

(1968) 05 DEL CK 0007

In the Delhi High Court

Case No : Civil Writ Petition No's. 294, 330 and 343 of 1968

Shiv Kumar Sharma

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-05-1968

Acts Referred:

Citation : AIR 1969 Delhi 64

Hon'ble Judges : S.K. Kapur, J; Narain Andley, J

Bench : Division Bench

Advocate : Party in perso, for the Appellant; C.K. Daphtary, Attorney General of India, N.A. Palkhiwala and B. Sen and Prakash Narain, for the Respondent

Judgement

S.K. Kapur, J.—This judgment will dispose of Civil Writ Petitions Nos. 294 of 1968, 330 of 1968 and 343 of 1968. The principal attack in these writ petitions is against the implementation of the Award dated 19th February, 1968, of the Indo-Pakistan Western Boundary Case Tribunal constituted pursuant to the agreement dated 30th June, 1965, between the Government of India and the Government of Pakistan. The award will, for brevity, be hereafter referred to as the "Kutch Award."

2. The dispute between the two Governments was regarding the Gujarat-West Pakistan border and by agreement dated 30th June. 1965, the two Governments agreed inter alias that-

(1) Ministers of the two Governments will meet in order to agree on the determination of the border in the light of their respective claims and the arrangements for its demarcation;

(2) in the event of no agreement between the Ministers of the two Governments on the determination of the border being reached within two months of the cease-fire, (1-7-65), the two Governments shall, as contemplated in the joint Communique of October 24, 1959, have recourse to the Tribunal (to be constituted in the manner provided in (3) hereafter) for determination of the

border in the light of the respective claims of the parties and the evidence produced before it and the decision of the Tribunal shall be final and binding on both the parties;

(3) the Tribunal shall be constituted consisting of three persons, none of whom would be a national of either India or Pakistan. One member shall be nominated by each Government and the third member, who will be the Chairman, shall be jointly selected by the two Governments. In the event of the two Governments failing to agree on the selection of the Chairman within three months of the cease-fire, they shall request the Secretary-General of the United Nations to nominate the Chairman:

(4) the decision of the Tribunal shall be binding on both the Governments, and shall not be questioned on any ground whatsoever. Both Governments shall implement the findings of the Tribunal in full as quickly as possible and shall refer to the Tribunal for decision any difficulties which may arise between them in the implementation of these findings. For that purpose the Tribunal shall remain in being until its findings have been implemented in full.

3. The Award was published on or about February 19, 1968 and the alignment of the boundary as in the majority opinion was declared as the boundary determined by the Tribunal.

4. The petitioners' case is that the alignment of the boundary by the Tribunal has resulted in awarding parts of the territory of India to Pakistan and such territory cannot be handed over to Pakistan by mere executive action. According to the petitioners there is a cession of territory belonging to India and consequently the Kutch Award cannot be implemented without an amendment of the Constitution as provided by Article 368 and, in the alternative, even if there be no cession of territory belonging to India requiring a constitutional amendment as aforesaid, the Kutch Award can be implemented only by legislation under Article 253 of the Constitution. According to the respondents, on the other hand, neither any constitutional amendment nor any law is necessary, there being no cession of territory but only settlement of a dispute between the two countries as to where in fact the boundary is. It is further contended that entering into an agreement for settlement of such a dispute is an attribute of sovereignty and, Therefore, the Award can be implemented without any law.

5. After we had issued rule in Civil Writ No. 294 of 1968. Civil Writ Petitions Nos. 330 and 343 of 1968 were filed and we issued rules in those petitions as well. On 23rd April, 1968. Mr. Parkash Narain accepted notice on behalf of the respondents in the two later writ petitions and the learned counsel for the petitioners stated that the only point they wished to urge in support of the petitions was that having regard inter alia to the terms of the Kutch Award a law was necessary before transferring any territory. Upon this statement by the learned counsel for the petitioners, Mr. Parkash Narain stated that no separate returns would be necessary in these two writ petitions. In view of this all the

three writ petitions were heard together.

6. Shri Shiv Kumar Sharma, petitioner in Civil Writ Petition No. 294 of 1968, appearing in person, relied on certain maps to show that the border between the erstwhile Province of Sind and the then independent State of Kutch was well defined and, Therefore, any transfer of territory in pursuance of the Kutch Award amounted to cession of Indian territory as envisaged in Article 1(3) of the Constitution and consequently such territories could not be altered without amending Article 1 of the Constitution. He further contended, relying on paragraph 6 of the counter-affidavit, wherein it is stated:

"It is denied that a very Important part of territory or any territory of India is being given to Pakistan and that too "for fear of war". A mistaken claim to territory which was in the adverse possession of India does not have the effect of converting such territory into territory of India and demarcation of the real boundary does not amount to cession of territory."

That even if any territory was, as admitted by the respondents in their counter-affidavit, "in the adverse possession of India" it was a territory acquired by India within the meaning of Article 1(3)(c) and, Therefore, parting with such territory also amounted to cession of territory. He also referred us to page 153 of the Award, and particularly the following paragraph-

"In my opinion it would be inequitable to recognise these inlets as foreign territory It would be conducive to friction and conflict The paramount consideration of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such. The points where the boundary will thus cut off the two inlets are these:

At the western inlet, the boundary will leave the boundary symbols indicated on Indian Map B-34 at the point marked thereon as "26", more precisely where the cart track is indicated as departing from the edge of the Rann in a southeasterly direction- This point is indicated as Point "L" on map C. On the other side of the inlet, the point will be that where the camel track is indicated on Indian Map B-34 to reach the edge of the Rann that point is indicated as Point "M" on Map C. Between Points "L" and "M", the boundary shall be a straight line.

The boundary will cross the eastern inlet at its narrowest point in a straight line between Points "N" and "O" marked on Map C."

and contended that in the context foreign territory meant foreign to Pakistan and that the Tribunal had, on the basis of equity and in the interest of amity, peace and stability between the two countries, decided to award the inlets, which in fact belonged to India, to Pakistan and, Therefore, the implementation of the Kutch Award must necessarily involve cession of Indian territory. Mr. Bobde, learned counsel for the petitioner in Writ Petition No. 343 of 1968, and Mr Lekhi, learned counsel for the petitioner in Civil Writ Petition No. 330 of 1968, also

adopted the same line of reasoning as Shri Shiv Kumar Sharma, the petitioner in person, with respect to effect of the finding at page 153 of the Kutch Award Mr. Bobde, however, further contended that:

(1) the Kutch Award could not be implemented without constitutional amendment, or, in any case, a law made under Article 253, even if India was wrongly in possession of any part of the territory now awarded in favor of Pakistan;

(2) as decided by the Tribunal itself the scope of reference to the Tribunal was to decide what actual boundary between India and Pakistan was and not what it should be. In spite of the limited scope of the reference and the finding of the Tribunal, the Tribunal went on to decide on grounds of equity and in the interest of peace and harmony between the two countries as to what the boundary should be and this involved cession of territory belonging to India, or at least claimed by India as belonging to it;

(3) India was exercising administrative control over the territories allocated to Pakistan and had all alone been claiming the same as belonging to India and India could not now be allowed, for the sake of sustaining the validity of the Award, to disclaim those territories and say that those never belonged to India.

(4) in view of the actual possession of the territory with India the subjects of the Republic of India had a constitutional right under Article 19 to travel within that territory and cession thereof necessarily affected the rights of the subjects of the country necessitating law for the implementation of the Award;

(5) wherever a Treaty requires either alteration of laws or confers, benefits on Indian subjects or affects their rights, in any manner, the implementation can be effected only by law and not by executive fiat. Since Indian laws were applicable to the territory transferred to Pakistan by the Kutch Award cession thereof to Pakistan must necessarily involve cutting down the amplitude of laws insofar as they applied to that territory.

Mr. Bobde, in fact, went to the extent of saying that whenever a territory is in possession of a country rightly or wrongly the transfer thereof amounts to cession and that would be more so in case of India in view of the fact that under Article 1(3) of the Constitution territory acquired by India forms as much a part of Indian territory as any other territory mentioned in Sub-clauses (a) and (b) of clause (3) of Article 1 of the Constitution He further suggested that since he was unable to visualise any treaty which did not either involve alteration of laws or confer benefits on the subjects or take away their rights, it was impossible to say that any treaty could be implemented without the sanction by Parliament According to him. Article 253 of the Constitution was directed to that end; and

(6) even if it be held that the petitioners had failed to prove that the territories transferred belonged to India and there was no cogent evidence on which a decision could be based, the questions should be referred to the Union

Government as to whether or not any of the territories allocated to Pakistan was in possession of India or belonged to India or was claimed by India as belonging to her.

7. With regard to this contention I may straightway point out that on the view I have taken of the nature of the dispute and the amplitude of executive powers as to the making and implementation of treaties, it is unnecessary to refer the questions to the Government as suggested.

8. Mr. P.N. Lekhi, learned counsel In Civil Writ No. 330 of 1968, contended that-

(1) in 1935 the territorial limits of the Province of Sind were properly defined and, Therefore, Pakistan could not claim any area beyond such defined boundaries;

(2) the inlets around Nagar Parkar peninsula are Indian territories and, Therefore, the implementation of the Kutch Award entails cession of territory belonging to India;

(3) in spite of the unauthorised statement made by the representative of India in favor of Pakistan before the Tribunal Chhad Bet and Dhara Banni continued to remain Indian territories;

(4) the area of Kanjarkto allocated to Pakistan under the Kutch Award is Indian territory;

(5) the Rann of Kutch is geographically a well defined feature and the entire Rann was a part of the territory of the erstwhile State of Kutch;

(6) Pakistan was estopped by conduct of the British Government to claim any area in excess of the area comprising the Province of Sind as on 15th August, 1947; and

(7) the erstwhile State of Kutch exercised jurisdiction over the entire area given by the Tribunal to Pakistan.

9. Mr. Palkhiwala, the learned counsel for the respondents, did not dispute that the meaning attributed to the words "foreign territory" in the Award by the petitioners was correct. Mr. Palkhiwala referred us to various passages in the Kutch Award and contended that there was no defined boundary between the erstwhile State of Kutch and the Province of Sind and the whole dispute referred to the Tribunal was the determination and demarcation of the boundary. He did not suggest that the findings of the Tribunal were binding on the Courts in India in deciding the issue, namely, whether any territory of India had been ceded, but referred to them only as indicative of the position, namely, that the boundary between Kutch State and Sind was undefined; that India was laying claim to the entire territory shown as belonging to India in the Map A filed before the Tribunal; that Pakistan was claiming a part of the area held to belong to India; and that there was genuine bona fide dispute as to the real boundary between the two countries and it is that dispute which was referred to the Tribunal for

decision. Mr. Palkhiwala placed the following points before us for consideration!

(1) the question before the Tribunal was as to where the boundary lay between India and Pakistan in 1947;

(2) it was a pure question of fact which has been determined by a duly appointed international Tribunal and accepted and confirmed by the Government of India;

(3) the Tribunal found that there was no well-defined boundary between Sind and Kutch;

(4) there was no satisfactory evidence, according to the Tribunal, that the territories awarded to Pakistan were comprised in, or administered by, Kutch State at any material time;

(5) Sind was found by the Tribunal to have exercised jurisdiction and authority over the area awarded to Pakistan;

(6) the Tribunal's Award rested purely on appreciation of evidence and conflicting testimony; and

(7) as regards the two inlets and the jagged boundary the Tribunal supported its decision on the additional ground that it was conducive to harmony and international peace that those areas should be held to belong to Pakistan and that conclusion was arrived at because there was no cogent evidence contrary to the decision on these points.

10. It is unnecessary to refer to the Award in detail but I would just refer to certain passages which lend cogency to the arguments of Mr. Palkhiwala that the real dispute between India and Pakistan was about determination of the undetermined boundary between the two, countries. Before I do that, it is pertinent to point out that both the countries agreed before the Tribunal that the relevant date for ascertaining the boundary of Sind was 18th July, 1947, the date of passing of Indian Independence Act and the learned counsel for the parties did not contest that that would be the appropriate date. It is also worthy of note that India had contended before the Tribunal that its function was to ascertain where the boundary has been and not to ascertain where the boundary ought to be. The Tribunal, it appears from the Award, rendered its decision on that basis, namely, that if

"a particular line is the boundary then there is no question of any equity being applied in order to vary it from where, as a matter of fact, it has been found to be. There is no question of any legal doctrine being applied, it is a question of fact, pure and simple. Principles of equity can at most be invoked in assessing evidence."

11. I now proceed to refer to some of the passages in the Award. Mr. Palkhiwala referred us to the following pages of the Award in support of his arguments:

Contention No. 1 Pages 2, 3, 15, 108 and 152.

Contention No. 2 Page 17.

Contention No. 3 Pages 8, 117 to 119, 123 to 126, 129, 134 to 145.

Contention No. 4 Pages 141 and 142.

Contention No. 5 Pages 140, 142, 143, 144, 151 and 152.

Contention No. 6 Pages 10, 107, 108, 149 and 152.

Contention No. 7 Pages 17, 147 and 153.

At page 141 the Tribunal observed-

"In summary, on the evidence on record it may be taken as positively established that, in this century, prior to Independence, outside Dhara Banni and Chhad Bet (which will be treated presently), the police and criminal jurisdiction of Bind authorities over disputed territory extended, in the sector between the eastern loop and Dhara Banni, to Ding, Vighokto and Biar Bet There is, however, no evidence which affirmatively proves in a conclusive fashion that the jurisdiction of Sind police and Sind Courts encompassed areas west of the eastern loop, or east of Chhad Bet Conversely, no proof is offered that Kutch either assumed or exercised such jurisdiction over any part of the disputed territory (leaving aside Dhara Banni and Chad Bet)

The instances cited in Chapter IX, Sections 12.05 and 13 do not materially assist in clarifying where the limits of police and criminal jurisdiction of India and Pakistan lay at each relevant time after Independence."

12. Regarding Dhara Banni and Chhad Bet the Tribunal observed:

"With reference to Dhara Banni and Chhad Bet, I deem it established that, for well over one hundred years, the sole benefits which could be derived from these areas were enjoyed by inhabitants of Sind. It is not suggested that the grazing as such was subject to British taxation. Such limited evidence as there is on record seems, however, to justify the assumption that the task of maintaining law and order was discharged by the Sind authorities; it is not even suggested that the authorities of Kutch at any time viewed such a task as forming part of their duties. The Kutch Tajviydar of Chhad Bet stated in a revealing letter of 26th March 1940 that "it is seen that the people of foreign territory have assumed a form of Administration on this Bet and have for a long time established their foothold" (see Chapter IX, Section 15.10.3). Whatever other Government functions were required with respect to these outlying grazing grounds, on which herds of cattle were from time to time shepherded, were apparently undertaken by Sind. Thus, the births, deaths and epidemics occurring there were recorded by the taluka office in Diplo. It is not shown that Kutch, at any time, established a thana on Chhad Bet.

The collection by Kutch of grazing fees must be viewed as an exercise of Government functions in the period before 1945, despite the fact that the actual

presence of Kutch police is not proved and that the tax collectors do not appear to have been themselves invested with general police authority; their jurisdiction was strictly fiscal. It is established that these measures were instituted in 1926 and were discontinued about two years later, were reassumed for a brief period, of time in 1942, were seemingly discontinued connection with the extradition case, and were thereafter again instituted in a different form under the lease executed in the summer of 1945. At no time were these tax levies fully effective, as is evidenced by the small amounts recovered, which fall far short of the expenditure incurred in the collection. More significantly, during each of the three phases, the imposition of the levy was opposed, not only by the local villagers, but by the British Government authorities concerned. The first phase resulted in the order of the Collector, acting on the authority of the commissioner in Sind, that payment of fees should be refused. The second phase led to the indictment and demand for extradition of Kutch officials for having arrested Sind villagers who contended that the territory was British; then also the Khavda Thanedar noted that British authorities "impressed upon the minds of the people of the villages..... that the limits of Chhad Bet do not belong to this sacred State....." (Pak Doc B 145/Ind). During the third phase, lastly, the lessee -- who worked under a Kutch contractual indemnity clause protecting him against criminal indictment encountered the opposition of a party furnished with British Government weapons and accompanied by Sind police. The third phase began shortly before Independence. Taken in all, these activities by Kutch cannot be deemed to have constituted continuous and effective exercise of Jurisdiction. By contrast, the presence of Sind in Dhara Banni and Chhad Bet comes as close to effective peaceful possession and display of Sind authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who used the crazing grounds, and the Sind authorities, must have acted on the assumption that Dhara Banni and Chhad Bet were British territory. (Pages 144 and 145 of the Award)."

* * * * * "Many passages of this nature which were published both on the Kutch and the British side characteristically referred to "the Rann" without specifying what this term meant. It is by no means obvious that "the Rann" necessarily included the Bets situated therein, for much of the evidence on record which relates to the nineteenth century establishes that a distinction was made in practice between rights to the Bets and rights in and to the Rann proper, and it is not a foregone conclusion to assume that an area like Dhara Banni - Chhad Bet, either subjectively or objectively, can at the time of each statement have been deemed to constitute a Bet in the Rann. Furthermore, it appears quite possible that upon enquiry, that area as well as the jutting triangle and other marginal areas would have been recognised and treated as forming an extension of the mainland of Sind, and as not being encompassed by the expression "the Rann" used in the publication in question. Any uncertainty in this respect ought properly to be resolved in favor of Pakistan. The reason Therefore is that the claim made by Kutch must, because of the form in which it was made, and because it was

unsupported by other action, be interpreted restrictively, to the disadvantage of the claiming party and the statements issued by the British authorities must be understood in like fashion and cannot in the circumstances be extensively interpreted, (page 147 of the Award)."

* * * * * "Some of the maps which do depict a conterminous boundary as aforesaid are inconsistent in so far as they show minor portions of the boundary variously. It is known that these variations were made by the Survey of India without consulting or obtaining sanction from the authorities solely competent to decide political matters, (page 149 of the Award)."

* * * * * "As stated earlier, the activities undertaken by Kutch in these areas cannot be characterised as continuous and effective exercise of jurisdiction. By contrast, the presence of Sind and Dhara Banni and Chhad Bet partakes of characteristics which, having regard to the topography of the territory and the desolate character of the adjacent inhabited region. Come as close to effective peaceful occupation and display of Government authority as may reasonably be expected in the circumstances. Both the inhabitants of Sind who openly used the grazing grounds for over one hundred years and the Sind authorities must have acted on the basis that Dhara Banni and Chhad Bet were Sind territory.

Against the background of other evidence produced by Pakistan, decisive importance must be given to the Sind activities displayed in the sector of Rahim Ki Bazar and in Dhara Banni and Chhad Bet. (page 151 of the Award)."

* * * * * "Reviewing and appraising the combined strength of the evidence relied upon by each side as proof or indication of the extent of its respective sovereignty in the region, and comparing the relative weight of such evidence, I conclude as follows. In respect of those sectors of the Rann in relation to which no specific evidence in the way of display of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favor of India. These sectors comprise about ninety per cent of the disputed territory. However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established. I am of the opinion that Pakistan has made out a better and superior title. This refers to a marginal area south of Rahim Ki Bazar, including Pirol Valo Kun, as well as to Dhara Banni and Chhad Bet, which on most maps appears as an extension of the main land of Sind.

These findings concern the true extent of sovereignty on the eve of Independence. I do not find that the evidence presented by the parties in relation to the post-independence period is of such a character as to have changed the position existing on the eve of Independence (page 152 of the Award)."

13. It is needless to burden this judgment with further quotations from the Award though we were taken through practically the whole of it because as will appear from what I am going to say hereafter that the nature and scope of the

enquiry before us is confined within certain limits. To me the perusal of the Kutch Award shows beyond doubt that there was considerable evidence supporting both the countries and it was on the appraisal of that evidence that the Tribunal determined where the boundary lay. The passage at page 153 of the Award, which has already been quoted, must be read in the context and, to my mind, it appears to have been based up- on a finding of fact that the territories referred to therein belonged to Pakistan.

14. Mr. Bobde referred us to S. 2 of the Indian Independence Act, 1947, and said that according to Sub-section (2) of S. 2 read with Sub-section (1) thereof all territories which at the date of the passing of the Act were included in the Province of Sind alone belonged to Pakistan and consequently what was not included in Sind was not a part of Pakistan. He also drew our attention to item 8 in the First Schedule to the Constitution as originally enacted wherein Kutch was shown as a Part "C" State. Be that as it may, the fact remains that neither the statutes nor the Constitution defined the boundary precisely. The learned counsel for the petitioners laid considerable emphasis on paragraph 6 of the counter-affidavit, about which I have already made a mention, filed by the respondents in Civil Writ No. 294 of 1968, and said that the respondents had therein admitted that a part of territory now awarded to Pakistan was in adverse possession of India which inter alias showed that India exercised administrative control and jurisdiction over that area. Apart from the fact that this paragraph has to be read in the light of paragraph 2 of the petition, which it seeks to answer, it clearly appears that the paragraph, when read as a whole and in the light of other paragraphs in the counter-affidavit, means nothing more than this that both the countries were laying claim to certain parts of the territory in dispute and even if some territory now awarded to Pakistan was in possession of India in assertion of their claim but with full consciousness of the dispute and uncertain factual position that would not make it Indian Territory and settlement of such dispute could not be termed as cession of territory in fact belonging to India requiring any amendment in the Constitution or the passing of a law.

Let me now address myself of the question posed on behalf of the petitioners that a part of territory belonging to India has in fact been given to Pakistan. It is an impossible task to be undertaken by this Court in the exercise of writ jurisdiction to go into the mass of evidence placed by both the countries before the Tribunal and come to a conclusion in favor of the petitioners particularly because the dispute is with a foreign country which cannot be before us. Once it is held that there was a bona fide dispute between the two Governments as to where in fact the boundary lay, writ jurisdiction cannot be invoked for a decision on conflicting evidence that, as a matter of fact, certain territories awarded to Pakistan were a part of Indian territory. That is more so because on the perusal of the Award, which incorporates the evidence considered by the Tribunal, we are satisfied that there was evidence in support of the claims of both the countries.

The material placed before the Tribunal further shows that there is no such

conclusive evidence justifying a decision in favor of the existence of a conterminous boundary finally settled between the two countries. As a matter of fact, Mr. Bobde made it very clear that he did not want to invite a decision on appraisal of the conflicting evidence as to what areas belonged to India or to Pakistan. He said that for the purposes of his argument it was sufficient to show that India claimed the territories now awarded to Pakistan as her territories and Therefore necessarily exercised administrative control and jurisdiction therein and that even otherwise no treaty could be implemented without a law made in exercise of power under Article 253 of the Constitution. From the Kutch Award it does clearly appear that India was laying claim to certain areas now awarded to Pakistan and that is further supported by the Map marked "A" filed before the Tribunal.

That, however, does not carry Mr. Bobde or Mr. Lekhi any further. The Constitution does not precisely define the boundary of Indian territory. Constitutional amendment would be necessary only if any alteration in Article 1 is involved. If there is a dispute as to what in fact the territory of India is and that dispute is settled on the basis that certain territory never belonged to India it does not, in my opinion, entail any cession of Indian territory requiring a constitutional amendment. In answering this question one has to bear in mind the distinction between cession of territory and the settlement of a dispute as to where in fact the boundary between India and Pakistan lies. If the matter falls in the latter category, no constitutional amendment would be necessary. The learned counsel then contended that the territories of India would include the territories acquired by India and consequently the territories in possession of India must be treated as territories acquired within the meaning of Article 1(3)(c) of the Constitution. Their Lordships of the Supreme Court explained the scope of Article 1(3)(c) in the case which came before them upon a Reference by the President of India under Article 143 of the Constitution reported in *In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India*, and their Lordships observed:

"Then, as regards the argument that the inclusion of the power to acquire must necessarily exclude the power to cede or alienate, there are two obvious answers. Article 1(3)(c) does not confer power or authority on India to acquire territories as Mr. Chatterjee assumes. There can be no doubt that under international law two of the essential attributes of sovereignty are the power to acquire foreign territory as well as the power to cede national territory in favor of a foreign State. What Article 1(3)(c) purports to do is to make a formal provision for absorption and integration of any foreign territories which may be acquired by India by virtue of its inherent right to do so. It may be that this provision has found a place in the Constitution not in pursuance of any expansionist political philosophy but mainly for providing for the integration and absorption of Indian territories which, the date of the Constitution, continued to be under the dominion of foreign State; but that is not the whole scope of Article 1(3)(c). It refers broadly to all foreign territories which may be acquired by India and

provides that as soon as they are acquired they would form part of the territory of India. Thus, on a true construction of Article 1(3)(c) it is erroneous to assume that it confers specific powers to acquire foreign territories."

15. If India be in possession of a particular territory because it claims sovereignty over it but is all the time cognizant of the uncertainty of the position and existence of a bona fide dispute about where the territory lies, it cannot be termed as acquisition within the meaning of Article 1. Acquisition implies absorption into the territories of the Union of India and mere possession in the circumstances mentioned hereinbefore cannot be treated as acquisition. What has to be seen is whether any territory belonging to India has been ceded thereby bringing about any change in Article 1. In the light of the above discussion I hold that there is no cession of any territory belonging to India. In my opinion, Therefore, no constitutional amendment is called for, for the implementation of the Kutch Award.

16. Mr. Bobde and Mr. Lekhi then contended that having claimed this territory as belonging to India, the respondents cannot be permitted to disclaim the same. The answer, to my mind, is simple. All that the respondents say is that there was no well defined and demarcated boundary between the two countries and by a Treaty the said dispute has been settled. There is, in the circumstances, no disclaimer as suggested by Mr. Bobde. It is not a disclaimer in Court to support the action of India or the Kutch Award but even the agreement dated 30th June, 1965 shows that the two Governments agreed to get the boundary determined. That apart on the perusal of the materials placed before us, including the Kutch Award, I am satisfied that there was a bona fide dispute between the two countries as to the boundary. Mr. Bobde strongly relied on the Berubari case reported in *In Re: The Berubari Union and Exchange of Enclaves* Reference Under Article 143(1) of The Constitution of India, . That has no application to the present case. In that case their Lordships of the Supreme Court interpreted the agreement to mean that it involved cession of territory belonging to India. That is not the case here.

17. This then takes me to the other argument of the learned counsel for the petitioners that a treaty can be implemented only by legislation. Mr. Bobde referred us to AIR 1937 82 (Privy Council) , in support of this proposition. In that case, three laws made by the Parliament of Canada, namely, the Weekly Rest in Industrial Undertakings Act, 1935; the Minimum Wages Act, 1935, and the Limitation of Hours of Work Act, 1935, which gave effect to draft conventions adopted by the International Labour Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles, were held ultra virus of the Parliament of Canada on the ground that the legislation related to matters assigned exclusively to the Legislatures of the Provinces. It was observed-

"Their Lordships, having stated the circumstances leading up to the reference in this case, are now in a position to discuss the contentions of the parties which were summarized earlier in this judgment. It will be essential to keep in mind the

distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes."

18. Now that I am on this decision, I may also point out, as that will have a bearing on the other argument based on Article 253 of the Constitution, that there was in the British North America Act Section 132 providing that the Parliament of Canada shall have "all powers necessary or proper for performing the obligations of Canada, or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries". It was in exercise of the power u/s 132 that the impugned laws were enacted by the Parliament of Canada and were held by the Privy Council to be ultra virus of the Parliament of Canada. The ratio of the decision is that the obligations, which were sought to be given effect to, were not obligations incurred by Canada as part of the British Empire but by virtue of her status as an international person and, Therefore, Section 132 did not apply. Section 132 having been treated as out of the way, the validity of the legislation was tested in the light of Ss. 91 and 92 of the said Act and it was held that the legislation came within the classes of subjects, by Section 92, assigned to the Legislatures of the Provinces and was, Therefore, ultra virus of the Dominion Parliament.

19. Mr. Bobde and Mr. Lekhi did not dispute that making of a treaty was an attribute of sovereignty and, Therefore, any country could enter into a treaty but they contended that the implementation thereof belonged to the Legislature and, Therefore, the Executive could not give effect to the treaty unless supported by law. They said that Article 253 was enacted for that purpose and that is why the Article is confined only to implementing of any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body, and does not touch upon the making of the treaties. This question was left open by their Lordships of the Supreme Court in *In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India*, . In my opinion, the scope of Article 253 Is different. It starts with a non obstinate clause, namely, notwithstanding anything in the foregoing provisions of this Chapter. The Chapter deals with the distribution of legislative powers. Treaty making and implementation of treaties is a subject which falls under entry 14 of List I of the Seventh Schedule. If the matter had been left at that, the Parliament would have, without the aid of

Article 253, been competent to enact laws for implementation of treaties etc. under the said entry 14. The Constitution-makers must have felt the difficulty in the way of the Union Parliament in enacting different types of laws for the implementation of obligations under treaties etc. with respect to the subjects assigned exclusively to the State. To give one example, if the implementation of a treaty involved legislation or change in a law in force in a State falling exclusively within the State list, it could have been suggested that though that law was being altered with a view to implementing a treaty yet the State Legislature alone could do, that, exactly as it happened in AIR 1937 82 (Privy Council) .

This Article is, Therefore, directed towards giving power to the Union Parliament to invade the State List to the extent it may be necessary for the purpose of implementing the treaty obligations of India. In short, the Article has been enacted to cope with a situation similar to one which arose in AIR 1937 82 (Privy Council) . In my opinion, implementation of every treaty does not require legislative aid. In the case AIR 1937 82 (Privy Council) , the Privy Council held that the performance of obligations under the treaty, if they entailed alteration of the existing domestic law, required legislative sanction. Mr. Palkhiwala suggested that this statement of law was exhaustive on the subject and in no other case was legislation necessary for implementation of treaties. Mr. Bobde, however, relied on *Civilian War Claimants Association, Limited v. The King* (1932) AC 14; *Walker v. Baird* (1892) A. C. 491; and *West Rand Central Gold Mining Co. Ltd. v. The King* (1905) 2 K. B. 391, to show that the Privy Council decision in AIR 1937 82 (Privy Council) , was not exhaustive of the position and legislation was required even where the fulfillment of obligations under a treaty affected the right of or conferred benefits on the subjects of the concerned country or necessitated alteration in domestic laws. In Halsbury's Laws of England, Third Edition, Volume 7, page 287, paragraph 607 the position is stated thus:

"Treaties concluded by the Crown are in general binding upon the subject without express parliamentary sanction but the previous consent of, or subsequent ratification by, the legislature is legally necessary to their validity in certain cases."

In foot-note (1) it is said-

"In England there is no codified list of subjects upon which the Crown has power to bind the subject by treaty without parliamentary sanction; but where any reasonable doubt arises, it is usual either to obtain statutory authority beforehand, or to stipulate in the treaty that the consent of the legislature shall be obtained (2 Anson's Law and Custom of the Constitution (4th Edn.), Pt. II, p. 137). Now that treaties regularly require ratification to become binding, the authority of Parliament need only be obtained for ratification. Thus for example, the treaties of peace made in 1947 with Italy and certain other countries had to be ratified before they came into force. Since they affected the private rights of British subjects, the Treaties of Peace (Italy, Roumania, Bulgaria, Hungary and

Finland) Act, 1947 (10 & 11 Geo. 6 C. 23), was passed, which gave the Crown power to make such appointments, establish such offices, make such Orders in Council, and do such things as appeared to it to be necessary for carrying out the treaties, and for giving effect to any of their provisions (ibid., S. 1 (1)). Orders in Council could provide for the imposition, by summary process or otherwise, of penalties in respect of breaches of its provisions (ibid., s. 1 (2)). They had to be laid before Parliament, and might be annulled by the Crown in Council upon an address from either House (ibid., s. 1(3)). Expenses incurred in carrying out the treaty were to be defrayed out of moneys provided by Parliament (ibid , s. 1 (7)) Thus the Crown obtained powers of subordinate legislation enabling it to carry the treaties into effect. The Japanese Treaty of Peace Act, 1951 (15 & 16 Geo. 6 & 1 Eliz. 2 c. 6), is in almost the same terms."

Again, in Constitutional Law by Wade and Phillips, Fourth Edition, page 201, it is said-

"The question -- when do British treaties involve legislation? -- may be answered by the following summary:

(1) Treaties which, for their execution and application in the United Kingdom, require some addition to, or alteration of, the existing law. Thus a treaty which purported to confer immunity upon privately owned foreign merchant ships may deprive a British subject of his remedy and so constitute an alteration of his legal rights which can only be made enforceable by statute. The King will not be advised to ratify such treaties unless and until such legislation has been passed, or Parliament has given the necessary assurance that it will be passed. A treaty imposing upon the United Kingdom a liability to pay money, either directly or contingently, usually falls within this category, because, as a rule, money cannot be raised or expended without legislation,

(2) Treaties requiring for their application in the United Kingdom that new powers which it does not already possess shall be given to the Crown. Extradition treaties are in this category, Without statutory authority arrest by the Crown of a person accused of the commission of a crime in a foreign State with a view to his surrender can be challenged successfully by writ of habeas corpus.

(3) It is the practice and probably by now may be regarded as a binding constitutional convention, that treaties involving the cession of territory require the approval of Parliament given by a statute."

20. The position, to my mind, appears to be this that if a treaty either requires alteration of or addition to existing law, or affects the rights of the subjects, or are treaties on the basis of which obligations between the treaty-making State and its subjects have to be made enforceable in municipal Courts, or which, involves raising or expending of money or conferring new powers on the Government recognizable by the municipal Courts, a legislation will be necessary. Of course, if it involves cession of territory then so far as India is concerned constitutional amendment may also be necessary. It is not possible to prepare an

exhaustive list as to which treaties can be implemented by legislation and I will not attempt to do so. There may be other treaties where implementation by law is necessary and Therefore the Privy Council decision cannot be treated as an exhaustive statement of law on the subject. To my mind, one thing is however clear that where the implementation of a treaty merely involves the ascertainment of the disputed boundaries with a foreign State, no legislation would be necessary. Legislation in the instances mentioned heretofore is necessary because in India treaties do not have the force of law and consequently obligations arising there from will not be enforceable in Municipal Courts unless backed by legislation. Settlement of dispute as to boundary raises no such obligation requiring implementation in Municipal Courts, Cases may arise where a domestic law is in express terms extended to a named city and that city as a result of a treaty, settling a dispute like the present, has to be handed over to another country. In that case legislation may be necessary.

21. On behalf of the petitioners it was contended that under Article 19 every citizen of the country has the right to reside and settle in any part of the territory of India and move freely within the territory of India and if before this Treaty. Indian subject had the right to settle or move freely within the territory in occupation of India, the rights of the subjects will certainly be affected if that part is given over to Pakistan. That argument suffers from a fallacy. The right under Article 19 extends only within the territory of India and, Therefore, if any part did not in fact belong to India there would be no such right with respect to that part.

22. As to the other contentions by Mr. Lekhi, I have already indicated that it is not possible in these proceedings to decide the controversial question of fact as to which part belonged to which country and on the perusal of the aforesaid agreement dated 30th June 1965, and the material referred to in the Kutch Award my conclusion is that there was a bona fide dispute and none of the countries was actually sure where the boundary lay.

23. Mr. Lekhi then contended that the term "boundary" is itself a well-recognized term in international law and the various maps of the Province of Sind drawn during the British rule should be taken as conclusive. He said that, for instance, the boundaries of none of the States on the border of Pakistan are expressly defined in the Constitution and tomorrow any Government may say that a particular part does not belong to India and thereby cede territory without even a reference to the Legislature. My answer to that is that no Government is expected to function in that manner and, Therefore, such a situation could not have been visualised or taken note of by the Constitution makers. The boundaries of One's country are more sacred to every subject than anything else. Those who head the various departments of Government sit under oath to uphold the integrity, honour and prestige of the country. There are checks and counter checks provided under our system of laws and that system permits on occasions the legislature to be pitted against the executive, the State against the

Union, interest against interests and the courts against illegal, mala fide or arbitrary act by any other branch of Government. Such balances always provide sufficient safeguards. There is nothing in this case which shows lack of integrity on the part of the Government to its oath.

24. In the result, Therefore, the petitions fail and are dismissed with no order as to costs.

Andley, J.

25. I agree.

26. Petitions dismissed.