

(1951) 07 BOM CK 0006
In the Bombay High Court
Case No : Misc. Application No. 201 of 1950

The State of Bombay

APPELLANT

Vs

Heman Santlal Alreja

RESPONDENT

Date of Decision : 24-07-1951

Acts Referred:

Bombay General Clauses Act, 1904 — Section 3(2), 7
Bombay Land Requisition (Amendment) Act, 1950 — Section 2
Bombay Land Requisition Act, 1948 — Section 3, 3(1), 3(2), 5, 6
Bombay Land Requisition Ordinance, 1947 — Section 20
Civil Procedure Code, 1908 (CPC) — Order 3 Rule 4
Constitution of India, 1950 — Article 13, 13(1), 19, 19(1), 19(2)
Government of India Act, 1935 — Section 1(1), 104, 292, 293, 299(2)
Preventive Detention (Amendment) Act, 1951 — Section 11(1)

Citation : AIR 1952 Bom 16 : (1951) 53 BOMLR 837

Hon'ble Judges : Chagla, C.J.;Gajendragadkar, J

Bench : Division Bench

Advocate : C.K. Daphtary, Solicitor General; M.P. Amin, General and H.M. Seervai, for the Appellant; M.M. Javeri and N.A. Palkhiwala, for the Respondent

Judgement

Chagla, C.J.

[1] This appeal arises out of a petition challenging an order of requisition made u/s 6 (4) (a), Bombay Land Requisition Act, 1948, requisitioning the premises of the petitioner who occupied them as a sub-tenant. When this petition first came up before Tendolkar J. he held that Act XXXIII [33] of 1948 was void. The State of Bombay came in appeal and we held Heman Santlal Alreja v. State of Bombay, 53 com. L.R. 355, that that Act was not void and remanded the petition to the learned Judge for disposal on merits. The learned Judge considered various preliminary points that were raised with regard to the validity of legislation dealing with requisition. He came to the conclusion that Act XXXIII [33] of 1948 amended by the Bombay Land Requisition (Amendment) Act, 1950, (Act II [2] of 1950) and further amended by the Bombay Land Requisition (Second Amendment) Act, 1950, (Act XXXIX [39] of 1950) was void on various grounds

and he also held that the order of requisition dated 29 5 1950, was bad inasmuch as it did not state the public purpose for which the premises had been requisitioned. He, therefore, issued a writ of mandamus against the State of Bombay restraining it from enforcing or taking any proceedings in the enforcement of that order. The State of Bombay has appealed from that decision.

[2] In considering the validity of the Requisition Act, we have to bear in mind that although the administration of the Act may have resulted in some hardship, on the whole it is a beneficent measure intended to subserve a very pressing social need. It, therefore, calls at our hands a benevolent interpretation. The Court must always lean in favour of holding the validity of an Act rather than against it. There may be cases where a law is alleged to contravene fundamental rights. In such a case, undoubtedly, the Court must zealously scrutinize the provisions of the impugned Act in order to see that fundamental rights are not violated. But where what is challenged is only the letter of the law and substance is in the interest of a large body of citizens, then as far as possible the Court must try to uphold the substance and not permit the letter to defeat the object of the Legislature.

[3] The first question that arises on this appeal is whether the Provincial Legislature set up under the Government of India Act, 1935, was competent to enact Act XXXIII [33] of 1918. It may be pointed out that in the former appeal before us it was not disputed by counsel that when the Act was passed in April 1948 the Legislature that passed it had legislative competence and the Act continued to be a valid Act and all its provisions were valid until 26-1-1950. When counsel make a concession at the bar, it means that the point is so clear and inarguable that it must be taken as well settled and any decision based on a concession must be considered as a binding decision. Therefore, we did hold in the last appeal that Act XXXIII [33] of 1948 was passed by a competent Legislature. The learned Judge below permitted the parties to re-agitate the question before him. Perhaps he thought that the question was of such importance that further arguments were necessary and the decision should not be permitted to rest on a mere concession. Be that as it may, the learned Judge has considered the question and has come to the conclusion that Act XXXIII [33] of 1948 was ultra vires of the Provincial Legislature which enacted it in 1948.

(4) Section 299(3), Government of India Act, 1935, provided (to the extent that it is material) that neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land. The Act under consideration is an Act authorising the Government to requisition land for any purpose and the learned Judge has taken the view that requisition permissible under the Act is for an indefinite period and, therefore, in law such requisitioning amounts to compulsory acquisition, and as compulsory acquisition is admittedly not for public purposes, the Provincial Legislature were debarred from enacting any such law by reason of Section 299(2), Government of India Act. Therefore the question that we have to

determine is whether on a true construction of Act XXXIII [33] of 1948 it can be said that it is a law authorising the compulsory acquisition for public purposes of any land. The first question that arises is whether requisitioning, whether for a definite or indefinite duration, amounts to compulsory acquisition within the meaning of Section 299(2), and in order to answer this question it is necessary to state the legislative history with regard to this sub-section. In *Tan Bug Taim v. Collector of Bombay*, 47 Bom. L. R. 1010, Bhagwati J. took the view that requisition was not acquisition because it only created in the Government the right to temporary use and possession of land and did not transfer any title. He therefore, took the view that the Provincial Legislature had no competence to legislate with regard to requisition of land as the subject-matter did not fall within Entry 9 of List II which dealt with compulsory acquisition of land. In view of this decision, the Government of India issued a notification on 21-10-1947, u/s 104, Government of India Act, by which the Governor General empowered all Provincial Legislatures to enact laws with respect to the requisitioning of land, being a matter not enumerated in any of the Lists in Schedule 7 to the Act. It is, therefore, clear that the Government of India accepted Bhagwati J.'s decision as correct, realised that requisition was different from acquisition, that requisitioning was not provided for in any of the Lists, and u/s 104 expressly gave power to the Provincial Legislatures to legislate with regard to requisitioning of land. I should have thought that this legislative history makes it impossible to contend that requisitioning can ever be the same thing as acquisition. It is also clear that when the Provincial Legislature passed Act XXXIII [33] of 1913 it was not legislating in respect of Entry 9 in List II but it was legislating in pursuance of the power conferred upon it by the notification of 21-10-1917, and it may be noted that as far as this power is concerned it is not limited in the manner the power for compulsory acquisition is limited by Section 299(2), Government of India Act. If the Legislature legislated pursuant to the power conferred upon it under the notification, then no question can arise whether requisition was for any purpose or for public purpose.

[5] Further, in *Dwarkanadas Shrinivas v. Sholapur Mills*, 53 Bom. L. R. 218, a division bench of this Court was considering the distinction between taking possession and acquisition under Article 31(a) of the Constitution, and, in my judgment, at p. 226 I pointed out that the distinction between acquisition and possession is that whereas in the case of the former there is a transfer of ownership and transfer of title, in the latter case there is no transfer of ownership or title. If this be the correct test, then it is clear that when Government take possession of property under the powers given to it under Act XXXIII (33) of 1918, they are requisitioning property and not acquiring it, because it is not disputed that there is no transfer of ownership or title when possession is handed over to Government, the ownership and title continuing to remain vested in the owner of the property. The view we took as to the meaning of acquisition has received support from a judgment of the Supreme Court in *Charanjit Lal v. Union of India*, 53 Bom. L. R. 489 sc . Mukherjea J. at p. 515

says:

"In the context in which the word "acquisition" appears in Article 31(2), it can only mean and refer to acquisition of the entire interest of the previous holder by transfer of title,..."

[6] The learned Judge has come to the conclusion that he has on the ground that Bhagwati J.'s judgment in *Tan Bug Taim v. Collector of Bombay*, 47 Bom L.R. 1010 was based upon the minority judgment in *Minister of State for the Army v. Dalziel*, (1944) 63 L.R. 261 and according to Tendolkar J. as the Supreme Court has now held that the minority judgment is no longer good law but the majority judgment correctly lays down the law, the judgment of Bhagwati J. must be considered to be overruled. Turning to this Australian case, the facts on which the judgment of the High Court was based were that one Arthur Dalziel was the occupier as a weekly tenant of certain vacant land and this land was taken possession of by the Commonwealth of Australia. The taking possession of was held to be for an indefinite period, and the question that arose was whether on these facts the taking possession constituted an acquisition of property within the meaning of the placitum in the Australian Constitution (Section 51 (xxxi)) which empowered the Parliament to make laws with respect to the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws. The majority of the Judges took the view that the taking possession of property for an indefinite period constituted, acquisition. Rich J. in one of the majority judgments at p. 285 states :

"The language used (of the placitum) is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property."

The Chief Justice who delivered the minority judgment took the view that the only question to consider was whether the rights acquired by the State were proprietary rights. According to him the Commonwealth was merely in the position of a licensee and not an owner and therefore he came to the conclusion that there was no acquisition within the meaning of the placitum. It was this minority judgment which Bhagwati J. accepted as laying down the correct law. One thing must be borne in mind that the High Court of Australia was not considering what we have to consider here, viz. the distinction between acquisition and requisition. Nor did the Court in Australia have a clear legislative history before it to help to construe the expression "acquisition" used in the Constitution.

[7] Now, turning to the Supreme Court judgment, Mukherjea J. was considering whether the contention put forward by the Attorney General in *Charanjit Lal's* case (53 Bom L.R. 499) that the word "property" as used in Article 31 of the Constitution connoted the entire property, that is to say, the totality of the rights

which the ownership of the object connotes, and the learned Judge states at p. 516 that he found it difficult to accept that contention. He says :

"The test would certainly be as to whether the owner has been dispossessed substantially from the rights held by him or the loss is only with regard to some minor ingredients of the proprietary right."

It was in this connection that he referred to a passage from the judgment of Rich J. in *Dalziel's* case (1941-68 C. L. R. 261). Then the learned Judge goes on to say that it was not necessary to pursue the matter any further as in his opinion there had been no possession of the rights of the shareholder in that case. Therefore, in the first place, the observation of Mukherjea J. is an obiter and he definitely refused to decide the question; in the second place the obiter is with regard to the question of taking possession and not acquisition; and, finally, the obiter merely lays down that in order to constitute taking possession the totality of rights need not be taken away: but if a person is substantially deprived of his rights, then it would constitute taking possession within the meaning of Article 31. It is difficult to see how from this obiter it is possible to infer that Mukherjea J. overruled the judgment of Bhagawati J. or that he accepted the view of the majority in the Australian case that acquisition does not necessarily imply a transfer of title or ownership.

[8] Mr. Jhaveri has asked us not to interpret Section 299(2) in the light of Article 31(2). He rightly points out that Article 31(2) deals both with acquisition and taking possession and the Constitution has provided safeguards in favour of the citizen both when the State acquires property or takes possession of property. Therefore, according to him a distinction may legitimately be drawn between the connotation of the expression "acquisition" and the connotation of the expression "taking possession," but he contends that inasmuch as Section 299(2) of the Government of India Act merely refers to compulsory acquisition, that expression should be construed as including taking possession as well. There is force in this argument and we would probably have been inclined to accept it, but for the legislative history to which we have drawn attention and which compels us to come to the conclusion that we have. Our attention is also drawn to Section 299(5) which provides that "land" as used in this section includes Immovable property of every kind and any rights in or over such property. It is therefore argued that requisitioning of land must result in acquisition of some right in or over property, and therefore by result of this extended meaning of the expression "land," compulsory acquisition for public purposes of any land must be construed in Section 299(2) as including requisitioning of land. This argument is not tenable because all that the extended meaning of "land" denotes is that ownership may be acquired not only of land but of any right in or over land. Therefore, if we are right in our view that acquisition implies transfer of ownership or title, the definition of "land" contained in Section 299(5) presents no difficulty.

[9] Even assuming that requisitioning for an indefinite duration constitutes

acquisition within the meaning of Section 299(2), we have to consider the question whether in this case an order of requisition made by Government under the Act is for an indefinite duration or whether the duration of the order is limited by the statute itself. Now, it is well settled that when a temporary Act lapses, the rules and orders made thereunder expire, and Act XXXIII (33) of 1949 is a temporary Act which was liable to expire on 31-3-1950 unless it was extended for a further period not exceeding two years. Therefore, in any case the outside limit of the duration of the Act was fixed at 31-3-1952. The learned Judge has taken the view that by reason of the fact that u/s 3 (2) of the Act Section 7, Bombay General Clauses Act, 1901, has been made applicable upon the expiry of the Act, orders of requisition made under the Act would continue in force for an indefinite period after the Act lapses by efflux of time. In our opinion, the view taken by the learned Judge, with respect, of the effect of Section 7, Bombay General Clauses Act is not a correct one. Section 7 merely saves anything duly done or suffered under a repealed Act or any right, privilege, obligation or liability acquired, accrued or incurred under such an Act. Any action taken or any right acquired or liability incurred under any requisitioning order made under Act XXXIII [33] of 1948 is saved notwithstanding the fact that the Act may cease to be operative. But Section 7 does not authorise the Government to continue in force orders of requisitioning made under the Act after the expiry of the Act. The power of Government to requisition property springs from the provisions of the Act, and if the Act lapses, then these powers must also cease to exist. It would have been open to the Legislature to continue in force the orders of requisitioning made under the Act after the expiry of the Act, but the Legislature has not chosen to do so, and Section 7, Bombay General Clauses Act, can-not be construed to mean that by reason of its provisions the orders of requisitioning passed under the Act do not cease to be operative and continue in operation for an indefinite period. It is instructive to consider the language of Section 20 which repeals the Bombay Land Requisition Ordinance of 1947 which preceded Act XXXIII [33] of 1948. By sub a. (a) (ii) any order made under that Ordinance requisitioning any land shall be deemed to be made under Act XXXIII [33] of 1948 and under Sub-clause (iii) any land requisitioned or continued to be subject to requisition under the Ordinance shall be deemed to be requisitioned or continued to be subject to requisition under the Act. Therefore, we have a clear provision here of continuing in force orders of requisition made under the Ordinance which, but for this provision, would have expired on the repeal of the Ordinance.

[10] In *Krishnan v. The State of Madras* (1951) 14 S.C.J. 453, the Supreme Court was considering the Preventive Detention (Amendment) Act of 1951 which amended the Preventive Detention Act of 1950 and which continued the operation of the old Act up to 31-3-1952. An argument was advanced before the Supreme Court that by Section 11 (1) of the amending Act discretionary power was given to the appropriate Government to continue the detention for such period as it thought fit and thereby to authorise preventive detention for an

indefinite period, which was contrary to the provisions of Article 22(4) of the Constitution. Sastri J. dealt with this argument by saying (p. 451):

" . . . the now Act is to be in force only up to 1-4-1952 and no detention under than Act can continue there, after, the discretionary power could be exercised only subject to that over all limit."

It should be noted that the Act by Section 1 (3) pro-vided that it shall have to cease to have effect on 1-3-1952 save as respects things done or omitted to be done before that date. Therefore, we had a provision in that Act for saving what had already been done and yet that was not considered sufficient to save preventive detention orders made under the Act after the expiry of the Act. Mahajan also dealt with the operation of temporary statutes. The learned Judge says (p. 463):

"Such temporary statutes cease to have any effect after they expire, they automatically come to an end at the expiry of the period for which they have been enacted and nothing further can be done under them."

The learned Judge below has considered an analogous legislation with regard to the requisitioning of land under the Defence of India Act and he has pointed out tint there express provision was made that all requisitioned land shall continue to be subject to be requisitioned until the expiry of the Ordinance or the Act as the case may be, and the learned Judge draws the inference that as such words ate omitted from Act XXXIII [33] of 1948, therefore the legislature did not intend the requisitioning orders made under the Act to cease to have effect after the expiry of the Act, With respect to the learned Judge, the mere omission of these words cannot possibly affect the true interpretation of Section 7, General Clauses Act. Those words may have been inserted for greater caution, and the absence of these words cannot lead one to the conclusion that the requisitioning orders made under the Act would continue to be in force after the Act had expired.

[11] Therefore, in our opinion, the power of requisitioning given to Government under the Act was not for an indefinite period; the power was restricted and circumscribed by the duration of the Act. We, therefore, hold that Act XXXIII [33] of 1948 was intra vires of the Provincial Legislature.

[12] We have nest to consider the validity of Act [II] of 1950. That Act amended Act XXXIII [33] of 1948 by extending the duration of Act XXXIII [33] of 1948 from 31-3-3950 to 31-9-1952. Then by other sections it also amended certain substantive provisions of Act XXXIII [33] of 1948. The most important amendment was that it enabled the Government to create a statutory tenancy between the person to whom requisitioned premises had been allotted and the landlord of the premises. It is necessary to bear in mind that in Act XXXIII [33] of 1948 itself there was a provision that the Provincial Government may by notification in the Official Gazette direct that the Act shall remain in force for a further period not exceeding two years. Therefore, the position under Act XXXIII [33] of 1946 was that the Legislature had passed a temporary Act, the duration

of which was fixed up to 31-3-1950. It had also passed conditional legislation extending the duration of the Act for a further period of two year on the condition that the Provincial Government should issue a notification to that effect. The law has now been finally settled by the Supreme Court that a power given by the Legislature to the Provincial Government to extend the duration of an Act does not constitute delegated legislation. The Legislature has already applied its mind to the question, has decided that the Act may be extended for a further period of two years, but instead of passing effective legislation to that effect it has left it to some outside authority to decide whether the extension should be given effect to or not. The Legislature has in no way effaced itself or abrogated its functions. Conditional legislation of this character is within the legitimate powers of a sovereign Legislature. It is also well settled that if pursuant to the power conferred upon it by Section 8 of Act XXXIII [33] of 1948 the Provincial Government had issued a notification extending the Act for a further period of two years, the efficacy of such notification could not have been due to any independent power vested in the Provincial Government, but would have been due to the Legislature itself which had provided for the issue of such a notification. In *The Empress v. Burah*, 5 Ind. App 178 power was given to the - Lieutenant-Governor under Act XXII [as] of 1869 to issue various notifications, and dealing with this power their Lordships of the Privy Council at p. 195 say;

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII [22] of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute."

It was also pointed out by the Privy Council in *Hodge v. The Queen* (1833) 9 A. C. 117 :

"" . . . It was argued as the Bar that a Legislature committing important regulations to agents of delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has treated and set up another, or take the matter directly into its own hands."

[13] Therefore, when the Legislature by Act II [2] of 1950 extended the Act for two years, it was not passing any new legislation, but it was doing exactly what the Provincial Government by notification could have done under Act XXXIII [33] of 1948. To use the language of the Privy Council, it destroyed the agency which it had created and took the matter directly into its own hands. It has been argued that there is no warrant for assuming that when the Legislature passed Act II [2] of 1950 it was merely exercising the power delegated to the Provincial Government and was not engaging upon a fresh and independent legislative

activity. In order to decide this contention, it is necessary to look at the background to Act II [2] of 1950. That Act came into force on 28.3-1950. At that date Act XXXIII [33] of 1948 was still in force and the Provincial Government had still the power to issue a notification u/s 3. But just prior to that date, on 22-2-1950, a judgment had been delivered by Bhagwati J, which was confirmed by a division bench in *Narottamdas Jethabhai v. Phillips*, 52 Bom. L. R. 571 holding that the power conferred upon the Provincial Government under the City Civil Court Act to increase the jurisdiction of the City Civil Court from Rs. 10,000 to Rs. 25,000 constituted delegated legislation and was therefore bad. This decision was based on a judgment of the federal Court which held that the Legislature could not confer upon the Provincial Government the power to extend the operation of an Act. It may be added that the decision of this Court is no longer good law as it has been reversed by the Supreme Court. It would, therefore, not be surprising if the Provincial Government, in view of the law as it was then understood, should not take the risk of issuing a notification which might be challenged, but should leave it to the Legislature to take the power directly into its own hands which it had conferred upon Government. But it is pointed out that the Legislature did not merely extend the duration of Act XXXIII [33] of 1948 by Act II [2] of 1950 ; it also passed substantive legislation ; and therefore it is pointed out that it would be a mistake to think that the Legislature was merely functioning to give effect to the power it had conferred upon the Provincial Government.

[14] Now, in this appeal we are strictly not concerned with the other provisions of Act II [2] of 1950. In our opinion, these provisions are clearly severable from Section 2 with which we are concerned. There can be hardly any doubt as to the severability of the other provisions of Act II [2] of 1950, because Act XXXIII [33] of 1948 could be administered without these provisions till Act II [2] of 1950 was passed. The petitioner in this case is in no way affected by any of the substantive provisions of Act II [2] of 1950. He is only concerned with these provisions of Act XXXIII [33] of 1948 which have been extended by Act II [2] of 1950. Therefore, we do not propose to decide whether the Legislature effectively amended certain provisions of Act XXXIII [33] of 1948 by enacting amendments in Act II [2] of 1950.

[15] The authorities also draw a distinction between the repeal of an old Act and the re-enacting of a new Act and the extension of an old Act. When an Act is passed extending the duration of some law, it cannot be said that some new law was created. The old law already on the statute book continues. Our attention was drawn to an American case which is relevant on the point. In *United States v. Powers*, (1938) 307 U. S. R. 1245, the Connally Act of 22-2-1935, originally provided that it should cease to be in effect on 16-6-1937, but it was extended prior to 16-6-1937 to 30-6-1933, and the Supreme Court of America held that the amended Act authorised a prosecution for violations committed prior to 16-6-1937, under an indictment returned subsequent thereto but prior to 30-6-1939. In the judgment of Douglas J. it is stated (p. 1248):

" . . . , . Due to the amendment, the Act has never ceased to be in effect. No new law was created; no old one was repealed. Without hiatus of any kind, the original Act was given extended life."

It is true that in this case the amending Act did not in any way alter the substantive provisions of the original Act. But, as I said before, we are only considering the effect of Act II [2] of 1950 to the extent that it extends the duration of Act XXXIII [33] of 1948. Even temporary statutes which are made perpetual by subsequent Acts become perpetual not from the date of the subsequent Act but ab initio. See Halsbury, vol. 31, p. 512, Article 665. And Maxwell on Interpolation of Statutes, Edn. 9, p. 406, states the law thus:

"If a temporary Act be continued by a subsequent one, or an expired Act be revived by a later one, all infringements of the provisions contained in it are breaches of it rather than of the renewing or retiring statute."

Therefore, to the extent that the Legislature enacted Section 2 of Act II [a] of 1950, it did not put on the statute book any new legislation. The old law instead of expiring on 31-3-1950, continued till 31-3-1952.

[16] We have already held that Act XXXIII [33] of 1948 was an existing law within the meaning of Article 31(5)(a), and therefore even if such a law offended against Article 31(2), it did not become void under Article 31(1). But a very interesting question has been raised in this appeal as to whether the provisions of any existing law referred to in Article 31(5)(a) are merely the provisions of Act XXXIII [33] of 1948 which keeps the Act in force up to 31-3-1950, or whether they also include the provision which permits of its extension for a further period of two years. Existing law is defined in Article 366(10) as any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation. Therefore, in order that a law should be an "existing law" the only qualification laid down by the Constitution is that it should have been passed before the commencement of the Constitution. Inasmuch as the Provincial Legislature in 1918 not only passed the law fixing its duration till 31-3-1950, but also passed conditional legislation extending its duration up to 31-3-1952, on a plain reading of the definition of "existing law" the provisions of an existing law for the purposes of Article 31(5)(a) included both the actual operation of Act XXXIII [33] of 1948 and its potential operation in the sense that the Act had within itself the potentiality of being extended up to 31-3-1952. If this be the true position, then Act XXXIII [33] of 1948 as amended by Act II [2] of 1950 to the extent that it merely extended its duration up to 31-3-1952, was an existing law. If it was an existing law even though it contravened the provisions of Article 31(2), inasmuch as the power of requisitioning vested in Government was not restricted to public purposes, even so it would not be void as the contravention is permissible under Article 31(5)(a). The question may be looked at from another point of view. Article 31(2) prohibits the State, which includes the Legislature, from making any

law which takes away or abridges the rights conferred by Part III and any law made in contravention of Article 31(2) shall, to the extent of the contravention, be void. Therefore, if the Legislature was making any law when it enacted Act II [2] of 1950 which abridged or curtailed the fundamental right conferred upon the citizen under Article 31(2), then the law would be void to the extent of such contravention. But if we are right in the view that we have taken that the Provincial Legislature had already made a law empowering Government to requisition property for any purpose and the Legislature had already decided that the duration of that law should be not merely up to 31-3-1950 but conditionally up to 31-3-1952, then the Legislature when it passed Act II [2] of 1950 was not making any law contrary to the provisions of Article 31(2). Such a law had already been made, it was already on the statute book, and it had been, saved by Article 31(5)(a). Therefore, in our opinion, Section 2 of Act II [2] of 1950 falls to be considered not with reference to Article 13(2) but with reference to Article 13(1).

[17] A very interesting and able argument has been advanced by Mr. Palkhivala that the Constitution makes distinction between "existing law" and "law in force." It is pointed out that there is an exhaustive definition of "existing law" given in Article 366(10) and "law in force" is not exhaustively defined, but there is an inclusive definition both in Article 13 and in Article 372. It is suggested that the definition of "law in force" is wider than "existing law". It is said that whereas "existing law" means actual law in operation, "law in force" includes not only law actually in force but also law potentially in force in the sense of the law being capable of being extended by means of a notification or other method. According to Mr. Palkhivala the scheme of the Constitution is this. Article 373(1) continues in force all the laws in force in the territory of India immediately before the commencement of the Constitution. This includes laws actually in operation and also by reason of Explanation I laws which may not be in operation at the date of commencement of the Constitution or laws applied only to particular parts and not extended to the whole country. These laws in force are to continue subject to the provisions of the Constitution and one of the provisions in the Constitution is Article 13(1). Article 13(1) makes void all laws actually in operation and also all laws potentially in operation to the extent that they are inconsistent with fundamental rights. When we turn to Article 31(5)(a) what is saved is not "laws in force" but "existing laws," Therefore, only laws in actual operation and not potentially in operation are saved. Therefore, when we have a law which is actually in operation which contains provisions for its potential extension, the actual law is saved under Article 31(5)(a), but to the extent that it may be extended in future it may become void under Article 13(1) if it contravenes any of the fundamental rights. This argument is advanced for the contention that as far as Act XXXIII [33] of 1948 was concerned what was saved by Article 31(5)(a) was the actual operation of law till 31-3-1950, but to the extent that it was potentially capable of being extended for two years beyond 31-3-1950, it was not saved by Article 31(5)(a). According to Mr. Palkhivala, the Constituent

Assembly drew a dead line at laws actually in operation and refused to save them beyond that line if they contravened any of the fundamental rights. It is pointed out that the same expression "existing law" is used in Sub-clause (2), (3), (4), (5) and (6) of Article 19. There also according to Mr. Palkhivala the Constituent Assembly permitted restrictions upon the rights conferred under Article 19(1)(a) to (g) only to the extent of saving laws actually in operation.

[18] The argument is very attractive and receives considerable support from two different expressions used in the Constitution. It is perfectly true that the ordinary and normal canon of construction requires that when we find in a statute or in a constitution two different expressions used, as far as possible two different meanings must be given to these expressions, because it must be assumed that the Legislature or the Constituent Assembly did not use two different expressions without intending to convey two different meanings. But instances are not unknown where two different expressions have been used to convey the same meaning. Now, if one were to give a plain natural construction to these two expressions, it is clear that "existing law" is a term of wider connotation than "law in force" and not otherwise as contended by Mr. Palkhivala. "Existing law" would include all laws whether actually in force or potentially in operation. The only qualification laid down by the Constitution, as I have pointed out before, is that these laws must have been passed before the Constitution came into force. "Law in force" has a narrower and more restricted connotation. It seems to indicate laws actually in force, not laws whose operation is suspended or which have not been extended to certain territories. Because its connotation was narrow and restricted, the Constitution had to give to it an extended meaning both in Article 13 and in Article 372 by including in the expression "law in force" any law or any part thereof which may not be in operation at the date of the commencement of the Constitution at all or in particular areas. I must frankly confess I am at a loss to understand why instead of giving this extended meaning by an explanation the Constitution did not use the same expression "existing law" in Article 13 and in Article 372. The ways of draftsmen like these of Providence are very often inscrutable. But Mr. Seervai has pointed out an explanation which according to him does not make the ways of draftsmen so inscrutable as we think they are. He has drawn our attention to the Government of India Act, 1935, which was the constitutional predecessor of our Constitution and he points out that Section 282, Government of India Act in terms corresponded to Article 372. Section 293, Government of India Act dealt with adaptation of laws which is dealt with in our Constitution by Article 372(3), and just as in Article 372 the expression used in Sections 292 and 293 is "law in force" and not "existing law," the expression "existing law" is also to be found in the Government of India Act, but the actual expression used is not "existing law" but "existing Indian law", and "existing Indian law" is also defined similarly to its definition in the Constitution as any law, ordinance, order, bye law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being

comprised in British India being a Legislature, authority or person having power to make such a law, ordinance, order, bye law, rule or regulation. Neither Section 292 nor Section 293, Government of India Act contained the explanation which we find in Article 372. Parliament passed a statute on 18th February 1937, 1 Geo. VI, c. 9, for the purpose of explaining and amending Sections 292 and 293, Government of India Act, and Section 1 (1) (i) of the Act provided that

"a law passed or made before the said date by a Legislature or other competent Authority in British India, and not previously repealed, is, for the removal of doubts, hereby declared to be a law in force immediately before that date notwithstanding that it, or parts of it, may not then be in operation, either at all or in particular areas."

Therefore, by this Act Parliament incorporated in Sections 292 and 293 the explanation that we now find in the Constitution in Article 372. It is significant to note that this Act was passed for removal of doubts and for explaining the expression used in Sections 292 and 293. Therefore, it is clear that Parliament felt that it was possible to contend that there was difference between the expression "law in force" and "existing law," and "law in force" might not include laws not in operation or not extended to all areas. What the Constitution has now done is, it has reproduced in Article 372 the language of Sections 292 and 293 and has added by way of an explanation what was contained in 1 Geo. VI, c. 9. But this explanation does not remove all difficulties, because Mr. Palkhivala has pointed out that whereas Section 299(4), Government of India Act, provides that nothing in this section shall affect the provisions of any law in force at the date of the passing of this Act, when we turn to Article 31(5)(a) the expression used is "existing law" and not "law in force." There is one indication which we might resort to, although with some hesitation, and that is the marginal note both to the Government of India Act and the Constitution. It is clear that marginal notes to sections in statutes may not be looked at for the purpose of construing the section. But as Maxwell points out at p. 45, the rule regarding the rejection of marginal notes for the purposes of interpretation is now of imperfect obligation, and the learned author cites with approval the language of Collins M.R. in *Bushell v. Hammond*. (1904) 73 L. J. K. B. 1005, "the side-note, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section."

[19] Reference has been made to the observations of their Lordships of the Privy Council in *Balraj Kunwar v. Rae Jagatpal Singh*, 31 Ind. App. 132 (P.c.) where they say (p. 142):

"It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament."

In this particular case, their Lordships were construing Act I of 1869 and the construction which commended itself to their Lordships gave a meaning to every part of the sections under consideration. It is perfectly true that if the sections by themselves make the meaning of the words used by the Legislature plain and explicit, marginal notes cannot be invoked for the purpose of adding to, subtracting or altering the words used by the Legislature, But when the words are ambiguous, there should be no objection to looking at the marginal note in order to understand, to use the language of Lord Macmillan, the drift of the section. It should also be borne in mind that at one time marginal notes did not appear in the statute by authority of Parliament and therefore could be said that Parliament had not enacted the marginal note. This is no longer true, and every part of the statute including marginal notes and punctuation appears in the statute by authority of Parliament. As pointed out by Lord Macmillan, with respect, it seems that the opinion expressed by the Privy Council in 1901 has undergone some change. When we therefore turn to the marginal note to Article 372 it is significant to note that the note says, "'Continuance in force of existing laws and their adaptation.'" therefore, if the marginal note is any indication at all, it does indicate that the Constituent Assembly did not intend to make any difference or distinction between "laws in force" and "existing laws." The position is the same with regard to the Government of India Act. The marginal note to Section 292 is, "Existing law of India to continue in force", and the marginal note to Section 293 is, "Adaptation of existing Indian laws." Then there is a further indication that Mr. Palkhivala's contention that the Constitution-making body intended to draw a dead line at laws actually in operation is not tenable. If one turns to Article 19, Sub-clauses, (2), (3), (4), (5) and (6), where the expression "existing law" is used, we find that the restriction on fundamental right is not only with regard to the saving of existing law, but also with regard to any future law that the State might make. Therefore, it would not be true as far as Article 19 is concerned that the intention of the Constituent Assembly was to save only laws actually in operation and to declare void laws only potentially in force and laws to be made in future. We also find that high judicial authority has also taken the same view of the interpretation of the two expressions "law in force" and "existing law". In *The United Provinces v. Mt. Atiqah Begum*, 1910 2 F. C. R. 110, an Act which was retrospective in its effect was challenged on the ground that it contravened Section 292, Government of India Act, which directed all laws which were in force to continue in force until they were repealed or amended, and Sir Maurice Gwyer C. J. says (p. 131):

"The purpose of Section 292 was clearly to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorised its enactment; and it is a safeguard usually inserted by draftsmen in similar circumstances."

Therefore, the learned Chief Justice looked upon Section 292 as an enactment which kept in force existing law, and the learned Chief Justice points out other constitutional enactments where similar provision is inserted. One learned Judge

of our own Supreme Court has used "existing law" and "law in force" as interchangeable terms. In *Keshavan Madhava Menon Vs. The State of Bombay*, , Mr. Justice Das says (p. 334):

"... What Article 13(1) provides is that all existing laws which clash with the exercise of the fundamental rights (which ate for the first time created by the Constitution) shall to that extent be void."

Now, it may be remembered that the expression used in Article 13(1) is "lass in force" and not "existing laws" and yet the learned Judge reads that expression as meaning "existing laws". Frankly the point is not free from difficulty or doubt, but on the whole we have come to the conclusion that in the Constitution the expressions "existing laws" and "laws in force" have bemused without any distinction or difference.

[20] The next question is whether the Legislature of the State of Bombay was competent to enact Act II [2] of 1950. As we have pointed out, no difficulty arises with regard to the competency of the Legislature that passed Act XXXIII [33] of 1948. But the competence of the State Legislature was altered by the Constitution. Whereas the Legislature in 1948 legislated with regard to a subject matter which was wide and unlimited viz. requisitioning of land, the position had materially altered when powers were conferred upon the State Legislature under the Constitution of India. The Union Parliament is given power to legislate with regard to acquisition or requisitioning of property for the purposes of the Union. This is Entry 33 in List I. In List II which is the State List, Entry 36 is in the following terms:

"Acquisition or requisitioning of properly, except for the purposes of the Union, subject to the provisions of Entry 42 of List III,"

and when we turn to Entry 42 in the Concurrent List it is to the following effect:

""Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in winch such compensation is to be given."

Entry 33 in List I presents no difficulty. Power is given to the Union Parliament to acquire or requisition property only for the purposes of the Union. But the construction of Entry 36 in the State List presents considerable difficulty. It is difficult to see why acquisition or requisitioning of property is qualified by "except for the purposes of the Union" because under Article 246(6) the power of the State Legislature has been made subject to the power conferred upon the Union Legislature under Lift I. It is equally difficult to understand why the power of the Provincial Legislature is made further subject to the provisions of Entry 42 of List III, because the power of the State Legislature again has been made subject to the powers conferred under the Con-current List. The learned Judge below read the expression ""subject to the provisions of Entry 42 of List III" as importing

into it the limitation upon the power of the State Legislature to acquire or requisition property only for the purposes of the State or for any other public purpose. With respect, we are unable to agree with that construction. The only limitation placed upon the State Legislature is that it can-not legislate with regard to acquisition or requisitioning of property for purposes which are for the purposes of the Union, and the other limitation is that the Union Parliament may legislate with regard to compensation and the form and the manner in which such compensation is to be given, notwithstanding the fact that laws with regard to acquisition or requisitioning for the purposes other than the purposes of the Union may be enacted by the State Legislature, if "subject to the provisions of Entry 42 in List I" were intended to import the limitation with regard to public purposes or purposes of the State, it is difficult to see why & similar limitation was not put in Entry 33 of List I. The interpretation placed by the learned Judge, with very great respect to him, is based upon the confusion between competence and contravention of fundamental rights. The State Legislature may be competent to legislate for any purpose other than the purpose of the Union, and yet if it so legislated, it may contravene the provisions of Article 31(2) in which case the legislation would be void to the extent of the contravention. But jurisdiction is one thing and the erroneous exercise of that jurisdiction is entirely a different thing. A full bench of the Allahabad High Court in *Raja Suryapalsingh and Others Vs. The U.P. Govt.*, has taken the same view of the construction of Entry 36 in List II and has held that the legislative competence of the State Legislature is not controlled by Entry 42 in List III. In our opinion, therefore, the State Legislature under the Constitution is competent to legislate for any purpose other than the purposes of the Union.

[21] It is argued that even, so Act II of 1950 was ultra vires of the State Legislature because it dealt with requisitioning for any purpose, and "any purpose" would include purposes of the Union, There is no doubt that if the State Legislature by Act II of 1950 conferred power upon the Government to requisition land for any purpose without any limitation or qualification, then the Act would be ultra vires of the Legislature. But there is a very important principle which must be borne in mind in construing a statute. It must always be presumed that a Legislature knows the limits of its competence and that it is acting within the limits set up by the Constitution and not outside these limits. If possible a construction should be placed upon a statute which would put it within the limits of the competence of the Legislature rather than outside these limits. This principle was clearly enunciated by Sir Maurice Gwyer in *In re The Hindu Women's Rights to Property Act, 1937*, (1941) 3 F. C. R. 12. The question that was agitated before the Court in that case was whether the Hindu Women's Rights to Property Act, 1937, was void inasmuch as it affected succession to agricultural land. This Act was passed by the Legislative Assembly of the Indian Legislature on 4th February 1937. This was before the Government of India Act came into force. At that time the powers of the Indian Legislature were plenary. It was passed by the Council of State on 6th April 1937, after Part II

came into operation and received the Governor. General's assent on 14th April 1937. After Part III came into force, which was on 1st April 1937, the Central Legislature was precluded from dealing with the subjects enumerated in List II of the Seventh Schedule to the Government of India Act. Laws with regard to the devolution of agricultural land could be only enacted by Provincial Legislatures and the Central Legislature had no competence to legislate with regard to agricultural land. The word used in the Hindu Women's Rights to Property Act was "property", and it was contended that the word was wide enough to cover both agricultural and non-agricultural land, and therefore the argument was put forward that the Central Legislature was trespassing upon the field reserved for the Provincial Legislature and therefore the Act was void. Sir Maurice Gwyer says (p. 36):

"If that word (viz. property) necessarily and inevitably comprises all forms of property, including agricultural land then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say property other than agricultural land."

He then goes on to say (p. 27): "There is a general presumption that the Legislature does not intend to exceed its jurisdiction," and he refers to various cases particularly to the well known case of *Macleod v. Attorney General for New South Wales*, (1891) A. C. 455. In that case the Legislature of the New South Wales had enacted a law providing that whosoever being married marries another person during the life of the former husband or wife, whosoever such second marriage takes place, shall be liable to penal servitude for seven years. The question that arose was whether the Act had extra territorial effect, and Lord Halsbury in his judgment stated (p. 457):

".....Their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent would be inconsistent with the powers committed to a colony....."

further on the learned Law Lord says (p. 459) :

".....Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony."

[22] Therefore, in this particular case if the Bombay Legislature was legislating

for requisitioning of land for any purpose, it was using an expression of wide and general import and the presumption would be that it was using that expression only with reference to these purposes which it was within its competence to legislate about. It should be noted that this is not a question of severability. The Court is not severing "purposes of the Union" from "other purposes." Severability would imply that the Legislature had legislated both for purposes of the Union and other purposes and then the Court would try and see if the Act was severable, and if so, save that portion of the Act, which was within the competence of the Legislature. But as Sir Maurice Gwyer puts it, this is a question of construction, and if on a true construction we hold that the Legislature was legislating for purposes other than the purposes of the Union, then the legislation would be a competent legislation and no question of severing "purposes of the Union" from "other purposes" would arise. Reliance has been placed upon *Romesh Thappar v. The State of Madras* 1950 S. C. R. 694. In that case Section 9 (1) (a), Madras Maintenance of Public Order Act, 1949, was challenged as being in contravention of Article 19 of the Constitution. That section empowered the Governor of Madras, if he was satisfied that for the purpose of securing the public safety and the maintenance of public order it was necessary so to do, to prohibit the entry into or circulation, sale or distribution in the State of Madras of any newspaper. Under Article 19(s) it is competent to a Legislature to enact a law in respect of any matter which under, mines the security of the State and that is a restriction upon the right given under Article 19(1)(a) of freedom of speech and expression, and the question that fell to be considered by the Supreme Court was whether a legislation with regard to securing the public safety and the maintenance of public order was a legislation for the security of the State. The Supreme Court held that Section 9 (1) (a) authorised imposition of restrictions for a wider purpose, viz., securing public safety and maintenance of public order, than the security of the State permissible under the Constitution, and therefore Section 9 (1) (a) was void. The case here therefore was not of the Legislature using an expression of wider import, but a case where the Legislature had used two different expressions and the attempt was to approximate these two expressions to the expression used in the Constitution. Further, the Supreme Court was not considering the competence of the Legislature at all. What it was considering was whether the Act offended against the fundamental rights guaranteed to the citizen. It was in this connection that Mr. Justice Sastri made the following observation at p. 603, on which the learned Judge below has relied:

"Where a law purports to authorise the imposition of restrictions on a fundamental right in language wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action afflicting such right it is not possible to uphold it even so far as it may be applied within the constitution limits, as it is not severable. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void."

Therefore, it was the test of severability that Mr. Justice Sastri was applying. As

we said before, on the view that we take, we are not dealing with a case of severability but with a case where we have to put a particular construction upon the expression used by the Legislature. Reliance was also placed on a judgment of the Federal Court in *Rex v. Basudev*, 1940 F. C. R. 657. In that case the Legislature of the United Provinces passed an enactment authorising the Provincial Government preventively to detain any person who habitually indulged in blackmarket. The Federal Court held that the law was bad as it was ultra vires of the Provincial Legislature. It was pointed out by the Federal Court that the power to make laws with respect to preventive detention which a Provincial Legislature had under Entry 1 of List II, Government of India Act, 1935, was strictly limited by the condition that such detention must be for reasons connected with the maintenance of public order, and the Court held that blackmarketing was not a reason connected with the maintenance of public order. It is difficult to see how this decision is of any assistance. The Legislature had passed a law unconnected with public order and it was impossible to bring black-marketing within the ambit of public order. The Legislature had legislated upon an entirely different topic from the one mentioned in Entry I of List II. Therefore, in our opinion, it is open to us to take the view that when the Legislature passed Act II of 1950, it was legislating for any purpose other than the purpose of the Union.

[23] We are conscious of the difficulty that in enacting Act II of 1950 the Legislature was extending the operation of Act XXXIII of 1948 which enabled Government to requisition land for any purpose. But in extending the Act from March 31, 1950, to March 31, 1953, the Legislature must be presumed to have extended it within the scope and ambit of its own competence. It would have been open to the Legislature expressly to have stated in Act II of 1950 that the Act was being extended till March 31, 1952, but the power to requisition for any purpose would be limited by excluding "purposes of the Union." It has expressly not stated so. But we must construe the expression "for any purpose" used in Act XXXIII of 1948 when it stood amended by Act II of 1950 as meaning "for any purpose other than the purposes of the Union."

[24] Therefore, in our opinion, Act II of 1950 was within the legislative competence of the State Legislature. In this view of the matter, it is unnecessary to consider the further contention urged on behalf of the State that Act II of 1950 is saved by reason of the provisions contained in Explanation in to Article 372 of the Constitution.

[25] Even assuming we are wrong in the view that we have taken as to the constitutionality of Act II of 1950, and assuming Act II of 1950 contravenes Article 31(2) inasmuch as it does not restrict the power of Government to requisition land for a public purpose, the question arises as to what is the effect of the unconstitutionality of Act II of 1950. In this connection it is important to remember that the Legislature passed Act XXXIX of 1950 which amended Act XXXIII of 1948 by substituting for the words "any purpose" the words the

purpose of the State or any other public purpose," and by Section 6 of that Act its gave a retrospective effect to the Act by providing that the amendments made by this Act shall be deemed to have been and always to have been made with effect from 26-1-1950. Therefore, the Legislature attempted retrospectively to bring Act XXXIII [33] of 1948 into conformity with the Constitution by putting Act XXXIX [39] of 1950 on the statute book. Counsel for the petitioner has given up the contentions taken up in the Court below that Act XXXIX [39] of 1950 was bad inasmuch as it did not receive the assent of the President and also the contention that the Legislature could not retrospectively amend an unconstitutional Act. It is, however, urged by Mr. Palkhivala that if Act II [2] of 1950 was void, it was void from its inception and therefore it failed to extend Act XXXIII [33] of 1948, and when Act XXXIX [39] of 1950 was passed there was no law regarding acquisition on the statute book which could be amended by that Act.

[26] The American authorities draw a distinction between unconstitutional Acts which are void from their inception and these Acts which become, void only when the Court declared them to be unconstitutional. Willis on Constitutional Law at p. 90 says:

"There is a second class of situations in which the Courts are in conflict as to whether the rule should be the rule of void ab initio, or the rule of void from date of declaration of unconstitutionality. These are cases of creation of moral obligations on the part of the Government, creation of a public office, the civil liability of officers for acts done under unconstitutional statutes, the defence of an officer to an action of mandamus brought to compel him to act under an unconstitutional statute, the curing of the defect of unconstitutionality by statutory amendment, and the curing of the defects of unconstitutionality by change in the Constitution."

So the case before us would fall in the category of an unconstitutional statute where the defect of unconstitutionality has been cured by statutory amendment. Crawford on Statutory Construction (1940 Edn.) at p. 173 says:

"But where a statute is unconstitutional in part only, It may be laid down, as a general rule, undoubtedly in all jurisdictions, that the statute may be amended by obliterating the invalid provisions or by correcting these which violate the Constitution."

In the case of Act XXXIII [33] of 1948 the Act cannot be said to be wholly unconstitutional; it is unconstitutional to the extent that it permits Government to requisition property for a purpose which may not be a public purpose and that un. constitutionality has been corrected by subsequent enactment. It is stated that this Court has taken the view that if an Act is void as contravening the provisions of fundamental rights, it must be deemed to be annulled and the consequences are the same as if it was repealed, and therefore it is urged that we must hold that Act II of 1950, if it is unconstitutional, stood annulled from the

moment of its enactment. The authority relied upon is *In re Keshav Madhav Menon*, 52 Bom. L. R. 540. In that case we were construing Article 31(1) of the Constitution and the question was whether Article 31(1) had retrospective effect, and at p. 543 in delivering the judgment of the Court I used the following language:

""But in substance and in its effect there is no difference between an Act which is repealed and an Act which is declared void. In both cases the Act ceases to be operative. The law is annulled."

But I have pointed out that there is difference between repealing an Act and declaring an Act void. At p. 543 I have pointed out that repeal involves a legislative process whereas declaration of a law to be void does not. I have also pointed out that Article 395 specifically repeals certain laws, whereas under Article 13(1) it would be for the Courts of law to determine which laws are inconsistent with the Constitution. This case went before the Supreme Court. The Supreme Court came to the same conclusion as we did but on a different ground, and *Das J. in Keshavan Madhava Menon v. The State of Bombay*, (1951) S. C. R. 228 states:

" it should further be seen that Article 13(1) does not in terms make the existing laws which are inconsistent with fundamental rights void ab initio or for all purposes. On the contrary, it provides that all existing laws, in so far as they are inconsistent with the fundamental rights, shall be void to the extent of their inconsistency. They are not void for all purposes but they are void only to the extent they come into conflict with the fundamental rights. In other words, on and after the commencement of the Constitution no existing laws will be permitted to stand in the way of the exercise of any of the fundamental rights."

Therefore, the position today is that when the petitioner comes before us and asks us to declare Act XXXIII [33] of 1948 as void on the ground that it contravenes the fundamental rights of the citizen, we find on the statute book an Act which has cured the unconstitutionality of Act XXXIII [33] of 1948. Should we then, notwithstanding what the Legislature has done, still declare Act XXXIII [33] of 1948 to be void ? In our opinion, we are bound to take notice of what the Legislature has done, and if the law is not void today, we should not declare it void because it offended against the provisions of the Constitution prior to its amendment. We are, therefore, of the opinion that the challenge made to the Act on various grounds fails and that the Act must be held to be valid.

[27] Another and a minor question arises on the facts of this particular case. The requisitioning order in question dated 29-5-1950, does not on the face of it state what is the public purpose for which the property was requisitioned. We took the view in *State of Bombay v. Mohanlal Kapur*, 53 Bom TJ. 669 that every requisitioning order must contain a statement that the premises are being requisitioned, but it must also state the purpose of the State or any other public purpose for which the premises are being requisitioned, It is urged by the

State that when the requisitioning order was issued on 29-5-1950, Act XXXIX [39] of 1950 had not been passed and in *State of Bombay v. Mohanlal Kapur*, 53 Bom. L.R. 669, we were considering an order which was passed on 12-12-1950, after the enactment of Act XXXIX [39] of 1950. But in advancing this contention the Solicitor General for the State overlooks the provisions of Section 6 of that Act. That section provides that all orders for requisition made under Sections 5, 6 and 7 of the said Act (i. e. Act XXXIII [33] of 1948) on or after that date (viz . 26-1-1950) shall be deemed to have been made under the said Act as amended by this Act. Therefore, the order of 29-5-1950, must be deemed to have been made under Act XXXIII [33] of 1948 as amended by Act XXXIX [39] of 1950 inasmuch as the order was made after 26-1-1950. Therefore, the order must be deemed to have been made pursuant to the power of the Government to requisition not for any purpose but for purposes of the State or any other public purpose. If that be so, the decision in *State of Bombay v. Mohanlal Kapur*, 53 Bom. L. R. 669 must apply also to the order which is challenged in this petition. The Solicitor-General says that the requisitioning authority on 29-5-1950, could not possibly have stated the public purpose or the purpose of the State in the order, as in fact the law then was different. But the State cannot have it both ways. If the Legislature has retrospectively cured the defect of unconstitutionality in Act XXXIII [33] of 1948 by Act XXXIX [39] of 1950, then any order that offends against the provisions of the amended Act must be held to be bad. The argument that the law in fact was different cannot avail the Solicitor General, because the Legislature has declared that the law must be deemed to have been as amended by Act XXXIX [39] of 1950. Therefore, we must uphold the view of the learned Judge below that the requisitioning order dated 29-5-1950, is bad *ex facie*, it having failed to mention the purpose for which the order was made,

[28] The result, therefore, is that the appeal fails and must be dismissed.

[29] On the question of costs, the learned Judge below having held on all points in favour of the petitioner directed that the petitioner should pay the costs of the petition up to the amendment and all costs incurred subsequent thereto should be paid by the respondent. In the appeal before us, the petitioner has lost on all the points urged by him except the minor point as to the validity of the order itself. Mr. Palkhiwala contends that this is a matter of great public importance and we should bear that in mind in awarding costs. As far as this appeal is concerned, there is no doubt that we could have disposed of this appeal on the narrow ground that the order being *ex facie* bad, the petitioner was entitled to succeed and the State was bound to fail in appeal. But the State itself, and rightly so, was anxious that the question of the constitutionality of the Act should be finally decided by the highest Court in the State. Any sense of uncertainty as to what the law was, was not a good thing either for the State or for the citizen, and therefore we acceded to the request of the Solicitor-General that we should deal with the constitutional question raised by *Tendolkar J.* Therefore, as far as the appeal is concerned, I think the fairest order to make would be that there will be no order as to costs of the appeal.

[30] With regard to the costs of the petition in the Court below, the position is very different. It was the petitioner himself by amending his petition who invited the Court to deal with constitutional questions and give a decision in his favour. But for the amendment the matter would have been disposed of on the narrow question of the validity of the order itself. Therefore, in our opinion, the order of costs of the petition should be made by us on a different principle from the order that we are making with regard to the costs of the appeal. Therefore, the costs of the hearing of the petition will be that the petitioner must pay to the State three fourths of the costs of the hearing of the petition, Costs of the reference will be costs in the petition. Costs to be taxed on the Long Cause scale.

[31] The respondent has cross-objected against the failure on the part of the learned Judge below to give a direction to the State to remove the lock and seal placed upon certain portions of the premises which were sought to be requisitioned by the order which was held to be a bad order. In our opinion, the petitioner is entitled to possession of the premises which he was asked to hand over under the order of requisition. Therefore, we will direct that the State should hand over possession of the premises within seven days from today. The rest of the cross objections dismissed. No order as to costs.

[32] Appeal dismissed; Cross-objection partly allowed.