricultural Lands Act, 1948. He was restored to the position of an estate holder retrospectively, as if Sections 32 to 32R of the Bombay Tenancy and Agricultural Lands Act, 1948 never applied to his lands. Then by the impugned Regulation the rights as an estate holder, which had been restored to him by the impugned Notification, were wiped out and he became entitled to a meagre amount of purchase price from his permanent and other tenants. The Notification which in its effect was to precede the Regulation was in fact published after the Regulation. The Notification was dated 24th February 1962 and was published on 1st March 1962. The Regulation received the assent of the President on 19th February 1962 and was published on 24th February 1962. The net result of the impugned enactments was that the petitioner became entitled to get nothing from his inferior holders, that the purchase price receivable by him from his permanent tenants was reduced from

six times the rent to three times the assessment, that his non-permanent tenants of 12 years standing were converted into permanent tenants, and that from his other tenants he became entitled to receive a purchase price at six times the assessment instead of from 20 to 80 times the assessment.

12. The main submission of Mr. Porus Mehta, who appeared for the petitioner, was that the impugned enactments were invalid as they violated the petitioner's fundamental right under Article 19(1)(f) and were not protected by Article 31A of the Constitution. Before dealing with this main submission it is desirable to dispose of some of the minor arguments advanced by Mr. Porus Mehta.

13. Mr. Porus Mehta argued that the impugned Notification was invalid because it went beyond the scope of the legislative powers of the Governor under sub-para. (7) of para. 5 of the Fifth Schedule. Sub-para. (1) of para. 5, as stated above, authorizes the Governor to direct by notification that any Act of Parliament or of the State Legislature shall not apply to a Scheduled Area or that it shall apply to a Scheduled area subject to such exceptions and modifications as he may specify. Mr. Porus Mehta's argument was that the exceptions and modifications which may be specified by the Governor must be such as to adjust the law to local conditions but must not go to the extent of making a change in the policy of Parliament or the State Legislature, as the case may be. Mr. Mehta urged that the main purpose of the amending Bombay Act 13 of 1956 was to provide for statutory purchase of lands by tenants and that it was not open to the Governor in the exercise of his powers under sub-para. (7) of para. 5 to delete altogether that portion of the amending Act by which the statutory purchase of lands by tenants was provided for. Mr. Mehta relied on certain observations of Mahajan J. and Mukherjea J. in *Jatindra Nath Gupta v. The Province of Bihar* [1949] F.C.R. 595, relating to the scope of Governor's powers under the corresponding Sub-section (1) of Section 92 of the Government of India Act, 1935. Mahajan J. (as he then was) said in his judgment (p. 617) :

...It is obvious that u/s 92(1) the scope of the legislative power of the Governor is not larger than the scope of the statute of the Provincial Legislature. He has no power to enlarge the statute or extend its scope u/s 92(1)... He cannot go beyond it, he must function within it. He can subtract from its provisions and can modify it.

Mukherjea J. observed in the course of his judgment (p. 635) :

...though the power exercisable by the Governor u/s 92(1) of the Government of India Act is in essence legislative power, it is different from and is of a much more restricted and attenuated character than the power conferred upon the Governor by Sub-section (2). Under Sub-section (1), the Governor has no power to make independent legislation. He can only apply to an excluded area a legislation which has already been passed by the Dominion or the Provincial Legislature. It is true that he can make modifications and exceptions but these are only for adjusting the provisions of the Act to the local circumstances. The

Governor cannot certainly, by notification u/s 62(1), alter the basic structure of an Act or its policy or principles.

14. We are of the view that the observations of Mahajan J. and Mukherjea J. in the above case do not support Mr. Porus Mehta's contention that the Governor in the present case exceeded his powers under sub-para. (7) of para. 5 of the Fifth Schedule in issuing the impugned Notification. Under the scheme of the Government of India Act, 1935, no Act of the Federal Legislature or of a Provincial Legislature applied by its own force to an excluded or partially excluded area. Under Sub-section (1) of Section 92 the Governor was authorised to direct that any Act of the Federal Legislature or the Provincial Legislature should apply to an excluded or partially excluded area subject to such exceptions or modifications as he thought fit. Under the scheme of the Constitution, Scheduled Areas are not excluded from the legislative competence of the Parliament and the State Legislatures. Acts passed by them apply to Scheduled Areas by their own force. The Governor, however, has been authorised by sub-para. (1) of para. 5 of the Fifth Schedule to direct, not only that an Act shall be subject to certain exceptions or modifications in its application to a Scheduled area, but that it shall not apply at all to such an area. Moreover, the Governor has been expressly empowered to give retrospective effect to any such directions. Now, since the Governor of Maharashtra had the power to issue a notification under sub-para. (1) of para. 5 directing that the Bombay Amending Act 13 of 1956 shall not apply at all to Mehwasai Estates in the West Khandesh District, he had obviously the power to direct that certain important provisions of that amending Act shall not apply to that area. We cannot, therefore, accept Mr. Porus Mehta's argument that the impugned Notification was issued in excess of the Governor's powers under sub-para. (1) of para. 5.

15. The next argument of Mr. Porus Mehta related to the validity of the impugned Regulation. He argued that the impugned Regulation became law when the assent of the President thereto was published in the Maharashtra Government Gazette on 24th February 1962. The impugned Notification was, however, not published in the Gazette till 1st March 1962. Mr. Porus Mehta argued that, at the time when the Regulation became law, the petitioner was not an estate holder and had merely the right of getting the purchase price of his lands from his permanent and ordinary tenants u/s 32H of the Bombay Tenancy and Agricultural Lands Act, 1948. Since the petitioner was not an estate holder on 24th February 1962, no effect can be given, according to Mr. Porus Mehta, to the provisions of the Regulation by which the petitioner's non-existing estate was abolished. The answer to this argument is very simple. Sub-section (3) of Section 1 of the impugned Regulation provided that the Regulation shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint. The State Government subsequently notified that the Regulation shall come into force from 1st April 1962. The Notification had come into force at the latest on 1st March 1962. It would follow that the petitioner was reinstated to the position of an estate holder by the Notification and that his estate could,

therefore, be extinguished under the provisions of the impugned Regulation.

16. Another argument of Mr. Porus Mehta was that the impugned Regulation was invalid because the Governor in making the Regulation exceeded the scope of his powers under sub-para. (2) of para. 5 of the Fifth Schedule. Sub-para. (2) confers on the Governor the power to make Regulations "for the peace and good Government of any area in a State which is for the time being a Scheduled Area." Mr. Porus Mehta argued that the Governor's powers under sub-para. (2) of para. 5 are to be exercised in cases of dire necessity or great peril and that no such necessity or peril justified the making of the impugned Regulation. We find no justification for Mr. Porus Mehta's contention that the Governor's powers under sub-para. (2) of para. 5 are limited in this manner. Scheduled Areas are tribal areas and they may have problems of their own. They have been separately governed almost from the beginning of British rule in the country. The history of the administration of these areas was traced by Hidayatullah J. (as His Lordship then was) in a minority judgment in *Edwingson Bareh Vs. State of Assam and Others*, . The Legislative powers of the Governor under para. 5 of the Fifth Schedule are to be traced to the peculiar problems of tribal areas and are not meant to be exercised only in circumstances of emergency. Moreover, the provisions of Articles 388 to 340 of the Constitution make it clear that the framers of the Constitution did not intend that the special provisions relating to the governance of Scheduled Areas should be a permanent feature of the Constitution.

17. We shall next turn to the main submission of Mr. Porus Mehta that the impugned enactments are invalid because they violate the petitioner's fundamental right under Article 19(1)(f) and are not protected by Article 31A of the Constitution. In *Sri Ram Ram Narain Medho v. The State of Bombay* [1959] Supp. (1) S.C.R. 489 61 Bom. L.R. 811, the Supreme Court dealt with the effect of Sections 32 to 32R of the Bombay Tenancy and Agricultural Lands Act, 1948 on the title of landlords. The Court observed in this connection (p. 519) :

...The title to the land which was vested originally in the landlord passes to the tenant on the tiller's day or the alternative period prescribed in that behalf. This title is defeasible only in the event of the tenant failing to appear or making a statement that he is not willing to purchase the land or committing default in payment of the price thereof as determined by the Tribunal. The tenant gets a vested interest in the land defeasible only in either of those cases and it cannot therefore be said that the title of landlord to the land is suspended for any period definite or indefinite.

Thus the position of the petitioner prior to the impugned enactments was that he had ceased to have title to the lands in the possession of his ex-tenants, that the ex-tenants had become the owners thereof and that the petitioner was only entitled to a certain amount by way of purchase price of the lands. That right of the petitioner to receive the purchase price was a right in property. The combined effect of the impugned enactments was to deprive the petitioner of

most of that property. This result was brought about by first converting the petitioner's money claim into an estate under the impugned Notification and then by abolishing that estate under the impugned Regulation. A similar piece of legislation was held by the Supreme Court in *Maharana Shri Jayvantsinghji Ranmalsinghji v. The State of Gujarat* [1962] Supp. (2) S.C.R. 411 to be invalid on the ground that it was not protected by Article 31A and was violative of the fundamental right guaranteed by Article 19(1)(f). Mr. Porus Mehta further argued that the impugned enactments were a colourable piece of legislation because they were calculated to deprive the petitioner of his money claim by giving them a garb of "estate legislation", i.e. legislation falling under Clause (1)(a) of Article 31A of the Constitution. If the Governor had proceeded directly to issue a Regulation depriving the petitioner of his money claim, the Regulation would not have been covered by Clause (1)(a) of Article 31A of the Constitution and would have been invalid on the ground that it amounted to an unreasonable restriction on the petitioner's right under Article 19(1)(f) to hold and dispose of property. By first issuing a Notification which converted the petitioner's money claim into an estate and then making a Regulation which abolished that estate, the Governor brought about the same result in an indirect manner, Mr. Porus Mehta argued that the Governor was not entitled to do indirectly what the Constitution prevented him from doing directly. Both the impugned enactments must, therefore, be held to be invalid and of no effect.

18. The arguments advanced in reply by the learned Advocate General who appeared for the State can be grouped under two heads. The learned Advocate General submitted: (a) that the impugned enactments cannot be challenged on the ground that they violated any fundamental rights, because the legislative powers of the Governor under para. 5 of the Fifth Schedule are not limited by Part III of the Constitution which deals with fundamental rights, and (b) that supposing the legislative powers of the Governor to be limited by the provisions in Part III, the impugned enactments are "estate legislation" under Clause (1)(a) of Article 31A and are not liable to be challenged on the ground that they take away or abridge any of the rights conferred by Articles 14, 19 and 31 of the Constitution.

19. We shall first deal with Mr. Porus Mehta's submission on the assumption that the legislative powers of the Governor cannot be so exercised as to violate fundamental rights. On that assumption the question to be considered is whether the impugned enactments are protected by Article 31A of the Constitution and, if not, whether they violate the petitioner's fundamental right under Article 19(1)(f) of the Constitution.

20. The sheet-anchor of the petitioner's case is the decision of the Supreme Court in *Maharana Shri, Jayvantsinghji Ranmalsinghji v. The State of Gujarat*. In that case the Supreme Court dealt with petitions of several ex-Talukdars from different parts of Gujarat. The Talukdari tenure was abolished by Bombay Talukdari Tenure Abolition Act, 1949. On the abolition of the Talukdari Tenure, the

ex-Talukdars became "occupants" of the lands in their possession, including the lands in the possession of their tenants. The Bombay Talukdari Abolition Act, 1949, was amended by an amending Act of 1955, as a result of which the permanent tenants of ex-Talukdars became entitled to the rights of occupants on payment of occupancy price equal to four multiples of the assessment. This amending Act was not challenged before the Supreme Court. The position after this amending Act was that the ex-Talukdars were entitled to receive occupancy price from their permanent tenants at four times the assessment under the amended Bombay Talukdari Tenure Abolition Act and they were entitled to get purchase price u/s 32H of the Bombay Tenancy and Agricultural Lands Act, 1948, from their non-permanent tenants at the rate of between 20 and 200 times the assessment. In 1958, the Bombay Land Tenure Abolition Laws (Amendment) Act, 1958, was passed by the Bombay Legislature. The legality of this Act, and in particular the provisions contained in Sections 3, 4 and 6 thereof, was challenged before the Supreme Court. The main purpose of the impugned Act was to define the term "Permanent tenant". All the five Judges of the Supreme Court, who decided the case, appear to have been of the view that the ex-Talukdars were not estate holders at the time when the impugned Act was passed, that they were the holders of money claims against their ex-tenants and that the impugned Act could not be protected under Article 31A of the Constitution if it purported to reduce their money claims. There was, however, a difference of opinion between their Lordships on the interpretation of Section 4 of the impugned Act. There were two possible interpretations of that section. One was that the section redefined the term permanent tenant so as to include in that term all tenants of an ex-Talukdar who had been his tenants for more than 12 years. The other interpretation was that the section merely altered a rule of evidence by throwing the burden on the landlord to prove, in the case of every tenant who had been a tenant for more than 12 years, that he was not a permanent tenant. There was also some difference of opinion on the effect of Section 6 of the impugned Act. That section required that every ex-Talukdar must apply within six months of the commencement of the impugned Act for a declaration that any tenant under him was not a permanent tenant.

21. The judgment of Sinha C.J. and S. K. Das J. in this case was given by Das J. Their Lordships were inclined to favour the first interpretation of Section 4, viz. that it brought artificially within the definition of permanent tenant those ordinary tenants who had been tenants for more than 12 years. Their Lordships, however, proceeded to consider the case on the basis that the second interpretation of Section 4 was correct and that the section threw on the ex-Talukdar the burden of proving that his tenants were not permanent tenants. They then considered the effect of Section 6 and came to the conclusion that, in the circumstances of the case, Section 6 had the effect of depriving the ex-Talukdar of any real opportunity of showing that his tenants of more than 12 years were not permanent tenants. Das J. observed (p. 434) ;

...This combined effect of ss.3, 4 and 6 of the impugned Act, 1958 does in our

opinion deprive the tenure-holder (i.e. the ex-Talukdar) of any real opportunity of contesting the claims of his tenants and makes them permanent tenants once they are recorded in the record of rights, thereby depriving the tenure-holder of the purchase price which he was entitled to get from them u/s 82H of the Tenancy Act,...

Das J. further held that the consequent reduction of the purchase price recoverable by the ex-Talukdars amounted to a violation of their fundamental rights under Article 19(1)(f) of the Constitution. Das J. said (p. 437) :

...on April 1, 1957 the petitioners were left only with the right to get the purchase price u/s 32H. That right of the petitioners was undoubtedly a right to property. In *Bombay Dyeing & Manufacturing Co., Ltd. v. The State of Bombay* [1958] S.C.R. 1122 60 Bom. L.R. 731, this Court observed, with regard to unpaid wages of an employee, that when an employee had done his work, the amount of wages earned by him becomes a debt due to him from the employer and this was property which could be assigned under the law.... We think that the same principle must apply in the present case. The right of the petitioners to the purchase price u/s 32H of the Tenancy Act, 1948, from those of their tenants who were non-permanent on April 1, 1957, was a right of property in respect of which the petitioners have a guarantee under Article 19(1)(f). The provisions in Sections 3, 4 and 6 of the impugned Act, 1958, in so far as they laid down that in certain circumstances a tenant shall be deemed to be a permanent tenant from the date of the Taluqdari Abolition Act, 1949, adversely affected the right of the petitioners with retrospective effect; it practically wiped off a large part of the purchase price which the petitioners were entitled to get. ...We are unable to hold that the six months" limit imposed by Section 6 of the impugned Act, 1958, is, in the circumstances, a reasonable restriction within the meaning of Article 19(5) of the Constitution.

On the question whether the impugned Act was protected by Article 31A of the Constitution, Das J. observed (p. 439) :

...On behalf of the respondent State reliance was sought to be placed on Article 31A of the Constitution. That Article, in our opinion, has no application to the present cases, inasmuch as there was no acquisition by the State of any estate or any rights therein or the extinguishment or modification of any such rights. On April 1, 1957, the tenure-holders had ceased to be tenure-holders in respect of lands held by non-permanent tenants. The relation between the tenure-holders and the tenants had changed from that of landlord and tenant to that of creditor and debtor. When, therefore, the impugned Act, 1958, affected the right of the petitioners as creditors to get a certain sum of money from the debtors, it did not provide for the acquisition by the State of any estate or of any rights therein; nor did it provide for the extinguishment or modification of any such rights. Therefore, Article 31A has no application and cannot save the impugned Act, 1958.

The judgment of Sarkar J. and Mudholkar J. was delivered by the latter. Their Lordships came to the conclusion that Section 4 of the impugned Act merely altered a rule of evidence and did not expand the definition of permanent tenant. Mudholkar J. observed (p. 461) :

Thus, in our judgment, Section 4 of the impugned Act does not expand the definition of a permanent tenant. Therefore, it cannot be said that it has the effect of taking away from the landlord any property which had vested in him on the tillers" day.

On the contention that Section 6 of the impugned Act put an unreasonable restriction upon the petitioner's right to hold property and therefore offended Article 19(1)(1) of the Constitution, His Lordship said (p. 462):

...This point does not appear to have been taken in the petitions. In any case, if our construction of Section 4 is right, then the impugned Act would be saved by Article 31A of the Constitution and its validity would not be open to attack on the ground that it violated Article 19(1)(f) of the Constitution.

22. The fifth Judge, Mr. Justice Ayyangar, delivered a separate judgment. His Lordship held that Section 4, of the impugned Act did not merely alter a rule of evidence but created a class of permanent tenants by including therein persons who were non-permanent tenants before the date of the impugned Act. His Lordship added that if this were the proper construction of Section 4, it was not seriously contested that the enactment would be void and unconstitutional. Hence by majority of 3 to 2 the Supreme Court allowed the petitions of the ex-Talukdars.

23. It was thus decided in Jayvantsinghji's case that an ex-landlord who is entitled to receive the purchase price of his lands u/s 32H of the Bombay Tenancy and Agricultural Lands Act, 1948, is not the holder of an "estate" as denned in Article 31A of the Constitution and that the money claim which he holds is property which is guaranteed from unreasonable restriction by Article 19(1)(f) of the Constitution.

24. It is clear that the position of the petitioner in the present case, prior to the impugned enactments, was precisely the same as the position of the ex-Talukdars prior to the passing of the Bombay Land Tenure Abolition Laws (Amendment) Act, 1948. The only difference between Jayiuntingshji's case and the case before us is that we have to deal with the effect of two interconnected enactments and not only one. By itself each of the impugned enactments (the impugned Notification and the impugned Regulation) can be looked upon as an estate legislation, i.e. legislation covered by Clause (1)(a) of Article 31A of the Constitution. They, however, were clearly a part of a legislative design and their true character must be ascertained by considering the effect which they produced and were intended to produce. The effect of the two enactments was to wipe out a major part of the purchase price which the petitioner was entitled to get from his tenants. Acting on the principle that the Governor could not do

indirectly what he was not competent to do directly, we must hold that the impugned enactments dealt with the money claim of the petitioner and are not protected by Article 31A of the Constitution.

25. It is well established that in such cases we must look to the substance of the enactments rather than their form in order to judge their constitutional validity. In *Attorney-General for Alberta v. Attorney-General for Canada* [1939] A.C. 117 the Privy Council considered the validity of a Bill passed by the Legislative Assembly of the Province of Alberta, entitled "An Act respecting the Taxation of Banks". The case arose out of a reference made by the Governor General of Canada to the Supreme Court of Canada on the validity of certain Bills, including the above Bill, passed by the Legislative Assembly of Alberta. The validity of the Bill was sought to be supported on the ground that the Legislative Assembly of the Province of Alberta had the Constitutional right to impose taxes "in order to the raising of a revenue for Provincial purposes". The Privy Council held that the Bill was ultra vires the Provincial Legislature because it was part of a legislative plan to prevent the operations within the Province of those banking institutions which had been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of the Dominion of Canada. Their Lordships stated the principle involved to be as follows (p. 130) :

...It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other...

26. Again in *Pillai v. Mudanayake* [1958] A.C. 514 the Privy Council considered the validity of two Acts passed by the Ceylon Parliament. By its Constitution the Ceylon Parliament was not competent to make persons of any community liable to disabilities or restrictions to which persons of other communities are not made liable. The Privy Council held the impugned Acts to be valid. We will presently refer to this judgment of the Privy Council in another connection. For the present we will notice the principle on the basis of which the Privy Council proceeded to consider the validity of the impugned enactments. Their Lordships observed (p. 528) :

With much of the reasoning of the Supremo Court of Ceylon their Lordships find themselves in entire agreement, but they are of opinion that there may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result, and that in such circumstances the legislation would be ultra vires. The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships" Board, and a legislature must, of course, be assumed to intend the necessary effect of its statutes. But the maxim *omnia praesumuntur rite esse acta* is at least as applicable to the Act of a legislature as to any other acts, and the court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It

must be shown affirmatively by the party challenging a statute which is upon its face *intra vires* that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.

27. In the present case the two impugned enactments were passed almost simultaneously and their necessary effect was to reduce the purchase price which the petitioner was entitled to get from his tenants. Before the impugned enactments the petitioner had no other right in the lands cultivated by his ex-tenants and his only right was to receive the purchase price thereof. After the impugned enactments also, the petitioner had no right in the lands, but the effect of the enactments was to wipe out the bulk of his purchase price. We must accordingly hold that the impugned enactments cannot be regarded as an estate legislation and cannot receive the protection of Article 31A of the Constitution.

28. It was argued by the learned Advocate General that no definite ratio can be deduced from the decision of the Supreme Court in *Jayvantsinghji's* case. The learned Advocate General contended that almost everything that was decided by Sinha C.J. and Das J. in that case was contradicted by Sarkar and Mudholkar JJ., that the decision of the case was in effect given by Ayyangar J. and that Ayyangar J. largely proceeded on a concession made by counsel on behalf of the State of Gujarat that the impugned Act was void and unconstitutional if its object and purpose was to expand the definition of permanent tenant so as to include some non-permanent tenants therein.

29. We do not find it possible to accept this argument. The ratio of *Jayvantsinghji's* case must be deduced on a consideration of the judgments of those Judges who favoured the final decision of the Court, i.e. Sinha O.J. and Das and Ayyangar JJ. In *Sahnond's* Jurisprudence, 12th ed. the learned author has observed (p. 183) :

Where there are several different judgments, as in a case on appeal, the ratio must be ascertained from the judgments of those in favour of the final decision.

The quotations given by us from the judgment of Das J., who spoke for Sinha C.J. and himself, clearly show that in their Lordships' view the impugned Act was not protected by Article 31A of the Constitution because it purported to reduce or wipe out the purchase price receivable by ex-Talukdars from their ordinary tenants u/s 32H of the Bombay Tenancy and Agricultural Lands Act, 1948. It is also clear from the judgment of Ayyangar J. that his Lordship did not decide the case merely on a concession made by counsel appearing for the State of Gujarat, but was himself of the view that the concession was correctly made. Dealing with the effect of Section 3(c) read with Section 4(b) of the impugned Act, Ayyangar J. observed that these provisions brought in

a new class of "permanent tenants"-persons who were before the date of the impugned enactment non-permanent tenants in whom by virtue of the provisions of Bombay Act 18 of 1956 the interest of the landlord stood transferred and by whom the purchase-price specified in Section 32H(1)(ii) was payable, into the

category of "permanent tenants". (p.470)

This observation shows that Ayyangar J. shared the view of the other learned Judges that if the impugned Act aimed at reducing the purchase price of the ex-Talukdars by transferring their non-permanent tenants into the category of permanent tenants, the Act was not entitled to the protection of Article 31A of the Constitution. Moreover, it can be shown from the judgment of Mudholkar J. that His Lordship and A. K. Sarkar J. shared the same view. The ease cannot, therefore, be looked upon as having been merely decided on a concession made at the Bar. In *Pramod Bhat v. Kanwar Raj Nath* (1954) 50 Bom. L.R. 878 a Division Bench of this Court considered the circumstances in which a decision of a Court on a concession made at the Bar is binding on Courts of co-ordinate jurisdiction. It was held that two conditions are necessary for such a decision to be a binding precedent; first that the concession must be necessary for the decision of the case, and second, that the Court must accept the concession and put its own imprimatur upon it as true statement of the law. We find that such concession as was made by counsel appearing on behalf of the State of Gujarat in *Jayvantsinghji's* case was accepted by the Court as a true statement of the law.

30. It was then argued by the learned Advocate General that the decision in *Jayvantsinghji's* case was the result of an assumption made by the Court, the assumption being that if a retrospective amendment reduces the purchase price payable to an ex-landlord u/s 32H of the Bombay Tenancy and Agricultural Lands Act, 1948, the amending Act cannot be looked upon as "estate legislation" and is not entitled to the protection of Article 31A of the Constitution. The learned Advocate General pointed out that in *State of Bihar v. Rameshwar Pratap* AIR [1961] S.C. 1049 it was held by the Supreme Court that a retrospective amendment of an estate legislation does not lose the character of estate legislation even if estates were abolished by the parent Act, because the amendment is to be read as if it was passed along with the parent Act. The learned Advocate General argued that the above principle was overlooked by the Supreme Court in *Jayvantsinghji's* case when it held that the impugned Act, which retrospectively amended the Bombay Talukdari Tenure Abolition Act, 1949, did not have the protection of Article 31A of the Constitution because it purported to reduce with retrospective effect the purchase price which ex-Talukdars were entitled to receive from their non-permanent tenants. On this ground it was urged by the learned Advocate General that the decision in *Jayvantsinghji's* case was arrived at sub silentio and cannot be held to be a binding precedent. We shall presently refer to the decision of the Supreme Court in the *State of Bihar v. Rameshwar Pratap*. Before doing so, we shall consider whether *Jayvantsinghji's* case is not a binding precedent on the ground urged by the learned Advocate General.

31. The circumstances in which a decision is said to be arrived at sub silentio have been described in *Salmond on Jurisprudence*, 12th ed. The learned author

says (p. 153) :

A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued Or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio.

A good illustration is *Gerard v. Worth of Paris, Ltd.* [1936] 2 All E.R. 905. There, a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of priority of the claimant's debt, and, on this argument being heard, the Court of Appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator. When, therefore, this very point was argued in a subsequent case before the Court of Appeal, the court held itself not bound by its previous decision.

It is clear from the above passage that where a case was decided in favour of a party on the basis of a position in law which was assumed by the Court, the decision is not an authority for what was assumed. The principle, however, cannot apply where a Court expressly decides a point of law and the decision is the result of a chain of reasoning in which a link is not specifically dealt with by the Court. To say that such an express, decision on a point of law has no binding authority amounts to an assertion that a point of law decided by a Court ceases to be a binding precedent if it is shown that a particular argument was not considered in deciding the point, An assertion to that effect is clearly wrong. In *Smt. Somavanti and Others Vs. The State of Punjab and Others*, , *Mudholkar J.* delivering the judgment of the majority of the Supreme Court said (p. 794) :

...The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided.

In *Jayvantsinghji's* case the impugned enactment purported to amend with retrospective effect certain Acts including the Bombay Talukdari Tenure Abolition Act, 1949, and this fact has been noted in the judgment of *Das J.* Despite the fact that the Bombay Talukdari Tenure Abolition Act, 1949, was a tenancy legislation and the further fact that the impugned enactment was retrospective in its operation, the Supreme Court held that the impugned enactment was not protected by Article 31A of the Constitution in so far as it purported to reduce the

purchase price which ex-Talukdars were entitled to receive from their non-permanent tenants. It does not appear to have been argued before the Court in Jayvantsinghji's case that the constitutional validity of the impugned enactment should be decided by assuming that it was enacted at the time of the parent Act. The fact that this argument was not advanced cannot, however, affect the binding nature of the decision.

32. The cases which are held to have been decided sub silentio are of a very different type. The difference is illustrated by the decision in *Gerard v. Worth of Paris, Ltd.*, which has been referred to in the above passage in *Salmond*. There a garnishee order on a bank account standing in the name of the liquidator of a company was made in favour of a claimant after holding that the claimant's debt was entitled to priority but without considering whether a garnishee order could properly be made on an account standing in the name of the liquidator. What was decided sub silentio was the right of a claimant to have garnishee order on a bank account standing in the name of the liquidator. The Court had not decided in that case, but had merely assumed, that such a garnishee order could be issued. Another instance of a decision which had passed sub silentio is found in the judgment of a Pull Bench of the Bast Punjab High Court in *Narotam Chand v. Durga Devi* AIR [1949] East Pun 109. In that case the Punjab Full Bench considered the binding nature of a previous decision of the Privy Council. The Privy Council had decided in the previous case that a suit filed by a step-daughter challenging the alienation by a step mother was barred by limitation under a certain Punjab Act. It was implicit in the decision of the Privy Council that the property alienated by the step-mother was ancestral property qua the step-daughter according to the customary law of the Punjab. This assumption was the result of a concession made by the parties in the Courts below, and the question whether the property was ancestral under the customary law was neither argued nor discussed before the Privy Council. The Punjab Full Bench held that the assumption made by the Privy Council regarding the nature of ancestral property according to the customary law of the Punjab had passed sub silentio and was not a binding decision. In both the instances mentioned above there was no express decision of the prior Court on the disputed point of law. We are accordingly of the view that the binding authority of Jayvantsinghji's case is not affected by the principle relied upon by the learned Advocate General.

33. Turning to the decision of the Supreme Court in *State of Bihar v. Rameshwar Pratap*, what was challenged there was the validity of the Bihar Land Reforms Amendment Act of 1959, which amended with retrospective effect some of the provisions of the Bihar Land Reforms Act, 1950. As a result of action taken under the parent Act (The Bihar Land Reforms Act, 1950), certain estates had become vested in the State of Bihar and the ex-proprietors of the estates were thereafter in possession of the lands as occupancy raiyats. The proprietors used to hold Melas on their lands and used to realise Tolls from such Melas. After the estates became vested in the State, Government Officers began to claim the right of realising Tolls from such Melas on behalf of the State Government. Aggrieved by

this action of the Government Officers, the ex-proprietors filed writ petitions in the Patna High Court to restrain the Government and its Officers from interfering with their right to hold Melas and collect Tolls. The Patna High Court held that the State had no right to hold Melas on the Bakasht lands of the ex-proprietors. The High Court allowed the petitions and issued the Writs as prayed for. The State of Bihar appealed to the Supreme Court and during the pendency of the appeal the Bihar Legislature passed the impugned Bihar Land Reforms Amendment Act of 1959. The effect of the Amending Act was to vest in the State the right to hold Melas retrospectively from the date on which the estates became vested in the State, It was argued before the Supreme Court on behalf of the ex-proprietors that the amending Act did not fall within the saving provision of Article 31A of the Constitution. It was argued that the expression "right in any estate" as denned by Clause (2)(b) of Article 31A included only rights of persons who were intermediaries, that on the date of the amending Act the ex-proprietors were occupancy raiyats and not intermediaries, and that therefore the amending Act which provided for the acquisition of the rights of such raiyats was not a law covered by Article 31A. In rejecting this argument the Supreme Court observed that the impugned provisions of the amending Act had retrospective effect, and that, therefore, the parent Act of 1950 was to be read as containing on the very date of its enactment provisions, not as originally enacted, but as they stood after the amendment. The Supreme Court, said (p. 1653) :

...Projecting ourselves to the date September 25, 1950, when the President's assent to the Bihar Land Reforms Act, 1950, was published in the Gazette and reading the Act as containing Section 4 and Section 6 as amended and also Section 7(b) it cannot but be held that what were being acquired by means of these provisions of the amending legislation giving retrospective effect were certain rights of the intermediaries.

The Supreme Court, however, went on to observe:

Even if it be assumed that what the amending legislation provided for was the acquisition of raiyats' rights, there is no justification for holding that these rights were not "rights in any estate" within the definition of Clause 2 of Article 31A.

Another contention advanced on behalf of the ex-proprietors before the Supreme Court was that, long before the date of the amending Act, their "estates" had ceased to exist as a result of notifications issued under the parent Act, that consequently what was being acquired by the amending Act could not be rights in estates, and that the amending Act could not therefore receive the protection of Article 31A of the Constitution. This argument was also rejected by the Supreme Court on the ground that the amendments brought about by the amending Act were retrospective. The Supreme Court said (p. 1654) :

...Here also we have to take note of the fact that the impugned provisions of the Amending Act, were made retrospective with effect from the date of the original enactment so that we have to project ourselves to September 25, 1950, the date

of the original enactment, and consider whether On that date the law provided for acquisition of a right in an "estate".

Here also the Supreme Court went on to say:

Even if we ignore the fact that the impugned provisions of the Amending Act were given retrospective effect there is no warrant for saying that what was being acquired was not a right in an "estate".

Accordingly the Supreme Court held that the amending Act was covered by Article 31A of the Constitution and was valid.

34. We must hold that there is a conflict between the decisions of the Supreme Court in Rameshwar Pratap's case and Jayvantsinghji's case. In Rameshwar Pratap's case the validity of an amending Act was upheld by recourse to the legal fiction that an amending Act, which is retrospective in its operation, should be deemed to have been enacted at the time of the parent Act. In Jayvantsinghji's case the amending Act, although it was retrospective, was held not to be protected by Article 31A of the Constitution because on the date on which it was passed the ex-Talukdars had ceased to be estate holders in respect of lands in the possession of their non-permanent tenants and were only entitled to receive the purchase price of these lands. Mr. Porus Mehta emphasised that in Rameshwar Pratap's case, the Supreme Court had found that the impugned amending Act was an estate legislation even on the date on which it was actually passed, and Mr. Porus Mehta therefore urged that the observations of the Supreme Court with regard to the legal fiction mentioned above were in the nature of obiter dicta. We cannot hold that these observations were obiter. It is well established that when a case is decided on two grounds, both the grounds constitute the ratio of the case. We are thus unable to reconcile the ratios of the two cases of the Supreme Court and are faced with the unhappy task of choosing between them. The duty of a lower Court in such an eventuality has been thus stated in *Salmond on Jurisprudence*, 12th ed., page 153:

Where authorities of equal standing are irreconcilably in conflict, a lower court has the same freedom to pick and choose between them as the schizophrenic court itself. The lower court may refuse to follow the later decision on the ground that it was arrived at per incuriam, or it may follow such decision on the ground that it is the latest authority. Which of these two courses the court adopts depends, or should depend, upon its own view of what the law ought to be.

Faced with this unhappy duty, we have come to the conclusion that we should choose to follow the decision of the Supreme Court in Jayvantsinghji's case. One reason for our preference is that Rameshwar Pratap's case would have been decided in the same way by the Supreme Court even if the Court had not adopted the legal fiction of assuming the amending Act to have been passed along with the parent Act. As stated above, the Supreme Court had clearly found in that case that the impugned amending Act was an estate legislation even on the date on which it was actually passed. On the other hand, the petitions of ex-

Talukdars in Jayvantsinghji's case would have been dismissed if the above legal fiction were adopted. The more basic reason, however, for our preference is that, with the greatest respect, we find the approach adopted in Jayvantsinghji's case to be preferable. It appears to us that if the constitutional validity of a retrospective amending Act is challenged on the ground of circumstances which have come into existence after the parent Act was passed, it would not be right to decide that question by assuming that the amending Act was passed at the same time as the parent Act. The legal fiction that a retrospective amending Act was passed at the same time when the parent Act was passed presupposes that the legislative competence of the Legislature has remained unchanged between the date of the parent Act and the date of the amending Act. That presupposition may not be justified. This can be illustrated by taking an extreme instance. Suppose a State Legislature passed an Act which is covered by one of the items in List II of the 7th Schedule of the Constitution. Suppose further that, as a result of an amendment of the Constitution, that item is shifted from List II to List I. Can the State Legislature thereafter pass an Act on the same topic so as to amend the parent Act with retrospective effect? It appears to us clear that the State Legislature cannot do so. It would follow that where the powers of a Legislature have suffered a change after the passing of the parent Act, the validity of a retrospective amending Act cannot be decided by recourse to the legal fiction that the latter was passed along with the former. In the case before us the petitioner had ceased to be the owner of the lands in the occupation of his tenants nearly five years before the impugned enactments and his relation with his ex-tenants was that between creditor and debtor. The impugned enactments cannot, therefore, receive the protection of Article 31A of the Constitution.

35. The learned Advocate General then argued that since the impugned Notification and the impugned Regulation, considered separately, were within the legislative powers of the Governor under para. 5 of the Fifth Schedule of the Constitution, they cannot be held to be outside the legislative competence of the Governor on a consideration of their combined effect. The impugned Notification by itself merely repealed retrospectively certain provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, in their application to Mehwass estates, with the result that the petitioner was reinstated to the position of an owner of his agricultural lands. The impugned Notification did not cut into his property rights in any way. That result was brought about by the impugned Regulation, which however was clearly in the nature of estate legislation and was protected under Article 31A. Each of the impugned enactments being thus within the powers of the Governor, they cannot, according to the learned Advocate General, be held to be invalid on the ground that they were parts of a legislative scheme. The learned Advocate General relied in support on certain observations of Latham C. J. of the High Court of Australia in *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373. In that case the Supreme Court of Australia upheld the validity of a legislative scheme whereby the Commonwealth of Australia imposed a high uniform Income Tax, gave priority to the payment of

Commonwealth tax over the State income taxes, and offered to the States compensatory grants on condition that they vacated the Income Tax field, In his judgment in that case Latham C. J. said (p. 411) :

...The contention that an Act which does not refer to or incorporate any other Act, which when considered by itself is not invalid, may be held to be invalid by reason of the enactment of other Acts, whether valid or invalid, meets many difficulties. Parliament, when it passes an Act, either has power to pass that Act or has not power to pass that Act. In the former case it is plain that the enactment of other valid legislation cannot affect the validity of the first-mentioned Act if that Act is left unchanged. The enactment of other legislation which is shown to be invalid equally cannot have any effect upon the first-mentioned valid Act, because the other legislative action is completely nugatory and the valid Act simply remains valid.

These remarks were relied upon by the learned Advocate General. We find, however, that the remarks were obiter and were not necessary for the decision of that case. Immediately after the above passage, the learned Judge went on to say: "It is not necessary, however, in the present case to examine these questions." At a subsequent stage of the judgment the learned Judge stated:

"Thus the objections to the Tax Act and the Grants Act fail, whether those Acts are considered separately or as part of a scheme to bring about the abandonment by the States of the raising of revenue by taxation of incomes."

Moreover, the context in which Latham C.J. made the remarks relied upon by the learned Advocate General was very different from the context of the case before us. There, as emphasised by Latham C.J., the plaintiffs (the States in Australia) who had challenged the Commonwealth Acts did not rely on any express provision of the Australian Constitution for the purpose of showing that the impugned Acts, considered together, were invalid.

37. There are several decisions which show that it is permissible, and often necessary, to consider the combined effect of two or more enactments for ascertaining their validity. In *W. R. Moran Proprietary Ltd. v. Deputy Commissioner of Taxation for New South Wales* [1940] A.C. 838, the Privy Council examined the validity of taxes imposed by two Federal Acts passed by the Commonwealth Parliament of Australia. These Acts were part of a scheme of Federal and State legislation, under which an excise duty was imposed upon flour in all the Australian States, but a special grant was made to the State of Tasmania which was to be applied in paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them in respect of the flour consumed in Tasmania. u/s 51 (ii) of the Constitution of Australia, the Parliament had the power to make laws "with respect to taxation, but so as not to discriminate between States or parts of States". The taxes were challenged on the ground that the legislative scheme under which they were imposed discriminated in favour of Tasmania. The Privy Council held that the various Commonwealth and

State Acts, if considered together as part of an organic whole, contained nothing which was prohibited by the Constitution. It is of particular interest to notice the manner in which their Lordships dealt with an argument which was pressed before them. The argument was that, supposing the scheme involved any discrimination in favour of Tasmania, the discrimination arose as a result of a certain Tasmania Act and that no infringement of Section 51(ii) of the Constitution was involved so long as the alleged discrimination was not brought about by any Taxation Act passed by the Commonwealth Parliament. In reply to this argument their Lordships said (p. 854,) :

...With the greatest respect to those judges in Australia who may have accepted this contention, it seems to their Lordships to go too far, and certainly much further than is necessary for the decision of the present case. It would seem to justify every case in which there is a Taxation Act containing no discriminatory provisions followed by an Appropriation Act, or a Tax Assessment Act, passed by the Commonwealth Parliament authorizing exemptions, abatements or refunds of tax to taxpayers in a particular State. It was argued before their Lordships that this would be *intra vires*. In the view of this Board it is impossible to separate such an Appropriation or Tax Assessment Act from the Taxation Act in considering the effect of Section 51(ii), or to turn a blind eye to the real substance and effect of Acts passed by the Federal Parliament at or about the same time, if it appears clear from a consideration of all the Commonwealth Acts that the essence of the taxation is discriminatory. Laws imposing taxation must deal with one subject of taxation only (Section 53 of the Constitution), and the established practice in Australia is to follow the Taxation Act with an "Assessment" Act providing for the collection and recovery of the tax, for exemptions and for refunds in appropriate cases. In the opinion of their Lordships, these Acts are all laws "with respect to taxation", all "relate to taxation", and taken together must not discriminate between States or parts of States.

38. A reference may then be made to the Privy Council decision in *Pillai v. Mudanayake* which we have considered earlier in a slightly different context. The question in that case was. whether the Citizenship Act, 1948, of Ceylon and the Ceylon (Parliamentary Elections) Amendment Act, 1949, imposed disabilities on Indian Tamils in Ceylon and thereby violated Section 29(2) of the Ceylon Constitution which laid down that no law of the Ceylon Parliament shall make persons of any community liable to disabilities or restrictions to which persons of other communities are not made liable. During the course of arguments their Lordships' attention was drawn to a subsequent Act called Indian and Pakistani Residents (Citizenship) Act, 1949, under which certain facilities were given to Indian Tamils for getting themselves registered as citizens of Ceylon. It was argued by Mr. Pritt Q.C. before the Privy Council that the later Act could not be read so as to justify the earlier Act. Their Lordships, however, observed (p. 529) :

...If there was a legislative plan the plan must be looked at as a whole, and when

so looked at it is evident, in their Lordships' opinion, that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island.

39. A similar decision was given by our Supreme Court in *The Lord Krishna Sugar Mills Ltd. v. The Union of India* [1960] 1 S.C.R. 80. The petitioners in that case had challenged the constitutionality of the Sugar Export Promotion Act, 1958. Under that Act the owners of sugar factories were required to deliver sugar for export at an under-valuation and the relevant provisions of the Act were challenged on the ground of violation of fundamental rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In reply it was pointed out that by a notification issued under the Sugar (Control) Order, 1955, which was made under the Essential, Commodities Act, 1955, the price of sugar for internal sales was increased so as to enable the owners of sugar factories to recoup the loss suffered by them in the export of sugar. It was held by the Supreme Court by majority that if the restriction to the fundamental rights under Articles 19(1)(f) and 19(1)(g) was under one law but countervailing advantages were created by another law passed as part of the same legislative plan, the Court must take that other law into account. In coming to this conclusion the Supreme Court approved and relied upon the decision of the Privy Council in *Pillai v. Mudanayake* referred to above.

40. It is thus amply clear that if two or more Acts form part of a legislative scheme their object and combined effect may be considered by the Court in deciding upon their constitutional validity. There can be no dispute that the impugned enactments in the present case were parts of a legislative scheme and the object and effect of the scheme was to reduce substantially the purchase price which the petitioner was entitled to get from his tenants under the provisions of Section 32H of the Bombay Tenancy and Agricultural Lands Act, 1948. It follows that the impugned enactments, taken together, did not fall under Clause (1) (a) of Article 31A of the Constitution and cannot receive the protection of that article.

41. The learned Advocate General tried to distinguish the present case from that of *Jayavantsinghji*'s case on the ground that here the legislative authority which amended the parent Act was different from the legislative authority which had passed it. The learned Advocate General pointed out that in *Jayvantsinghji*'s case the impugned amending Act as well as the parent Act were both passed by the Bombay Legislature. On the case before us the Bombay Tenancy and Agricultural Lands Act, 1948 and the Bombay Amending Act 13 of 1956 were passed by the Bombay Legislature, whereas the impugned Notification by which the Bombay Act 13 of 1956 was amended with retrospective effect was made by the Governor. The learned Advocate General emphasised that it was the special responsibility of the Governor, in exercise of his powers under sub-para. (1) of para, 5 of the Fifth Schedule of the Constitution, to make retrospective amendments in Parliamentary or State legislation so as to adjust it to the special

requirements of Scheduled Areas. We do not think that this distinction makes any difference in the application of the ratio of Jayvantsinghji's case to the case before us. Like the ex-Talukdars in Jayvantsinghji's case, the present petitioner had ceased to be a landlord and was the holder of money claims against his ex-tenants. It must follow that, like the impugned Act in Jayvantsinghji's case, the impugned enactments in the present case did not fall within the ambit of Article 31A of the Constitution. It is, moreover, relevant to observe, in reply to the above argument of the learned Advocate General, that the Bombay Legislature was fully aware of the special requirements of backward areas when it passed the Amending Act No. 13 of 1956. It provided in Sub-section (2) of Section 32H of the parent Act that the State Government may fix different minima and maxima for the purchase price to be paid by ordinary tenants in any backward area in the State. It was under that provision that the State Government had issued an Order on 31st March 1957 reducing the maximum price to be paid by ordinary tenants in Mehwassi Estates (including the petitioner's estate) to 80 times the assessment of the lands in their possession. The same State Government, in the name of the Governor, issued the impugned Notification nearly 5 years later. It was certainly open to the Governor to make amendments in the Bombay Act 13 of 1956 in its application to the Mehwassi estate and to reduce the purchase price which the petitioner was entitled to receive from his tenants; but in that case it was essential that the reduction of the purchase price must be capable of being justified as a reasonable restriction "either in the interests of general public or for the protection of the interests of any Schedule Tribe as provided in Clause (5) of Article 19 of the Constitution.

42. The next question is whether the impugned enactments imposed a restriction on the petitioner's fundamental right to hold property under Article 19(1)(f) of the Constitution and, if so, whether it was a reasonable restriction under Clause (3) of that Article. It cannot be disputed that the impugned enactments deprived the petitioner of the major part of his property consisting of the purchase price which he was entitled to get from his tenants. It was held by the Supreme Court in Narendra Kumar and Others Vs. The Union of India (UOI) and Others, , that the word "restriction" in Article 19 of the Constitution is wide enough to cover a case where a right guaranteed by that Article is wholly taken away. The burden, however, of showing that a restriction imposed on a right guaranteed by Article 19 is a reasonable restriction lies on those who support the restrictive legislation. In Saghir Ahmad Vs. The State of U.P. and Others, the Supreme Court said (p. 726) :

...There is undoubtedly a presumption in favour of the constitutionality of a legislation. But when the enactment on the face of it is found to violate a fundamental right guaranteed under article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article. If the respondents do not place any materials before the Court to establish that the legislation comes within the permissible limits of Clause (6), it is surely not for

the appellants to prove negatively that the legislation was not reasonable and was not conducive to the welfare of the community.

These observations were approved and followed in several subsequent decisions of the Supreme Court. In the case before us the impugned enactments are ex facie violative of the petitioner's fundamental right under Article 19(1)(f) and there is nothing in the affidavit in reply filed on behalf of the respondents which shows that the restriction was reasonably imposed either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. The learned Advocate General argued in this connection that in considering whether the restriction was reasonable under Clause (5) of Article 19, it would be proper to have regard to the fact that it was competent for the Legislature in the first instance to give nothing at all to the petitioner for the extinguishment of his rights in the lands which comprised his estate. In our view, this consideration is irrelevant, as it does not fall within the ambit of Clause (5) of Article 19. We must accordingly hold that the impugned enactments violated the petitioner's right under Article 19(1)(f) of the Constitution.

43. We will now turn to the group of arguments advanced by the learned Advocate General in support of his submission that the Governor's legislative powers under para. 5 of the Fifth Schedule of the Constitution enable him to override any of the fundamental rights guaranteed by Part III of the Constitution. If this submission is accepted, the impugned enactments cannot be struck down on the ground that they violate the petitioner's right under Article 19(1)(f).

44. The learned Advocate General argued, in the first place, that the term "State" defined in Article 12 of the Constitution does not comprise the Governor in so far as he exercises any of the legislative powers conferred on him by the Constitution and that the impugned enactments are, therefore, not affected by Article 13(2) which says that the State shall not make any law which takes away or abridges any of the fundamental rights. Article 12 runs thus:

In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

45. The learned Advocate General argued that while the definition includes in the term "State" the Government and Parliament of India and the Government and the Legislature of each of the States, it does not include either the President of India or the Governor of any State. He further argued that the words "other authorities" cannot include either the President or the Governors, because these words are part of the expression "all local or other authorities" and the association and juxtaposition of these words indicate that the "other authorities" are subordinate authorities not exercising plenary legislative powers.

46. We do not find any substance in this argument. Article 367 of the Constitution lays down that, unless the context otherwise requires, the General

Clauses Act, 1897, shall apply for the interpretation of the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Clause 60(c) of Section 3 of the General Clauses Act, 1897, says that "State Government" shall mean "in a State, the Governor, and in a Union territory, the Central Government"". Similarly, Clause 8 of Section 3 of the Act says that the expression "Central Government" shall mean the President, It would, therefore, follow that words "the Government and the Legislature of each of the States" which occur in Article 12 of the Constitution include the Governors of each of the States. Even if that were not so, the words "or other authorities" in article 12 are wide enough to include all constitutional and statutory authorities on whom powers are conferred by law. The ambit of the expression "other authorities" in Article 12 was considered by the Supreme Court in Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal and Others, . In the majority judgment in that case it was stated (p. 1862) ;

...The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution.

Mr. Justice J.C. Shah, who constituted the minority, did not agree that the expression has such a wide interpretation. His Lordship said (p. 1864) :

In my judgment, authorities constitutional or statutory invested with power by law not sharing the sovereign power do not fall within the expression "State" as defined in Article 12. Those authorities which are invested with sovereign power, i.e., power to make rules or regulations and to administer or enforce them to the detriment of citizens and others fall within the definition of "State" in Article 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not, in my judgment, "State" within the meaning of Article 12 of the Constitution.

The President and the Governors are covered by the term ""State"" even under the comparatively narrower definition laid down by Mr. Justice J.C. Shah.

47. The contention of the learned Advocate General that the President and the Governors are not "State" in so far as they exercise legislative powers under the Constitution is contrary to several decided cases. Under the proviso to Article 309 of the Constitution, the President and the Governors have powers to make rules regulating the recruitment and conditions of service of persons appointed to public services in connection with the affairs of the Union and the States respectively. This rule-making power of the President and the Governors is a legislative power. If the above contention of the learned Advocate General is right, it would follow that the rules made by the President and the Governors under the proviso to Article 309 need not conform with any of the fundamental rights guaranteed by Part III of the Constitution. Yet in several decisions of the

Supreme Court as well as of this Court, rules made by the President or the Governors under the proviso to Article 309 have been struck down on the ground that they violated Articles 14 and 16 of the Constitution. We may add that legislative powers have been conferred on the President and the Governors under some other Articles of the Constitution, such as Articles 240 and 318. It seems clear that these powers cannot be exercised by the President or the Governors so as to violate fundamental rights.

48. Assuming that the Governor is "State" within Article 12, the learned Advocate General argued that the Governor's legislative powers under sub-para. 1 of para. 5 of the Fifth Schedule are not limited by any provision relating to fundamental rights, because sub-para. (1) starts with the clause "Notwithstanding anything in this Constitution."

49. It appears to us that the non obstante clause in sub-para. (1) of para. 5 has no reference whatever to the fundamental rights guaranteed by the provision in Part III of the Constitution. Sub-para. (1) confers power on the Governor to direct that any particular Act of Parliament or of the State Legislature shall not apply to a Scheduled Area or that it shall apply to a Scheduled Area subject to such exceptions and modifications as he may specify. Only such provisions in the Constitution as come in the way of the exercise of this power by the Governor are covered by the expression "notwithstanding anything in this Constitution." The non obstante clause obviously refers to provisions like the one found in Article 245 of the Constitution, which lays down that Parliament may make laws for the whole or any part of the territory of India and that the Legislature of a State may make laws for the whole or any part of the State. It is significant that although the Government of India Act, 1935, was not concerned with fundamental rights, a similar non obstante clause was found in Section 92(1) thereof, which corresponded with sub-para. (1) of para 5 of the Fifth Schedule of the Constitution.

50. The non obstante clause in sub-para. (1) of para, 5 cannot be held to affect the fundamental rights guaranteed by the Constitution for the simple reason that those rights were not conceived by Constitution-makers as being merely in the nature of restrictions on the powers of the various legislative bodies set up by the Constitution. Fundamental rights are the rights guaranteed to individuals. They are fundamental because the Constitution is founded on them. One effect of the guarantee of fundamental rights is that, as provided by Clause (2) of Article 13, any law made by the State is void if it contravenes any of them. But the guarantee of fundamental rights to individuals has several other consequences. One such consequence is specified in Clause (1) of Article 13, which lays down that all laws in force in the territory of India immediately before the commencement of the Constitution are void to the extent to which they are inconsistent with fundamental rights. These laws were obviously made by the legislative bodies other than the bodies set up by the Constitution, Another consequence of the recognition of the fundamental rights of individuals is that

these rights are capable, in appropriate cases, of being exercised as against the executive action of the State. Articles 14 and 16 of the Constitution protect the individual from arbitrary executive action of the State no less than from its arbitrary legislative action. Similarly, Article 21 which says that no person shall be deprived of his life or personal liberty except according to procedure established by law, Article 22(1) which says that every arrested person shall be informed of the grounds of his arrest and shall not be denied the right to consult and to be defended by a legal practitioner of his choice, Article 22(2) which requires that every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of his arrest, operate as limitations on the executive action of the State. Some fundamental rights, moreover, are intended to be exercised against other members of society. Thus Article 17 forbids the practice of untouchability and provides that the enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law. Article 23 prohibits traffic in human beings and forced labour. Article 24 prohibits the employment of children below the age of 14 in any factory or mine. Since the fundamental rights guaranteed to individuals are not merely in the nature of restrictions on the legislative powers of authorities set up by the Constitution, it follows that the non obstante clause in sub-para. 1 of para. 5 of the Fifth Schedule has no reference to the provisions contained in Part III of the Constitution.

51. What is stated above is borne out by the anomalies which are bound to occur if the said non obstante clause is, so interpretation as to cover the provisions in the Constitution relating to fundamental rights. On such interpretation, the Governor will be free to violate fundamental rights in providing exceptions and modifications, in any Act of the Parliament or the State Legislature in its application to a Scheduled Area. All the laws, however, which were enacted by the Governor u/s 92 of the Government of India Act of 1935 and which were in force in the Scheduled Area at the commencement of the Constitution would be void to the extent to which they are inconsistent with fundamental rights. Again, the Governor will have to respect fundamental rights such as those contained in Articles 14, 16, 21, 22 etc. in his executive action in the Scheduled Area, although he is not bound to respect them in so far as he exercises his legislative powers under sub-para. 1 of para. 5. Further, the Acts of Parliament or of the State Legislature which apply to the Scheduled Area will have to be in conformity with fundamental rights, although this limitation would not apply to the exceptions or modifications which the Governor may make in the application of those Acts. Moreover, the people staying in the Scheduled Area will be entitled to the fundamental rights such as those embodied in Articles 17, 23 and 24 which protect individuals from harmful social customs. These anomalies support the conclusion that the non obstante clause was not intended to have any reference to the fundamental rights: guaranteed by the Constitution.

52. There are several other reasons which are equally, if not more, weighty in support of the above conclusion. It is hardly possible that the makers, of the

Constitution, who solemnly declared in the Preamble that their object was to secure to "all" the citizens of India, Justice, Liberty, Equality, and Fraternity, decided to exclude the people in all the Scheduled Areas from the enjoyment of the fundamental rights which were guaranteed to other citizens. Moreover, if the makers of the Constitution had intended that the people in Scheduled Areas should be deprived of fundamental rights guaranteed to other citizens, a specific and positive provision to that effect would have been made in Part III of the Constitution, Articles 33 and 34 of the Constitution provide for restrictions on fundamental rights in the case of armed forces and in respect of areas where Martial law was in force. No such provision in respect of Scheduled Areas is to be found in Part III or in any other Part of the Constitution.

53. There is another consideration which shows that the non obstante clause in sub-para. (1) of para. 5 has no reference to the provisions of the Constitution relating to fundamental rights. The powers of the Governor under sub-para. (1) of para. 5 are limited to the application of particular Acts of Parliament or the State Legislature to a Scheduled Area or a part thereof. Under sub-para. (2) of para. 5, the Governor has wider plenary powers to make regulations "for the peace and good Government" of any Scheduled Area in the State. When the Governor makes a regulation under sub-para. 2, sub-para. (4) requires that the regulation must receive the assent of the President before it has any legal effect. Moreover, sub-para (5) requires that the Governor shall consult the Tribes Advisory Council (set up under para 4) before making any regulations in the exercise of his powers under sub-para. 2. Now, if the Constitution-makers had intended that the legislative powers of the Governor under para. 5 should not be limited by any consideration of fundamental rights, the non obstante clause would have been provided in sub-para. (2) rather than in sub-para. (1). The learned Advocate General argued that the legislative powers of the Governor under sub-para. (2) are also wide enough to enable him to make regulations violative of fundamental rights. We shall presently consider the merits of this argument. We are here concerned with the meaning of the non obstante clause. Its absence in sub-para. (2), which gives plenary legislative powers to the Governor, and its presence in sub-para. (1), which gives him very limited legislative powers, make it abundantly clear that the clause was not intended to enable the Governor to violate fundamental rights.

54. A reference may then be made to paras, 6 and 7 of the Fifth Schedule. Para 6 empowers the President to declare what areas in the country shall be Scheduled Areas and also to alter the boundaries thereof. If fundamental rights were not to prevail in Scheduled Areas, the power of declaring any area to be a Scheduled Area and of altering the boundaries of any Scheduled Area would not have been conferred on the President. Para 7 empowers Parliament by law to amend or repeal any of the provisions of this Schedule and lays down that no law made by Parliament in this behalf shall be deemed to be an amendment of the Constitution for the purpose of Article 368. This also indicates that it was not the intention of the Constitution to deny fundamental rights to the people residing in

Scheduled Areas.

55. Besides sub-para (1) of para 5 of the Fifth Schedule, there are other provisions in the Constitution which confer legislative powers and which contain a similar non obstante clause. It can be shown that these provisions also were not intended to facilitate the violation of fundamental rights. Article 35 confers powers on Parliament to the exclusion of the State Legislatures of making laws on certain topics referred to in part III, such as abolition of untouchability and prohibition of forced labour and of traffic in human beings. Article 35 says that "notwithstanding anything in this Constitution", Parliament shall have, and the Legislature of a State shall not have, power to make laws on those topics. Obviously this non obstante clause was not intended to enable Parliament to make laws violative of fundamental rights. The non-obstante clause was put in because some of the topics mentioned in that Article would have otherwise fallen in either List II or List III of the Seventh Schedule of the Constitution. Another instance is found in Clause (1) of Article 364. That provision confers powers on the President to direct by public notification that any law made by Parliament or the Legislature of a State or any existing law, shall not apply to any major port or aerodrome or shall apply thereto subject to such exceptions or modifications as may be specified in the notification. The provision commences with the clause "Notwithstanding anything in this Constitution". Here also it is not possible that it was the intention of Clause (1) of Article 364 to empower the President to make laws violative of fundamental rights. The non obstante clause was added because the provision would otherwise be inconsistent with the powers of Parliament and the State Legislatures to make laws in respect of major ports and aerodromes. Another instance is found in Article 369. That Article confers on Parliament the power to make laws in respect of certain matters in the State List or the Concurrent List for a period of five years from the commencement of the Constitution. The Article starts with the clause "Notwithstanding anything in this Constitution". It is obvious that the Article does not empower Parliament to make laws on the topics mentioned therein so as to violate fundamental rights.

56. Our conclusion with regard to the interpretation of sub-para. (1) of para. 5 of the Fifth Schedule derives support from the recent decision of the Supreme Court in *LaLa Hari Chand Sarda Vs. Mizo District Council and Another*, . We will presently examine this case in a somewhat different context. Here it is sufficient to notice that the Supreme Court recognized in that case that citizens staying in Tribal Areas in the State of Assam are entitled to the fundamental rights guaranteed by the Constitution. The administration of these Tribal Areas is governed by the provisions of the Sixth Schedule. If citizens in Tribal Areas of the State of Assam are entitled to fundamental rights, it is hardly possible that those rights are not available to citizens in Scheduled Areas administered under the provisions of the Fifth Schedule.

57. We would not have dealt at such length with the meaning of the non-obstante clause in sub-para. (1) of para 5 of the Fifth Schedule if our view had

not been in conflict with two Division Bench decisions of the Andhra Pradesh High Court, on which strong reliance was placed by the learned Advocate General. Of these two decisions, the one directly in point is in *Seepuri Nagabhushanam and Others Vs. Secretary to Government, Panchayat Raj Government of Andhra Pradesh, Hyderabad*, . In that case the Governor of Andhra Pradesh, in exercise of his power under sub-para (1) of para 5 of the Fifth Schedule, had modified a section in the Andhra Pradesh Panchayat Samithis and Zilla Parishads Act, 1959 by adding a proviso thereto. The proviso was to the effect that Presidents and Vice-Presidents of Panchayat Samithis in Scheduled Areas shall be elected only from amongst those members of the Panchayat Samithis who belong to Scheduled Tribes. This proviso was challenged on the ground that it was discriminatory and violative of fundamental rights guaranteed by Part III of the Constitution. The learned Judges rejected this argument, holding that the non obstante clause in sub-para. (1) of para. 5 of the Fifth Schedule enabled the Governor to modify the enactment in such a way as to violate fundamental rights. In coming to this conclusion, the learned Judges relied on a previous decision of the same High Court in *Nageswara Rao v. Principal, Medical College* AIR [1962] A.P. 212. The learned Judges did not give any other reasons in support of their conclusion. It is possible that the proviso impugned in that case was valid in view of Clause (4) of Article 15 which allows special provisions to be made, inter alia, for the advancement of Scheduled Tribes. No reference to that clause, however, was made in the judgment of the Division Bench. Turning then to the earlier case *Nageswara Rao v. Principal, Medical College*, we find that the judgment therein disposed of a number of petitions filed under Article 226 of the Constitution. The petitions related for the most part to a reservation which was made in favour of "multi-purpose candidates" (i.e. those who had passed the Higher Secondary Certificate Examination) in the matter of admission to the Pre-professional course in Medicine in various medical colleges in the State of Andhra Pradesh. The reservation was to the extent of 1/3rd of the total number of seats available for admission by open competition. The Division Bench which heard the case held that the reservation was fair and was not discriminatory. Several petitions were dismissed on that ground. The learned Judges then turned to a petition which had been filed by a student who came from the part of Andhra Pradesh known as Telangana. The same reservation in favour of multi-purpose students which was found by the Division Bench to be non-discriminatory was made in this case also, but here it was made in pursuance of a recommendation of the Regional Committee appointed by a Presidential Order issued under Article 371(7) of the Constitution as amended by the Constitution (Seventh Amendment) Act, 1956. Clause (7) of Article 371 provides:

Notwithstanding anything in this Constitution, the President may, by order made with respect to the State of Andhra Pradesh or Punjab, provide for the constitution and functions of regional committees of the Legislative Assembly of the State, for the modifications to be made in the rules of business of the Government and in the rules of procedure of the Legislative Assembly of the

State and for any special responsibility of the Governor in order to secure the proper functioning of the regional Committees.

The Division Bench observed that the recommendations of the Regional Committee appointed by Presidential Order issued under Article 371(1) had the force of law and that the recommendations would prevail even if they were in any way inconsistent with any provision of the Constitution to the extent they bore only on matters of general policy. The Division Bench went on to say (p. 219):

...In our opinion, this consequence flows from the non-obstante clause of Article 871. If that is the real legal position, the reservation for Multipurpose candidates cannot be brought in issue either as being without competence or as being in contravention of Article 14 of the Constitution.

As observed above, the Division Bench had held earlier in its judgment that this reservation in favour of Multi-purpose candidates was fair and non-discriminatory. The Division Bench then went on to deal with another objection of the same petitioner, relating to a reservation of a maximum of 3% of the total number of seats for candidates who had distinguished themselves in sports and extra curricular activities. This reservation was also supported by a recommendation of the Regional Committee, and the Court therefore held that the reservation was valid even if it contravened Article 14 of the Constitution. Immediately thereafter the Court went on to say:

In any event, the petitioner does not seem to have any chance of securing admission, the marks obtained by him being too low- So, even if these reservations are struck down as being illegal, there is very little chance of his obtaining admission....

58. It will be seen that while the decision in Nagabhushanam v. Secy. to Govt. merely followed the earlier case Nageswara Rao v. Principal, Medical College, the Views expressed in this earlier case about the effect of the non obstante clause in Article 371(1) of the Constitution were largely obiter and were not the result of adequate arguments addressed at the Bar. No reasons have been given in either case in support of the view that the non obstante clause, whether in Article 371(7) or in sub-para. 1 of para. 5 of the Fifth Schedule, had the effect of permitting the violation of fundamental rights guaranteed by the Constitution. We have given detailed reasons why we are unable to accept that view. With respect, therefore, we cannot follow these decisions of the High Court of Andhra Pradesh.

59. Turning next to sub-para (2) of para 5 of the Fifth Schedule, the learned Advocate General argued that, even in the absence of a non obstante clause, the plenary legislative powers given to the Governor by that provision enable him to override the fundamental rights in making Regulations in respect of Scheduled Areas, The learned Advocate General relied in support of this argument on the observations of the Privy Council in (1878) L.R. 5 I.A. 178 (Privy Council) ,

relating to the manner in which a Court should examine the legislative competence of bodies possessed of plenary powers of legislation. Their Lordships observed (p. 193):

...The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted.

The learned Advocate General argued that sub-para 2 of para 5 of the Fifth Schedule read with Article 244 shows, affirmatively, that the Governor has plenary powers to make Regulations for the peace and good Government of Scheduled Areas and that there is nothing in these provisions which shows, negatively, that these powers are restricted in any manner. There is, in our view, no substance in this argument. A restriction on the legislative powers of the Governor is found in Clause (2) of Article 13 of the Constitution which provides that the State shall not make any law which takes away or abridges the fundamental rights conferred by Part III of the Constitution. In view of this express provision, it is impossible to hold that the legislative powers of the Governor under sub-para 2 of para 5 are subject to no restriction.

60. The learned Advocate General then argued that Article 244 and Schedules V and VI of the Constitution represent a total departure from the legislative and executive provisions which are applicable to the Union and the States. The distribution of legislative powers between the Union Parliament and the State Legislatures has been provided in Part XI of the Constitution. Articles 73 and 162 show that the executive power of the Union extends to the matters with respect to which Parliament has power to make laws and that the executive power of a State extends to the matters with respect to which the Legislature of a State has power to make laws. The learned Advocate General pointed out that, according to the scheme of Article 244 and the Fifth and Sixth Schedules, the distinction between Federal and State subjects has been abrogated and the Governor has been given legislative and executive power on all subjects relating to the peace and good government of Scheduled Areas and Tribal Areas. The learned Advocate General then emphasised that Article 244 of the Constitution, which lays down that the provisions of the Fifth and the Sixth Schedules shall apply to the administration of Scheduled Areas and Tribal areas, does not contain a clause that the Article is "subject to other provisions of the Constitution". From the absence of such a clause, the learned Advocate General argued that Article 244 is not subject to the provisions of the Constitution which guarantee fundamental

rights. The learned Advocate General took us through the various Articles of the Constitution where phrases such as "subject to the provisions of this Constitution" or "subject to the other provisions of this Part" or other similar clauses have been used, and cited a number of decisions in which the Supreme Court dealt with questions involving the interpretation of such provisions. The learned Advocate General also took us through the various paras of the Sixth Schedule and emphasised the extensive powers, executive, legislative and judicial, which are enjoyed thereunder by Regional and District Councils in the Tribal Areas of Assam. In particular, the learned Advocate General drew our attention to the provisions of para 10 of the Sixth Schedule which empower the District Council to make Regulations for the regulation and control of money-lending and trading within the district by persons other than Scheduled Tribes resident in the district, and argued that these provisions are inconsistent with some of the fundamental rights guaranteed by the Constitution. On these grounds the learned Advocate General asked us to hold that the legislative powers which have been conferred by the Fifth and Sixth Schedules are not limited by provisions of the Constitution relating to fundamental rights.

61. We are of the view that the fact that a separate scheme for the administration of Scheduled Areas and Tribal Areas has been laid down by Article 244) and the Fifth and Sixth Schedules of the Constitution has no bearing on the question whether the individuals residing in these areas are entitled to the enjoyment of the fundamental rights guaranteed by the Constitution. Clause (2) of Article 13 says in clear and categorical terms that the State shall not make any law which contravenes any of the fundamental rights and it must, therefore, follow that the legislative powers granted in any part of the Constitution are subject to the limitation imposed by Clause (2) of Article 13, even if it is not stated in the particular Article by which the legislative powers are granted that the Article is "subject to the other provisions of the Constitution." It is, however, not necessary to deal further with this part of the learned Advocate General's argument, because the argument is in effect negated by the decision of the Supreme Court in *Hari Chand Sarda v. Mizo District Council*. The appellant in that case was a non-tribal and was a trader in one of the tribal districts of Assam. He had a temporary licence to carry on his trade in that district. The Executive Committee of the District Council passed an order refusing a further renewal of the licence and directing the appellant to remove his properties from the District. This order was passed by the Executive Committee in exercise of its powers u/s 3 of a Regulation which had been made by the District Council under para 10 of the Sixth Schedule of the Constitution. In the majority judgment of the Supreme Court it was observed (p. 831) :

The appellant being a citizen of India and the Mizo District being part of the Union Territory he has undoubtedly a fundamental right under Article 10(1)(g) to carry on trade in any part of the country including the Mizo District. Any restriction infringing such a right can only be sustained if it is a reasonable restriction imposed in the interest of the general public as envisaged by Article

19(6).

The majority held that Section 3 of the Regulation contained no principle to guide the authority concerned with granting or refusing to grant a licence and was, therefore, an unreasonable restriction on the fundamental right guaranteed under Article 19(1)(g) of the Constitution. The minority judgment of Bachawat J. also proceeded on the basis that the appellant was entitled to the fundamental right guaranteed by Article 19(1)(g) of the Constitution, but his Lordship held that Section 3 of the Regulation did not amount to an unreasonable restriction of that right. This decision shows that there is no substance in the learned Advocate General's contention that the provisions of Article 244 and of the Fifth and Sixth Schedules permit legislation violative of fundamental rights.

62. While emphasising that sub-para (2) of para 5 of the Fifth Schedule, which confers plenary legislative powers on the Governor, does not begin with the clause "subject to the other provisions of the Constitution", the learned Advocate General argued that there is a certain scheme discernible in the Constitution, and the scheme, according to the learned Advocate General, is that whenever legislative powers are granted to any authority and the powers are intended to be subject to fundamental rights, the above or a similar clause is inserted in the Article by which the legislative powers are granted. To establish the alleged scheme, the learned Advocate General relied on Articles 245(1), 123(5) and 213(3). Article 245(1) lays down:

Subject to the provisions of this Constitution, the Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

According to the learned Advocate General, the clause "subject to the provisions of this Constitution" was inserted in order to secure that Parliament and the State Legislatures shall exercise their legislative powers in such a way as not to violate fundamental rights. Article 123 confers powers on the President to promulgate Ordinances at a time when the Houses of Parliament are not in session, and the learned Advocate General drew our attention to Clause (3) of that Article which says:

If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

According to the learned Advocate General, it is this provision which prevents the President from promulgating an Ordinance violative of fundamental rights. Article 213 contains a similar provision to enable Governors to promulgate Ordinances during the recess of State Legislatures, and here again cl. (3) provides:

If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:....

63. We find this argument to be misconceived. In view of the express provision contained in Clause (2) of Article 13 that the State shall not make any law violative of fundamental rights, it was clearly unnecessary to repeat the same statement in every Article by which legislative powers are conferred on different authorities by the Constitution. The restrictive clauses which are found in Articles 245, 123 and 213 were not provided with a view to ensure that fundamental rights are not violated in exercise of the powers granted by those Articles. The restrictive clauses have a very different purpose. Without the restrictive clause, Article 245(1) would read:

Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

Such a statement would obviously be defective, because the legislative powers of Parliament and the State Legislatures are also restricted by provisions relating to the division of powers between the Union and States. Sub-clause (3) of Article 123 says that an Ordinance promulgated by the President shall be void if it makes any provision which Parliament would not be competent to enact, and the purpose of this restrictive clause clearly is that the President must confine an Ordinance to be promulgated by him to such topics as are within the legislative competence of Parliament. Similarly, the purpose of Clause (3) of Article 213 is to secure that an Ordinance promulgated by a Governor is confined to the ambit of the legislative competence of the State Legislature. That these are the purposes of the restrictive provisions in these Articles is borne out by the fact that similar restrictions were found in the corresponding sections of the Government of India Act, 1935. Section 99(1) of the Government of India Act, 1935, which corresponded with Article 245(1) of the Constitution, provided:

Subject to the provisions of this Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federal State, and a Provincial Legislature may make laws for the Province or for any part thereof.

Sub-section (3) of Section 42 of the Government of India Act, 1935, which corresponded with Clause (3) of Article 123 of the Constitution, laid down:

If and so far as an Ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

Sub-section (3) of Section 88, which corresponded with Clause (3) of Article 213, read:

If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.

64. We are accordingly of the view that the legislative powers conferred on the Governor by sub-para (1) and (2) of para 5 of the Fifth Schedule do not empower him to make amendments or pass Regulations violative of any of the

fundamental rights guaranteed by the Constitution.

65. Towards the end of his argument, the learned Advocate General urged that the impugned Notification and the impugned Regulation are severable and that, even if the Regulation is struck down as unconstitutional, the Notification should be upheld. It appears to us that the doctrine of severability has no application to the case before us. We have not found the impugned Notification to be valid and the impugned Regulation to be void. Our view, on the contrary, is that although each of the impugned enactments may appear to be innocent by itself, they are parts of a legislative scheme, the object and effect of which was to deprive the petitioner of his fundamental right under Article 19(1)(f) of the Constitution. If we are right in this view, both the impugned enactments must be struck down.

66. In the result we hold that the impugned enactments violate the petitioner's fundamental right under Article 19(1)(f) of the Constitution and are void. We accordingly direct respondents Nos. 1 to 4 to refrain from enforcing the impugned enactments against the petitioner.

67. Regarding costs, it must be observed that the arguments in this case went on for nearly 10 days. We direct that the petitioner's costs should be paid by the first respondent, the State of Maharashtra, and that the costs should be assessed at Rs. 5,000.

68. It has been brought to our notice that, in reply to an application for interim relief which had been filed by the petitioner in this case, the learned Advocate General stated to the Court on 14th October 1964 that, in the event of this petition being finally decided in favour of the petitioner, the respondents undertake to pay the reasonable costs thrown away by the petitioner in lodging and prosecuting applications before the Mamlatdar u/s 3 of the impugned Regulation. This statement of the learned Advocate General has been recorded in an order passed by Tambe and Naik JJ. on 14th October 1964. The learned Judges directed that the costs of the applications mentioned above should be assessed by and under the directions of this Court and gave liberty to the parties to apply for that purpose. Mr. Sorabji for the petitioner applied today that the costs should be assessed as provided in the said order. This petition, however, has not yet been "finally decided". If the respondents do not appeal to the Supreme Court from this decision, or if they appeal and the appeal is dismissed, the petitioner will be at liberty to apply for assessment of the said costs.