

(1970) 09 DEL CK 0007

In the Delhi High Court

Case No : Civil Writ No's. 323, 431, 439 and 967 of 1970

P.L. Mehra, etc.

APPELLANT

Vs

D.R. Khanna etc.

RESPONDENT

Date of Decision : 02-09-1970

Acts Referred:

Citation : AIR 1971 Delhi 1

Hon'ble Judges : V.S. Deshpande, J;Prakash Narain, J;Hardayal Hardy, J

Bench : Full Bench

Advocate : G.S. Vohra, D.D. Kapoor and R.L. Tandon, for the Appellant; S.S. Chadha, for the Respondent

Judgement

V.S. Deshpande, J.—What is the nature of unconstitutionality attaching to a statute under Article 13 of the Constitution and how can it be cured? This basic question arises in this and the connected writ petitions. The statute concerned is the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 (hereinafter called the "Principal Act").

2. Sections 5 and 7 (2) of the Principal Act provided a summary procedure to the Government to recover from the unauthorised occupants of public premises possession and damages for use and occupation respectively. The Government could also take recourse to the Civil Court to seek these reliefs. The Principal Act thus enabled the Government to discriminate between the occupants of public premises arbitrarily by adopting the summary procedure against some while giving to the others the benefit of the regular civil suits. Following the majority decision in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, , Therefore Sections 5 and 7 (2) were held to contravene Article 14 of the Constitution and Therefore void under Article 13(2) thereof in Rajendra Prosad Singh Vs. Union of India (UOI) and Others, and in Hukum Chand v. S. D. Arya, Civil Ref. No. 1 of 1968, D/- 29-5-1968 (Delhi) by Division Bench of this Court (I. D. Dua, C. J. and V. S. Deshpande, J.) respectively. Section 7 (1) which provides a similar summary procedure to the Government for the recovery of

rent is open precisely to the same constitutional objection. As Sections 5 and 7 constituted the crucial provisions of the Principal Act, the rest of the provisions of the Act may not be able to survive the invalidity of Sections 5 and 7. The whole of the Principal Act may, Therefore be assumed to be void under Article 13(2) for the purpose of these cases.

3. The only vice of the Principal Act was that it did not expressly bar the Government from taking recourse to the Civil Court for recovery of possession, rent or damages for use and occupation. Parliament stepped in to cure the unconstitutionality of the Principal Act by enacting the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1968 (hereinafter called the "Amendment Act"). The main amendment was the addition of Section 10-E to the Principal Act. Section 10-E is as follows:-

"10-E, Bar of jurisdiction - No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorised occupation of any public premises or the recovery of the arrears of rent payable under sub-section (1) of Section 7 or the damages payable under sub-section (2) of that section or costs awarded to the Central Government under sub-section (4-A of Section 9 or any portion of such rent, damages or costs".

4. The petitioners in this and the connected writ petitions are unauthorised occupants of Government premises. They are being evicted by the Government u/s 5 of the amended Act. They realise that the amended Act as such is free from the vice of discrimination. But they nevertheless contend that the eviction proceedings against them are illegal and pray that they be quashed. Their argument is that the whole of the Principal Act was void and as such non-existent in law. Parliament could not amend it as there was nothing to amend. The only course open to Parliament was to re-enact the whole of the Principal Act including the contents of the Amending Act incorporated into the Principal Act. The amendment of a non-existent Act was ineffective.

5. The respondents, on the other hand, contend that even if it is assumed that the whole of the Principal Act was void, Parliament was competent to remove its vice of discrimination by enacting the Amending Act. The Act as amended was perfectly valid. The Principal Act did not become non-existent when it became void. It continued on the statute book and was Therefore available for being amended by the Parliament. The Amending Act was thus not ineffective. The proceedings for eviction brought against the petitioners u/s 5 of the amended Act were Therefore valid and could not be quashed by this Court.

6. The question for consideration, Therefore, is twofold. Its first aspect is one of substance, namely, whether a statute becoming void is so dead and non-existent that even Parliament cannot take notice of it to amend it. Its second aspect is one of form, namely, whether the only way to revive such statute is not to amend it but to re-enact the whole of it with the amendment added to it.

7. Legislature us first examine the first aspect of the question touching the

substance of the matter. It involves a correct understanding of the meaning of Article 13. The first two clauses of Article 13 read as follows:-

"(1) All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

"(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

It would be seen that Article 13 itself does not expressly repeal any particular statute. The Legislature has thus not given to Article 13 the force of repealing statute. It is the exclusive function of the Legislature to repeal a statute. Since the Legislature has not repealed the Principal Act, it must be considered to continue to exist on the statute book as an unrepealed statute.

8. The true nature of Article 13 is to declare that a law contrary to any provision of Part 111 of the Constitution is void to the extent of inconsistency between the two. Such inconsistency is to be determined in each individual case by the decision of a superior Court in India. The voidness of a statute under Article 13 is Therefore a result of a judicial decision only. In this respect, the voidness of a statute under Article 13 is only one species of the genus i.e., unconstitutionality of a statute. Such unconstitutionality can be declared only by a decision of a Court. No Court has any inherent power to declare a statute unconstitutional. The powers of the Court are derived from the Constitution alone. Therefore, a statute may be declared unconstitutional by a Court only if the statute is inconsistent with the Constitution. Such inconsistency may be of various kinds such as the contravention of a fundamental right rendering a statute void under Article 13, incompetence of a Legislature to enact a particular statute or part of it under Chapter 1 of Part Xi read with the Seventh Schedule of the Constitution or the inconsistency of a statute or a part of it with any part of the Constitution. The golden thread running through all these types of unconstitutionality is the same. It is construction of the particular statute vis-a-vis the Constitution by a Court of Law. The unconstitutionality consists only in the particular interpretation of the statute and the Constitution by a Court of Law.

9. There is thus a clear distinction between the effects on a statute, (1) by legislation on a statute is a physical change. An express repeal removes the statute out of the statute book. The amendment makes physical changes in the statute. But a judicial decision does not make any physical change in the statute. It only places a particular meaning on it leaving the statute on the statute book without any change. This difference is due to the clear separation of functions between the Legislature and the Judiciary. The function of the Legislature is fundamental and formal. No statute can come into existence unless the Legislature makes it. No statute can go out of existence unless the Legislature repeals it. The Courts do not possess the power to make a statute or repeal a

statute. The function of the Courts is to interpret a statute and to give it a meaning. If, according to the decision of a Court a statute or a part of it is inconsistent with the Constitution and is, Therefore, unconstitutional. This meaning is to be found only in the statute book. Indeed, the whole concept of the unconstitutionality of a statute is the product of judicial decisions. It can exist only when the Courts are given by a particular Constitution, as is done by the Constitution of India, the power to construe the meaning of a statute vis-a-vis the Constitution and to declare if the statute or any part of it is unconstitutional, being inconsistent with a Constitution. Such a concept has no place when a Constitution does not empower the Courts with such a power, as for instance, in the United Kingdom.

10. This view of the nature of the unconstitutionality attaching to a statute under Article 13 is borne out by the relevant Supreme Court decisions. Prima facie, the object of both the clauses (1) and (2) of Article 13 is the same, namely, to enable the Courts to declare a statute void if the Court is of the view that it contravenes a fundamental right. This is why the same word "void" is used in both the clauses to describe the effect of such unconstitutionality statute. Prima facie and a priori, the meaning of the word "void" in both the clauses should, Therefore, be the same. Initially, however, two different views have been expressed by the Supreme Court as to the nature of a "void" statute according as it falls under clause (1) or clause (2) of Article 13. In *Keshavan Madhava Menon Vs. The State of Bombay*, and *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, , a pre-Constitution statute becoming void under Article 13(1) was described as being "ineffectual or nugatory and devoid of any legal force or binding effect".

11. On the other hand, in *Behram Khurshed Pesikaka Vs. The State of Bombay*, , Mahajan, C. J., speaking for the majority at page 651 (of SCR) = (at p. 145 of AIR), followed the meaning given to the expression "void" in Article 13(1) by the majority decision in *Keshavan Madhava Menon's* case but gave a stronger meaning to the word, "void" even under Article 13(1) in the following words at pages ;651-652 (of SCR) = (at p. 145 of AIR):

"An existing law which is unconstitutional is not law, and is null and void. For determining the rights and obligations of citizens the part declared void should be notionally taken to be obliterated from the section for all intents and purposes, though it may remain written on the statute book and be a good law when a question arises for determination of rights and obligations incurred prior to 26th January, 1950 and also for the determination of rights of persons who have not been given fundamental rights by the Constitution".

In *Deep Chand Vs. The State of Uttar Pradesh and Others*, , Subba Rao, J., speaking for the majority made a sharp distinction between the two clauses of Article 13 in the following words at pages 20-21 (of SCR) = (at p. 656 of AIR):

"Under clause (1), a pre-Constitution law subsists except to the extent of its

inconsistency with the provisions of Part 111; whereas, no post-Constitution law can be made contravening the provisions of Part 111, and Therefore the law, to that extent, though made, is a nullity from its inception (The law made in spite of the prohibition is a still-born law".)

12. These divergent views were however synthesised by Wanchoo, J., speaking for a unanimous Constitution Bench in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, in the following words:

"The meaning of the word "void" for all practical purposes is the same in Article 13(1) as in Article 13(2), namely, that the laws which were void were ineffectual and nugatory and devoid of any legal force or binding effect".

It is to be noted that Wanchoo, J., used precisely the same words to describe the nature of a void statute under both the clauses of Article 13 as were used in the previous decisions of the Supreme Court in Keshavan Madhava Menon Vs. The State of Bombay, and in Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, . The language used in describing the nature of a void statute in the majority decisions in Behram Khurshed Pesikaka Vs. The State of Bombay, and Deep Chand Vs. The State of Uttar Pradesh and Others, was scrupulously avoided. The Court thus seems to have preferred the former to the latter.

13. Thus the decision in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, as to the nature of a statute becoming void under Article 13 confirms the view that the statute itself continues to exist on the statute book but has become "ineffectual, nugatory and devoid of any legal force or binding effect". The thrust of these words is that such a law cannot be given effect to by the Courts in deciding upon the rights of the parties. These words are significant only for the purposes of the Courts vis-a-vis the rights of the parties. They would be meaningless if applied to the power of the Legislature to re-enact, repeal or amend a statute. For, one can hardly say that these powers of the Legislature cannot be exercised in respect of a statute which is ineffectual, nugatory and devoid of any legal force or binding effect. Indeed, it would be all the more necessary for the Legislature to amend or cure statutes which are suffering from such defects. The nature of the defects is such that only a judicial decision can point them out. It is not by an act of Legislature but only by a judicial decision that one would know whether a statute is ineffectual, nugatory and devoid of any legal force or binding effect. The decision in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, appears, Therefore,, to be sufficient to negative the contention of the petitioners that a statute which is void within the meaning of Article 13(2) of the Constitution is non-existent and is not available for amendment. All that can be said about such a statute is that it is ineffectual, nugatory and devoid of any legal force or binding effect.

14. Though the concept of voidness is the same in Article 13(1) and Article 13(2), Article 13(1) applies to pre-Constitution laws while Article 13(2) applies to

post-Constitution laws. As observed by Wanchoo, J., further in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . "The voidness of the pre-Constitution laws is not from inception. Such voidness supervened when the Constitution came into force; and so they existed and operated for sometime and for certain purposes; the voidness of post-Constitution laws is from their very inception and they cannot Therefore continue to exist for any purpose". Do these words mean that a post-Constitution statute as distinguished for a pre-Constitution statute becomes non-existent or notionally obliterated, from the statute book? I am unable to attribute any such meaning to them. For, the only difference between the pre-Constitution and the post-Constitution laws being void under Article 13 is this: The pre-Constitution laws continue to exist till they come into conflict with the fundamental rights at the commencement of the Constitution, while the post-Constitution laws cannot so continue to exist at all as they come into conflict with the fundamental rights immediately they were enacted. Both of them Therefore exist on the statute book. While the pre-Constitution statutes continue to be enforceable till the commencement of the Constitution, the post-Constitution statutes become unenforceable immediately on their enactment. The crux of the Supreme Court's view appears to be in the words "could not continue to exist". It is the continuance of the existence, I. e., operativeness or the enforceability and not the existence itself on the statute book which is denied to the post-Constitution laws which become void under Article 13(2) of the Constitution.

15. The word "void" is also used in Article 254(1) of the Constitution apparently with the same meaning. In *Deep Chand Vs. The State of Uttar Pradesh and Others*, Article 13(1) was said to be in pari materia with Article 254(1). In respect of the meaning of the word "void" Article 13(2) may also be said to be in pari materia with Art. 254(1) specially because the State law there under becomes void if repugnant to a law made by Parliament whether (the Parliamentary law is) passed before or after the law made by the State. The analogy of the words "before or after" would apply to both the pre-Constitution and the post-Constitution laws under Article 13 and would place them on the same footing in respect of the meaning of the word "void". Article 251 of the Constitution is also based on the same principle which underlies Article 254(1) except that the power of Parliament to make laws is expected to be of a short duration. Article 251 expressly states that the State law which is repugnant to the law of Parliament shall be "inoperative". This would indicate that the word "void" in Articles 254(1) and 13 means only "inoperative".

16. It is true that in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, a post-Constitution statute becoming void under Article 13(2) was held not to have been revived by a subsequent Constitutional amendment. The Explanation for this view is twofold. Firstly, the Constitutional amendment was prospective and retrospective. Secondly it did not expressly indicate the intention of the Legislature to revive the particular statute. But this aspect of the decision has no bearing on the question before us which is whether the void statute itself

can be amended by Parliament. It is more relevant to point out that a Constitutional amendment which specifically refers to the void statute such as the Constitution (First Amendment) Act 1951 inserting Article 31B and the Ninth Schedule though they had already become void under Art. 13. This was recognised by the Supreme Court in *N.B. Jeejeebhoy Vs. Assistant Collector, Thana Prant, Thana, ,* after referring to their previous decisions in *Dhirubha Devisingh Gohil Vs. The State of Bombay*, and the *The State of Uttar Pradesh and Others Vs. H.H. Maharaja Brijendra Singh, .*

17. The incongruity in both these aspects of the question raised by the petitioners may be noted here. The voidness of the Principal Act is a result of our decision which simply means that this Court would have refused to give effect to the provisions of the Principal Act in a litigation between parties. But the effect of the decision of the Court is tried to be extended beyond the scope of *res judicata* and *stare decisis* to the point of repealing the Principal Act though such repeal can be effected only by the Legislature and not by a Court decision. Again, whether the Principal Act should be revived by re-enactment or by an amendment or by the passing of an independent statute is for the Legislature to decide. But the petitioners seek a judicial decision holding that the Legislature must follow the method of re-enactment and cannot follow the method of amendment. The distinction which the petitioners ignore is that there are two distinct purposes and view-points for which the laws void under Article 13 are to be regarded by the Courts as non-existent in law in deciding the rights of the parties but are taken note of by Parliament as being on the statute book for the purpose of validating and other legislation.

18. Talking in terms of known legal categories, the effect of Article 13(1) on a pre-Constitution law is similar to that of an implied repeal. The effect of Article 13(2) on a post-Constitution law is to make it *ultra vires* to the extent it is inconsistent with fundamental rights. In either case the extent of the implied repeal and the extent of *ultra vires* is determined by a judicial decision. Allen in his "Law in the Making " Seventh Edition at page 474 observe that "repeal by implication is a matter of construction and is a very striking instance of the control exercised by the courts over the operation of the statute". He does not say that such construction can affect the existence of the statute on the statute book. Again at page 563 the learned author refers to the judicial control (not repeal) of ;sub-ordinate legislation by the courts through the doctrine of *ultra vires*. At pages 268-269 the learned author warns us against taking "mere decisions in themselves as settling disputed points and forgetting the fundamental principle which governs the whole employment of precedent. That principle, as we have seen, was insisted upon by Lord Mansfield, and it was re-affirmed by Sir George Jessel with his usual clarity when he said: In *re Halett's Estate*, (1880) 13 Ch D 696 at p. 712, "The only use of authorities or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him. Simple and self-evident though this dictum may sound, it is not always kept in view. The result is that the form tends to be

confused with the substance. Precedents, as has been observed by a distinguished Judge of our own time, should be "stepping -stones and not halting places! (Lord Macmillan in *Birch v. Brown*, 1931 Ac 605 at p. 631)." The essential difference between legislation and judicial decision in their effect on pre-existing laws including statutes is also brought out by Salmond in his "jurisprudence" Eighth Edition, page 176 as follows:

"The first virtue of legislation lies in its abrogative power. It is not merely a source of new law but is equally effective in abolishing that which already exists. But precedent possesses merely constitutive efficacy its defect is that its operation is irreversible. It cannot go back upon its foot steps and do well what it has once done ill."

It is clear from the above that unlike legislation, a judicial decision can control the operation of the statute but cannot repeal a statute out of existence. On the other hand the power of the legislature to remove the cause of repeal by implication or of the ultra virus by amending either the Constitution or the statute concerned or by enacting a separate statute altogether has never been doubted. Even a reversal of a previous decision holding a statute to be inconsistent with the Constitution would have the same effect of curing the unconstitutionality of the statute. This is the established law not only in India but in other countries following the British system of jurisprudence.

19. Prof. Willoughby in "The Constitutional Law of the United States" 2nd Edition, Vol. 1, page 10 expresses the view that a statute is not annulled or repealed by a court decision. He says:-

"The doctrine that the judicial declaration of the unconstitutionality of a statute has not the effect of a veto or nullification or abrogation of the statute so as, in effect to strike it from the statute books, is excellently stated by the Court of West Virginia in *Shephard Whealing*, (30 W, Va 479)"

The court says:- "(The Court) does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognise it, and determines the rights of the parties just as if such statute had no application. The court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does not repeal..... the statute. The parties to that suit are concluded by the judgment but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision cannot be pleaded as estoppel, but can be relied on only as a precedent".

20. The same view is expressed by Wynes in his "Legislative, Executive and Judicial Powers in Australia" 2nd Edition, pages 40 and 41:-

"The high responsibility involved in the process and the fallibility of human

judgment combine to make the Courts who are entrusted with the solemn duty of adjudicating upon questions of constitutionality reluctant to refuse to give effect to the expressed will of the Legislature. For the Judiciary is a branch of the Government co-ordinate with the Legislature and the Executive although it may appear to occupy a position of superiority. In point of law the Court is not entrusted with any power to veto the acts of the Legislature; its function is to decide between litigants and to enforce its decree by appropriate means. But if, in the process of adjudicating upon private rights and duties, it becomes necessary to determine whether Parliament has exceeded its powers in the particular case, it so happens that it has, in the opinion of the Court, done so, then involved in the judgment is the decision that the legislative enactment is unconstitutional and of no effect in the circumstances of the case. In strict legal theory, however, the judgment of the Court does no more than decide inter partes and the statute remains on the Statute Book as a subsisting law; in so far as the Court has refused to enforce it, because it is in conflict with the Constitution and it is consumed that the decision will not be followed if subsequent proceedings under it are brought, the practical result is that the law becomes a dead letter. But although the principle of stare decisis is the general rule, the High Court is not necessarily bound by previous decisions and in the event of a subsequent suit being brought under the enactment and the Court's not following its earlier judgment, the statute will stand in full force and effect because it has never, legally, been repealed."

21. A similar view was taken in *Ulster Transport Authority v. James Brown and Sons Ltd.* (1953) Nir 79. There, constructing Section 5 (1) of the Act of 1920 which enacts that "any law made in contravention of the restrictions imposed by this sub-section shall so far as it contravenes these restrictions, be void", Lord MacDermott L. C. J. observed:

"I am not aware of any authority for the view that language such as this necessarily means that contravention must produce an actual gap in the statute book in the sense that the measure concerned, or some specific part thereof, simply drops out of the authorised text."

22. Commenting on a portion of the above view of Prof. Willoughby, Mahajan, C. J. observed in *Behram Khurshed Pesikaka Vs. The State of Bombay*, that in view of Articles 13 and 141 of the Constitution there was no scope in India for the application of the American doctrine enunciated by Prof. Willoughby. It is true that as distinguished from a High Court decision which is effective only between the parties and as a precedent to be followed in the same High Court, a Supreme Court decision is binding on all courts in India and is Therefore effective not only as a precedent but also as a general law of all-India application. Nevertheless, such law is Judge made law. It is not legislation and Therefore it does not directly repeal or amend the statute which is declared void by it. This was recognised by Bhagwato, J. in the same case at p. 621 (Of SCR) = (at p. 131 of AIR) in the following words:-

"Even though under Article 141 of the Constitution the law declared by this Court is binding on all the courts within the territory of Union and is to be the law of the land the effect of that declaration was not to enact a statutory provision or to alter or amend Section 13(b) of the Bombay Prohibition Act, 1949."

As Mahajan, C. J. had himself earlier pointed out in *Keshavan Madhava Menon Vs. The State of Bombay*, of the report:-

"According to the contention of the learned counsel, the principles applicable to repealed statutes are not in terms applicable to such a case (of a statute being void under Article 13(1) of the Constitution) whether they are to be found in the rules of the Common law of England or whether they are contained in the Interpretation Act or the General Clauses Act. None of those however have any application to the construction of statutes framed in language like the one contained in Article 13(1) of the Constitution it is difficult to apply that rule (that the repeal of a statute has obliterated it completely) on any sentimental grounds at this date to the case of statutes which are declared void or declared to have no effect whatsoever after a certain date only."

23. In the same case at page 235 (of SCR) = (at p. 130 of AIR) Das J. pointed out that "the effect of Article 13(1) is quite different from the effect of the expiry of a temporary statute or the repeal of a statute by a subsequent statute." At page 241 (Of SCR) = (at p. 132 of AIR) Fazl Ali, J. pointed out that in the previous draft of Article 13 of the Constitution the words "shall stand abrogated" were present. But these words were substituted by the words "shall be void" in Article 13(1) as it actually became a part of the Constitution. The word "abrogate" is nearer in effect to the word "repeal". Therefore the word "void" was substituted in its place. Out of the meanings of the word "void" stated in Black's "Law Dictionary" 3rd Edition only the following were adopted in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, namely, "ineffectual, nugatory, having no legal force or binding effect."

24. From the above discussion it is clear that the declaration of a statute as void under Article 13(2) by a court has two entirely distinct aspects. So far as the courts are concerned, such a statute is unenforceable. The courts would Therefore ignore it. The courts would decide cases between private parties on the basis that such a statute has no binding force. But so far as the Legislature is concerned such a statute is very much in existence. It has not been repealed. It is Therefore on the statute book. The Legislature is Therefore bound to take notice of it as also of the view expressed by the court regarding its inconsistency with the fundamental rights. The Legislature is Therefore entitled to pass fresh legislation with a view to remove the vice of unconstitutionality from such a statute and to make it valid.

25. It is not the scheme of the Constitution that the Legislature only enacts a statute but has no further concern with it. The repeal of a statute is not left to be brought about by a judicial decision. When a court is said to "strike down" a

statute what is meant is that the court declares the statute void to make it nugatory and without any binding force. It does not mean that the court repeals a statute. It is Therefore clear that it is the Legislature which alone may either repeal such a statute wholly or may enact a new statute which would either repeal it partly or add something new to it.

26. It is in this context that we must understand the Supreme Court's observation in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, regarding the continued existence of a statute declared void under Article 13(2). The statute does not continue to exist in the sense that it does not possess any binding force or enforceability. But such a statute is on the statute book for the purpose of further parliamentary legislation. This distinction is brought out by the following Supreme Court decisions. In *Ram Kirpal Bhagat and Others Vs. The State of Bihar*, the question was whether the Land Customs Act, 1924 became applicable to excluded or partially excluded areas on the commencement of the Constitution. u/s 192 of the Government of India Act, 1935 a specific declaration of the Governor was required to apply any legislation to the areas in question. The Land Customs Act, 1924 has not been so applied to the Santhal Parganas. Under Article 372(1) of the Constitution subject to the other provisions of the Constitution all the laws in force in the territory of India shall continue to be so in force. It was held that laws which were existing laws in territories other than the excluded and partially excluded areas would not be existing laws in relation to excluded or partially excluded areas. The Land Customs Act, 1924 could not Therefore apply to the Santhal Parganas as an existing law. An existing law in that case was equated with the law in force. A law which was not in force or in operation in a particular area was not an existing law in that area. It is clear that it is the force or the binding nature of the law which was equated with its existence. In this view so far as the courts are concerned they would not regard such a law to be existing in such an area. If a law were to be made applicable to such an area then it would come into force in that area and would be an existing law there. But when a law is not in force in a certain area it may still be a law on the statute book and thus in existence for the purpose of parliamentary legislation. This is why ;in *Sri Sadasib Prakash Brahmachari Vs. The State of Orissa*, the Orissa Act No. 2 of 1952 which was only on the statute book but had not been brought into force by the necessary notification could be amended by subsequent State legislation even though on the date of the amendment it was not a law in force. For the purpose of the courts a law which had not been brought into force is no law at all and it does not exist. But for the purpose of Parliament such a law is on the statute book and Therefore not only existed but is capable of being amended.

27. It is the same distinction between the purposes of the Court and the purposes of the legislature which underlies some other decisions of the Supreme Court. Section 22 of the Madras Sales Tax Act which was a post- Constitution addition by way of adaptation made after the commencement of the Constitution was unconstitutional due to inconsistency with Article 286 of the Constitution.

But a subsequent legislation which removed the said inconsistency validated it, *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, . The Legislature Therefore regarded the said unconstitutional provision as being in existence on the statute book which could be validated by subsequent legislation. In *The State of Mysore and Another Vs. D. Achiah Chetty, etc.*, , the Mysore Land Acquisition Act which contained a shorter procedure for the acquisition of land was held to be discriminatory inasmuch as an alternative procedure more favorable to the land-owner was available under the City of Bangalore Improvement Act, Section 52 of which purported to override any other repugnant State legislation. The State Legislature however passed the Bangalore Acquisition of Land (Validation) Act, 1962 which substituted a single law for the acquisition of land under the Mysore Land Acquisition Act out of the way. The argument that an acquisition of land contrary to Article 14 of the Constitution cannot ever be validated and the validating Act was ineffective for the reason, was repelled by the learned Chief Justice of India in the following words:-

"This argument leads to the logical conclusion that a discrimination arising from selection of one law for action rather than the other, when two procedures are available, can never be righted by removing retrospectively one of the competing laws for the field. This is a wrong assumption. In AIR 1944 1 (Federal Court) trials before special judges (not sessions Judges under the Code of Criminal Procedure) were deemed to be trials before Sessions Judges in accordance with the Code and the Federal Court upheld ;the constitutionality of the ordinance by which this fiction was created. The supremacy of the Legislature in India, within the constitutional limits of their jurisdiction is as complete as that of the British Parliament. If two procedures exist and one is followed and the other discarded there may in a given case be found discrimination. But the legislature has still the competence to put out of action retrospectively on of the procedures leaving one procedure only available, namely, the one followed and thus to make disappear the discrimination. In this way a Validating Act can get over discrimination. Where, however, the legislative competence is not available, the discrimination must remain for ever since the discrimination can only be removed by a legislature having power to create a single procedure out of two and not by a legislature which has not that power."

28. There is thus a clear distinction between express repeal of a statute made by legislation and an implied repeal of a statute brought to light by a judicial decision. An expressly repealed statute is truly non-existent as it has gone out of the statute book. The Courts would of course ignore it in deciding the rights of the parties but even the Legislature would have to ignore it in undertaking further legislation. On the other hand, a statute declared unconstitutional due to its inconsistency with the Constitution only loses its binding force in litigation between the parties and is non-existent like an impliedly repealed statute only in deciding the rights of parties. But it is very much exists on the statute book and may be either repealed or amended by the Legislature. To illustrate the difference between the two further, it may be pointed out that the repeal of a

statute revives under the common law a statute which has been repealed previously by the statute which is now repealed. Such a revival is however prevented by Section 6 of the General Clauses Act. But the implied repeal of a statute does not revive any statute which has been previously repealed by a statute which is now repealed. For, the implied repeal is not a legislative repeal at all. It results only from judicial construction. Therefore, an impliedly repealed statute is itself revived in ways in which an expressly repealed statute cannot revive. For instance, a reversal of the judicial construction which had resulted in repeal by implication would revive the impliedly repealed statute. Similarly an amendment of either the Constitution or the impliedly repealed statute removing the inconsistencies between the two would also revive the impliedly repealed statute. No such revival is possible of a statute which has been expressly repealed. An express repeal of a statute is like a termination of its existence which is final. On the other hand, an implied repeal is like a suspension of its existence with the result that the statute revives after the suspension ends.

29. There are thus only two kinds of repeal of a statute. Either a statute is expressly repealed and is dead for ever or it is impliedly repealed or declared unconstitutional and is in a state of suspension. In the latter state it is ineffectual and void but is not dead inasmuch as it exists on the statute book. There is no such thing as a statute which is on the statute book and is yet non-existent on the statute book for the purpose of further legislation. The non-existence of a void statute is only a figure of speech. It is only because such a statute is incapable of supporting any rights or liabilities that it is regarded as ineffectual, nugatory or without binding force. But such a statute very much exists and is capable of being repealed or amended. It is in no sense non-existent for the purpose of further legislation.

30. The conclusion on the first aspect of the question is that a statute which is void within the meaning of Article 13(2) of the Constitution is "ineffectual, nugatory and without legal force or binding effect" and the courts will not enforce it in deciding on the rights of the parties. But a statute very much exists on the statute book and Parliament is bound to take notice of it for further legislation to repeal or amend it.

31. The second aspect of the question is whether a void statute cannot be amended but must be re-enacted. Let us try to examine the basis of this contention. Its origin may be traced in the following statement of Prof. Willoughby in Vol. 1 of his book (cited above) in paragraph 7 at page 11 which is as follows:-

"Effect of subsequent Grant of Legislative Power.

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature and, if thus tested, it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment, the necessary legislative power is granted.

"An after-acquired power cannot, ex proprio vigore, validate a statute void when enacted".

32. It is to be noted that only the last sentence "An after-acquired power cannot, ex proprio vigore, validate a statute void when enacted" is based on the decision of the United States Supreme Court in *Newberry v. United States*, (1921) 256 Us 232. The said decision was relied upon in *Deep Chand Vs. The State of Uttar Pradesh and Others*, for the proposition that a subsequent amendment of the Constitution did not revive a void statute. At page 24 of the report (1959) Supp (2) Scr 7 of *Deep Chand's* case, however, the whole of the passage from Willoughby is re-produced and contrasted with a subsequent passage from the same author with the following comment:-

"For the former proposition, the decision in (1921) 256 Us 232 and for the latter proposition the decision in (1891) 140 Us 545 are cited".

33. With the greatest respect it may be pointed out that the decision in (1921) 256 Us 232 was not at all concerned with the question whether a void statute is not rendered valid without re-enactment.

34. What then is the source or authority for such a statement of law by Prof. Willoughby? It is important to know this for, the following statement by Prof. Cooley in Column I page 384 of his work on Constitutional Limitations was approved by Mukherjee, J, in *Saghir Ahmad Vs. The State of U.P. and Others*, "(A) statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the Constitutional objection but must be re-enacted."

Since no decisions are cited by these learned authors in support of these views, the Explanation for these views appears to be twofold. Firstly, all that they mean is that there is no automatic revival of a void statute by a subsequent constitutional amendment. When they say a void statute would have to be re-enacted if it is to be revived, they only mean that the Legislature has to expressly indicate its intention to revive the void statute. The intention of the Legislature may be expressed in a manner appropriate to the action. If only a small part of the statute is void, then the Legislature may only amend it, but if numerous amendments are involved, Legislature may think of re-enacting the whole statute. The word "re-enact" Therefore is only an omnibus expression to mean the appropriate legislative action. Alternatively, the Explanation seems to be that in the Constitution seems to be that in the Constitution of certain States in the United States there is an express provision that a statute must not be amended merely by referring to its title but must be re-enacted as a whole with the new portion incorporated in it. There were good reasons for making such provisions in some of the State Constitutions. A statute originally enacted would be found in the statute book of that year or of that period. Subsequently statutes which amended that original statute would be found in the statute books of the years in which the statute was amended. Publication of revised statute books

incorporating the amendments in the original statute and reproducing the statute in its amended form took time. Before the publication of the amended statute it was difficult to know if the original statute has been amended and if so where the amendment could be found. Even in India we experience such a difficulty. This was why certain State Constitutions in the United States made it compulsory that at each amendment the whole statute should be re-enacted. For instance, such a provision is contained in Article 13, Section 24 of the Constitution of the State of California. In the absence of a constitutional provision of this character, however, as pointed out by the Supreme Court of California in *Fletcher v. Prather* (1894) 102 Cal413 : 36 Pac 658, "a section of a statue might be and often was amended in one or more of four ways: 1. By striking out certain words; 2. By striking out certain words and inserting others; 3. By inserting certain words; and 4. By adding other provisions".

35. In "Sutherland on Statutes and Statutory Construction" 3rd Edition by Horack in Vol. I, paragraphs 1903 and 1904, pages 328 to 337, this difference is clearly brought out. On the one hand is a statute which is expressly repealed. In paragraph 1903, it is pointed out that such a statute cannot be amended for the simple reason that it is not on the statute book at all. In the same class are unconstitutional statutes in those States in which a mere amendment without re-enactment is forbidden by the State Constitution. The courts in these States have regarded an unconstitutional statute as legally non-existent which cannot be give effect to by an attempt to amend it. For, "in these States to validate an unconstitutional Act by amendment, the whole Act as amended must be re-enacted (end of page 334).

36. On the other hand are those States in which an amendment without re-enactment is allowed by the State constitutions. The legal position in these cases is lucidly stated by Sutherland at pages 335 to 337 as follows:

"Probably a majority of the courts have rejected the theory that an unconstitutional Act has no existence, at least for the purpose of amendment. The unconstitutional Act physically exists in the official statutes of the State and is there available for reference, and as is there available for reference, and as it is only unenforceable, the purported amendment is given effect. If the law as amended is constitutional, it will be enforced. The amendment need not be intelligible and complete on its subject although that is obviously desirable.

37. This escape from the legal fiction that an unconstitutional Act does not exist is sound. That fiction serves only as a too convenient method of stating that an unconstitutional Act gives no right or imposes no duties. This conclusion should not be used to determine an issue which was not considered in formulating the fiction. The intent of the legislature in amending an unconstitutional Act is just as easily ascertained as it is when it amends a valid Act. Amendment offers a convenient method of curing a defect in an unconstitutional Act." The advantage of an Amendment without re-enactment is that it pinpoints attention only to the amended portion of the Act to enable the reader to know what is new. If the new

is mixed with the old as in a re-enactment, then it is difficult to know why and what is the change brought about by the amendment.

38. In India there is absolutely no prohibition on the amendment of a statute and there is no law which requires that the whole statute must be re-enacted at the time of amendment. Consequently the amendment of an unconstitutional statute without its re-enactment is legal in India. The preamble of the Amendment Act of 1968 refers to the long title of the Principal Act. This is sufficient to identify the statute which is being amended. After its identification the Amendment Act has merely to be read side by side with the Principal Act and the meaning of the whole Act, as amended, becomes clear. For, the effect of the amendment is that the very words of the Amending Act and the new Act is the one which so stands amended.

In *Allison v. Corker*, Supreme Court of New Jersey (1902) 67 Nlj 596 : 52 A. 362 60 Lra 564, it was observed as follows:-

"The argument is that an unconstitutional statute is a nullity. Granting this, it does not follow that it may not be imported into valid legislation by appropriate reference. It is entirely within the legislative power to give effect to document without their full recital The matter is one purely of identification. Surely nothing can be more definite than a reference to a document that has been regularly promulgated a public statute..... But I am prepared to go farther, and hold that an unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. If properly to be called void, it is only so with reference to claims based upon it. Neither of the three department to which the constitution has committed government by the people, can encroach upon the domain of another. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised in rem, but always in personam. The Supreme Court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed unconstitutional. For many purposes an unconstitutional statute may influence judicial judgment where, for example, under colour of it private or public action has been taken. An unconstitutional statute is not merely a blank paper. The solemn act of the legislature is a fact to be vested to expunge it or; remove it from its proper place among statutes."

39. The view that an unconstitutional statute cannot be amended but must be re-enacted has thus no principle or authority to support it. It is further based upon a misconception. A statute is regarded as a sentient being. A void statute is regarded as a dead statute. What was merely a figure of speech is taken to be a reality. A void statute which is only unenforceable is imagined to be dead and Therefore gone out of the statute book. It is this misconception which has given rise to the view that a statute which does not exist at all cannot be amended as there is nothing to amend. For, the statute is very much available on the statute book for amendment by the legislature.

40. Further, the same argument which concedes that a void statute can be re-enacted must concede that it can be amended. What is re-enactment? As in Section 24 of the General Clauses Act, re-enactment is preceded by the repeal of a statute, the substance of which is enacted again. This is why it is called "re-enactment".

41. The second contention of the petitioners Therefore concedes that the Legislature has the power to repeal a void Act. If the Legislature can repeal a void Act and it can make a new Act then it must follow that it can amend a void Act. For, the power to amend is either a power to enact or a power to repeal. There can be no amendment which either does not repeal a part of the existing statute or does not add to it. Basically, it is the power to enact a statute which is possessed by the Legislature. A repeal or an amendment is nothing different from enactment. The possession of the power to enact a new Act and to repeal a void Act Therefore gives the Legislature the power to amend a void Act.

42. In *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, , the learned Chief Justice of India has made certain general observations regarding validation of statutes. In paragraph 4, his Lordship observed as follows:

"When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively."

The amendment of a void statute which removes the cause of its unconstitutionality is Therefore the proper course for the Legislature to adopt in dealing with an unconstitutional statute. It is not only permissible but is also desirable. As further observed by the learned Chief Justice of India, there are only conditions to be observed in making such an amendment. Firstly the Legislature must be competent to enact the amending act. Secondly the result of the amendment must make the statute constitutional. Both these conditions were satisfied by the Amending Act of 1968. It must Therefore be held to have cured the Principal Act of its vice of discrimination and made it valid.

43. The petitioners strongly relied upon the decision of 3:2 majority of the Constitution Bench of the Supreme Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, , holding the Pondicherry General Sales Tax Act, 1965 to be void and stillborn because the Pondicherry Legislature abdicated its legislative function. Though the unconstitutionality did not arise under Article 13(2) of the Constitution, the decisions in *Deep Chand Vs. The State of Uttar Pradesh and Others*, , respectively) were referred to at page 661 of the report (SCR) = (at p. 1488 of AIR) to show that the Act was void. The Pondicherry General Sales Tax (Amendment) Act. 1966, purported to amend the Pondicherry General Sales Act, 1965, but the majority at page 662 (of SCR) = (at p. 1489 of AIR), held that the Amending Act proceeded on the footing that the Principal Act was valid and still on the statute book. It was not an independent re-enactment of the Principal Act.

As the Principal Act was still-born, an attempt to revive what was void ab initio was frustrated and the amending Act could, Therefore, have no efficacy.

44. With great respect, it appears that the decision in *B. Shama Rao Vs. The Union Territory of Pondicherry*, is distinguishable. Firstly it was the Supreme Court which had held the Pondicherry General Sales Tax Act, 1965 to be void. The effect of the decision of the Supreme Court is different from the effect of a decision of a High Court. Articles 142 and 144 of the Constitution make the Supreme Court decision binding on all courts in India and require all the civil and judicial authorities in India to act in aid of the same. The effect is that the Supreme Court decision becomes a judge-made law of general application throughout India. In that respect it can be put against the statute which is declared void by it and such a statute ceases to have any enforceability anywhere in the country.

45. On the contrary, the decision of a High Court is primarily one between the parties. Secondly it is a precedent which is binding on the courts subordinate to the said High Court. It is not a binding precedent outside the territorial limits of the said High Court. Further, such a decision can be reversed by a larger Bench of the same High Court or by the Supreme Court. The very basis of the authority of precedent is the principle of stare decisis. This principle can be invoked only when the precedent has a finality and a universal application. In both these respects the decision of a High Court is found wanting. Such a decision cannot Therefore result in making the statute declared void by it to be unenforceable everywhere in India. It often happens that different High Courts take different views regarding the constitutionality of a statute. The Principal Act itself was held to be valid by the Special Bench of Calcutta High Court in *Standard Literature Co. Private Ltd. and Others Vs. Union of India (UOI)*, . Later the same High Court reversed the decision and declared S. 5 of the Principal Act to be void in *Rajendra Prosad Singh Vs. Union of India (UOI) and Others*, . This illustrates the difficulty of regarding the decision of a High Court as invalidating a statute of all-India application. In respect of a High Court decision Therefore the usual rule applies that the statute continues to be law in the country though such a High Court decision may be followed as a precedent in other cases within the jurisdiction of the said High Court.

46. Secondly the unconstitutionality of the Pondicherry General Sales Tax Act, 1965 was not be reason of it being contrary to any provision of Part Iii of the Constitution. Therefore Article 13 of the Constitution was not attracted at all. Consequently it is not a decision as to the nature of unconstitutionality under Article 13(2) of the Constitution. For the same reason it does not decide whether an Act void under Act 13(2) can be validated by an amendment or not.

47. Thirdly the decision in *B. Shama Rao Vs. The Union Territory of Pondicherry*, was further explained and distinguished in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, by the same Constitution Bench, this time unanimously. Law grows from precedent to precedent. Just as a later statute

impliedly repeals an earlier one to the extent of the repugnance between the two, a later precedent modifies an earlier one by developing the Law. In *B. Shama Rao Vs. The Union Territory of Pondicherry*, the contention of Shri S. T. Des, for the petitioner at page 661-G (of SCR) = (at p. 1488 of AIR) was that the Principal Act being void the Amendment Act could not resuscitate it. This was a novel contention not supported by any previous authority. The learned counsel relied on the decisions in *Deep Chand Vs. The State of Uttar Pradesh and Others*, and *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, cases. But none of them had decided that a void Act could not be revived by an amendment of the said Act itself. Secondly, learned counsel's argument was self-contradictory inasmuch as he had bracketed the decision in *Deep Chand Vs. The State of Uttar Pradesh and Others*, , with the decision in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . Actually, as shown above, the decision in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, was contrary to the decision in *Deep Chand Vs. The State of Uttar Pradesh and Others*, , in holding that there was no distinction between Articles 13(1) and 13(2) as to the meaning of the word "void" though in *Deep Chand Vs. The State of Uttar Pradesh and Others*, , a sharp distinction in this respect was drawn between the two clauses of Article 13. At page 662 (of SCR) = (at p. 148 of AIR) of the majority judgment in *B. Shama Rao Vs. The Union Territory of Pondicherry*, , it was stated that an amendment could be made only of a valid Act which was still on the statute book. With great respect, their Lordship's attention does not seem to have been invited to the fact that even a void Act could continue to be on the statute book and this position was established by the meaning given to the expression "void" by the Supreme Court in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . It is further held that only an independent Act could revive the void Act and that the Amending Act was not an independent Act. In the minority judgment, however, the decisions in *Deep Chand Vs. The State of Uttar Pradesh and Others*, and *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, cases were distinguished as being under Article 13(2) of the Constitution from *B. Shama Rao Vs. The Union Territory of Pondicherry*, which was a case of excessive delegation. According to the minority judgment, the Principal Act was clearly within the competence of the Pondicherry Legislature and there was nothing in the Constitution which prohibits the substitution of a defective law by a law which is not subject to any infirmity. The Amending Act effectively cured the defect in the Principal Act the whole of which was not void. It is the same Constitution Bench which was so divided that came to hear *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, .

48. The majority of the Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, had approved of an extreme contention that void law could not be amended at all though as respectfully pointed above, this proposition was not supported by any previous authority. In effect, this was new law established by *B. Shama Rao Vs. The Union Territory of Pondicherry*, . A rigid adherence to the new legal position could unsettle the division of functions between the

Legislature and the Courts enshrined in the Constitution. For, whenever only a comparatively small part of a statute was open to a Constitutional objection, the legislative practice was to amend the Act to remove this defect. Such amendment was concerned only with the unconstitutional portion of the Act. The rest of the Act was not re-enacted inasmuch as it was free from any defect. One recent instance of such legislative practice would be sufficient to bring out this point. In *Union of India (UOI) Vs. Kamlabhai Harjiwandas Parekh and Others*, the Supreme Court held that section 8(3)(b) of the Requisitioning and Acquisition of Immovable Property Act, 1952 to be void as being ultra virus Article 31(2) of the Constitution. The whole purpose of the Act was to requisition and acquire property for a public purpose. According to Article 31(2) of the Constitution, no such acquisition could be made except on payment of compensation which had to be a just equivalent prior to the Fourth Amendment of the Constitution. The provision in Section 8(3)(b) of the impugned Act was Therefore of crucial importance. Once it was struck down, the rest of the Act could not stand inasmuch as no property could be acquired without payment of adequate compensation. Though the whole of the Act was thus void, the Legislature could see that the Constitutional objection was confined to Section 8(3)(b) of the Act. Act No. 31 of 1968, namely, the Requisitioning and Acquisition of Immovable Property Amendment Act, 1968, Therefore, merely amended that portion of the Act without re-enacting the whole of the Act. No one has thought it fit to challenge the Amending Act on the ground that it could not amend the void Act.

49. It is in this background that the Constitution Bench seems to have re-considered the extreme position taken up in *B. Shama Rao Vs. The Union Territory of Pondicherry*, , when it heard argument in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . Section 5 of the East Punjab General Sales Tax Act, 1948 was held to be void, but the rest of the Act was held to be valid and could survive even after Section 5 was declared void. Section 5 was amended by the East Punjab General Sales Tax (Second Amendment) Act, 1952 by the following words:-

"In sub-section(1) of Section 5 of the East Punjab General Sales Tax Act, 1948, after the word "rates", the following words shall be inserted and shall be deemed always to have been so inserted, namely, "not exceeding two piece in a rupee."

It was contended that even if the whole Act was not still-born, Section 5 was non est. The Amending Act did not insert a new section 5 but purported to amend the earlier section 5 which was not in existence. This contention was apparently based on the decision in *B. Shama Rao Vs. The Union Territory of Pondicherry*, . But this contention was repelled in the following words:

"No doubt in terms the section inserts the words, "not exceeding two piece in a rupee" in section 5. If section 5 is inserted in the Act by the Amending Act with the said words added, there cannot possibly be any objection, for that would be an amendment of an existing Act. But in substance the amendment brings about the same effect. The words "shall be deemed always to have been so inserted"

indicate that in substance section 5, as amended, is inserted in the Act with retrospective effect".

Had the decision in *B. Shama Rao Vs. The Union Territory of Pondicherry*, been followed without qualification, the amendment of section 5 of the East Punjab General Sales Tax Act, 1948 would have been insufficient inasmuch as the whole of section 5 was not re-enacted by it. The very fact that an amendment of a void section was held to bring about the same effect as re-enactment shows how the previous decision was modified. This may be the reason why the learned two Judges who had dissented from the majority decision in *B. Shama Rao Vs. The Union Territory of Pondicherry*, were in agreement with the other learned Judges in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . It is true that Subba Rao, C. J., used the following words in justifying the amendment, namely, "if section 5 is inserted in the Act by the Amending Act with the said words added, there cannot possibly be any objection, for that would be an amendment of an existing Act". This apparently meant that the amendment of a void section in an existing Act was unobjectionable. It cannot be inferred therefrom, however, that an amendment of a section in a void Act would be necessarily objectionable.

50. The invalidity of Section 5 of the East Punjab General Sales Tax Act, 1948 was due to the same reason as was present in *B. Shama Rao Vs. The Union Territory of Pondicherry*, , namely, the excessive delegation of legislative power amounting to a surrender of its function by the legislature. The decision in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, establishes the proposition that a void section of a statute can be validated by a mere amendment which is not re-enactment of the void section. If this principle applies to a section of the void statute, there is no reason or principle why it should not apply to a statute which is void as a whole. What is true of a part must be true of the whole. For, a void statute, no less than a void section exists on the statute book for the purpose of amendment.

51. Lastly in *Municipal Committee, Amritsar and Others Vs. State of Punjab and Others*, , the Supreme Court at last seems to have abandoned the extreme view adopted by the majority in *B. Shama Rao Vs. The Union Territory of Pondicherry*, and reverted to the generally accepted previous position that a void Act can be amended and need not be re-enacted. I begin with the head-note: :In the State of Punjab local authorities and individual owners of land were holding cattle fairs. The Punjab Cattle Fairs (Regulation) Act, 1967, was passed by the State Legislature in exercise of powers under Entry 28 of List II of VII Schedule to the Constitution, declaring a monopoly in the State to hold cattle fairs and prohibiting all local authorities and individuals from holding cattle fairs at "any place in the State". There was no definition of the expression "cattle fair" in the Act. The validity of the Act was challenged on the ground that the provisions of the Act were "vague and ambiguous", and the High Court, in *Mohinder Singh Sawhney Vs. State of Punjab and Others*, , accepted the contention. The State

Legislature thereupon by Amendment Act 18 of 1968 introduced Section 2 (bb) defining the expression "cattle fair" to mean a gathering of more than 25 persons for the purpose of general sale or purchase of cattle". Fair Officers were appointed u/s 4 (1) of the Act and u/s 4 (2) they declared certain areas as fair areas. Some of the areas so declared belonged to a Municipal Committee in the State. The Municipal Committee, a lessee from the Municipal Committee and some residents in the State challenged the Act in the Supreme Court, inter alia, on the following ground:

"Since the Act was struck down in *Mohinder Singh Sawhney Vs. State of Punjab and Others*, , the Act ceased to have any existence in law and could not Therefore be amended".

52. The Court, however, repelled the contention by the following two observations at pages 452 and 454 (of SCR) = (at pp. 1103 and 1104 of AIR):-

"We are unable to accept the argument that since the High Court of Punjab by their judgment in *Mohinder Singh Sawhney Vs. State of Punjab and Others*, struck down the Act, Act 6 of 1968 had ceased to have any existence in law..... The effect of that decision was only that the Act was in law, non-existent, so long as there was no definition of the expression "cattle fair" in the Act. That defect has been remedied by the Punjab Act 18 of 1968".

These two observations fully support the distinction made by me above (at page 20) between the two different aspects of the nature of a void statute. On the one hand, such a statute does not cease to exist in law as a result of the Court decision declaring it void inasmuch as it continues to be on the statute book and is available for legislative action including its amendment. On the other hand, such a statute becomes non-existent in law in the sense that it becomes unenforceable by the Courts unless and until it is validated by an amendment after which it becomes enforceable again.

53. Their Lordships then recalled the following words of Kania, C. J.

"..... it is only in express constitutional provisions limiting legislative power and controlling the temporary will of a majority by a permanent and paramount law settled by the deliberate wisdom of the nation that one can find a safe and solid ground for the authority of Courts of Justice to declare void any legislative enactment".

54. At page 453 (of SCR) = (at p. 1103 of AIR), their Lordships sounded a salutary warning that

"the rule that an Act of a competent legislature may be "struck down" by the Courts on the ground of vagueness is alien to our Constitutional system. The Legislature of the State of Punjab was competent to enact legislation in respect of "fairs" vide Entry 28 of List II of the Seventh Schedule to the Constitution. A law may be declared invalid by the superior Courts in India if the Legislature has no power to enact the law or that the law violates any of the fundamental rights

guaranteed in Part III of the Constitution or is inconsistent with any Constitutional provision, but not on the ground that it is vague".

55. What is said by their Lordships above ought to remind us again that this Court has no power to declare that the Amending Act of 1968 is either void or ineffective in achieving its purpose. The Legislature was competent to enact it and clearly expressed its intention therein to insert the amendment in the Principal Act with a view to remove the vice of discrimination from the Principal Act. Just as the Legislature could read the Principal Act along with the Amending act and putting the two together remove the defect of unconstitutionality from the amended Act, the Courts also can construe the Amending Act in the same way. So construed, the Amending Act would be seen to achieve its purpose of curing the unconstitutionality of the Principal Act. There is no ground known to the Constitution which warrants this Court in holding that the Amending Act is either void or inefficacious.

56. Learned Counsel for the petitioner urged that the amendment of Section 5 of the Punjab General Sales Tax Act in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, was retrospective and this had the effect of overruling the judicial decision which had invalidated Section 5. The judicial decision had the effect of holding that Section 5 was void ab initio from the inception. Therefore a validation of Section 5 had time of its enactment if the effect of the judicial decision is to be wiped out. In the present case, it is argued, the amendment of 1968 is only prospective and it would not have the effect of wiping out our holding in the present case that the whole of the Principal Act was void ab initio from 1958 onwards.

57. An amendment may be either prospective or retrospective. The only difference between the two is that a retrospective amendment is made applicable by a fiction to past transaction while a prospective amendment applies only to future transactions. If the Legislature does not intend to validate the past transactions, it need not make the amendment retrospectively. Even when the past transactions are to be validated, the retrospective amendment is not intended to wipe out the judicial decision holding the statute unconstitutional. In fact, as pointed out by the Supreme Court in *Mahal Chand Sethia v. State of West Bengal* (1969) 2 Sc 500. "If (Legislature) cannot declare any decision of a Court of law to be void or of no effect. It can however pass an Amending Act to remedy the defect pointed out by a Court of law or on coming to know of it aliunde. An amending Act simpliciter will cure the defect in the statute only prospectively". In *Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another*, the Amending Act merely tried to overrule a previous decision of the Court holding the Principal Act to be void. The Court did not express the opinion that the Principal Act could not be amended but on the other hand observed as follows:-

"The nature of the amendment made in Act 4 of 1920 has not been indicated. Nor is there anything which enacts that the notification issued without the

sanction of the State Government must be deemed to have been issued validly u/s 51(2) without the sanction of the Local Government. On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of this Court. That in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare that the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it, shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court".

See also *The Municipal Corporation of The City of Ahmedabad and Another, Vs. The New Shrock Spg. and Wvg. Co. Ltd. etc. etc.,* .

58. These decisions make two things clear. Firstly, an unconstitutional Act or an unconstitutional part thereof can be amended by the Legislature. Secondly, the amendment, if retrospective, must not try to invalidate the judicial decision which had held the Principal Act to be unconstitutional. On the other hand, as was observed by the learned Chief Justice of India in *Prithvi Cotton Mills*" case, Air 1970 192: "a Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances". The retrospective amendment Therefore amends the statute in such a way as to alter the conditions on which the decision holding the statute unconstitutional was based. It will be seen Therefore that it is not necessary for an amendment to be retrospective to wipe out the effect of a judicial decision. For, under the amended statute a judicial decision would be different not because the previous judicial decision was wrong but because the provisions of the statute are altered.

59. The argument Therefore that a retrospective amendment alone can cure the unconstitutionality of a statute is ill-founded. A prospective amendment can alter the provisions of the statute equally well and is in fact less open to objections than a retrospective amendment. It is not possible Therefore to distinguish the principle established by the Supreme Court in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, and *Municipal Committee, Amritsar and Others Vs. State of Punjab and Others*, cases from the principle applicable to the cases before us. The principle is the same, namely an amendment which changes the provisions of the statute so as to make the statute constitutional would be valid particularly if it is prospective. If retrospective, it must take care not to impose an unreasonable restriction on fundamental rights. But such a limitation does not obtain against a prospective amendment which must Therefore be held to be valid in the present case.

60. The true principle is that a amendment which changes the provisions of an unconstitutional statute with a view to make it constitutional is in effect a re-enactment of such a statute. It is stated in *American Jurisprudence*" Vol. 50, paragraph 468, at page 482 as follows:

"The amended statute is regarded as if the original statute has been repealed and the whole statute re-enacted with the amendment".

61. On the second aspect of the question also, Therefore, the contention of the petitioners is not supported either by principle or authority. An unconstitutional statute can be amended successfully when it removes the vice of discrimination from it. It is not necessary to repeal the whole of the Principal Act and to re-enact it with the amendments incorporated into it. In fact, the effect of the amendment is the same as if the Principal Act had been re-enacted with amendments included in the Act as amended. The amending Act of 1968 was Therefore valid.

62. In dealing with the Amending Act of 1968, and reading it side by side with and into the Principal Act of 1958, we are bound to be guided by the presumption of the constitutionality of a statute. We know that Parliament had competence to pass the Amending Act of 1963. We also know that the Act cures the Principal Act of its only vice of discrimination and reading the Amending Act as part of the Principal Act, the amended Act is free from any such vice and is thus fully constitutional. Since the Principal Act was on the Statute book, Parliament could read it. Parliament has two alternatives to adopt, of which it could have adopted any one. It could either repeal the Principal Act and re-enact it with amendment incorporated into it as is done in certain American States according to their constitutional requirements. Alternatively, Parliament could merely insert the new amendments into the Principal Act as is universally practiced in all the States in which there is no constitutional requirement that an amendment must be made by way of re-enactment only. India falls into the second group of States. The legislative practice in India is also the same, namely, to amend unconstitutional Acts (when the extent of amendment is small) and not to repeal and re-enact them unless amendment is extensive. It is not for this Court to dictate to Parliament which of the above two methods it should not adopt to cure the unconstitutionality of the Principal Act. That is exclusively the choice of Legislature.

63. The function of the Court is to so interpret a statue as to "proliferate the purpose" of the Legislature, to use the words of judge Learned Hand. The purpose of the Amending Act of 1968 is clearly to cure the Principal Act of the vice of discrimination. In that respect the Amending Act is a remedial legislation which has to be construed by Courts even more liberally than other statutes. When the purpose of the Legislature is so clear, can any Court refuse to see it? Can the Court shut its eyes to the Principal Act? If Parliament could read the Principal Act why cannot the Court do so? It would be against common sense and logic to deny that the Principal Act can be read on the statute book and the Amending Act can be read as incorporated in it. Once this is done, there is no difficulty in arriving at the conclusion that the Amending Act has served its purpose and cured the Principal Act of its unconstitutionality.

64. Even the Courts have to take notice of the existence of an unconstitutional

statute as observed by Chief Justice Hughes of the U. S. Supreme Court in *Chicot County Drainage District v. Baxter State Bank*, (1940) 308 Us in the following words:

"The Courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County*, (1886) 118 Us 425; *Chicago I. & L. Ry. Court. v. Hackett*, (1913) 228 Us 559. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, if status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified".

(See Field, "The Effect of an Unconstitutional Statute" reviewed in 42 Yale Law Journal 779).

In *Venkata Rao Esajirao Limbekar and Others Vs. The State of Bombay and Others*, , the Supreme Court was considering the Hyderabad Act 21 of 1950 which was struck down by the Andhra Pradesh High Court in *Inamdars of Sulhnagar Colony and Others Vs. Government of Andhra Pradesh and Another*, , as void on the sole ground that it had not received the assent of the President as required by Article 31(3) of the Constitution. The Act, though void, was however No. 3 of 1954 and by the Bombay Act No. 32 of 1958. Both the Amending Acts received the assent of the President. The Supreme Court Therefore observed at page 321 (of SCR) = (at p. 129 of AIR) as follows:-

"If the assent of the President had been accorded to the amending Acts, it would be difficult to hold that the President had never assented to the parent Act, namely, Hyderabad Act No. 21 of 1950. Even if such assent had not been accorded earlier it must be taken to have been granted when Amending Act No. 3 of 12954 was assented to."

This observation of the Supreme Court is extremely important as it shows that a void Act can be validated by the amendment and the President is deemed to have taken notice of the void Act when assenting to the Amending Act. In view of these authorities, it would be difficult to maintain that a void Act cannot be taken

notice of either by the Courts or by the Legislature even for the above-mentioned purposes.

65. The only power of this Court is to declare an Act unconstitutional if it conflicts with any part of the Constitution. The Principal Act as amended in 1968 does not conflict with any part of the Constitution. This Court has Therefore no power to declare that the Principal Act continues to void under Article 13(2) even after the Amendment of 1968. Still less has this Court any power to declare that the Amending Act of 1968 is not effective in serving its purpose. If Parliament could read the Principal Act as it was on the statute book, this Court would not act in a hypercritical manner and refuse to read the same. There is no authority or principle to support the contention that a statute declared void by this Court goes out of the statute book. Therefore, Parliament was competent to amend it. The proceedings for eviction of the petitioners under the amended Act are Therefore valid and unobjectionable.

66. The contention of the petitioners is that the Amending Act of 1968 is ineffective. They Therefore virtually want this Court to hold that the Amending Act of 1968 is also void or unconstitutional. But the Legislature was competent to enact the Amending Act of 1968 and its effect is fully constitutional inasmuch as it cures the Principal Act of its only vice of discrimination. This Court has Therefore no power under the Constitution to hold the Amending Act as ineffective, void or unconstitutional. The function of this Court is only to construe the Amending Act of 1968. Any person who reads it would know that the Legislature expressed its clear intention to introduce the amendment into the Principal Act and thereby regard the Principal Act as being available on the statute book for such amendment. In doing so, the Legislature did not contravene any constitutional limitations. Nor can it be said that the Amending Act does not clearly express the intention of the Legislature to revive the Principal Act by the amendment. In view of the strong presumption of constitutionality of a statute which this Court is bound to respect, the Amending Act and the Amended Act must both be regarded as valid. I find so.

67. My answer to the second aspect of the question for decision, Therefore, is that the Principal Act could be revived or validated by the Amending Act of 1968 and no further re-enactment of it was necessary.

I would sum up my conclusions as follows:-

- (1) A statute enacted by the Legislature can be repealed only by the Legislature.
- (2) Unless expressly repealed, the statute continues to be on the statute book to be read by the Legislature and also by the Courts.
- (3) Article 13 does not itself repeal any statute.
- (4) The function of the Courts is only to construe a statute vis-a-vis the Constitution and give a judicial decision whether a statute or a part of it conflicts with the Constitution.

(5) If the Court holds that a statute is inconsistent with the Constitution, the effect of the decision is to attach this meaning to the statute, namely, that the statute is unconstitutional. If a different view is taken later by the Court or by a superior Court then this meaning of the statute is liable to change.

(6) Such a decision only changes the meaning of the statute but does not make any physical change in its language or its existence on the statute book.

(7) Both the Legislature and the Courts have to take note of every statute on the statute book.

(8) A Court may refuse to enforce an unconstitutional statute but may still be influenced by it, for example, when considering whether an act is done under the colour of a statute even though the statute was unconstitutional or in considering the effect of unconstitutionality on past transactions which are closed.

(9) The Legislature and the Courts function in two different spheres. One legislates while the other construes the legislation to decide whether it would affect the rights of parties or not.

(10) Just as the Legislature cannot say that a judicial decision on the facts and on the statute considered by it was wrong, so also a Court cannot directly strike down a statute in the sense of repealing it out of the statute book.

(11) The Legislature may remove the vice of unconstitutionality from a statute by an appropriate method such as repeal and enactment, amendment without repeal or enacting independent legislation by way of validation or otherwise.

(12) Courts cannot hold a statute to be unconstitutional unless it conflicts with the Constitution. The Amending Act of 1968 does not conflict with the Constitution and cannot be held to be ineffective, void or unconstitutional.

(13) The clear meaning of the Amending Act of 1968 is to cure the unconstitutionality of the Principal Act and therefore the amended Act is valid.

(14) It would not only be hypertechnical but unjust to defeat the clear intention of Parliament expressed in the Amending Act of 1968 and to hold that the Principal Act still remains void.

The contentions of the petitioners were confined to the invalidity of the Principal Act and the inefficacy of the Amending Act. No other ground was urged by them in support of these writ petitions. For the conduct of the petitioners on merits has been reprehensible. In this writ petition, the petitioner was transferred out of Delhi in 1967 and consequently lost his entitlement to occupy the Government premises in Delhi. Nevertheless, he is refusing to vacate the same. In C. W. P. 322 of 1970, the petitioner retired from Government service in 1964 and is yet refusing to vacate the Government premises which he was entitled to occupy only till retirement. In C. W. P. 439 of 1969, the leases of the petitioners were terminated in 1963 and yet they have so far defied all attempts of the Government to evict them. In C. W. P. 967 of 1969, the petitioner, a Government

servant, was transferred out of Delhi in 1968 but is refusing to vacate the Government premises.

68. I would Therefore dismiss all these writ petitions with costs.

Hardayal Hardy, J.

69. I have had the advantage of perusing the judgment prepared by my learned brother Deshpande. There is much in it that evokes admiration and compels assent. But there is also a great deal with which I cannot agree and must Therefore express my dissent from the view taken by him.

70. The circumstances in which the above writ petition and the connected petitions (Civil Writ Nos. 322 of 1970, 439 of 1969 and 967 of 1967) have been placed before this Full Bench are these:

The petitioners in each are occupiers of premises as defined in Section 2 (b) of the Public Premises (Eviction of Unauthorised Occupants) Act, Xxxii of 1958 which will hereafter be referred to as the Principal Act Section 4 of the said Act empowers an "estate officer" appointed under the Act to issue a notice to any person who in his opinion is in unauthorised occupation of public premises to show cause why an order of eviction not be made against him while Sections 5 and 7 provide for orders of eviction and recovery of rent or damages being made by him in respect of such premises and persons. For facility of reference both Sections 5 and 7 are reproduced hereunder:-

"5 (1) If, after considering the cause, if any, shown by any person in pursuance of a notice u/s 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the estate officer may, on a date to be fixed for the purpose, make an order of eviction, for reasons to be recorded therein, directing that the public premises shall be vacated by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction within forty-five days of the date of its publication under sub-section (1), the estate officer or any other officer in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary:

Provided that in the case of any such person who is not a Government employee and who has been in continuous occupation of the public premises for a period exceeding three years immediately preceding the date of the publication of the order of eviction, the estate officer, shall not, if an application is made to him in this behalf, evict such person from the public premises within ninety days of such publication".

"7. (1) Where any person is in arrears of rent payable in respect of any public

premises, the estate officer may, by order, require that person to pay the same within such time and in such Installments as may be specified in the order.

(2) Where any person is, or has at any time been, in unauthorised occupation of any public premises, the estate officer may, having damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such Installments as may be specified in the order:

Provided that no such order shall be made until after issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

(3) If any person refuses or fails to pay the arrears of rent or any Installment thereof payable under sub-section (1) or the damages or any Installment thereof payable under sub-section (2) within the time specified in the order relating thereto, the estate officer may issue a certificate for the amount due to the Collector who shall proceed to recover the same as an arrear of land revenue."

71. The petitioners in these cases are persons against whom orders u/s 5 have been made. In some cases an order u/s 7 has also been made. The validity of all those orders was challenged by the petitioners on the ground that both Section 5 and Section 7 of the Act are void, being discriminatory and violative of Article 14 of the Constitution and, Therefore, any action taken under them was illegal and invalid. On behalf of the respondents the validity of the action was sought to be supported on the plea that the vice of discrimination was removed by the Public Premises (Eviction of Unauthorised Occupants) Amendment Act XXXII of 1968 which came into force on August 16, 1968 and inasmuch after the Principal Act had been amended, the objection raised in the petitions was ill-founded.

72. The petitioners "reply to the respondents" plea was that Sections 5 and 7 of the Principal Act were void ab initio under Article 13(2) of the Constitution. The rest of the provisions of the Act being inseverable from these two sections which framed an integral part of the scheme under the Act, the whole Act was void and as such it would not be amendable by Parliament by mere insertion of Section 10-E in the Principal Act without the whole Act being re-enacted. A similar contention was raised by a petitioner in a case that came before one of us (Prakash Narain, J.,) and was accepted by the learned Judge.

73. The judgment in that case was followed by S. N. Shankar, J., in another case which was decided by his Lordship.

74. As the question raised in the present petitions, which were first admitted for hearing before a Division Bench, was of great importance they were later referred to a Full bench. That is how they have now come up before us.

75. In order to appreciate the question that arises for decision, it is necessary to

keep in view the legislative history of the measure with which we are concerned in this case. The problem of providing a speedy machinery for the eviction of persons in unauthorised occupation of public premises and recovery of rent and damages from them appears to have been engaging the attention of Government since several years past. To meet the situation, in 1950 the Government Premises (Eviction) Act, 1950 was enacted. The Act was, however, declared ultra virus by the decisions of the High Courts of Calcutta, Allahabad and Punjab. These decisions stood in the way of Government in taking speedy action even in flagrant cases of unauthorised occupation and the only way in which such persons could be evicted was by the ordinary process of law which often involved considerable delay. An attempt was, Therefore, made to provide a speedy machinery and at the same time to comply with the requirements of the Constitution. The result was the enactment of the Principal Act in 1958. Similar measures were also enacted by some of the State legislatures in respect of the premises belonging to State Government. Of these, the Punjab Public Premises and Land (Eviction and Rent Recovery) Act, was one. It will hereafter be referred to as the Punjab Act.

76. By a majority decision in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, the Supreme Court held Section 5 of the Punjab Act which is in terms identical with Section 5 of the Principal Act, to be void on the ground that it enabled the Government to discriminate, contrary to Article 14 of the Constitution, between the occupiers of public premises by evicting some of them under the summary procedure laid down in Section 5 while resorting to the ordinary procedure of a civil suit in evicting others.

77. Meanwhile, a Full Bench of Calcutta High Court (D. N. Sinha, C. J., Arun Kumar Mukherjea and S. K. Mukherjea, JJ. in Rajendra Prosad Singh Vs. Union of India (UOI) and Others,) relying upon the decision of the Supreme Court in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, and disregarding their own earlier decision in Standard Literature Co. Private Ltd. and Others Vs. Union of India (UOI), held Section 5 of the Principal Act to be violative of Article 14 of the Constitution and thus void. In (Civil) Reference No. 1 of 1968 (Delhi) a Division Bench of this Court (Inder Defendant Dua, C. J. and Deshpande, J.) by their judgment D/- 29-5-1968, held Section 7 (2) of the Principal Act to be void for the same reasons on which Section 5 of the Punjab Act was struck down by the Supreme Court and Section 5 of the Principal Act by the High Court of Calcutta. The decision of the Supreme Court was responsible for promulgation of June 17, 1968, of an ordinance called the Public Premises (Eviction of Unauthorised Occupants) Amendment Act XXXII of 1968 which came into force on August 16, 1968. Although in the statement of objects and reasons accompanying the Bill for amending the Principal Act the Supreme Court's decision in regard to Section 5 of the Punjab Act alone was mentioned, the President and the Parliament when promulgating the Ordinance or enacting the Amending Act were not unaware of the decisions of Calcutta High Court and this Court, with reference to Sections 5 and 7(2) of Principal Act because by

adding in the Principal Act Section 10E by the Ordinance and the amending Act the intention obviously was to cure the vice existing in both Section 5 and Section 7. The newly inserted Section 10E reads as under:-

"No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorised occupation of any public premises or the recovery of the arrears of rent payable under sub-section (2) of that Section or costs awarded to the Central Government under sub-section (4A) of Section 9 or any portion of such rent, damages or costs."

It is true that uptill now Sections 5 and (2) alone have been declared void. There is no decided case which has so far declared Section 7(1) to be void. It is also true that so far the whole Act has not been declared void and the decisions holding Sections 5 and Section 7(2) to be void are also decisions of High Court and not of the Supreme Court. Whatever decision of the Supreme Court there is on the subject, is with reference to Section 5 of the Punjab Act and it is by a process of analogy and parity of reasoning that Parliament apprehending that Sections 5 and 7 were in imminent danger of being struck down, set about finding ways and means of preventing the mischief.

78. My learned brother Deshpande says and I agree with him that the only vice of the Principal Act was that it did not expressly deprive the Government of its ordinary remedy of a suit for the recovery of rent, damages and possession from the occupants of public premises. It was possible to argue, might use the summary procedure under Sections 7(1), 7(2) and 5 to recover rent, damages for occupation and possession from the occupants of similar premises Government might show leniency by resorting to a civil suit for the same purpose.

79. It is thus the alternative remedy available to Government under the Code of Civil Procedure, 1908 that made the Principal Act discriminatory. Parliament could have removed the vice of discrimination from the Principal Act either by amending the CPC and providing that no suit in respect of anything done under the Principal Act shall be entertained by a Civil Court or alternatively it could take action with respect to the Principal Act by depriving with the Government of the alternative remedy of a civil suit. Parliament adopted the latter course and attempted to remove the vice of discrimination from the whole of Section 7 comprising sub-sections (1) and (2) and Section 5 by the addition of Section 10-E to the Principal Act.

80. The contention urged on behalf of the petitioners is that the whole of the Principal Act prior to its amendment in 1968 was void. Section 5 and Section 7(2) have been declared void by two High Courts. Section 7(1) though not formally declared so, was none-the-less void for the same reason. The remaining provisions of the Act were merely incidental and were intended to subserve and/or effectuate the proceedings for the recovery of rent, damages and possession which were instituted under Sections 7(1), 7(2) and 5. These other provisions could not separately exist as their existence depended on Sections 7(1), 7(2)

and 5 which constituted the core of the Act and were its only *raison d'être*. Without these provisions Parliament would not have enacted the other provisions at all. The Whole Act was, Therefore, void and as such it could not have been amended because there was nothing to amend. The only course open to Parliament was to re-enact the whole of the Principal Act with the amendment added to it. The amendment of a void Act which was dead the moment it was born and Therefore non-existent, was ineffective. The proceedings for eviction of the petitioners could not, Therefore, be taken even under the Amended Act.

81. The respondents do not dispute that Sections 5 and 7 (2) of the Principal Act were void as they contravened Article 14 of the Constitution. They are, however, not prepared to concede that Section 7 (1) of the Principal Act was also invalid. Their contention on the other hand is that Section 7(1) was valid and the rest of the provisions of the Act were necessary to give effect to the proceedings u/s 7(1) and, Therefore, the whole Act could not be held to be void. The respondents further contend that the amendment of 1968 was sufficient to cure the vice of Sections 5 and 7(2) with the result that the Act as it stood when action was taken against the petitioners was a valid piece of legislation and if the same vice affected Section 7(1) then the amendment had removed that vice as well. The petitioners are being proceeded against under the Act as amended. The action taken against them is, Therefore, under an Act which is immune from attack on any ground on which the Principal Act was being attacked.

82. In my opinion Section 7 (1) of the Principal Act was open to the same objection as Sections 5 and 7(2) and that it too was void. In fact the Legislature also seems to have taken the same view and has made provision for it in Section 10-E. I am also of the opinion that without these sections the rest of the Act could not be effective and thus the whole of the Principal Act was void.

83. The sole question for decision, Therefore, is whether Parliament could not amend the Principal Act in the way it has done by introducing Section 10-E, as the Act was void and non-existent in the eye of law and that the only way it could achieve its purpose of providing speedy machinery for dealing with unauthorised occupants of public premises and other incidental matters was to re-enact the whole of the Principal Act with the contents of the Amending Act added to it.

84. On behalf of the petitioners a twofold argument has been advanced. Firstly, it is urged that a statute which is void within the meaning of Article 13(2) of the Constitution is non-existent. Such a statute has been variously described as dead, still-born and non-existent for all purposes, including amendment; secondly, such a statute cannot be amended but must be re-enacted.

85. The question of voidness of a statute under Article 13(2) is no longer *res integra* and is covered by several decisions of the Supreme Court. The first time it came before that Court was in the case of *Keshavan Madhava Menon Vs. The State of Bombay*, . The law under consideration in that case was Indian Press

(Emergency Powers) Act, 1931, a pre-Constitution law and its constitutionality had to be judged in the light of Article 13(1). The Court, by majority, held that Article 13(1) which were inconsistent with the fundamental rights void ab initio, but only rendered such laws ineffectual and void with respect to the exercise of the fundamental rights on and after the date of the commencement of the Constitution and that the Article had retrospective effect. Mahajan, J., (as he then was) wrote a separate judgment in which he agreed with the majority view expressed by S. R. Das, J., with regard to the prospective nature of the effect of Article 13(1). But when reference was made to the rule of construction laid down by the American Courts in respect of statutes declared void on account of their repugnancy with the Constitution of the United States of America, his Lordship observed at page 256 (of SCR) = (at p, 138 of AIR) of the report:-

"It is obvious that if a statute has been enacted and is repugnant to the Constitution, the statute is void since its very birth and anything done under it is also void and illegal. The Courts in America have followed the logical result of this rule and even convictions made under such an unconstitutional statute have been set aside by issuing appropriate writs. If a statute is void from its very birth, then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law. This rule, however, is not applicable in regard to laws which were existing and were constitutional according to the Government of India Act, 1935. Of course, if any law is made after the 25th January, 1950, which is repugnant to the Constitution, then the same rule will have to be followed by Courts in India as is followed in America and even convictions made under such an unconstitutional law will have to be set aside by resort to exercise of powers given to this Court by the Constitution."

Behram Khurshed Pesikaka Vs. The State of Bombay, was the next case. This case again dealt with a pre-Constitution statute: Bombay Prohibition Act Xxv of 1949, and, Therefore, involved the impact of Article 13(1) of the Constitution on that Act. The case is, however, of importance as in the course of his judgment Mahajan, C. J., who spoke for the majority while reiterating his earlier view of Article 13(1) in Keshavan Madhava Menon Vs. The State of Bombay, specifically referred to and dissented from the observations of Willoughby (The Constitution of the United States, 2nd Edition, Volume I, page 10) on which reliance has been place by my learned brother. The observations of the learned author read:

"The declaration by a Court of unconstitutionality of a statute which is in conflict with the Constitution affects the parties only and there is no judgment against the statute; that the opinion or reasons of the Court may operate as a precedent of to the determination of other similar cases, but it does not strike the statute from the statute book; the parties to that suit are concluded by the judgment, but no one else is bound; a new litigant may bring a new suit, based on the very sane statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent."

Dealing with the aforesaid observations, his Lordship observed:

"Article 141 of the Constitution declares that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. In view of this clear enactment there is no scope in India for the application of the American doctrine enunciated by Willoughby" and went on to add "Once a statute is declared void under Article 13(1) or 13(2) by this Court, that declaration has the force of law, and the statute so declared void is no longer law qua persons whose fundamental rights are thus infringed. In America there is no similar statutory provision and that being so, the doctrine enunciated by the learned author can have no application here. In this country once a law has been struck down as unconstitutional law by a Court, no notice can be taken of that law by any Court, and in every case an accused person need not start proving that the law is unconstitutional. The Court is not empowered to look at that part of the law which has been declared as void and Therefore there is no onus resting on the accused person to prove that the law that has already been declared unconstitutional is unconstitutional in that particular case as well. The Court has to take notice only of what the law of the land is, and convict the accused only if he contravenes the law of the land."

86. Then came *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, which also dealt with a pre-Constitution Act viz., the C. P. & Berar Motor Vehicles (Amendment) Act III of 1948 which had amended the Motor Vehicles Act 1939 (Central Act IV of 1939) and conferred extensive powers on the Provincial Government including the power to create a monopoly of the motor transport business in its favor to the exclusion of all motor transport operators. The case of the petitioners was that with the advent of the Constitution the Act was rendered void under Article 13(1) of the Constitution being inconsistent with the provisions of Articles 19(1)(g) and 31(2) of the Constitution, and reliance was placed on the decision of the Supreme Court in *Saghir Ahmad Vs. The State of U.P. and Others*, . On behalf of the respondents it was contended that although as a result of the said decision the impugned Act was rendered void, the Constitution (First Amendment) Act, 1951 and the Constitution (Fourth Amendment) Act, 1955, had the effect of removing the inconsistency and the Amending Act III of 1948 became operative again. The petitioners rejoined by contending that the impugned Act being void under Article 13(1) was dead and could not be revived by any subsequent amendment of the Constitution and must be re-enacted. The contention was repelled and it was held that *Saghir Ahmad Vs. The State of U.P. and Others*, had no application and that the contentions put forward by the respondents were well founded.

87. *Saghir Ahmad Vs. The State of U.P. and Others*, was the first case in which the impact of Fundamental Rights guaranteed inter alia under Article 19(1)(g) of the Constitution as amended by the Constitution of India (First Amendment) Act, 1951, on a post-Constitution Act viz., the U. P. Road Transport Act II of 1951 came to be examined. The case is important because it was there held that a

legislation which contravened Article 19(1)(g) of the Constitution and was not protected by clause (6) of the Article when it was enacted after the commencement of the Constitution cannot be validated even by subsequent amendment of the Constitution. It was observed:-

"The amendment of the Constitution, which came later, cannot be invoked to validate an earlier legislation which must be regarded as unconstitutional when it was passed. As Professor Cooley has stated in his work on Constitutional Limitation "a statute void for unconstitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted." We think that this is sound law and our conclusion is that the legislation in question which violates the fundamental right of the appellants under Article 19(1)(g) of the Constitution and is not shown to be protected by clause (6) of the Article, as it stood at the time of enactment, must be held to be void under Article 13(2) of the Constitution."

88. My learned brother while dealing with the second branch of the petitioners" argument relating to the necessity of re-enacting the statute with a view to revivify a statute which is void within the meaning of Article 13(2) of the Constitution has cited the following passage from Willoughby (The Constitution of the United States, 2nd Edn. Volume I, paragraph 7 at page 11):-

"Effect of Subsequent Grant of Legislative Power.

The validity of a statute is to be tested by the Constitutional power of a legislature at the time of its enactment by that Legislature , and, if thus tested, it is beyond the legislative power, it is not rendered valid, without re-enactment, if later, by constitutional amendment the necessary legislative power is granted. "An after-acquired power cannot, ex proprio vigore, validate a statute void when enacted".

According to my learned brother, the above cited passage from Professor Willoughby except its last sentence "An after-acquired power cannot, ex proprio vigore, validate a statute void when enacted" is not supported by any decision. The last sentence is no doubt based on the decision of the United States Supreme Court in (1921) 256 Us 232 but according to my learned brother the decision in (1921) 256 Us 232 was not at all concerned with the question whether a void statute is not rendered valid without re-enactment.

89. After stating the above proposition my learned brother has considered the source of the above statement of law by Professor Willoughby and has found Explanation for it in the constitutions of some of the federating States in America where there is an express provision that a statute must not be amended merely by referring to its title but must be re-enacted as a whole with the new portion incorporated in it.

90. With very great respect the whole of that discussion which includes extracts from Sutherland on Statutes and Statutory Construction and the various

decisions from the State Supreme Courts, appears to me to run counter to the rule laid down in the passage cited above, which according to Mukherjea, J., (as he then was) is sound law. The observations of Professor Willoughby to which exception has been taken by my learned brother, are fully in accord with what was said by Professor Cooley in his celebrated work on Constitutional Limitations (Vol. I page 384 note) and approved by the Supreme Court. In my opinion it is not open to this Court to strike down the effect of those observations by trying to find Explanations why they were made.

91. After the decision in the case of Saghir Ahmad Vs. The State of U.P. and Others, came the decision in M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, which again dealt with a post-Constitution law. One of the questions raised in that case was whether Section 22 of the Madras General Sales tax Act (Madras Act 9 of 1939) which was unconstitutional when it was enacted under the Adaptation Order issued by the President under Article 372(2) of the Constitution and was, Therefore, void, could become enforceable without re-enactment when the constitutional bar was removed. Venkatarama Aiyar, J., who spoke for the Court summed up the position as follows:-

"Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate *proprio vigore* when the Constitutional bar is removed, and there is no need for a fresh legislature to give effect thereto."

The above decision was strongly relied upon by the learned Counsel for the respondents and a passing reference to it has also been made by my learned brother in support of his view that there is a distinction between the purposes of the Court and the purposes of the legislature with which I shall deal later. My learned brother has referred to the observations of Lord MacDermott, L. C. J. in 1953 Nir 79 and of the Supreme Court of United States in (1891) 140 Us 545 35 Law Ed 572 . Both these decisions were cited by Venkatarama Aiyar, J., in the above mentioned case. There is however a clear distinction between M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, and the present case. In that case only one of the sections of the Act was void; the rest of the Act was valid. It was Therefore said that the statute could not be held to have been wiped out of the statute book. It may also be mentioned that I have not been able to find any reference to M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, in any of the subsequent decisions of the Supreme Court in which the impact of Article 13(2) of the Constitution came to be considered.

92. In Deep Chand Vs. The State of Uttar Pradesh and Others, which was decided on 15-1-1959, within less than a year of the decision in Sundararamier's case, neither Subba Rao, J., nor S. R. Das, C. J., made any reference to that decision

although the case of (1891) 140 Us 545 was approvingly referred to in the judgment of S. R. Das, C. J., and Subba Rao, J., after dealing with the powers of Parliament and the Legislatures of the States and observing that those powers were subject to the limitations imposed by Part Iii of the Constitution, referred to the distinction between clauses(1) and (2) of Article 13 and said:

"There is a clear distinction between the two clauses. Under Clause (1), pre-Constitution law subsists except to the extent of its inconsistency with the provisions of Part III; whereas; no post-constitution law can be made contravening the provisions of Part Iii, and Therefore, the law, to that extent, though made, is a nullity from its inception. If this clear distinction is borne in mind, much of the cloud raised is dispelled. When clause (2) of Article 13 says in clear and unambiguous terms that no State shall make any law which takes away or abridges the rights conferred by Part Iii, it will not avail the State contend either that the clause does not embody a curtailment of the power to legislature or that it imposes only a check but not a prohibition. A Constitutional prohibition against a State making certain laws cannot be whittled down by analogy or by drawing inspiration from decisions on "the provisions of other constitutions; nor can we appreciate the argument that the words "any law" in the second line of Article 13(2) posits the survival of the law made in the teeth of such prohibition. It is said that a law can come into existence only when it is made and Therefore any law made in contravention of that clause can only mean an Act passed or made factually, notwithstanding the prohibition. The result of such contravention is stated in that clause. A plain reading of the clause indicates, without any reasonable doubt, that the prohibition goes to the root of the matter and limits the State's power to make law; the law made in spite of the prohibition is a still-born law."

Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, represents the Supreme Court's attempt at synthesis of its previous opinions. In this case Wanchoo, J., who spoke for the Court carried the point developed in Deep Chand Vs. The State of Uttar Pradesh and Others, further and observed:

"There is no question of the contravention of Article 13(2) being a continuing matter. Therefore, where there is a question of a post-constitution law, there is a prohibition against the State from taking away or abridging fundamental rights and there is a further provision that if the prohibition is contravened the law shall be void to the extent of the contravention. In the view of this clear provision, it must be held that unlike a law covered by Article 13(1) which was valid when made, the law made in contravention of the prohibition contained in Article 13(2) is a still-born law either wholly or partially depending upon the extent of the contravention. Such a law is dead from the beginning and there can be no question of its revival under the doctrine of eclipse. A plain reading Therefore of the words in Article 13(1) and Article 13(2) brings out a clear distinction between the two. Article 13(1) declares such pre-Constitution laws as are inconsistent with fundamental rights void. Article 13(2) consists of two parts; the first part

imposes an inhibition on the power of the State to make a law contravening fundamental rights, and the second part, which is merely a consequential one, mentions the effect of the breach. Now what the doctrine of eclipse can revive is the operation of a law which was operative until the Constitution came into force and has since then become inoperative either wholly or partially; it cannot confer power on the State to enact a law in breach of Article 13(2) which would be the effect of the application of the doctrine of eclipse to post-Constitution laws. Therefore, in the case of Article 13(1) which applies to existing law, the doctrine of Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, but in the case of a law made after the Constitution came into force, it is Article 13(2) which applies and the effect of that is what we have already indicated and which was indicated by this Court as far back as Saghir Ahmad Vs. The State of U.P. and Others, ."

93. The statute under challenge in that case was U. P. Land Tenures (regulation of Transfers) Act, 1952 which was unconstitutional because it contravened Article 31 inasmuch as it deprived the petitioner of his property without providing for payment of any compensation. The respondent contended that it was saved by the Constitution (Fourth Amendment) Act, 1955. The contention was repelled and it was held:-

"All post-Constitutional laws which contravened the mandatory injunction contained in the first part of Article 13(2) are void, as void as are the laws passed without legislative competence, and the doctrine of eclipse does not apply to them. We are Therefore of opinion that the Constitution (Fourth Amendment) Act cannot be applied to the Transfer Act in this case by virtue of the doctrine of eclipse. It follows Therefore that the Transfer Act is unconstitutional because it did not comply with Article 31(2), as it stood at the time it was passed. it will Therefore have to be struck down, and the petitioner given a declaration in his favor accordingly,"

94. My learned brother is of the view that when it is said that a void statute is a dead statute, it is merely a figure of speech which is being taken to be a reality. What is really meant by the expression is that a statute which is void within the meaning of Article 13(2) of the Constitution is "ineffectual, nugatory and without legal force or binding effect" and the Courts will not enforce it in deciding rights of the parties. But such a statute very much exist on the statute book and Parliament is bound to take notice of it for further legislation to repeal or amend it. This indeed appears to be the major premise for the view taken by my learned brother who also finds support for his view in the following passage in the judgment in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, . It was there said:

"The meaning of the word "void" for all practical purposes is the same in Article 13(1) as in Article 13(2) namely, that the laws which were void were ineffectual and nugatory and avoid of any legal force or binding effect. But the pre-Constitution laws could not become void from their inception on account of the

application of Article 13(1). The meaning of the word "void" in Article 13(2) is also the same viz., that the laws are ineffectual and nugatory and devoid of any legal force or binding effect, if they contravene Article 13(2)."

Although my learned brother has quoted from the judgment the sentence following the above passage, he does not seem to be willing to concede the full implications of the statement of law laid down therein. It was there said:

"But there is one vital difference between pre-Constitution and post-Constitution laws in this matter. the voidness of the pre-Constitution laws is not from inception. Such voidness supervened when the Constitution came into force; and so they existed and operated for some time and for certain purposes; the voidness of post-Constitution laws is from their very inception and they cannot Therefore continue to exist for any purpose."

95. My learned brother has taken into consideration that part of the judgment in which the meaning of the word "void" in Article 13(2) has been given as "ineffectual, nugatory and devoid of legal force or binding effect", but he is not prepared to give full effect to what follows, namely, "that such a law could not exist for any purpose" and Therefore could not be revived by the amendment of the Constitution.

96. According to my learned brother, the decision in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others,

"confirms the view that the statute itself continues to exist on the statute book but has become ineffectual, nugatory and devoid of any legal force or binding effect.

The thrust of these words is that such a law cannot be given effect to by the Courts in deciding upon the rights of the parties. these words are significant only for the purposes of the Courts vis-a-vis the rights of the parties. they would be meaningless if applied to the power of the legislature to re-enact, repeal or amend a statute."

My learned brother is also of the opinion that "the continuance of existence of a statute" is synonymous with "its operativeness or enforceability" and is different from "continuance of its existence on the statute book."

97. I find it exceedingly difficult to put faith in the continued existence of a statute which the Supreme Court says was "dead" or "still-born" when it was enacted. The concept of a dead statute being still in "existence for the purpose of amendment reminds me of the metaphysical concept of "non-existence" being regarded as a form of "existence". I am also unable to share my learned brother's interpretation of what has held in Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, . That decision in no way supports the view taken by him and is entirely against it.

98. In my opinion, this line of reasoning evinces a desire to apply to a post-

Constitution statute the doctrine of eclipse in opposition to what has already been decided by the Supreme Court in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . In *Deep Chand Vs. The State of Uttar Pradesh and Others*, , S. R. Das, C. J., did try to revive that doctrine as explained in *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, when he said that it also applied to a post-Constitution Act which infringed a fundamental right guaranteed to citizens only and was nevertheless on the statute book as a valid law binding on non-citizens and Therefore if the shadow was removed by a constitutional amendment it would immediately be applicable even to the citizens without being re-enacted. But even the learned Chief Justice was not prepared to go further and he said,

"whether a post-Constitution law of other kind, namely, which infringes a fundamental right guaranteed to all persons irrespective of whether they are citizens or not and which, Therefore, can have no operation at all when it is enacted, is to be regarded as a still-born law as if it had not been enacted at all and, Therefore, not subject to the doctrine of eclipse, is a matter which may be open to admission.

99. It appears to me that implicit in this statement is the admission that if the doctrine of eclipse does not apply to a post-Constitution Act which infringes a fundamental right guaranteed to citizens and non-citizens alike then the Act can be made to operate only if it is re-enacted and not otherwise. That apart, *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, is a clear authority for the proposition that the doctrine of eclipse cannot apply even to a statute of the kind which S.R. Das, C. J., had in mind for it is clearly said there that

"in the case of post-Constitution laws, it would be hardly appropriate to distinguish between laws which are wholly void as for instance, laws contravening Article 19. Theoretically, the laws falling under the latter category may be valid qua non-citizens; but that is a wholly unrealistic consideration and it seems to us that such notionally partial valid existence of the said laws on the strength of hypothetical and pedantic considerations cannot justify the application of the doctrine of eclipse to them."

The judgment in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, is an unanimous judgment of five Judges, of whom two of their Lordships, B. P. Sinha and K. N. Wanchoo, JJ., were the same as in *Deep Chand Vs. The State of Uttar Pradesh and Others*, . B. P. Sinha J., had then agreed with S. R. Das, C. J., on the theory of eclipse.

100. On behalf of the respondents it was argued that the cases of *Deep Chand Vs. The State of Uttar Pradesh and Others*, and *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, could not be treated as authoritative in view of the fact that *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, was neither cited nor considered in either of these two cases. With regard to *Deep Chand Vs. The State of Uttar Pradesh and Others*, it was also

argued that since all the Judges in that case were unanimously of the view that the Act did not violate Article 31, it was wholly unnecessary to consider whether there was distinction between lack of legislative competence and violation of constitutional limitations and that this had been specifically pointed out in the minority judgment of S. R. Das, C. J. and B. P. Sinha, J.

101. I am afraid it is not permissible for this Court to countenance any such argument. But even otherwise, so far as our Constitution is concerned, there does not seem to be much scope for the argument that there is any distinction between lack of legislative competence arising out of the scheme of distribution of powers between the Centre and the States and the prohibition contained in Article 13(2) of the Constitution with respect to post-Constitution Acts. The Constitution prohibition in both cases appears to me to be the same as any contravention thereof has the effect of rendering the statute or its part, as the case may be void.

102. One argument which was strongly pressed on us by the respondent's counsel was about the "distinction between the effects on a statute (1) by a legislation and (2) by a judicial decision". It was argued that the effect of legislation on a statute is a physical change. An express repeal removes the statute out of the statute book. The amendment makes physical changes in the statute. But a judicial decision does not make any physical change in the statute. It only places a particular meaning on it leaving the statute on the statute book without any change. This difference is due to the clear separation of function between the Legislature and the Judiciary. The function of the Legislature is fundamental and formal. No statute can come into existence unless the Legislature makes it. No statute can go out of existence unless the Legislature repeals it. The Courts do not possess the power to make a statute or repeal a statute. The function of the Courts is to interpret a statute and to give it a meaning. If, according to the decision of a Court a statute or a part of it is inconsistent with the Constitution including Part Iii thereof, the meaning of such a statute is that it is inconsistent with the Constitution and is, Therefore, unconstitutional. This meaning is to be found only in a judicial decision. It will not be found in the statute book.

103. It is true that a decision of the Supreme Court, much less a decision of any other Court, much less a decision of any other Court, holding a statute to be void does not repeal the statute and that it is only a legislature having requisite competence which can repeal a statute. But that is by no means the entire statement of law on the point. What the Court does when it holds a statute to be void under Article 13(2) is to declare that such a statute had not been enacted at all. It existed neither in the past nor shall it exist in future. Having been born dead there is nothing except its reversal that can revitalise it. The activities of the two organs of State, namely, the legislature and the Courts, though complementary and in no way antagonistic to each other, have their own allotted functions. The function of the legislature is to enact, amend or repeal a statute.

The courts, especially the Supreme Court and the High Courts, do not have any such function. They only test the statute enacted, amended or repealed by the legislature in the light of the organic law of the land, namely, the Constitution, and if they find that the statute enacted after coming into force of the Constitution, contravenes Part III of the Constitution or any other Constitutional provision which limits the power of the Legislature, they simply say that the statute should be held never to have been enacted at all. It neither was nor shall it be.

104. It would also not be correct to say that the voidness of a statute under Art. 13 is the result of a judicial decision. If a statute contravenes the provisions of the Constitution it is void because the Constitution says so. A statute is either void or not void. A Court only adjudges whether it is so in terms of the Constitution. Legislature only repeals a statute which is in existence. It is correct that no statute can go out of existence unless the legislature repeals it; but vis-a-vis a statute which is void ab initio it is begging the question to say that it remains on the statute-book till it is repealed.

105. In that view of the matter I fail to understand what difference it would make to the statute still remaining physically on the "statute-book", a circumstance which appears to have registered such a profound impression on the mind of my learned brother it cannot be denied that even in the case of a statute which is repealed by the legislature it is only in subsequent editions that the repealed statute is not printed. It may be that once a statute is repealed, a red line is drawn across it in the statute-book to show that it is not longer there. The same result will follow or at any rate, should follow, when a statute is declared void by the Supreme Court for a note can certainly be made to identify such a statute from others with respect to which no such declaration has been made.

106. A great deal of emphasis was laid by the respondents' counsel on certain passages at page 10 of the "Constitution of the United States" 2nd Edition, Volume I by Professor Willoughby and at pages 40 and 41 of 2nd Edition of Wynes treatise on "Legislative, Executive and Judicial Powers in Australia" which having been set out by my learned brother need not be re-produced here. I find it hard to subscribe to the view that when the Supreme Court declares a statute or a part of it as void under Article 13(2) of the Constitution, it merely decides the rights of the statute or that the decision merely operates as a precedent for the determination of other similar cases but it does not strike out the statute from the statute-book. Having regard to the provisions of Art. 142 of the Constitution, the decision of the Supreme Court is certainly a judgment against the statute and is not a mere precedent. Once such a decision has been rendered its effect is as if the statute were a body without a soul and it is wholly immaterial that its carcass is still allowed to remain there.

107. For the same reason, I cannot subscribe to the view expressed by Wynes as I find it difficult to reconcile myself to the idea that a statute which the Supreme

Court has declared void still remains on the statute book as a subsisting law for any purpose. The argument that the Supreme Court is not bound by its previous decisions is neither here nor there for there is nothing under the sun which is ever-lastingly immutable. Human judgment being the result of finite intelligence is variable and subject to change and, Therefore, any declaration made by a judgment in respect of a statute may also suffer from the same infirmity. There is nothing absolute. All perception and knowledge is relative and, Therefore, when a statute is declared dead the declaration is merely the outcome of perception and knowledge which the Judges have of what is right when they make the declaration. When that decision is altered and it cannot be disputed that the principle of stare decisis makes such alteration a rather rare phenomenon, its place is taken by a new declaration. It is the new declaration of the Court that breathes life into the statute that was previously declared dead by it and revivifies it. The agency and the process by which the miracle of resurrection is performed are the same. The Legislature can also perform the same miracle; only it has to follow the same process which it had followed earlier when the statute was first enacted by it with the added precaution that the statute when re-enacted should not suffer from the vice ever again.

108. It was contended on behalf of the respondents that it is legislature alone which has the power to repeal a statute. The courts have no such power. What the Courts do when they declare a statute as un-constitutional, is to render it inoperative. The result is as if the statute were impliedly repealed and were to remain in a state of suspended animation and that it would revive as soon as the suspension came to an end.

109. With great respect, I beg to differ. I do not think any such view of the effect of declaration of voidness of a post-Constitution statute by Courts, has been taken in any of the judgments of the Supreme Court to which our attention was invited by the learned counsel. The argument by analogy, based on the two cases: (1) Criminal Appeal No. 182 of 1996,D/- 13-11-1969 Ram Kirpal Bhagat and Others Vs. The State of Bihar, and (2) Sri Sadasib Prakash Brahmachari Vs. The State of Orissa, also does not carry the point further. There is no parallel between an existing law which though in force in some area had not yet been extended to another area and a law which has been declared by courts to be dead at the very moment of its birth.

110. My conclusion on the first part of the argument on behalf of the petitioners, Therefore, is that a statute which is void within the meaning of Article 13(2) of the Constitution is non-existent for all purposes, including repeal, amendment or enforceability.

111. Before concluding this part of the judgment, it may be mentioned that my learned brother has referred to some decisions from the State Supreme Courts in America (see e.g., (1894) 102 Cal 412 36 Pacific 658 and 1902 N. L. J. 596 52 60 L. R. A. 564 and has extracted passages from those judgments and have not had the benefit of reading those judgments would Therefore not like to say

anything about them.

112. This takes me to the second part of the petitioners' argument, namely, that since a void statute cannot be amended the only way to achieve the object which the Legislature has in view, consistently with the provisions of the Constitution, is to re-enact the statute after removing from it the vice that had led to the Court's declaration as to its voidness.

113. It was urged that the view that an unconstitutional statute cannot be amended but must be re-enacted has neither any principle nor authority to support it and that the view is based upon a misconception. I do not think so. The view has the clear support of the Supreme Court's judgment in *B. Shama Rao Vs. The Union Territory of Pondicherry*, which has been noticed by my learned brother himself but has been distinguished on grounds, which if I may say so with very great respect, do not command themselves to me. The facts of that case are that on June 30, 1965 the Legislative Assembly for the Union Territory of Pondicherry had passed the Pondicherry general Sales Tax Act 10 of 1965. Section 1 (2) of the Act provided that it would come into force on a date to be appointed by the Pondicherry Government. Section 2 provided that the Madras General Sales Tax Act, 1959 as in force in the State of Madras immediately before the commencement of the Pondicherry Act, shall be extended to Pondicherry subject to certain modifications, one of which related to the constitution of the Appellate Tribunal. The Act also enacted a Schedule giving the description of goods, the point of levy and the rates of tax. The Pondicherry Government issued a notification on March 1, 1966, appointing April 1, 1966, as the date of commencement. Prior to the issue of the notification, the Madras Legislature had amended the Madras Act and consequently it was the Madras Act as amended up to April 1, 1966 which was brought into force in Pondicherry.

114. After the Act came into force the petitioner was served with a notice to get himself registered as a dealer under the Act. He challenged the validity of the Act by filing a writ petition. After the petition was filed the Pondicherry legislature passed the Pondicherry General Sales Tax (Amendment) Act 13 of 1966 whereby Section 1 (2) of the principal Act was amended to read that the latter Act "shall come into force on the 1st day of April, 1966." It was also provided that all taxes levied or collected and all proceedings taken and things done were to be deemed valid as if the principal Act as amended had been in force at all material times.

115. On behalf of the petitioner it was contended that since the principal Act was void ab initio on account of excessive delegation, the Amendment Act could not resuscitate that which was still-born. Support for this contention was sought from the decisions of the Supreme Court in *Deep Chand Vs. The State of Uttar Pradesh and Others*, and *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . Against that contention the position taken by the respondents was that assuming that the principal Act suffered from the said defect the defect was removed by the Amendment Act inasmuch as the Pondicherry Legislature re-enacted the said Act extending the Madras Act as amended up to April 1, 1966 to

Pondicherry. The alternative contention on behalf of the respondents was that the Amendment Act was an independent legislation, that the Pondicherry Legislative Assembly had power to enact a retrospective law and had re-enacted the provisions of the Principal Act extending as from, April 1, 1966, the Madras Act was amended till that date.

116. The majority (Subba Rao, C. J., Shelat and Mitter, JJ.) held that the Pondicherry Act 10 of 1965 was still-born and, Therefore, could not be revived by the Amendment Act of 1966. It was also held that the Amendment Act was passed on the footing that there was in existence a valid Act and that it was and was intended to be an amendment of the Principal Act. It could not be construed as an independent legislation and, Therefore, it could not be said that the Pondicherry Legislature had re-enacted the Principal Act extending the Madras Act as amended up to April 1, 1966 to Pondicherry.

117. According to the learned counsel for the respondent the first distinction between B. Shama Rao Vs. The Union Territory of Pondicherry, and the case before us, was that it was the supreme Court which had held the Pondicherry General Sales Tax Act, 1965 to be void whereas no such declaration has been made in the instant case. With respect to the Principal Act with which we are concerned, the declaration of invalidity has so far been made by High Courts only. It was urged that there is a distinction between the decision of the Supreme Court and that of a High Court. In respect of a High Court's decision, Therefore, the usual rules about the decision being treated merely as a precedent to be followed in other cases within the jurisdiction of the said High Court and the statute continuing to be law in the country, must prevail. it is true that Articles 141 and 144 of the Constitution make the law declared by the Supreme Court binding on all courts in India and require all authorities civil and judicial in India to act in aid of the Supreme Court. The law laid down by the Supreme Court, Therefore becomes the law of the land and the same cannot be said about the decision of a High Court which has only a territorial application. It, however, seems to me that in essence, the declaration of voidness of a statute made by a High Court, unless it is reversed by the Supreme Court, has the same effect although the operation of the declaration may be confined to the territorial limits of the High Court's jurisdiction. Within those territorial limits the statute has to be regarded as "still-born", "dead" and "non-existent" and unless it is re-enacted, it will be wholly inoperative and of no legal effect. Take the case of a statute which has been declared void by the High Court of one State while it has been held to be valid by the High Court of another State. So far as the State where it has been held valid or at any rate, has not been held void, no question of its amendment or re-enactment arise. The need for re-enactment or amendment will arise only in a State or territory where the statute has been struck down unless the decision is meanwhile reversed by the Supreme Court.

118. It, Therefore, follows that in substance and reality the effect of the declaration made by the High Court as well as the Supreme Court is the same.

The first ground of distinction pointed out by the learned counsel, Therefore, does not appear to me to be substantial.

119. The second ground of distinction pointed out by the learned counsel, appears to me to be even less substantial than the first. it is true that unconstitutionality of the Pondicherry Act, 1965 was not by reason of its being contrary to any provision of Part Iii of the Constitution and the decision is, Therefore, not under Article 13(2) of the Constitution. But as I have said before, the constitutional prohibition under Article 13(2) and lack of legislative competence which must include abdication of essential legislative functions by the legislature, have the same effect so far as the validity of a statute is concerned.

120. The third ground of distinction pointed out by my learned brother also does not appear to have any real merit. The basis for this distinction according to him is to be found in the subsequent decision of the Supreme Court in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, by the same Constitution Bench. In that case Section 5 of the East Punjab General Sales Tax Act, 1948, as originally enacted, conferred on the Government power to levy tax at such rates as the Government might fix. The section was amended by Act 18 of 1952 with retrospective effect fixing the rate of tax at "not exceeding two piece in a rupee". The appellants' petitions in the High Court challenging the imposition of purchase of the goods covered by the Act were dismissed by the High Court. On behalf of the appellants it was contended before the Supreme Court that since Section 5 as originally enacted was the charging section and has been declared void, the entire Act was void, and, Therefore, could not be revived by the Amending Act of 1952 as it was non-existent.

121. The contention was repelled and it was held that Section 2 as it stood before the amendment was no doubt void but the section as amended by the amending Act of 1952 was valid. the decision in *B. Shama Rao Vs. The Union Territory of Pondicherry*, was specifically referred to by Subba Rao, C. J. who spoke for the Court and was held to be clearly distinguishable. According to my learned brother the decision in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, which is an unanimous judgment of the same Constitution Bench that had previously decided by majority *B. Shama Rao Vs. The Union Territory of Pondicherry*, establishes the proposition that a void section of a statute can be validated by a mere amendment which is not re-enactment of the void section. With great respect, this does not appear to be a correct reading of the Judgment in *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, . Section 5 of the East Punjab General Sales Tax (Second Amendment) Act, 1952 in these words:-

"In sub-section (1) of Section 5 of the East Punjab General Sales Tax Act, 1948 after the words "rates" the following words shall be inserted and shall be deemed always to have been so inserted, namely:-

"not exceeding two piece in a rupee."

The case of B. Shama Rao Vs. The Union Territory of Pondicherry, was distinguished on the ground that in that case the whole of the Madras Act was void for the simple reason that the core of that act which was taxing statute lay in the charging section and the remaining sections had no independent existence. In Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, the charging section was intact and what was struck out was only the section providing for rates. It could not, Therefore, be said that when section 5 was struck out, section 4 or other sections also fell with it.

122. It is, however, the second contention of the appellants in Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, which is relevant for the discussion of the view expressed by my learned brother. The contention was that even if the whole Act was not still-born, section 5 was non-existent, that the Amending Act did not insert a new Section 5 but purported to amend the earlier Section 5 which was not in existence.

123. The contention was met by the learned Chief Justice in these words:-

"No doubt in terms the section inserts the words not exceeding two piece in a rupee" in Section 5. If Section 5 is inserted in the Act by the Amending Act with the said words added, there cannot possibly be any objection, for that would be an amendment of an existing Act. But in substance the amendment brings about the same effect. The words "shall be deemed always to have been so inserted" indicate that in substance Section 5, as amended, is inserted in the Act with retrospective effect."

I have no doubt that if the whole Act had been held to be void the decision would have been on the same lines on which B. Shama Rao Vs. The Union Territory of Pondicherry, was decided because in that event there would have been no existing Act which could have been amended and the only alternative would have been to re-enact the statute. the use of the words "shall be deemed always to have been so inserted" seems to be an additional reason for the way the case was decided.

124. Learned counsel for the petitioners argued that the amendment of Section 5 of the Punjab General Sales Tax Act in Devi Das's case was retrospective and this had the effect of overruling the High Court's decision which had invalidated Section 5. The judicial decision had the effect of declaring that Section 5 was void ab initio. the section had, Therefore, to be amended retrospectively if the effect of the judicial decision was to be wiped out and the section was to be validated. In the present case the amendment introduced by the Amending Act of 1968 in the Principal Act is clearly prospective. it would not, Therefore, have the effect of wiping out the decision that the whole of the Principal Act was void ab initio. On behalf of the respondents, on the other hand, it was contended that the only purpose of a retrospective amendment is to validate past transactions. If the legislature does not intend to validate past transactions it need not make

the amendment retrospectively. it is true that a retrospective amendment is made applicable by a fiction to past transactions while a prospective amendment applies only to a future transaction. But I am not aware of any decided case in which it has been laid down that that is the only purpose of a retrospective amendment. On the other hand, if I understand aright the import of the passage from the judgment of *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, , it can only mean that the purpose of using the words "shall be deemed always to have inserted" in the amended Section 5 was to provide that the section when originally enacted should be read as it was now amended. the validation in such a case may be not only with respect to past transactions but also with respect to the legislative provision itself.

125. In the absence of a full argument, however I do not think it is necessary to express any definite opinion on this point in the present case.

126. Counsel for the respondents seemed to take the view that the decision in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, being contrary to the decision in *Deep Chand Vs. The State of Uttar Pradesh and Others*, in so far as it held that there was no distinction between Clauses (1) and (2) of Article 13 as to the meaning of the word "void" and Therefore the observation at page 662 of the report (SCR) = (at p. 1489 of AIR) in *B. Shama Rao Vs. The Union Territory of Pondicherry*, that an amendment could be made only of a valid Act which was still on the statute-book", might not have been made had their Lordships' attention been invited to the fact that even a void and that this position was established by the meaning given to the expression "void" by the Supreme Court in *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, . Support for this view was sought to be derived from the minority judgment in *B. Shama Rao Vs. The Union Territory of Pondicherry*, .

127. I am afraid it is not permissible for us to take that view of the decision of the Supreme Court. So far as we are concerned we are bound to follow the majority view in *B. Shama Rao Vs. The Union Territory of Pondicherry*, and cannot take shelter behind any notions of supposed legislative practice nor is it open to us to say that "rigid adherence to the new legal position (as expounded in *B. Shama Rao Vs. The Union Territory of Pondicherry*,) new legal position could un-settle the division of functions between the legislature and the courts enshrined in the Constitution."

128. In this connection, the learned counsel referred to a decision of the Supreme Court in *Union of India (UOI) Vs. Kamlabhai Harjiwandas Parekh and Others*, which according to him established the legislative practice which he had in mind. In that case the Supreme Court had held section 8(3)(b) of the Requisitioning and Acquisition of Immovable Property Act, 1952 to be void as being ultra virus Art, 31 (2) of the Constitution. the provision was of crucial importance as without it the rest of the Act would not stand. Though the whole of the Act was thus void according to the learned counsel, the defect was removed by merely amending that portion of the Act by the Amending Act 31 of 1968,

without re-enacting the whole of the Act. The circumstance that no one had thought it fit to challenge the Amending Act on the ground that it could not amend a void Act, seems to me to be entirely beside the point. If the Amending Act does not hurt any one and Therefore its validity is not questioned does it prove that the Act is not challengeable or that there is any established legislative practice which has the backing of the Constitution.

129. My learned brother has referred to some cases which though they were not cited at the Bar, have been found by him to throw some light on the point with which we are concerned in this case. Out of deference to my learned brother, I should like to say a few words about those cases. the cases noticed by my learned brother are (1) Municipal Committee, Amritsar and Others Vs. State of Punjab and Others, , (2) (1969) 2 Sc 500; and (3) (Civil Appeals 125 to 133 of 1967, D/- 23-2-1970) Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another, .

130. The circumstances which gave rise to the decision in Municipal Committee, Amritsar and Others Vs. State of Punjab and Others, were these.

131. The Punjab Cattle Fairs (Regulation) Act 1967 was struck down by the Punjab High Court by its judgment in several connected writ petitions in Mohinder Singh Sawhney Vs. State of Punjab and Others, . The Punjab legislature, thereafter passed the Punjab Cattle Fairs (Regulation) Amendment Act, 18 of 1968. The Amending Act as well as the Principal Act were then challenged before the Supreme Court in several writ petitions and the matter was decided by that Court in Municipal Committee, Amritsar and Others Vs. State of Punjab and Others, . In similar writ petitions filed in the Punjab High Court the validity of the amending Act and the Act as amended was up-held by its decision reported at Kehar Singh v. State of Punjab (1969) 71 Pun Lr 24.

132. In Mohinder Singh Sawhney Vs. State of Punjab and Others, the Principal Act was struck down on the ground that the legislation was vague, uncertain and ambiguous inasmuch as no definition of the words "Cattle Fairs" was to be found in the Principal Act, this definition was provided by the amending Act of 1968.

133. Before the Supreme Court two contentions were advanced, viz. (a) that the Punjab High Court having struck down the Principal Act the same had ceased to have any existence in law; and (b) that even if the judgment of the Punjab High Court in Mohinder Singh Sawhney Vs. State of Punjab and Others, did not make the Act non-existent, the judgment operated as res judicata inter partes and on that account the Act could not be enforced without re-enactment. The Supreme Court found both the contentions un-acceptable.

134. Their Lordships of the Supreme Court first dealt with the matter as to whether the Principal Act had been rightly and correctly struck down. On this the rule laid down was that the Punjab High Court had applied the test of "due process of law" to the enactment but as that test had no application in our Constitutional set up, the High Court was in error in holding that the Act was

void. It was further observed that if the Legislature was competent to enact legislation in accordance with the entries in the lists given in the Seventh Schedule then it could not be declared invalid on the test of "due process of law" incorporated in the American Constitution by the 5th and 14th Amendments. In other words, as I understand it, the decision in *Mohinder Singh Sawhney Vs. State of Punjab and Others*, was overruled and the result was that the law would be deemed to have been always in force. The law being always enforceable an amendment to that could be made in the manner it was done and the amendment had to be tested in that background. The manner of carrying out an amendment, whether by re-enactment or otherwise has not been adverted to by the Supreme Court. There is only one passage which may tend to suggest that re-enactment was not necessary. The passage reads:-

"The effect of that decision (the decision of the Punjab High Court in *Mohinder Singh Sawhney Vs. State of Punjab and Others*,) was only that the Act was in law, non-existent, so long as there was no definition of the expression "cattle fairs" in the Act. that defect has been remedied by the Punjab Act, 18 of 1968."

I cannot read this observation as laying down that the view propounded as laying down that the view propounded by the Supreme Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, and *Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others*, has been overruled. These observations were made in the context of what the Court had said earlier that the principal Act could not be struck down and was wrongly struck down and also in the context of whether the principle of *res judicata* was attracted. Another reason why these observations cannot be regarded as over-ruling the view that re-enactment was necessary is that there is no reference to those cases nor is there any discussion on the subject. In any case, those decisions were of the Constitution Bench comprised of five Judges while the decision in the case of *Municipal Committee, Amritsar and Others Vs. State of Punjab and Others*, is by a non-Constitution Bench of three Judges.

135. As regards the decision in (1969) 2 Scwr 500, the reliance placed on it does not seem to me to be well-founded.

136. In this case eighty-one persons were charged with offences under Sections 120-B, 417 and 409, I. P. C. By a notification, the cases against these persons were distributed for trial by the Government of West Bengal to the Calcutta Special Court. Later a special Court was constituted u/s 2 of the West Bengal Criminal law Amendment (Special Courts) Act, 1929 and the cases were allotted to it for trial. This order was subsequently superseded by the State Government and it re-allotted the cases to the Special Court created earlier. the order of re-allotment was challenged in the High Court and was held to be bad. thereafter West Bengal Criminal Law Amendment (Special Courts Act), 1954 was passed by the West Bengal Legislature. By this Act the State Government was authorised to withdraw any case from any special Court and transfer the same to any other Special Court for disposal provided the first court had not taken cognizance of

the offence. The amendment Act of 1954 was brought in during the pendency of an appeal against the earlier order of a learned Single Judge of Calcutta High Court holding the re-allotment to be bad. It was argued that in view of the amendment the appeal should be allowed and the order of the Single Judge set aside. In the background of the power of the legislature to nullify a court decision it was observed by Mitter, J. (S. M. Sikri and Reddy, JJ. Concurring), "A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the legislature or if it infringed the rights enshrined in Part III of the Constitution. Needless to add it can "strike down or declare invalid any Act or direction of a State Government which is not authorised by law. The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of no effect. it can however pass an Amending Act to remedy the defects pointed out by a court of or an coming to know of it aliunde. An amending Act simplicities will cure the defect in the statute only prospectively. But as a legislature has the competence to pass a measure with retrospective effect it can pass an Amending Act to have effect from a date which is past. Usually Legislatures pass Acts styled Amending and Validating Act, with the object not only to amend the law from a past date but to protect and validate actions already taken which would otherwise be invalid as done without legislative sanction. There is nothing in our Constitution which creates any fetter on the Legislature's jurisdiction to amend laws with retrospective effect and validate transactions effected in the past. Further, there is nothing in our Constitution which restricts such jurisdiction of the legislature to cases where Courts of law have not pronounced upon the invalidity or infirmity of any legislative measure....."

137. Thus the point at issue in the present case was neither urged nor considered, and in any case a retrospective amendment like the one brought about by the Amending Act of 1954 by the West Bengal Legislature stands on a different footing. The power given by the Amending Act to the State Government authorising it to withdraw any case from any Special Court and transfer the same to any other Special Court for disposal in the new sub-section (3) to Section 4 of the Act of 1949 was given in the following words quoted on page 503 of the report:-

"The new sub-section shall be and shall be deemed to have always been substituted for the old sub-section. Further, it was also provided in the amendment that notwithstanding anything to the contrary contained in the judgment, decree or order of any Court where a transfer as made by the State Government had been ordered it shall be deemed to have been validly made as if the amendment was always in force".

The reference to the case of Civil Appeals 125 to 133 of 1967, Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another, is also of no avail as in that case the Supreme Court was again concerned with the rectification by the legislature of a defect pointed out by the Supreme Court in

the imposition of cases under The Central Provinces of Self-Government Act, 1920 which was rectified by Madhya Pradesh Koyala Upkar (Manyatakaran Adhiniyam Act 18 of 1964. Here also the earlier decision of the Supreme Court was made innocuous as would be apparent from the passage cited by my learned brother and has nothing to do with the point of issue.

138. I may now refer to two other decisions of the Supreme Court to which our attention was invited by the learned counsel for the respondents. One is The State of Mysore and Another Vs. D. Achiah Chetty, etc., . I have not been able to appreciate the precise relevance of this case to the present case. But if at all it has any relevance, it rather helps the argument of the learned counsel for the petitioners that amendment is not the way to validate a wholly void statute. Re-enactment, it is true, may not be the only way, but prospectively amending the statute is certainly not the right way. The facts of that case are that in Mysore there were two Acts bearing on acquisition of private land for public purposes. One of them was the Mysore Land Acquisition Act which followed the same scheme as the Land Acquisition Act, 1894 in force in India, the other was the City of Bangalore Improvement Act, 1945. The latter Act inter alias outlined the procedure by which acquisition of land was to be made. Section 52 of the Act laid down that any provision of law contained in any other enactment in force in Mysore which was repugnant to provision contained in the Act shall stand down to the extent of repugnancy. The Mysore Land Acquisition Act, on the other hand, has sections 4, 5A and 6 analogous to the corresponding sections in the Central Act of 1894.

139. Action for acquisition of petitioners' land having been taken under the Mysore Land Acquisition Act without advertence to the provisions of the Improvement Act, was challenged by them on the ground that it was ultra virus of Section 52 and the provisions of the Third Chapter of the Improvement Act. It was also contended that Government's action in using the provisions of the Mysore Land Acquisition Act was discriminatory because in other cases the provisions of the Improvement Act had been applied. Before the petitions came up for hearing the Governor of Mysore promulgated an Ordinance called the City of Bangalore Improvement (Amendment) Ordinance, 1960 introducing retrospectively S. 27-A. This was followed by an Act which re-enacted the provisions of the Ordinance. By this section compliance with the Third Chapter of the Improvement Act was dispensed with. The petitioners then challenged the Amending Ordinance and the Amending Act on the ground of non-compliance with Arts. 213 (1) and 254 (1) of the Constitution. They also attacked the notifications.

140. The High Court accepted the petitions holding the Ordinance and the Act unconstitutional. The High Court also held that the notifications applying the shortened procedure whereby the provisions of the Third Chapter were dispensed with in some cases and were followed in others, offended against the equality clause in the Constitution. The action for acquisition was, Therefore, struck down.

The State appealed against the decision to the Supreme Court but before the appeal came up for hearing the Bangalore Acquisition of Lands (Validation) Act, 1962, was passed by the Mysore State Legislature which received the assent of the President on 4th May, 1963, which purported to validate all past actions notwithstanding any breach of the Improvement Act or any other law or the decree and order of the High Court. the State Government contended that the Validating Act cut short all controversy whereas the respondents' contention was that there were still two Acts which covered the same field but prescribed two different procedures. The discriminatory procedure under the Mysore Land Acquisition was still there with the result that the impugned notifications continued to remain unconstitutional as before.

141. The respondents' contention was repelled by the learned Chief Justice M. Hidayatullah with the following observations:-

"The above argument denies to the legislature the supremacy which it possesses to make laws on the subject of acquisition. What the Legislature has done is to make retrospectively a single law for the acquisition of these properties. the Legislature could always have repealed retrospectively the Improvement Act rendering all acquisitions to be governed by the Mysore Land Acquisition Act alone. This power of the Legislature is not denied. the resulting position after the validating Act is not different. By the non obstinate clause the Improvement Act is put out of the way and by the operative part the proceedings for acquisition are wholly brought under the Mysore Land Acquisition Act to be continued only under that Act. The Validating Act removes altogether from consideration any implication arising from Chapter Iii of Section 52 of the Improvement Act in much the same way as if that Act had not been passed."

Counsel for the respondents contended that the aforesaid decision lent support to their view that there is a clear distinction between express repeal of a statute by legislature and an implied repeal of a statute by legislature and an implied repeal of a statute brought to light by a judicial decision. Whereas "a repealed statute is truly non-existent as it was gone out of the statute-book and would, Therefore have to be ignored not only by the Courts but also by the legislature which would have to undertake further legislation; on the other hand, a statute declared void by the Supreme Court or High Court only loses its binding force in litigation between the parties and is non-existent only in the decision of rights of the parties.

142. This aspect of the matter has been dealt with by me in the earlier part of the judgment. I need not, Therefore, repeat what I have already said about the true nature of the declaration of voidness made by the Supreme Court and the High Court. So far as the controversy between re-enactment and amendment of a void statute is concerned, the above decision does not appear to me to have any relevance. On the other hand, it may be argued with a certain degree of plausibility that the legislature being alive to the difficulty of getting rid of the discrimination resulting from the existence of two paralleled procedures enacted

a third Act putting out of action retrospectively one of the procedures leaving in the field only the other and thus caused the discrimination to disappear.

143. In substance the legislative process was one of re-enactment and not of amendment of the void statute. The next case of *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, to which our attention was invited by the learned counsel contains only general observations regarding validation of statutes. Dealing with validation of a tax declared by a Court to be illegally imposed the learned Chief Justice observed:-

"Validation of a tax so declared illegal may be done only if the ground of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal tax on provision and then by fiction making the tax already collected to stand under the re-enacted law, meaning and interpretation of the law under which the tax was collected and by the legislative fiat makes the new meaning binding any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law, and make it retrospectively so as to bind even past transactions. The validity of a Validating law, Therefore, depends upon whether the legislature possess the competence which it claims over the subject matter and whether in making the validation it removes the defects which the Courts had found in the existing law and makes adequate provisions in the valid law for a validating imposition of tax."

144. Apart from the fact that the decision has nothing to do with the question under discussion in this case, the amendment of the taxing statute declared void, does not seem to be one of the methods which according to the learned Chief Justice the Legislature generally adopts to validate the imposition of tax. No help can, Therefore, be derived from this decision for the argument that the statute declared wholly void can be validated by amendment of the provisions that had led to the declaration of voidness by the Court.

145. At this stage one other decision of the Supreme Court: *N.B. Jeejeebhoy Vs. Assistant Collector, Thana Prant, Thana*, may be noticed. The Land Acquisition (Bombay Amendment) Act, 1948, a pre-Constitution statute was held to be "still-born" and void at the inception because it did not provide for payment of compensation as required by Section 299(2) of the Government of India Act, 1935. it was Therefore, not an "existing law" within the meaning of Article 31(5) of the Constitution. It was held that since the Act did not satisfy the conditions laid down in Clause (6) of Article 31, it did not qualify itself for immunity from attack on the ground of non-compliance with the provisions of Section 299 of the Government of India Act, and Therefore no resuscitation of the Act was possible

under Clause (5) of Article 31.

146. This part of the decision is completely in accord with the other decisions of the Supreme Court about the true meaning of a void statute. It is, however, one other argument that was advanced by the learned Attorney General on behalf of the respondents which is of interest so far as the matter under discussion in the present case is concerned. The argument was based on two earlier decisions of the Supreme Court, namely *Dhirubha Devisingh Gohil Vs. The State of Bombay*, and *The State of Uttar Pradesh and Others Vs. H.H. Maharaja Brijendra Singh*, . In the first case the validity of the Bombay Taluqdari Tenure Abolition Act, 1948, was impugned on the ground that it took away or abridged the fundamental rights guaranteed by the Constitution. it was contended that the Act was void inasmuch as it was made in violation of the provisions of Section 299 of the Government of India Act, 1935. The Supreme Court, however, upheld the validity of the Act on the ground that the Act was one of the numerous Acts specified in the Ninth Schedule to the Constitution and on the language of Article 31-B of the Constitution which was construed as affording protection to each and every one of the Acts specified in the Ninth Schedule from any challenge on the ground of violation of any of the fundamental rights secured under Part III of the Constitution irrespective of whether they were pre-existing or new rights.

147. The second case followed the decisions of the first case. the decisions, Therefore, turned on the express provision of Article 31B of the Constitution. The significance of the decision lies in the following observations in the concluding portion of the Judgment:-

"The learned Attorney-General contended that Article 31-A and Article 31-B should be read together and that if so read Article 31B would only illustrate cases that otherwise fall under Article 31-A and, Therefore, the same construction as put upon Article 31-B should also apply to Art. 31-A of the Constitution. This construction was sought to be based upon the opening words of Article 31-B, namely, "without prejudice to the generality of the provisions contained in Article 31-A. We find it difficult to accept this argument. The words "without prejudice to the generality of the provisions", indicate that the Acts and regulations specified in the Ninth Schedule would have the immunity even if they did not attract Article 31-A of the Constitution. if every Act in the ninth Schedule would be covered by Article 31-A, this Article would become redundant. Indeed, some of the Acts mentioned therein, namely, items 14 to 20 and many other Acts added to the Ninth Schedule, do not appear to relate to estates as defined in Article 31-A(2) of the Constitution.

We, Therefore, hold that Article 31B is not governed by Article 31-A and that Article 31B is a constitutional device to place the ground that they infringe Part III of the Constitution. We, Therefore, hold that as the Amending Act was void from its inception, Article 31-A could not save it."

148. In the result the amending Act was held void. Counsel for the respondents

contended that the decision establishes the principle that a void statute is ignored by the Courts as non-existent in law in deciding the rights of the parties but is taken note of by Parliament as being on the statute-book for the purpose of validating and other legislation. I am unable to appreciate how this result follows from the above decision. In my opinion the ration of the decision on this part of the case lies in the observation that Article 31B is a constitutional device to place the specified statutes beyond any attack on the ground that they infringe Part Iii of the Constitution.

149. The position as it emerges from the various decisions of the Supreme Court to which a reference has been made and as I understand those decision may thus be summed up:-

150. A wholly void statute may be rendered operative by the Legislature in any of the following ways:-

(i) The statute may be re-enacted after the vice which had led to the declaration of voidness being removed from it;

(ii) The legislature may pass a validating Act retrospectively putting out of the way one of the competing statutes which enabled unconstitutional discrimination being practiced under it and by providing that all action should be deemed to have been to have been taken and shall be continued under the other statute which is otherwise without blemish.

(iii) By Constitutional amendment specifically mentioning the void statute and protecting it against any attack on the ground that it violates any of the fundamental rights secured under Part Iii of the Constitution. Prospective amendment of the portions of a void statute with the intention of ridding it of the vice afflicting it, as has been done by the Amending Act of 1968 in the present case, is not one of the methods that could be adopted to achieve that result. At least the decisions of the Supreme Court as I understand them leave no room for that.

151. It seems that in the amending Ordinance at least an attempt was made to give the Ordinance the semblance of re-enacted measure by laying down in Section 2 as follows:-

"During the period of operation of this Ordinance, the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 (hereinafter referred to as the Principal Act), shall have effect subject to the amendments specified in Sections 3, 4 and 5.."

152. I have already said that the whole of the Principal Act was void. in view of my finding that such an Act could be rendered operative in one of the three ways mentioned above and since that had not been done and the Act was merely amended in 1968 by the insertion of an additional section, namely, Section 10E, the amendment was ineffective and the Act remained void. Any action taken against the petitioner under a void Act was consequently invalid and must, Therefore be struck down.

153. In the result, I would allow the petitions and quash all the proceedings taken against the petitioners for their eviction and/or recovery of rent and/or damages; but in the circumstances; there will be no order as to costs.

Order of the Court

154. In view of the decision of the majority, all the four writ petitions (C. Ws. 431/1970, 323/1970, 439/21969 and 967 of 1967) are allowed and the proceedings taken against the petitioners for their eviction and/or recovery of rent and/or damages are quashed. But in the circumstances, there will be no order as to costs.

155. Appeals allowed.