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Dec. 17.

THE STATE OF WEST BENGAL

v.

SUBODH GOPAL BOSE AND OTHERS.

[PATANJALI SASTRI C.J., MEHR CHAND MAHAJAN, S. R. DAS, GHULAM HASAN and JAGANNADHADAS JJ.]

Constitution of India, arts. 19 (1) (f) & 31—Scope of—Correlation between art. 19 (1) (f) and art. 31—Clauses (1) and (2) of art. 31, whether mutually exclusive—"Deprivation"—"Acquisition"—"Taking possession of"—Meanings of—Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950 (West Bengal Act VII of 1950), s. 7—Whether ultra vires *art. 19 (1) (f) and art. 31.*

The first respondent B purchased a Touzi in 24-Parganas Collectorate at a revenue sale held on 9th January, 1942. As such purchaser he acquired under s. 37 of the Bengal Revenue Sales Act, 1859, the right "to avoid and annul all under-tenures and forthwith to eject all under-tenants" with certain exceptions which are not material here. In exercise of that right he gave notices of ejectment and brought a suit in 1946 to evict certain under-tenants including the second respondent herein and to recover possession of the lands. The suit was decreed against the second respondent who preferred an appeal to the District Judge, 24-Parganas, contending that his under-tenure came within one of the exceptions referred to in s. 37. When the appeal was pending, the Bill which was later passed as the West Bengal Revenue Sales (West Bengal Amendment) Act, 1950, was introduced in the West Bengal Legislative Assembly on 23rd March, 1950. It would appear, according to the "statement of objects and reasons" annexed to the Bill, that great hardship was being caused to a large section of the people by the application of s. 37 of the Bengal Land Revenue Sales Act, 1859, in the urban areas and particularly in Calcutta and its suburbs where "the present phenomenal increase in land values has supplied the necessary incentive to speculative purchasers in exploiting this provision (section 37) of the law for unwarranted large scale eviction" and it was, therefore, considered necessary to enlarge the scope of protection already given by the section to certain categories of tenants with due safeguards for the security of Government revenue. The Bill was eventually passed as the amending Act and it came into force on 15th March, 1950. It substituted by s. 4 the new s. 37 in place of the original s. 37 and it provided by s. 7 that all pending suits, appeals and other proceedings which had not already resulted in delivery of possession, shall abate. Thereupon B contending that s. 7 was void

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as abridging his fundamental rights under art. 19(1)(f) and art. 31 moved the High Court under art. 228 to withdraw the pending appeal and to determine the constitutional issue raised by him. The appeal was accordingly withdrawn and the case was heard by Trevor Harries C.J. and Banerjee J. who, by separate but concurring Judgments, declared s. 7 unconstitutional and void. They held that B's right to annul under-tenures and evict under-tenants being a vested right acquired by him under his purchase before s. 37 was amended, the retrospective deprivation of that right by s. 7 of the amending Act without any abatement of the price paid by him at the revenue sale was an infringement of his fundamental right under art. 19 (1)(f) to hold property with all the rights acquired under his purchase, and as such deprivation was not a reasonable restriction on the exercise of his vested right, s. 7 was not saved by cl. (5) of that article and was void. The State of West Bengal preferred the present appeal to the Supreme Court :

Held, per PATANJALI SASTRI C.J.—Article 19 (1) (f) has no application to this case. The word "hold" in the article means own. The said sub-clause (f) gives the citizen of India the abstract right to acquire, own and dispose of property. This article does not deal with the concrete rights of the citizens of India in respect of the property so acquired and owned by him. These concrete rights are dealt with in art. 31 of the Constitution.

Under the scheme of the Constitution all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under cl. (1) of art. 19, the powers of State regulation of those freedoms in public interest being defined in relation to each of those freedoms by cls. (2) to (6) of that article, while rights of private property are separately dealt with and their protection provided for in art. 31, the cases where social control and regulation could extend to the deprivation of such rights being indicated in para. (ii) of sub-clause (b) of cl. (5) of art. 31 and exempted from liability to pay compensation under cl. (2).

Held, per PATANJALI SASTRI C.J. (MEHR CHAND MAHAJAN and GHULAM HASAN JJ. concurring).—(i) Article 31 protects the right to property by defining the limitations on the power of the State to take away private property without the consent of the owner. Clauses (1) and (2) of art. 31 are not mutually exclusive in scope and content, but should be read together and understood as dealing with the same subject, namely the protection of the right to property by means of limitations on the State's power referred to above, the deprivation contemplated in clause (1) being no other than the acquisition or taking possession of the property referred to in cl. (2).

The words "taking of.....possession or.....acquisition" in art. 31(2) and the words "acquisition or requisitioning" in entry

No. 33 of List I and entry No. 36 of List II as also the words "acquired or requisitioned" in entry No. 42 of List III are different expressions connoting the same idea and instances of different kinds of deprivation of property within the meaning of art. 31(1) of the Constitution.

No cut and dried test can be formulated as to whether in a given case the owner is "deprived" of his property within the meaning of art. 31; each case must be decided as it arises on its own facts. Broadly speaking it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of art. 31, if, in effect, it withheld the property from the possession and enjoyment of the owner, or seriously impaired its use and enjoyment by him or materially reduced its value. The expression "taking.....possession" in art. 31(2) of the Constitution can only mean such possession as the property taken possession of is susceptible to and need not be actual physical possession.

(ii) It is difficult to hold that the abridgement sought to be effected retrospectively of the rights of a purchaser at a revenue sale is so substantial as to amount to a deprivation of his property within the meaning of art. 31(1) and (2). No question accordingly arises as to the applicability of cl. 5(b)(ii) of art. 31 to the case.

Per DAS J.—(1) The abridgement of the rights of the purchaser at a revenue sale brought about by the new s. 37 amounts to nothing more than the imposition of a reasonable restriction on the exercise of the right conferred by art. 19(1)(f) in the interests of the general public and is perfectly legitimate and permissible under cl. (5) of that article. It is well-settled that the statement of objects and reasons is not admissible as an aid to the construction of a statute but it can be referred to only for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. Those are matters which must enter into the judicial verdict as to the reasonableness of the restrictions which art. 19(5) permits to be imposed on the exercise of the right guaranteed by art. 19(1)(f).

(II) The correlation between art. 19(1)(f) and art. 31 is that if a person loses his property by reason of its having been compulsorily acquired under art. 31 he loses his right to hold that property and cannot complain that his fundamental right under art. 19(1)(f) has been infringed. The rights enumerated in art. 19(1) subsist while the citizen has the legal capacity to exercise them.

A. K. Gopalan's case [1950] S.C.R. 88 and *Chiranjit Lal's* case [1950] S.C.R. 869 referred to.

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For the purpose of this appeal the matter proceeds on the footing that art. 19 relates to abstract right as well as to right to concrete property.

(III) The true scope and effect of cls. (1) and (2) of art. 31 is that cl. (1) deals with deprivation of property in exercise of police power and enunciates the restrictions which our Constitution makers thought necessary or sufficient to be placed on the exercise of that power, namely, that such power can be exercised only by authority of law and not by a mere executive fiat and that cl. (2) deals with the exercise of the power of eminent domain and places limitations on the exercise of that power. These limitations constitute our fundamental rights against the State's power of eminent domain.

(IV) Both these clauses cannot be regarded as concerned only with the State's power of eminent domain, because then—

(a) cl. (1) would be wholly redundant, for the necessity of a law is quite clearly implicit in cl. (2) itself;

(b) deprivation of property otherwise than by taking of possession or acquisition of it will be outside the pale of constitutional protection:

(c) there will be no protection against the exercise of police power in respect of property either by the executive or by the legislature.

Chiranjit Lal's case [1950] S.C.R. 869 and *The Bihar Zamindari* case [1952] S.C.R. 889 referred to.

(V) The State's police power is not confined—

(a) within the ambit of art. 19 for to say otherwise will mean:

(i) that there is no protection for any person, citizen or non-citizen, against exercise of police power by the executive over property;

(ii) that although in cls. (2) to (6) there is protection against the legislature in respect of "restriction" there is no protection against "deprivation"; or

(b) within cl. (5) (b) of art. 31 because to say otherwise will mean:—

(i) that the police power which is inherent in sovereignty and does not require express reservation has been unnecessarily defined and reserved;

(ii) that the Constitution does not prescribe any test for the validity of the laws which fall within the clause and, therefore, the law falling within the clause may be as archaic, offensive and unreasonable as the legislature may choose to make it;

(iii) that the clause gives no protection against the executive;

(iv) that the exercise of the police power by the legislature is confined within the very narrow and inelastic limits of the clause and that no beneficial or social legislation involving taking

of property can be undertaken by the State if the law falls outside the clause except on terms of payment of compensation ;

(v) that acquisition of property for which compensation is usually provided, *e.g.*, acquisition of land for a public park, hospital or clearing a slum area will henceforth be permissible without the law providing any compensation.

(VI) The argument that if art. 31(1) is read as a fundamental right against deprivation of property by the executive and art. 31(2) as laying down the limits of State's power of eminent domain then there will be no real protection whatever, for the State will deprive a person of his property without compensation by simply making a law is not tenable because—

(i) there will certainly be protection against the execute just as the 29th clause of the Magna Charta was a protection against the British Crown ;

(ii) there is protection under art. 31(2) against the legislature in the matter of taking of possession or acquisition for compensation has to be given and under cl. (5) of art. 19 against unreasonable restraint :

(iii) the absence of protection against the legislature in other cases is not greater than the absence of protection against the legislature in respect of taxation and if the legislature can be trusted in the latter case it may equally be trusted in the former case.

(VII) Every taking of a thing into the custody of the State or its nominee does not necessarily mean the taking of possession of that thing within the meaning of art. 31(2) so as to call for compensation. The police power is exercised in the interest of the community and the power of eminent domain is exercised to implement a public purpose and in both cases there is a taking of possession of private property. There is, however, a marked difference between the exercise of these two sovereign powers. It is easy to perceive, though somewhat difficult to express, the distinction between the two kinds of taking of possession which undoubtedly exists. In view of the wide sweep of the State's police power it is neither desirable nor possible to lay down a fixed general test for determining whether the taking of possession authorised by any particular law falls within one category or the other. Without, therefore, attempting any such general enunciation of any inflexible rule it is possible to say broadly that the aim, purpose and the effect of the two kinds of taking of possession are different and that in each case the provisions of the particular law in question will have to be carefully scrutinised in order to determine in which category falls the taking of possession authorised by such law. A consideration of the ultimate aim, the immediate purpose and the mode and manner of the taking of possession and the duration for which such possession is taken, the effect of it on the rights of the person dispossessed and other such like elements must all determine the judicial verdict.

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(VIII) Treating the right to annul under-tenures and to eject under-tenants and decree for ejectment as "property" as used in art. 31(2) the State has not acquired those rights for there has been no transfer by agreement or by operation of law of those rights from the respondent B to the State or anybody else. The purchase being at a Revenue sale to which West Bengal Act VII of 1950 applies, the purchaser of the property has been deprived of this right by authority of law and the case falls within cl. (1) of art. 31 and no within cl. (2) of art. 31. If the impugned section is regarded as imposing restrictions on the purchaser, such restrictions in the circumstances of the case are quite reasonable and permissible under article 19(5) and, in the premises, the plea of unconstitutionality cannot prevail and must be rejected.

Per JAGANNADHADAS J.—(i) On the assumption that the question raised in this case is one that arises under art. 19(1)(f) and (5) of the Constitution, the impugned section of the West Bengal Act VII of 1950 is *intra vires* because the restrictions are reasonable within the meaning of art. 19(5) of the Constitution;

(ii) that art. 19(1)(f) while probably meant to relate to the natural rights of the citizens comprehends within the scope also concrete property rights. The restrictions on the exercise of rights envisaged in art. 19(5) appear to relate—normally, if not invariably—to concrete property rights;

(iii) that cl. (1) of art. 31 cannot be construed as being either a declaration or implied recognition of the American doctrine of "police power".

It comprehends within its scope the requirement of the authority of law, as distinguished from executive fiat for the exercise of the power of eminent domain, but its scope may well be wider. "Acquisition" and "taking possession" in art. 31(2) cannot be taken as necessarily involving transfer of title or possession. The words or phrases comprehend all cases where the *title* or *possession* is taken out of the owner and appropriated without his consent by transfer or extinction or by some other process, which in substance amounts to it, the possession in this context meaning such possession as the nature of the property admits and which the law recognizes as possession.

(iv) In the context of art. 31(2) as in the cognate context of article 19(1)(f)—the connotation of the word "property" is limited by the accompanying words "acquisition" and "taking possession". In the present case the right to annul under-tenures cannot in itself be treated as property for it is not capable of independent acquisition or possession. The deprivation of it can only amount to a restriction on the exercise of the rights as regards the main property itself and hence must fall under art. 19(1)(f) taken with 19(5).

Butchers Union etc. Co. v. *Crescent City etc. Co.*, (111 U.S. 746), *Punjab Province* v. *Daulat Singh and Others* ([1946] F.C.R. 1), *Chiranjit Lal Chaudhuri* v. *The Union of India and Others* ([1950] S.C.R. 869), *A. K. Gopalan* v. *The State of Madras* ([1950] S.C.R. 88), *P. D. Shamdasani* v. *Central Bank of India* ([1952] S.C.R. 391), *Ministry of State for the Army* v. *Dalziel* (68 C.L.R. 261), *Pennsylvania Coal Co.* v. *Mahon* (260 U.S. 322), *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Mills Ltd.* ([1954] S.C.R. 674), *State of Madras* v. *V. G. Row* ([1952] S.C.R. 597), *Ram Singh* v. *The State of Madras* ([1951] S.C.R. 451), *State of Bihar* v. *Maharajadhiraja Kameshwar Singh of Darbhanga* ([1952] S.C.R. 889), *Noble State Bank* v. *Haskell* (219 U.S. 104), *Eubank* v. *Richmond* (226 U.S. 137), *Joseph Hurtado* v. *People of California* (1883) (10 U.S. 516), referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 107 of 1952.

Appeal from the Judgment and Order dated 22nd March, 1951, of the High Court of Judicature at Calcutta (Harries C.J. and Banerjee J.) in Reference No. 4 of 1950 in Civil Rule No. 1643 of 1950.

M. C. Setalvad, Attorney-General for India (B. Sen, with him) for the appellant.

Atul Chandra Gupta (*Jay Gopal Ghose*, with him) for respondent No. 1.

1953. December 17. The following Judgments were delivered.

PATANJALI SASTRI C. J.—This appeal raises issues of great public and private importance regarding the extent of protection which the Constitution of India accords to ownerships of private property.

The first respondent herein (hereinafter referred to as the respondent) purchased the entire Touzi No. 341 of the 24-Parganas Collectorate at a revenue sale held on January 9, 1942. As such purchaser, the respondent acquired under section 37 of the Bengal Revenue Sales Act, 1859 (Central Act No. 11 of 1859) the right "to avoid and annul all under-tenures and forthwith to eject all under-tenants" with certain exceptions which are not material here. In exercise of that right the respondent gave notices of ejectment and brought a suit in 1946 to evict certain under-tenants, including the second respondent herein, and to recover possession

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of the lands. The suit was decreed against the second respondent who preferred an appeal to the District Judge, 24-Parganas, contending that his under-tenure came within one of the exceptions referred to in section 37.

When the appeal was pending, the Bill, which was later passed as the West Bengal Revenue Sales (West Bengal Amendment) Act, 1950, (hereinafter referred to as "the amending Act") was introduced in the West Bengal Legislative Assembly on March 23, 1950. It would appear, according to the "statement of objects and reasons" annexed to the Bill, that great hardship was being caused to a large section of the people by the application of section 37 of the Bengal Land Revenue Sales Act, 1859, in the urban areas and particularly in Calcutta and its suburbs where "the present phenomenal increase in land values has supplied the necessary incentive to speculative purchasers in exploiting this provision (section 37) of the law for unwarranted large-scale eviction" and it was, therefore, considered necessary to enlarge the scope of protection already given by the section to certain categories of tenants with due safeguards for the security of Government revenue. The Bill was eventually passed as the amending Act and it came into force on March 15, 1950. It substituted by section 4 the new section 37 in the place of the original section 37, and it provided by section 7 that all pending suits, appeals and other proceedings which had not already resulted in delivery of possession shall abate.

Thereupon, the respondent, contending that section 7 was void as abriging his fundamental rights under article 19(1) (f) and article 31, moved the High Court under article 228 to withdraw the pending appeal and determine the constitutional issue raised by him. The appeal was accordingly withdrawn and the case was heard by Trevor Harries C. J. and Banerjee J. who, by separate but concurring judgments, declared section 7 unconstitutional and void and returned the case to the District Court for disposal in conformity

with their decision. The learned Judges held that the respondent's right to annul under-tenures and evict under-tenants being a vested right acquired by him under his purchase before section 37 was amended, the retrospective deprivation of that right by section 7 of the amending Act without any abatement of the price paid by the respondent at the revenue sale was an infringement of his fundamental right under article 19(1) (f) to hold property with all the rights acquired under his purchase, and as such deprivation was not a reasonable restriction on the respondent's exercise of his vested right, section 7 was not saved by clause (5) of that article and was void.

On behalf of the appellant State the learned Attorney-General contended before us that if, as the respondent claims, his right to annul under-tenures and evict under-tenants in occupation other than those protected under the original enactment, was "property" within the meaning of clause (1) of article 19, then, it was also "property" within the meaning of clause (1) of article 31, as the expression must have the same connotation in both the provisions, and the respondent, having been "deprived" of it under the authority of law, namely, section 7 of the amending Act, such deprivation was lawful and could not be challenged. In support of this contention learned counsel strongly relied on the observations of my learned brother Das in *Chiranjit Lal Choudhury's* case(1) and also on the analogy of the reasoning of the majority in *Gopalan's* case(2). Alternatively, it was urged that if the correct view was that the nullification of the respondent's right was only the imposition of a "restriction" on the enjoyment of the property purchased by him, as has been held by the learned Judges below, then, it was a reasonable restriction imposed in the interests of the general public under clause (5) of article 19, having regard to the facts and circumstances which led to the enactment of the measure as disclosed in the Statement of Objects and

(1) [1950] S. C. R. 869.
(2) [1950] S. C. R. 88.

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Reasons annexed to the Bill which, for this purpose, is admissible.

It will be convenient to deal first with the latter contention of the Attorney-General. Sub-clause (f) of clause (1) of article 19 has, in my opinion, no application to the case. That article enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country. The freedoms declared in sub-clauses (a) to (e) and (g) are clearly of that description and in such context sub-clause (f) should, I think, also be understood as declaring the freedom appertaining to the citizen of free India in the matter of acquisition, possession and disposal of private property. In other words, it declares the citizen's right to own property and has no reference to the right to the property owned by him, which is dealt with in article 31. Referring to the "privileges and immunities" mentioned in article 4 and Amendment 14 of the American Federal Constitution, Bradley J. said in *Butcher's Union etc. Co.* v. *Crescent City etc. Co.*(1):

"The phrase has a broader meaning. It includes those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which Washington J. enumerates the right of protection; the right to pursue and obtain happiness and safety; the right to pass through and reside in any State for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State and *to take, hold and dispose of property either real or personal.* (*Corfield* v. *Coryell,* 4 Wash. (C.C.) 371). These rights are different from the concrete rights which a man may have to a specific chattel or a piece of land or to the performance by another of a particular contract, or to damages of a particular wrong, all which may be invaded by individuals; they are the capacity, power or privilege of having and enjoying

(1) 111 U. S. 746.

those concrete rights and of maintaining them in the courts, which capacity, power or privilege can only be invaded by the State. These primordial and fundamental rights are the privileges and immunities of citizens which are referred to in the 4th article of the Constitution and in the 14th Amendment to it." (Italics mine).

We are not here concerned with the meaning and content of the phrase "privileges and immunities" in the context of those provisions which, according to some of the Judges, have a reference only to those privileges and immunities which owe their existence to the Federal Constitution or its laws. What is of importance for the present purpose is that the two learned Judges thought that the "right to take, hold and dispose of property" was one of those "primordial and fundamental rights" of the same class as the right to pursue happiness and safety and other such basic freedoms appertaining to free citizens and was different from the concrete rights which a person may have to a specific *res* or thing owned, being the capacity, power or privilege of having and enjoying those concrete rights. Sub-clause (f) of clause (1) of article 19 seems analogous to clause (1) of article 17 of the United Nations Declaration of Human Rights "Everyone has the right to own property alone as well as in association with others" and article 31 to clause (2) of article 17 "No one shall be arbitrarily deprived of his property." I have no doubt that the framers of our Constitution drew the same distinction and classed the natural right or capacity of a citizen "to acquire, hold and dispose of property" with other natural rights and freedoms inherent in the status of a free citizen and embodied them in article 19(1), while they provided for the protection of concrete rights of property owned by a person in article 31. The meaning of the phrase "to acquire, hold and dispose of property" as well as the nature of the subject matter to which it has reference in the sense indicated above, is also clear from the terms of sections 111 and 298 of the Government of India Act, 1935, where the same phrase is used

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in prohibiting imposition of "disability" on grounds of religion, place of birth, descent, colour or any of them on a British subject domiciled in the United Kingdom and on an Indian subject of His Majesty determined, in the case of citizens and non-citizens not deal with expropriation of specific property belonging to such persons which is dealt with in section 299.

There are difficulties in the way of accepting the view of the learned Judges below that article 19 (1) (f) and 19 (5) deal with the concrete rights of property and the restraint to which they are liable to be subjected. In the first place, it will be noticed that sub-clause (f) of clause (1) of article 19 deals only with the rights of citizens, whereas article 31 deals with the rights of persons in general. If article 31, which is headed by the caption "right to property", was designed to protect property rights of citizens as well as non-citizens, why was it considered necessary to provide for the protection of those rights in sub-clause (f) of clause (1) of article 19 also ? I do not think that our Constitution-makers could have intended to provide a double-barrelled constitutional protection to private property. Moreover, right to "acquire" and "dispose of" property could only refer to the capacity of a citizen. The word "hold", which is inserted between those two words must, in my opinion, be understood to mean "own", and not as having reference to something different, *viz.*, rights to specific things owned by a citizen ? I see no force in the objection that unless sub-clause (f) of clause (1) of article 19 read with clause (5) is construed as relating to concrete property rights also, the legislature would have the power to impose even *unreasonable* restrictions on the enjoyment of private property by citizens. It is difficult to believe that the framers of our Constitution could have intended to differentiate between citizens and non-citizens in regard to imposition of restrictions on enjoyment of private property. Such restrictions are imposed in exercise of the power inherent in the State to regulate private rights of property when they

are sought to be exercised to the injury of others having similar rights, and the measure of restriction imposed in exercise of such regulative power must be determined, in the case of citizens and non-citizens alike, by the necessity of protecting the community. On the other hand, differential treatment of citizens and non-citizens would be perfectly intelligible if sub-clause (f) of clause (1) of article 19 and clause (5) are understood as dealing only with the freedom or capacity to acquire, hold and dispose of property in general, for, it would be justifiable to exclude aliens from such freedom, as has been done in several countries for the benefit of their own nationals, particularly in respect of land. Moreover, both by the preamble and the directive principles of State policy in Part IV, our Constitution has set the goal of a social welfare State and this must involve the exercise of a large measure of social control and regulation of the enjoyment of private property. If concrete rights of property are brought within the purview of article 19(1) (f), the judicial review under clause (5) as to the reasonableness of such control and regulation might have an unduly hampering effect on legislation in that behalf, and the makers of our Constitution may well have intended to leave the Legislatures free to exercise such control and regulation in relation to the enjoyment of rights of property, providing only that if such regulation reaches the point of deprivation of property the owner should be indemnified under clause (2) of article 31 subject to the exceptions specified in para. (ii) of sub-clause (b) of clause (5) of article 31.

Nor am I much impressed with the suggestion that the reference to "exercise" in clause (5) of article 19 of the rights conferred by sub-clause (f) of clause (1) indicates that the latter rights must be rights of property. Clause (5) could as well contemplate restrictions on the excercise of a citizen's freedom to acquire, hold and dispose of property, as for instance, banning acquisition of land in a givien locality, say a tribal area, or putting a ceiling on the quantum of land that a citizen can hold, or restricting alienation of land to specified classes of persons only (cf. *Punjab Province* v.

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Daulat Singh and Other (1) and the reasonableness of such restrictions being brought under judicial review. For all these reasons, I am of opinion that under the scheme of the Constitution, all those broad and basic freedoms inherent in the status of a citizen as a free man are embodied and protected from invasion by the State under clause (1) of article 19, the powers of State regulation of those freedoms in public interest being defined in relation to each of those freedoms by clauses (2) to (6) of that article, while rights of private property are separately dealt with and their protection provided for in article 31, the cases where social control and regulation could extend to the deprivation of such rights being indicated in para. (ii) of sub-clause (b) of clause (5) of article 31 and exempted from liability to pay compensation under clause (2). On this view, no question of correlating article 19 (1) (f) with article 31 could arise and the analogy of *Gopalan's* case has no application. On this view, the question whether section 7 of the amending Act is a reasonable restriction on the exercise of the respondent's right to the property purchased by him could not also arise, as clause (5) of article 19 could then have reference only to disabilities of the kind already mentioned.

Turning next to the contention based on article 31 (1), it was put thus in the language of Das J. in *Chiranjit Lal Choudhury's* case( ) which the learned Attorney-General fully adopted :

"Article 31(1) formulates the fundamental right in negative form prohibiting the deprivation of property except by authority of law. It implies that a person may be deprived of his property by authority of law. Article 31(2) prohibits the acquisition or taking possession of property for a public purpose under any law, unless such law provides for payment of compensation. It is suggested that clauses (1) and (2) of article 31 deal with the same topic, namely, compulsory acquisition or taking possession of property, clause (2) being only an elaboration of clause (1). There appear

(1) [1946] F.C.R. 1 (P.C.).
(2) [1950] S.C.R. 869, 924.

to me to be two objections to this suggestion. If that were the correct view, then clause (1) must be held to be wholly redundant and clause (2), by itself, would have been sufficient. In the next place such a view would exclude deprivation of property otherwise than by acquisition or taking of possession. One can conceive of circumstances where the State may have to deprive a person of his property without acquiring or taking possession of the same. For example, in any emergency, in order to prevent a fire spreading, the authorities may have to demolish an intervening building. This deprivation of property is supported in the United States of America as an exercise of "police power". This deprivation of property is different from acquisition or taking of possession of property which goes by the name of "eminent domain" in the American law. The construction suggested implies that our Constitution has dealt with only the law of "eminent domain", but has not provided for deprivation of property in exercise of "police powers". I am not prepared to adopt such construction, for I do not feel pressed to do so by the language used in article 31. On the contrary, the language of clause (1) of article 31 is wider than that of clause (2), for deprivation of property may well be brought about otherwise than by acquiring or taking possession of it. I think clause (1) enunciates the general principle that no person shall be deprived of his property except by authority of law, which, put in a positive form, implies that a person may be deprived of his property, provided he is so deprived by authority of law. No question of compensation arises under clause (1). The effect of clause (2) is that only certain kinds of deprivation of property, namely those brought about by acquisition or taking possession of it, will not be permissible under any law, unless such law provides for payment of compensation. If the deprivation of property is brought about by means other than acquisition or taking possession of it, no compensation is required, provided that such deprivation is by authority of law."

I have made this lengthy extract in order to avoid possible unfairness in summarising it. These

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observations were made while rejecting an argument of the petitioner in that case, which, however, the learned Judge decided in his favour on another point, and are thus purely *obiter*. With all respect to my learned brother I am unable to share the view expressed by him. He reads clauses (1) and (2) as mutually exclusive in scope and content,—clause (2) imposing limitations only on two particular kinds of deprivation of private property, namely, those brought about by acquisition or taking possession thereof, and clause (1) authorising all other kinds of deprivation with no limitation except that they should be authorised by law. There are several objections to the acceptance of this view. But the most serious of them all is that it largely nullifies the protection afforded by the Constitution to rights of private property and, indeed, stultifies the very conception of the "right to property" as a fundamental right. For, on this view, the State, acting through its legislative organ, could, for instance, arbitrarily prohibit a person from using his property, or authorise its destruction, or render it useless for him, without any compensation and without a public purpose to be served thereby, as these two conditions are stipulated only for acquisition and taking possession under clause (2). Now, the whole object of Part III of the Constitution is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State, which as defined by article 12 includes the Legislatures of the country. It would be a startling irony if the fundamental rights of property were, in effect, to be turned by construction into an arbitrary power of the State to deprive a person of his property without compensation in all ways other than acquisition or taking possession of such property. If the Legislatures were to have such arbitrary power, why should compensation and public purpose be insisted upon in connection with what are termed two particular forms of deprivation ? What could be the rational principle underlying this differentiation ? To say that clause (1) defines the "police power" in relation to rights of property is no satisfactory answer, as the same power

could as well have been extended to these two particular kinds of deprivation. Such extension would at least have avoided the following anomaly: compensation is paid to indemnify the owner for the loss of his property. It could make no difference to him whether such deprivation was authorised under clause (1) or clause (2). In either case his property would be gone and he would suffer loss. It would matter little to him what happened to the property after he was deprived of it—whether it was used for a public purpose or was simply destroyed without any public purpose being served. In fact, he could more readily reconcile himself to the loss forced upon him if he found his property being used for the public benefit; for, in that case, he would be participating in that benefit as a member of the public. But that consolation would be denied to him by deprivation under clause (1), which makes his loss all the more grievous. But, according to Das J.'s. reading of that clause, the Constitution-makers have provided for no indemnification of the expropriated owner. Why? Because, it is said, deprivation under clause (1) is an exercise of "police power." This, to my mind, is fallacious. You first construe the clause as conferring upon the State acting through its Legislature unfettered power to deprive owners of their property in all other cases except the two mentioned in clause (2), and then seek to justify such sweeping and arbitrary power by calling it "police power." According to Das J. clause (1) was designed to confer "police power" on the State to deprive persons of their property by means other than acquisition or taking possession of such property. He would read the clause in a positive form as implying that a person may be deprived of his property by authority of law. In other words, the framers of our Constitution, who began Part III by formulating the fundamental rights of individuals against invasion by the Legislatures in the country, ended by formulating the right of the Legislatures to deprive individuals of their property without compensation!

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Speaking of police power, as applied to personal liberty, Prof. Willis says(1):

There are two main requirements for a proper exercise of the police power—(1) there must be a social interest to be protected which is more important than the social interest in personal liberty, and (2) there must be, as a means for the accomplishment of this end, something which bears a substantial relation thereto.

This statement is equally true of police power as applied to private property. This is recognised and given effect to in clauses (2) to (6) of article 19 which delimit the regulative power of the Legislatures as applied to the freedoms enumerated in clause (1) of that article including the freedom referred to in sub-clause (f). But clause (1) of article 31 imposes no such limitations. Why should such *absolute* power be conferred on the Legislature in relation to private property, whereas the exercise of restrictive power under clauses (2) to (6) of article 19 is carefully limited to specified purposes and to the imposition of only *reasonable* restrictions in each of those cases? Could it have been intended that, while restriction imposed on the freedoms mentioned in clause (1) of article 19 should be reasonable and in public interest, deprivation of property, except in the two cases provided for in clause (2) of article 31, need not be reasonable nor for the public benefit? To say that the requirement of "authorisation by law" was considered sufficient limitation in all other cases of deprivation takes no note of the fact that in the case of restrictions under clauses (2) to (6) of article 19 also, their authorisation could only be by law and yet other limitations have been imposed. In fact, authorisation by law can obviously be no limitation on the *Legislature,* and "police power", as developed in the American case law, is essentially a legislative power.

Now, what is this "police power" and how does the Constitution of India provide for its exercise by the State? Referring to the doctrine of police power

(1) Constitutional Law, p. 728.

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in America, I said in *Gopalan's* case(1) : "When that power (legislative power) was threatened with prostration by the excesses of due process, the equally vague and expansive doctrine of "police power", *i.e.,* the power of Government to regulate private rights in public interest, was evolved to counteract such excesses." And Das J. (2), said that the content of due process of law had to be narrowed down by the "enunciation and application of the new doctrine of police power as an antidote or palliative to the former". This court held in the aforesaid case that the framers of our Constitution definitely rejected the doctrine of due process of law. Is it to be supposed that they accepted the "antidote" doctrine of police power and embodied it in clause (1) of article 31 as a specific power conferred on the Legislatures to deprive persons of their property ? The suggestion seems unwarranted and, indeed, contrary to the scheme of our Constitution. That scheme, in marked contrast with the Constitution of America, is to distribute legislative powers among the Union and the State Legislatures according to the Lists of the Seventh Schedule and among such powers was included the power of "acquisition or requisitioning of property" for Union and State purposes in entry No. 33 of List I and No. 36 of List II respectively. Thus, what is called the power of eminent domain, which is assumed to be inherent in the sovereignty of the State according to Continental and American jurists and is accordingly not expressly provided for in the American Constitution, is made the subject of an express grant in our Constitution. Having granted the power in express terms, the Constitution defines in article 31 the limitations on the exercise thereof as constituting the fundamental right to property of the owner, all fundamental rights of the people being restraints on the State [see observations at page 198 in *Gopalan's* case(1)]. But the power of social control and regulation of private rights and freedoms for the common good

(1) [1950] S.C.R. 88, 200.

(2) [1950] S.C.R. 88, 313.

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being an essential attribute of a social and political organisation otherwise called a State, and pervading, as it does, the entire legislative field, was not specially provided for under any of the entries in the legislative Lists and was left to be exercised, wherever desired, as part of the appropriate legislative power. Even where such regulative powers are defined and delimited, as for instance in clauses (2) to (6) of article 19 in relation to the rights and freedoms specified in clause (1), the powers themselves are left to be exercised under laws made with respect to those matters. For example, the power of social control and regulation as applied to freedom of speech and expression is exercisable under a law made with respect to entry No. 1 of List II (Public Order) or entry No. 39 of List III (Newspapers, books and printing presses) and in relation to a freedom not falling under clause (1) of article 19, like the freedom to drink or to eat what one likes, such freedom can be restrained or even prohibited under a law made with reference to entry No. 8 of List II (Intoxicating liquors, etc.) or entry No. 19 of List III (Drugs and poisons). Thus the American doctrine of police power as a distinct and specific legislative power is not recognised in our Constitution and it is therefore contrary to the scheme of the Constitution to say that clause (1) of article 31 must be read in positive terms and understood as conferring police power on the Legislature in relation to rights of property. I entirely agree with the observations of Mukherjea J. in *Chiranjit Lal's* case([1]), that "In interpreting the provisions of our Constitution we should go by the plain words used by the Constitution-makers and the importing of expressions like 'police power', which is a term of variable and indefinite connotation in American law, can only make the task of interpretation more difficult."

The correct approach, in my opinion, to the interpretation of article 31 is to bear in mind the context and setting in which it has been placed. As already stated, Part III of the Constitution is designed to afford protection to the freedoms and rights mentioned

(1) [1950] S.C.R. 869, 907

therein against inroads by the State which includes the Legislatures as well as the executive Governments in the country. Though, as pointed out in *Gopalan's* case(1) citing *Eshukbayi Eleko* v. *Officer Administering the Government of Nigeria*(2), protection against executive action is not really needed under systems of Government based on British jurisprudence according to which no member of the executive can interfere with the liberty or property of a subject except in pursuance of powers given by law, our Constitution-makers, who were framing a written Constitution, conferred such protection explicitly by including the executive Governments of the Union and the States in the definition of "the State" in article 12. A fundamental right is thus sought to be protected not only against the legislative organ of the State but also against its executive organ. The purpose of article 31, it is hardly necessary to emphasise, is not to declare the right of the State to deprive a person of his property but, as the heading of the article shows, to protect the "right to property" of every person. But how does the article protect the right to property? It protects it by defining the limitations on the power of the State to take away private property without the consent of the owner. It is an important limitation on that power that legislative action is a pre-requisite for its exercise. As pointed out by Cooley, "The right to appropriate private property to public uses lies dormant in the State, until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriation. Private property can only be taken pursuant to law"(3). In England the struggle between prerogative and Parliament having ended in favour of the latter, the prerogative right of taking private property became merged in the absolutism of Parliament, and the right to compensation as a fundamental right of the subject does not exist independently of Parliamentary enactment. The result is that Parliament alone could authorise interference with the enjoyment of private property.

(1) [1950] S.C.R. 88.
(2) [1931] A C. 662.
(3) Constitutional Limitations, Vol. II, p. 1119.

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Blackstone also says that it is the Legislature alone that can interpose and compel the individual to part with his property(1). It is this limitation which the framers of our Constitution have embodied in clause (1) of article 31 which is thus designed to protect the rights to property against deprivation by the State acting through its executive organ, the Government. Clause (2) imposes two further limitations on the Legislature itself. It is prohibited from making a law authorising expropriation except for public purposes and on payment of compensation for the injury sustained by the owner. These important limitations on the power of the State, acting through the executive and legislative organs, to take away private property are designed to protect the owner against arbitrary deprivation of his property. Clauses (1) and (2) of article 31 are thus not mutually exclusive in scope and content, but should, in my view, be read together and understood as dealing with the same subject, namely, the protection of the right to property by means of the limitations on the State power referred to above, the deprivation contemplated in clause (1) being no other than the acquisition or taking possession of property referred to in clause (2).

Much argument was expended to show that clause (2) dealt only with *two* specified modes of depriving a person of his property, namely, acquisition and requisitioning and could not, therefore, be considered to be a mere elaboration of clause (1), which referred to deprivation generally. It was submitted that clause (2) should be read with entry No. 33 of List I, No. 36 of List II and No. 42 of List III, each of which refers to acquisition or requisitioning of property and to no other mode of deprivation. It was also pointed out that sub-section (2) of section 299 of the Government of India Act, 1935, as well as entry No. 9 of List II of the Seventh Schedule thereof referred only to compulsory acquisition of land for public purposes, and it was not until the Bombay High Court held in *Tan Bug Taim and Others* v. *The Collector of Bombay and Others* (2), that rule 75(a) of the Defence of India Rules

(1) Commentaries, Vol. I, p, 110.
(2) I.L.R. 1946 Bom. 517.

under which a property situated in Bombay was requisitioned was *ultra vires* on the ground that entry No. 9 of List II did not confer on the Legislature the power of requisitioning, that such power was conferred on the Central Legislature by the India (Proclamations of Emergency) Act, 1946 (9 and 10 Geo. V, Ch. 23). Attention was drawn to the Regulations and Acts relating to compulsory acquisition of land in this country including the Land Acquisition Act, 1894, all of which provided for the vesting of the property acquired in the Government or in one of its officers, and it was suggested that the framers of our Constitution, who must have been aware of the difficulties arising out of the lacuna in the Government of India Act, 1935, in regard to the power of requisitioning, added the words "taken possession of" in clause (2) and the word "requisitioning" in the entries referred to above. It was, therefore, urged that the words "acquired" or "taken possession of" should not be taken to have reference to all forms of deprivation of private property by the State.

I see no sufficient reason to construc the words "acquired or taken possession" used in clause (2) of article 31 in a narrow technical sense. The Constitution marks a definite break with the old order and introduces new concepts in regard to many matters, particularly those relating to fundamental rights, and it cannot be assumed that the ordinary word "acquisition" was used in the Constitution in the same narrow sense in which it may have been used in pre-Constitution legislation relating to acquisition of land. These enactments, it should be noted, related to *land,* whereas article 31(2) refers to moveable property as well, as to which no formal transfer or vesting of title is necessary. Nor is there any warrant for the assumption that "taking possession of property" was intended to mean the same thing as "requisitioning property" referred to in the entries of the Seventh Schedule. If that was the intention, why was the word "requisitioning" not used in clause (2) as well ? It is fallacious to suggest that unless "taking possession" is synonymous with "requisitioning", the power to make a law

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authorising the taking of possession of property would be lacking because no entry in any of the Lists of the Seventh Schedule confers that power. A specific entry in the legislative Lists is no more necessary for conferring such power than for conferring power to make a law authorising *deprivation* of property which clause (1) of article 31 postulates. [See observations in *P. D. Shamdasani* v. *Central Bank of India*(1)]. The word "acquisition" is not a term of art, and it ordinarily means coming into possession of, obtaining, gaining or getting as one's own. It is in this general sense that the word has been used in articles 9, 11 and 19(1) (f) and not as implying any transfer or vesting of *title*. In *Minister of State for the Army* v. *Dalziel*(2) a Full Bench of the High Court of Australia had to construe the scope of the legislative power with respect to "acquisition" of property conferred on the Commonwealth Parliament by section 51 (xxxi) of the Austrailan Constitution (63 and 64 Vic., Ch. 12), and the court decided by a majority that the power included the power to take possession of property for a temporary purpose for an indefinite period. To say that acquisition implies the transfer and vesting of title in the Government is to overlook the real nature of the power of the State as a sovereign acting through its legislative and executive organs to appropriate the property of a subject without his consent. When the State chooses to exercise such power, it *creates* title in itself rather than *acquire* it from the owner, the nature and extent of the title thus created depending on the purpose and duration of the use to which the property appropriated is intended to be put as disclosed in the law authorising its acquisition. No formula of vesting is necessary. As already stated, in the case of moveable property no formal transfer or vesting of title apart from seizing it could have been contemplated. And, what is more, clause (5) (b) (ii) of article 31, which excepts any law made in future "for the prevention of danger to life or property" from the operation of clause (2) shows that the latter clause, but for such exception, would entail liability to pay compensation for deprivation by destruction, which must therefore

(1) [1952] S.C.R. 391, 394.

(2) 68 C.L.R. 261.

be taken to fall within the scope of clause (2), for a law made for the prevention of danger to life or property may often have to provide for destruction of the property appropriate. I am of opinion that the word "acquisition" and its grammatical variations should, in the context of article 31 and the entries in the Lists referred to above, be understood in their ordinary sense, and the additional words "taking possession of" or "requisitioning" are used in article 31(2) and in the entries respectively, not in contradistinction with, but in amplification of the term "acquisition", so as to make it clear that the words taken together cover even those kinds of deprivation which do not involve the continued existence of the property after it is acquired. They would, for instance, include destruction which implies the reducing into possession of the thing sought to be destroyed as a necessary step to that end. The expression "taking possession" can only mean taking such possession as the property is susceptible of and not actual physical possession, as "the interest in, or in any company owing, any commercial or industrial undertaking", which is expressly included in clause (2) of article 31, is not susceptible of any actual physical occupancy or seizure. It is, however, unnecessary here to express any concluded opinion on the precise scope and meaning of the expression "shall be taken possession of or acquired" in clause (2) except to say that it does not admit of being construed in the same wide sense as the word "taken" used in the Fifth Amendment of the American Constitution, but implies such an appropriation of the property or abridgement of the incidents of its ownerships as would amount to a deprivation of the owner. Any other interference with enjoyment of private property short of such appropriation or abridgement would not be compensable under article 31(2).

It will now be seen that the two objections raised by Das J. to the view expressed above, namely, that

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clauses (1) and (2) must be read together and understood as dealing with the same topic, are really baseless. The first objection is that clause (1) would then be redundant. It would not be so, because it embodies one of the three important limitations on the exercise of the State power of deprivation of private property, namely, the necessity for the legislative action as a condition precedent to the exercise of the power and constitutes a protection against the executive organ of the State. The second objection that the State's power in an emergency to deprive a person of his property without payment of compensation, as for example, to demolish an intervening building to prevent a conflagration from spreading, would be excluded is equally baseless. Cases of that kind, as we have seen, would fall within the exception in clause (5) (b) (ii), and no compensation would be payable for the loss caused by the destruction of property authorised under that clause. The learned Attorney-General suggested that sub-clause (b) was inserted *ex abundante cautela* as even without it no one could have supposed that a law of the kind mentioned in that sub-clause would fall under clause (2). There could have been no doubt, for instance, that the power of taxation referred to in paragraph (i) of that sub-clause was a distinct power. It is difficult to appreciate this argument. If the exceptions in sub-clause (b) were so obvious that they need not have been explicitly provided for, then equally must be second objection of Das J. fall to the ground. To say that sub-clause (b) is introduced by way of abundant caution is not to do away with the exceptions but to emphasise their existence *aliunde*. Whether it was considered necessary to provide expressly that destruction of private property under emergency conditions entails no liability to pay compensation or whether the State's power to do so was so well established that sub-clause (b) (ii) was really unnecessary and must be taken to have been inserted *ex abundante cautela,* in either view, the second objection must equally fail. The fact is that all the cases referred to in sub-clause (b) are different forms

of deprivation of property and, as difficulties of construction might arise in a written Constitution if they are not expressly and specifically excepted from the requirement under clause (2) as to payment of compensation, the framers have thought it necessary to insert clause (5) (b).

Where was the necessity, it was asked, to provide in clause (1) of article 31 for protection against the executive government in the matter of compulsory acquisition of property by the State, as no such protection is provided for in the case of the regulative powers exercisable under article 19(2) to (6) ? The answer is : the same need apparently which dictated the enactment of article 265 providing for similar protection in the matter of taxation. In any case, this would be no more of an objection, if it be an objection, to the view I have indicated above than to the other view which also recognises the necessity for legislative action before a person could be deprived of his property.

Attention was called to article 38 as showing that one of the goals set by the Constitution was the promotion of social welfare, and it was urged that the attainment of that object as well as the growing complexities of modern conditions of life must call for an expanding power of social control and regulation, particularly in the sphere of the enjoyment of private property and that the exercise of such power without entailing liability to pay compensation ought not to be confined within the narrow limits specified in article 31 (5) (b). This is a misconception. In the first place, social welfare is not inconsistent with the ownership of private property and does not demand arbitrary expropriation of such property by the State without compensation. On the other hand, as pointed out by Blackstone "The public good is in nothing more essentially interested than in the protecion of every individual's private rights as modelled by the municipal law"(1). This is not an antiquated view. So modern a document as the Declaration of Human

(1) Commentaries Vol. I, p. 109.

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Rights in the United Nations has specifically provided for the protection of private property by including the clause "No one shall be arbitrarily deprived of his property" in article 17, and the framers of our Constitution have evidently proceeded on that view. Secondly, the argument also overlooks that clause (5) (b) was *not* intended to define and does *not* define exhaustively the power of social control and regulation in relation to rights of private property. It only *limits* the purposes for which the power could be exercised without liability to pay compensation, though its exercise results in deprivation of property in the sense already explained. But where its exercise does not involve deprivation of property, no question of paying compensation would arise, and the Legislatures in the country would, as already indicated, be free to enact laws providing for the exercise of such power within the fields marked out for them in the Legislative Lists. There is, therefore, no room for the apprehension that article 31 (5) (b) would unduly cramp social control and regulation of private property for the public good or would lead to any alarming consequences to the safety of the community.

But why all this ado, it was asked, about protection against deprivation of property by legislative action? There is no such protection provided in the Constitution against deprivation of property by the Legislature exercising the power of taxation. Why then complain if there is no protection against the Legislature authorising deprivation of property without compensation under article 31(1)? Our Constitution-makers, it was said, trusted the Legislature, as the people of Great Britain trust their Parliament which protects the Englishman's right to property. In ultimate analysis, is not well-informed and organised public opinion the true and effective protection against arbitrary action of the Legislature? The argument has no force. So far as the power of taxation is concerned, the Constitution recognises no fundamental right to immunity from taxation and that is why presumably no constitutional protection is provided against the exercise of that power. But fundamental

rights under the Constitution stand on a different footing. Indeed, the argument is a bold challenge to the policy of including a declaration of such rights in Part III of the Constitution. In *Gopalan's* case(1), I said :

"Madison (who played a prominent part in framing the First Amendment of the American Constitution) pointing out the distinction, due to historical reasons, between the American and the British ways of securing 'the great and essential rights of the people', observed 'Here they are secured not by laws paramount to prerogative but by Constitutions paramount to laws.' " This has been translated into positive law in Part III of the Indian Constitution.

There have always been two schools of opinion regarding the efficacy of a declaration of fundamental rights in a Constitution. Britain never believed in a formal declaration of such rights. Referring to the demand of the Indian Delegation that the Parliamentary Bill which was later passed as the Government of India Act, 1935, should embody certain fundamental rights, the Joint Parliamentary Committee observed(2) :

"The question of so-called fundamental rights, which was much discussed at the three Round Table Conferences, was brought to our notice by the British India Delegation, many members of which were anxious that the new Constitution should contain a declaration of rights of different kinds, for reassuring minorities for asserting the equality of all persons before the law, and for other like purposes; and we have examined more than one list of such rights which have been compiled. The Statutory Commission observe with reference to this subject :—'We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless unless there exist the will and means to make them effective.' With these

(1) [1950] S.C.R. 88, 198.
(2) Para. 366.

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observations we entirely agree; and a cynic might indeed find plausible arguments, in the history during the last ten years of more than one country, for asserting that the most effective method of ensuring the destruction of a fundamental right is to include a declaration of its existence in a constitutional instrument."

But the American view is different. Answering a similar objection to the inclusion of a Bill of Rights in the American Constitution, Jefferson said :

"But though it is not absolutely efficacious under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cram Government in its useful exertions. But the evil of this is short-lived, moderate, and reparable. The inconveniences of the want of a declaration are permanent, afflictive, and irreparable. They are in constant progressive from bad to worse. The executive in our Governments is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the Legislatures is the most formidable dread at present, and will be for many years." (Quoted in Cooley's Constitutional Limitations, 8th Edn., Vol. I, p. 535).

It is obvious that the framers of our Constitution shared the American view and included Part III in the Constitution of India. It is, therefore, a wrong approach to construe the articles of Part III by pointing to the British way, which is more a traditional than a constitutional way, of protecting the rights and liberties of the individual by making Parliament supreme.

On this view of the meaning and effect of article 31, the question is whether section 7 read with section 4 of the amending Act infringes the fundamental right of the respondent under that article. These provisions

by their retrospective operation undoubtedly abridge the respondent's rights of property by nullifying one of the incidents of the estate purchased by him at the revenue sale, namely, the right to annul certain kinds of under-tenures and evict certain classes of under-tenants in occupation of portions of the estate. Does such abridgement amount to deprivation of property within the meaning of article 31 as interpreted above, and, if so, does it fall within the exception in clause (5) (b) (ii) of that article ?

Now, the word "property" in the context of article 31 which is designed to protect private property in all its forms, must be understood both in a corporeal sense as having reference to all those specific things that are susceptible of private appropriation and enjoyment as well as in its juridical or legal sense of a bundle of rights which the owner can exercise under the municipal law with respect to the user and enjoyment of those things to the exclusion of all others. This wide connotation of the term makes it sometimes difficult to determine whether an impugned law is a deprivation of property within the meaning of article 31 (2), for, any restriction imposed on the use and enjoyment of property can be regarded as a *deprivation* of one or more of the rights theretofore exercised by the owner. The American courts have experienced similar difficulty in deciding whether a given statutory abridgement of the rights of the owner is an exercise of the police power" for which no compensation can be claimed, or a "taking" of property within the meaning of the Fifth Amendment clause "Nor shall private property be taken for public use without just compensation." "The general rule at least" said Holmes J. in delivering the majority opinion in *Pennsylvania Coal Co.* v. *Mahon*(1), "is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognised as a taking." The vague and expansive doctrine of "police power" and the use of the term "taken" in the Fifth Amendment construed in a very wide sense so as to cover any injury or damage to property, coupled with the equally vague

(1) 260 U.S. 393.

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and expansive concept of "due process", allow a greater freedom of action to the American courts in accommodating and adjusting, on what may seem to them a just basis, the conflicting demands of police power and the constitutional prohibition of the Fifth Amendment. Under the Constitution of India, however, such questions must be determined with reference to the expression "taken possession of or acquired" as interpreted above, namely, that it must be read along with the word "deprived" in clause (1) and understood as having reference to such substantial abridgement of the rights of ownership as would amount to deprivation of the owner of his property. No cut and dried test can be formulated as to whether in a given case the owner is "deprived" of his property within the meaning of article 31; each case must be decided as it arises on its own facts. Broadly speaking it may be said that an abridgement would be so substantial as to amount to a deprivation within the meaning of article 31 if, in effect, it withheld the property from the possession and enjoyment of the owner, or seriously impaired its use and enjoyment by him, or materially reduced its value.

The learned Judges of the High Court did not consider the case from this point of view. As has been stated, they applied article 19 (1) (f) and (5) and held that section 7 of the amending Act, by its retrospective operation, imposed on the respondent's enjoyment of the property purchased by him at the revenue sale restrictions which were not reasonable. That view, for reasons already indicated, cannot be accepted and the matter has to be looked at from the point of view of article 31 as interpreted above. A comparison of the scope and effect of the old section 37 which is substituted in its place by section 4 of the amending Act and which section 7 shows to be clearly retrospective, discloses that, although the right of a purchaser to annual under-tenures and evict under-tenants is curtailed by the new section 37 by enlarging the scope of the exceptions in the old section, it entitles the purchaser, as a countervailing advantage, to enhance the rent payable by the tenure holders and tenants

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newly brought within the exception. The purchaser is left free in other respects to continue in enjoyment of the property as before. In other words, what the amending Act seeks to do is to enlarge the scope of the protection provided by the exception in the old section, as it was found to be inadequate, while conferring certain compensating benefits on the purchaser. This amendment is in the line with the traditional tenancy legislation in this country affording relief to tenants whenever the tenancy laws were found, due to changing conditions, to operate harshly on the tenantry. I find it difficult to hold that the abridgement sought to be effected retrospectively of the rights of a purchaser at a revenue sale is so substantial as to amount to a deprivation of his property within the meaning of article 31 (1) and (2). No question accordingly arises to the applicability of clause (5) (b) (ii) to the case.

In the result, the appeal is allowed and the judgment of the High Court is set aside. The first respondent will pay the costs of this appeal incurred by the appellant here and in the lower Court.

MEHR CHAND MAHAJAN J.—For reasons given in my judgment in *Dwarkadas Shrinivas* v. *Sholapur Spinning and Weaving Mills Ltd.*, (C.A. 141 of 1952)(1) I agree with my Lord the Chief Justice in his construction of article 31 of the Constitution. I also concur in the conclusions reached by him, and in his decision of the appeal.

DAS J.—I agree that this appeal must be allowed but I have arrived at this conclusion by a different process of reasoning. As the arguments advanced before us have raised very important constitutional issues it is only right that I should give the reasons for my decision in some detail.

The facts and circumstances leading up to the present appeal are as follows :

At a revenue sale held on the 9th January, 1942, the respondent Subodh Gopal Bose purchased the entire Touzi No. 341 recorded in the collectorate of the

(1) Reported *infra*.

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permanently settled district of 24-Parganahs in West Bengal. At the date of that sale the auction-purchasers at a revenue sale had, under section 37 of the Bengal Land Revenue Sales Act, 1859, as it then stood, certain rights as therein mentioned. That section ran thus :

"37. The purchaser of an entire estate in the permanently-settled districts of Bengal, Bihar and Orissa, sold under this Act for the recovery of arrears due on account of the same shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement; and shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-tenants, with the following exceptions :—

First—*Istimrari* or *Mukarrari* tenures which have been held at a fixed rent from the time of the permanent settlement.

Secondly—Tenures existing at the time of settlement which have not been held at a fixed rent ;

Provided always that the rents of such tenure shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

Thirdly—*Talukdari* and other similar tenures created since the time of settlement and held immediately of the proprietors of estates and farms for terms of years so held, when such tenures and farms have been duly registered under the provisions of this Act.

Fourthly—Leases of lands whereon dwelling houses, manufactories or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship or burning or burying grounds have been made, or wherein mines have been sunk.

And such a purchaser as is aforesaid shall be entitled to proceed in the manner prescribed by any law for the time being in force for the enhancement of the rent of any land coming within the fourth class of exceptions above made, if he can prove the same to

have been held at what was orginally an unfair rent, and if the same shall not have been held at a fixed rent, equal to the rent of good arable land, for a term exceeding twelve years ; but not otherwise ;

Provided always that nothing in this section contained shall be construed to entitle any such purchaser as aforesaid to eject any *raiyat* having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force, or to enhance the rent of any such *raiyat* otherwise than in the manner prescribed by such laws, or otherwise than the former proprietor, irrespectively of all engagements made since the time of settlement, may have been entitled to do."

In exercise of his rights under the section set out above the respondent Subodh Gopal Bose annulled all under-tenures and tenancies appertaining to the said Touzi and on the 18th March, 1946, instituted a suit, being Title Suit No. 35 of 1946, in the Fourth Court of the Subordinate Judge at Alipore 24-Parganahs for the ejectment of respondents Nos. 2 to 6, claiming that he was entitled to recover possession of the lands in suit by virtue of the rights conferred on him by section 37. The respondent No. 2, who was the defendant No. 1, alone contested the suit. His defence was, *inter alia,* that he was a *raiyat* and as such protected by the proviso to section 37. He also claimed protection under the fourth exception to that section. The learned Subordinate Judge who tried the suit delivered his judgment on the 14th February, 1949. By that judgment he overruled the contentions of the contesting defendant and passed a decree for ejectment against him. He dismissed the suit against the other defendants (who are now respondents Nos. 3 to 6), holding that they were not necessary parties to the suit.

On the 25th March, 1949, the respondent No. 2 preferred an appeal, being Title Appeal No. 252 of 1949, before the District Judge at Alipore, 24-Parganahs. That appeal was transferred to the court of the Additional District Judge for hearing. While

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that appeal was pending the West Bengal Legislature passed West Bengal Act VII of 1950, called the Bengal Land Revenue Sales (West Bengal Amendment) Act of 1950, which received the assent of the Governor of Bengal on the 15th March, 1950, and was published in the Official Gazette on the day.

By section 4 of the amending Act, section 37 of the Bengal Revenue Sales Act, 1859, was replaced by a new section the material part of which runs thus :

"37. (1) The purchaser of an entire estate in the permanently settled districts of West Bengal sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed after the time of settlement and shall be entitled to avoid and annul all tenures, holdings and leases with the following exceptions :

(a) tenures and holdings which have been held from the time of the permanent settlement either free of rent or at a fixed rent or fixed rate of rent, and

(b) (i) tenures and holdings not included in exception (a) above made, and

(ii) other leases of land whether or not for purposes connected with agriculture or horticulture,

existing at the date of issue of the notification for sale of the estate under this Act :

Provided that notwithstanding anything contained in any law for the time being in force or in any lease or contract no person shall be entitled to hold under such a purchaser as is aforesaid any tenure, holding or lease coming within exception (b) above made, free of rent or at a low rent or at a rent or rate of rent fixed in perpetuity or for any specified period unless the right so to hold has been expressly recognised under any law for the time being in force by any competent civil or revenue court ; and the purchaser shall be entitled to proceed in the manner prescribed by any law for the time being in force for the

determination of a fair and equitable rent of such tenure, holding or lease."

Section 7 of the amending Act provides as follows :—

"7. (1) (a) Every suit or proceeding for the ejectment of any person from any land in pursuance of section 37 or section 52 of the said Act, and

(b) every appeal or application for review or revision arising out of such suit or proceeding, pending at the date of the commencement of this Act shall, if the suit, proceeding, appeal or application could not have been validly instituted, preferred or made had this Act been in operation at the date of the institution, the preferring or the making thereof, abate.

(2) Every decree passed or order made, before the date of commencement of this Act, for the ejectment of any person from any land in pursuance of section 37 or section 52 of the said Act shall, if the decree or order could not have been validly passed or made had this Act been in operation at the date of the passing or making thereof, be void ;

Provided that nothing in this section shall affect any decree or order in execution whereof the possession of the land in respect of which the decree or order was passed or made, has already been delivered before the date of commencement of this Act.

(3) Whenever any suit, proceeding, appeal or application abates under sub-section (1) or any decree or order becomes void under sub-section (2), all fees paid under the Court-fees Act, 1870, shall be refunded to the parties by whom the same were respectively paid."

It is quite clear that under this section 7 the suit of the respondent Subodh Gopal Bose must abate and the decree passed in his favour must become void if that section be valid law and *intra vires* the Constitution of India.

On the 21st July, 1950, the respondent Subodh Gopal Bose applied before the Additional District Judge before whom the appeal was pending to make

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a reference under article 228 of the Constitution of India for a decision of the question whether the provisions of section 7 were void being *ultra vires* the Constitution. The learned Additional District Judge by his order dated the 16th September, 1950, dismissed that application. On the 24th November, 1950, the respondent Subodh Gopal Bose applied to the High Court under article 228 and eventually on the 18th December, 1950, the High Court directed the appeal to be transferred to the High Court only for the decision of the constitutional point. The proceedings were numbered as Reference Case No. 4 of 1950. Notice having been given by the Court to the Advocate-General of Bengal, the State of West Bengal appeared on the Reference. On the 22nd March, 1951, the High Court held that section 7 imposed an unreasonable restriction on the respondent Subodh Gopal Bose's right to hold property and violated his fundamental right guaranteed by article 19 (1) (f) read with article 19 (5) and was, therefore, void under article 13 (1). With this finding the High Court sent back the records to the lower appellate court for disposal of the appeal in the light of that finding. On the 30th November, 1951, the High Court gave leave to the State of West Bengal to appeal to us. Hence the present appeal.

Section 7 of the amending Act, the validity whereof is challenged before us, in terms, affects pre-existing rights. Accordnig to that section every suit or proceedings for ejectment under old section 37 and every appeal or application for review or revision arising out of such suit or proceeding pending at the commencement of the amending Act is to abate if the suit, proceeding, appeal or application could not have been validly instituted, referred or made, had the amending Act been in operation at the date of such suit, proceeding, appeal or application. Further, every decree passed or order made before the commencement of the amending Act for the ejectment of any person from land in pursuance of old section 37 is likewise to become void if such decree or order could not have been validly passed or made if the

amending Act had been in operation at the date of the decree or order. The proviso, however, saves decrees or orders in execution whereof possession had been delivered before the commencement of the amending Act. It is, therefore, clear that section 7 affects pre-existing rights by giving, in effect, retrospective operation to section 4 which has substituted, *inter alia,* the new section 37 for the old section 37 of the Act of 1859. A cursory comparison of the language of the old section 37 with that of the new section 37 will at once make it clear that the substantial right given by the old section to the purchaser to avoid and annul under-tenures and to eject under-tenants is no longer available to him under the new section 37. Although the opening part of the new section 37 purports to give to the purchaser the right to avoid and annul the tenures etc., that right, by reason of the wide sweep of exception (b), has, for all practical purposes, ceased to exist. The new section 37 does not deprive the purchaser of the physical property, namely, the estate purchased at the revenue sale and he continues to be the owner of that property and can exercise and enforce all the rightes which his ownership gives him, except that he cannot, by reason of the new section 37, avoid or annul the under-tenures etc. or eject the under-tenants. In other words, out of the bundle of rights constituting the ownership acquired by him under the old section 37, an item of important right has been taken away, thereby abridging or restricting his ownership. The respondent, Subodh Gopal Bose, contends that his fundamental right, under article 19(1)(f) of the Constitution, namely his right to hold, that is to say, his right to enjoy and exercise the full rights of ownership in relation to the property acquired by him under the old section 37 has been violated and, therefore, section 7 which operates retrospectively and gives retrospective operation to the new section 37 is *ultra vires* the Constitution and is void under article 13(1).

The learned Attorney-General has not seriously contended that the impugned section has not

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prejudicially affected the right given to the purchaser by the old section 37 but he maintains that the abridgement of the rights of the purchaser at a revenue sale brought about by the new section 37 amounts to nothing more than the imposition of a reasonable restriction on the exercise of the right conferred by article 19 (1) (f) in the interests of the general public and is perfectly legitimate and permissible under clause (5) of that article. The High Court repealled the above noted contention and held that the restriction was unreasonable. The High Court based its conclusions on three things, namely, (i) the retrospective operation of the impugned section, (ii) the absence of any provision for the abatement of the purchase price and (iii) the failure of the State to show any reason why the impugned section was introduced into the amending Act. The learned Attorney-General submits that the first two elements taken into consideration by the High Court are wholly irrelevant for the purpose of determining whether the restriction imposed was reasonable in the interest of the general public. Ordinarily a statute is construed prospectively unless it is made retrospective by express words or necessary intendment; but, the learned Attorney-General submits, the fact that a statute is expressly or by necessary implication made retrospective, does not, by itself, furnish any cogent reason for saying that the statute is *prima facie* unfair and, therefore, unreasonable. While I see some force in this argument I am, nevertheless, not convinced that the fact of the statute being given retrospective operation may not be properly taken into consideration in determining the reasonableness of the restriction imposed in the interest of the general public. Nor am I satisfied that the loss occasioned to the purchaser by reducing, without any abatement of the purchase price, an estate in possession into one in reversion may not also be taken into account in determining the reasonableness of the restrictions permissible under article 19 (5). As said by my Lord the Chief Justice in *The State of Madras* v. *V. G. Row*(1):

(1) [1952] S.C.R. 597 at p. 607.

"It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

As regards the third element, the High Court has pointed out that no suggestion had been made before it that the number of pending suits or proceeding for ejectment of tenants was abnormally large or that there was any other cogent reason for introducing the impugned section in the amending Act. Indeed, in the later case of *Iswari Prasad* v. *N. R. Sen*(1) a special bench of the same High Court, consisting of three learned Judges including the two who had decided the case under appeal before us, has distinguished the very judgment from the one then under appeal, and in doing so, laid great emphasis on the absence of any such suggestion in this case. The High Court held that those circumstances were present in the later case and accordingly held that the law impugned in the later case was not unconstitutional.

It is, indeed, very unfortunate that several important matters which would have assisted the High Court in arriving at a right conclusion as to the reasonableness of the restrictions imposed by the impugned section were not brought to the notice of the High Court. Thus, for example, the statement of objects and reasons appended to the Bill which eventually became the amending Act does not appear to have been placed before the High Court. The statement of the objects and reasons appended to the Bill quite clearly refers to the great hardship caused by the application of the old section 37 to a large number of people in the urban area and particularly in Calcutta

(1) 55 C.W.N. 719 at p. 727.

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and its suburbs where the then prevailing phenomenal increase in land values had supplied the necessary incentive to speculative purchasers in exploiting that section for unwarranted large-scale eviction and maintains, according to the sponsor of the Bill, that such large-scale evictions necessitated the enlargement of the scope of protection of that section, with due safeguards for the securing of Government revenue. It is well settled by this court that the statement of objects and reasons is not admissible as an aid to the construction of a statute (see *Aswini Kumar Ghose* v. *Arabinda Bose*(1)) and I am not, therefore, referring to it for the purpose of construing any part of the Act or of ascertaining the meaning of any word used in the Act but I am referring to it only for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. Those are all matters which, as already stated, must enter into the judicial verdict as to the reasonableness of the restrictions which article 19 (5) permits to be imposed on the exercise of the right guaranteed by article 19 (1) (f). Further, there is another significant fact which does not appear to have been pressed on the attention of the High Court. The Bill had been introduced in the Legislature on the 23rd March, 1949, and was referred to a select committee. On the 25th April, 1949, when the Bengal Legislature was not in session West Bengal Ordinance No. 1 of 1949 was passed. The two preambles to that Ordinance recited as follows :

"Whereas it is expedient, pending the enactment of further legislation, to provide for the temporary stay of certain suits, proceedings and appeals in pursuance of the Act :

And whereas the West Bengal Legislature is not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action ;"

The fact that an Ordinance had to be passed pending the passing of this Bill and the preambles to the

(1) [1953] S.C.R. 1.

Ordinance do undoubtedly indicate that, in the opinion of the authorities, the then prevailing conditions disclosed a serious evil which urgently necessitated the taking of immediate action. Further, it appears from the judgment delivered by the High Court on the application subsequently made by the State for leave to appeal to this court that a number of cases were pending before the courts in which the same question was involved. This is also a circumstance which was not brought to the notice of the High Court before the judgment under appeal was pronounced. Finally, in the judgment under appeal I find no reference to the proviso to the new section 37 which enlarges, as it were, by way of compensation for the loss of the right of ejectment, the purchaser's right to claim enhancement of rent much beyond the very limited right of enhancement of rent which, under the old section, was confined only to the fourth excepted under-tenures. Then, there is the fact, found by the High Court, that land values had gone up so high that auction-purchasers could now be found who, even without the right to eject the under-tenants, would willingly pay a sum much in excess of the arrears of Government revenue which remains constant since the permanent settlement. The cumulative effect of the foregoing facts which were not placed before the High Court much outweighs the consideration of the pecuniary loss of the respondent, Subodh Gopal Bose, as the auction-purchaser and in the circumstances the infliction of the loss of the right to eject under-tenants can only be regarded as a reasonable restriction permitted by article 19(5) to be imposed on the exercise of the right guaranteed under article 19(1) (f). In my judgment the reasons for which the High Court declared section 7 of the amending Act to be *ultra vires* the Constitution are no longer tenable in view of the circumstances now before us which were not brought to the notice of the High Court and the decision of the High Court cannot, therefore, be sustained.

An alternative argument, however, has been raised by learned advocate for the respondent, Subodh Gopal Bose, that the impugned section violates the

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fundamental right secured to him by article 31(2) of the Constitution and is, therefore, void under article 13(1). The contention, shortly put, is that the right, conferred by the old section 37, to avoid and annul the under-tenures and to eject the under-tenants is, by itself, "property" and that as the new section 37 has taken away that property without having made any provision for compensation therefor the impugned section is unconstitutional in that it violates the provisions of article 31(2).

The Bill which eventually became the Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950, was introduced in the West Bengal Legislature on the 23rd March, 1949, and after having been passed by the Legislature it received the assent of the Governor on the 15th March, 1950. The Bill was, therefore, pending in the West Bengal Legislature when the Constitution of India came into force and was passed into law after the date of the Constitution. It does not appear, however, that the Bill was reserved for the consideration of the President or received his assent. Therefore, the impugned law cannot claim the protection of article 31 (4) and, what is more, if it is such a law as is referred to in clause (2) of article 31, then, by virtue of clause (3), it cannot have any effect at all. The question, therefore, is as to whether the impugned section is or is not such a law as is referred to in article 31(2). The question requires, for a proper answer, a close scrutiny of the provisions of article 31 and other relevant articles of the Constitution bearing on it.

At the outset it is well to bear in mind the decision of this court in *A. K. Gopalan's* case(1), explaining the correlation between the provisions of sub-clauses (a) to (e) and (g) of clause (1) of article 19 and articles 20, 21 and 22 of the Constitution. Kania C. J., at page 101, my Lord the present Chief Justice at pages 191-192, Mahajan J., at page 229, Mukherjea J., at pages 255-256 and I at pages 302-306 expressed the view that the validity of the Preventive Detention Act could not be judged by the provisions of article 19. The majority

(1) [1950] S.C.R. 88.

of the Bench took the view that the rights conferred by article 19(1) (a) to (e) and (g) could be enjoyed only so long as the citizen was free and had the liberty of his person but that the moment he was lawfully deprived of his personal liberty under article 21 he ceased to have the rights guaranteed by article 19(1) (a) to (e) and (g). The result of this part of the decision in *A. K. Gopalan's* case(1) was summarised in the later case of *Ram Singh* v. *The State of Delhi*(2), by my Lord the present Chief Justice in the judgment that he delivered on behalf of himself, Kania C. J., and myself. Said his Lordship at pages 455-456 :

"Although personal liberty has a content sufficiently comprehensive to include the freedoms enumerated in article 19 (1), and its deprivation would result in the extinction of those freedoms, the Constitution has treated these civil liberties as distinct fundamental rights and made separate provisions in article 19 and articles 21 and 22 as to the limitations and conditions subject to which alone they could be taken away or abridged. The interpretation of these articles and their correlation were elaborately dealt with by the full court in *Gopalan's* case(1). The question arose whether section 3 of the Act was a law imposing restrictions on "the right to move freely throughout the territory of India" guaranteed under article 19 (1) (d) and, as such, was liable to be tested with reference to its reasonableness under clause (5) of that article. It was decided by a majority of 5 to 1 that a law which authorises deprivation of personal liberty did not fall within the purview of article 19 and its validity was not be judged by the criteria indicated in that article but depended on its compliance with the requirements of articles 21 and 22, and as section 3 satisfied those requirements, it was constitutional."

Mahajan J., who by a separate judgment dissented from the majority on another point, not material for our present purpose, said at page 467 :

"On the other points argued in the case I agree with judgment of Sastri J."

(1) [1950] S.C.R. 88. (2) [1951] S.C.R. 451.

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It must, therefore, be regarded as settled that the freedom referred to in article 19 (1) sub-clauses (a) to (e) and (g) are guaranteed to a citizen of India while he is a free man. These freedoms, even when they are so available, are, however, not absolute and unbridled licence but are subject to social control in that reasonable restrictions may be imposed on them by law as indicated in clauses (2) to (6) of article 19. But as soon as the citizen is lawfully deprived of his personal liberty as a result of detention, punitive or preventive, he loses his capacity to exercise the several rights enumerated in sub-clauses (a) to (e) and (g) of article 19 (1) and cannot complain of the infraction of any of those rights. The validity of the law which deprived a citizen of his personal liberty which inevitably destroys his rights under the sub-clauses mentioned above cannot be judged by the test of reasonableness laid down in clauses (2) to (6) of article 19 but falls to be determined according to the provisions of articles 20, 21 and 22 of the Constitution. This, I apprehend, is the result of the two decisions of this court referred to above.

Such being the correct correlation between article 19 (1) sub-clauses (a) to (e) and (g) on the one hand and article 21 on the other, the question necessarily arises as to the correlation between article 19 (1) (f) and article 31. Article 19 (1) (f) guarantees to a citizen, as one of his freedoms, the right to acquire, hold and dispose of property but reasonable restrictions may be imposed on the exercise of that right to the extent indicated in clause (5). Article 31, as its heading shows, guarantees to all persons, citizens and non-citizens the "right to property" as a fundamental right to the extent therein mentioned. What, I ask myself, is the correlation between article 19 (1) (f) read with article 19 (5) and article 31 ? If, as held by my Lord in *A. K. Gopalan's* case(1) at page 191, sub-clauses (a) to (e) and (g) of article 19 (1) read with the relevant clauses (2) to (6) "presuppose that the citizen to whom the possession of these fundamental rights is secured retains the substratum of personal freedom on which alone the enjoyment of these rights necessarily

(1) [1950] S.C.R. 88.

rests", it must follow logically that article 19 (1) (f) read with article 19 (5) must likewise presuppose that the person to whom that fundamental right is guaranteed retains his property over or with respect to which alone that right may be exercised. I found myself unable to escape from this logical conclusion and so I said in *A. K. Gopalan's* case at pages 304-305 :

"But suppose a person loses his property by reason of its having been compulsorily acquired under article 31 he loses his right to hold that property and cannot complain that his fundamental right under sub-clause (f) of clause (1) of article 19 has been infringed. It follows that the rights enumerated in article 19 (1) subsist while the citizen has the legal capacity to exercise them. If his capacity to exercise them is gone, by reason of lawful conviction with respect to the rights in sub-clauses (a) to (e) and (g), or by reason of a lawful compulsory acquisition with respect to the right in sub-clause (f), he ceases to have those rights while his incapacity lasts."

I reiterated the same opinion in my judgment in *Chiranjitlal's* case(1). Nothing that I have heard on the present occasion has shaken the opinion I expressed in those cases as to the correlation of article 19 (1) (f) read with article 19 (5) and article 31 of our Constitution.

A suggestion was thrown out by my Lord in course of arguments, that article 19 (1) (f) was concerned only with the abstract right and capacity to acquire, hold and dispose of property and had no reference or relation to any rights in any particular property but that article 31 only was concerned with the right to a concrete property and there was no correlation between the two articles. The matter, however, was not argued by either side and I am not prepared to express any final opinion on it. For the purpose of this appeal I am content to proceed on the footing that article 19 relates to abstract right as well as to right to concrete property.

(1) [1950] S.C.R. 869 at p. 919.

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I now turn to article 31 which appears under the heading "right to Property". The clauses of that article which are material for the purposes of determining the question in debate run as follows :

"(1) No person shall be deprived of his property save by authority of law.

(2) No property, movable or immovable, including any interest in, or in any company owing, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given.

* * *
* * *

(5) Nothing in clause (2) shall affect—

(a) the provisions of any existing law other than a law to which the provisions of clause (6) apply, or

(b) the provisions of any law which the State may hereafter make—

(i) for the purpose of imposing or levying any tax or penalty, or

(ii) for the promotion of public health or the prevention of danger to life or property, or

(iii) in pursuance of any agreement entered into between the Government of the Dominion of India or the Government of India and the Government of any other country, or otherwise, with respect to property declared by law to be evacuee property."

It is suggested that the two clauses are not mutually exclusive but must be read together and that they are only concerned with what has been described as the State's power of eminent domain which, according to Professor Willis, means the legal capacity of sovereignty, or one of its governmental organs, to take private property for a public use upon the

payment of just compensation. Reference is made to certain passages culled from the works of eminent ancient writers like the Dutch publicist and statesman Hugo Grotius who flourished in the 17th century and William Blackstone the celebrated English jurist who wrote his Commentaries round about 1769 and from Judge Cooley's well known book on Constitutional Limitations to show that from early times jurists have insisted on three things as pre-requisites for the exercise of this power of eminent domain, namely, (1) the authority of law, (2) the requirement of public use, and (3) the payment of just compensation. These three pre-requisites which constitute limitations on the power of eminent domain are said to have been epitomised in 1791 in the last two clauses of the Fifth Amendment to the Constitution of the United States of America. The contention is that article 31 reproduces those three limitations on the power of eminent domain, namely, that clause (1) announces the necessity for legislative sanction as a pre-requisite for the exercise of the power, thus protecting all persons against expropriation by the State acting through its executive organ, the Government, and that clause (2) reproduces the necessity of a public purpose and payment of compensation. It is concluded that these important limitations on the State's power of eminent domain are designed to protect a person against arbitrary deprivation of his property and they constitute his fundamental right in relation to his property.

The proposition thus formulated is certainly attractive and, indeed, has found favour with my learned colleagues but appears to me to be open to certain objections. I say in all humility that I consider the method of approach and the line of reasoning in support of that proposition entirely fallacious and wrong. The steps in the argument seem to be (i) that the power of eminent domain and the limitations thereon as explained by eminent jurists are incorporated in the Fifth Amendment to the Constitution of the United States, (ii) that clauses (1) and (2) of article 31 are concerned with the same topic of

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eminent domain and (iii) that, therefore, clauses (1) and (2) of article 31 must be read as having reproduced the same limitations on the power of eminent domain. This line of reasoning amounts, in effect, to likening one thing with another thing and then saying that as that other thing means such and such this thing must, therefore, bear the same meaning—a method which has been deprecated by Lord Halsbury in *Styles'* case(1). Further, if this line of reasoning were correct or permissible then we might as well have said, as indeed we were asked to say, that article 21 reproduced the American constitutional limitations against deprivation of life and personal liberties and that, therefore, the expression "procedure established by law" to be found in article 21 meant exactly what the expression "due process of law" occurring in the Fifth Amendment did. This we resolutely and definitely declined to do in *A. K. Gopalan's* case (supra). At page 108 of the report of that case Kania C.J. expressed the view that that line of reasoning was not proper and was misleading. My Lord the present Chief Justice at page 197 repelled that contention. After quoting the words of Madison about the great and essential rights of the people" my Lord concluded at page 199 :

"This has been translated into positive law in Part III of the Indian Constitution, and I agree that in construing these provisions the high purpose and spirit of the Preamble as well as the constitutional significance of a Declaration of Fundamental Rights should be borne in mind. This, however, is not to say that the language of the provisions should be stretched to square with this or that constitutional theory in disregard of the cardinal rule of interpretation of any enactment, constitutional or other, that its spirit, no less than its intendment should be collected primarily from the natural meaning of the words used".

After noticing the argument of learned counsel for the petitioner Mukherjea J. at page 266 *et seq* found

(1) [1889] L.R. 14 A.C. 381.

it impossible to introduce the American doctrine of due process of law into our article 21. If the language of our article 21 could not be stretched to square with the American due process clause so as to give effect to the suggested enlargement of the scope of our fundamental right to life and personal liberties but had to be interpreted by giving the words their ordinary natural meaning I cannot see why the language of article 31 should not be construed in the usual way so as to give effect to the plain intention of our Constitution-makers. I say with the utmost humility that the proper method of approach is to adopt the golden rule of construction referred to in the judgment of my Lord quoted above and not to start off with any kind of assumption that our Constitution must be regarded as having reproduced this or that doctrine.

Apart from the erroneous line of reasoning referred to above, the conclusion arrived at by following that reasoning appears to me to be open to serious objections on merits also. If it were correct to say that the two clauses, (1) and (2), of article 31 deal with the same topic of the State's power of eminent domain which is inherent in its sovereignty then, as I pointed out in my judgment in *Chiranjitlal's* case(1) at page 925, clause (1) must be held to be wholly redundant and clause (2) by itself would have sufficed, for the necessity of a law is quite clearly implicit in clause (2) itself which alone would have served as a protection against State action through its executive organ, the government. Another and more serious objection against reading both the clauses as dealing only with the same topic of eminent domain is, as pointed out by me in *Chiranjitlal's* case (supra), that such construction will place the deprivation of property otherwise than by the taking of possession or acquisition of it outside the pale of all constitutional protection. As I said there and as I shall also do hereafter in detail, one can conceive of circumstances where the State, in exercise of the State's police power, may have to deprive a person of his property without taking possession of it or acquiring it within the meaning of

(1) [1950] S.C.R. 869.

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article 31(2). This police power of the State is also one of the powers inherent in the sovereignty of the State. The suggestion that the first two clauses of article 31 should be read as dealing only with eminent domain will, if accepted, lead us to hold that our Constitution has not dealt with the State's police power to deprive a person of his property and has not provided for us any protection against the State by imposing any limitation on the exercise of that power. The suggested construction will render the enunciation of our fundamental "Right to property" patently incomplete. It has been urged that the State's police power is recognised and regulated by article 19 clauses (2) to (6) and article 31 (5) (b). I shall deal with that argument in detail hereafter and show that it is quite untenable. Apart from that argument, the result of reading article 31, clauses (1) and (2) together will be to hold that our Constitution has not provided for us any protection against the exercise of the State's police power either by the Legislature or by the executive. Such a conclusion I am not prepared to accept. Accordingly I thus explained what I conceived to be the true scope and effect of clauses (1) and (2) of article 31 in *Chiranjitlal's* case (supra) at page 925, namely, that clause (1) deals with deprivation of property in exercise of police power and enunciates the restriction which our Constitution-makers thought necessary or sufficient to be placed on the exercise of that power, namely, that such power can be exercised only by authority of law and not by a mere executive fiat and that clause (2) deals with the exercise of the power of eminent domain and places limitations on the exercise of that power. It is these limitations which constitute our fundamental right against the State's power of eminent domain. The language used in article 31(2) clearly indicates beyond doubt that the power of eminent domain as adopted in our Constitution is concerned with only that kind of deprivation of property which is brought about by the taking of possession or acquisition contemplated by that clause. I again adverted to this matter in *The State of Bihar* v. *Maharajadhiraja*

Kameshwar Singh of Darbhanga(1). It is said that such a construction of article 31(1) instead of enunciating any fundamental right of the people at all will, on the contrary, declare the fundamental right of the Legislature to deprive a person of his property by merely enacting a law. This appears to me to be a very superficial criticism which completely overlooks that article 31(1), as far as it goes, does lay down a fundamental right by imposing a limitation at least on the executive power. It is this limitation placed on the executive power that constitutes our fundamental right to property under article 31(1). I see no compelling or cogent reason for changing the views I expressed on this point in my judgments in those two cases.

It is necessary, at this stage, to examine the several other objections that have been taken to the correctness of the interpretation suggested by me. It is said that the State's police power in relation to the citizens' right to freedom is fully recognised in article 19. Clause (1) of that article secures to the citizens of India seven specified rights but clauses (2) to (6) permit the State to make laws imposing reasonable limitations on the exercise of these seven rights as therein mentioned. The argument is that clauses (2) to (6) recognise the police power of the State in that they permit it to make laws imposing restrictions on the seven rights of the citizens and that they at the same time regulate that power by placing limitations upon it by requiring that the restrictions which may be imposed must be reasonable. It is then pointed out that the State's police power is further saved by article 31(5) (b) and it is concluded that the police power having been recognised and provided for in article 19 and article 31(5) (b) there is no necessity to read article 31(1) as concerned with the State's police power at all. I see no force or validity in the aforesaid objection.

I first deal with the objection in so far as it is founded on the recognition of the State's police power in

(1) [1952] S.C.R. 889 at pp. 988-989.

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article 19. I say that there is no force in this objection for the following reasons :

(a) article 19(1) enumerates seven rights to freedom and guarantees them to the citizens of India. Clauses (2) to (6) of that article recognise and regulate the exercise of police power over those rights by the State through its legislative organ, for the State is, by those clauses, permitted to impose reasonable restrictions by law only. Therefore, it follows that article 19 does not give any protection to the citizens against the executive government in respect of even those seven rights. The citizens, however, have protection against the executive as well as the Legislature under article 21 but that protection covers life and personal liberties only. Where, then, is the citizen's protection against the exercise of police power by the executive over his property ? It is nowhere except in article 31(1) as construed by me.

(b) Article 19 guarantees the seven rights of the citizens only and recognises and regulates the exercise of police power over those rights by the legislative organ of the State. A non-citizen is entirely outside that article and consequently he has none of those seven rights and has no protection against the State under that article. He has, therefore, to fall back upon article 21 and contended that all his personal liberties including the six rights enunciated in article 19(1) (a) to (e) and (g) are protected against the exercise of police power by the State through its executive or legislative limb. But article 21, as already observed, only protects him from deprivation of life and personal liberties. Where, then, is the non-citizen's protection against deprivation of his property by the exercise of police power by the executive government. It is nowhere unless article 31(1) is read in the way I have suggested.

(c) Finally, clauses (2) to (6) of article 19 authorise the State to make laws imposing reasonable "restrictions" on the citizen's rights under clause (1). It is true that in *A. K. Gopalan's* case (supra) Fazl Ali J. in his dissenting judgment took the view that

"restrictions" might cover the case of total deprivation, but none of the other members of that Bench accepted that position. Kania C. J. said at page 106 :

"Therefore, article 19 (5) cannot apply to a substantive law depriving a citizen of personal liberty. I am unable to accept the contention that the word 'deprivation' includes within its scope "restriction" when interpreting article 21".

My Lord the present Chief Justice expressed his views at p. 191 in the words following :

"The use of the word 'restrictions' in the various sub-clauses seems to imply, in the context, that the rights guaranteed by the article are still capable of being exercised, and to exclude the idea of incarceration though the words 'restriction' and 'deprivation' are sometimes used as interchangeable terms, as restriction may reach a point where it may well amount to deprivation. Read as a whole and viewed in its setting among the group of provisions (articles 19-22) relating to 'Right to Freedom', article 19 seems to my mind to presuppose that the citizen to whom the possession of these fundamental rights is secured retails the substratum of personal freedom on which alone the enjoyment of these rights necessarily rests".

The contrary view expressed by a Bench of the Allahabad High Court was rejected by my Lord at the end of page 193 with the following remark :

".....their major premise that deprivation of personal liberty was a 'restriction' within the meaning of article 19 is, in my judgment, erroneous".

Mahajan J. expressed the same view in the following passage at page 227 in his judgment in that case :

"Preventive detention in substance is a negation of the freedom of locomotion guaranteed under article 19(1) (d) but it cannot be said that it merely restricts it".

Mukherjea J. said at page 256 :

.....and the purpose of article 19 is to indicate the limits within which the State could, by legislation,

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impose restrictions on the exercise of these rights by the individuals. The reasonableness or otherwise of such legislation can indeed be determined by the court to the extent laid down in the several clauses of article 19, though no such review is permissible with regard to laws relating to deprivation of life and personal liberty".

His Lordship concluded thus at page 264 :

"The result is that, in my opinion, the first contention raised by Mr. Nambiar cannot succeed and it must be held that we are not entitled to examine the reasonableness or otherwise of the Preventive Detention Act and see whether it is within the permissible bounds specified in clause (5) of article 19".

After discussing the matter at some length at pages 302-305 I concluded on page 306 :

"In my judgment article 19 has no bearing on the question of the validity or otherwise of preventive detention and, that being so, clause (5) which prescribes a test of reasonableness to be defined and applied by the court has no application at all".

A suggestion was made that although in *A. K. Gopalan's* case (supra) the word "restriction" occurring in clauses (2) to (6) could not, in its application to sub-clauses (a) to (e) and (g) be taken as extending to "deprivation ", there is no compelling reason to hold that the word "restriction" occurring in clause (5) may not in its application to sub-clause (f), cover "deprivation". There is no substance in this contention. Clause (5) covers sub-clauses (d), (e) and (f) and surely one and the same word "restriction" used in one and the same clause (5) cannot have one meaning in its application to sub-clauses (d) and (e) and a different meaning and connotation in its application to sub-clause (f). Further, the reasons why, in *A. K. Gopalan's* case (supra), that word was given a narrower meaning in its application to sub-clauses (a) to (e) and (g) apply *mutatis mutandis* in its application to sub-clause (f) read in correlation to article 31. It is, therefore, clear from the decision of this court in *A. K. Gopalan's* case (supra) that article 19 does not give any protection

against deprivation of property as distinct from mere restriction imposed on the right to property. For protection against deprivation of life and personal liberties including the several rights to freedom enunciated in sub-clauses (a) to (e) and (g) of article 19 by the exercise of police power by the legislative or the executive organ of the State the citizen as well as the non-citizen will have to look to article 21. For protection against the deprivation of property by legislative or executive State action both the citizen and the non-citizen will have to rely on article 31. If, as I shall show presently, clause (5) (b) were inserted in article 31 *ex abundanti cautela* and not as a substantive provision defining the ambit or scope of the police power or formulating any limitation on that power, then the protection against deprivation of property will have to be derived from only clauses (1) and (2). If, in such circumstances, both those clauses are read in the way suggested by learned counsel for the respondent, Subodh Gopal Bose, namely, as dealing only with the topic of the State's power of eminent domain then there will remain no escape from the conclusion that in the Republic of India neither a citizen nor a non-citizen has any constitutional protection against the exercise of police power either by the legislative or executive organ of the State. On the other hand, if the construction suggested by me be adopted, everybody, citizen or non-citizen, will have, under article 31 (2), full protection against the exercise of the power of eminent domain by both the executive as well as Legislature and in addition to that will also have protection against the exercise of police power over property by the executive. The preservation of this protection alone, even if some may regard it as very meagre, is, to my mind, a sufficiently cogent reason for adopting the construction suggested by me in preference to the other construction which, if adopted, will not save even this meagre protection.

The next objection to the conclusion arrived at by me is that police power of depriving a person of his property is amply provided for in article 31 (5) (b) and it is not necessary to read it into article 31 (1).

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A perusal of clause (5) of article 31 which I have already quoted will at once show that that clause excepts certain laws from the operation of clause (2) only. It will also appear that the exception covers, under sub-clause (b), only certain kinds of future laws. Item (i) under sub-clause (b) comprises future laws imposing or levying any tax or penalty. Item (ii) under that sub-clause saves future laws for the promotion of public health or the prevention of danger to life or property. It is said that this clause (5) (b) (ii) saves laws to be made in exercise of the State's police power. The argument is that the State's police power of imposing "restriction" on the citizens' right to acquire, hold and dispose of property is recognised and controlled by clause (5) of article 19 and that when it becomes necessary for the police power to extend beyond "restrictions" and to inflict "deprivation" of property it can do so by the kind of law which is, by clause (5) (b) (ii) of article 31, saved from the operation of clause (2). It is pointed out that in the matter of imposition of "restrictions" on the exercise of the right to acquire, hold and dispose of property the only limitation on the police power is that the "restrictions" to be imposed by law must be reasonable as indicated in article 19 (5) but that in the matter of "deprivation" of property by authority of law under article 31 the limitation on the police power is more stringent, namely, that such law may be made only for the promotion of public health or the prevention of danger to life or property as mentioned in clause (5) (b) (ii) and for no other purpose. The argument thus formulated is attractive for its simplicity and has the appearance of plausibility but cannot stand the test of close scrutiny. I say so for the following reasons :—

(i) Every student of Constitutional law is well aware that constitutional lawyers classify the State's sovereign power into three categories, namely, the power of taxation, the power of eminent domain and the police power. These are distinct categories of sovereign powers with different connotations subserving different needs of the society and the State. If both

clauses (1) and (2) of article 31 deal with and impose restrictions only on the State's power of eminent domain, then there was no real necessity for exempting by article 31 (5) (b) the taxation power or the police power from the operation of the power of eminent domain, for, *ex hypothesi,* the two first mentioned powers, being distinct from the power of eminent domain, did not and could not fall within the last mentioned power and, therefore, needed no exemption. Even a casual student of Constitutional law knows that money is one of the kinds of property which, it is said, cannot be taken in exercise of the State's power of eminent domain and that being so there could be no necessity for exempting laws imposing taxes from the operation of article 31 (2) which embodies only the doctrine of eminent domain. Further, the police power, like the power of taxation and the power of eminent domain, is an attribute of sovereignty itself. It is, as Professor Willis calls it, "the offspring of political necessity". This coercive legal capacity is inherent in every sovereign and requires no specific reservation. Indeed, in the Constitution of the United States there is no specific reservation of the police power of the State. There was, therefore, no necessity for expressly saving the police power of our State by a constitutional provision. Why, then, was clause (5) (b) (ii) inserted in article 31 at all ? The answer will become obvious if it is remembered that it is extremely difficult to define precisely the ambit and scope of the State's police power over or in relation to private property and some of the instances and forms of the exercise of such police power over or in relation to property may superficially resemble the exercise of the power of eminent domain. The conclusion, therefore, becomes irresistible that although clause (5) (b) (ii) was not strictly speaking necessary for saving the police power, nevertheless, our Constitution-makers, out of abundant caution and with a view to avoid any possible argument, thought fit to insert sub-clause (5) (b) (ii) in article 31. It is impossible to hold that the entire police power of the State to deprive a person of his property is contained in that sub-clause.

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(ii) According to the argument article 31 (5) (b) saves the power of the State to make certain laws in exercise of its power of taxation or its police power. It will be noticed that it does not give us any protection against the Legislature by laying down any test for the validity of those laws. The acceptance of the suggested construction will mean that laws thus saved may be as archaic, offensive and unreasonable as the legislature may choose to make them so long as they relate to the subjects referred to in that sub-clause. If our sense of the sanctity of private property is not shocked at the prospect of leaving our property at the unfettered mercy of the Legislature in respect of laws of the kind specified in clause (5) (b) (ii), I do not see why the construction suggested by me should be rejected only on the ground that it will give a *carte blanche* to the Legislature to make any law it pleases for the deprivation of property in exercise of police power.

(iii) Article 31 (5) (b) gives us no protection against the executive with respect to the exercise of these powers. Take article 31 (5) (b) (i) first. That it was not intended to be a protection against the executive in the exercise of the power of taxation cannot for a moment be doubted, for if it were so intended, there was no necessity, then, for inserting into the Constitution article 265 providing that no taxes shall be levied or collected except by authority of law, which clearly means that the executive cannot, on its own authority, levy or collect any tax. It is, therefore, quite plain that article 31 (5) (b) (i) was not designed to give any protection against the executive in the matter of the exercise of the power of taxation and that our Constitution-makers, precisely for that reason, considered that it was necessary that such protection should be given expressly and, therefore, inserted article 265. Likewise, article 31 (5) (b) (ii) saves certain laws and does not in terms give us any protection against the exercise of police power by the executive. Where, then, is our protection against deprivation of property by the exercise of police power by the executive Government? It is nowhere to be

found in our Constitution except in article 31(1). This, to my mind, clearly indicates that article 31(1) was designed to formulate a fundamental right against deprivation of property by the exercise of police power by the executive arm of the State. The protection against the exercise of the power of eminent domain by the executive government is to be found in the requirement of a law which alone may authorise the taking of possession or the acquisition of the property which, as will be explained later, is implicit in article 31(2) itself and it is, therefore, not necessary to have recourse to article 31(1) to secure that protection.

(iv) To say that the entire police power of the State to deprive a person of his property is to be found only in article 31(5)(b)(ii) will be to confine the exercise of that power by the Legislature within a very narrow and inelastic limit, namely, only for the promotion of public health or the prevention of danger to life or property. On the assumption that article 31 (5)(b)(ii) is concerned with saving the police power it may cover the laws authorising the destruction of rotten or adulterated foodstuff or the pulling down of a dangerous dilapidated building or the demolition of a building to prevent fire from spreading. But it is quite easy to contemplate laws which do not fall within article 31 (5) (b) (ii) but are, nevertheless, made unmistakably in exercise of the State's police power. Consider the case of a law authorising the seizure and destruction of, say, obscene pictures or blasphemous literature. Such law is clearly necessary for the promotion or protection of public morality. Nobody can for a moment think of contending that such law will be void if it does not provide for compensation and yet that will be the result if we are to accept the suggested construction, for such a law made for protecting public morality is obviously not covered by article 31 (5)(b)(ii) and will, according to such construction, be hit by article 31(2). A construction which leads to the astounding result of compelling the State to buy up obscene pictures and blasphemous literature if it desires to preserve public morality cannot merit serious consideration and must be discarded at once. Take

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the case of a law providing for the compulsory contribution by all banks based upon the average daily deposits for the purpose of creating a guarantee fund to secure the full repayment of deposits to all depositors in case any such bank becomes insolvent and is ordered to be wound up. This law quite clearly deprives the banks of property in the shape of their respective contributions and it is not covered by clause (5) (b) (i) as it cannot be said to impose a tax or a penalty and does not fall within (5) (b) (ii) either, for it is not a law for the promotion of public health or for the prevention of danger to life or property. This law being thus outside clause (5) (b) cannot, according to the suggested construction be supported as an instance of exercise of police power for, *ex hypothesi*, the entire police power with regard to deprivation of property is contained in clause (5) (b) and consequently the law I have mentioned will not be protected from the operation of article 31(2) and must be void for not providing any compensation. Yet in the United States where so much is made of the sanctity of private property and from where we are prone to draw inspiration in these matters such a law has been upheld as constitutional, as an instance of a valid exercise of the State's police power "which extends to all the great public needs." [See *Noble State Bank* v. *Haskell*(1)]. Again, suppose there is a labour dispute between, say, a tramway company and its workers and the running of the tram cars is stopped. A law which in such circumstances authorises the State to take possession of the tram depot and run the tram cars by the military or other personnel during such emergency for the convenience of the travelling public is not within clause (5)(b)(ii) and on this construction will be void if it does not provide for compensation to the tramway company. On the suggested construction pushed to its logical conclusion it will not be possible in future to impose any social control on the profiteers or black-marketeers, for a law controlling and fixing prices of essential supplies will always deprive them of property of the value to be measured by the difference between

(1) 219 U.S. 104.

the blackmarket price and the controlled price. The suggested construction may even make it difficult to support any future law containing provisions similar to those in the procedure codes or other laws not strictly falling within the clause (5)(b)(ii) but authorising the seizure of books, documents or other property or the appointment of a receiver or sequestrator to take possession of property, for in all such cases there will be a "deprivation" of property. It is unnecessary to multiply instances. The several instances I have just given above appear to me to furnish ample justification for rejecting a construction which may make it impossible for the State to undertake beneficial legislation to promote social interest and may invalidate laws of the kind I have mentioned.

(v) Article 31(5)(b)(ii) saves from the operation of clause (2) laws to be made in future for the promotion of public health or the prevention of danger to life or property. Obviously it was contemplated that the laws thus saved would involve the taking of possession or acquisition of private property, for otherwise there would be no necessity for the exemption at all. Take the case of a law authorising the opening out of a congested part of a town and the acquisition of land for the laying out of a public park for affording fresh air and other health amenities to the public. Consider the case of a law authorising the clearing up of slums and the closing down of putrid and unhealthy surface drains and acquisition of land for broadening the lanes so as to lay underground sewers thereunder. One may also refer to a law authorising the acquisition of land for the erection of a hospital for patients suffering from infectious diseases, *e.g.*, plague, small-pox and cholera. All these laws will come under the heading of promotion of public health or the prevention of danger to life. According to the suggested construction the acquisition of property authorised by each of these laws will be exempt from payment of compensation to the owner, for these laws are, by clause (5)(b)(ii) exempted from article 31(2). And yet acquisition of land for such public purposes is precisely the kind of acquisition which is always made on payment of

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compensation under the Land Acquisition Act 1894. A construction which takes a law made really and essentially in exercise of the power of eminent domain out of article 31(2) cannot readily be accepted as cogent or correct.

(vi) The complexities of modern States constantly give rise to conflicts between opposing social interest and it is easy to visualise circumstances when much wider social control legislation than is envisaged or recognised in the laws referred to in article 31(5)(b) will be imperatively necessary. Indeed, as Professor Willoughby states in his Constitutional Law of the United States, Vol. III, p. 1774, "the police power knows no definite limit. It extends to every possible phase of what the Courts deem to be the public welfare". In the language used by Holmes J. in *Noble State Bank* v. *Haskell* (supra), "it may be said in a general way that the police power extends to all the great public needs". In *Eubank* v. *Richmond*(1) the Court said of the police power :

"It extends not only to regulation which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity.....It is the most essential of powers, at times most insistent, and always one of the least limitable of the powers of government."

And all the more will such wide police powers be required in a State which, like our own, aims at being a welfare State governed by the directive principles of State policy such as are to be found in Chapter IV of our Constitution. To so confine the State's police power as suggested by learned advocate for the respondent will be to bring about social stagnation and thereby to retard the progress of our State. There is nothing in the language of our Constitution which compels us to adopt such a construction. In my judgment a construction which is calculated to produce the undesirable result I have mentioned must, I feel sure, be rejected.

(1) 226 U.S. 137.

The last objection to reading article 31(1) as the enunciation of the fundamental right against deprivation of property by the exercise of police power and reading article 31(2) as laying down limitations on the State's power of eminent domain is that so read article 31 will, in reality, afford no effective protection at all, for the State will always exercise its police power under article 31 (1) and deprive a person of his property without any compensation by the simple device of making a law and will never exercise its power of eminent domain under article 31(2). Where, then, it is asked, is our protection against the State with respect to our property ? The objection thus formulated overlooks the difference between the nature and purpose of the two powers which I shall presently discuss and explain and is not otherwise well founded for the following reasons :

(1) It is incorrect to say that article 31 (1) as construed by me gives no protection at all. It certainly gives protection against deprivation of property by executive fiat just as did that part of the famous 29th Clause of the Magna Charta which proclaimed that no free person should be dispossessed of any free tenement of his except by the law of the land. As pointed out by Mathews J. in *Joseph Hurtado* v. *People of California*(1), by the 29th Clause of the Magna Charta the English Barons were not providing for security against their own body or in favour of the commons by limiting the power of Parliament but were protecting themselves against oppression and usurpation of the King's prerogatives. In other words, that clause of the Magna Charta was not designed as a protection against Parliament at all and indeed did not purport to formulate any limitation on the State's power of eminent domain but was only intended to be a protection against the exercise of police power by the highest executive, the King. There is unmistakably a familiar ring in the langauge of our article 31(1) echoing the sound of the language of the 29th Clause of that great charter which the English Barons had wrested from their King. The purpose and function

(1) (1883) 10 U.S. 516 at p. 531.

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of our article 31(1), as I apprehend it, are the same as those of the Magna Charta. Our Constitution has given us ample protection against the executive in relation to all the three sovereign powers of the State. Thus the executive cannot, on its own authority, and without the sanction of a law deprive any person of his life or personal liberty by reason of article 21 or of his property because of article 31(1) or take possession of or acquire private property under article 31 (2) or impose any tax under article 265. Our Constitution makers evidently considered the protection against deprivation of property in exercise of police power or of the power of eminent domain by the executive to be of greater importance than the protection against deprivation of property brought about by the exercise of the power of taxation by the executive, for they found a place for the first mentioned protection in article 31(1) and (2) set out in Part III dealing with fundamental rights while they placed the last mentioned protection in article 265 to be found in Part XII dealing with finance etc. So with regard to all the three sovereign powers we have complete protection against the executive organ of the State.

(2) It is said we have no protection against legislative tyranny in respect of our property. This complaint obviously is not well founded, for our Constitution has given us some measure of protection against the legislature in respect of our property. Thus if the State exercises its power of eminent domain by taking possession of or acquiring private property of any person it must do so upon the three conditions prescribed by article 31 (2). There is no shorter cut in such a case. Apart from this the citizens of India have further protection against the legislature in respect of their right to acquire, hold and dispose of property. This right is guaranteed to them by article 19(1) (f). The Constitution, however, recognises by clause (5) that the State has police power to restrict the right in the interest of the general public or for the protection of the interests of any Scheduled tribe but prescribes a limitation on this police power by requiring that the restrictions to be imposed by

law must be reasonable. This requirement constitutes the citizens' fundamental right against the exercise of police power by the legislature in respect of his right under article 19 (1) (f) whilst they are in possession and enjoyment of this right.

(3) It is then urged that our Constitution, accordnig to my construction of it, does not give us any protection against the legislature in the matter of deprivation of property in exercise of the State's police power. This is no ground for rejecting my construction, for, on the construction suggested to the contrary, the position is exactly the same, for article 31 (5) (b) only saves certain laws from article 31(2), that is to say, recognises the police power but does not formulate any test for determining the validity of those laws which may be as unreasonable as the legislature may make them. Apart from this, what, I ask, is our protection against the legislature in the matter of deprivation of property by the exercise of the power of taxation ? None whatever. By exercising its power of taxation by law the State may deprive us, citizen or non-citizen of almost sixteen annas in the rupee of our income. What, I next ask, is the protection which our Constitution gives to any person against the legislature in the matter of deprivation even of life or personal liberty ? None, except the requirement of article 21, namely, a procedure to be established by the legislature itself and a skeleton procedure prescribed in article 22. In *A. K. Gopalan's* case (supra), notwithstanding the reference made to the epigrammatic observation of Bronson J. in *Taylor* v. *Porte*(1) to the effect that it sounded very much like the Constitution speaking to the legislature that the latter could not infringe our right unless it chose to do so, the majority of this Court declined to question the wisdom and policy of the Constitution or to stretch the language of article 21 so as to square it with its own notions of what the ambit of the right should be but felt bound to give effect to the plain words of the Constitution. (See Kania C. J. at page 11, Mukherjea J. at page 277 and my judgment at page 321). If,

(1) 4 Hill 140.

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therefore, in the matter of deprivation of property by the exercise of the State's power of taxation our Constitution has only given us protection by article 265 against the executive but none whatever against the legislature and if, in the matter of deprivation of our life and personal liberty our Constitution has given us no better protection against the legislature than the requirement of a procedure to be established by the legislature itself and the skeleton procedure prescribed by article 22, and seeking that our Constitution has, by article 31(2), given us protection against the legislature at least with respect to the exercise of the power of eminent domain, what is there to complain of if, in the matter of deprivation of property by the exercise of the State's police power, our Constitution has, by article 31 (1), given us protection only against the executive but none against the legislature? What is abnormal if our Constitution has trusted the legislature, as the people of Great Britain have trusted their Parliament? Right to life and personal liberty and the right to private property still exist in Great Britain in spite of the supremacy of Parliament. Why should we assume or apprehend that our Parliament or State legislatures should act like mad men and deprive us of our property without any rhyme or reason? After all our executive government is responsible to the legislature and the legislature is answerable to the people. Even if the legislature indulges in occasional vagaries, we have to put up with it for the time being. That is the price we must pay for democracy. But the apprehension of such vagaries can be no justification for stretching the language of the Constitution to bring it into line with our notion of what an ideal Constitution should be. To do so is not to interpret the Constitution but to make a new Constitution by unmaking the one which the people of India have given to themselves. That, I apprehend, is not the function of the court. If the Constitution, properly construed according to the cardinal rules of interpretation, appears to some to disclose any defect or lacuna the appeal must be to the authority competent to amend the Constitution and not to the court.

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(4) Further, there may be quite cogent and compelling reason why our Constitution does not provide for any protection against the legislature in the matter of deprivation of property otherwise than by taking of possession or acquisition of it. It is futile to cling to our notions of absolute sanctity of individual liberty or private property and to wishfully think that our Constitution-makers have enshrined in our Constitution the notions of individual liberty and private property that prevailed in the 16th century when Hugo Grotius flourished or in the 18th century when Blackstone wrote his Commentaries and when the Federal Constitution of the United States of America was framed. We must reconcile ourselves to the plain truth that emphasis has now unmistakably shifted from the individual to the community. We cannot overlook that the avowed purpose of our Constitution is to set up a welfare State by subordinating the social interest in individual liberty or property to the larger social interest in the rights of the community. As already observed, the police power of the State is "the most essential of powers, at times most insistent, and always one of the least limitable powers of the government". Social interests are ever expanding and are too numerous to enumerate or even to anticipate and, therefore, it is not possible to circumscribe the limits of social control to be exercised by the State or adopt a construction which will confine it within the narrow limits of article 31 (5) (b) (ii). It must be left to the State to decide when and how and to what extent it should exercise this social control. Our Constitution has not thought fit to leave the responsibility of depriving a person of his property, whether it be in exercise of the power of eminent domain or of the police power, to the will or caprice of the executive but has left it to that of the legislature. In the matter of deprivation of property otherwise than by the taking of possession or by the acquisition of it within the meaning of article 31 (2) our Constitution has trusted our legislature and has not thought fit to impose any limitation on the legislature's exercise of the State's police power over

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private property. Our protection against legislative tyranny, if any, lies, in ultimate analysis, in a free and intelligent public opinion which must eventually assert itself.

Having dealt with the correlation between clauses (1) and (2) of article 31 as I apprehend it and having considered and rejected the objections to the conclusions I have arrived at, I proceed now to examine and analyse the provisions of clause (2). As I explained in my judgment in the *Darbhanga case* (*supra*) at pp. 989-990, article 31 (2) has imposed three conditions on the exercise of the State's power of eminent domain over private property and those limitations constitute the protection granted to the owner of the property as his fundamental right. It insists that this sovereign power may be exercised only if it is authorised by a law. It is, therefore, clear that the executive limb of the State cannot exercise this power on its own authority and without the sanction of law. The taking of possession or acquisition must be for a public purpose which implies that this power cannot be exercised except for implementing a public purpose. It cannot be exercised for a private purpose. What is a public purpose has been elaborately dealt with in that case and need not be discussed over again here. Finally, the law authorising the taking of possession or acquisition of the property must provide for compensation. Compensation, therefore, is payable only when the State takes possession of or acquires private property. What, then, is the meaning of the words "taken possession of or acquired" and their grammatical variations as used in article 31 (2) ?

It is pointed out that the last clause of the Fifth Amendment which deals with eminent domain uses the word "taken" and it is suggested that as our article 31 (2) deals with the same topic of eminent domain it will be reasonable to hold that our article 31 (2) reproduces the American constitutional limitations and that, therefore, the expression "taken possession of or acquired" used in our article 31 (2)

must be read as having the same meaning which has been attributed by the Judges of the Supreme Court of the United States to the word "taken" occurring in their Fifth Amendment. I am quite unable to accept this construction and the line of reasoning on which it is founded. In the first place, I deprecate the line of reasoning which starts by likening one thing with another and then ends by imputing the qualities of the other thing to the first mentioned thing. The cardinal rule of interpretation is to ascertain the meaning and effect of an enactment, constitutional or otherwise, from the words used therein. If the words used have acquired a technical or special meaning, that meaning must be given to them. To say that the expression "taken possession" of or acquired" must be read as "taken" and given the same wide meaning as the American courts have given to the word "taken" is to ignore the entire historical background of the law relating to compulsory acquisition of private property by the State. Under the English law, on which more or less our modern laws are founded, the term "acquisition" has a special meaning. It connotes the idea of transfer of title, voluntary or involuntary. When the acquisition by the State is effected by agreement after negotiation there is a regular conveyance transferring the title from the vendor to the State. Even when the acquisition by the State is effected by the coercive process of exercising its sovereign power the idea of purchase is nevertheless present, for there is a vesting of the property in the State by operation of law. Acquisition of private property by the State under the English law, therefore, connotes the concept of a purchase, voluntary or involuntary, and involves a transfer of the entire title from the owner to the State or a third party for whom the State acquires the property. In India, the compulsory acquisition of private property was first introduced by Bengal Regulation I of 1824. Since then we have had no less than seven Acts dealing with the compulsory acquisition of private property by the State, namely, Act I of 1850, Act XLII of 1850, Act XX of 1852, Act I of

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1854, Act XXII of 1863, Act X of 1870 and lastly the present Land Acquisition Act, Act I of 1894. Each of these Acts provides for the vesting of the acquired property in the State. This means that the owner is divested and his title passes, by operation of law, to the State. The word "acquisition", therefore, has become, as it were, a word of art having a long accepted legislative meaning implying the transfer of title. It will be quite wrong, according to the correct principles of interpretation, not to give the word "acquisition" and its grammatical variations this technical and special meaning I, therefore, respectfully agree with what Mukherjea J. said in *Chiranjit Lal's* case (*supra*) at page 902, namely :

"It cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former. In taking possession, on the other hand, the title to the property admittedly remains in the original holder, though he is excluded from possession or enjoyment of the property. Article 31 (2) of the Constitution itself makes a clear distinction between acquisition of property and taking possession of it for a public purpose, though it places both of them on the same footing in the sense that a legislation authorising either of these acts must make provision for payment of compensation to the displaced or expropriated holder of the property. In the context in which the word "acquisition" appears in article 31 (2), it can only mean and refer to acquisition of the entire interest of the previous holder by transfer of title and....."

It follows from what has been stated above that the word "acquired" used in article 31 (2) must be given the special meaning which that word has acquired and cannot be read as synonymous with "taken" as used in the Fifth Amendment to the Constitution of the United States.

It is then suggested that any rate the expression "taken possession of" should be read in the sense in which the word "taken" is understood in the American law. But even in America the word "taken" has not always been interpreted in the same way. The old view was that in order to be a "taken" there must be either an actual taking of physical property or a physical occupancy of some physical property. This view was, however, regarded as too narrow and mechanical. It was said that the ownership of a thing, tangible or intangible, was made up of the rights, powers, privileges and immunities concerning that thing and that the property was not the thing itself but consisted of these rights, powers, privileges and immunities. It was, therefore, concluded that there must be a "taking" whenever there was any injury to property otherwise than by the police power or taxation which, if done by a private individual, would be actionable as a tort; in other words that it must be held that there would be a "taking" whenever any of the rights, powers, privileges or immunities making up the ownership was taken from the owner. Indeed, this wide interpretation of the word "taken" was facilitated by the fact that, in order to avoid the old, narrow view of the meaning of that word, many of the States so amended their Constitutions as to require compensation for property "damaged, injured or destroyed" for a public use. (See Professor Willis' Constitutional Law, pp. 820-821). Our Constitution-makers were well aware of the very wide meaning eventually given to the word "taken" by the American courts. They did not, however, use the word "taken" in article 31 (2) which they would surely have done if they intended to reproduce the wide American concept of "taking". Our Constitution-makers, on the contrary, deliberately chose to adopt the narrower view point and accordingly used the words "taken possession of" in order to make it quite clear that they required compensation to be paid only when there was an actual taking of the property out of the possession of the owner or possessor into the possession of the State or its nominee. Of course the manner of

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taking possession must depend on the nature of the property itself. I repeat with humility that it is not permissible to ignore the historical background and the actual words used in our Constitution.

It is finally said that both clauses (1) and (2) of article 31 deal with the topic of eminent domain and, therefore, the expression "taken possession of or acquired" occurring in clause (2) has the same meaning which the word "deprived" used in clause (1) has. In other words, both the clauses are concerned with deprivation of property and there is no reason to think that the expression "taken possession of or acquired" was used in clause (2) to indicate any particular kind or shade of deprivation. The obvious retort that at once comes to one's mind is that if it were intended by our Constitution-makers to convey the same general idea of deprivation of property by whatever means or mode it was brought about why did they use the word "deprived" in clause (1) and why did they use in clause (2) a different expression which, as commonly used and understood, connotes a much narrower meaning? It would have been quite easy to frame clause (2) by using the word "deprived" instead of the expression "taken possession of or acquired". As our Constitution-makers used different expressions in the two clauses it must be held that they had done so for a very definite purpose and that purpose could be nothing else but to provide for compensation for only a particular kind of deprivation specifically mentioned and not for any and every kind of deprivation. In this connection reference may be made to Entry 33 in List I, Entry 36 in List II and Entry 42 in List III of the Seventh Schedule. The words used in those entries are "acquisition or requisitioning" or their grammatical variations. The legislative power being confined only to "acquisition or requisitioning" it will not be unreasonable to hold that "taking of possession" referred to in article 31 (2) is in the nature of "requisitioning". In section 299 (2) of the Government of India Act the words "taking of possession" did not occur nor did they occur in any of the legislative lists in the Seventh Schedule to that Act, but they have

been introduced in article 31 (2) and in the three entries mentioned above the word "requisitioning" has been added after the word "acquisition". If "taken possession of or acquired" occurring in article 31 (2) be given a meaning wider than what is meant by "acquired or requisitioned" or their variations used in the entries then it will amount to saying that article 31 (2) even contemplates a law with the respect to matters which are beyond the legislative powers conferred on Parliament and the State Legislatures, for they can only make a law with respect to "acquisition or requisitioning". To counter this reasoning it is pointed out that Parliament under the Union List has the residuary power of legislation and, therefore, there is no difficulty in giving a wider meaning to the expression "taken possession of or acquired". It will then amount to giving one and the same expression different meanings. Thus in its application to a law made by the State Legislature "taken possession of or acquired" must perforce mean "requisitioned" or "acquired" whereas in its application to a law made by Parliament it will have a much wider meaning. This is opposed to the cardinal rules of interpretation. Therefore, "taken possession of or acquired" should be read as indicative of the concept of "requisition or acquisition".

A further question, however, arises at this stage and it may be now considered. Does every taking of a thing into the custody of the State or its nominee necessarily mean the taking of possession of that thing within the meaning of article 31 (2) so as to call for compensation? The exercise of police power in relation to property may conceivably result in the extinction or destruction of the property or in the State taking the property in its control. Take the case of the law authorising the municipal bailiff to seize rotten vegetables or adulterated foodstuffs and destroy them or to enter upon the property of a private owner to pull down the dilapidated structure. Consider the law authorising the men of the fire brigade to go upon the property of a private owner and demolish it to prevent the fire from spreading to the houses beyond or on the

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other side of that house. Take the case of the law authorising the seizure and destruction of property for the protection of public morality. Although in none of the above cases there is any acquisition of property involving a transfer of title, there is in each of the above cases a "taking of possession" and destruction of property by the State by authority of law and yet nobody will say that any of the above laws authorise the "taking of possession" of the property within the meaning of article 31 (2) so that if such law does not provide for compensation the law will be unconstitutional and void. Take the case of the Court of Wards Act. It is a law which authorises the State to take possession of the estate of a disqualified proprietor and to manage it for him. The State only manages the estate on behalf and for the benefit of the disqualified proprietor. The disqualified proprietor does not appoint the State or any State official to manage his estate and he cannot dismiss or discharge the manager appointed by the State. The possession of the manager can hardly, in such a situation, be described as the possession of the disqualified proprietor. The disqualified proprietor is, therefore, in a sense, deprived of the possession of his estate and the State takes the estates in its possession. The same thing may be said of the Lunacy Act. There is no transfer of title to the State and, therefore, there is no acquisition of property by the State. This law, however, takes the property out of the possession of the owner who is adjudged a lunatic. But nobody will say that the Court of Wards Act or the Lunacy Act calls for compensation.

The learned Attorney-General has also drawn our attention to statutes, namely, Act XLVII of 1950 (The Insurance (Amendment) Act, 1950) passed on the 20th May, 1950, and which has added several sections to the Insurance Act, 1938, Act LI of 1951 (Railway Companies (Emergency Provisions) Act, 1951), passed on the 14th September, 1951, and Act LXV of 1951 (Industries (Development and Regulation) Act, 1951) enacted on the 30th October, 1951, in support of his contention. He points out that each of those laws is strictly speaking outside article 31 (5) (b) and that the

result of our holding that the taking of possession authorised by those Acts falls within article 31 (2) so as to call for compensation will be to prevent imposition of social control so urgently necessary for the protection of the larger interests of the society. His argument is that the taking of possession authorised by none of these three Acts falls within article 31 (2) and only illustrates the exercise of the State's police power. As all the three Acts were passed after the Constitution came into force and as they may be challenged in future an argument founded on them will really be begging the question in debate before us. I, therefore, prefer just to note the Attorney-General's contention and pass on and not to base my decision on consideration of any of those Acts.

Confining myself then to the illustrations given by me I think it is fairly clear from the foregoing discussion that none of the laws referred to above by me authorise any "acquisition" of property in the sense explained above and although each of them does authorise a sort of taking of possession of the property yet nobody can contend that the taking of possession so authorised by them falls within article 31 (2). In other words, the taking of possession authorised by those laws does not amount to the exercise of the power of eminent domain but is the result of the exercise of police power. It follows, therefore, that every taking of possession does not fall within article 31 (2). What, then, is the test for determining whether a taking of possession authorised by a particular law is a taking of possession in exercise of the power of eminent domain or is a taking of possession in exercise of the State's police power. I have already referred to the nature of the State's police power and quoted from some American decisions showing that the State's police power extends not only to regulations which promote public health, morals and safety but to those which promote the public convenience or the general prosperity. In its application to private property it, in some measure, resembles the exercise of the power of eminent domain. Thus the police power is exercised in the interest of the community and the power

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of eminent domain is exercised to implement a public purpose and in both cases there is a taking of possession of private property. There is, however, a marked distinction between the exercise of these two sovereign powers. According to Professor Willis at page 717 eminent domain takes property for use by the public or for the benefit of the public, while the police power prevents people from so using their own property as to injure others. The fundamental principle which is held to justify the exercise of police power is that no one shall use his property or exercise any of his legal rights as injuriously to interfere with or affect the property or other legal rights of others. (See Willoughby, Vol. III, p. 1775). The primary purpose of police power is protection or prevention—that persons may be restrained from so exercising their private rights of property, contract or conduct as to infringe the equal rights of others or to prejudice the interests of the community. (Willoughby, Vol. III, p. 1783). When the State finds that a certain public purpose needs fulfilment and then in order to implement that public purpose the State takes possession of private property on its own account after acquiring it or even without acquiring it and having taken possession of the property the State itself uses or utilises the property or makes it over to a third party to do so for implementing that public purpose which the State has taken upon itself to serve and for which the property was taken possession of or acquired the State is said to have exercised its power of eminent domain. This power can only be exercised under a and that law must provide for compensation. The point to note is that in such a case the public purpose is one which the State has set out to fulfil as its own obligation and the State takes possession on its own account to discharge its own obligation. In police power the State destroys or extinguishes or takes possession of property in order to prevent the owner from indulging in anti-social activities or otherwise inflicting injury upon the legitimate interests of other members of the community either by using his property in a manner he should not do or by omitting to use it in a manner

he should do. In such a case the State steps in and destroys or extinguishes only to prevent an injury to social interest or takes possession and assumes the superintendence of the property not on its own account for implementing its own public purpose but for protecting the interests of the community. It is easy to perceive, though somewhat difficult to express, the distinction between the two kinds of taking of possession which undoubtedly exists. In view of the wide sweep of the State's police power it is neither desirable nor possible to lay down a fixed general test for determining whether the taking of possession authorised by any particular law falls into one category or the other. Without, therefore, attempting any such general enunciation of any inflexible rule it is possible to say broadly that the aim, purpose and the effect of the two kinds of taking of possession are different and that in each case the provisions of the particular law in question will have to be carefully scrutinised in order to determine in which category falls the taking of possession authorised by such law. A consideration of the ultimate aim, the immediate purpose and the mode and manner of the taking of possession and the duration for which such possession is taken, the effect of it on the rights of the person dispossessed and other such like elements must all determine the judicial verdict. The task is difficult and onerous but the court will have to hold the scale even between the social control and individual rights and determine whether, in the light of the constitutional limitation, the operation of the law is confined to the legitimate sphere of the State's police power or whether it has overstepped its limits and entered into the field of eminent domain. It is only in this way that the Court serves and upholds the Constitution by reconciling the conflicting social interests.

In the light of the foregoing discussions and the conclusions reached by me I now proceed to examine the contention that the impugned section 7 of the amending Act (VII of 1950) is unconstitutional in that it infringes Subodh Gopal Bose's fundamental right to property guaranteed by article 31. The argument is

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that having purchased the entire Touzine at a revenue sale the respondent Subodh Gopal Bose had under the old section 37 of the Act of 1859, acquired the valuable right to annul the under-tenures and to eject the under-tenants and that he had actually obtained a decree for ejectment but that he had been deprived of those vested rights by the operation of section 7 of the amending Act which, in effect, gave retrospective operation to the new section 37. Assuming that the right to annul under-tenures and to eject under-tenants and the decree for ejectment come within the term "property", as used in article 31(2) as to which I have considerable doubts the question at once arises whether they have been taken possession of or acquired under the impugned Act. The Touzi still remains the property of the respondent Subodh Gopal Bose. He can realise rents and exercise all acts of ownership except that he cannot exercise the right to annul the under-tenures or eject any under-tenants or execute the decree he has obtained. But have these last mentioned rights been taken possession of or acquired by the State within the meaning of article 31(2)? There is no doubt that the State has not "acquired" these rights in the sense I have explained, for there has been no transfer, by agreement or by operation of law, of those rights from the respondent Subodh Gopal Bose to the State or anybody else. The impugned law has not vested those rights in the State or anybody else and does not authorise the State or anybody else to exercise these rights. Referring to the position of the shareholders under the Sholapur Spinning and Weaving Company (Emergency Provision) Act, 1950, Mukherjea J. said in his judgment in *Chiranjitlal's* case (supra) at pp. 905-906 :—

"The State has not usurped the shareholders' right to vote or vested it in any other authority. The State appoints directors of its own choice but that it does, not in exercise of the shareholders' right to vote but in exercise of the powers vested in it by the impugned Act. Thus there has been no dispossession of the shareholders from their right of voting at all. The same reasoning applies to the other rights of the

shareholders spoken of above, namely, their right of passing resolutions and of presenting winding up petitions. These rights have been restricted undoubtedly and may not be capable of being exercised to the fullest extent as long as the management by the State continues. Whether the restrictions are such as would bring the case within the mischief of article 19(1)(f) of the Constitution I will examine presently; but I have no hesitation in holding that they do not amount to dispossession of the shareholders from these rights in the sense that the rights have been usurped by other people who are exercising them in place of the displaced shareholders."

The above reasoning applies *mutatis mutandis* to the case now before us. The truth is that these rights have not been taken possession of or acquired at all in exercise of the power of eminent domain but have been extinguished or destroyed in exercise of the State's police power to prevent public mischief and anti-social activities referred to in the objects and reasons appended to the bill which eventually became the impugned law. In the premises, the respondent Subodh Gopal Bose has been deprived of his "property", if these rights can be properly so described, by authority of law and the case falls within article 31(1) and not within article 31(2) at all.

If the impugned section is regarded as imposing a restriction on the right of Subodh Gopal Bose to hold property then, for reasons I have mentioned, I hold such restrictions, in the circumstances of this case, to be quite reasonable and permissible under article 19 (5). If the impugned section operates as an extinguishment of his right to property, treating the right to annul under-tenures and to eject under-tenants and to execute the decree for ejectment as property, then, in my judgment, these rights of the respondent Subodh Gopal Bose have not been taken possession of or acquired by the State within the meaning of article 31(2) but he has been deprived of his property by authority of law under article 31(1) which calls for no compensation. In the premises, the plea of unconstitutionality cannot prevail and must be rejected. I

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would, therefore, allow the appeal with costs both here and in the High Court.

GHULAM HASAN J.—I concur with my Lord the Chief Justice that the view of the High Court, Calcutta, that section 7 of the West Bengal Revenue Sales (West Bengal Amendment) Act, 1950, is void as abridging the fundamental rights of the first respondent under article 19(1)(f) and (5) of the Constitution cannot be sustained and I agree with the order proposed by him.

JAGANNADHADAS J.—I have had the advantage of reading the judgments of my Lord the Chief Justice and of my learned brother Justice S. R. Das.

On the assumption that the question raised in this case is one that arises under article 19(1) (f) and (5) of the Constitution—that being the footing on which the learned Judges of the High Court dealt with the case—I agree with that portion of the judgment of my learned brother Justice S. R. Das which holds that the impugned section 7 of the Bengal Land-Revenue Sales (West Bengal Amendment) Act, 1950 (West Bengal Act VII of 1950) is *intra vires* and for the reasons stated by him.

A larger question has, however, been raised as to whether this is a case which falls within the scope of article 19(1) (f) and (5) or article 31 of the Constitution. Since, on either view, we are all agreed as to the final result of this appeal, I have felt rather reluctant to go into this larger question. But out of profound respect for my Lord the Chief Justice and my learned brother Justice S. R. Das who have dealt with the matter fully and out of a sense of duty to the Court, I venture to express my views briefly.

My Lord the Chief Justice is inclined to the view that the fundamental right declared in article 19(1) (f) has no reference to concrete property rights but refers only to the natural rights and freedoms inherent in the status of a citizen. Even so, with respect, I fail to see how the restrictions on the *exercise* of those rights referred to in article 19(5) can be otherwise than with reference to concrete property rights. To me, it

appears, that article 19(1) (f), while probably meant to relate to the natural rights of the citizen, comprehends within its scope also concrete property rights. That, I believe, is how it has been generally understood without question in various cases these nearly four years in this Court and in the High Courts. At any rate, the restrictions on the exercise of rights envisaged in article 19(5) appear to relate—normally, if not invariably—to concrete property rights. To construe article 19(1) (f) and (5) as not having reference to concrete property rights and restrictions on them would enable the legislature to impose unreasonable restrictions on the enjoyment of concrete property (except where such restrictions can be brought within the scope of article 31(2) by some process of construction). As at present advised, I am unable to give my assent to such a view.

Now as regards article 31, I agree that clause (1) cannot be construed as being either a declaration or implied recognition of the American doctrine of "police power". The negative language used therein cannot, I think with respect, be turned into the grant, express or implied, of a positive power. Ineed as my Lord the Chief Justice has pointed out in his judgment, no such grant of police power is necessary having regard to the scheme of the Constitution. That scheme, as I understand it, is this. The respective legislatures in the country have plenary powers assigned to them with reference to the various subjects covered by the entries enumerated in the Lists of the Seventh Schedule by virtue of articles 245 to 255. These powers are subject to the limitation under article 13 that the power is not to be so exercised as to infringe the fundamental rights declared in Part III of the Constitution. And, therefore, the legislatures can exercise every power—including the police power, if it is necessary to import that concept—within these limits, in so far as it is not provided for in article 19(2) to (6) and article 31(5) (b) (ii) or other specific provisions in the Constitution, if any. The only problem thus presented to the Courts is not as to what is the extent of the police power, but as to what is the scope

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and limit of the fundamental right which is alleged to have been infringed by legislative action. I agree with my learned brother Justice S. R. Das that the Constitution envisages a large measure of social control as a means to achieve the goal set out in the preamble and in the directive principles enumerated in Part IV. I am also of the view that the Courts may not ignore the directive principles, as having no bearing on the interpretation of constitutional problems, since article 31 categorically states that "it shall be the duty of the State (including the legislature by virtue of the definition of 'State' in Part III made applicable by article 36) to apply these principles *in making laws*". While, therefore, I agree in thinking that a substantial measure of social control legislation may become necessary in the fullness of time, that to my mind, is no reason for construing article 31(1) as implying some undefined police power, though such a consideration may have relevance in the determination of the ambit of a fundamental right.

On the other hand, I am unable to agree with the view that article 31(1) has reference only to the power of Eminent Domain. I do not dispute that it comprehends within its scope the requirement of the authority of law, as distinguished from executive fiat for the exercise of the power of Eminent Domain. But it appears to me that its scope may well be wider. This really depends on what is the exact meaning to be assigned to the word "property" as herein used and on whether "deprivation" contemplated by article 31 (1) is in substance the same as "taking possession" or "acquisition" contemplated in article 31(2). My Lord the Chief Justice is inclined to the view that "taking possession" or "acquisition" is to be construed as having reference to and meaning "deprivation" or *vice versa*. Undoubtedly "taking possession" and "acquisition" amount to "deprivation" but the converse may not follow in the particular context in which these words and phrases are used. With great respect, I can see no warrant for the construction adopted except the assumption that article 31(1) and article 31(2) refer to the same and identical topic of

eminent domain and that they provide for the different requirements thereof, *i.e.*, the requirement of authority of law under article 31(1) and the requirements of public purpose and compensation under article 31(2). But it appears to me that if in article 31 (2) "acquisition" and "taking possession" were meant to be synonymous with "deprivation" already used in article 31 (1) there was no reason to drop the use of the word "deprivation" in article 31(2) and to use other words and phrases therein. For instance, article 31(2) may well have run as follows. "There shall be no deprivation of property, movable or immovable,.....for public purposes under any law authorising the same unless the law provides....." or some other such clause may have been suitably drafted. It appears to me that while the framers of the Constitution laid down the requirement of the authority of law for "deprivation of property" with a larger connotation, they limited the requirement of payment of compensation to what may reasonably be comprehended within the concepts of "acquisition" and "taking possession". With respect, to read these words and phrases in article 31 (2) as meaning the same thing as "deprivation" used in article 31 (1) and to make the test of "substantial abridgement" or "deprivation" as the *sine qua non* for payment of compensation under article 31 (2) is to open the door for introduction of most, if not all the elements of wide uncertainty which have gathered round the word "taken" used in the corresponding context in the American Constitution, notwithstanding caution to the contrary which my Lord the Chief Justice has indicated in his judgment. I am inclined to think that it is in order to obviate this that the framers of the Constitution deliberately avoided the use of the word "deprived" or "deprivation" in article 31(2).

I am conscious of the principle that a Constitution has to be liberally construed so as to advance the content of the right guaranteed by it. But where, as in this case, there is, what appears, a deliberate choice of the language used, and where it is not unlikely that having regard to the goal that the Constitution has

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set to itself in Part IV, certain degree of caution and restraint may well have been intended as to the limits of the right, the intendment of the language used has, in my opinion, to prevail.

On the other hand, I am unable to agree with my learned brother Justice S. R. Das that "acquisition" and "taking possession" in article 31 (2) have to be taken as necessarily involving transfer of title or possession. The words or phrases appear to me to comprehend all cases where the *title* or *possession* is taken out of the owner and *appropriated* without his consent by transfer or extinction or by some other process, which in substance amounts to it, the possession in this context meaning such possession as the nature of the property admits and which the law recognises as possession. This seems to follow from the enumeration of the classes of property in article 31 (2) to which it is applicable and also by reason of the broader consideration that from the point of view of the owner or possessor whose title or possession is appropriated, every such act of appropriation stands on the same footing. That the idea of transference of title or possession is not necessarily to be implied by article 31 (2) appears to me to be also indicated by article 31 (5) (b) (ii), which more often than not, would cover cases of destruction of property. Incidentally, I may mention that I am inclined to the view, in agreement with my Lord the Chief Justice, that article 31 (5) (b) (ii) is an exception to article 31 (2) and is intended to absolve the need for payment of compensation for "acquisition" or "taking possession" of property for the purposes specified therein. It, therefore, seems to imply payment of compensation, if such "acquisition" or "taking possession" of property is for other purposes.

The question then remains as to what is "property" contemplated by article 31 (2), apart from the specified categories included therein by enumeration in the phrase "any interest in, or in any company owning, any commercial or industrial undertaking." It is no doubt true that in a wide sense, property connotes not

only a concrete thing—corporeal or incorporeal—but all the bundle of rights which constitute the ownership thereof and probably also each individual right out of that bundle in relation to such ownership. But in the context of article 31 (2)—as in the cognate context of article 19 (1) (f)—the connotation of the word is limited by the accompanying words "acquisition" and "taken possession". Hence out of the general and wide category falling within the connotation of the word "property", only that which can be the subject matter of "acquisition" or "taking possession", is the "property" which is within the scope of article 31(2). This to my mind excludes, for instance, a bare individual right, out of the bundle of rights which go to make up property as being itself property for purposes of article 31 (2), unless such individual right is in itself recognised by law as property or as an interest in property—an easement, a *profits-a-prendre* and the like—and as capable of distinctive acquisition or possession. Thus for instance in the case with which we are concerned in the present appeal, the right to annul under-tenures cannot in itself be treated as property, for it is not capable of independent acquisition or possession. The deprivation of it can only amount to a restriction on the exercise of the rights as regards the main property itself and hence must fall under article 19 (1) (f) taken with 19 (5), according to my understanding thereof.

In my view, however, the word "property" as used in article 31 (1) may have been intended to be understood in a wider sense and deprivation of any individual right out of a bundle of rights constituting concrete property may be deprivation of "property" which would require the authority of law. I am aware of the possible criticism that in two parts of the same article the same word must be intended to have been used in the same sense. While this is a normal rule of construction, it can yield to the requirement of the context arising from the juxtaposition of other words or phrases. To my mind article 31 (1), though part of an article is in essence an independent provision to some extent overlapping with the requirements of the law

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of Eminent Domain. It is on a par with article 21. It seems to me to serve a distinct purpose over and above that relating to the law of Eminent Domain, viz., that it relates also to deprivation of property other than that which may fall within the scope of article 31 (2). It enjoins that such deprivation shall not be brought about save by authority of law.

In view of what I have said above, it follows that the assumption with which I have started, *viz.*, that this is a case falling under article 19 (1) (f) and (5) is, in my opinion, correct.

In the result I agree that the appeal should be allowed with costs here and in the High Court.

Appeal allowed.

Agent for the appellant : *P. K. Bose.*

Agent for respondent No. 1 : *R. R. Biswas.*

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Dec. 18.

DWARKADAS SHRINIVAS OF BOMBAY
v.
THE SHOLAPUR SPINNING & WEAVING CO. LTD., AND OTHERS.

[PATANJALI SASTRI C.J., MEHR CHAND MAHAJAN, S. R. DAS, VIVIAN BOSE and GHULAM HASAN JJ.]

Sholapur Spinning and Weaving Company (Emergency Provisions) Ordinance II of 1950, replaced by Act XXVIII of 1950—Whether ultra vires *art. 31 of the Constitution—Arts. 19 and 31—Scope of—Whether different.*

The Sholapur Spinning and Weaving Co., Ltd., was incorporated under the Indian Companies Act, 1913, with an authorised capital of Rs. 48 lakhs divided into 1590 fully paid up ordinary shares of Rs. 1,000 each, 20 fully paid up ordinary shares of Rs. 500 each and 32,000 partly paid up cumulative preference shares of Rs. 100 each, the paid up capital of the Company being Rs. 32 lakhs comprised of Rs. 16 lakhs fully paid up ordinary shares and Rs. 16 lakhs partly paid up preference shares, Rs. 50 being unpaid on each of the 32,000 cumulative preference shares. The Company did good business and declared high dividends for some time ; but in the year 1949 there was accumulation of stocks and financial difficulties. On the 27th July, 1949, the Directors gave notice of