RUSTOM CAVASJEE COOPER

v.

UNION OF INDIA

February 10, 1970

[J. C. SHAH, S. M. SIKRI, J. M. SHELAT, V. BHARGAVA, G. K. MITTER, C. A. VAIDIALINGAM, K. S. HEGDE, A. N. GROVER, P. JAGANMOHAN REDDY, I. D. DUA AND A. N. RAY, JJ.]

Banking Companies (Acquisition and Transfer of Undertakings) Act 22 *of* 1969—*Sections* 4, 5, 6, 15(2) *and Schedule II—Fundamental rights, infringement of—Legislative competence—Constitution of India, Arts.* 14, 19 and 31 (2), *Entries* 43, 44, 45 *List I, Entry* 42 *List III Seventh Schedule.*

Constitution of India, 1950, *Art.* 14—*Equality—Banking Companies (Acquisition and Transfer of Undertakings) Act* 1969, *s.* 15(2)—*Statute permitting Banks to do business other than Banking but practically preventing them from doing non-banking business—If discriminatory.*

Constitution of India, 1950, *Art.* 19(1)(*f*) *cl.* (6) (*ii*) *and* 19(1)(*g*)—*Banking Companies (Acquisition and Transfer of Undertakings) Act,* 1969—*Carrying on of business by the State to the exclusion of citizens—If could be challenged under Art.* 19(1)(*g*)—*Restrictions on the right to do non-banking business—If unreasonable.*

Constitution of India, 1950, *Arts.* 19(1)(*f*) *and* 31(2)—*If mutually exclusive.*

Constitution of India, 1950, *Art.* 31(2)—*Compensation—Meaning of compensation—Undertaking—Acquisition as a unit—Principles of valuation—Justiciability of compensation.*

Constitution of India, 1950, *Art.* 123—*Ordinance—Promulgation of—Nature of power conferred by Article.*

Constitution of India, 1950, *Art.* 32—*Banking Companies (Acquisition and Transfer of Undertakings) Act,* 1969—*When share-holder can move petition for infringement of the rights of the Company.*

Legislative competence—Entry 45 *List I, Entry* 42, *List III Seventh Schedule—"Banking", meaning of—"Property" meaning of—Banking Companies (Acquisition and Transfer of Undertakings) Act,* 1969—*Section* 4—*"Undertaking", meaning of—Validity of law acquiring undertaking.*

On July 19, 1969, the Acting President promulgated, in exercise of the power conferred by cl. (1) of Article 123 of the Constitution, Ordinance 8 of 1969, transferring to and vesting the undertaking of 14 named Commercial Banks, which held deposits of not less than rupees fifty crores, in the corresponding new Banks set up under the Ordinance. Petitions challenging the constitutionality of the Ordinance were lodged in this Court, but before they were heard Parliament enacted the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. The object of the Act was to provide for the acquisition and transfer of the Undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with the national policy and objectives and for matters connected therewith or incidental

A thereto. The Act repealed the Ordinance and came into force on July 19, 1969, *i.e.*, the day on which the Ordinance was promulgated, and the Undertaking of every named Bank with all its rights, liabilities and assets was deemed, with effect from that date, to have vested in the corresponding new bank. By s. 15(2)(e) the named Banks were entitled to engage in business other than banking which by virtue of s. 6(1) of the Banking Regulation Act, 1949, they were not prohibited from carrying on. Section 6 read with Schedule II provided for and prescribed the method of determining compensation for acquisition of the undertaking. Compensation to be determined was for the acquisition of the undertaking as a unit and by section 6(2), though separate valuation had to be made in respect of the several matters specified in Schedule II of the Act, the amount of compensation was to be deemed to be a single compensation. Under Schedule II the compensation payable was to be the sum total of the value of the assets under the heads (a) to (h), calculated in accordance with the provisions of Part I less the sum total of the liabilities and obligations calculated in accordance with the provisions of Part II. The corresponding new Banks took over vacant possession of the lands and buildings of the named Banks. By Explanation I to cl. (e) of Part I of Schedule II the value of any land or building to be taken into account in valuing the assets was to be the market value or the ascertained value whichever was less; by Explanation 2 cl. (1) "ascertained value" in respect of buildings wholly occupied on the date of the commencement of the Act was to be twelve times the amount of annual rent or the rent for which the building could reasonably be expected to be let out from year to year, reduced by certain deductions for maintenance, repairs etc.; under cl. (3) of Explanation 2 the value of open land with no building thereon or which was not appurtenant to any building was to be determined with reference to the price at which sale or purchase of comparable lands were made during the period of three years immediately preceding the commencement of the Act. The compensation was to be determined, in the absence of agreement, by a tribunal and paid in securities which would mature not before ten years.

The petitioner held shares in some of the named Banks, had accounts, current and fixed deposit, in these Banks and was also a Director of one of the Banks. In petitions under Article 32 of the Constitution he challenged the validity of the Ordinance and the Act on the following principal grounds :

(i) the Ordinance was invalid because the condition precedent to the exercise of the power under Article 123 did not exist;

(ii) the Act was not within the legislative competence of Parliament, because, (a) to the extent to which the Act vested in the corresponding new Banks the assets of business other than Banking the Act trenched upon the authority of the State Legislature and (b) the power to legislate for acquisition of property in entry 42 List III did not include the power to legislate for acquisition of an undertaking;

(iii) Articles 19(1)(f) and 31(2) are not mutually exclusive and a law providing for acquisition of property for a public purpose could be tested for its validity on the ground that it imposed limitations on the right to property which were not reasonable; so tested, the provisions of the Act which transferred the Undertaking of the named Banks and prohibited those Banks from carrying on business of Banking and practically prohibited them from carrying on non-banking busi-

ness, impaired the freedoms guaranteed by Articles 19(1)(f) and (g); A

(iv) the provisions of the Act which prohibited the named Banks from carrying on banking business and practically prohibited them from carrying on non-banking business violated the guarantee of equal protection and were, therefore, discriminatory; B

(v) the Act violated the guarantee of compensation under Article 31(2);

(vi) the Act impaired the guarantee of freedom of trade under Article 301; and

(vii) retrospective operation given to Act 22 of 1969 was ineffective since there was no valid Ordinance in existence and the provision in the Act retrospectively validating infringement of the fundamental rights of citizens was not within the competence of Parliament. C

On behalf of the Union of India a preliminary objection was raised that the petitions were not maintainable because, no fundamental right of the petitioner was directly impaired as he was not the owner of the property of the undertaking taken over. D

HELD : (*Per Shah, Sikri, Shelat, Bhargava, Mitter, Vaidialingam, Hegde, Grover, Reddy and Dua, JJ.*)

1. The petitions were maintainable.

A company registered under the Indian Companies Act is a legal person, separate and distinct from its individual members. Hence a shareholder, a depositor or a director is not entitled to move a petition for infringement of the rights of the company unless by the action impugned his rights are also infringed. But, if the State action impairs the right of the share-holders as well as of the company the Court will not, concentrating merely upon the technical operation of the action deny itself jurisdiction to grant relief. In the present case the petitioner's claim was that by the Act and the Ordinance the rights guaranteed to him under Articles 14, 19 and 31 of the Constitution were impaired. He thus challenged the infringement of his own rights and not of the Banks. [555 G-556 H] E F

The State Trading Corporation of India Ltd. Ors. v. *The Commercial Tax Officer, Visakhapatnam & Ors.*, [1964] 4 S.C.R. 99 and *Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar and Ors.*, [1964] 6 S.C.R. 885 held inapplicable. G

Dwarkadas Shrinivas v. *The Sholapur Spinning & Weaving Co. Ltd. and Ors.*, [1954] S.C.R. 674 and *Chiranjit Lal Chowdury* v. *The Union of India*, [1950] S.C.R. 869, referred to.

2. (i) Exercise of the power to promulgate an Ordinance under Article 123 is strictly conditioned. The clause relating to the satisfaction is composite; the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final. H

A [Since the Act was declared invalid no opinion was expressed on the extent of the jurisdiction of the court to examine whether the condition relating to satisfaction of the President was fulfilled.] [559 H-560 B; 561 G]

(ii) Act 22 of 1969 was within the legislative competence of Parliament.

B The competence of Parliament is not covered in its entirety by entries 43 and 44 of List I of the Seventh Schedule. A law regulating the business of a corporation is not a law with respect to regulation of a corporation. [563 B]

Parliament has exclusive power to legislate with respect to "Banking" in entry 54 List I. A legislative entry must receive a meaning conducive to the widest amplitude subject to limitations inherent in the federal C scheme which distributes legislative power between the union and the constituent units. But, the field of "banking" cannot be extended to include trading activities which, not being incidental to banking, encroach upon the substance of the entry "trade and commerce" in entry 26 List II. It cannot be said that all forms of business described in s. 6(1) of the Banking Regulation Act, 1949, cls. (a) to (n) are, if carried on in addition to banking as defined in s. 5(b) of the Act, banking, and that Parliament is competent to legislate in respect that business under entry D 54 List I. [565 D, 566 D]

The contention that Parliament was incompetent to legislate for acquisition of the named Banks in so far as it related to assets of the non-banking business had to fail for two reasons: (a) there was no evidence that the named Banks held any assets for any distinct non-banking business, and (b) the acquisition was not shown to fall within any entry in List II of Seventh Schedule. [568 E]

E Power to legislate for acquisition of "Property" in entry 42 List III includes the power to legislate for acquisition of an undertaking. The expression "property" in entry 42, List III, has a wide connotation and it includes not only assets, but the organisation, liabilities and obligations of a going concern as a unit. The expression "undertaking" in section 4 of the Act clearly means a going concern with all its rights, liabilities and assets as distinct from the various rights and assets which compose F it. The obligations and liabilities of the business form an integral part of the undertaking and for compulsory acquisition cannot be divorced from the assets, rights and privileges. A law could, therefore, be enacted for compulsory acquisition of an undertaking as defined in s. 5 of the Act. [568 B-D]

There was no satisfactory proof in support of the plea that the Act was not enacted in the larger interest of nation but to serve political ends. G Whether by the exercise of the power vested in the Reserve Bank under the pre-existing laws, results could be achieved which it was the object of the Act to achieve was not relevant in considering whether the Act amounted to abuse of legislative power. This court has the power to strike down a law on ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. [583 D, 584 H]

H *Commonwealth of Australia* v. *Bank of New South Wales*, L.R. [1950] A.C. 235 and *Rajahmundry Electric Supply Corporation Ltd.* v. *The State of Andhra*, [1954] S.C.R. 779, referred to.

(iii)(a) Articles 19(1)(f) and 31(2) are not mutually exclusive.

Under the Constitution the extent of protection against impairment of a fundamental right is determined not by the object of the legislature nor by the form of the action, but by its direct operation upon the individual's rights. [576 C] A

In this Court, there is, however, a body of authority that the nature and extent of the protection of the fundamental rights is measured not by the operation of the State action upon the rights of the individual but by its object. Thereby the constitutional scheme which makes the guaranteed rights subject to the permissible restrictions within their allotted field, fundamental, got blurred and gave impetus to a theory that certain Articles of the Constitution enact a Code dealing exclusively with matters dealt with therein and the protection which an aggrieved person may claim is circumscribed by the object of the State action. The decision in *A. K. Gopalan* v. *The State of Madras*, [1950] S.C.R. 88, given early in the history of the Court, has formed the nucleus of this theory. The principle underlying the opinion of the majority in *Gopalan* was extended to the protection of the freedom in respect of property and it was held that Art. 19(1)(f) and 31(2) were mutually exclusive in their operation and that the substantive provisions of a law relating to acquisition of property were not liable to be challenged on the ground that they imposed unreasonable restrictions on the right to hold property. With the decision in *Kavalappara Kochuni* v. *State of Kerala*, [1960] 3 S.C.R. 887, there arose two divergent lines of authority: (i) "authority of law" in Art. 31(1) is liable to be tested on the ground that it violates other fundamental rights and freedoms including the right to hold property guaranteed by Art. 19(1)(f); and (ii) "authority of a law" within the meaning of Art. 31(2) is not liable to be tested on the ground that it impairs the guarantee of Art. 19(1)(f), in so far as it imposed substantive restrictions through it may be tested on the ground of impairment of other guarantees. The expression "law" in the two clauses of Article 31 had, therefore, two different meanings. [570 C-576 B] B C D E

The theory that the object and form of the State action determined the extent of the protection which the aggrieved party may claim is not consistent with the constitutional scheme. Clause (5) of Art. 19 and cls. (1) & (2) of Art. 31 prescribes restrictions upon State action subject to which the right to property may be exercised. Article 19(5) is a broad generalisation dealing with the nature of limitations which may be placed by law on the right to property. The guarantees under Art. 31(1) & (2) arise out of the limitations imposed on the authority of the State, by law, to take over the individual's property. The true character of the limitations under the two provisions is not different. Clause (5) of Art. 19 and cls. (1) & (2) of Art. 31 are parts of a single pattern; Art. 19(1)(f) enunciating the basic right to property of the citizen and Art. 19(5) and cls. (1) & (2) of Art. 31 dealing with the limitations which may be placed by law subject to which the rights may be exercised. Limitations prescribed for ensuring due exercise of the authority of the State to deprive a person of his property and of the power to compulsorily acquire his property are, therefore, specific classes of limitations on the right to property falling within Art. 19(1)(f). In the Constitution the enunciation of rights either expressly or by implication does not follow a uniform pattern. But one thread runs through them; they seek to protect the rights of the individual or groups of individuals against infringement of those rights within specified limits. [576 E-577 G] F G H

Formal compliance with the conditions under Article 31(2) is not sufficient to negative the protection of the guarantee of the right to pro-

A perty. The validity of "law" which authorises deprivation of property and a "law" which authorises compulsory acquisition of property for a public purpose must be adjudged by the application of the same tests. Acquisition must be under the authority of a law and the expression "law" means a law which is within the competence of the legislature and does not impair the guarantee of the rights in Part III. If property is compulsorily acquired for a public purpose and the law satisfies the requirements of Art. 31(2) and 31(2A), the court may presume that by B the acquisition a reasonable restriction on the exercise of the right to hold property is imposed in the interest of the general public. This is so, not because the claim to plead infringement of the fundamental right under Art. 19(1)(f) does not avail the owner; it is because the acquisition imposes permissible restriction on the right of the owner of the property compulsorily acquired. [577 H-578 D]

C The assumption in *A. K. Gopalan* v. *The State of Madras,* [1950] S.C.R. 88, held incorrect. [578 E]

Kavalappara Kottarathi Kochuni & Ors. v. *State of Madras,* [1960] 3 S.C.R. 887, *Swami Motor Transport Co. (P) Ltd.* v. *Sri Sankaraswamigal Mutt,* [1963] Supp. 1 S.C.R. 282, *Maharana Shri Javavantsingji* v. *State of Gujarat,* [1962] Supp. 2 S.C.R. 411, 438, *Ram Singh & Ors.* v. *State of Delhi,* [1951] S.C.R. 451, *State of West Bengal* v. *Subodh Gopal,* [1954] D S.C.R. 587, *State of Bombay* v. *Bhanji Munji & Anr.* [1966] 1 S.C.R. 777, *Babu Barkya Thakur* v. *State of Bombay,* [1961] 1 S.C.R. 128, *Smt. Sitabati Debi* v. *State of West Bengal,* [1967] 2 S.C.R. 940 and *State of Madhya Pradesh* v. *Ranojirao Shinde,* [1968] 3 S.C.R. 489, referred to.

(b) The law which prohibited, after July 19, 1969, the named Banks from carrying on banking business, being a necessary incident of the right assumed by the Union, could not be challenged because of Art. E 19(6)(ii) in so far as it affected the right to carry on business. [583 C]

Clause (6) of Art. 19 consists of two parts: (i) the right declared by sub-cl. (g) is not protected against the operation of any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by that sub-clause; and (ii) *in particular* sub-cl. (g) does not affect the operation of any law relating *inter alia,* to carrying on by the State or by a Corporation owned or controlled by F the State, of any trade, business, industry or service whether or not such law provides for the exclusion, complete or partial, of citizens. It cannot be held that the expression "in particular" used in cl. (6) is intended either to particularise or to illustrate the general law set out in the first limb of the clause and, therefore, is subject to the enquiry whether it imposes reasonable restrictions on the exercise of the right in the interest of the general public. The rule enunciated by this Court in *Akadasi Padhan* v. *State of Orissa,* [1963] Supp. 2 S.C.R. 691, applies to all laws G relating to the carrying on by the State of any trade, business, industry or service. The basic and essential provisions of law which are "integrally and essentially connected" with the carrying of trade by the State will not be exposed to the challenge that they impair guarantee under Art. 19(1)(g), whether the citizens are excluded completely or partially from carrying on that trade, or the trade is competitive. Imposition of restrictions which are incidental or subsidiary to the carrying on of trade by the State whether to the exclusion of the citizen or not must however, H satisfy the test of the main limb of the Article. [580 F, H; 581 H]

Akadasi Padhan v. *State of Orissa,* [1963] Supp. 2 S.C.R. 691, followed.

Early Fitzwilliam's Wentworth Estates Co. v. *Minister of Housing & Local Government & Anr.* [1952] 1 All E.R. 509, *Saghir Ahmad* v. *State of U.P.* [1955] 1 S.C.R. 707, 727, *Rasbihari Panda* v. *State of Orissa* [1969] 3 S.C.R. 374, *Vrajlal Manilal & Co.* v. *State of Madhya Pradesh & Ors.* [1970] 1 S.C.R. 400 and *Municipal Committee Amritsar* v. *State of Punjab*, [1969] 3 S.C.R. 447, referred to.

(c) The restrictions imposed upon the right of the named Banks to carry "non-banking" business were plainly unreasonable.

By s. 15(2)(e) of the Act the Banks were entitled to engage in business other than banking. But a business organisation deprived of its entire assets and undertaking, its managerial and other staff, its premises and its name, even if it had a right to carry on non-banking business would not be able to do so, specially, when even the portion of the value of its undertaking made payable to it as compensation was not made immediately payable. Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot, in practice, be carried on, the Court will regard imposition of the restrictions as unreasonable. [579 F, 586 H]

Mohammad Yasin v. *Town Area Committee, Jalalabad & Anr.* [1952] S.C.R. 572 and *Dwarkadas Shrinivas* v. *Sholapur Spinning & Weaving Co. Ltd. & Ors.*, [1954] S.C.R. 674, referred to.

(iv) When, after acquiring the assets, undertaking, organisation, goodwill and the names of the named Banks they are prohibited from carrying on banking business, whereas, other banks, Indian as well as foreign, are permitted to carry on banking business, a flagrantly hostile discrimination is practised. There is no explanation why the named Banks are specially selected for being subjected to this disability. Section 15(2) of the Act which by the clearest implication prohibited the named Banks from carrying on banking business is, therefore, liable to be struck down.

The named Banks, though theoretically competent are, in substance, prohibited from carrying on non-banking business. For reasons set out for holding that the restriction is unreasonable, the guarantee of equality was impaired by preventing the named Banks from carrying on non-banking business. [590 E-H]

[In the absence of any reliable data the Court did not express any opinion on the question whether selection of the undertaking of some out of many banking institutions for compulsory acquisition is liable to be struck down as hostile discrimination.] [589 F]

Chiranjit Lal Chowdhuri v. *The Union of India*, [1950] S.C.R. 869, *State of Bombay* v. *F. N. Balsara*, [1951] S.C.R. 682, *State of West Bengal* v. *Anwar Ali Sarkar*, [1952] S.C.R. 284, *Budhan Choudhry and Ors.* v. *State of Bihar*, [1955] 1 S.C.R. 1045, *Shri Ram Krishna Dalmia* v. *Shri Justice S. R. Tendolkar*, [1959] S.C.R. 279 and *State of Rajasthan* v. *Mukanchand*, [1964] 6 S.C.R. 903, 910, referred to.

(v) The Act violated the guarantee of compensation under Art. 31(2) in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation of the undertaking of the named Banks and by the method prescribed the amounts so declared could not be regarded as compensation. [610 F]

In *P. Vajravelu Mudalkar* v. *Special Deputy Collector, Madras*. [1965] 1 S.C.R. 614, and in the cases following it arising under statutes enacted

A after the coming into force of the Constitution (Fourth Amendment) Act, 1955 this Court held that the expression compensation in Art. 31(2) after the Constitution (Fourth Amendment) Act continued to have the same meaning it had in Art. 31(2) before it was amended *viz.*, "just equivalent" or "full indemnification". But this Court in *The State of Gujarat* v. *Shantilal Mangaldas*, [1969] 3 S.C.R. 341, observed that compensation payable as compulsory acquisition of property was not by the application of any principles, determinable as a precise sum and by B calling it a "just" or "fair" equivalent, no definiteness could be attached thereto, that the rules relating to determination of value of lands, buildings, machinery and other classes of property differed, and the application of several methods or principles lead to widely divergent amounts; that principles could be challenged on the ground that they were irrelevant to the determination of compensation but not on the plea that what was awarded as a result of the application of those C principles was not just or fair compensation; and that a challenge to a statute that the principles specified by it did not award a just equivalent would be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable. Notwithstanding the difference in *Vajravelu* and *Shantilal Mangaldas*, both the lines of thought, which converge in the ultimate result, support the view that the principle specified by the law for determination of compensation is beyond the pale of challenge, if it is relevant to the determination of D compensation and is a recognised principle applicable in the determination of compensation for property compulsorily acquired and the principle is appropriate in determining the value of the class of property sought to be acquired. On the application of the view expressed in *Vajravelu* and *Shantilal Mangaldas* cases the Act had to be struck down as it failed to provide the expropriated Banks compensation determined according to relevant principles. [594 G, 595 C, 598 F-H]

E *P. Vajravelu Mudaliar* v. *Special Deputy Collector, Madras*, [1965] 1 S.C.R. 614 and *State of Gujarat* v. *Mangaldas & Ors.* [1969] 3 S.C.R. 341 applied.

Attorney-General v. *De Keyser's Royal Hotel*, L.R. [1920] A.C. 508, *State of West Bengal* v. *Mrs. Bela Banerjee*, [1954] S.C.R. 558, *N. B. Jeejeebhoy* v. *Assistant Collector, Thana Prant*, [1965] 1 S.C.R. 636, *Union of India* v. *Kamalabai Harjiwandas Parekh & Ors.*, [1968] 1 F S.C.R. 463, *Union of India* v. *Metal Corporation of India*, [1967] 1 S.C.R. 255, *State of Madras* v. *D. Namasivaya Mudaliar*, [1964] 6 S.C.R. 936, *Lachman Dass* v. *Municipal Committee, Jalalabad* A.I.R. 1969 S.C. 1126, *Trego* v. *Hunt*, L.R. [1896] A.C. 7, *State of Bihar* v. *Maharajadhiraja Sir Kameshwar Singh of Darbhanga*, [1952] S.C.R. 889 and *Bombay Dyeing & Manufacturing Co. Ltd.* v. *State of Bombay*, [1958] S.C.R. 1122, referred to.

G There are different methods applicable to different classes of property and a method appropriate to the determination of value of one class of property may be wholly inappropriate in determining the value of another class. A principle specified by Parliament for determining compensation for the property to be acquired is not conclusive. But if several principles are appropriate and one is selected for determination of the value of the property to be acquired, selection of that principle to the H exclusion of other principles is not open to challenge, for, the selection must be left to the wisdom of the Parliament. [599 C. F]

The object underlying the principles of valuation is to award the owner the equivalent of his property with its existing advantages and its

potentialities. Where there is an established market for the property acquired the problem of valuation presents little difficulty. Where there is no established market for the property acquired, the object of the principle of valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future, without taking into account the urgency of the acquisition, the disinclination of the owner to part with the property and the benefit which the acquirer is likely to obtain by the acquisition. [599 G] A

Compensation to be determined under the Act was for acquisition of the undertaking and when an undertaking is acquired as a unit the principles for determination of compensation must be relevant and appropriate to the acquisition of the entire undertaking. But the Act instead of providing for valuing the entire undertaking as a unit provided for determining the value, reduced by the liabilities, of only some of the components which constituted the undertaking and also provided different methods of determining compensation in respect of each such component. This method is *prima facie* not a method relevant to the determination of compensation for acquisition of the undertaking, for, the aggregate value of the components is not necessarily the value of the entirety of a unit of property acquired, especially, when the property is a going concern with an organised business. On this ground alone acquisition of the undertaking was liable to be declared invalid for it impaired the constitutional guarantee for payment of compensation for acquisition of property by law. [601 D] B C D

Even if it be assumed that the aggregate value of the different components was equal to the value of the undertaking of the named banks as a going concern, the principles specified did not give a true recompense to the bank for loss of the undertaking. In determining the compensation for the undertaking (i) certain important classes of assets were omitted from the heads (a) to (h); (ii) the method specified for valuation of lands and buildings was not relevant to determination of compensation and the value determined thereby in certain circumstances was illusory as compensation; and (iii) the principle for determination of the aggregate value of liabilities was also irrelevant. [602 B] E

The undertaking of a Banking Company taken once as a going concern would ordinarily include the good-will and the value of the unexpired long-term leases in the prevailing conditions in the urban areas. But good-will of the banks was not one of the items in the assets in the schedule. Thus, the value determined by excluding important components of the undertaking such as the good-will and the value of the unexpired period of leases would not be compensation for the undertaking. The view of this Court in *Vajravelu Mudaliar* that exclusion of potential value amounted to giving inadequate compensation and was not fraud on power had no application when valuation of an undertaking was sought to be made by breaking it up into several heads of assets, and important heads were excluded and others valued by the application of irrelevant principles. [602 C, 608 B] F G

Trego v. *Hunt*, L.R. [1896] A.C. 7, referred to.

Making a provision for payment of capitalised annual rental at twelve time the amount of rent cannot reasonably be regarded as payment of compensation having regard to the conditions prevailing in the money market. Again, the annual rent was reduced by several outgoings and the balance was capitalised. The vice of items (v) & (vi) of cl. (1) of Explanation 2 was that they provided for deduction of a capital charge H

A out of the annual rental which according to no rational system of valuing property by capitalisation of the rental method was admissible. The method provided by the Act permitted the annual interest on the amount of the encumbrance to be deducted before capitalisation and the capitalised value was again reduced by the amount of the encumbrance because, the encumbrance included not only those mortgages or capital charges in respect of which the amount had fallen due but also the liability under the mortgage or capital charge whether the period stipulated under the B deed creating the encumbrance had expired or not. In effect a single debt was, in determining the compensation, debited twice, first, in computing the value of assets and, again, in computing the liabilities. By the Act, the corresponding new banks took over vacant possession of the lands and buildings belonging to the named banks. The Act instead of taking into account the value of the premises as vacant premises adopted a method which could not be regarded as relevant. Under cl. 3 of Explanation 2 the value of the open land was to be the market value whereas C the value of the land with buildings to be taken into account was the value determined by the method of capitalisation of annual rent or market value whichever was less. The Act, therefore, did not specify a relevant principle for determination of compensation for lands and buildings. [604 B-605 B, 606 B-607 F]

The deficiencies in the Act did not result merely in inadequate com- D pensation within the meaning of Art. 31(2). The Constitution guarantees a right to compensation—an equivalent in money of the property compulsorily acquired. That is the basic guarantee. The law must, therefore, provide compensation and for determining compensation relevant principles must be specified: if the principles are not relevant the ultimate value determined is not compensation. Therefore, determination of compensation to be paid for the acquisition of an undertaking as a unit after awarding compensation for some items which go to make up the under- E taking and omitting important items amounted to adopting an irrelevant principle in the determination of the value of the undertaking and did not furnish compensation to the expropriated owner. [607 H, 608 E]

Further, by giving the expropriated owner compensation in bonds of the face value of the amount determined maturing after many years and carrying a certain rate of interest, the constitutional guarantee was not necessarily complied with. If the market value of the bonds is not approxi- F mately equal to the face value, the expropriated owner may raise a grievance that the guarantee under Art. 31(2) is impaired. [609 D-E]

[In view of the finding that there was no evidence that the named banks owned distinct assets apart from the assets of the banking business, the Court did not express any opinion on the question whether a composite undertaking of two or more distinct lines of business may be acquired where there is a public purpose for the acquisition of the assets of one or G more lines of business but not in respect of all the lines of business. [591 F]

The Court did not also express any opinion on the question whether in adopting the method of determination of compensation, by aggregating the value of assets which constitute the undertaking, the rule that cash and choses-in-action are incapable of compulsory acquisition may be applied. [604 B]

H In view of the decision that the provisions relating to determination and payment of compensation impaired the guarantee under Art. 31(2), the Court did not consider whether the Act violated the freedom of trade, commerce and intercourse in respect of (i) agency business (ii) the business of guarantee and indemnity carried on by the named banks.

For the same reason the court did not consider the validity of the retrospective operation given to the Act by ss. 1(2) and 27.] [609 H] A

Section 4 is the kingpin in the mechanism of the Act. Sections 4, 5 and 6 read with Sch. II provide for the statutory transfer and vesting of the undertaking of the named banks in the corresponding new banks and prescribe the method of determining of compensation for expropriation of the undertaking. Those provisions are void as they impair the fundamental guarantee under Art. 31(2). Sections 4, 5 and 6 and Sch. II are not severable from the rest of the Act. The Act in its entirely had to be declared void. [610 G] B

Per Ray, J. dissenting:

[His Lordship did not deal with the preliminary objection based on the petitioner's *locus standi* since the petitions were heard on merits.]

(i) The interpretation of Article 123 is to be made, first, on the language of the Article and, secondly, the context in which that power is reposed in the President. The power is vested in the President who is the executive head and the circumstances contemplated in the Article are a guide to the President for exercise of such power. Parliament is not in session throughout the year and during the gaps between sessions the legislative power of promulgating Ordinance is reposed in the President in cases of urgency and emergency. The President is the sole judge whether he will make the Ordinance. The President, under Article 74(1) of the Constitution, acts on the advice of Ministers who are responsible to Parliament and under Article 74(2) such advice is not to be enquired into by any Court. The Ordinances promulgated under Article 123, are limited in life and the Ordinance must be laid before Parliament and the life of the Ordinance may be further shortened. The President under Article 361(1), is not answerable to any Court for acts done in the performance of his duties. The power under Article 123 relates to policy and to an emergency when immediate action is considered necessary and if an objective test is applied the satisfaction of the President contemplated in the Article will be shorn of the power of the President himself and as the President will be acting on the advice of Ministers it may lead to disclosure of facts which under Article 75(4) are not to be disclosed. For these reasons it had to be held that the satisfaction of the President under Article 123 is subjective. [657 D-H] C D E

The only way in which the exercise of power by the President can be challenged is by establishing bad faith or *mala fide* or corrupt motive. The fact that the Ordinance was passed shortly before the Parliament session began, did not show any *mala fide*. Besides, the respondent was not called upon to meet any case of *mala fides*. [659 G] F

Bhagat Singh v. *King Emperor*, 58 I.A. 169, *King Emperor* v. *Sibnath Banerjee*, 72 I.A. 241, *Lakhi Narayan Das* v. *Province of Bihar*, [1949] S.C.R. 693, *Liversidge* v. *Sir John Anderson*, [1942] A.C. 206, *Point of Ayr Collieries Ltd.* v. *Lloyd-George*, [1943] 2 All E.R. 546 and *Carltona, Ltd.* v. *Commissioners of Works*, [1943] 2 All E.R. 560, *Hugli Electricity Co., Ltd.* v. *Province of Bombay*, 76 I.A. 57 and *Padfield* v. *Minister of Agriculture, Fisheries and Food*, [1968] 1 All E.R. 604, referred to. G

Barium Chemicals Ltd. v. *The Company Law Board*, [1966] Supp. S.C.R. 311 and *Rohtas Industries case*, [1969] 3 S.C.R. 108, distinguished.

(ii) The Act was one for acquisition of property and was also in relation to banking. The legislation was valid with reference to entry 42 List III (Acquisition and requisitioning of property) and entry 45 List I (Banking) and it did not trench upon entry 26 List II, namely, trade and commerce within the State. [633 D-F] H

A Under s. 6(1) of the Banking Regulation Act, 1949, the four types of businesses, namely, (i) the receiving of scrips or other valuables on deposit or for safe custody and providing of safe deposit vaults, (ii) agency business, (iii) business of guarantee, giving of indemnity and underwriting and (iv) business of acting as executors and trustees, disputed by the petitioner not to be banking business, are recognised as legitimate forms of business of a banking company. The provisions contained in
B s. 6(1) are the statutory restatement of the gradual evolution, over a century, of the various kinds of business of banking companies. By cl. (n) of s. 6(1), in addition to the forms of business mentioned in cls. (a) to (m), a banking company may engage in "doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company". The words "other things" appearing in cl. (n), after enumerating the various types of business in cls. (a) to (m), point to the inescapable conclusion that the business mentioned in cls.
C (a) to (m) are all incidental or conducive to the promotion or advancement of the business or the banking company. Entry 45 in List I of Seventh Schedule is only "banking" and it does not contain any qualifying words like "the conduct of business" occurring in entry 38 of the Government of India Act, 1935. "Banking will therefore have the wide meaning to include all legitimate business of a banking company referred to in s. 5(b) as well as in s. 6(1) of the 1949 Act. Further, the restriction contained in s. 6(2) of the 1949 Act that no banking company shall
D engage in any form of business other than those referred to in sub-s. (1) establishes that the various types of business mentioned in sub-s. (1) are normal recognised business of a banking company and, as such, are comprised in the Undertaking of the bank. [624 F, 625 F-G, 627 D-E]

Tennant v. *The Union Bank of Canada*, [1894] A.C. 51, *Banbury* v. *Bank of Montreal*, [1918] A.C. 624, *Commonwealth of Australia and*
E *Others* v. *Bank of New South Wales and Others*, [1950] A.C. 235, *Bank of Chettinad* v. *T.C. of Colombo*, [1948] A.C. 378 P.C., *United Dominions Trust Ltd.* v. *Kirkwood*, [1966] 1 Q.B. 783, *United Provinces* v. *Mst. Atiqa Begum and Others*, [1940] F.C.R. 110 and *Union Colliery Company of British Columbia* v. *Bryden*, [1899] A.C. 580, referred to.

The Undertaking of a banking company is property which can be validly acquired under Article 31(2) of the Constitution. The word
F "property" should be given a liberal and wide connotation and would take in those well recognised types of interest which have the insignia or characteristics of proprietary right. By Undertaking of a bank is meant the entire integrated organisation consisting of all property, movable or immovable and the totality of undertaking is one concept which is not divisible into components or ingredients. [635 H, 636 D]

Gardner v. *London Chatham and Dover Railway Co.*, [1867] Vol. II
G Chancery Appeals 201, *Re : Panama, New Zealand and Australian Royal Mail Company, Re : Portsmouth (Kingston Fratton and Southsea) Tramsway Co.*, [1892] 2 Ch. 362, *H. H. Vivian and Company Ltd.*, [1900] 2 Ch. 654, *Doughty* v. *Lomagunda Reefs Ltd.* [1902] 2 Ch. D. 837, *Minister for State for the Army* v. *Datziel*, 68 C.L.R. 261, *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, [1954] S.C.R. 1005 and *J. K. Trust. Bombay* v. *The Commissioner of Income-tax Excess Profits Tax, Bombay*,
H [1958] S.C.R. 65, referred to.

State of Madhya Pradesh v. *Ranojirao Shinde & Anr.*, [1968] 3 S.C.R. 489, held inapplicable.

(iii) (a) Article 19(1) (f) and (g) do not at all enter the domain of Art. 31(2). A

The view of this Court in *Kavalappara Kochuni* v. *State of Madras* and *Sitabati Devi* v. *State of West Bengal* was that Art. 31(2), after the Constitution Fourth Amendment Act, 1955, related entirely to acquisition or requisition of property by the State and was totally distinct from the scope and content of Art. 31(1) with the result that Art. 19(1)(f) did not enter the area of acquisition or requisition of property by the State. Again, in *State of Gujarat* v. *Shantilal Mangaldas* the Court observed : ["*Sitabati Devi*] unanimously held that the validity of the Act relating to acquisition and requisition cannot be questioned on the ground that it offended Art. 19(1)(f) and cannot be decided by the criterion under Article 19(5)". [621 C. H] B

The provisions of the Constitution are to be interpreted in a harmonious manner, that is, each provision must be rendered free to operate with full vigour in its own legitimate field. If acquisition or requisition of property for a public purpose has to satisfy again the test of reasonable restriction in the interest of the general public, harmony is repelled and Art. 31(2) becomes a mere repetition and meaningless. A reasonable restriction is inherent and implicit in public purpose. That is why public purpose is dealt with separately in Art. 31 (2). It will be pedantry to say that acquisition for public purpose is not in the interest of the public. Articles 31(2) and 31(2)(A) form a self contained code, because : (i) it provides for acquisition or requisition with authority of a law; (ii) the acquisition or requisition is to be for a public purpose; (ii) the law should provide for compensation; (iv) the adequacy of compensation is not to be questioned; and, finally, the amendment of Art. 31 indicates in bold relief the separate and distinctive field of law for acquisition and requisition, by the State, of property for public purpose. [622 C-623 C] C D E

A public purpose is a purpose affecting the interest of the general public and, therefore, the welfare State is given powers of acquisition or requisition of property for public purpose. One cannot be guided either by passion and property on the one hand or prejudice against deprivation on the other. Public purpose steers clear of both passion and prejudice The object of the Act according to the legislation is to use the deposits in wider public interest and what was true of public purpose when the Constitution was ushered in the mid-century is a greater truth after two decades. [623 H] F

A. K. Gopalan v. *State of Madras*, [1950] S.C.R. 88, *State of West Bengal* v. *Subodh Gopal Bose*, [1954] S.C.R. 587, *State of Bombay* v. *Bhanji Munji and Anr.*, [1955] 1 S.C.R. 777, *Kavalappara Kottarthil Kochuni and Ors.* v. *The State of Madras and Ors.*, [1960] 3 S.C.R. 887, *Smt. Sitabati Devi and Anr.* v. *State of West Bengal and Anr.* [1967] 2 S.C.R. 940, *State of Gujarat* v. *Shantilal Mangaldas and Others*, A.I.R. 1969 S.C. 634, *State of Bihar* v. *Maharaja Darbhanga*, [1952] S.C.R. 889 and *Iswari Prosad* v. *N. R. Sen* A.I.R. 1952 Cal. 273, referred to. G

Even on the assumption that Article 19(1)(f) or (g) is attracted in case of acquisition or requisition of property dealt with by Article 31(2), the Act had to be upheld as a reasonable restriction in the interest of the general public. [654 H] H

(b) Article 19(6) in the two limbs and in the two sub-articles of the second limb deals with separate matters; and state monopoly in respect of

A trade or business is not open to be reviewed in courts on the ground of reasonableness. [638 D]

Akadasi Padhan v. *State of Orissa*, [1963] Supp. 2 S.C.R. 691, followed.

Motilal v. *Government of the State of Uttar Pradesh* I.L.R. [1951] 1 All. 269 and *Municipal Committee of Amritsar* v. *State of Punjab*, Writ Petition No. 295 of 1965 decided on 30 January, 1969, referred to.

B

Earl Fitzwilliam's Wentworth Estates Co. v. *Minister of Housing and Local Government and Another*, [1952] A.C. 362, distinguished.

(c) Section 15(2) of the Act allowed the named Banks to carry on business other than banking. If the entire undertaking of a banking company was taken by way of acquisition, the assets could not be separated to distinguish those belonging to the banking business from others C belonging to non-banking business, because, assets were not in fact divisible on any such basis. Furthermore, that would be striking at the root of acquisition of the entire undertaking. No acquisition or requisition of the undertaking of a banking company is complete or comprehensive without all businesses which are incidental and conducive to the entire business of the bank. It would be strange to hold that in the teeth of express provisions in the Act permitting the banks to carry on businesses D other than banking that the same would amount to a prohibition on the bank to carry on those businesses. Constitutionality of the Act could not be impeached on the ground of lack of immediate resources to carry on business. The petitioner's contention based on Art. 19(6) therefore had to fail. [639 B-E]

(iv) The acquisition of the undertaking did not offend Art. 14 because of intelligible differentia and their rational relation to the object to E be achieved by the Act and it followed that these Banks could not, therefore, be allowed to carry on banking business to nullify the very object of the Act. The fourteen banks were not in the same class as other scheduled banks. The classification was on the basis of the fourteen Banks having deposit of Rs. 50 crores and over. The object of the Act was to control the deposit resources for developing national economy and as such the selection of fourteen Banks, having regard to their larger resources, their greater coverage, their managerial and personal resources F and the administrative and organisational factors involved in expansion, was both intelligible and sound and related to the object of the Act. From the point of view of resources these fourteen banks were better suited than others and, therefore, speed and efficiency which were necessary for impementing the objectives of the Act could be ensured by such classification. The legislature is the best judge of what should subserve public interest. [644 E, 642 E-H]

G *Shri Ram Krishna Dalmia* v. *Shri Justice S. R. Tendolkar*, [1959] S.C.R. 279, *P. V. Sivarajan* v. *The Union of India*, [1959] 1 Supp. 779, *Kathi Raning Rawat* v. *State of Saurashtra* [1952] S.C.R. 435, *The Board of Trustees, Ayurvedic and Unani Tibia College, Delhi* v. *The State of Delhi*, [1962] Supp. 1 S.C.R. 156, *Mohd. Hanif Quareshi* v. *State of Bihar*, [1959] S.C.R. 628 and *Harnam Singh* v. *Regional Transport Authority, Calcutta*, 1954 S.C.R. 371, referred to.

H (v) When principles are laid down in a statute and those principles are relevant to determination of compensation, namely, they are principles in relation to the property acquired or are principles relevant to the time of acquisition of property or the amount fixed is not obviously and shockingly

illusory, there is no infraction of Art. 31(2) and the owner cannot impeach it on the ground of "just equivalent" of the property acquired. The relevancy is to compensation and not to adequacy. It is unthinkable that Parliament, after the Constitution Fourth Amendment Act, intended that the word compensation should mean 'just equivalent' when Parliament had put a bar on challenge to the adequacy of compensation. Just compensation cannot be inadequate and anything which is impeached as unjust or unfair is impinging on adequacy. [649 C-E]

Vajravelu Mudaliar v. *Special Deputy Collector, Madras,* [1965] 1 S.C.R. 614, *Shantilal Mangaldas* v. *State of Gujarat,* [1969] 3 S.C.R. 341, *Bela Banerjee's case,* [1954] S.C.R. 558, *Union of India* v. *The Metal Corporation of India Ltd.,* [1967] 1 S.C.R. 255 and *Cruttwell* v. *Lye,* 17 Ves. 335, referred to.

Under the Act entire undertaking was the subject matter of acquisition and compensation was to be paid for the undertaking and not for each of the assets of the undertaking. There is no uniform established principle for valuing an undertaking as a going concern but the usual principle is assets minus liabilities. If it be suggested that no compensation was provided for any particular asset that would be questioning adequacy of compensation, because, compensation was provided for the entire undertaking. When the relevant principle set out was ascertained value it could not be urged that market value should have been the principle. It would really be going into adequacy of compensation by preferring the merits of one principle to that of the other for the oblique purpose of arriving at what was suggested to be just equivalent. [650 G, 651 F-G, 649 D]

The contention as to exclusion of good-will amounted to questioning adequacy and would not vitiate the principle of valuation which had been laid down. Good-will can arise when the undertaking is sold as a going concern. The fourteen banks carried on business under licence by reason of s. 22 of the Banking Regulation Act, and the concept of sale in such a situation is unreal. In case of compulsory acquisition no goodwill passes to the acquiring authority. Besides, no facts were pleaded in the petition to show what goodwill the banks had. [653 F]

In the valuation of lands and buildings market value is not the only principle. That is why the Constitution has left the laying down of the principles to the legislature. Ascertained value is a relevant and sound principle based on capitalisation method which is accepted for valuation of land and properties. The contention that twelve times the annual rent was not a relevant principle and was not an absolute rule and compensation might be illusory could not be accepted. Capitalisation method is not available to land because land is not generally let out. Nor can it be said that the principle is irrelevant when there are two plots side by side one with building and the other vacant because standard rent necessarily takes into account value of land on which the building is situated. If rental method be applied to land the value may be little, but it is a principle relevant to determination of compensation. Furthermore, there was no case in the petition that there was land with building side by side with vacant land. [651 F-H, 652 A-C]

As to securities shares and debentures Explanation (iv) and (v) to Part I(c) would be operative only when market value of shares and debentures was considered reasonable by reason of its having been affected by abnormal factors or when market value of shares and debentures was not ascertainable. In both cases principles were laid down, namely, how

A valuation had to be made taking into account various factors and these principles were relevant to determination of compensation.

Deductions on account of maintenance and repairs is essential in the capitalization method. Insurance would also be an essential deduction in the capitalisation method and it could not be assumed that the Bank would insure for a value higher than what was necessary; also payment of tax or ground rent might be out of income but these had to be provided for in ascertaining value of the building under the capitalisation method.

There was no basis for the argument that Explanation 2(i)(vi) which dealt with deduction of interest on borrowed capital was included twice, namely, under Explanation 2(i)(vi) and also under liabilities in Part II. Interest on mortgage or borrowed capital is one of the deductions in calculating outgoings under capitalisation method. In Part II the liabilities were those existing at the commencement of the Act and contingent liabilities which corresponding new Bank might reasonably be expected to be required to meet out of its own resources on or after the commencement of the Act. Interest payable on mortgage or borrowed capital on or after the commencement of the Act would not be taken into account as outground for saying that the principle was not relevant. [654 G]

The contentions that no time limit was mentioned with regard to payment of compensation in s. 6(1) and that s. 6(6) was an unreasonable restriction had no force because (i) there was no question of fixing time within which agreement was to be reached or determination was to be made by a tribunal and (ii) under s. 6(6) the government would pay the money to the Bank only if the Bank agreed to pay to the share-holders; therefore, s. 6(6) was a provision for the benefit of the Bank and the share-holders and there was no unreasonableness in it. [652 D-653 D]

The principles set out in the Act was relevant to the determination of compensation. It might be that adoption of one principle conferred lesser sum of money than adoption of another; but that would not be a ground for saying that the principle was not relevant. [654 G]

(vi) Article 305 directly applies to a law relating to banking and all business necessarily incidental to it carried on by the State to the complete or partial exclusion of the fourteen banks. Article 302 can have no application and an individual cannot complain of violation of Art. 301 in such a case. Article 305 applied in the present case and, therefore neither Art. 301 nor Art. 302 was applicable. [641 H]

(vii) A legislation which has retrospective effect affecting acquisition or requisition of property is not unconstitutional and is valid. The Act which was retrospective in operation did not violate article 31(2) because the Article speaks of "authority of law" without any words of limitation or restriction as to law being in force at the time. Further, the vital distinction between Art. 20(1) and Art. 31(2), namely, that the former cannot have by its own terms have any retrospective operation while the latter can, is to be kept in the forefront in appreciating the soundness of the proposition that retrospective legislation as to acquisition of property does not violate Art. 31(2). [615 A-B, 617 B]

M/S. West Ramand Electric Distribution Company Ltd. v. *State of Madras,* [1963] 2 S.C.R. 747, and *State of Mysore* v. *Achiah Chetty,* A.I.R. 1969 S.C. 477. followed.

Punjab Province v. *Daulat Singh & Others,* 73 I.A. 59, explained.

(viii) The Act contained enough guidelines for reaching the objectives set out in the preamble. First, the government could give directions only in regard to policy involving public interest; secondly, directions could only be given by the Central Government and no one else; thirdly, these directions could only be given after consultations with the Governor of the Reserve Bank; the Central Government and the Governor of the Reserve Bank are high authorities; fourthly, matters involving public interest are objective and subject to judicial scrutiny. In working the Act directions from the Central Government were necessary to deal with policy and other matters to serve the needs of national economy. [640 D]

Harishankar Bagla v. *The State of Madhya Pradesh*, [1955] 1 S.C.R. 380, reffered to.

ORIGINAL JURISDICTION : Writ Petitions Nos. 222, 300 and 298 of 1969.

Writ Petitions under Art. 32 of the Constitution of India for enforcement of the fundamental rights.

N. A. Palkhivala, M. C. Chagla, A. J. Raja, N. N. Palkhivala, R. N. Bannerjee, S. Swarup, B. Datta, J. B. Dadachanji, O. C. Mathur, and *Ravinder Narain,* for the petitioner (in W.P. Nos. 222 and 300 of 1969).

R. V. S. Mani, for the petitioner (in W.P. No. 298 of 1969).

Niren De, Attorney-General, Jagadish Swarup, Solicitor-General, M. C. Setalvad, C. K. Daphtary, R. H. Dhebar, R. N. Sachthey and *S. P. Nayar,* for the respondent (in W.P. No. 222 of 1969).

Niren De, Attorney-General, Jagadish Swarup, Solicitor-General, M. C. Setalvad, C. K. Daphtary, N. S. Bindra, R. H. Dhebar, R. N. Sachthey, S. P. Nayar and *N. H. Hingorani,* for respondent (in W.P. No. 300 of 1969).

Niren De, Attorney-General, Jagadish Swarup, Solicitor-General, M. C. Setalvad, C. K. Daphtary, V. A. Seyid Muhammad, R. H. Dhebar, R. N. Sachthey and *S. P. Nayar,* for the respondent (in W.P. No. 298 of 1969).

M. C. Setalvad, S. Mohan Kumaramangalam, R. K. Garg, S. C. Agarwal and *V. J. Francis,* for intervener No. 1.

M. C. Setalvad, R. H. Dhebar and *S. P. Nayar,* for intervener No. 2.

S. Mohan Kumaramangalam and *A. V. Rangam,* for intervener No. 3.

Lal Narain Sinha, Advocate-General, Bihar, R. K. Garg and *D. P. Singh,* for interevener No. 4.

V. K. Krishna Menon, M. R. K. Pillai and *D. P. Singh,* for intervener No. 5.

A *P. Ram Reddy* and *P. Parameswara Rao,* for intervener No. 6.

M. C. Chagla, Santosh Chatterjee and *G. S. Chatterjee,* for intervener No. 7.

The Judgment of J. C. SHAH, S. M. SIKRI, J. M. SHELAT, B V. BHARGAVA, G. K. MITTER, C. A. VAIDIALINGAM, K. S. HEGDE, A. N. GROVER, P. JAGANMOHAN REDDY AND I. D. DUA, JJ. was delivered by SHAH, J. A. N. RAY, J. gave a dissenting Opinion.

Shah, J. Rustom Cavasjee Cooper—hereinafter called 'the petitioner'—holds shares in the Central Bank of India Ltd., the C Bank of Baroda Ltd., the Union Bank of India Ltd., and the Bank of India Ltd., and has accounts—current and fixed deposit —with those Banks : he is also a director of the Central Bank of India Ltd. By these petitions he claims a declaration that the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 8 of 1969 promulgated on July 19, 1969, and the D Banking Companies (Acquisition and Transfer of Undertakings) Act 22 of 1969 which replaced the Ordinance with certain modifications impair his rights guaranteed under Arts. 14, 19 and 31 of the Constitution, and are on that account invalid.

In India there was till 1949 no comprehensive legislation governing banking business and banking institutions. The Central Legislature enacted the Banking Companies Act 10 of 1949 (later called "The Banking Regulation Act") to consolidate and amend the law relating to certain matters concerning banking. By s. 5(b) of that Act, "banking" was defined as meaning "the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise"; F and by s. 5(c) a "banking company" meant "any company which transacts the business of banking in India". By s. 6 it was enacted that in addition to the business of banking as defined in s. 5(b) a banking company may engage in one or more of the forms of business specified in cls. (a) to (o) of sub-s. (1). By sub-s. (2) of s. 6 banking companies were prohibited from en- G gaging "in any form of business other than those referred to in sub-section (1)". The Act applied to commercial banks, and enacted provisions, amongst others, relating to prohibition of employment of managing agents and restrictions on certain forms of employment; minimum paid-up capital and reserves; regulation of voting rights of shareholders and election of Board of Directors; H prohibition of charge on unpaid capital; restriction on payment of dividend; maintenance of a percentage of assets; return of unclaimed deposits; and accounts and balance sheets. It also enacted provisions authorising the Reserve Bank to issue directions

to and for trial of proceedings against the Banks and for speedy disposal of winding up proceedings of Banks. A

The Banking Regulation Act was amended by Act 58 of 1968, to give effect to the policy of "social control" over commercial banks. Act 58 of 1968 provided for reconstitution of the Boards of Directors of commercial banks with a Chairman who had practical experience of the working of a Bank or financial, economic and business administration, and with a membership not less than 51% consisting of persons having special knowledge or practical experience in accountancy, agriculture and rural economy, banking, cooperation, economics, finance, law and small-scale industry. The Act also provided that no loans shall be granted to any director of the Bank or to any concern in which he is interested as Managing Director, Manager, employee, or guarantor or partner or in which he holds substantial interest. The Reserve Bank was invested with power to give directions to commercial banks and to appoint directors or observers in the interest of depositors or proper management of the Banking Companies, or in the interest of Banking policy (which expression was defined by s. 5(ca) as "any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources". The Reserve Bank was also invested with power to remove managerial and other personnel from office and to appoint additional directors, and to issue directions prohibiting certain activities in relation to Banking Companies. The Central Government was given power to acquire the business of any Bank if it failed repeatedly to comply with any direction issued by the Reserve Bank under certain specific provision in regard to any matter concerning the affairs of the Bank and if acquisition of the Bank was considered necessary in the interest of the depositors or in the interest of the banking policy or for the better provision of credit generally or of credit to any particular section of the community or in a particular area. B C D E F

During the last two decades the Reserve Bank reorganised the banking structure. A number of units which accounted for a small section of the banking business were amalgamated under directions of the Reserve Bank. The total number of commercial banking institutions was reduced from 566 in 1951 to 89 in 1969, 73 scheduled and 16 non-scheduled. G

In exercise of the authority conferred by the State Bank of India Act 21 1955 the undertaking of the former Imperial Bank of India was taken over by a public corporation controlled by the H

Central Government. The State Bank took over seven subsidiaries under authority conferred by Act 38 of 1959. There were in June 1969 14 commercial banks operating in India each having deposits exceeding Rs. 50 crores. The following is an analysis of the commercial banking structure in India in June 1969 :

	No. of Banks	No. of Offices	Deposits (in crores)	Credit (in crores)
State Bank of India .	1	1,566	948	967
Subsidiaries of State Bank of India . .	7	888	291	219
Indian scheduled commercial banks (each with deposit exceeding Rs. 50 cores) . . .	14	4,130	2,632	1,829
Banks incorporated in foreign countries .	15*	130	478	385
Other Indian Scheduled Banks . . .	36	1,324	296	197
Non-scheduled commercial Banks . .	16	216	28	16

*Only 13 were operating.

Late in the afternoon of July 19, 1969 (which was a Saturday) the Vice-President (acting as President) promulgated, in exercise of the power conferred by cl. (1) of Art. 123 of the Constitution, Ordinance 8 of 1969 transferring to and vesting the undertaking of 14 named commercial banks in corresponding new banks set up under the Ordinance. The long little of the Ordinance read as follows :

> "An Ordinance to provide for the acquisition and transfer of the undertakings of certain banking companies in order to serve better the needs of development of the economy in conformity with national policy and objectives and for matters connected therewith or incidental thereto."

By s. 2 "banking company" was defined as not including a foreign company within the meaning of s. 591 of the Companies Act, 1956. An "existing bank" was defined by s. 2(b) as meaning "a banking company specified in column 1 of the First Schedule, being a company the deposits of which, as shown in the return as on the last Friday of June, 1969, furnished to the Reserve Bank

under section 27 of the Banking Regulation Act, 1949, were not less than rupees fifty crores". In the Schedule to the Act were included the names of fourteen commercial banks : A

1. The Central Bank of India Ltd.
2. The Bank of India Ltd.
3. The Punjab National Bank Ltd. B
4. The Bank of Baroda Ltd.
5. The United Commercial Bank Ltd.
6. Canara Bank Ltd.
7. United Bank of India Ltd.
8. Dena Bank Ltd. C
9. Syndicate Bank Ltd.
10. The Union Bank of India Ltd.
11. Allahabad Bank Ltd.
12. The Indian Bank Ltd.
13. The Bank of Maharashtra Ltd.
14. The Indian Overseas Bank Ltd. D

These banks are hereinafter referred to as the named banks. A "corresponding new bank" was defined in relation to an existing bank as meaning "the body corporate specified against such bank in column 2 of the First Schedule". By s. 2(g) it was provided that the words and expressions used in the Ordinance and not defined, but defined in the Banking Regulation Act, 1949, had the meaning respectively assigned to them in that Act. Thereby the definitions of "banking" and "banking company" in s. 5(b) and s. 5(c) of the Banking Regulation Act were incorporated in the Ordinance. E

The principal provisions of the Ordinance were :— F

(1) Corporations styled in the ordinance "corresponding new banks" shall be established, each such corporation having paid-up capital equal to the paid-up capital of the named bank in relation to which it is a corresponding new bank. The entire capital of the new bank shall stand vested in the Central Government. The corresponding new banks shall be authorised to G carry on and transact the business of banking as defined in cl. (b) of s. 5 of the Banking Regulation Act, 1949, and also to engage in one or more forms of business specified in sub-s. (1) of s. 6 of that Act. The Chairman of the named bank holding office immediately before the commencement of the Ordinance shall be the Custodian of the corresponding new bank. The general superintendence and direction of the affairs and business of H a corresponding bank shall be vested in the Custodian, who shall be the chief executive officer of that bank.

(2) The undertaking within or without India of every named bank on the commencement of the Ordinance shall stand transferred to and vested in the corresponding new bank. The expression "undertaking" shall include all assets, rights, powers, authorities and privileges, and all property, movable and immovable, cash balances, reserve fund investments and all other rights and interests arising out of such property as are immediately before the commencement of the Ordinance in the ownership, possession, power or control of the named bank in relation to the undertaking, including all books of accounts, registers, records and all other documents of whatever nature relating thereto. It shall also include all borrowings, liabilities and obligations of whatever kind then subsisting of the named bank in relation to the undertaking. If according to the law of any foreign country, the provisions of the Ordinance by themselves do not effectively transfer or vest any asset or liability situated in that country in the corresponding new bank, the affairs of the named bank in relation to such asset or liability shall stand entrusted to the chief executive officer of the corresponding new bank with authority to take steps to wind up the affairs of that bank. All contracts, deeds, bonds, agreements, powers of attorney, grants of legal representation and other instruments of whatever nature subsisting or having effect immediately before the commencement of the Ordinance, and to which the named bank is a party or which are in favour of the named bank shall be of as full force and effect against or in favour of the corresponding new bank, and be enforced or acted upon as fully and effectively as if in the place of the named bank the corresponding new bank is a party thereto or as if they are issued in favour of the corresponding new bank. In pending suits or other proceedings by or against the named bank, the corresponding new bank shall be substituted in those suits or proceedings. Any reference to any named bank in any law, other than the Ordinance, or in any contract or other instrument shall be construed as a reference to the corresponding new bank in relation to it.

(3) The Central Government shall have power to frame a scheme for carrying out the provisions of the Act, and for that purpose to make provisions for the corresponding new banks relating to capital structure, constitution of the Board of Directors, manner of payment of compensation to the shareholders, and matters incidental, consequential and supplemental. Corresponding new banks shall also be guided in the discharge of their functions by such directions in regard to matters of policy involving public interest as the Central Government may give.

(4) On the commencement of the Ordinance, every person holding office as Chairman, Managing Director, or other Direc-

tor of a named bank, shall be deemed to have vacated office, and all officers and other employees of a named bank shall become officers or other employees of the corresponding new banks. Every named bank shall stand dissolved on such date as the Central Government may by notification in that behalf appoint.

(5) The Central Government shall give compensation to the named banks determined according to the principles set out in Second Schedule, that is to say,—

(a) where the amount of compensation can be fixed by agreement, it shall be determined in accordance with such agreement;

(b) where no such agreement can be reached, the Central Government shall refer the matter to the Tribunal within a period of three months from the date on which the Central Government and the existing bank fail to reach an agreement regarding the amount of compensation.

Compensation so determined shall be paid to each named bank in marketable Central Government securities. For the purpose of determining compensation, Tribunals shall be set up by the Central Government with certain powers of a Civil Court.

(6) The Central Government shall have power to make such orders not inconsistent with the provisions of the Ordinance which may be necessary for the purpose of removing defects.

Under the Ordinance the entire undertaking of every named commercial bank was taken over by the corresponding new bank, and all assets and contractual rights and all obligations to which the named bank was subject stood transferred to the corresponding new bank. The Chairman and the Directors of the Banks vacated their respective officers. To the named banks survived only the right to receive compensation to be determined in the manner prescribed. Compensation, unless settled by agreement, was to be determined by the Tribunal, and was to be given in marketable Government securities. The entire business of each named bank was accordingly taken over, its chief executive officer ceased to hold office and assumed the office of Custodian of the corresponding new bank, its directors vacated office; and the services of the administrative and other staff stood transferred to the corresponding new bank. The named bank had thereafter no assets, no business, and no managerial, administrative or other staff, it was incompetent to use the word "Bank" in its name, because of the provisions contained in s. 7 (1) of the Banking Regulation Act, 1949, and was liable to be dissolved by a notification of the Central Government.

A Petitions challenging the competence of the President to promulgate the Ordinance were lodged in this Court on July 21, 1969. But before the petitions could be heard by this Court, a Bill to enact provisions relating to acquisition and transfer of undertakings of the existing banks was introduced in the Parliament, and was enacted on August 9, 1969, as "The Banking Companies (Acqui-
B sition and Transfer of Undertakings) Act 22 of 1969". The long title of the Act was in terms identical with the long title of the Ordinance. By sub-s. (1) of s. 27 of the Act, Ordinance 8 of 1969 was repealed. In the First Schedule were included the names of the 14 banks named in the Ordinance in juxtaposition with the names of the corresponding new banks. By sub-s. (2) of s. 1,
C the Act came into force on July 19, 1969, and the undertaking of every named bank was deemed, with effect from that date, to have vested in the corresponding new bank. By s. 27(2), (3) and (4) actions taken or things done under the Ordinance inconsistent with the provisions of the Act were not to be of any force or effect, and no right, privilege, obligation or liability was to be deemed to have been acquired, accrued or incurred under the Ordinance.

D

The general scheme of the Ordinance relating to the transfer to and vesting in the corresponding new bank of the undertaking of each named bank, payment of compensation, and management of the corresponding new bank, remained unaltered. The Act departed from the Ordinance in certain matters :

E (1) Under the Act the named banks remain in existence for certain purposes and they are not liable to be dissolved by order of the Government. If under the laws in force in any foreign country it is not permissible for a banking company, owned or controlled by Government, to carry on the business of banking in that country, the assets, rights, powers, authorities and privileges
F and property, movable and immovable, cash balances and investments of any named bank operating in that country shall not vest in the corresponding new bank. The directors of the named banks shall remain in office and may register transfers or transmission of shares; arrive at an agreement about the amount of compensation payable under the Act or appearing before the Tribunal for obtaining a determination as to the amount of compensation; distribute
G to shareholders the amount of compensation received by the Bank under the Act for the acquisition of its undertaking; carry on the business of banking in any country outside India if under the law in force in that country any bank, owned or controlled by Government, is prohibited from carrying on the business of banking there; and carry on any business other than the business of bank-
H ing. The Central Government has power to authorise the corresponding new bank to advance the amount required by the named bank in connection with the functions which the directors may perform. Reference to any named bank in any law, or in any

contract or other instrument shall be construed as a reference to the corresponding new bank in relation to it, but not in cases where the named bank may carry on any business and in relation to that business. A

(2) Principles for determination of compensation and the manner of payment are modified. Interim compensation may be paid to a named bank if it agrees to distribute to its shareholders in accordance with their rights and interests. A major change is made in the principles for determining compensation set out in Sch. II. By Explanation I to cl. (e) of Part I of Sch. II, the value of any land or buildings to be taken into account in valuing the assets is to be the market value of the land or buildings, but where such market value exceeds the "ascertained value", that "ascertained value" is to be taken into account, and by Explanation II the "ascertained value" of any building wholly occupied on the date of the commencement of the Act is to be twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let out from year to year, and reduced by one-sixth of the amount of the rent on account of maintenance and repairs, annual premium paid to insure the building against risk of damage or destruction, annual charge, if any, on the building, ground rent, interest on any mortgage or other capital charge on the building, interest on borrowed capital if the building has been acquired, constructed, repaired, renewed or re-constructed with borrowed capital, and the sums paid on account of land revenue or other taxes in respect of such building. B C D E

(3) The Central Government may reconstitute any corresponding new bank into two or more corporations; amalgamate any corresponding new bank with another banking institution; transfer the whole or any part of the undertaking of a corresponding new bank to any other banking institution; or transfer the whole or any part of the undertaking of any other banking institution to a corresponding new bank. The Board of Directors of the corresponding new banks are to consist of representatives of the depositors of the corresponding new bank, employees of such banks, farmers, workers and artisans to be elected in the prescribed manner and of other persons as the Central Government may appoint. F G

(4) The profits remaining after making provision for bad and doubtful debts, depreciation in assets, contributions to staff and superannuation funds and all other matters for which provision is necessary under any law, the corresponding new bank shall transfer the balance of profits to the Central Government.

(5) Provision of law relating to winding up of corporations do not apply to the corresponding new banks, and a corresponding new bank may be ordered to be liquidated only by the order of the Central Government. H

A The petitioner challenges the validity of the Ordinance and the Act on the following principal grounds :

(i) The Ordinance promulgated in exercise of the power under Art. 123 of the Constitution was invalid, because the condition precedent to the exercise of the power did not exist;

B

(ii) That in enacting the Act the Parliament encroached upon the State List in the Seventh Schedule of the Constitution, and to that extent the Act is outside the legislative competence of the Parliament;

C (iii) That by enactment of the Act, fundamental rights of the petitioner guaranteed by the Constitution under Arts. 14, 19(1)(f) & (g) and 31(2) are impaired;

(iv) That by the Act the guarantee of freedom of trade under Art. 301 is violated; and

D (v) That in any event retrospective operation given to Act 22 of 1969 is ineffective, since there was no valid Ordinance in existence. The provision in the Act retrospectively validating infringement of the fundamental rights of citizens was not within the competence of the Parliament. That

E sub-sections (1) & (2) of s. 11 and s. 26 are invalid.

The Attorney-General contended that the petitions are not maintainable, because no fundamental right of the petitioner is directly impaired by the enactment of the Ordinance and the Act, or by any action taken thereunder. He submitted that the peti-

F tioner who claims to be a shareholder, director and holder of deposit and current accounts with the Banks is not the owner of the property of the undertaking taken over by the corresponding new banks and is on that account incompetent to maintain the petitions complaining that the rights guaranteed under Arts. 14, 19 and 31 of the Constitution were impaired.

G

A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the

H purpose of liability, and by a share in the profit. Again a director of a Company is merely its agent for the purpose of management. The holder of a deposit account in a Company is its creditor : he is not the owner of any specific fund lying with the Company. A

shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the Company, unless by the action impugned by him, his rights are also infringed.

By a petition praying for a writ against infringement of fundamental rights, except in a case where the petition is for a writ of *habeas corpus* and probably for infringement of the guarantee under Arts. 17, 23 and 24, the petitioner may seek relief in respect of his own rights and not of others. The shareholder of a Company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the Company subject to the contract contained in the Articles of Association. But on that account the petitions will not fail. A measure executive or legislative may impair the rights of the Company alone, and not of its shareholders; it may impair the rights of the shareholders and not of the Company : it may impair the rights of the shareholders as well as of the Company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal: it is essentially qualitative: if the State action impairs the right of the shareholders as well as to the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief.

The petitioner claims that by the Act and by the Ordinance the rights guaranteed to him under Arts. 14, 19 and 31 of the Constitution are impaired. He says that the Act and the Ordinance are without legislative competence in that they interfere with the guarantee of freedom of trade and are not made in the public interest; that the Parliament had no legislative competence to enact the Act and the President had no power to promulgate the Ordinance, because the subject-matter of the Act and the Ordinance is (partially at least) within the State List; and that the Act and Ordinance are invalid because they vest the undertaking of the named banks in the new corporations without a public purpose and without setting out principles and the basis for determination and payment of a just equivalent for the property expropriated. He says that in consequence of the hostile discrimination practised by the State the value of his investment in the shares is substantially reduced, his right to receive dividend from his investment has ceased, and he has suffered great financial loss, he is deprived of the right as a shareholder to carry on business through the agency of the Company, and that in respect of the deposits the obligations of the corresponding new banks not of his choice are substituted without his consent.

(1) [1954] S. C. R. 674.

A In *Dwarkadas Shrinivas* v. *The Sholapur Spinning & Weaving Co. Ltd. and Others*(1) this Court held that a preference shareholder of a company is competent to maintain a suit challenging the validity of the "Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance" 2 of 1950 (which was later replaced by Act 27 of 1950), which deprived the Company of B its property without payment of compensation within the meaning of Art. 31. Mahajan, J., observed :

> "The plaintiff and the other preference shareholders are in imminent danger of sustaining direct injury as a result of the enforcement of this Ordinance, the C direct injury being the amount of the call that they are called upon to pay and the consequent forfeiture of their shares."

Das, J., in the same case examined the matter in some detail and observed at p. 722 :

D "The impugned Ordinance, . . . directly affects the preference shareholders by imposing on them this liability, or the risk of it, and gives them a sufficient interest to challenge the validity of the Ordinance, ... Certainly he can show that the Ordinance under which these persons have been appointed was E beyond the legislative competence of the authority which made it or that the Ordinance had not been duly promulgated. If he can, with a view to destroy the *locus standi* of the persons who have made the call, raise the question of the invalidity of the Ordinance . . ., I can see no valid reason why, for the self same purpose, he should not be permitted to challenge the F validity of the Ordinance on the ground of its unconstitutionality for the breach of the fundamental rights of the company or of other persons."

A similar view was also taken in *Chiranjit Lal Chowduri* v. *The Union of India*(1) by Mukherjea, J., at p. 899, by Fazl Ali, G J., at p. 876, by Patanjali Sastri, J., at p. 889 and by Das, J., at p. 922.

The judgment of this Court in *The State Trading Corporation of India Ltd. & Others* v. *The Commercial Tax Officer, Visakhapatnam & Ors.*(2) has no bearing on this question. In that case in a petition under Art. 32 of the Constitution the State Trading H Corporation challenged the infringement of its right to hold property and to carry on business under Art. 19 (1)(f) & (g) of

(1) [1950] S. C. R. 869. (2) [1964] 4 S.C.R. 99.

the Constitution and this Court opined that the Corporation not being a citizen was incompetent to enforce the rights guaranteed by Art. 19. Nor has the judgment in *Tata Engineering and Locomotive Co. Ltd.* v. *State of Bihar and Ors.*(1) any bearing on the question arising in these petitions. In a petition under Art. 32 of the Constitution filed by a Company challenging the levy of sales-tax by the State of Bihar, two shareholders were also impleaded as petitioners. It was urged on behalf of the shareholders that in substance the interests of the Company and of the shareholders were identical and the shareholders were entitled to maintain the petition. The Court rejected that contention, observing that what the Company could not achieve directly, it could not relying upon the "doctrine of lifting the veil" achieve indirectly. The petitioner seeks in this case to challenge the infringement of his own rights and not of the Banks of which he is a shareholder and a director and with which he has accounts—current and fixed deposit.

It was urged that in any event the guarantee of freedom of trade does not occur in Part III of the Constitution, and the petitioner is not entitled to maintain a petition for breach of that guarantee in this Court. But the petitioner does not seek by these petitions to enforce the guarantee of freedom of trade and commerce in Art 301: he claims that in enacting the Act the Parliament has violated a constitutional restriction imposed by Part XIII of its legislative power and in determining the extent to which his fundamental freedoms are impaired, the statute which the Parliament is incompetent to enact must be ignored.

It is not necessary to consider whether Art. 31A (1)(d) of the Constitution bars the petitioner's claim to enforce his rights as a director. The Act *prima facie* does not (though the Ordinance purported to) seek to extinguish or modify the right of the petitioner as a director : it seeks to take away expressly the right of the named Banks to carry on banking business, while reserving their right to carry on business other than banking. Assuming that he is not entitled to set up his right to enforce his guaranteed rights as a director, the petition will not still fail. The preliminary objection raised by the Attorney-General against the maintainability of the petitions must fail.

I. *Validity of Ordinance* 8 *of* 1969—

Power to issue Ordinance is by Art. 123 of the Constitution vested in the President. Article 123 provides :

"(1) If at any time, except when both Houses of Parliament are in session, the President is satisfied that

(1) [1964] 6 S.C.R. 885.

A circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

B

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the re-assembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

C

(b) may be withdrawn at any time by the President.

Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

D

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."

E

Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. Whether in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not

F detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. The President is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution in-

G vesting the President with power to legislate by promulgating Ordinances.

Power to promulgate such Ordinance as the circumstances appear to the President to require is exercised—(a) when both Houses of Parliament are not in session; (b) the provision in-

H tended to be made is within the competence of the Parliament to enact; and (c) the President is satisfied that circumstances exist which render it necessary for him to take immediate action. Exercise of the power is strictly conditioned. The clause relating to

the satisfaction is composite: the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final.

The Attorney-General contended that the condition of satisfaction of the President in both the branches is purely subjective and the Union of India is under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action. He relied upon the decisions of the Judicial Committee in *Bhagat Singh* v. *The King Emperor*(1); *King Emperor* v. *Benoari Lal Sarma*(2). and upon a decision of the Federal Court in *Lakhi Narayan Das* v. *The Province of Bihar*(3), which interpreted the analogous provisions of the Government of India Act, 1935, conferring upon the Governor-General in the first two cases, and upon the Governor of a Province in the last case, power to issue Ordinances. He also relied upon the judgment of the Judicial Committee in *Hubli Electricity Co. Ltd.* v. *Province of Bombay*(4).

The Attorney-General said that investment of legislative power upon the President being an incident of the division of sovereign functions of the Union and a "matter of high policy", the expression "the President is satisfied that circumstances exist which render it necessary for him to take immediate action" is incorporated as a guidance and not as a condition of the exercise of power. He invited our attention to the restraints inherent in the Constitution on the exercise of the power to promulgate Ordinance in cls. (1) & (2) of Art. 74; cls. (3) & (4) of Art. 75 and Art. 361, and submitted that the rule applicable to the interpretation of parliamentary statutes conferring authority upon officers of the State to act in a prescribed manner on being satisfied about the existence of certain circumstances is inept in determining the true perspective of the power of the head of the State in situations of emergency.

On the other hand, Mr. Palkhivala contended that the President is not made by Art. 123 the final arbiter of the existence of the conditions on which the power to promulgate an Ordinance may be exercised. Power to promulgate an Ordinance being conditional, counsel urged, this Court in the absence of a provision—express or necessarily implicit in the Constitution—to the contrary, is competent to determine whether the power was exercised not for a collateral purpose, but on relevant circumstances

(1) L. R. 58 I. A. 169.
(2) L. R. 72 I. A. 57.
(3) [1949] F. C. R. 693.
(4) L. R. 76 I. A. 57.

which, *prima facie*, establish the necessity to take immediate action. Counsel submitted that the rules applicable to the interpretation of statutes conferring power exercisable on satisfaction of the specified circumstances upon the President and upon officers of the State, are not different. The nature of the power to perform an official act where the authority is of a certain opinion, or that in his view certain circumstances exist or that he has reasonable grounds to believe, or that he has reasons to believe, or that he is satisfied, springing from a constitutional provision is in no manner different from a similar power under a parliamentary statute, and no greater sanctity may attach to the exercise of the power merely because the source of the power is in the Constitution and not in a parliamentary statute. There is, it was urged, nothing in the constitutional scheme which supports the contention that the clause relating to satisfaction is not a condition of the exercise of the power.

Counsel relied upon the judgments of this Court in *Barium Chemical Ltd. and Another* v. *The Company Law Board and Ors.*(1) and *Rohtas Industries Ltd.* v. *S. D. Agarwal and Anr*;(2) upon the decisions of the House of Lords in *Padfield & Others* v. *Minister of Agriculture, Fisheries and Food and Others*(3); and of the Judicial Committee in *Duraiyappah* v. *Fernando and Others*(4); *Nakkuda Ali* v. *M. F. De S. Jayaratne*(5); *Ross-Clunis* v. *Papadopoullos*(6), and contended that the decisions of the Judicial Committee in *Bhagat Singh's* case(7) and *Benoari Lal Sarma's* case(8) interpreted a provision which was in substance different from the provision of Art. 123, that the decision in *Lakhi Narayan Das's* case(9) merely followed the two judgments of the Judicial Committee and since the status of the President under the Constitution *qua* the Parliament is not the same as the constitutional status of the Governor-General under the Government of India Act, 1935, the decisions cited have no bearing on the interpretation of Art. 123.

The Ordinance has been repealed by Act 22 of 1969, and the question of its validity is now academic. It may assume significance only if we hold that Act 22 of 1969 is valid. Since the Act is, in our view, invalid for reasons hereinafter stated, we accede to the submission of the Attorney-General that we need express no opinion in this case on the extent of the jurisdiction of the Court to examine whether the condition relating to satisfaction of the President was fulfilled.

1. [1966] Supp. S.C.R. 311.
2. [1969] 3 S.C.R. 108.
3. [1968] 1 All E. R. 694.
4. L.R. [1967] A.C. 337.
5. L.R. [1951] A.C. 66.
6. [1958] 2 All E.R. 23.
7. L.R. 58 I.A. 169.
8. L.R. 72 I.A. 57.
9. [1949] F.C.R. 693.