

(1956) 05 GAU CK 0004

In the Gauhati High Court

Case No : Civil Rule No's. 26, 31, 32 and 33 of 1956

Sristikar Dowarah and Others

APPELLANT

Vs

A.N. Kidwai and Others

RESPONDENT

Date of Decision : 23-05-1956

Acts Referred:

Assam Revenue Tribunal (Transfer of Powers) Act, 1948 — Section 100, 2, 3(3), 5, 99
Eastern Bengal and Assam Excise Act, 1910 — Section 9, 9
General Clauses Act, 1897 — Section 4(13)
Government of India Act, 1935 — Section 220(3), 290, 290(2), 296, 296(1)
Minimum Wages Act, 1948 — Section 27

Citation : AIR 1956 Guw 142

Hon'ble Judges : Sarjoo Prasad, C.J.; Haliram Deka, J

Bench : Division Bench

Advocate : Ranadeb Choudhury, H. Goswami, S.K. Ghose, S.C. Das and G.R. Kalita, in Civil Rule No. 26 of 1956, Ranadeb Choudhury, H. Goswami, P. Chaudhuri, S.C. Das and G.R. Kalita, in Civil Rule No. 31 of 1956, S.K. Ghose, P. Choudhuri and G.R. Kalita, in Civil Rule No. 32 of 1956 and G.R. Kalita and S.C. Das, in Civil Rule No. 33 of 1956, for the Appellant; S.M. Lahiri, General, F. Ahmed, D.N. Medhi, Sr. Govt. Advocate, J.P. Bhattacharjee and N.M. Lahiri, in Civil Rule No. 26 of 1956, S.M. Lahiri, General, F. Ahmed, D.N. Medhi, Sr. Govt. Advs., R.K. Goswami, Jr. Govt. Advocate in Civil Rule No. 31 of 1956, S.M. Lahiri, General, D.N. Medhi, Sr. Govt. Advocate, R.K. Goswami, Jr. Govt. Advocate, A.R. Barua and B.K. Goswami, in Civil Rule No. 32 of 1956 and S.M. Lahiri, General, D.N. Medhi, Sr. Govt. Advocate and S.C. Bordoloi, for the Respondent

Judgement

Sarjoo Prasad, C.J.—These are four, applications for appropriate writs under Article 226 of the Constitution of India. The petitioners in all these cases are unsuccessful claimants or settlement of excise shops. I will deal with the individual case of these petitioners of a later stage; but the common question of constitutional importance which arises for decision in all these cases is the competency of the Appellate Authority constituted under Sub-section (3) of Section 3, Assam Revenue Tribunal (Transfer of Powers) Act (Assam Act 4 of 1948) to entertain appeals and revise decisions in matters arising under the

provisions of the Assam Excise Act, 1910 (Act 1 of 1910).

The Tribunal in question was constituted by Government notification, dated 5-7-1955, under which the Governor of Assam was pleased to appoint the Commissioner of Hills Division and Appeals as the Authority to entertain appeals and revise decisions in such cases. The case of the petitioners is that the said officer was not a properly constituted Authority and was, therefore, not competent to dispose of the appeals.

2. The competency of the aforesaid Appellate Authority-is challenged mainly on two grounds. Firstly, it is urged that S 3(3), Revenue Tribunal (Transfer of Powers) Act, 1948 (hereinafter called the impugned Act) is ultra vires or repugnant to Section 296(2), Government of India Act, 1935; and, secondly, that in any case the notification in question appointing the present appellate Authority is repugnant to the whole scheme and policy of Section 9, Excise Act (Act 1 of 1910) itself.

An alternative line incidentally struck by Mr. Section K. Ghose, appearing in some of the cases, is that even assuming that Sub-section (3) of Section 3 of the impugned Act is valid, the power of the Provincial Government under the Act to appoint an Appellate Authority ceased after once the Authority had been appointed.

Such an Authority having been constituted by an earlier notification dated 11-5-1955, the Provincial Government could not dissolve that Authority at its pleasure and appoint the present appellate Authority unless there was fresh delegation of power by an Act-of the Legislature authorising such an appointment the delegation under the impugned Act having been exhausted. These points I propose to consider in due course.

3. Section 296 of the Constitution Act Government of India Act, 1935, provided for the constitution of Courts of appeal in revenue matters. With the repeal of the Government of India Act, and with the introduction of the new Constitution, this provision has of course ceased to be a part of the Constitution; but Act 4 of 1948, the Act impugned, was enacted under the authority of the Government of India Act 1935, as adapted by the Adaptation Order. Therefore, it is necessary to examine the provisions of this section in order to consider the question whether and to what extent, if any, the provision of Section 3(3) of the impugned Act is repugnant to this Section. Section 296, Government of India Act, 1935 runs thus:

(1) No member of the Dominion Legislature or of a Provincial Legislature shall be a member of any tribunal in a Governor's or Chief Commissioner's Province having jurisdiction to entertain appeals or revise decisions in revenue cases.

(2) If in any province any such jurisdiction as aforesaid was, immediately before the commencement of Part III of this Act, vested in the Local Government, the Governor shall constitute a tribunal, consisting of such person or persons as he may think fit, to exercise the same jurisdiction until other provision in that behalf

is made by Act of the Provincial Legislature.

(3) There shall be paid to the members of any tribunal constituted under the last preceding subsection, such salaries and allowances as the Governor may determine, and those salaries and allowances shall be charged on the revenues of the Province.

4. It is apparent from this section that it postulates three important considerations in the matter of constitution of these appellate tribunals. In the first place it prohibits a member of the Dominion Legislature or of a Provincial Legislature from being a member of any such tribunal having jurisdiction to entertain appeals or revise decisions in revenue matters.

In an earlier case the question arose whether a Minister who had to be a member of the Provincial Legislature and in fact was such a member could be constituted an appellate Authority for such purposes and this Court held in the negative on the application of Section 296(1) of the Constitution Act: vide *Ghanashyam Das v. State of Assam* 1953 Assam 129 :AIR V 40 (A).

Next the section provides that if in any province such jurisdiction as aforesaid (namely, the jurisdiction to entertain appeals or revise decisions in revenue cases) was, immediately before the commencement of the Act, vested in the Local Government, the Governor was authorised to constitute a tribunal consisting of such person or persons as he might think fit to exercise jurisdiction to entertain appeals or revise decisions in revenue cases.

But this authority of the Governor to constitute such a tribunal, was intended to be operative only for a temporary period and therefore the section lays down that the authority of the Governor would extend only till and up to the period that the Provincial Legislature had not made any provision in that behalf by an Act of that Legislature.

Thus the Constitution places an obligation on the Provincial Legislature to constitute a "tribunal for such purposes by its own Act. Thirdly, the section provides for payment of salaries and allowances to the members of the tribunal so constituted, the said salaries and allowances being charged on the revenues of the Province.

5. It appears that, as contemplated by Sub-section (2) of Section 296, the Legislature did intervene to provide for the constitution of a revenue tribunal having jurisdiction to entertain appeals and revise decisions in revenue cases by legislative enactments. The first enactment on the point was the Assam Revenue Tribunal Act, 1946 (Assam Act 2 of 1946). Section 3 of the Act laid down that the Provincial Government shall constitute a Tribunal to be called the Assam Revenue Tribunal.

The Tribunal was to consist of a President and two Members, appointed for a term of live years. The President was to be a non-official and possess the qualifications of a High Court Judge, as laid down in Sub-section (3) of Section

220 of the Government of India Act, 1935. Of the members, one was to be a non-official who had been for not less than 10 years a pleader, advocate, or barrister, or who had for at least ten years held a judicial office in British India not inferior to that of a subordinate Judge.

The other member was to be the Director of Land Records, Assam. It further provided that the President or non-official member was not to be retained in the post after attaining the age of 60 years; and any vacancy in the office of the President or the non-official member was to be filled in the manner prescribed above; and they were also to be paid such salaries as prescribed by the Government.

Section 5 of the Act provided that the tribunal was to exercise such jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Government immediately before the 1st day of April, 1937 under any law for the time being in force. It is to be remembered that the 1st day of April 1937 is the relevant date on which the Government of India Act came into operation. It is not necessary for the present to refer to the other provisions of this Act.

It is conceded on all hands that the enactment of this legislation by the Provincial Legislature operated to extinguish the powers of the Governor to constitute a Tribunal within the meaning of Sub-section (2) of Section 296 of the Constitution Act. It would appear from the language of the relevant sections discussed above that this legislation *prima facie* carried out the obligations placed upon the Legislature by the above, provisions of the Constitution Act. Those sections embody the essential legislative principles on which the Tribunal could be formed and function.

In enacting the law on the point, the Provincial Legislature empowered the Provincial Government to constitute a revenue tribunal on certain basic principles. It laid down the number of persons requisite to constitute the tribunal, specified their respective qualifications for the post and defined the functions which they were to exercise in entertaining appeals and revisions in revenue cases. The Provincial Government was bound to respect these directions of the Legislature in constituting the Tribunal.

All the essential principles of legislation therefore which by the operation of S, 296, Government of India Act, 1935, were to be defined by the Provincial Legislature on the subject were defined by the Act of the Legislature and the constitutional burden was thus discharged. The only authority which the Legislature under Assam Act 2 of 1946 delegated to the Provincial Government was to constitute and select the personal of the revenue tribunal according to the principles laid down in that Act. The Schedule to the Act shows that the tribunal so constituted was also to exercise jurisdiction u/s 9 of the Eastern Bengal and Assam Excise Act (.Act 1 of 1910).

6. Mr. Ranadeb Chaudhuri contends that if the above Act continued to remain in

force, probably no exception could be taken to the Revenue Tribunal constituted thereunder, as it fulfilled all the requirements of Section 296 of the Constitution Act. But the Act of 1946 was superseded by the impugned Act of 1948, The preamble of this latter Act shows that the legislation was intended to transfer the powers and jurisdiction exercised by the Assam Revenue Tribunal to the Assam High Court and to an authority appointed by general or special order of the Provincial Government

The relevant provision in this Act is Sub-section (3) of Section 3 which is now seriously questioned before us. Sub-section (1) of Section 3 provides that subject to the provisions of Sub-section (3), the Assam High Court shall exercise such jurisdiction to entertain appeals and revise decisions in revenue cases as was vested in the Provincial Government immediately before the 1st day of April 1937 under any law for the time being in force.

Sub-section (2) also provides that the High Court " shall have jurisdiction to entertain appeals and revise decisions in all revenue cases, arising under the provisions of the enactments specified in Sch A, in which such jurisdiction was vested ill the Provincial Government. For these purposes, therefore, by operation of the above sub-sections of Section 3 of the Act, the High Court became substituted in place of the Revenue Tribunal.

But Sub-section (3) of that section provides that without prejudice to the foregoing provisions the authority appointed by general or special order of the Provincial Government shall exercise such jurisdiction to entertain appeals and revise decisions in matters arising under the provisions of the enactments specified in Sch B as was exercised by the Revenue Tribunal.

Now Sch. B refers amongst others to appeals against the order of the Excise Commissioner with power to call for proceedings and revise order of a subordinate officer u/s 9 of the Assam Excise Act (Act 1 of 1910). We thus find that whereas in all other matters the High Court exercises jurisdiction in place of the Revenue Tribunal by virtue of Sub-section (3) in regard to the enactments specified in Sch. B, including the power to entertain appeals and revise decisions in cases arising u/s 9 of the Excise Act, the jurisdiction is to be exercised by an authority appointed by general or special order of the Provincial Government.

It is argued that this provision has given a carteblanche to the Provincial Government to constitute a Tribunal to deal with such cases, however they like and whenever they like and it may be done even" in regard to individual cases without any restraint as to the personnel or its qualifications. It is therefore, argued that the Legislature In enacting Sub-section (3) of Section 3 has practically abdicated all its legislative functions and acted in violation of the statutory burden which the Constitution Act enjoined on it by virtue of the provisions of Section 296.

Unlike the Act of 1946, the present provision does not indicate or lay down any basic legislative policy or principle by which the Provincial Government is to be

guided in exercising the power delegated to it for constituting the Tribunal; on to contrary the entire legislative discretion has been conceded to the Provincial Government. It is, therefore, urged that, Sub-section (3) of Section 3 of the legislation impugned is void for excess of delegation.

7. If it is found that Sub-section (3) of Section 3 of the Act impugned is repugnant to Section 296, Government of India Act (the Constitution Act), the above sub-section must be declared to be void and it would destroy the very sanction on which the Government has proceeded to appoint the Authority to entertain appeals and revise decisions in these revenue cases. The difference between the Act of 1946 and Sub-section (3) of Section 3 of the impugned Act of 1948 is both real and significant.

It is quite clear from the earlier Act that the Legislature was keen to lay down the policy and principles on which the Tribunal was to be constituted." It laid down the strength of the Tribunal; it provided for the President and the Members of the Tribunal; their respective qualifications; their period of office; in case of any vacancy, the manner in which those posts were to be filled; and the powers which the tribunal was to exercise.

The present legislation says nothing except this that the authority constituted by the Provincial Government shall hear such revenue cases as arise under the laws specified in Sch B, including cases under the Excise Act. This in effect amounts to making the Government a parallel authority to constitute the Tribunal leaving the entire principle and policy of such constitution to be determined by the Government itself.

In other words it amounts to saying to the Provincial Government: "You appoint the Tribunal as and when you like, instead of my doing so". The whole function which the Constitution Act enjoined should be discharged by the Provincial Legislature, was thus delegated to the Provincial Government.

8. The Legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law. The policy may be stated in as few or as many words as the Legislature thinks fit, provided it gives an intelligent guidance to the subordinate authority.

The Court can interfere if there is no policy discernible at all or the delegation is of such a vague nature as to amount to abdication; but as the discretion vests in the Legislature to determine whether there is need for delegation, the Court should be slow to interfere with the exercise of such discretion except in clear cases of abuse. Therefore, it has to be assumed that the Legislature, while as a part of its legislative functions, can confer powers to make rules and regulations for the purpose of giving effect to an enactment, it is its duty to lay down the policy and the principles which would justify the framing of those rules and regulations.

In cases of emergency even larger powers of delegation may be conceded and justified by circumstances. Nevertheless, the law does not permit any absolute and unlimited delegation so as to amount to abdication or self-effacement. Normally, the Legislature must discharge its legislative functions itself and not through others. It may be also conceded that a Legislature which has plenary powers of legislation is free to legislate within the allotted sphere in any manner it considers necessary and desirable to give effect to its intention and policy. It may utilise any outside agency to any extent it finds necessary for doing things which it is unable to do itself, or may find it inconvenient to do.

It means in other words that the Legislature can entrust powers to an outside agency to act as a subordinate authority for framing rules and regulations for the purpose of giving effect to its intentions. But both in America and in this country it is now well-settled that it cannot abdicate its essential legislative functions and create a sort of a parallel Legislature to do what the Legislature itself should have done. In this respect the Indian Constitution approximates more to the American pattern.

9. The limitations of delegated legislation have been discussed in various decisions of the Supreme; Court. One of the earliest of them is what is known popularly as the Delhi Laws Act case;--"In re Article 143, Constitution of India and Delhi Laws Act (1912) etc."AIR 1951 SC 332 . There was some doubt expressed as to whether the said decision actually laid down any definite principle on the point of delegation.

Indeed, Patanjali Sastri C. J. in--"Kathi Raning Rawat v. State of Saurashtra" 1952 SC 123 pointed out that while undoubtedly certain definite conclusions were reached by the majority of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different and it was difficult to say that any particular principle had been laid down by the majority in the Delhi Laws Act case (B) which could be of assistance in the determination of other cases.

The position, however, has since been clarified by a recent pronouncement of the same Court in--"Rajnarain Singh v. Chairman Patna Administration Committee Patna" 1954 SC 569 where Bose J. who delivered the judgment of the Court opined with reference to the Delhi Laws Act case (B) that because of the elaborate tare with which every aspect of the problem was examined in that case, the decision tended to become diffuse; but if one concentrated on matters actually decided and forgot for the moment the reasons given, a plain" pattern emerged leaving only a narrow margin of doubt for future dispute. Having said this the learned Judge proceeded to emphasise the principles-thus:

In our opinion the majority view was that an executive authority can be authorised to modify an existing law or future laws, but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms and there was some divergence of view about this in the former

case. But this much is clear from the opinions set out above; it cannot include a change of policy.

Therefore, the real test is whether there is delegation in matters of essential legislative principle and policy to the Executive Government. If it is then it must be held that the legislation is void for excess of delegation. This is specially so where the Legislature has been entrusted by the Constitution With the right to enact a particular kind of legislation, as opposed to legislating generally on a particular topic.

In the former case there can be no delegation of legislative power; in the latter case, for ancillary purposes and with a view to give effect to the legislation, with due regard to local conditions some amount of delegation is permissible and valid and cannot be avoided in the present stage of social progress. A perusal of Section 296 itself shows the importance which the Constitution Act attached to the constitution of these Courts of appeal in revenue matters.

The earlier legislation of 1946 showed what the Constitution intended. It was expected that the Provincial Legislature would carry out the behest of the Constitution Act in framing the legislation on the point and indicate the relevant policy and principle, leaving only ancillary matters to the Provincial Government. Section 3(3) of the impugned Act, therefore, goes beyond the bounds of permissive delegation and is repugnant to Section 296 of the Constitution (Act).

10. The learned Advocate-General contends that there is nothing in the language of Section 296, Government of India Act to warrant the assumption that the Provincial Legislature in framing a law on the point of the constitution of Revenue Tribunals was required to do anything more than indicate by legislation that such a Tribunal had to be constituted by the Provincial Government.

All that the section said was that until other provision in that behalf was made by an Act of the Provincial Legislature, the Governor shall constitute the Tribunal. Therefore, if an Act in that behalf was brought into being by the Legislature, the obligation under the Government of India Act stood discharged.

As to how the Tribunal had to be constituted, who would be its members, what would be their qualification and tenure of office and the functions which they would discharge are mere matters of detail which could be conveniently left to the discretion of the executive authority and about which the Legislature was not concerned. He submits that the words "in that behalf" occurring in Section 290(2) do not mean anything more than indicating that the Legislature should authorise the creation of such a Tribunal, and that was all.

We are unable to accept this argument of the learned Advocate-General for the reasons already discussed above about the true meaning and import of Section 296 of the Constitution Act. The observations of the Privy Council in the well-known case of--"Empress v. Burah", 4 Cal 172 (180) (E) or some of the passages quoted from the various judgments of the Supreme Court in the Delhi

Laws Act case (B) do not advance the contention of the learned Counsel.

It is now too late to dispute the position that the Legislature has plenary powers of legislation when acting within the bounds of its legislative" sphere, but the case of *Empress v. Burah* (E) was a case of conditional legislation. When plenary powers, of legislation exist as to particular subjects, they may well be exercised either absolutely or conditionally. As observed in that case

Legislation conditional on the use of particular powers, or on the exercise of a limited discretion entrusted by the Legislature to persons in whom it places confidence, is not uncommon and in many circumstances, may be highly convenient.

The passages in the Delhi Laws Act case (B) on which the learned Counsel relies all accept the principle that delegation should not cross the line where the act of the Legislature may amount to abdication of legislative functions or self-effacement.

11. The learned Advocate-General then contends that the power to legislate by the Provincial Government is not derived from Section 296 of the Act. but from Sections 99 and 100 of the Act read with the relevant Legislative Lists. This is of course true; but in legislating on the field the Provincial Government is subject to the other provisions of the Constitution Act and Section 296 is one of them. In other words, in making such a legislation the Legislature must respect the provisions of Section 296 of the Act and carry out the obligations imposed by that Section.

Section 296 occurs in Part XII of the Act which deals with miscellaneous and general provisions. A mere perusal of the sections contained in that part would show that the sections had their overriding effect whenever necessary. If the contention of Mr. Lahiri prevails then the prohibition contained in Section 296(1) will have no meaning and the Legislature in enacting a law on the point could ignore the Constitutional inhibition.

At one stage Mr. Lahiri even suggested that Section 296 was a temporary provision and could not control Sections 99 and 100 of the Act. The contention is against the plain language of the section and if the contention were correct Sub-section (1) and (3) of the section would be redundant, because they condition a tribunal not only constituted by the Governor but also by the Legislature.

It is next urged by the learned Advocate-General that there are innumerable legislative precedents to support a legislation of the kind impugned before us. He has drawn our attention in this context to a large number of legislations which are similar in form to the Act impugned. He contends that some of those Acts have stood the test of judicial scrutiny and he relies on several decisions in support of his contention.

It is not necessary to notice many of them here because on examination it appears that they arise out of legislations where the Legislature had indicated

the policy of the law, but left the details of effectuating the legislation to the discretion of the executive authorities. In that sense they are cases of conditional legislation. I shall, however, refer to a law of them which appear to me of some importance; because in my view this part of the argument of the learned Advocate-General based as it is upon legislative precedents calls for serious attention.

12. The earliest to which reference has been made is a decision of the Privy Council in an appeal from the Dominion of Canada in--"Archibald G. Hodge v. Reg." (1883) 9 AC 117 (F). The subject-matter which arose for consideration in that case was the legislative character of certain sections of "The Liquor License Act of 1877, Cap. 181, Revised Statutes of Ontario." It authorised the appointment of License Commissioners to act in each Municipality and empowered them to pass, under the name of resolutions certain bylaws or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses, for limiting their number for declaring that a limited number of persons qualified to have tavern licenses were exempted by certain tavern accommodation required by the law, for regulating licensed taverns and shops, for defining the powers and duties of license inspectors and for imposing penalties for infraction of the by laws.

It is obvious that the Legislature indicated its broad policy and as the above matters were of a local nature it left the discretion for creating bylaws on those points to the Licensing Commissioners appointed by the Statute who in these respects assumed the powers of the Municipal institutions. Their Lordships observed

that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc.

The decision in--"Veerappa Pillai v. Raman & Hainan Ltd. 1952 SC 192 relates to the Motor Vehicles Act. It was held there that the grant of a permit under the Act was entirely within the discretion of the transport authorities and depended upon several circumstances which had to be taken into account. It was, however, recognised at the same time that the Motor Vehicles Act was a statute which created new rights and liabilities and prescribed an elaborate procedure for their regulation that being so, it was obvious that the legislation embodied both policy and principle and only left the details of its working to the discretion of the executive authorities.

The other decision of the Supreme Court in--"Harishankar Bagla v. The State of Madhya Pradesh" 1954 SC 465 considered the validity of certain sections of the Essential Supplies (Temporary Powers) Act, 1946 in their relation to the Cotton Textiles (Control of Movements) Order, 1948. The policy underlying the Act was to regulate the transport of cotton textiles in a manner so as to ensure an even distribution of the commodity in the country and make it available at a fair price

to all.

The preamble and the body of the sections in the Essential Supplies Act sufficiently formulate the legislative policy and the ambit and character of the Act was such that the details of that policy could only be worked out by delegating them to a subordinate authority within the framework of that policy. The case, therefore, is of no help to the learned Advocate-General. On the contrary it was reiterated in that case that the Legislature cannot

delegate its function of laying down legislative policy in respect of a measure and its formulation as a rule of conduct. The Legislature must declare the policy of the law and the legal principles which are to control any given cases and must provide a standard to guide the officials or the body in power to execute the law.

The only other decision which needs mention is--"Edward Mills Co. Ltd., Beawar v. State of Ajmer" 1955 SC 25 This was a case on its own facts. It was held there that there was an element of delegation implied in the provisions of Section 27, Minimum Wages Act, inasmuch as the Legislature authorised some other body to do some thing which it might have done itself. But such delegation was not held in the circumstances to be unwarranted or unconstitutional.

It is not possible for the Legislature to provide specifically for all cases, howsoever much it may try to project its mind into the future. Therefore, legislation from the very, earliest times and particularly in modern times has taken the form of conditional legislation.

13. I recognise that appointment of public officers is not necessarily a legislative function unless the Legislature is vested therewith by constitutional provisions.

But the creation of a public office is generally said or assumed to be a legislative function, though it has been held in a number of cases that the Legislature in providing for the creation of local offices, may make the operation of the Act in a given locality dependent upon some contingency or event. In either case the Legislature cannot delegate to another body the power to create an office or appoint an officer which is enjoined upon it by a constitutional provision (vide 79 Law Ed (Anno.) 573-575 (J)). At another place in the same volume of Lawyers Edition 79 Law Ed (Anno.) 479 (K) the following relevant passage occurs:

It must be recognised at the outset that there is no absolute and universal formula for determining in all cases the powers which must be exercised by the legislative body itself and those which may be delegated by the Legislature to some subordinate or administrative agency. The line of demarcation between those essentially legislative functions which must be exercised by the Legislature itself and those of an administrative nature, or involving mere details, which may be delegated to another body or officer, is very vague and fluctuating, and is often difficult to define or discern.

Crawford in his well-known treatise on "Statutory Construction" at p. 24 formulates the principle thus:

Inasmuch as the legislative power of the government is vested exclusively in the Legislature in accordance with the doctrine of the separation of powers, the general rule is that the Legislature cannot surrender or abdicate such power. As a result, any attempt to do so, is unconstitutional and void. Nor can this power to make laws be delegated by the Legislature to any other authority *delegatus non potest delegare*.

A power however, which is not legislative in character may be delegated. If the power, on the other hand is clearly legislative in nature and exclusively belongs to the legislative department of the government, its delegation by the Legislature will be unconstitutional. Obviously, the difficulty lies in determining what powers belong exclusively to the legislative department.

The Courts have, however, announced a number of principles by which the legality of any delegation of legislative power may be determined, but the application of these principles is not and has not been easy, as will appear from the further discussion in this chapter. As a general rule, it would seem to be the nature of the power rather than the manner " in which it is exercised by the administrative officer, which determines whether the delegation is lawful. In Weaver's "Constitutional Law" at p. 328 the learned author observes:

The powers delegated to administrative authorities are those which cannot be exercised successfully by one of the departments. They are functions that require a blending of legislative, executive, and judicial powers; that must be performed by more expert bodies; that demand the use of discretion; that require promptness of action; or that will permit the development of a social and economic policy based on a broad perspective without the delays, difficulties, or restrictions incident to Court procedure or legislative action.

Keeping in view the various tests enumerated above, it appears to me that here the Constitution enjoined the creation of the Tribunal by the Provincial Legislature u/s 290, Constitution Act; but the Provincial Legislature in violation of this constitutional mandates left this essential legislative function to be performed by the Provincial Government on the authority of the impugned Act, without indicating the policy or principle by which the Provincial Government was to be guided in the performance of the duty so delegated to it; and vesting an absolute or unlimited discretion in the Government for this purpose. The said provision of the impugned Act therefore is void for excess of delegation.

14. As a last resort Mr. Lahiri contends that this Court should not interfere in these petitions for writs, because the provision in the impugned Act even though invalid or void for excess of delegation u/s 296, Government of India Act, would be good law if enacted under the present Constitution.

It is urged that the purpose of the writs would be defeated if the State Legislature were to enact the law in the same form in which the impugned Act stands at present; and there being no such provision in the present Constitution as Section 296, Constitution Act, the act of the Legislature could not be

questioned.

We have no reason to impute any such sinister intention to the Legislature and to assume that the State Legislature will persist in its error and perpetuate a legislation which gives a wide and unfettered discretion to the executive Government without any legislative policy or background, and enables them to act as arbitrarily as they can in constituting this very important appellate revenue tribunal.

Even if the Legislature does so, it might well be argued, as it has been argued now by Mr. Ranadeb Chaudhuri for the petitioners, that such a legislation would be repugnant to Article 19(1)(f) of the Constitution & could not be regarded as a reasonable piece of legislation. He has placed reliance on several judgments of the Supreme Court to fortify his sub-mission. The question is, however, hypothetical and we do not propose to answer it at this stage.

It is sufficient to say that Section 3(3) of the impugned Act being repugnant to Section 290, Constitution Act, is void and inoperative for all purposes. It could not be regarded as an "existing law" under the present: Constitution and gave no authority to Government In issue the notification winch they did constituting the Revenue Tribunal to hear these cases.

15. At this stage it is convenient to deal with the contention of Mr. Section K. Ghose that even if the offending section in the Act impugned is held to be valid, the Government became functions, office after once the power constituting the tribunal under the Act had been exercised. Thereafter, according to the learned Counsel, the power lapsed unless there was a fresh legislation authorising the act by the Provincial Legislature.

It is an admitted fact that in the exercise of the power u/s 3(3) of the impugned Act (Act 4 of 1948), the Governor of Assam purported to create various appellate authorities from time to time. The authorities so constituted to hear appeal in revenue cases as specified in Sch. B of the impugned Act may be chronologically specified as follows:

1. On 15-6-48--the Minister of Excise to the Government of Assam (this was held to be repugnant to Section 296(1), Constitution Act).
2. On 15-9-52--the Secretary to the Government of Assam in Excise Department, the Secretary, Finance and the Commissioner of Divisions cancelling the notification dated 15-6-48.
3. On 11-5-55--the Secretary, Excise Department, the Secretary, Finance, and the Commissioner of Hills Division and Appeals cancelling the notification dated 15-9-52.
4. On 5-7-55--Commissioner of Hills Division and Appeals by cancelling notification dated 11-5-55.

It would thus appear that the constitution of the tribunal was altered by the

Government from time to time. Mr. Ghose contends that there is a difference between the constitution of the tribunal and the filling up of vacancies which might occur therein. The latter could of course be done by the Government but the constitution itself could not be altered from stage to stage. The power to constitute the tribunal was a legislative function which even if validly delegated, could not be so exercised. It could be done only once and thereafter the power was exhausted.

To hold otherwise is to concede a perennial source of legislative function to Government. The question of filling up vacancies did not arise, because the officers did not hold office *ex officio*. I agree that much of this is true. It may be inexpedient and even improper to confer such a power on the Government; but the language of Section 3(3) of the impugned Act is wide enough to justify the claim of the Government.

Mr. Ghose, however contends that if Section 3(3) of the impugned Act is given that wide interpretation so as to arm the State Government with power to constitute a tribunal however they like and whenever they like, without any fetter or restraint on their discretion, they may create a tribunal even for decision of individual cases. He points out that in fact the learned Advocate-General strongly claims this interpretation to be correct.

The section viewed in that light clearly offends against the ban of Article 14 of the Constitution as it would enable Government to discriminate between individual cases. Mr. Ghose relies upon the high authority of the Supreme Court in support of his contention. There is undoubtedly much force in this contention but in the view which we have taken on; the first point it seems unnecessary to decide this, aspect of the matter finally.

16. I shall now turn to the question whether the notification dated 5-7-55 appointing the present appellate authority is repugnant to the scheme and policy of Section 9 of the Excise Act (Act 1 of 1910) and as such the authority is not duly constituted. The notification in question was issued by the Governor in exercise of the powers conferred on him u/s 3(3) of the impugned Act.

If therefore it is found, as it has already been found by me earlier, that Section 3(3) of the impugned Act is void, there is no legal warrant for the constitution of the tribunal which accordingly falls through. But the argument is based on the alternative assumption of the validity of Section 3(3) of the impugned Act. In that light it deserves to be examined. It is true that the point as such has not been specifically raised in the petitions but as the point arose on the face of Section 9 of the Excise Act itself we allowed the parties to discuss the same.

17. It is as well to recall at this stage that the impugned Act was to provide for the transfer of powers and jurisdiction of the Assam Revenue Tribunal constituted under the earlier Act of 1946. As already discussed, the jurisdiction of the said Revenue Tribunal passed on to the High Court in all revenue cases arising under the provisions of the enactments specified in Sch. A; whereas under Sub-section

(3) of Section 3 of the impugned Act the jurisdiction of the Tribunal (since defunct) was to be exercised by an authority appointed by the Provincial Government in matters arising under the provisions of the enactments specified in Sch. B of the Act.

One of the enactments specified in Sch. B is The Eastern Bengal and Assam Excise Act (Act 1 of 1910). The Schedule also specifically refers to appeals against the order of the Excise Commissioner and the power to call for proceedings and revise order of a subordinate officer u/s 9 of the Excise Act. It is quite obvious that the intention of the Legislature in producing the impugned Act was to give effect, inter alia, to the provisions of the Excise Act.

There is nothing in any portion of the impugned Act to indicate that the intention of the Legislature was to abrogate or repeal the provisions of Section 9 of the Excise Act, as I understood the learned Advocate General to contend at one stage. The two Acts are not inconsistent with each other in any sense of the term. In fact the Act of 1948, which is a general Act for the distribution of the jurisdiction of the quondam Revenue Tribunal constituted under the repealed Act of 1946, means to effectuate Section 9 of the Excise Act and carry out its intent and purpose.

There is nothing at all in the impugned Act to encourage the erroneous assumption that it purported to repeal impliedly or to modify in any manner the provisions of the Excise Act. The principle of implied repeal could be invoked only in those cases where the two Acts, by a competent Legislature, are inconsistent or repugnant. In that event the Court might well be invited to hold that the later Act impliedly repealed the earlier.

Even in such cases the Court leans against an implied repeal unless the two Acts are so manifestly repugnant to each other that effect cannot be given to both at the same time. Besides Special Acts like the Excise Act cannot be repealed by General Acts, like the impugned Act, unless by express or necessary intendment. Here there is no such case at all and we must proceed to examine the point on the footing that Section 9 of the Excise Act was in no way, amended, altered or repealed by the impugned Act.

It follows, therefore, that the Provincial Government, when it proceeded to appoint an authority u/s 3(3) of the impugned Act, with a view to carry out the purpose of Section 9 of the Excise Act, should have proceeded to do so consistently with the provisions of the latter Act and not in violation of the scheme and policy thereof.

The authority given to the Provincial Government under the impugned Act was given to the end that the provisions of the Statute embodied in Section 9 of the Excise Act should be better carried into effect and not with the view of neutralising or contradicting those provisions (vide :--"Rajam Chetti v. Seshayya" 18 Mad 236 (L)).

18. Let us then advert to the provisions of Section 9 of the Excise Act, as it then stood, to see whether the notification appointing the present appellate authority is repugnant to that section. Section 9 runs thus:

1. In all proceedings under this Act, the Excise Commissioner and the Commissioner of the Division shall be subject to the control of the Board, and the Collector shall be subject to the control of the Excise Commissioner and the Board, and shall also, in such cases and such matters as the (Provincial Government) may specify, be subject to the control of the Commissioner of the Division.

2. Orders passed under this Act or under any rule made hereunder shall be appealable as follows in manner prescribed by such rules as the (Provincial Government) may make in this behalf

(a) to the District Collector, any order passed by a Collector other than the District Collector;

(b) to the Excise Commissioner, or, in such cases and such matters as the (Provincial Government) may specify, to the Commissioner of the Division, any order passed by the District Collector; and

(c) to the Board, any order passed by the Excise Commissioner or by the Commissioner of a Division.

3. In cases not provided for by Clause (a), (b) and (c) of Sub-section (2), orders passed under this Act or under any rules made hereunder shall be appealable in such cases and to such authorities as the (Provincial Government) may declare by rules made in this behalf.

4. The Board, the Excise Commissioner, the Commissioner of the Division (in such case and such matters as the (Provincial Government may specify), or the District Collector may call for the proceedings held by any officer or person subordinate to it or him or subject to its or his control and pass such orders thereon as it or he may think fit.

19. The scheme of the section shows that it envisages a hierarchy of revenue Courts and Tribunals. At the top is the Board. Next in order is the Excise Commissioner and the Commissioner of the Division, both being subject to the control of the Board. The Excise Commissioner and the Commissioner of the Division are, therefore, for the purposes of Section 9, Excise Act officers of co-ordinate jurisdiction.

The lowest in the order is the Collector who is subject to the control of the Excise Commissioner and the Board and in specified matters subject to the control of the Commissioner of the Division. The term "Commissioner of the Division" has not been defined in the Act but the term "Collector" has been defined. It includes the "District Collector" which again means the Chief Officer in charge of the revenue administration of a District.

Sub-section (2) of Section 9 clearly provides that an appeal lies to the "District Collector" from any order passed by the "Collector" other than the District Collector; from the order of the District Collector to the Excise Commissioner, or, in matters specified, to the Commissioner of the Division; and finally to the Board against an order passed by the Excise Commissioner or by the Commissioner of the Division.

Thus the Excise Commissioner and the Commissioner of the Division have almost co-ordinate powers under the scheme of Section 9; if at all, the powers of the Commissioner of the Division are more restricted as they relate only to matters specified by the Provincial Government.

There is no provision for any appeal to the Commissioner of the Division against the orders of the Excise Commissioner. The appeal lies against the orders of the Excise Commissioner to the Board and in no sense under the scheme and policy underlying Section 9, Excise Act, as it then stood, the appellate, powers of the Commissioner of the Division could be equated to those of the Board, which was the highest appellate authority, even against the orders of the Commissioner of the Division.

The present notification purports to appoint the Commissioner of Hills Division and Appeals as the highest appellate authority to hear appeals in these cases. This is manifestly in violation of the above section and repugnant to its clear intent and purpose. It is admitted on all hands that originally there were two Divisional Commissioners in the State designated as Commissioner "Surma Valley and Hill Division" and the Commissioner "Assam Valley Division" respectively.

Later the posts were abolished. Then again an inspecting Commissioner was appointed for the whole State. Later again two posts of Commissioners have been created designated as Commissioner Hills and Plains Divisions respectively. How far these administrative changes have tended to facilitate administrative convenience is more than we can say; but it is obvious that the Commissioner Hills Division is a "Commissioner of the Division".

Indeed this proposition could not be seriously disputed but it was suggested that the full designation of the officer is "Commissioner Hills Division and Appeals", and therefore the officer is not merely the Commissioner of a Division as contemplated by Section 9 but something else. According to the learned Advocate General the addition of the words "And Appeals" in the style and designation of the officer causes all the difference and metamorphoses him into something "rich and strange".

The argument in my opinion is futile and does not merit any serious attention. The officer continues to be a Commissioner of the Division in spite of all the other functions which he may fulfill; and that being so he could not be authorised on the plain terms of Section 9 of the Act as it stood at the time of the notification to set on appeal over the orders of the Excise Commissioner and the notification

constituting such a Tribunal is therefore void.

20. Mr. Lahiri has, however, tried to wriggle out of the difficulty by another line of reasoning based upon the Assam Commissioner's Powers Distribution Act (Act 1 of 1939). It appears that by the time the Act came to be passed the post of the Commissioner Surma Valley and Hill Division had been abolished

The said Act provided u/s 2 that after the commencement thereof all powers and jurisdictions in Civil, Criminal and Revenue matters theretofore exercised by the Commissioner Surma Valley and Hill Division should be deemed to be transferred to the Commissioner Assam Valley Division or to such authority as the Governor might direct.

Sub-section (2) of Section 3 of the Act, however, made an important exception. It stated that any jurisdiction to hear appeals or revise decisions in revenue cases arising under both the Divisions, in respect of which the jurisdiction immediately before the commencement of the Act was vested in the Commissioner of a Division should be exercised by a Tribunal constituted u/s 296, Government of India Act.

The learned Advocate-General, therefore, argues that by virtue of this provision the Commissioner of the Division, ceased to exist for purposes of Section 9, Excise Act and was substituted by the Revenue Tribunal appointed u/s 296. He also seeks to strengthen his submissions by a reference to the Schedules in the Act. In Schedule A for purposes of construction the term Commissioner of (or the Division was to be read as Commissioner, Assam Valley Division or such other authority as the Governor may direct.

In Schedule B it was provided that in Section 4(13), General Clauses Act, both Central and Provincial, after the words "a Division" the words "and shall include the Assam Revenue Tribunal while exercising-"jurisdiction heretofore exercised by a Commissioner in appeals and revisions in Revenue cases shall be inserted". I am unable to see how this Act assists the learned Counsel at all in the interpretation "of Section 9, Excise Act or alters the scheme and policy of the Section.

The Act in question relates only to the distribution of the powers of the Commissioner. It does not in any manner affect or re-enact Section 9, Excise Act, wherein the hierarchy of Courts or Tribunals stands as it was. It may be that for a time the post of the Commissioner of a Division was abolished and substituted by some other body or authority. But it cannot be spelled out from the statute that when the post again comes into being the officer holding it can be invested with higher powers than what is contemplated by that Section of the Excise Act.

If on the contrary it is suggested, as the argument appears to imply, that "the Commissioner of the Division" has been abolished for all purposes u/s 9, Excise Act by virtue of the provisions of Act 1 of 1939 and has been substituted by another body, then the appointment of the present "Commissioner of a Division"

to hear these revenue cases as an appellate authority would be not only in violation of Section 9, Excise Act but also in violation of Act 1 of 1939, the officer having no longer any such authority. The argument defeat's itself, because in that case Act 1 of 1939 would be deemed to have bereft, the Commissioner of a Division to hear any such revenue matter by operation of Section 3(2) of the Act.

21. All this discussion, however, becomes somewhat unreal and academic when we realise that Section 9, Excise Act as it stood at the time of the notification was subsequently amended. Indeed this was not discovered until long after the arguments were closed and the cases were pending for judgment.

We then at the request of the parties, heard them afresh as to the effect of the said amendment which was introduced by Section 2 of Act 23 of 1955 and received the assent of the Governor on 28-12-1955. It may be noted that the appeals in the present cases were heard by the Appellate Authority in February last that is after the amendment had come into force. The amendment is as follows:

For Section 9 of the Principal Act the following shall be substituted, namely:

9(1) Orders passed under this Act or under any rule made hereunder shall be appealable as follows in manner prescribed by such rules as the State Government may make in this behalf.

(a) to the Excise Commissioner, any order passed by the District Collector or a Collector other than the District Collector;

(b) to the Appellate Authority appointed by the State Government for the purpose, any order passed ; by the Excise Commissioner.

(2) In cases not provided for by Clause (a) and (b) of Sub-section (1), orders passed under this Act or under any rules made hereunder shall be appealable to such authorities as the State Government may prescribe.

(3) The Appellate Authority, the Excise Commissioner or the District Collector may call for the proceedings held by any officer or person subordinate to it or him or subject to its or his control and pass such orders thereon as it or he may think fit.

22. That the amendment is by a competent Legislature and is otherwise quite in order is beyond question. Unlike the old section, the substituted Section 9 does not mention the "Commissioner of a Division", as one of the authorities entitled to hear appeals in revenue cases under the section. It speaks only of the Collector, the District Collector, the Commissioner of Excise and the Appellate Authority appointed by the State Government for the purpose.

It is, therefore argued that it removes the disability, if any, under which the "Commissioner of a Division" laboured under the old section in the matter of his being an officer of co-ordinate jurisdiction with the Excise Commissioner and subject to the appellate authority and control of the Board.

It is further submitted that the disability having been removed the Commissioner Hills Division and Appeals could be suitably appointed to hear appeals in such cases from the orders of the Excise Commissioner by a Government notification constituting him as the Appellate Authority. It is true that the Government notification in the present cases was much earlier, yet by the time the cases came to be heard the change in the law had come into, being and it would be fruitless to issue writs in such cases when the purpose of the writs could be easily circumvented by another notification appointing the same Authority.

There is unquestionably much strength in these submissions and I would have had no hesitation in accepting them, but for two insurmountable difficulties. The first is that there is no legislative warrant for the constitution of the Appellate Authority under the notification aforesaid, Section 3(3) of the impugned Act, on the authority of which the said notification was issued, having been held to be void and repugnant to Section 290 of the Constitution Act.

The decision in--"Bhikaji Narain Dhakras v. State of Madhya Pradesh" 1955 SC 781 : AIR V 42 does not assist the learned Advocate General, because there the legislation in question was a perfectly valid legislation when it was passed but it was held to be void to the extent that it came into conflict with Article 13(4) read with Article 31 of the Constitution. Therefore when Article 31 was amended and the bar was removed the legislation continued to function as a valid piece of legislation. To quote the felicitous phraseology of Section R. Das, J. as" lie then was:

The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then it is not intelligible what "existing law" could have been sought to be saved from the operation of Article 19(1)(g) by the amended Clause (6) in so far as it sanctioned the creation of State monopoly, for "ex hypothesi", all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of Clause. (6) as it then stood.

Here the true position is that Section 3(3) was ab initio void, as being without any legislative sanction. It was tainted at its very source and was as such incapable of any legal effect. Then was no question of removal of any constitutional bar which came to operate on it at any later stage.

The second difficulty is the prohibition contained in Section 3(2), Assam Commissioner's Powers Distribution Act (Act 1 of 1939), which specifically divested the then Commissioner of the jurisdiction to entertain and revise decisions in such revenue cases. The Act still continues to be good law and as I understand no alterations or modifications have been made in the Act so as to place the Commissioner, Hills Division and Appeals on any better footing.

The Act as construed by the learned Advocate General himself vests the

jurisdiction in these matters in the Tribunal constituted u/s 296 of the then Government of India Act and to that extent takes away the jurisdiction of the Commissioner in that regard.

We are therefore, constrained to hold that the Appellate Authority constituted in these cases by virtue of the notification dated 5-7-1955 has not been validly constituted and as such was not competent to hear these appeals. The order of the Appellate Authority must therefore be quashed by writs of certiorari.

23. It now remains to say a few words about the facts of the individual cases. Learned Counsel for the petitioners were conscious of their limitation in attempting to invoke our jurisdiction under Article 226 of the Constitution merely on facts. They have therefore tried to confine their arguments to certain broad aspects of then cases.

Civil Rule No. 31 of 1956 In Civil Rule No. 31 of 1956 the order of the Excise Commissioner is in favour of the petitioner. Therefore if the order of the Appellate Authority is quashed the order in his favour will stand. It is therefore unnecessary for us to go into, the facts of that case at all.

Civil Rule No. 33 of 1956 : Similarly in Civil Rule No. 33 of 1956 if the order of the Appellate Authority; goes the order of the Commissioner stands. In this case the Commissioner has directed resettlement of the liquor shop, It is not for us to interfere with, the merits of the order. The petitioner, if so advised, may seek his remedy before an Appellate Authority duly constituted for the purpose.

We cannot say that the order of the Excise Commissioner is manifestly erroneous or offends against the principles of natural justice. It would be for the duly constituted Appellate Authority to decide about the merits of the petitioner's claim. Whether Narendra Nath Bora Respondent 4 is or is not a suitable person to obtain settlement is not for us to decide now.

It appears that the petitioner also has been considered as grossly unsuitable for an excise lessee-because of his indigent circumstances and was regarded as a set up candidate. These are entirely questions of fact which we cannot review at this stage. It is contended that the order of resettlement is without jurisdiction, but nothing has been brought to our notice to justify the same.

Civil Rule No. 32 of 1956 : The petitioner has-been refused settlement both by the Excise Commissioner and the Appellate Authority. Therefore even if the order of the Appellate Authority goes the order of the Commissioner's stands against him. He challenges the Commissioner's order. on the ground that only in the previous year the Appellate Authority found him the proper person for receiving settlement of the excise shop, yet the Excise Commissioner had persisted in his refusal to make settlement with the petitioner.

The order of the Excise Commissioner has been placed before us and we find that it depends entirely on a consideration of facts and relevant materials, The officer thinks that the petitioner has held the shop continuously for more than 15

years; that he has held other excise shops also and that he being fairly old should now give way to younger aspirants. He further holds that under the rules there is no compulsion now to giving preference to a sitting lesson. It is therefore impossible for us to question the propriety of the order on those grounds. The petitioner may have his remedy, if any, before a duly constituted Appellate Tribunal.

Civil Rule No. 26 of 1956 : In this case also the petitioner failed both before the Excise Commissioner and the Appellate Authority. Therefore, even if the order of the Appellate Authority is quashed, the petitioner does not stand to gain. Here again we are asked to interfere with the order of the Excise Commissioner on grounds which are essentially questions of fact, he finds that the balance between the petitioner and the person to whom he offered settlement was "almost evenly weighed." He further opined that the petitioner was old and his sons were well-settled, therefore some others should have a chance. These grounds may or may not be quite adequate, but some discretion has to be allowed to the authorities making these settlements.

24. On merits, therefore, it is not possible for us to interfere with the orders of the Commissioner at this stage and convert ourselves into a Court of appeal on facts. In the circumstances, there is no other alternative except to direct that the order of the Appellate Authority in each case should be quashed leaving it to the parties affected by the order of the Commissioner to seek their remedies if available, before the appropriate Authority. We may only hope that the State Legislature will be pleased to enact an appropriate legislation on the point so as to enable the constitution of an Appellate Authority at an early date.

25. The applications are accordingly allowed and the Rules are made absolute, but in the circumstances, without costs. The orders of the Appellate

Authority which have been quashed shall not take effect.

Deka, J.

26. I agree.