
(1959) 04 CAL CK 0004
In the Calcutta High Court
Case No : Civil Revn. No. 3531 of 1958

Nirmal Bose

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-04-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Constitution of India, 1950 — Article 226, 246, 248, 253, 256

Citation : AIR 1959 Cal 506 : 63 CWN 485 : 63 CWN 484

Hon'ble Judges : D.N. Sinha, J

Bench : Single Bench

Advocate : P.K. Sengupta and A.P. Chakraborty, for the Appellant; M. C. Setalvad, Attorney General and D.P. Pal, for Opposite Party 1 and 2, S.M. Bose, General and Arun Mukherjee, for Opposite Party 3, for the Respondent

Final Decision : Dismissed

Judgement

D.N. Sinha, J.—The petitioner in this case is a citizen of India, having his permanent residence in the District of Jalpaiguri in the State of West Bengal. The subject-matter of this application is the proposed transfer to Pakistan of a portion of Berubari Union No. 12, which is now situated in Police Station, Jalpaiguri, District Jalpaiguri. In order to appreciate the exact nature of the dispute it is necessary to understand the facts relating to the proposed transfer, and for this purpose, a historical survey is inevitable. On 20-2-1947, the British Government announced its intention of transferring power in British India to Indian hands by June, 1948. On 3-6-1947 a statement was made by the said Government on the method of transfer of power in India. On 18-7-1947 the British Parliament passed the Indian Independence Act, 1947. This Act was to come into operation from the "appointed date," namely the 15th August, 1947. It was indicated that as from the 15th day of August, 1947 two independent Dominions shall be set up in India, to be known respectively as India and Pakistan. By Section 2 of the said Act, it was laid down that subject to the provisions of Sub-sections (3) and (4) of Section 2, the territories of India shall be the territories under the sovereignty of

His Majesty which, immediately before the appointed date, were included in British India, except the territories which under Sub-section (2) of Section 2 were to be the territories of Pakistan, I shall presently refer to the said Act once again, since it will have to be considered in greater detail. It will be appropriate to state here that so far as India is concerned. The Constituent Assembly, which at first sat on 9-12-1946 re-assembled after the midnight of 34-8-1947, as the Sovereign Constituent Assembly for India. On 13-12-1946 had been introduced the historic objective resolution of Sri Nehru, which was adopted on 22-1-1947. The Constituent Assembly next considered the salient principles of the proposed Constitution as outlined by various committees, and thereafter appointed a drafting committee on 29-8-1947. The drafting committee embodied the decision of the Assembly with alternative and additional proposals in the form of a "draft constitution" which was published in February, 1948. The draft was presented to the Constituent Assembly on 4-11-1948 and after three readings was finalised and received the signature of the President of the Assembly and declared as passed on 26-11-1949 and became the Constitution of India. A few of the articles contained in the Constitution as set out in Article 394 came into force at once, and the remaining provisions of the Constitution came into force on 26-1-1950 which day is referred to in the Constitution as the "commencement of the Constitution." For purposes of this application, our real starting point is the Indian Independence Act, 1947. I have already referred to certain portions of it. I shall now proceed to consider Section 3 thereof, which is the section which is really relevant for our purposes. The relevant part thereof is set out below:

"3 (1) As from the appointed date--

(a) the province of Bengal as constituted under the Government of India Act, 1935, shall cease to exist;--

(b) there shall be constituted in lieu thereof two new provinces to be known respectively as East Bengal and West Bengal

(2)

3. The boundaries of the new provinces aforesaid shall be such as may be determined whether before or after the appointed date, by the award of a Boundary Commission appointed or to be appointed by the Governor General in that behalf, but until boundaries are so determined--

(a) The Bengal District specified in the First Schedule to this Act, together with, in the event mentioned in Sub-section (2) of this section, the Assam District of Sylhet, shall be treated as the territories which are to be comprised in the new province of East Bengal;

(b) The remainder of the territories comprised at the date of the commencement of this Act in the province of Bengal, shall be treated as the territories which are to be comprised in the new province of West Bengal.

4. In this section the expression "Award" means in relation to a Boundary

Commission the decision of the Chairman of that Commission contained in his report to the Governor General at the conclusion of the Commission's proceedings."

2. The province of West Bengal has since become the State of West Bengal and India as the Indian Union has become an Independent Sovereign Republic. The Province of East Bengal has become East Pakistan.

3. Coming now to the First Schedule of the Indian Independence Act 1947, we find that the District of Jalpaiguri has not been mentioned. If the matter stood there, the whole of the district of Jalpaiguri including the Berubari Union would have come to West Bengal. The fact however is that the first Schedule to the Act never came into operation at all. So far as Bengal is concerned. I have already mentioned that the Indian Independence Act, 1947 was passed on 18-7-1947 and the appointed date when the two independent dominions were to come into existence was 15-8-1947. Under Sub-section (3) of Section 3 of the Act, the boundaries between the two new provinces of East Bengal and West Bengal were as specified in Sub-section (3) read with the First Schedule, until it was determined by an award of the Boundary Commission appointed by the Governor General to demarcate the boundary. Under Sub-section (3) of Section 3 read with the First Schedule, the District of Jalpaiguri fell wholly within the province of West Bengal, which has subsequently become the State of West Bengal. In point of time however, the award of a Boundary Commission known as the "Radcliffe Award" came into existence on 12-8-1947, that is to say, before the appointed date. Thus, at no point of time did the First Schedule to the Indian Independence Act 1947 come into operation so far as Bengal is concerned. I shall now say a little more about the "Radcliffe Award". On 30-6-1947 an announcement was made by the Governor General, published in the Gazette of India (Extraordinary), stating that in accordance with the provisions of paragraphs 5 to 8 of the statement made by His Majesty's Government dated 3-6-1947 it had been decided that the province of Bengal and Punjab shall be partitioned. The Governor General accordingly appointed inter alia, a Boundary Commission for Bengal, consisting of four judges of the High Court and a Chairman to be appointed later. The Chairman appointed later was Sir Cyril Radcliffe. So far as Bengal was concerned the terms of reference were as follows:

"The Boundary Commission is instructed to demarcate the boundaries of the two parts of Bengal on the basis of ascertaining the contiguous areas of Muslims and non-Muslims. In doing so, it will also take into account other factors."

4. The Commission went into action and an award was made, now known as the "Radcliffe Award", on 12-8-1947 that is to say, 3 days before the "appointed date". The report sets out, in Clause 3, the terms of reference. In Clause 7, it is stated that the province of Bengal offered a few, if any, satisfactory natural boundaries and its development has been on lines that do not well accord with a division by contiguous majority areas of Muslims and non-Muslims, as directed in the terms of reference. In clause 8 the Chairman formulated certain basic

questions, upon which depended the demarcation of the boundary line between East and West Bengal, One such basic question is important for Our purpose and is set out below:

"6. Which State's claim ought to prevail in respect of the Districts of Darjeeling and Jalpaiguri, in which the Muslim population amounted to 7.42 per cent. of the whole in the case of Darjeeling. and to 23.08 per cent. of the whole in the case of Jalpaiguri, but which constituted an area not in any natural sense contiguous to another non-Muslim area of Bengal?"

5. The award sets out the fact that the members of the Commission were unable to arrive at an agreed view and they assented to the Chairman proceeding to give his own decision. We thus arrive at Clause 10 of the award, the relevant portion whereof runs as follows:

"..... The demarcation of the boundary line is described in detail in the schedule which forms Annexure A to this award, and in the map attached thereto, Annexure B. The map is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the map in Annexure B, the description in Annexure A is to prevail."

6. I now come to the Schedule containing Annexure A. For our purpose it is the first clause in this Annexure that is relevant and is set out below:

"A line shall be drawn along the boundary between the Thana of Phansidewa in the District of Darjeeling and the Thana Tetulia in the District of Jalpaiguri from the point where that boundary meets the Province of Bihar and then along the boundary between the Thanas of Tetulia and Rajganj the Thanas of Pachagar and Rajganj, and the Thanas of Pachagar and Jalpaiguri, and shall then continue along the northern corner of the Thana Debiganj to the boundary of the State of Cooch-Bihar. The District of Darjeeling and so much of the District of Jalpaiguri as lies North of this line shall belong to West Bengal, but the Thana of Patgram and any other portion of Jalpaiguri District which lies to the East or South shall belong to East Bengal".

7. As I have said, the "Radcliffe Award" having come into operation before the appointed date, the First Schedule to the Indian Independence Act, 1947 became useless and need not be considered at all, a fact which seems to have been overlooked by the learned Advocate appearing on behalf of the petitioner. It will be necessary for the purposes of this application to consider in some detail the map attached to the "Radcliffe Award", being Annexure B. This map was not published and is not available to the members of the public. Copies were, however, made available at the hearing, by the learned Attorney General and a copy was given to the learned Advocate for the petitioner, and I have heard their detailed arguments thereon. I direct that the copy that has been handed over to me, be marked as Exhibit 1 and placed in the record. It will be necessary to deal with this map in detail, but for the time being I shall continue the enumeration of

facts. After the "Radcliffe Award" was made, certain disputes arose out of its interpretation. By a special agreement concluded on 14-12-1948 at the Inter-Dominion Conference held in New Delhi, the two Dominions agreed that a Tribunal should be set up as early as possible and not later than January 31, 1949 for the adjudication and final settlement of certain boundary disputes. So far as the East-West Bengal disputes were concerned, two categories were mentioned, but no disputes were mentioned concerning the Berubari Union. In fact, the District of Jalpaiguri was not mentioned at all. According to the agreement, a Tribunal was set up, known as the "Indo-Pakistan Boundary Disputes Tribunal". The Tribunal is popularly known as the "Bagge Tribunal" after its chairman, the Hon'ble Lord Justice Bagge and the award is known as the "Bagge Award", which is dated 26-1-1950. As I have mentioned above, the disputes which are the subject-matter of this application, were not referred to this Tribunal, and forms no part of the "Bagge Award". The learned Advocate, for the petitioner argues that there could possibly have been no doubt or ambiguity in the Radcliffe award so far as Berubari Union is concerned, because no such dispute was referred to the "Bagge Tribunal". Although the dispute with regard to the Berubari Union was not raised in the first instance, it soon came to be raised. In the year 1952, the question of the Berubari Union became a matter of dispute and discussion between India and Pakistan. There is really no dispute upon the fact that all this time the Berubari Union, situated in the District of Jalpaiguri, continued to be in the possession of the Indian Union. What happened was that sometime in 1952, Pakistan claimed the Berubari Union as having gone to it under the "Radcliffe Award" and India claimed it for herself. The matter was considered by the Prime Minister of India Sri Jawaharlal Nehru and the erstwhile Prime Minister of Pakistan Sir Feroz Khan Noon, who were advised by their Secretaries and Revenue Officers. On 10-9-1958 an agreement was arrived at, which is really the subject-matter of this application. A copy of the agreement, which has so far been treated as confidential, was made available at the hearing of this application. I direct that the copy of the agreement handed over to me be marked as Exhibit 2 and placed in the record. This agreement states that in accordance with the directives issued by the two Prime Ministers, the Secretaries discussed certain disputes. One of such disputes was in connection with Berubari Union No. 12. It goes on to state that as a result of the discussion, certain agreements were arrived at. The relative part of the agreement relating to Berubari Union No. 12 reads as follows:

"(3) Berubari Union No. 12

This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The division of Berubari Union No. 12 will be horizontal, starting from the northeast corner of Debiganj thana.

The division should be made in such a manner that the Cooch Behar enclaves between Pachagar Thana of East Pakistan and Berubari Union No. 13 of Jalpaiguri thana of West Bengal will remain connected as at present with Indian territory

and will remain with India. The Cooch Behar enclaves lower down between Boda thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan."

8. This agreement was signed on behalf of the Government of Pakistan by M. Section A. Baig, Foreign Secretary, Ministry of Foreign Affairs and Commonwealth Relations, and on behalf of the Government of India by M.J. Desai, Commonwealth Secretary, Ministry of External Affairs. It will appear that so far as this document is concerned, there is nothing to show that this agreement was entered into by the two Prime Ministers. What happened, however, was that a joint communique was issued by the two Prime Ministers, which was released simultaneously at New Delhi and Karachi on 11-9-1958 a copy whereof is annexed to the petition and marked as Annexure "A". In this communique, it has been stated that the two Prime Ministers had a frank and friendly discussion about the border problems and they arrived at an agreed settlement in regard to almost all the border disputes in the eastern region. There is no specific mention in the communique about Berubari Union No. 12, but it is not disputed that the agreement, a copy of which is Ext. 2. signed by the two Secretaries, is the agreement with which we are concerned in this case. Before I proceed further, I will refer to certain facts and figures which were given by our Prime Minister during the Lok Sabha debates on 9-12-1958 a copy whereof has been made available to me by the learned Attorney General and which I have directed to be kept on the record in a bundle marked Exhibit 3. As a result of the so-called "Nehru-Noon Agreement," the total area which comes to India is 42.4 square miles, and the total area that goes to Pakistan is 4.8 square miles. This area of 42.4 square miles is already in possession of India now, and over this Pakistan has agreed to relinquish her claim. The total area of Berubari Union is 8.75 square miles and agreement is that approximately half of it should go to Pakistan and the other half should be retained by India. The total population of Berubari Union is 10,000 to 12,000 so that approximately 5000 to 6000 persons are affected by the agreement.

9. The next thing that I have to consider in some detail is the map, which is annexure "B" to the "Radcliffe Award" (Ext. 1 herein). It will be recollected that under the award the boundary line has been determined both by description, as contained in annexure A, as well as graphically as in annexure B. In Clause 10 of the award it has been laid down that the map (Annexure B) is annexed for purposes of illustration, and if there should be any divergence between the boundary as described in Annexure A and as delineated on the map in Annexure B, the description in Annexure A is to prevail. Coming now to the map, Ext. 1, scale 1"=8 miles, I must first mention that the Berubari Union has not been mentioned in it at all. It is however stated that it consists of a narrow, almost rectangular portion, which lies just to the south of Thana Pachagar (just below the word "Haldibari R. S. "). Roughly speaking it is like a rectangle placed at a slant of about 45 degrees to the horizontal. This map was examined by me in the presence of the learned Advocates appearing on both sides. Mr. Sengupta on

behalf of the petitioner, while not denying that this rectangle is the Berubari Union, states that he is not prepared to admit that the map being. annexure B to the "Radcliffe Award" is a correct one. It appears to me that the map suffers only from such defects as are often to be found in large maps. Apart from this, there is no material before me to hold that it is an incorrect map. Another map was shown to me, also in the presence of all parties namely, the survey map of Berubari Union, in the scale of 1"-1 mile. I direct it to be marked as Exhibit 4 and placed in the record. The correctness of this map has not been disputed. This survey map, which is in greater detail, shows that the Berubari Union is not exactly in a rectangular form. Having looked at the two maps (Exts. 1 and 4) I am unable to hold without further materials that Annexure B to the "Radcliffe Award" is an incorrect map. All that can be said is that it has not the same details of shape and contour as are to be found in the survey map. Coming to Annexure B of the Radcliffe Award, I find that the map shows the boundary lines as settled by the "Radcliffe Award". Visually it appears that the whole of the Berubari Union as to the south of the Radcliffe line, that is to say it has been awarded to Pakistan. This is a fact that must be taken into account for a dispassionate consideration of the question. Coming now to Annexure A, which contains the description, and which must prevail in a case of conflict between the two annexures, it is necessary to follow it closely in order to discover the exact conflict which has arisen in respect of the Berubari Union. I have already set out above, clause 1 in Annexure A. Upon a reference to the map it will be seen that for our purposes the first starting point is the Thana of Phansidewa in the Dist. of Darjeeling. To the south-east of Phansidewa is Thana Tetulia and to the east is Thana Rajganj. To the south-east of Tetulia is Thana Pachagar. To the south of Pachagar is Thana Boda and to the south-east of Boda is Thana Debiganj. The south-eastern border of Pachagar is however, not Boda but a portion of Thana Jalpaiguri just in between Pachagar and Boda and this constitutes the Berubari Union. Between Thanas Pachagar and Boda there are enclaves of the Cooch Behar State. Let us now consider how a line should be drawn according to Clause 1 of Annexure A. A line has to be drawn along the boundary between Phansidewa and Tetulia from the point where that boundary meets the Province of Bihar. There is no difficulty here. Then we are to go along the boundary between Thanas of Tetulia and Rajganj, and between Pachagar and Rajganj and between Pachgar and Jalpaiguri. There is no difficulty here either. The next thing that is mentioned in Clause 11 is that the line shall then continue along the nor them corner of Thana Debiganj to the boundary of the State of Cooch Behar, In fact, however, there is a portion where the boundary must run between Thana Jalpaiguri and Thana Boda, if Berubari Union is to fall into Indian territory as a whole. Thus, if we are to include the Berubari Union completely within the Indian Union, then, after the line has travelled down the border line between thana Pachagar and Rajganj, and Pachagar and Jalpaiguri. we nave to run along a portion which is the boundary between Thana Jalpaiguri and a Cooch Behar enclave and then run along the boundary between Thana Jalpaiguri and Thana Boda, and then continue along the northern corner of the Thana Debiganj to the

boundary of the State of Cooch Behar. There is no mention in the Radcliffe award of the boundary line continuing along the boundary between Thana Jalpaiguri and a Cooch Behar enclave, or along the boundary between the Thanas Jalpaiguri and Boda. If we are to give a literal effect to the description contained in Clause 1, then we arrive at or near a point which has been marked "M" in the survey map Ext. 4. The next thing indicated in Clause 1 of Annexure A is the northern corner of Thana Debiganj which is at or near the point marked "N" in the survey map, Ext. 4. If we are to include the whole of Berubari Union in India then from the point "M" we shall have to run along the boundary between Thanas Boda and Jalpaiguri and to an extent along the boundary between Jalpaiguri and a Cooch Behar enclave. This is not authorised by the description in Clause 1 and in interpreting the award we cannot add to its provisions. What has been actually done therefore is to draw a straight line, almost horizontally between points, "M" and "N". The part of Berubari Union which is to the north of the boundary line and is situated adjacent to India, comes to India and that which is in the south goes to Pakistan. It is impossible to discover now as to what was the real intention of Sir Cyril Radcliffe, without taking his evidence, which is an impossible proposition now. It is quite possible that he thought erroneously that the Berubari Union formed part of Thana Debiganj, but it is useless to speculate on this, point. I confess I do not see how else the problem could have been solved without continuing the line from "M" to "N" by the shortest route possible, that is to say a straight line. Any other method appears to me to lead to a worst fate so far as India is concerned.

10. The next question that arises logically is as to whether the procedure adopted by the two Prime Ministers in effecting this adjustment of the boundaries between the two countries is in accordance with law, and what exactly are the legal implications of such action. The first point that must be borne in mind is that it is nobody's case that the Prime Ministers of the two countries acted as a sort of boundary commission or considered the matter from the point of view of a fresh arbitration, bearing in mind the terms of reference of the Radcliffe Commission or the basic questions which were propounded by Sir Cyril Radcliffe in Clause 8 of the award. There was no question of considering contiguous areas of Muslim and non-Muslim population, or any of the basic questions so formulated. The solution of boundaries must therefore have been done in one of two ways. One is that the dispute was summarily resolved by drawing a straight line between two points in regard to which there is first dispute, and resolving the problem by a half-(SIC) half solution, that is to say. a give and take basis, without a determination of what was given away or what was acquired. The other would be by way of a determination as to what the "Radcliffe Award" actually meant (like what was done by the Bagge Tribunal) and coming to the conclusion that the straight line between the points "M" and "N" horizontally must have been what was intended to be laid down under the "Radcliffe Award". It is obvious that the two approaches would give rise to two different situations. In the first case, there might be cession or acquisition of territory, whereas in the

second case there is neither, because the parties have merely determined as to what belong; to them. The legal position in the two cases will be entirely different as I shall presently show. Before I proceed further, I must deal with certain preliminary objections that have been put forward: on behalf of the respondents Nos. 1 and 2 by the learned Attorney General. The first objection taken is as regards the jurisdiction of this Court. It is argued that the respondents Nos. 1 and 2 are outside the jurisdiction of this Court and inasmuch as relief can only be claimed as against them, this application should be thrown out in limine. So far as the Union of India is concerned, it has always been a vexed question as to whether it can only be sued in the High Court which has jurisdiction over its headquarters, that is to say, the capital of India, or whether it can be said to exist and operate throughout the Indian Union. It is said, and I cannot say-without a semblance of reason, that it would be a contradiction in terms to say that the Union of India does not exist or operate within a territory which belongs to it. This question however has been set at rest so far as I am concerned, by an appellate decision of this Court, (unreported) which I have cited in *Ramesh Chandra Chatterjee Vs. Director General of Observatories and Another*, . The case cited is. *Lloyds Bank Ltd, v. Lloyds Bank Indian Staff Association (Calcutta Branches)* judgment D/-17-1-514 In that case Harries C. J. said as follows:

"It was faintly suggested at the outset that a "mandamus" could issue, against the Government of India which is respondent in this matter, restraining that Government from giving effect to the awards Article 226 of the Constitution expressly allows writs in the nature of prerogative writs to issue against Government which is a departure from English practice. That Government must however be located in the territory over which the Court exercises jurisdiction and in my view the Government cannot be said to be located in the State of West Bengal" and therefore writs under Article 226 cannot issue against it at the instance of this Court."

11. This principle has now been enunciated by the Supreme Court in *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, . *Mukherjea J.* noted that prior to the commencement of the Constitution, the powers of issuing prerogative writs could be exercised in India only by the High Courts of Calcutta, Madras and Bombay, and that also within very rigid and definite limits. The Constitution introduced a fundamental change of law in this respect, by giving to all the High Courts new and very wide powers in the matters of" issuing writs" which they never possessed before. The learned Judge then proceeds to say as follows:

"There are only two limits placed upon the exercise of these powers by a High Court under Article 226 of the Constitution; one is that the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction" that is to say, the writs issued by the Court cannot run beyond the territories subject to its jurisdiction. The other limitation is that the person or authority to

whom the High Court is empowered to issue writs "must be within those territories" and this implies that they must be amenable to its jurisdiction either by a residence or location within those territories. It is with reference to these two conditions thus mentioned that the jurisdiction of the High Courts to issue writs under Article 226 of the Constitution is to be determined".

12. Upon this point two Supreme Court decisions have been cited by Mr. Sengupta. The first case is Election Commission, India Vs. Saka Venkata Subba Rao and, . In that case, the respondent had been convicted by the Sessions Judge of East Godavari in the year 1942) and sentenced to a term of seven years" rigorous imprisonment. After his release, the respondent stood for election to a reserved seat in the Kakinada constituency of the Madras Legislative Assembly. He was elected. A question was then raised that the respondent was disqualified by reason of his conviction, from standing in the election, and the Election Commission was about to consider the matter. The respondent thereupon applied to the High Court of Madras under article 226 of the Constitution, asking for the issue of a writ in the nature oi mandamus of of prohibition directing the Commission to forbear from proceeding with the reference. The Commission questioned the jurisdiction of the Madras High Court, but this was rejected. Thereupon the Election Commission preferred an appeal to the Supreme Court. The appeal was allowed and it was held that the Madras High Court had no jurisdiction. It was urged on behalf of the respondent that the High Court of Madras had jurisdiction because the reference related to his right to sit and vote for the Legislative Assembly of Madras and the parties to the dispute also resided in that State. Reliance was placed on the decision of the Privy Council in the Pariakimedi case. AIR 1943 164 (Privy Council) . Speaking about the powers of the High Courts under Article 226 of the Constitution Sastri C.J. said as follows:--

"But wide as may be the powers thus conferred, a two-fold limitation was placed upon their exercise. In the first place, the power is to be exercised "throughout the territories in relation to which it exercises jurisdiction" that is to say, writs issued by the Court cannot run beyond the territories subjected to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories" which clearly implies that they must be amenable to its jurisdiction either by residence or location within those territories. These writs were thus specifically directed to the persons or authorities against whom redress is sought and were made returnable in the Court issuing them, and, in case of disobedience were enforceable by attachment for contempt. These characteristics of the special form of remedy rendered it necessary for its effective use that the persons or authorities to whom the Court was asked to issue these writs should be within the limits of its territorial jurisdiction. We are unable to agree with the learned judge who held that if a tribunal or authority permanently located and normally carrying on its activities elsewhere exercise its jurisdiction within those territorial limits so as to affect rights of parties therein, such tribunal or authority must be regarded as

functioning" within the territorial limits of the High Court and being therefore amenable to its jurisdiction under Article 226".

13. The second case cited is A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another, . That was a case under the Travancore Taxation on Income (Investigation Commission) Act. As a result of the merger of Travancore and Cochin and their eventual merger with India, the Indian Income Tax Investigation Commission came to be empowered to appoint an "authorised official" u/s 6 of the Act, and did appoint the respondent, Venkitachallam Patty, as such. The question arose whether the High Court of Travancore Cochin had jurisdiction to grant reliefs against the authorised official who resided and carried on his activities within the jurisdiction of the High Court, although his principals did not. The matter went up to the Supreme Court and it was held that the High Court had jurisdiction. The jurisdiction under article 226 is exercised by the High Court in order to protect and safeguard the rights of the citizens and wherever the High Court finds that any person within its territories is guilty of doing an act which is not authorised by law or is violative of the fundamental rights of the citizens, it exercises that jurisdiction in order to vindicate his rights and redress his grievances. The only conditions of its exercise of that jurisdiction are firstly that the writs cannot run beyond the territories subject to its jurisdiction and secondly the person, or authority to whom the High Court was empowered to issue such writs must be within those territories that is to say, amenable to its jurisdiction by residence or location within those territories. It was held that an authorised official, although he was an arm of the Commission, could not be called a mere mouth-piece of the Commission or a conduit pipe transmitting the orders of the Commission. He performed various functions on his own initiative and if he did something wrong or violative of the law, he could be restrained from doing so by the High Court. There could not be an agency in doing wrong. It will be seen that the decision turned on the facts of the case and the provisions of the particular law involved. It was found that complete justice could be done by issuing a writ upon the person amenable to jurisdiction.

14. It is clear therefore, that in order to exercise jurisdiction against the respondents Nos. 1 and 2 in this case, the person or authority concerned must be resident of or permanently located within the State of West Bengal and it is not sufficient that their activities outside the State affects the rights of persons within the State. It has been held that so far as the Union of India is concerned, it is permanently located, and the location must be deemed to be, at the Capital. The respondent No. 2 also functions beyond my jurisdiction. That being so, it is clear that I have no jurisdiction to issue a high prerogative writ against either the respondent No. 1 or 2. Being laced with this bar of jurisdiction, Mr. Sen Gupta argued that at any rate this Court can issue a writ upon the 3rd respondent, namely, the State of West Bengal. He pointed out that the Union of India exercising its executive power, could only make its agreement with regard to Berubari Union effective by taking recourse to Article 256 of the Constitution. That article runs as follows:

"The executive power of every State shall be so exercised as to ensure compliance with the laws made by parliament or any existing laws which applied in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose".

15. The learned Attorney General also conceded that this was presumably the only way in which the Government of India could make effective the agreement in respect of the Berubari Union. Mr. Sengupta argues that the Communique made it clear that necessary instructions were being issued to the State of West Bengal for survey and demarcation and presumably for carrying out the terms of the agreement. The learned Attorney General argues that the communique, so far as the State Government was concerned, related only to the question, of maintaining peace during the exchange of territories, In other words, the communique (Annexure "A" to the petition) does not contain any statement about executive instructions being given to the State of West Bengal to implement the agreement. Looking at the communique I think that it is a possible view to take. In fact, without further evidence it would be impossible to hold that there has been as yet any directions given or proposed to be given to the State of West Bengal to actively participate in the implementation, or the Nehru-Noon agreement, by making over possession of any portion of Berubari to Pakistan. Mr. Sengupta argues that even at this stage it is open to this Court to issue appropriate writs to forbid the State of West Bengal which is clearly amenable to the jurisdiction of this Court, from taking any steps to implement an unlawful agreement. According to Article 256, the executive power of every State is to be exercised not so as to comply with an arbitrary dictation by the Government of India in exercise of its executive power, but it is only bound to comply with directions of the Government of India so as to ensure compliance with the laws made by Parliament or any other law in existence. In other words, the existence of) a law made by Parliament or a competent legislature sanctioning; a particular action is the precondition for State action under Article 256. There is as yet no law passed by Parliament sanctioning the so-called agreement for exchange of territories. In my opinion, this is an aspect of the matter that cannot be lightly brushed aside, and this application cannot instantly be rejected on the ground that this Court has no jurisdiction over the first two respondents. It is because of this reason that I have decided not to dispose of this application merely upon a preliminary ground. I shall briefly examine the merits of the case, that is to say, whether upon the materials placed before me I can come to a conclusion that something has been done which is contrary to law and the Constitution. Apropos the merits, and without giving up the objection as to jurisdiction, the learned Attorney General has taken yet another preliminary point. He argues that upto the present moment what has been done is that the Central Government has, through its accredited representative, entered into an agreement for the purpose of the adjustment of boundaries between India and Pakistan, and even if this involves exchange of territories, the agreement

constitutes and "Act of State" which cannot be the subject-matter of consideration and adjudication by a Municipal Court, He says that the agreement is in the nature of a Treaty entered into between two Sovereign States, and such matters cannot be agitated in Municipal Courts, For this purpose, he has cited a Bench decision of this High Court. Union of India (UOI) Vs. Manmull Jain and Others, . In that case we are (sic) concerned with Chandernagore which was formerly under the sovereignty of the French Republic, That Republic ceded the territory in full sovereignty to India. The Treaty containing the proclamation was published in the extraordinary issue of the Gazette of India on 19-8-1952. The point that arose in this case was as to whether the Treaty was legally valid without Parliamentary legislation and whether such question could be agitated in this High Court. Das Gupta J. (as he then was) said as follows:

"Even if it were assumed that this Treaty was not legally valid without Parliamentary legislation, the transfer of the territory to India remains an accomplished fact which is accepted as such by both interested parties, namely, French Republic and the Union of India; consequently, it would be territory comprised within the territory of India whether or not the Treaty was legally valid. It is well to remember in this connection the principle laid down in the case of--Secretary of State v. Rustom Khan AIR 1941 PC 64 that when a territory is acquired by a sovereign State for the first time it is an Act of State; it matters not how it is acquired; it may be by conquest, it may be by cession following a Treaty, it may be by occupation of territory hitherto occupied by recognised ruler and in all cases the result is the sameDr. Bannerjee's contention that when a Parliamentary legislation making the Treaty an Act of Parliament the Treaty cannot have any legal force or authority is based in my judgment on a misconception of the nature of a Treaty, Making a Treaty is an executive Act and not a legislative Act. Legislation may be and is often required to give effect to the terms of a Treaty. Thus, if a Treaty, say provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent; but the Treaty is complete without the legislation.

16. The attention of the learned Judge was drawn to Item 14 of the Union List which grants power to Parliament to pass legislation for the purpose of entering into Treaty or agreement with foreign countries and their implementation. The learned Judge proceeded to say as follows:

"Undoubtedly this provides for all legislation in connection with the entering into Treaties. This cannot, however, in my opinion, justify a conclusion that the makers of the Constitution intended that no Treaty should be entered into unless the Parliament has legislated on the matter. The power of legislation on this matter of entering into Treaty at least entitled the executive power to enter into Treaties. I can see no justification or principle or authority over the view that making Treaty requires legislation for its validity. The President makes the Treaty in exercise of this executive power and no Court of law in India can question its validity. My conclusion is that when the President in whom article 53 of the

Constitution vests all the executive power of the Union has entered into a Treaty, the Municipal Courts cannot question the validity of the Treaty",

17. This decision is, of course, binding on me but it must be taken to have decided the case that was before the Court. It was a case of an acquisition of territory by cession under a Treaty. In this particular case the facts are in reverse. I shall assume for the moment that by the agreement, or "Treaty" as it is called, territory belonging to the Union is being ceded to a foreign power. The question is whether an agreement arrived at between the President or the Government of India and a foreign power, to that effect can be called an Act of State" and be effected without legislation by Parliament, and whether it is open to the Municipal Courts to go into such questions. Two articles in the Constitution which are to be considered in this connection are articles 53 and 73. Article 53 lays down that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through an officer subordinate to him, in accordance with the Constitution. Article 73 lays down that subject to the provisions of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The question as to this executive power has been the subject matter of controversy. The expression "executive power" is not defined in the Constitution. But the Constitution being a written one, the powers of the different organs of Government, including the executive, must be spelt out from the Constitution itself. The meaning of "executive power" under the Constitution came in for consideration by a Full Bench of the Allahabad High Court in *Moti Lal and Others Vs. The Government of the State of Uttar Pradesh and Others*, . The point that arose in that case was whether the Government of a State has power under the Constitution to carry on trade or business, as for example, running a Government bus service, in the absence of a legislative enactment authorising the State Government to do so. The learned judges adopted different lines of approach, but the most acceptable analysis of the law was made by Mootham and Wanchoo JJ., who held as follows:

"The question is, as we have said, by no means free from difficulty, but upon the whole we think that we may reasonably infer that the words "executive power" in the Constitution have substantially the same meaning as "executive authority" in the Act of 1935, and that it is the superintendence, direction and control of the civil Government of a State which is vested in the Governor of the State. It follows, therefore, we think, that although an executive act by a State Government may not be authorised by legislative enactment it will nevertheless be within the executive power of the State if - (i) it is not an act which has been assigned in the Constitution of India to other authorities or bodies such as legislature the judiciary or the Public Service Commission; (ii) it is not contrary to the provisions of any law; and (iii) it does not encroach upon or otherwise infringe the legal rights of any member of the public".

18. In other words, when the ground is not covered by any law and there is no

question of encroaching into the jurisdiction of the legislature or violating any provisions of the Constitution of the rights of any person, there does not seem to be any reason why the executive cannot act on its own initiative, provided it is within the sphere of executive action permitted to it by the Constitution. The Government of India has three different organs. Legislature, Judiciary and the Executive. Since it has a written Constitution, there are specific provisions with regard to the three heads of power embodied in different parts of the Constitution. The business of the legislature is to pass laws. It is the business of the Judiciary to apply the Constitution and the laws, in any case properly brought before them. The judiciary exercises control over the executive action in the sense that it decides as to whether any such action is supported by the Constitution or by some law. It is not the business of Courts to pass judgment on the policy of executive action, and the executive on the other hand, has no authority to pass verdict upon the validity of a judgment. In short, the body that deliberates and enacts laws is the legislative body. The body which judges and applies the laws in a particular case is the judiciary, and the body that carries the laws into effect or superintends the enforcement of them, is the executive. Although a distinctive mark of the executive is that it carries out the law made by the legislature, its power is not confined only to the execution of the laws passed by the legislature. It has power conferred by the Constitution itself expressly or impliedly. Implied powers are generally of two kinds. Those which vest in Government by virtue of what is called "its inalienable functions or sovereign powers" e.g. defending the State against aggression and internal enemies, or the maintenance of law and order, and secondly those which are necessary for the exercise or performance of a general power conferred or duty enjoined by the Constitution or statutory enactment's. It will be appropriate here to consider a decision of the Privy Council", *Eshugbayi Eleko v. Government of Nigeria*, AIR 1931 P.C. 248. The facts of that case were shortly as follows: One Docemo was the ruling chief of Lagos in 1861, when he by treaty ceded Lagos to Britain, The successor of Docemo came into disfavour with the British Government, and in 1917 was passed the Deposed Chiefs Removal Ordinance". In or about 6th August, 1925 the Governor of Lagos acting under the ordinance directed that the appellant Eshugbayi, a native chief holding the office of Eleko, in the Colony, should be deposed and removed from his office and that he should leave the Colony within 24 hours and shall not return without the consent of the Governor, As the order was not complied with, the Governor made an order of deportation. Thereupon, Eshugbayi moved the Court in Nigeria. The application was rejected. There was an appeal to the Judicial Committee of the Privy Council, One of the points taken was that the Governor acted in exercise of executive powers, that is to say, he performed an "Act of State", which could not be questioned in a municipal Court of law. Lord Atkin delivering the judgment of the Judicial Committee stated as follows:--

"Their Lordships are satisfied that the opinion, which has prevailed that the Courts cannot investigate the whole of the necessary conditions is erroneous.

The Governor acting under the Deportation Ordinance acts solely under executive powers, and in no sense as a Court. As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive. A suggestion was made by one of the learned Judges that the order in this case was an Act of State. This phrase is capable of being misunderstood. As applied to an act of the sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war Or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive, directed to subjects within the territorial jurisdiction, it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the Act.'"

19. The decision lays down a principle which is applicable to the facts of this case. If it was merely a treaty by which India was acquiring property ceded by a foreign power, that might have been a different matter. But where, an action of the executive government affects the property of one who now enjoys the status of an Indian citizen, it does not follow that by a pure executive action the .right of property or other rights guaranteed to a citizen by the Constitution can be affected and the right of the citizen to have recourse to the municipal Courts taken away. In such a case, the rights of property and other rights being assured by the Constitution, the executive must at all times be ready to show to the Courts that the action is in consonance with the Constitution and the law, and cannot escape on the ground that it is an act of State. This aspect of the question has been considered in the Supreme Court decision. *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, ". The question which arose there was as to whether a State Government could carry on a trade or business as a mere executive action without legislative sanction. Mukherjea C. J. said as follows:

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.The executive Government, however can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable

Government to carry on their business, a specific legislation sanctioning such course would have to be passed."

20. This appears to me to be also consonant with elementary justice and commonsense. Where territory is acquired, the property-right of the citizen, that is to say, his existing property right is not affected. But where territory is ceded, not only his property right, but all his rights including even life and liberty are affected. It seems to me unthinkable that the Constitution contemplated that a citizen should wake up one morning and find that he and all that he possessed have been bodily handed over to a foreign power, without his knowledge and consent. In such matters, individual consent may not be necessary, but the democratic process of Parliamentary sanction, which means sanction through his chosen representatives is necessary. In my opinion, the question of an "Act of State" does not arise in this case at all. As pointed out by Chagla G. T-in P.V. Rao Vs. Khushaldas S. Advani, (Reversed by the Supreme Court, but not on this point) an Act of State is different fundamentally from an act of Sovereign authority. An Act of State operates extra-territorially. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an Act of State as between a Sovereign and his subjects. I think that the time has come to reorientate our ideas, based on English jurisprudence, about what constitutes an "Act of State", Under that concept, the Act of State is "an act of a higher nature referring to the King's Supreme and imperial power of sovereignty which ought not to be disputed and handled in vulgar argument". In India however, there is no king and sovereignty is vested in the people. It is inconceivable therefore that the executive Government could perform an "Act of State" affecting their rights which cannot be questioned by the people themselves. This preliminary ground is of no substance. Bearing all this in mind, we have now to consider the constitutional position. The first point that has been taken by the learned Attorney General is that the particular agreement which is being challenged is merely an adjustment of the boundary between two foreign States and therefore there is no question of cession of territory and consequently no sanction of Parliament is necessary. Before we are in a position to decide this question, it will be necessary to see what the position is under the Constitution. Article 1 of the Constitution declares that India, that is Bharat, shall be a Union of States. It then proceeds to lay down that the States and the territories thereof shall be as specified in the First Schedule. Finally it delineates what the "territory of India" shall comprise of. It is laid down *infer alia* that the territory of India shall comprise of the territories of the States. Coming now to the First Schedule under the heading "States," the 13th Item must be set out because it has a bearing on the argument advanced before me. It is as follows:

"13. West Bengal

The territories which immediately before the commencement of this Constitution were either comprised in the Province of West Bengal or were being administered

as if they form part of that Province "

21. We next come to Article 3 of the Constitution which runs as follows:

"3. Parliament may by law--

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State :

provided that no bill for this purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless where the proposal contained in the bill affects the area, boundaries or a name of any of the States the bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired."

22. I have already pointed out above that under Article 73 of the Constitution, the executive power of the Union could be exercised on all matters with respect to which Parliament has power to make laws. Entry No. 14 in list 1 of the Seventh Schedule relates to "entering into treaties or agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries." This however is "subject to the provisions" of the Constitution. We have already seen that under Article 3 there is specific provision for legislation being passed by Parliament on 5 headings. In so far as this specific power is given to Parliament the executive power is curtailed and qualified. In other words, so far as diminishing the area of any State is concerned, that can only be done by Parliament promulgating a law. Mr. Sen Gupta on behalf of the petitioner has argued that even Parliament could not act under Article 3, if the increase of area or diminution of area of any State was to be done vis-a-vis a foreign State. In other words, he argues that Article 3 deals only with an inter-State adjustment as regards area or boundaries of a State, and not otherwise. I am unable to accept this argument. There is no such limitation in Article 3 of the Constitution, and it is not for me to introduce words of limitation in a provision of the Constitution, which, as is well known, must be liberally construed. If the increase or diminution takes place along a border line between India and a foreign State, Article 3 must necessarily come into operation, and cannot be excluded. In fact, Parliament has already passed a law confirming the provisions of a treaty whereby Indian territory has been ceded. By Article 4 of the Indo-Bhutan Treaty of friendship concluded on 8-8-1949 and subsequently ratified, the Government of India undertook to cede to the Government of Bhutan a strip of

territory measuring 32.81 square miles known as Dewangiri on the border of Kamrup district in the State of Assam. Thereupon Parliament passed an Act called the Assam (Alteration of Boundaries) Act-1951 (Act XLVII of 1951) under Article 3 of the Constitution, declaring that the State of Assam shall cease to comprise the strip of territory mentioned above, which shall be ceded to the Government at Bhutan". Article 3 is not the only power vested in Parliament in this respect. Under Article 246, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule annexed to the Constitution. I have already pointed out Entry 14, which relates to the entering into treaties and agreement with foreign countries and the implementation thereof. Then there is Entry 97 which relates to "any other matter" not enumerated in List II or List III. Article 248 confers on Parliament the exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. Article 253 of great importance as it gives power to Parliament to make any law for the whole or any part of the territory of India implementing any treaty, agreement or convention with any other country or countries or any decision made at any international Conference, association or other body. This article is in conformity with the directive principles laid down in Article 51 of the Constitution which lays down that the State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another and encourage settlement of international dispute by arbitration. In my opinion, Parliament is competent to deal with the matter, when it is brought before it in the manner laid down by the Constitution. It is not however within the scope of this application to indicate the exact manner in which this should be done. Now, I come to the question of the adjustment of boundaries, If the adjustment of boundaries is no more than deciding the correct boundary between India and a foreign State, as made by the "Radcliffe Award," then the adjustment of the boundaries simpliciter does not involve either giving up of territory or acquisition of territory. In other words, it is an ascertainment of what really belongs to India and no more, In such a case, Article 3 is not attracted at all and the matter would fall within Article 73, and I do not see why it cannot be done in exercise of the executive power of the Union, unless Parliament has by law provided that such a thing cannot be done by the exercise of such power. There is no such law in existence. On the other hand, where the adjustment of boundaries is effected by cession to a foreign power of territory belonging to India, then it would come within the purview of Article 3 because it must necessarily result in diminution of the area of a State belonging to the Indian Union. Coming to the facts of this case, I have already mentioned above the facts which led to the alleged agreement concerning the Berubari Union. According to the terms of the agreement, (Ext 2) the Berubari Union No. 12 is to be so divided as to give half the area to Pakistan, the other half, adjacent to India, being retained by India. This might mean one of two things. It might mean that the adjustment was a rough and ready settlement of the dispute. Since the title to Berubari Union was disputed, the contestants might think that it was useless to go into details as to what belonged to either party

under the "Radcliffe Award" and the best way to settle the dispute was to divide the Berubari Union into two parts and allot one part to each of the contestants, although it might mean that either party was getting more than what had been granted to it under the "Radcliffe Award", or less. It is plain that under such circumstances, an adjustment of boundaries might involve either cession of territory or acquisition thereof. Such an adjustment will require the sanction of Parliament. On the other hand, if the adjustment of boundaries be a mere determination of what was given under the "Radcliffe Award" and in terms thereof, then it is an adjustment simpliciter, and no question of either cession or acquisition of territory arises. In such a case, no sanction is necessary. It is impossible for me, upon the materials that have been placed before this Court in this application, to decide one way or the other. The determination of such a question will require further evidence and this cannot be conveniently done in this jurisdiction,

23. I shall now proceed to consider a further point that has been taken on behalf of the petitioner on this issue. Mr. Sen Gupta has argued that even if the case is one of adjustment simpliciter. it will be necessary to have the sanction of Parliament because of the position in International Law. He argues that even if we suppose that the entirety of the Berubari Union has been given under the "Radcliffe Award" to Pakistan, still, it is an admitted fact that the Indian Union has been in possession of the same and has been exercising dominion over this territory. Firstly, he argues that under Public International Law, if a sovereign State was in occupation of a territory, exercising dominium over it, it becomes the territory of that sovereign State. , There is really no dispute about the possession or the exercise of dominium over the Berubari Union by India. In the statement made by the Prime Minister in the Lok Sabha on 9-12-1955 a copy of which has been handed over to me and is included in Ext. 3, the Prime Minister said as follows:

"It was in 1952 that this question of Berubari Union became a matter of dispute and discussion between India and Pakistan i. e., about 6 or 7 years ago. It is true that so far as possession is concerned it had been in our possession since Independence."

24. Mr. Sengupta has shown me Dakhilas in respect of realisation of revenue and also a list of voters prepared in 1953 of the District of Jalpaiguri which includes Berubari Union (included in Ext. 3). On the question of occupation, Mr. Sen Gupta has cited Hall's International Law, 1924 Edition, page 125 where it is stated as follows:

"The territorial property of a state consists in the territory occupied by the state community and subjected to its sovereignty and it comprises the whole area, whether of land Or water, included within definite boundaries ascertained by occupation, prescription, or treaty, together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion, and when such area abuts upon the sea,

together with a certain margin of water."

25. The learned author then proceeds to explain what "occupation" means in International Law. When a state does some act with reference to territory unappropriated by a civilised or semi-civilised state, which amounts to an actual taking of possession, a right is gained as against other states, which are bound to recognise the intention to acquire property, accompanied by the fact of possession as a sufficient ground of proprietary right. It is plain that upon the facts of this case no question of acquisition of territory by occupation arises. As Oppenheim has pointed out, in his "International Law", brought upto date by Professor Lauterpacht (18th Edition Page 555). "Occupation", is the act of appropriation by a State by which it intentional ly acquires sovereignty over such territory as is at the time not under the sovereignty of another State. Only such territory can be the object of occupation as belongs to no State. The territory of any State, even though it is entirely outside the international community, is not a possible object of occupation; and it can only be acquired through cession or subjugation. According to the learned author, a territory which once belonged to a State but has been afterwards abandoned is a possible object of occupation by another State. So far as Berubari Union is concerned, it was previously under the suzerainty of Britain. Under the Indian Independence Act, 1947 (and by ancillary legislation) two dominions were created and die territories in British India were divided amongst the two, The actual division was to be effected through a procedure mentioned therein. Assuming for a moment that under the "Radcliffe Award", Berubari Union had been given to Pakistan, it cannot be said in the context that Pakistan ever relinquished her claim over the territory or abandoned the same. It so happened that this particular territory remained in possession of India like other territories which remain in the possession of Pakistan, to which India has put forward a claim. The dispute has always been going on and the lapse of time cannot be said to be such as would give rise to rights under International Law by prescription or by abandonment. If either India or Pakistan realises that it has accidentally come to be in possession of territory which has been awarded to the sister State under the "Radcliffe Award", there appears to be no impediment in international law in making over the territory to the real owner. In fact, this would be the only honest course to adopt. As has been pointed out by Oppenheim, (ibid page 452) the territory of a State is not the property of the monarch, or of the Government, or even of the people of the State; its boundary is subject to the territorial supremacy or the Imperium of a State. Neither India nor Pakistan have acquired the respective territories by conquest. It has been effected by the voluntary cession of a foreign power. Regard being had to the particular context in which this came to happen, the question of acquiring territory because of me exercise of our Imperium, cannot and does not arise.

26. The next point to be considered has been raised by Mr. Sen Gupta on behalf of the petitioner and is a point by no means free from difficulty. I have already referred to Article 1 of the Constitution, where it has been stated that the

territory of India shall comprise inter alia of the territories of the States. The territories of the States are specified in First Schedule, and I have set out about Item No. 13 which relates to the State of West Bengal. The territory of West Bengal as set out therein consists of two parts. One part consists of territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. The second part consists of territories which were being administered immediately before the commencement of the Constitution, as if they form part of that Province. 26th January, 1950 is the date of the commencement of the Constitution. As I have already stated, 12th August 1947 was the date of the "Radcliffe Award". Therefore, whether immediately before the commencement of the Constitution Berubari Union was comprised in the Province of West Bengal or not, would depend on a proper interpretation of the "Radcliffe Award", and so far as this application is concerned it would be begging the question. Mr. Sen Gupta however, argues that if it is not covered by the first part, it is at least covered by the second, because at the commencement of the Constitution the territory in question was being administered as if it formed a part of West Bengal, and indeed it is still being administered in that fashion. Mr. Sen Gupta argues that if this be a correct interpretation, then the Constitution itself has made this disputed territory a territory included in the State of West Bengal and it is not necessary to travel into the sphere of International law. At first sight, this argument seems to be of substance. Indeed, if the Constitution itself has declared that a certain territory will be considered as part of West Bengal, that must be the last word on the subject. The learned Attorney-General however, has given a satisfactory answer to this point. He has pointed out that the words "administered as if they form part of that province" has got a special meaning for which a little historical digression is necessary. u/s 290 of the Government of India Act, 1935 it was provided that His Majesty may by order in council increase or diminish the area of any province or alter the boundaries of any province, provided a certain procedure mentioned therein was observed. By the Extra-Provincial Jurisdiction Act 1947 the Government of India was empowered to exercise the necessary powers in States where, under an agreement, jurisdiction, power and authority were transferred to the Government of India. As a step in the direction of effecting the organic integration of states, the Government of India Act 1935 was amended by introduction of Section 290A. The relevant part thereof is as follows:

"290-A. Administration of certain acceding states as Chief Commissioner's Province or as part of the Governor's or Chief Commissioner's Province--

(a) Where full and exclusive authority, jurisdiction and power for and in relation to governance of any Indian States or any group of such States are for the time being exercisable by the Dominion Government, the Governor General may by an order direct--

(b) that the State or the group of states shall be administered in all respects as if the State or the group of states form part of a Governor or a Chief

Commissioner's Province specified in the order;"

27. On 27-7-1949 was passed an order u/s 290A known as the States Merger (Governor's Province) Order, 1949. It provided inter alia that the provincially merged states were to be administered in all respect, as if they form part of the absorbing province. This order only applied in the first instance to the provinces mentioned in the schedule thereto. Amending orders were passed from time to time and on 31-12-1949 was passed the States Merger (West Bengal) Order, 1949, The preamble to the order stated that where as full and exclusive authority jurisdiction and power for and in relation to the governance of the Indian State of Cooch Behar were exercisable by the Dominion Government, it was expedient to provide by the order made u/s 290A of the Government of India Act 1935, for the administration of the said states in all respects as if it formed part of the province of West Bengal. Coming now to the First Schedule, as it appeared in the Constitution, and as it was first promulgated in 1950, we find that the states in India were divided into three categories namely Part A, Part B and Part C. The province of West Bengal became the state of West Bengal as a Part A state. So far as territories of states were concerned, it was provided as follows:

"The territory of the State of West Bengal shall comprise the territory which immediately before the commencement of this Constitution was comprised in the province of West Bengal. The territory of each of the other states in this part shall comprise the territories which immediately before the commencement of this Constitution were comprised in the corresponding province and the territories which, by virtue of an order made u/s 290A of the Government of India Act, 1935 were immediately before such commencement being administered as if they form part of that province".

27A. This part of the First Schedule was altered by the Constitution (Amendment of the First and Fourth Schedules) Order, 1950 which came into operation on 25-1-1950 whereby the paragraph relating to the territory of the State of West Bengal was omitted, so that, in the case of West Bengal the provision reads as follows:

"The territory of each of the other states in this part shall comprise the territories which immediately before the commencement of this Constitution were comprised in the corresponding province and the territories which, by virtue of an order, made u/s 290A of the Government of India Act, 1935, were immediately before such commencement being administered as if they form part of that province".

27B. By Section 4 of Act XXXVI of 1954 which came into operation on 2-10-1954 the following words were added:

"And in the case of the State of West Bengal shall also comprise the territory of Chandernagore as defined in Clause (c) of Section 2 of the Chandernagore (Merger) Act 1954".

28. By the Constitution (Seventh Amendment) Act, 1956 which came into operation on 19-10-1956 this part of the First Schedule was further amended and the entry with regard to West Bengal came to be in the form that is now to be found in the First Schedule of the Constitution and which has been set out above.

29. From this historical narrative, the learned Attorney General argued that the words "or were being administered as if they form part of that province" related to territories which were administered as part of the province of West Bengal by orders made u/s 290A of the Government of India Act, 1935 and in the context, referred only to the State of Cooch Behar, which had merged into Indian territory and was being administered as if it formed a part of the State of West Bengal. In other words, it is argued, and the contention seems to be well founded, that by these words it was merely intended to include territories which were being administered as if they were part of the province of West Bengal, u/s 290A of the Government of India Act, 1935 and does not refer to territories which were being treated as part of the province by mere occupation or by accident or by reason of the fact that the territory having gone to Pakistan had not yet been claimed by it, It therefore has no relevance so far as the Berubari Union is concerned.

30. I now come to the crucial point in this application. The question is whether any case has been made by the petitioner, at this stage, for the issue of a high prerogative writ. All that has happened until now is that the Government of India has entered into an agreement for the purpose of demarcation of the boundary between West Bengal and Eastern Pakistan. As I have mentioned above, it may or may not involve the cession of Indian territory. Assuming that it does, it means that the Government will have to place the matter before Parliament, so that the necessary legislation may be promulgated. As I have already mentioned I am not in a position to say in this application, upon the materials before me, as to whether the agreement to fix the boundary involves a mere determination of what has been given by the "Radcliffe Award", or whether it involves cession of territory. Without such materials I cannot decide whether such an agreement requires the sanction of Parliament or not. Assuming however, that it does require the sanction of Parliament, there is nothing to show that such sanction will not be obtained. In fact, from the various speeches and deliberations that have been placed before me, it appears that the Prime Minister and the Government of India have not yet made up their minds upon this point. As a matter of fact, at the hearing of this application, when the turn came for the learned Advocate General of West Bengal to address the Court, he gave the information that a bill had come from the Centre for being placed before the West Bengal Legislature. As it was still in a confidential stage, it was not possible for him to disclose the contents thereof. Regarding item No. 14 of List I in the 7th Schedule, read with Article 73 of the Constitution, there cannot be any doubt that the Union Government has the right, by executive action, to enter into treaties and agreement with a foreign power. Before implementing the same, it

may be necessary to get a legislation passed by Parliament, because of a special provision in the Constitution. But at this stage, it cannot be said that anything unlawful has been done. I do not see why I should assume that our Prime Minister, who is himself one of the persons responsible for the Constitution of India coming into being, should himself be contemplating a violation of it. After all, it must not be forgotten that the constitutional position is not an easy one and is almost the first of its kind that has arisen since we attained independence. If I am not satisfied that nothing unlawful or unconstitutional has been done in entering into such an agreement, then I do not see why at the moment I should decide complicated questions of law and issue a high prerogative writ. Then again, I have already held above that I have no jurisdiction over the O. P. Nos. 1 and 2. If that is so, the position becomes even more difficult for the petitioner. The only parties who are connected with the agreement are Outside my jurisdiction, and no writ can be issued upon them. So far as the State of West Bengal is concerned, I have indicated that under certain circumstances, it could be prevented from taking certain steps which were unconstitutional or illegal. But there is no evidence before me that as yet it has come into the picture at all, excepting the statement in the communique that there would be a survey and demarcation, and that the State of West Bengal would be requested to ensure keeping of the peace on the border. There is nothing to show that the Union Government has taken any steps under Article 256 of the Constitution, directing the State of West Bengal to do something which it is obliged to do under that article. As I have mentioned above, Article 256 speaks about giving directions to a State to exercise its executive power so as to ensure compliance with the laws made by Parliament or any existing, laws which apply in that State. Unless I know what directions have been given, it is impossible for me to decide whether the provisions of this article were being complied with or violated. In short, at the present moment it has not been shown to my satisfaction that either the Government of India or the State of West Bengal has done anything which is contrary to the Constitution, or contrary to law, and therefore, it is not possible for me to issue a writ in the nature of mandamus, which can only be issued in the aid of a legal right.

31. For the reasons stated above, this application must fail. I discharge the rule, but it must be clearly understood that it fails not necessarily upon the merits but because of an insufficiency of materials, without which the wheels of law cannot be made to move. I have however indicated that if there be a sufficiency of material to show that any part of Indian territory situated in this State was being ceded to a foreign power without complying with the requirements of the Constitution, this Court is not entirely powerless to stop its implementation.

32. The argument of the learned advocate for the petitioner however, mainly consisted of points which are of a political nature and with which this Court cannot concern itself. He pointed out the utter futility of appeasing Pakistan by meekly handing over parts of Indian territory, which action, instead of being considered as a token of strength is hailed as a sign of weakness. He argued with

vehemence that by such action the intransigence of Pakistan grows rather than diminishes. These arguments are better addressed to the accredited representatives of the people in another forum. Such questions can only be effectively determined in a forum where the only sanction is the will of the people. I can only decide the matter in accordance with the law as I find it and upon the materials as presented before me.

33. There will be no order as to costs.