(1998) 09 GAU CK 0016

Gauhati High Court

Case No: Writ Appeal No''s. 460 and 464 of 1997

Assam State Electricity Board and Others		APPELLANT
	Vs	
Bharat Hydro Power Corporation Ltd. and Others		RESPONDENT

Date of Decision: Sept. 21, 1998

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 11, 14(1), 8, 8
- Bharat Hydro Power Corporation Limited (Acquisition and Transfer of Undertaking) Act, 1996 - Section 1, 220(6)
- Companies Act, 1956 - Section 11
- Constitution of India, 1950 - Article 14, 19(1), 226, 245, 246
- Contract Act, 1872 - Section 10
- Electricity (Supply) Act, 1948 - Section 2, 2(4A), 2(5), 24, 26A
- Electricity Act, 1910 - Section 10, 11, 12, 13, 14
- Government of India Act, 1935 - Section 107, 107(2)
- Inter State Water Disputes Act, 1956 - Section 4
- Registration Act, 1908 - Section 17
- Transfer of Property Act, 1882 - Section 53A

Citation: (1998) 4 GLT 87

Hon'ble Judges: P.G. Agarwal, J; J.N. Sharma, J

Bench: Division Bench

Advocate: B. Hansaria, N.N. Saikia, J. Chutia and G. Deka, for W.A. No. 460/97 and P.G. Baruah and R. Baruah, for W.A. No. 464/97, for the Appellant; B.L. Jain, G.N. Sahewalla, A.K. Goswami and G. Goyal for W.A. Nos. 460 and 464/97, for the Respondent

Final Decision: Allowed

Judgement

J.N. Sarma, J.

These two Writ Appeals have been filed against the same judgment of the learned Single Judge passed in C.R. Nos. 6 and 283 of 1997. The judgment of the learned Single Judge was passed on 19.7.97. As both the Appeals raised the common questions of law and facts they are taken up for hearing together. It may be stated herein that a cross objection also has been filed by the Respondent Nos. 1,2 and 3 in Writ Appeal No. 464/97 and that also we have heard together.

2. We have heard Mr. P.O. Baruah, learned Counsel for Appellant in WA 464/97 and Mr. B. Hansaria, learned Counsel for Appellant in WA 460/97 and Mr. B.L. Jain, learned Counsel for Respondents in both the appeals.

3. A written argument has been filed on behalf of the Appellant in WA 460/97 and written argument also has been filed on behalf of the Respondents. Earlier CR No. 6/97 was filed challenging the legality and validity of an Ordinance, later on an Act was passed by the State of Assam in the name and style of "Bharat Hydro Power Corporation Limited (Acquisition and Transfer of Undertaking) Act, 1996 (Assam Act 1 of 1997) (hereinafter referred to as the "Act") and as such CR 283/ 97 was filed challenging the legality and validity of the Act (Assam Act 1 of 1997 shall hereinafter be referred as the Act for sake of brevity).

4. Before we go to the core question, let us have a look at the background which needed the necessity for the State of Assam to issue the Ordinance and thereafter to enact the Legislation.

5. In the year 1979, the Planning Commission sanctioned a proposal of the Assam State Electricity Board (hereinafter called ''ASEB'') for construction of a Hydro Electric Power Station in the District of Karbi Anglong on the river Barapani at an estimated cost of Rs.36.36 crores. The project comprised construction of S1 meter high concrete dam on the river Barapani near Hatidubi for utilising floor from catchment area of 1178 sq. km. The installed capacity of the project was 2 x 50 MW. The Dam was to be completed in 1986, but due to the failure of the local contractor, the project could not be completed and the ASEB terminated the contract and protracted ligation ensued. In the year 1992, after termination of contract as aforesaid, the project work was entrusted to National Project Construction Corporation (in short "NPCC") but the similar fete followed and ASEB had to terminate their contract as well in December, 1992. In the meantime, cost of the project initially sanctioned at Rs. 36.36 crores rose to Rs. 189.90 crores in September, 1992. Out of the aforesaid estimate, the work completed was of about Rs. 116 crores and the ASEB needed about Rs. 60 crores to complete the project excluding other liabilities but it could not get the said amount.

6. In the year 1992-93, the Govt, of India accepted the policy of privatisation even in power section. Due to such changed policy, Scope for availability of Govt, fund for generation project narrowed down and consequently, ASEB could not get additional

fund from the State Govt. The State Govt, following the policy of privatisation of the Central Govt, decided to transfer the project to a joint Sector.

7. On 25.3.93, Memorandum of Undertaking (MOU) was signed between the ASEB, Govt, of Assam and M/s. Subhash Project and Marketing Ltd. (SPML). According to the said MOU, SPML would promote a new company to complete the project. In terms of the said MOU a new company under the name and style of M/s. Bharat Hydro Power Corporation Ltd. (BHPCL), Respondent No. 1 came into existence in which equity participation Was as follows:

ASEB 11%
SPML.....40%
General Public ...49%

8. On 8.4.93 the Deed of Assignment was executed between ASEB and BHPCL in terms of which all the assets and liabilities of the project were transferred to the BHPCL on 8.4.1993. In terms of the said Deed of Assignment the BHPCL was to complete the project and start generation by June, 1995 which was subsequently extended to June, 1996.

9. It is the case of the ASEB as well as the State of Assam that the BHPCL after its incorporation failed to take charge of the project till 5.4.1994. Even after taking over of the project, BHPCL could not achieve any progress towards completion of the project due to serious lapses and negligence on its part. BHPCL and SPML however tried to put the blame on ASEB and the State Govt, for the delay in the progress of the project.

10. On 20.12.95, BHPCL filed a suit being TS No. 244/96 in the Court of the Assistant District Judge No. l, Guwahati for specific performance of the contract against ASEB alleging various breach by ASEB in performance of its obligation under the MOU and Deed of Assignment. ASEB filed an application for stay of suit in view of arbitration Clause. BHPCL also filed an application before this Hon''ble Gauhati High Court under Sections 8 and 11 of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator to decide pending disputes between the parties. The suit and the applications are pending. On 27.5.96 ASEB wrote to BHPCL that due to the failure of the BHPCL to complete the work within the extended period, the MOU was liable to be terminated and repudiated. Details of breaches committed by Biff CL were mentioned therein. Even after receipt of the aforesaid letter, BHPCL could not evince any circumstance to throw ray of hope towards execution of the project by completing the balance work and discharge the liabilities undertaken by it. On 30.11.96 the State of Assam having realised there has been inordinate delay in the completion of the project and it became imperative to safeguard the public interest by completing the project as early as possible in the context of acute power shortage in Assam, promulgated Bharat Hydro Power Corporation Limited (Acquisition and Transfer of Undertaking) Ordinance, 1996 acquiring the

undertaking of Karbi Langpi Project of Bharat Hydro Power Corporation Limited. The Ordinance was subsequently replaced by Bharat Hydro Power Corporation Limited (Acquisition and Transfer of Undertaking) Act, 1996. On 1.12.96, the State Govt, by Notification transferred to and vested the said project in the ASEB. After the said notification the possession of the project was handed over to the ASEB in presence of the representatives of both sides on 2.12.96 and on 5.12.96 Memorandum of Handing Over and Taking Over was signed. Thereafter, the writ petitions being CR 6/97 and CR 283/97 have been filed challenging the legality and validity of the Ordinance and the Act.

11. Before we go further, let us have a look at certain statements of facts made in the MOU at Clause D, E, F, G and I of the MOU which are quoted as follows:

D. ASEC has in order to implement the said project, already incurred the following expenditure and have also committed several liabilities as thereinafter mentioned upto 31st December, 1992.

Particulars	Amount (Rs.)
a) Expenditure incurred by ASEB	116,21,12,000.00
b) Current liabilities	2,49,38,880.27
c) Outstanding claims of contractors but not yet settled	2,24,48,051.31
d) Claim under litigation not yet settled	7,56,31,123.35

E. All the assets and other properties purchased for or acquired by ASEB on account of the said Electric Power Generation Project and as are appearing in the accounts of in respect of the said Electric Power Generation Project and have not been removed from there and said accounts and lists upto the date of take over will be submitted to SPML by ASEB and the fixed assets and properties will be physically handed over to Company by ASEB.

F. The lands showing in the maps and plans annexed hereto and marked with the letter ''X'' and letter ''X-1'' respectively are from time to time acquired by ASEB for the purposes of the said Electric Power Generation Project to be used to the extent as herein stated:

a)For Dam, Power Houses, Roads and Temporary Colony etc.	596.10 Hec.
b)For permanent colony at Lengery	45.50 Hec.
TOIAL	541.60 Hec.

(hereinafter referred to as ''the said land'') and since then the said Electric Power General Project is the sole and exclusive owner of land otherwise well and sufficiently entitled to the said land and is in peaceful possession thereof;

G. The compensation for the acquisition of the said land has been paid in full to all the respective land owners by ASEB through the Deputy Commissioner, Karbi Anglong and that there is no dispute with regard to payment of compensation for acquisition of the said land which such compensation amount has already been including in the heading Expenditure incurred by ASEB as aforesaid;

I. As far as ASEB is aware of, no further of additional land is required for the said Electric Power General Project and associated works there under.

In Clause 19 and 21 of the MOU it provides as follows:

19. It is recorded that all the rights, title, interest benefits, liberties, advantages and/or obligations whatsoever of the Government of Assam, the ASEB under and/or m respect of the said project as also in respect of and/or to the said land and of all the assets, equipments, plants, machineries, tools, articles, properties and/or goods forming part of the said project as also all the structures and/or buildings so far erected and/or constructed by ASEB on the said land (all hereinafter collectively referred to as the said "properties") together with all the said liabilities in as-is-where-is condition shall stand assigned, transferred and conveyed in favour of the Company, free from all encumbrances, charges and/or hindrances whatsoever, for the total consideration of Rs. 116,21,12,000.00 (Rupees one hundred sixteen crore twenty one lace twelve thousand only) to be paid by the Company as aforesaid and in the manner hereinafter stated subject to the undertaking of the company that the company shall carry out at its own costs charges and expenses all further works to be done for completion of the, said project exactly in accordance with the drawings and/or maps and/or departmental reports and/or specification and/or guidelines and/or designs and sketch or layout prepared by the consultants to be appointed by the company, subject to such modification and or alterations as may be made from time to time therein with the approval of ASEC (hereinafter collectively referred to as the "said guidelines") and shall also subject to what are hereinstated, pay all the liabilities and shall indemnify ASEB against payments thereof It is however, made clear that the company shall be at liberty to settle and/or enter into any compromise with any contractors or creditors of the said Electric Power Generation Project to reduce their claim against the said project and in case such claims are reduced, then and in that even ASEB shall not be entitled to claim refund of such reduced claim.

21. The aforesaid consideration of Rs. 116,21,12,000.00 (Rupees one hundred sixteen crores twenty one lace twelve thousand only) (being the total expenditure so far incurred by ASEB for an in respect of the said Electric Power General Project (hereinafter referred to as the said amount of deferred liability) shall go long the

same is not paid or liquidated as in the manner hereinstated be treated as deferred liability by ASEB to company upon its formation.

In Clause 47,48 and 49, it is provided as follows:

47. SPML agrees to furnish Bank Guarantee for Rs. SO lacs (Rupees fifty lacs only) to the Government within one week of signing of this MOU. This Bank Guarantee will be released immediately upon fulfilment of Clause 48 below.

48. SPML agrees to mobilise at least Rs. 500 lacs (Rupees five hundred lacs only) within 90 days from the date of formation of the new company as part of its equity contribution and further agrees co mobilise its entire equity contribution within 180 days from the date of formation of the company. As soon as SPML mobilises Rs. 500 lacs. Bank Guarantee stipulated in Clause 47 above shall stand released

49. The company within 30 days of its formation, shall furnish a performance guarantee to the ASEB with respect to completion of the project by June 1995 and repayment of the deferred liability in a period of 8 years. For this purpose, the company and the ASEB will work out a milestone schedule, indicating clearly the responsibilities of both the company and the ASEB and Government of Assam with respect to each milestone.

12. On 27th May, 1996 vide Annexure-3 to the Writ Appeal No. 460/97 it was pointed to the Company that nothing was done by them to perform then part of the contract in terms of the MOU and m paras 2,3,4, S and 6 of that letter it was stated as follows:

2. The SPML was required to mobilise at least Rs. 500 lakhs within 90 days and its entire equity contribution within 180 days respectively from the date of incorporation of BHPCL as per Clause 48 of the MOU. The SPML and its associates have failed to perform their duties and responsibilities on this account.

3. The BHPCL was required to furnish a performance guarantee to ASEB with respect to completion of the project by June, 1995 and repayment of the deferred liability in a period of 8 years within 30 days of its formation, but BHPCL failed to furnish a valid guarantee within the stipulated time and for that matter till date.

4. The BHPCL has failed to have the deed of assignment registered after completing all legal formalities including payment of appropriate stamp duty as per Clause 17 of the deed of assignment.

5. The share holding of ASEB in the BHPCL was required to be 11% and that of SPML and its associates 40% and the balance 49% of the authorised share capital was to be offered to the public as per Clause 4 of the MOU. The SPML and BHPCL have failed to take action in this respect also.

6. There has been irregularities in allotment of equity shares and the agreed ratio of shares as per Clause 4 of the MOU has not been maintained. As per Balance Sheet of the BHPCL for the year ending 31 st March, 1994, the total issued and paid-up

share capital was Rs. 4.16 crores and whereas no shares at all were allotted to ASEB. Further the shares representing 49% of the total paid-up capital of the company was also not offered to the general public for subscription as required under the relevant clause of the MOU.

13. The Preamble of the Act reads as follows:

ASSAM ACT No. 1 OF 1997 (Received the Assent of the Governor on 6th January, 1997) 6th January, 1997) THE BHARAT HYDRO POWER CORPORATION LIMITED (ACQUISITION AND TRANSFER OF UNDERTAKING) ACT, 1996.

An Act to provide for the acquisition, in the public interest, of the right, title and interest of the undertaking of the Bharat Hydro Power Corporation Limited and for matters connected therewith or incidental thereto.

WHEREAS the Bharat Hydro Power Corporation Limited, having its registered office in the State of Assam, has been engaged for speedy execution and completion of the Karbi Langpi (Lower Barapani) Hydro Electric Project for ensuring supply of electricity in the State of Assam in view of the chronic shortages of power in the State;

WHEREAS it was agreed upon in the Memorandum of Understanding entered into between the Government of Assam, the Assam State Electricity Board and the M/s. Subhas Project and Marketing Limited on 25th March, 1993 that the project would be completed and would be commissioned by the month of June, 1995;

And whereas the company failed in the sole object of speedy execution of the project within the specified time;

Whereas it is expethent in the public interest that the undertaking of the Bharat Hydro Power Corporation Limited should be acquired for the purpose of enabling the State Government to efficiently supervise, manage and execute the work expeditiously as to subserve the common good, in the context of the acute power shortage in the State.

14. In the writ application, the prayers made inter-alia are as follows:

... to cancel, recall or otherwise forebear from giving effect to the impugned Act No. l of 1997 " The Bharat Hydro Power Corporation Limited (Acquisition and Transfer of Undertaking) Act of 1996 " and/or as to why the provisions/sections of the said Act if any should not be adjudged and declared to be ultra vires and unconstitutional on the ground of violation of Articles 14 and 19(1)(g) of the Constitution of India and on the grounds of being vague, unfair and arbitrary and/or why a Writ of Mandamus and/or Certiorari and or Writ of like nature declaring adjudging the various provisions as mentioned in the petition should not be held as ultra vires and unconstitutional and/or beyond the legislative power of the State and/or as inoperative and void inter alia, on the grounds as mentioned in the petition ad also

in the paragraph 58 thereof and on hearing cause or causes shown to strike down the constitutional and legal vdidity of the aforesaid Act and/or the various provisions, thereof and adjudge and declare them to be ultra vires and unconstitutional and beyond the legislative powers of the State and/or as inoperative and void inter alia on the grounds as mentioned in the petition and make the Rule absolute and/or pass such further order or orders as to Your Lordships may deem fit and proper.

15. In order to appreciate the contention, let us have a look at the pleadings. In paragraph 40 of the writ application it is stated that this Act received the assent of the President on 6.1.97. This is factually an incorrect statement. The Act only received the assent of the Governor and it was published in the Assam Gazette. The grounds put forward for challenging the legality and validity of the Act as urged in the pleading particularly in paragraph 43 it is stated that it is validity of Articles 251 and 254 of the Constitution of India. Article 251 is with regard inconsistency between laws made by Parliament under Articles 249 and 250 and laws made by the legislature of States, and Article 254 is with regard to inconsistency between laws made by Parliament and laws made by the Legislature of States. In this paragraph, it is stated that as this law is against the Indian Electricity Act, 1910 and Supply Act, 1948 and as such Section 24 of the present Act is totally inoperative and/or void. It is also stated that Industrial Disputes Act, 1947 is also a Central Act and Section 15(2) of the State Act is inoperative and void being repugnant to the State Act.

16. In paragraph 46 it is stated that Section 1 of the Act is violative of Article 251 of the Constitution of India. In paragraph 47 it is stated that Sections 3 and 4 provide for transfer and vesting of the undertaking of the Petitioner No. 1 in the State of Assam and the said provisions involves the revocation of the licensees and the acquisition of the undertaking of Electric Generation and as such the provisions are in violation of Sections 3, 4, 5, 6 and 7 of the Electricity Act, 1910 and in paragraph 48 it is stated that Section 6 of the Indian Electricity Act, 1910 provides for compulsory purchase of undertakings of the licensees and the said Section 6 of the Act of 1910 has been made nugatory by Section 3 and the proviso there under of the present Act. It is also stated that Section 4(1) of the said Act has made nugatory the provisions of the Indian Electricity Act of 1910 and the same is inconsistent. There is a vague pleading that Section 3 also made nugatory the provisions in the Companies Act, 1956 which is Central Act and on which the Union alone is entitled to legislate, hi paragraph 50 there, is a pleading that Section 11 of the present Act is against the different Central Acts including Indian Electricity Act, Industrial Disputes Act and Contract Act and as such is void and inoperative.

17. In paragraph 51 it is stated that the said Act while purporting to nullify the Central Laws both m Union List and in Concurrent List also purports to take away the jurisdiction of the Courts including the right of the company to file suits and other legal proceedings against the State Govt, or the Board which is also void and

in contravention of the fundamental rights of the Petitioners.

18. In paragraphs 55, 56 and 58 it is stated as follows:

55. The said Act is in violation of the Fundamental rights of the Petitioners under Article 14 of the Constitution of India. There are various power generations companies both in Assam and outside Assam and your Petitioners are alone singled out for the purposes of such acquisition and transfer whereas other generations units are still continuing in private hands in Assam as well as in the whole of India. It is contrary to the General Policy of the Central Government which has decided for privatisation of electric generation units. The provisions of the said Act are arbitrary, discriminatory and unreasonable if the entire scheme of the Act is to be scanned and is thus ultra vires the Constitution of India. Unreasonable are arbitrariness are writ large on the face of the Act the right of the Petitioners are being taken away by the State does not take away the liabilities even the ones incurred prior to the said Memorandum of Understanding and the said Assignment.

56. The said Act is in violation of the fundamental rights of the Petitioners under Article 19(1)(g) of the Constitution of India and same unreasonably and arbitrarily violates the rights of the Petitioners to carry on their trade and business. It is also violative of Articles 300-A, 301 to 304 and wholly unreasonable and ultra vires.

58. The said Act is ultra vires the Constitution of India and/or is repugnant to the laws passed by the Parliament of India and as such the same and the various sections thereof are ultra vires the Constitution of India and/or are inoperative and void.

These are the basic pleadings in the writ application They have been quoted extensively in order to appreciate the question which now will arise for decision.

19. A Statute is the will of the legislature and an Indian statute is an Act of the Central Legislature or of a State Legislature. The Legislature, as the representation of the Nation or the people of a State expresses its will and such expression of the will is a "statute". When these statutes are expounded by the Courts, according to well-recognised rules of interpretation of statutes, such exposition forms the body of statute law. When a Court expounds a statute it first ascertains the meaning of a particular provision and then applies that meaning to a particular controversy. The object of the rules of interpretation is to help the judge to ascertain the intention of the legislature "not to control that intention", or to confine it within limits which the judges may deem reasonable or expethent. The greatness of a judge would depend upon his capacity to guess the object of the legislature and how the legislature intended to achieve that object, correctly and mould the law appropriately. The law is that not only the Court is to gather the intention of the legislature from the enactment but the Court also has to keep in view the general principles of interpretation and if the interpretation makes valid law that interpretation must be preferred.

20. We should also bear in mind in deciding the question of arbitrariness as argued in this matter a caution noted by Shakespeare in his drama "Measure for Measure", wherein it was stated as follows:

O, it is excellent

To have a giant''s strength; but it is tyrannious

To use it like a giant.

21. The next question we must bear in mind in interpreting a statute is that a part of an Act can be held valid and other part invalid if they are severable. If the offending provisions are so interwoven into the scheme that they are not severable the whole is ultra vires.

22. It is the normal rule that a statute passed by the competent legislature would be deemed to be a valid one unless it is invalid as established by the party seeking its invalidation by specific pleading. The pleading must be specific and not vague. It is well settled law that allegation regarding violation of constitutional or other provisions should be specific. If the pleadings are vague, the Court should not consider the alleged allegation regarding violation of the constitutional or other provisions. If any authority is required for this proposition, one may have a look at the following decisions:

1. Amrit Banaspati Co. Ltd. Vs. Union of India and others, at para 6 of the Judgment.

2. Third Income Tax Officer, Mangalore Vs. M. Damodar Bhat, where in para 6 of the judgment, the Apex Court has pointed out as follows:

We proceed to consider the next question arising in this appeal, viz. whether the High Courts was right in taking the view that the Income Tax Officer did not properly exercise the statutory discretion in Issuing the impugned notice with regard to the first item viz. tax for the assessment year 1960-61 amounting to Rs. 7056.15. It was argued on behalf of the Respondent that there was an appeal pending with the Appellate Assistant Commissioner against the order of assessment and therefore it was incumbent upon the Income Tax Officer to exercise the statutory discretion properly u/s 220(6) of the new Act in treating the Assessee as being in default. The finding of the High Court is that the Income Tax Officer "was not shown to have applied his mind to any of the facts relevant to the proper exercise of his discretion.

3. 1977 U.J. 180 (SC) The Municipal Board Maunath Bhanjan v. Swadeshi Cotton Mills Co Ltd. and Ors. That was a case with regard to the challenge to the imposition of Octroi duty on a Mill. They did not point out any reason as to why imposition could be said to be invalid and merely took certain vague grounds. The Supreme Court in para 11 of the judgment has pointed out as follows:

As has been shown, the company did not, even then, venture to point out any, reason why the imposition could be said to be invalid, and merely stated that the

"procedure" prescribed under Sections 131-135 had not been followed. That was for too vague plea to justify investigation and interference in the exercise of the extraordinary jurisdiction of the High Court under Article 226 of the Constitution.

4. S.R. Tewari Vs. District Board Agra and Another, now the Antarim Zila Parishad, Agra through its Secretary and Anr. That was a case with regard to termination of service of an employee and that was challenged and no plea was taken that the order of terminating the employment was one in reality of the nature of dismissal as punishment and in para 14 of the judgment the Supreme Court has pointed out as follows:

It must however be observed that in the petition the Appellant challenged the validity of the order terminating his services on the ground firstly that the Board had no power to terminate his employment and secondly that it was not justified in terminating the employment. It was never contended that the order terminating the employment was one in reality of the nature of dismissal as punishment, and the form used in the resolution of the Board was merely to camouflage the real object of the Board. Averment in the petition that the Board had acted capriciously and without any justification does not amount to a plea that the order was intended to be one of dismissal though in form one of determination of employment.

5. Hamdard Dawakhana (Wakf), Delhi and Another Vs. Union of India (UOI) and Others, That was a case with regard to the Essential Commodities Act and the point was not taken before the High Court that the product is under Essential Commodities Act within the meaning of Essential Commodities Act, 1955 and that was not raised in the pleading and that was sought to be raised before the Apex Court and the Apex Court has pointed that cannot be done. In an application under Article 226 challenging the validity of an order and more so the validity of a statute there must be specific pleading and the burden is squarely on the person challenging it.

6. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, That was a case with regard to doctrine of promissory estoppel and there the question of waiver was sought to be raised by the State of Uttar Pradesh and there in para 6 of the judgment, the Apex Court has pointed out as follows:

No plea of waiver can be allowed to be raised unless it is pleaded and the factual foundation for it is laid in the pleadings. Here it was common ground that the plea of waiver was not taken by the State Government in the affidavit filed on its behalf in reply to the writ petition, not was it indicated even vaguely in such affidavit. It was raised for the first time at the hearing of the writ petition. That was clearly impermissible without an amendment of the affidavit in reply or a supplementary affidavit raising such plea. If waiver were properly pleaded in the affidavit in reply, the Appellant would have had an opportunity of placing on record facts showing why and in what circumstances the Appellant came to address the letter 25th June,

1970 and establishing that on these facts there was no waiver by the Appellant of its right to exemption under the assurance given by the 4th Respondent. But the absence of such pleading in the affidavit in reply, this opportunity was denied to the Appellant. It was, therefore, not right for the High Court to have allowed the plea of waiver to be raised against the Appellant and that plea should have been rejected in limine.

7. Narendra Bahadur Singh and Another Vs. State of Uttar Pradesh and Others, . There a notification was challenged and the Supreme Court in para 6 has pointed out as follows ;

A party seeking to challenge the validity of a notification on a ground involving questions of fact should make necessary averments of fact before it can assail the notification on that ground.

8. Bharat Singh and Others Vs. State of Haryana and Others, . In this case the Petitioners challenged the validity of the acquisition of their land by the State of Haryana under Land Acquisition Act, 1894 for a public purpose and the Apex Court in para 13 of the judgment pointed out as follows:

As has been already noticed although the point as to profiteering by the State was pleased in the writ petitions before the High Court as an abstract point of law, there was no reference to any materials in support thereof nor was the point argued at the hearing of the Writ petitions. Before us also no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ Petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is Respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the Court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the CPC and a writ petition or a counter affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it So, the point that has been raised before us by the Appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit.

9. M.K. Balakrishnan Menon Vs. The Assistant Controller of Estate Duty-cum-Income Tax Officer, Ernakulam, In that particular case, the Supreme Court has pointed out that the Court ought not to interpret stationery provisions, unless compelled by their language in such a manner as would involve its constitutionality because the

legislature is presumed to enact a law which does not contravene or violate the constitutional provisions.

10. 1997 (3) GLT (SC) 8 Ratanlal Nath and Ors. v. State of Tripura and Ors. The Supreme Court was considering the validity of Tripura Panchayat (Delimination of Constituencies Rules, 1993 and certain rules were struck down the Division Bench of this Court and the Supreme Court in paragraph 12 of the judgment has pointed out in the judgment of the high Court no cogent reason has been given for invalidating the said sub-rule. The Supreme Court further pointed out that statutory rules could not have been struck down on such ambiguous reason.

We are noting down these judgments as that will be necessary to be considered when we are examining the findings arrived at by the learned Single Judge in the impugned judgment.

23. Before we go further. let us have a look at the findings arrived at by the learned Single Judge. In para 27 of the judgment it is held as follows:

As it is seen, stand of the Respondent No, 1 and 2 is that the impugned Act has been enacted by the State Legislature as per Entry 17 of the State List which deals with water supply, irrigation, canal, drainage and embankment water storage and water power project subject to the provisions of Entry 56 of the List I (Water Power) Union List. In the said entry water power is meant in its natural state and not for the purpose of generation of electricity.

In para 33 it has been held as follows:

From the above, it is clear that the ''pith and substance, of the impugned Act is to acquire the undertaking for public purpose and the Act, therefore, in my opinion, is a legislation on water power.

(emphasis supplied).

In para 35 it has been held as follows:

I am of the opinion that it is a legislation for acquisition of a generating undertaking and, therefore, falls within the purview of Entry 38 and 42 of the Concurrent List III and in this field, power of legislation is given by Article 246 and other Acts of the Constitution.

24. It is argued on behalf of the Appellant that if this is the finding of the learned Single Judge, the legislative competence of the State of Assam to enact the law cannot be questioned. On the other hand, the learned Counsel for Respondents submits that the word ''not'' has been dropped m the judgment. From a further reading of the finding of the learned Judge it appears that this contention other. Jain is correct and the word ''not'' was not in the sentence because of a typographical mistake, but be that as it may, this finding has not been challenged in the cross objection, but we are not finding fault on this count to decide the contentions of the

parties as to whether it is a legislation on water power coming under State List or is a legislation with regard to acquisition of an electrical undertaking.

25. Let us deal with this contention of the parties. For this, let us have a look at relevant Entries. The various Entries in the 3 lists are not powers but fields of the Legislature, see 1962 SCC 1044 Calcutta Gas Company v. State of West Bengal. The power to legislate is given by Article 246. The power to make legislation and, the relation between the Union and State and the distribution of legislative power are provided under Articles 245 and 246 of the Constitution of India. It cannot be contended that because there is no Entry in the List relating to deprivation of property as such it is not within the competence of the legislature of this country to enact such a law. Such a law could be made. see P.D. Shamdasani Vs. Central Bank of India Ltd., The entries in the Lists are mere legislative heads and are all of enabling character. They are designed to define and limit the respective area of legislative competence of the Union and the State Legislature.

26. When the vires of an enactment is challenged there is a difficulty in ascertaining the limits of its power. The difficulty must be resolved so far as in favour of the legislative body. It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. For this proposition one may have look at Raja Jagannath Baksh Singh Vs. The State of Uttar Pradesh and Another, wherein para 10 of the judgment the Supreme Court laid down the law as follows:

10. The first contention which has been raised by Mr. Goyal before us is that the Act is unconstimtional and void inasmuch as it is beyond the legislative competence of the U.P. Legislature, and this contention raises the question about the construction of Entry 49 in List II of the 7th Schedule of the Constitution This Entry relates to taxes on lands and buildings. The argument is that ''lands'' in the context does not include agricultural lands and so, the U.P. Legislature was not competent to levy the tax. In considering the merits of this argument, it is necessary to bear m mind that we are interpreting the words used in the Constitution and it is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal Constitution and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a Constitution. A general word used in an entry like the present one must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it, vide Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, and AIR 1941 16 (Federal Court) If this principle is borne in mind, h is obvious that the words ''lands'' cannot be interpreted in the manner suggested by Mr. Goyal. The word ''lands'' is wide enough to include all lands, whether agricultural or not, and it would be plainly unreasonable to

assume that it includes non-agricultural Constitution lands but does not include agricultural lands.

27. When the power of the legislature with limited authority is exercised in respect of a subject matter, but words of wide and general import are used, it may reasonably be presumed that the legislature was using the words in regard to that activity in respect of which it is competent to legislature and to no other ; and that the legislature did not intend to transgress the limits unposed by the Constitution. (see Jothi Timber Mart and Others Vs. Corporation of Calicut and Another, But at the same time the Court should guard against extending the meaning of the word beyond imagination. The doctrine of ''pith and substance '' means that if an enactment subsequently falls within the power expressly confined by the Constitution upon the legislature which enacted, it cannot be held to be invalid merely because it did not M exclusively within the power of the legislature. When a law is unpugned as ultra vires, in that case the is to be ascertained is the true character of the legislation and if on such examination it is found that the legislation is within the competence of the legislature, then the question of invalidation does not arise inasmuch as the legislative competence is to be determined not by degree but by substance. Once the pith and substance of the legislation is determined and is found to be within the power of the legislature then the in validness of such legislation will not come at all.
28. The learned Single Judge has held that the Act will fell within the purview of Entry 38 and 42 of List III. Let us have a look at List III Entry 32 in the Concurrent List. Entry 38 in List in relates to electricity. Entry 42 relates to acquisition and requisition of property. By the Constitution (7th Amended Act) the present Entry has been substituted for the original Entry.

29. Let us first take up the question regarding effect of Entry 42. It is argued that the question of repugnancy and inconsistency with the Central Act will come only when the State Act covers the field of legislation under Concurrent List. It is argued that by the impugned legislation in pith and substance is a legislation of Water Power and is covered by Entry 17 of List II of the 7th Schedule of the Constitution and hence there is no question of repugnancy. Even if it is assumed that the impugned Act is covered by entry 38 and/or 42 of the Concurrent List, the said law cannot be declared as repugnant to any Central law. Under Article 254 of the Constitution of India, only in the following circumstances question of repugnancy comes: (i) when there is direct conflict between the two provisions. This may happen (a) where one cannot be abeyed without disobeying the other (b) two enactments may also be inconsistent although obethence to each of them may be possible, without disobeying the other. The question of repugnancy is not confined only to the case where there is a direct conflict between two legislatures e.g. where the one says ''do'' what the other says ''don''t''. It may also arise where both laws operate m the same field and the two cannot possibly stand together. In all such cases, the law made by Parliament shall

prevail over a State law. The Union Parliament intended its legislation to be a complete and exhaustive code relating to the subject. The repugnancy must exist in fact and not depend merely on a possibility.

30. The learned Counsel for the Appellant places reliance in support of this contention on the following decisions:

1. AIR 1939 PC 74 Shyamakant Lal v. Rambhajan Singh and Ors. Where the Federal Court m paragraph 83 has held as follows:

When the question is whether a Provincial Legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of its validity, and every effort should be made to reconcile them and construe both so as to avoid their being repugnant to each other; and care should be taken to see whether the two do not really operate in different fields without encroachment. Further repugnancy must exist in fact, and not depend merely on a possibility.

Their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not and may never be in force: (1896) ACC 3 84 at pages 369-70.

2. 1979 SCC 898 M. Karunanidhi v.Union of India where in para 8 of the judgment the Supreme Court has stated that so far as Clause (1) of Article 254 is concerned it clearly lays down that where direct is a direct collision between a provision of a law made by the State and that made by Parliament with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the State law would be void to the extent of the repugnancy.

In para 24, the Supreme Court further pointed out as follows:

It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:

i) That there is a clear and direct inconsistency between the Central Act and the State Act.

ii) That such an inconsistency is absolutely irreconcilable.

iii) That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each order and a situation is reached there it is impossible to obey the one without disobeying the other.

In para 35, the propositions have been summarised as follows:

On a careful consideration, therefore, of

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

3 Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., . That was a case with regard to validity of the Kerala State Electricity Supply (Kerala State Electricity Board and Licensees Areas) Surcharge Order, 1968. It was challenged that by declaration of electricity as an essential article under the Act, the Act impinges upon various matters either in List I or List III of the Seven the Schedule to the Constitution. In para 4 of the judgment, the Supreme Court has pointed out that the scope of the legislative powers of the Parliament and the State Legislatures is now well settled as enumerated in Article 246 of the Constitution of India.

In para 5 of the judgment the Supreme Court in considering the word ''notwithstanding'' has held as follows:

Furthermore, the word ''notwithstanding'' in Clause (1) also means that if it is not possible to reconcile the two entries the entry in List I will prevail. But before that happens attempt should be made to decide in which list a particular legislation falls. For deciding under which entry a particular legislation falls the theory of "pith and substance " has been evolved by the Courts. If in pith and substance a legislation falls within one List or the other but some portion of the subject matter of that legislation incidentally trenches upon and might come to fall under another List, the Act as a whole be valid notwithstanding such incidental trenching. These principles have been laid down in a number of decisions.

In para 11 of the judgment, the question of repugnancy was considered by the Supreme Court and the Supreme Court has pointed out as follows:

That the question of repugnancy can arise only with reference to a legislation falling under the Concurrent List is now well settled. hi A.S. Krishna Vs. State of Madras, after referring to Section 107 of the Government of India Act, 1935 which is in terms similar to Clause (1) of Article 254, this Court observed:

For this Section to apply, two conditions must be fulfilled: (1) The provisions of the provincial law and those of the Central Legislation must both be m respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the provincial law will, to the extent of the repugnancy, become void.

To the similar effect is the decision in Prem Nath Kaul Vs. The State of Jammu and Kashmir, The whole question of repugnancy is elaborately discussed in State of Jammu and Kashmir Vs. M.S. Farooqi and Others,

The Supreme Court also considered the objects of the Electricity Act, 1910 and the Electricity Supply Act, 1948 and it also considered the provisions of the Kerala Act and in paragraph 23, it found that the Kerala Act m pith and substance in respect of trade and commerce, production, supply and distribution of electricity and within the competence of the State Legislature. No doubt, in that case the Act received the assent of the President which is not the case in hand.

4. Vijay Kumar Sharma and others Vs. State of Karnataka and others, The Karnataka Contract Carriages (Acquisition) Act received the assent of the President and its validity was challenged and in para 15(3), it was pointed out as follows:

Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment if any, is purely a incidental or inconsequential.

5. Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, That was a case with regard to acquisition of Tinsukia Electric Co. Ltd. by the State of Assam by an enactment in the name and style "Tinsukia and Dibrugarh Electric Supply Undertaking (Acquisition) Act (Assam Act 10 of 1973) and the legality and validity of that Act was challenged. This case requires a detailed discussion in view of the fact that certain provisions of the present Act are almost in parimateria with the provisions of the present Act.

Let us have a look at the certain provisions of that Act i.e. Act 10 of 1973. One tiling which must be noted in this case is that in that particular case the Tinsukia Electric Supply Co. Ltd. and the Dibrugarh Electric Supply Co. Pvt. Limited were licensees under the relative provisions of the Act, but m this particular case, this is denied that the Respondents are licensees. Of course, that Act also received the assent of the President. Section 6 of that Act of 1973 provides for gross amount payable to Licensee. Section 7 provides for vesting of undertakings. Section 8 of that Act provides for effect of transactions not bonafide. Section 9 of that Act provides for deductions from the gross amount. Section 11 provides for provisions for existing staff of licensee. Section 12 provides for inventory of assets and information. Section

17 of the Act provides for bar to jurisdiction of Court. Section 18 of that Act provides for effect of other laws. Section 19 provides for power to remove difficulties. Section 20 of that Act provides for arbitration.

31. In the impugned Act Section 4 provides for general effect of vesting. Section 5 provides that the State Government not liable for past liabilities. Section 6 provides for the power of the State Govt, to direct the vesting of the undertaking of the CO. in the Board. Section 7 provides for payment of compensation that may be fixed by the Commission considering the value of the assets of the Company after observing proper financial formalities. Section 8 provides for gross amount payable to the company. Section 9 provides for effect of transaction not bonafide. Section 10 provides for recovery of loss from the Company. Section 11 provides for deduction from the gross amount. Section 11 provides for payment of net amount. Section 13 provides for recovery of excess amount. Section 14 provides for constitution of Commission. Section 15 provides for employment of certain employees to continue. Section 16 provides for Provident Fund and other funds. Section 17 provides for inventory of assets. Section 19 provides for penalty. Section 23 provides for bar of jurisdiction of Court. Section 24 provides for effect of other laws. Section 26 provides for arbitration.

32. It may be noted herein that in the impugned judgment in para 95, it has been held that Sections 3, 4, 5, 6, 7, 7A, 15(2), 23, 24 are repugnant to the Central Act particularly the Act of 1910 and the Supply Act, 1948 and impugned Sections are not severable to validate the impugned Act and as the impugned Sections are found to be repugnant, the other remaining Sections of the impugned Act cannot give effective power to enforce the impugned legislation and in para 96 of the judgment the learned Single Judge held that as the impugned provisions cannot be separated from the remaining provisions of the Act, therefore, the whole of it must be struck down as void.

33. In the cross objection which has been filed this finding at paragraph 95 has not been challenged. So, it is not necessary for us to go to scrutinise the other sections of the Act save and except these provisions which have been mentioned.

34. In Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, the Supreme Court considered the various Section of the Act of 1973 and considered the contentions put forward and in paragraph 36, the question regarding declaration of the amount payable for acquisition argued to be arbitrary was rejected holding as follows:

36. Re. contention (C): This pertains to the question whether the principles laid down in the Act for determination of the "amount" payable for the acquisition are so arbitrary as to render the "amount" unreal and merely illusory. This contention would not, in law, be available to the Petitioners inasmuch as the law providing for the acquisition has the protection of Article 31-C of the Constitution. The argument

of Shri Soli J. Sorabjee in regard to the alleged "illusory" nature of the "amount" presupposes and proceeds on the premise that the impugned law does not have the protection of Article 31-C. Now that we have held that Article 31-C is attracted, the argument in regard to the alleged illusory nature of the amount does not survive at all.

In paragraphs 39, 40 and 41 of the judgment it has been laid down as follows:

39. Even if the unpugned law did not have the protection of Article 31-C a hypothesis on which contention (C) is based, the adequacy or inadequacy of the amount is not justiciable. The limitations of the Courts scrutiny explicit in Article 31(2) are referred to by Mathew J. in the His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala,

... the word ''amount'' conveys no idea of any norm. It supplies no yard-stick. It furnishes no measuring rod. The neutral word ''amount'' was deliberately chosen for the purpose. I am unable to understand the purpose in substituting the word ''amount'' for the word ''compensation'' in the sub-article unless it be to deprive the Court of any yard stick or norm for determining the adequacy of the amount and the relevancy of the principles fixed by law....

Referring to what might, yet, be open to judicial scrutiny, under Article 31(b), Shelat and Grower JJ. observed in the His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, 1606, para 609:

but still on the learned Solicitor General''s argument the right to receive the amount continues to be a fundamental right. That cannot be denuded of its identity. The obligation to act on some principle while fixing the amount arises both from Article 31(2) and from the nature of the legislative power for, there can be no power which permits in a democratic system an arbitrary use of power.

But the norm or the principle of fixing or determining the ''amount'' will have to be disclosed to the Court. It will have to be satisfied that the ''amount'' has reasonable relationship with the value of the property acquired or requisitioned and one or more of the relevant principles have been applied and further that the ''amount'' is neither illusory not it has been fixed arbitrarily, not at such a figure that it means virtual deprivation of the right under Article 31(2). The question of adequacy or inadequacy, however, cannot be gone into.

Justice Chandrachud observed: (at p. 2051, para 2136 of AIR):

The specific obligation to pay an ''amount'' and in the alternative the use of the word ''principles'' for determination of that amount must mean that the amount fixed or determined to be paid cannot be illusory. If the right to property still finds a place in the constitution, you cannot mock at the man and ridicule his right. You cannot tell him: ''I will take your fortune for a farthing''.

40. All the same, the concept of "Book-value" is an accepted accountancy concept of value. It cannot be held to be illusory.

In Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others, it has been held that even the concept of "written down Value" which is more disadvantageous to the owner than the "Book-Value" is not irrelevant.

... This Court has in terms accepted that payment of compensation on the basis of written down value calculated according to the income tax law for used machinery is not irrelevant as a principle for determining compensation. That principle appears to have been adopted for valuing used machinery though the legislation fixes compensation payable to each undertaking in round sum....

41. Accordingly, even if the impugned law had no protection of Article 31-C and tests appropriate to and available are applied, in the circumstances of this case, it cannot be said that the principles envisaged in the impugned law lead to an ''amount'' which can be called unreal or illusory. Contention (C) is accordingly held and answered against the Petitioners.

The learned Single Judge has struck down Sections 3, 4, 5, 6, 7, 7A, 15(2), 23 and 24. As indicated above, no reasons whatsoever has been given as to why these Sections are to be struck down and how they are not consistent. In paragraph 47, the same contention which has been raised regarding compensation and ouster of the jurisdiction of the Court. That was taken into consideration and that they were found to be valid by the Apex Court. So considering this case Tinsukhia Electric Supply Co. Ltd. Vs. State of Assam and others, in its entirety, the findings of the learned Judge that these sections are found to be repugnant with the Central Act has no legs to stand upon.

35. Before we proceed further, let us have a look at the contention raised before the learned Single Judge and the findings arrived at by the learned Judge. The contention as can be seen from the impugned judgment and as noted in the judgment are as follows:

i) It is further submitted that the Ordinance and the Act were passed with the consent of the Governor of the State of Assam and they were not reserved for the assent of the President nor they received the assent of the President.

ii) Even if the legislation is relatable to any one of the entries of List III, he same is to be read along with Article 254 of the Constitution of India and as the Central Legislations, namely the Act of 1910 and the Supply Act, 1948 operating the same field, as there is provision of compulsory purchase of generating stations/ undertakings and that the State Act invades the Central Acts as the field of legislation of both the Acts are same and not different.

iii) The challenge was on the ground of repugnancy at the impugned Act invades the provisions of Act 1910, Supply Act, 1948, Industrial Disputes Act as well as

Companies Act.

iv) Whether the impugned Act suffers from repugnancy in view of its alleged contradiction, inconsistency and direct clash with the Central Acts, namely the Act 1910, Supply Act, 1948, Indian Contract Act and the Industrial Disputes Act; and whether the Act is bad and liable to be set aside for non receipt of President''s assent.

v) The stand of the Petitioners is that the impugned Ordinance and the Act are without legislative competence as it transgresses the provisions of the Central Acts particularly the Act 1910 and the Supply Act 1948 and both the Ordnance and the Act were passed with the consent of the Governor of Assam and none of them were reserved for consideration of the President nor they received assent of the President.

vi) As far as generating company and licensee are concerned, the Central Govt, has made specific provisions in the Act 1910 and Supply Act 1948 for compulsory purchase of Undertaking and a detailed procedure has been prescribed u/s 6, 7, 7A, 8, 9,10 and 11 of the Act 1910 and Section 37 of the Supply Act 1948. That ''electricity'' for the purpose of legislation is enumerated in Entry No. 38 of the Concurrent List. It is further submitted that ''Electricity'' in broad term includes "generation of electricity from any source whether thermal, water, gas, wind or any other source" ; and that the definition of "generating station" mentioned in Section 2(5) of the Supply Act, 1948 also deals with the same.

36. On the other hand, the contention of the Appellant i.e. State of Assam as well as ASEB was that the impugned Act is not repugnant to the provisions of the Central Act. The impugned Act and the Central enactment in the instant case operate on two different fields without encroaching upon each other�s field, inasmuch as, the true nature and character of the impugned State Act is to acquire the Undertaking, whereas both the Central Acts i.e. Act of 1910 and the Supply Act, 1948 have made general provisions with regard to supply and use of electrical energy. Therefore, it does not suffer from repugnancy and the Act cannot be repugnant and even if there is repugnancy in certain provisions, that will not malce the whole Act void. There is no violation of Sections 3, 4, 5, 6, 7, 7A of the Act of 1910 by Section 34 of the impugned Act and as the petitioners are not licensees within the meaning of Act of 19 10 and the Government has jurisdiction and power to acquire any property for public purpose making necessary provisions for compensation and that the impugned Act has taken adequate care for payment of compensation after proper assessment by the Commission to be constituted by the authority. It is further contended on behalf of. the Appellants that the impugned Act has been enacted within the legislative competence of the State Legislature. The question of Article 254 of the Constitution of India does not arise inasmuch as the State law in its pith and substance is not repugnant to any Central Act and there is no direct conflict between the provisions of the Central Act and State Act bringing a position where

one cannot be obeyed without disobeying the other and the impugned Act and the Central Act both can stand together even though the State law may provide for certain additionallsupplementary provisions. It is the further contention of the Appellants that the impugned Act was enacted and will come under Entry 17 of the State List which deals with water power subject to the provisions of Entry 56 in List I (in the impugned judgnient in para 55 and 29 it has been referred as Entry 55 of the List I. This is a typographical mistake which should be Entry 56 of List I).

37. The findings of the learned Single Judge are as follows:

In para 27 of the unpugned judgment, the learned Judge has held that the Entry 17 of the State List deals with water supply, irrigation, canal, drainage and embankment water storage and water power project subject to the provisions of Entry 55 of List I (Water Power)-Union List. The meaning of the said entry water power is meant in its natural state and not for the purpose of generation of electricity. In para 29, it has been stated as follows:

Water power as mentioned in Entry 55 of List I is the power of water in its natural state and, therefore, it is not for the purpose of generation of electricity.

It is not understood how this findings can be arrived at inasmuch as Entry 55 of the List I relates to regulation of labour and safety in mines and oil fields. Entry 56 relates to regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expethent in the public interest.

So, this finding is somewhat anomalous. Further, the finding of the learned Judge hi para 30 that if, however, no entry in any of the three lists covers it, then it must be regarded as a matter not enumerated m any of the three lists. Then it belongs exclusively to Parliament under Entry 97 of the Union Lists as a topic of legislation.

38. Regarding Entry 97, what is to be stated is that a law cannot brought under the present Entry 97 where it clearly falls under some Entry of List II or III e.g. matters relating to ''public order''. If the law does not relate to any of the matters enumerated in List II or III, it will come under Entry 97 of List I. Where the competition is between an Entry in List II and Entry 97 in List I, the later cannot be so expansively interpreted as to whittle down the power of the State Legislature. The Entry in the State List must be given a broad and meaningful interpretation. (see International Tourist Corporation and Others Vs. State of Haryana and Others, So, without considering that aspect of the matter, this finding arrived at by the learned Judge cannot be upheld.

39. In para 35 of the judgment, the learned Single Judge came to the findings that "after examining the nature and character of the impugned Act, I am of the opinion that it is a legislation for acquisition of a generating undertaking and, therefore, falls within the purview of Entry 38 and 42 of the Concurrent List III and m this field,

power of legislation is given by Article 246 and other Acts of the Constitution.

40. In para 38 of the judgment, the learned Judge gave the following finding that the unpugned Act relates to "water power" under List II Entry 17, subject to the provision of Entry 56 of List I. Further, as stated above, the preamble of the impugned Act without ambiguity reflects that the legislation relates to the taking over the Hydro Electric Undertaking which is engaged in producing electricity. It cannot be said that the State Legislation relates to a project which engaged in utilising water power only and/or relates to subject under Entry 56 of List I. In view of these reasons, I hold that the impugned legislation is in respect of the same matter which falls under Entry 38 List III. The State legislation is competent to enact the Act under Entry 38 of List III if the State Legislation deals not with the matters which forms the subject of the earlier Central Legislatures, i.e. the Act 1910 but with other and distinct matter though subject seems to be, cognate and allied. There is no dispute that the State Legislature is competent to enact the legislation in question, but it is to be seen whether this State Legislation covers the same area of the Act 1910 and the Supply Act, 1948 or any provisions Contact Act and Industrial Disputes Act as alleged. The principle of law is that in such a situation the Central Act prevails over that of the State.

41. In para 53 the learned Judge has found that Section 6 of the Act of 1910 provides for compulsory purchase of undertaking by the licensees. This Section in fact, is a section wherein acquisition and/or transfer of undertakings of a licensee has been dealt with.

42. In para 59, it has been held as follows:

From the foregoing discussions, I hold that the Petitioner No. 1 is a "generating company" within the meaning of Section 2(4-A) of the Supply Act, 1948 and the said project is a "generating station" within the meaning of Section 2(5) and Section 26-A(2) as these Sections, inter-alia, provide that wherever the word "licensee" has been used the same will amount to reference to "generating company.

43. In para 60, it has been held as follows:

In that view of the matter, Petitioner No. 1 is a ''licensee'' for the purpose of completion, setting up generating station and supply of electricity. Due to change m policy in respect of private participation in power section Electricity (Amendment) Act, 1991 was passed and the definition of generating company in Section 2(vi) of the Supply Act, 1948 was substituted. Further, Section 28 of the Act 1910 provides that State Government can engage a non licensee for supplying energy to public with the previous sanction of the State Government.

44. In para 61, it has been held as follows:

In view of the above discussion, I hold that the writ Petitioner No. 1 is a ''licensee'' and, therefore, under the provision of the Act 1910 is entitled to notice.

45. In para 66 again the question of compulsory purchase uls 6 of the Act of 1910 has been dealt with and the findings arrived at by the learned Judge is as follows:

As submitted by the learned Counsel for the Petitioners Section 3 of the impugned Act has made nugatory the provisions made in the Companies Act, 1956 which is a Central Act and on which the Central Government alone is competent to legislate.

46. In para 69, it has been held that Sections 3 and 4 of the impugned Act has made Section 3 and 4 of the impugned Act has made Section 6 of the Act of 1910 nugatory. Similarly Section 7 of the Act of 1910 has been made nugatory by Sections 7 and 8 of the Act with regard to payment of amount therefore, these Sections are directly repugnant and inconsistent with the provisions of the Act, 1910 and the Supply Act, 1948.

47. In para 70 again reference has been made to compulsory purchase of undertakings. In para 71, it has been held as follows:

In that view of the matter, Sections 3 and 4 of the impugned Act, which deal with transfer and vesting and with general effect of vesting, are repugnant to the provisions of the Act 1910 and the Supply Act, 1948 and order provisions of the Act, and therefore, are redundant.

48. In para 72, it has been held as follows:

It is seen that Section 5(2), (3) and Section 4(6) including the explanation are repugnant to Section 7 of the Act, 1910. It is also seen that Chapter III of the unpugned Act, which deals with the payment of amount covering Sections 7 to 13 of the impugned Act, are also repugnant to Section 7(A) of the Act 1910 and Fourth Schedule of the Supply Act, 1948.

49. In para 75, it has been held as follows:

In view of the above position, it is also necessary to see whether any other sections of the impugned Act are also repugnant to the Central Act. Section 9 of the impugned Act empowers the State Government to deduct such amount, if the Govt, is of the opinion that the company has disposed of any fixed asset whether by way of sale, exchange, or incurred any expenditure liability not bonafide. In my opinion, this gives unguided power to the State Government and therefore, it is violative of Articles 14 and 19(1)(g) of the Constitution.

50. Even at the cost of repetition, we state below the principle regarding declaration of laws passed by the legislature as unconstitutional. In deciding upon the validity of laws. Judges have to bear in mind that the function of making laws has been entrusted to the elected representatives of the people and the function of the Courts is to interpret those laws and riot to act as a third or revising chamber. Certain general principles/ rules have emerged to guide the Courts in discharging their solemn duty to declare laws passed by a legislature unconstimtional:

i) There is a presumption in favour of the constitutionality and a law will not be declared unconstimtional unless the case is so clear as to be free from doubt; "to doubt the constitutionality of a law is to resolve it in favour of its validity.

If there is a reasonable doubt, it must be resolved in favour of the legislative action and their acceptance. The presumption m favour of the constitutionality of a statute and all circumstances which might lead to the statute being upheld must be presumed by the Court and must be shown not to exist by the person challenging the validity of the Act.

ii) Where the validity of a statute is questioned and (sic) are two interpretations, one of which would make the law valid and the other void, the former must be preferred and the validity of the law upheld.

iii) The Court will not decide constitutional questions if a case is capable of being decided on other grounds.

iv) The Court will not decide a larger constitutional question than is required by the case before it.

v) The Court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it.

vi) A Statute cannot be declared unconstimtional merely because in the opinion of the Court it violates one or more of the principles of liberty, or the spirit of the Constitution, unless such principles and that spirit are found in the terms of the constitution.

vii) In pronouncing on the constitutional validity of a statute, the Courts is not concerned with the wisdom or unwisdom, the justice or injustice of the law. If that which is passed into law is within the scope of the power conferred on a Legislature and violates no restrictions on that power, the law must be upheld whatever a Court may think of it.

viii) Ordinarily, Courts should not pronounce on the validity of an Act, or part of an Act, which has not been brought into force, because till then the question of validity would be merely academic.

51. The next question which is to be considered is that what is colourable legislation. A legislature lacking legislative power or subject to a constitutional prohibition may frame its legislation so as to make it appear to be within its legislative power or to be free from the constitutional prohibition. Such a law is "colourable" legislation, meaning thereby that while pretending to be a law in the exercise of undoubted power, it is in fact a law on a prohibited field.

52. This question of colourable legislation came up for consideration in K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa, . The Appellant''s contention was that the Orissa Agricultural Income Tax (Amendment) Act, 19S0 was a fraud,

colourable and its main object was to reduce the compensation payable for the acquisition of land contrary to the requirements of the Constitution with regard to payment of compensation. It was observed by the Supreme Court that the doctrine of colourable legislation did not involve any question of bonafide or malafide on the part of the legislature. The whole doctrine of colourable legislation resolves itself into the question of competency of a particular legislature to enact a particular law. Gajapati''s case has been repeatedly cited and followed by the Supreme Court. The Supreme Court following the Gajapati's case laid down the principle for determining the colourable legislation.

53. In interpreting a law, we must bear in mind the caution struck by Lord Daglock in W. Devis and Sons Ltd v. Atkins, reported in ;P77 AC 931. Lord Diplock has pointed out in a graphic phrase refusing to construe a provision which would convert it "into a veritable rogue''s charter".

54. In considering the powers of the Indian Legislature, the Privy Council, in R.V. Burah laid down a fundamental principle for the interpretation of a written Constitution. In a classic passage. Lord Selborne said:

The Indian Legislature has powers expressly limited by the Act of Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition, or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

55. No decision of the Privy Council has thrown any doubt on the soundness of Burah''s case. On the contrary, it has been relied upon in case after case from the Dominions. In His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala, the majority of Judges reaffirmed the correctness of the principle laid down in Burah''s case. In Kesavananda V. Kerala (supra) Ray, J. Palekar, J., Khanna J., Mathew J., Beg J., Chandrachud J., affirmed the principle Dwivedi J. affirmed the principle without mentioning Burah''s case by name. But the view expressed by Hedge and Mukherjea JJ. that Burah''s case was only an authority on delegated legislation and not in the interpretation of a written Constitution. But it is the majority decision which is binding on us.

56. Regarding competency of legislative power, we should bear in mind that whether the legislature is in possession of that power or not, the widest meaning must be given to the words used in interpreting the grant of legislative power, for to give any but the widest meaning is to define or delimit words which the constitution has not defined or delimited. Any one denying a particular power, or alleging a limitation on a power, must show that the power does not exist, or must show such limitation either expressly or by necessary implication from the terms of the Constitution. A strict construction of an ordinary law is based upon the presumption raised by the Courts that the Legislature does not intend what it has not clearly expressed. No presumption of a limited grant of power can be made by a Court, because to limit the grant of Legislative power is a constituent and not a judicial function. A distribution of legislative powers between the Union and the States in mutually exclusive at times gives rise to the question whether a law purporting to be made under one or more legislative entries in an authorised list is in fact legislation under one or more entries m the forbidden list. When such questions arose, the Privy Council evolved the rule of pith and substance as a rule of interpretation for their solution. When such a question arose before the Federal Court in AIR 1941 47 (Federal Court) Gwyer C.J. held in enacting those provisions the British Parliament had the provisions as interpreted by the Judicial Committee and he found that there was an exact analogy to the Indian Act and accordingly he held that the doctrine of pith and substance evolved by the Privy Council with reference to the Canadian Constitution can be applied under the G.I. Act of 1935. This was approved by the Privy Council in Prafulla Kumar Mukherjee v. Bank of Khulna, reported in AIR 1947 P.C. 60. There it was argued that though the doctrine of pith and substance may be applicable to Canada and Australia, in India the difficulty in dividing legislative powers had been foreseen. Accordingly, there and not two Lists had been prepared in order to cover the whole field with a definite priority attributed to the Lists so that anything contained in List I was reserved for the Federal Legislature and however incidentally it may be touched upon in an Act of the Provincial Legislature that Act was ultra vires in whole or part as the case may be. The Privy Council rejected this argument observing that it was not possible to make so clean a cut between the powers of the various legislatures and that they were bound to overlap. Lord Porter observed:

As Sir Maurice Gywer C.J. said in Subramanyam Chettiar case: ''it must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely inter-twined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statutes is examined to ascertain its ''pith and substance'', or its ''true nature and character'', for the purpose of determining whether it is

legislation with respect to matters in this list or in that." Their Lordships agree that this passage correctly describes the grounds on which the rule is founded, and that it applies to Indian as well as to Dominion Legislation.

Prafulla Kumar Mukherjee''s case has been repeatedly approved by the Supreme Court as laying down the correct rule to be applied in resolving conflicts which arise from overlaping powers in mutually exclusive lists. It may be added as a corollary of the pith and substance rule that once it is found that in pith and substance an impugned Act is a law on a permitted field any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act. The case before the Federal Court, it was later on approved by the Privy Council and accepted as the correct law by the Supreme Court. The Madras Agriculturists Relief Act, 1938 contained provisions to scale down all debts secured or unsecured due from an agriculturists whether payable under a decree or order of Civil or Revenue Court or otherwise with certain exceptions. The Act contained no reference to promissory notes or any form of negotiable instruments. The Federal Legislature had exclusive power to legislate with respect to cheques, bills of exchange, promissory notes and like instruments (List I, Entry 28), and the provisions of the Madras Act were in conflict with the existing law under Entry 28, namely the Negotiable Instruments Act, 1881. It was, therefore, contended that the Madras Act was wholly void or at any rate, was void in so far as it affected debts evidenced or secured by promissory notes or negotiable instruments. The Federal Court held that the Madras Act was not in pith and substance a law with respect to negotiable instruments or promissory notes. The fact that many, or even most, of the debts were in practice evidenced by negotiable instruments or promissory notes was an accidental circumstance which could not affect the question.

57. In India, although an attempt was made to make the three lists mutually exclusive, it became necessary to provide for the contingency of a conflict between the powers of the Union and the powers of the State. Accordingly, Article 246 (1) and (2), and Article 254(1) provide that to the extent to which a State law is in conflict with or repugnant to a Union law, which Parliament is competent to enact the Union law shall prevail and the State law shall be void to the extent of its repugnancy. Such a provision is necessary because an absurd situation would result if two inconsistent laws, each of equal validity, could exist side by side within the same territory. This rule as to the prevalence of the Union over the state law in case of conflict applies not only to Parliament''s exclusive power to legislate in respect of matters in List I but applies equally to its power to legislate in respect of matters in List III, subject to Article 254(2). However, an attempt must be made to see whether a conflict can be avoided by construction and if such a reconciliation is impossible then only will the non-obstante clause operate and the federal power prevail, for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship. See (1939) FCR 18.

58. The next thing what is to be considered as what is repugnancy. In order to decide that two questions arise -(1) Is the law made by Parliament is valid law? If it is not, no question of its repugnancy to a State law can arise. (2) If however, it is a valid law, the question as to what constitutes repugnancy directly arises. The Supreme Court has considered the question of repugnancy in a large number of cases and in Deepchand v. U.R, reported in 1959 SCC 648 Subba Rao, J. has laid down the law as follows:

Nicholas in his Australian Constitution, 2nd Edition, page 303, refers to three tests of inconsistency or repugnancy:

''(1) There may be inconsistency in the actual terms of the competing statutes ;

(2) Though there may be no direct conflict, a State law may be inoperative because the Commonweatlh law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

(3) Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter.

This Court in Ch. Tika Ramji v. U.P accepted the said three rules, among others as useful guides to test the question of repugnancy. In Zaverbhai Amaidas v. Bombay this Court laid down a similar test. At page 807, it is stated:

The principle embothed in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over dial of the State.

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles:

(1) Whether there is direct conflict between the two provisions;

(2) Whether Parliament intended to lay down as exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and

(3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

59. In M. Karunanidhi Vs. Union of India and Another, Fazal All J. reviewed the authorities on "repugnancy" under Art. 254 and held that the following propositions emerged from decided cases:

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3. That where the two statutes occupy a particular field, but there is room or possibility both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.

Applying these principles, Fazal Ali J. held that there was no repugnancy between the provisions of the Tamil Nadu Public Mem (Criminal Misconduct) Act and the Indian Penal Code or the Prevention of Corruption Act.

60. If there is an apparent of real conflict between two provisions of the Constitution, how is that conflict to be resolved. The problem thus raised is not peculiar to the interpretation of a constitution but is common to the interpretation of all statutes, the principles for resolving such a conflict are well known and are to be found in standard books on statutory construction, but the Supreme Court of India has compendiously described them as "the principle of harmonious construction". And as such the conflict would be resolved by applying the principle of harmonious construction as compendiously described by the Supreme Court. There is no conflict between the two provisions when objects and subjects are different.

61. In the background of these laws, now let us have a look at the findings arrived at by the learned Single Judge. The findings of the learned Judge in para 27 of the judgment is that- "In the said entry water power is meant in its natural state and not for the purpose of generation of electricity". The learned Judge in arriving at this finding gave a restricted meaning to the words "water power" which cannot be done m view of the law as indicated above. In Oxford Advance Learner''s Dictionary of Current English by A.S. Hornby the meaning of the words "water power" is-"Power obtained from flowing or falling/used to drive machinery or generate electric current.

In the Black''s Law Dictionary, the meaning of the words "water power" is given-The use of water for power according to common understanding means its application to a water wheel to the end that its energy under the specified head and fall may be utilized and converted into available force.

In the Words and Phrases Volume 44A where water power is defined as follows:

Water power" is not alone the water flowing in the stream, but includes, even if undeveloped, the site of the dam and the elevation at or from which power may be generated by the falling water.

So, the finding of the learned Single Judge that "water power" is meant in its natural state and not for the purpose of generation of electricity cannot be deemed to be a correct finding as referred to in para 27 of the unpugned judgment. Once this finding is arrived at by accepting the meaning of "water power" it must be deemed that the impugned Act was passed by legislature having competence to do so. As pointed out in a recent judgment by the Apex Court in State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., held that a legislation can be struck down by the Court on two grounds alone-(i) Lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the constitution or of any other constitutional provision. There is no third ground. It was further pointed out by the Supreme Court in that case that no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act.

62. As we have held m the instant case that this legislation is covered by Entry 17 in List in the question regarding legislative incompetence does not arise. Even if it is held that it falls under Entry 38 of the List III (Electricity) or Entry 42 of List IQ (Acquisition and Requisition of Property) the question which will arise is that what is the pith and substance of the inpugned legislation. The pith and substance of the impugned legislation is a legislation on water power and the question of repugnancy does not arise. Nothing has been shown to us that this law is in direct conflict with any of the Central laws in the sense that one cannot be obeyed without disobeying the order as pointed out by the Supreme Court in Zaverbhai Amaidas Vs. The State of Bombay, hi that case in para 8 of the judgment the Supreme Court held as follows:

The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter. If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254(2) will have no application. The principle embothed in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

63. It is not found that both the statutes cannot stand together or cannot operate in the same field as pointed out by the Supreme Court in the case of M. Karunanidhi (supra). Nothing has been shown to us that the entire field is occupied by the Central Legislation and that Parliament initiated its legislative power for that, as pointed out by the Supreme Court in Vijay Kumar Sharma and others Vs. State of Karnataka and others,

64. We find that the impugned legislation has no conflict with any of the Central Laws and in this connection it may be pointed out that the pleading with regard to this is absolutely vague and without particulars. Nothing has been shown and/or

pleaded how this legislation shall come ii conflict with the Central legislation holding the same field. Once we came to this decision, it must be held that the impugned Act to be a valid piece of legislation and we further hold that it is not repugnant with any of the Central Acts. The finding of the learned Judge on other points are not necessary to be considered, but yet as the matter was argued at length, we will discuss that aspect of the matter. The learned Judge again and again refers in the judgment that there is provision for compulsory purchase u/s 6 of the Indian Electricity Act, 1910. Section 6 gives an option to the State Electricity Board to purchase the undertaking. It is not a case of compulsory purchase, but an option to purchase of undertaking. Be that as it may, the learned Judge is correct in holding that Section 6 of the Act of 1910 merely provides procedure and manner to exercise an option. Section 6 merely empowers the State Electricity Board to exercise the option.

65. Mr. P.G. Baruah, learned Counsel for the State of Assam wanted to make a point that the learned Judge was wrong in saying that it is a case of compulsory purchase and word ''compulsory'' has a different meaning than the word ''Option'' and for that purpose he relies on the Concise Oxford Dictionary, 9th,Edition and in that meaning of the word ''compulsory'' and ''compulsory purchase'' is given as follows:

Compulsory-required by law or a rule (it is compulsory to keep dogs on leads). 2. Essential necessary.

Compulsory purchase- the enforced purchase of land or property by a local authority etc. for public use.

66. In Section 6(7) of the Act of 1910 there is a State Amendment and that amendment reads as follows:

In its application to the State of Assam, in Section 6(7) for the words "the purchase price of the undertaking", the words "an amount" substituted and the words, brackets, figure and punctuation marks "or as the case may be, Sub-section (3) of that Section.

67. Section 6 of the Act of 1910 has laid down the procedure for purchase of undertakings where the period of licensees has expired. Such purchase is a contractual term under Clause 10 of Schedule-III of the Electricity Rules. Thus Section 6 applies only to licensees and not to sanction holders. The question is that whether the Petitioner is a licensees as defined under the Act of 1910. Admittedly there is no licensees in favour of the Petitioner. Whether by virtue of Section 26-A read with Section 2(4-A) of the Electricity (Supply) Act, 1948, the Petitioner''s company is a generating company or not, that will be decided later on.

68. Let us have look at Section 2(4-A) of the Electricity (Supply) Act, 1948. Generating Company means a Company registered under the Companies Act, 1956 and which has among its objects the establishment, operation and maintenance of generating

stations. Section 26-A of tile Electricity (Supply) Act, 1948 provides for applicability of the provisions of Act 9 of 1910 to Generating Company and that Section is quoted below m its entirety to resolve the dispute in the matter.

26-A. Applicability of the provisions of Act 9 of 1910 to Generating Company-(1) Notwithstanding anything contained in Sub-section (2), nothing in the Indian Electricity Act, 1910 (9 of 1910) shall be deemed to require a Generating Company to take out a licence under that Act, or to obtain sanction of the State Government for the purpose of carrying on any of its activities.

(2) Subject to the provisions of this Act, Sections 12 to 19 (both inclusive) of the Indian Electricity Act; 1910 (9 of 1910), and clauses XIV to XVII (both inclusive) of the Schedule there to, shall, as far as may be, apply in relation to a Generating Company as they apply in relation to a licensee under that Act (hereafter to this-Section referred to as the licensee) and in particular a Generating Company may, in connection with the performance of its duties, exercise-

(a) all or any of the powers conferred on a licensee by Sub-section (1) of Section 12 of the Indian Electricity Act, 1910 (9 of 1910), as if-

(i) The reference thereto to licensee were a reference to the Generating Company;

(ii) the reference to the terms and conditions of licence were a reference to the provisions of this Act and to the articles of association of the Generating Company; and

(iii) the reference to the area of supply were 4 reference to the area specified under Sub-section (3) of Section 15-A to relation to the Generating Company;

(b) all or any of the powers conferred on a licensee by Sub-section (1) of Section 14 of the Indian Electricity Act, 1910 (9 of 1910), as if-

i) the reference therein to licensee were references to the Generating Company; and

ii) the Generating Company had the powers of a licensee under the said Act.

(3) The provisions of Section 30 of the Indian Electricity Act, 1910 (9 of 1910) shall not apply t6 the transmission or use of energy by a Generating Company.

(4) For the removal of doubts, it is hereby declared that Sections 31 to 34 (both inclusive) of the Indian Electricity Act, 1910, shall apply to a Generating Company. A bare perusal of this Section will show that even if it is held that the petitioner's company is a generating company, which is not necessary to be decided for this particular case, benefits of Section 6 of the Act of 1910 shall not be available to a generating company because Section 6 opens with "Where a licence has been granted to any person " ; so, the fmding of the learned Judge that the Section 6's benefits will be available to the petitioner's company is an erroneous finding. In the same manner, the benefit of Section 7 of the Act of 1910 will not be available to

the petitioner's company. Because it refers to Sections 5 and 6. The benefits of Section 7A of the Act of 1910 also shall not be available because it speaks of an undertaking of a licensee. The legislature in its wisdom made certain provisions of Act of 1910 applicable to a generating company in Section 26A. So, this contention that the impugned Act is in violation of the provisions of the Act of 1910 and the Supply Act, 1948 has no legs to stand upon. As pointed out above, Sections 6, 7, 7A, 8, 9, 10 and 11 of the Act of 1910 does not apply to a generating company.

69. Now let us have a look at Section 37 of the Electricity (Supply) Act, 1,948. Section 37 provides for purchase of generating stations or undertakings or main transmission lines by the Board. So, this section also is not applicable in the present case. So, the finding of the learned Judge that the impugned Act is repugnant to Sections 6,7,7A, 8,9,10 and 11 of the Act of 1910 and Section 37 of the Electricity (Supply) Act, 1948 is an erroneous findings inasmuch as the benefits of these sections are not available to a generating company.

70. Regarding it being repugnant to the Industrial Disputes Act, Contract Act and/or Companies Act, there is absolutely no definite and specific pleading m the writ application and nothing has been shown to us how and why the provisions of the impugned Act are repugnant to the provisions of those Central Acts. The finding of the learned Judge in para 66 regarding Section 6 of 1910 as indicated above will not apply to a generating company. Further m the last portion of that paragraph, the finding that Section 3 of the impugned Act has made nugatory the provision made in the Companies Act, 1956 is a finding without any reason as to how and why it has made nugatory the provisions made in the Companies Act, 1956.

71. The next question is that whether this generating company will have the option to the purchase of undertaking. Section 6 of the Act of 1910 provides for the purchase of undertaking. Section 6 came up for consideration before the Apex Court in the The Gujarat Electricity Board Vs. Shantilal R. Desai, where the Apex Court pointed out that use of the word ''option'' quantifies that two course are open to the authority i.e. either to purchase an undertakings or to renew the licence. So, that question shall not arise in the case of a generating company and as pointed out above, the benefits of Section 6 shall not be available to a generating company in view of Section 26-A of Electricity (Supply) Act, 1948. As there is no question for issue of licence to generating company under the Act of 1910 the question of renewal of licence does not arise. So, this benefit cannot be made available to a generating company even if the Petitioner''s company is held to be a Company as such.

72. Next let us scrutinise whether by the M.O.U. and Deed of Assignment the Petitioner company acquired any absolute right or title to the properties as mentioned in the deed. The decision on this is necessary as the Petitioner claims that rights flowed to them from the M.O.U. and deed of Assignment. The M.O.U. is at best a mere contract, and this did not comply with the requirement of Article 299 and as such it will not bind the Government. Clause (1) of Article 299 provides the

formalities of Contract for and on behalf of the Government. There was no compliance with those formalities. As pointed out by the Apex Court in Timber Kashmir Private Ltd. Vs. The Conservator of Forests, Jammu, the provisions of this clause are mandatory. If non-compliance with any of the conditions in the clause is patent on the face of the connect as in this case such a contract is not binding against or not enforceable by or against the Government. Of course, the equitable doctrine of promissory estoppel may be available. But this doctrine cannot be utilised/applied against the exercise of the legislative power of the State See Jit Ram Shiv Kumar and Others Vs. State of Haryana and Others, nor can be invoked to prevent the Government from acting m discharge of its duty under the law.

73. What is assignment in the context of the present deed? Assignment means transfer set Oriental Metal Pressing Works (P.) Ltd. Vs. Bhaskar Kashinath Thakoor and Another, hi Black''s Law Dictionary assignment has been defined as the act of trasferring to another all or part of one''s property, interest of rights. It is a transfer or making to another of the whole of any property real or personal. It includes transfer of all kinds of property. The Dictionary meaning of the word is alienate or transfer. Section 10 of the Conti-act Act provides what agreements are contract. It further provides that if any law requires such a contract to be registered, it will require registration to make h enforceable. Section 17 of the Registration Act mentions the documents that are required to be registered. It is not every agreement that is binding on a party to if simply because he agreed to it. The existence of a registered document is essential for creation of tide except as enacted in Section 53A TP Act. The deed of assignment in the case in hand was not registered, though it was essential and though the Petitioner was aware of it and this also has been taken as a defence m the affidavit-in-opposition of ASEB. In the absence of registration no tide passed to the petitioner with regard to the project, m the eye of law it continued to be the property of ASEB.

74. Mr. Jain, learned Counsel for respondents makes also the following submission:

That Barapani is an Inter State river and as such the State of Assam had no jurisdiction to make any law with regard to it, Before we get to that aspect of the matter, it may be stated herein that there was no pleading with regard to this plea; there was no argument before the learned Judge on this point and also there was no finding save and except reference to the judgment of the Apex Court in Cauvery Water Disputes Tribunal reported in In the matter of : CAUVERY WATER DISPUTES TRIBUNAL, It may be stated herein that the Petitioner herein got the benefit of water power concession u/s 72 of the Electricity (Supply) Act, 1948 as is evident from the MOU and now having availed that benefit, while for its alleged default, the Government has passed the impugned legislation, it cannot mm back and challenge the same. The law is that a point not taken in a writ petition will not be permitted to be taken at the time of hearing of the appeal. This question which is sought to be raised by Mr. Jain, learned Counsel is not a pure question of law, but a question to

be decided from the facts and as such this argument/defence by Mr. Jain cannot be allowed.

75. Let us have a look at AIR 1992 SC (Supra) the case cited by Mr. Jain, learned counsel for Respondents in support of the above contention. In that particular case, by exercising the power undo Section 4 of Inter State Water Disputes Act, 1956, the Central Govt, constituted a Water Disputes Tribunal called Cauvery Water Disputes Tribunal and that was for the adjudication of the water disputes regarding Inter-State river Cauvery and in para 17 of the judgment the Apex Court pointed out as follows: (the Apex Court quoted the Entry 56 of the Union List and Entry 17 of the State List)

An examination of both the Entries shows that the State has competence to legislate with respect to all aspects of water including water flowing through inter-state rivers, subject to certain limitations, viz. the control over the regulation and development of the inter-State river waters should not have been taken over by the Union and secondly, the State cannot pass legislation with respect to or affecting any aspect of the waters beyond its territory. The competence of the State legislature in respect of inter-State river waters is, however, denuded by the Parliamentary legislation only to the extent to which the latter '' legislation occupies the field and no more, and only if the Parliamentary Legislation in question declares that the control of the regulation and development of the inter-State rivers and river valley''s is expethent in the public interest, and not otherwise. In other words, if a legislation is made which fails to make the said declaration it would not a fact the powers of the State to make legislation m respect of inter-State river Water under Entry 17.

In the case m hand, there is no legislation by the Union of India and as such this argument of Mr. Jain, learned Counsel has no legs to stand upon and it stands rejected.

76. The next argument advanced by Mr. Jain, learned Counsel is that one cannot be a judge in his own case and for this plea, he submits that there is pleading in para 52 of the writ petition. A bare perusal of 152 of the writ petition will show that the is no such pleading. Further this contention of Mr. Jain is not factually correct inasmuch as in the unpugned Act provisions have been made for adjudication of different claims and in pursuance of it, the writ Petitioner filed application before this Court u/s 8 and 11 of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator and already it is submitted that a Commission has been appointed. Section 14(1) makes a provision for the Commission headed by a Sitting or retired High Court Judge and the power of the Commission has been laid down in that particular section. So, this argument that the authority has become a judge in its own case also cannot be accepted, hi the written argument submitted on behalf of the learned Counsel for Respondents, the same plea which were advanced before the learned Single Judge have been reiterated and the same cases relied on before

the learned Judge have been placed before us.

77. Let us have a look at the cases relied on by the Respondents (Petitioners in Civil Rule) in the judgment of the learned Judge. It is not necessary to consider all the cases. We herein mention some of them-

1. AIR 1970 SC 999 The Second Gift Tax Officer, Mangalore v. D.H. Hazareth where the Apex Court considered the doctrine of pith and substance and that will be taken note of.

2. The Rajahmundry Electric Supply Corporation Ltd. Vs. The State of Andhra, That was a case where an Electric Undertaking belonging to the Appellant was declared to have vested under the Govt, on the date specified therein and that appeal was allowed holding that in pith and substance it was a law for the acquisition of electrical undertakings and as such it was not within the legislative competence of the State Legislature. That is not the case m hand. In the instant case, there is no electrical undertakings and as a matter of fact, as will be evident from M.O.U. and the deed of assignment which cannot be deemed to be valid in the eye of law on failure to register it as required and also the M.O.U. which was signed being not in compliance with Article 299 of the Constitution cannot give any valid title to the Petitioner''s company. In spite of it, by the impugned Act provisions have been made for payment of compensation to the Petitioner''s company for the works done by them to be assessed m accordance with law and in accordance with the procedure provided therein by an independent Commission. There is no question of cancellation of licensee or acquisition of undertakings in the present case.

3. In State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others, That is a case where the question involved was whether after the coming into force of the All India Council for Technical Education Act, 1987 the State Government has power to grant and withdraw permission to start a technical institution as defined in the Central Act. Earlier to it, there was another Act in Tamil Nadu i.e. Tamil Nadu Private College (Regulation) Rules, 1976 along with the rules made thereunder and there was another Act i.e. Madras University Act, 1923. The question arose that whether there was conflict between the Acts. There reliance was placed in Osmania University Teachers'' Association Vs. State of Andhra Pradesh and Another, The Supreme Court found that both are on the same field and in case of repugnancy between legislation made by Parliament and that made by State legislature on the subject covered by List III, former shall prevail and to that extent the later shall be void unless it is saved by Article 254(2). in the case before the Apex Court in State of T.N. and Another Vs. Adhiyaman Educational and Research Institute and Others, In para 43 of the judgment held as follows:

As a result, as has been pointed out earlier, the provisions of the Central statute on the one hand and of the State statutes on the other, being inconsistent and, therefore, repugnant with each other, the Central statute will prevail and the

de-recognition by the State Government or the disaffiliation by the state University on grounds which are inconsistent with those enumerated in the Central statute will be inoperative.

So, this case does not help the Respondents inasmuch as that is not the position in the case in hand. The other cases referred are also on the same principle and that aspect of the matter regarding pith and substance and principles under Article 254 have been considered m detail in the judgment. In para 45 of the judgment reference has been made regarding the case of T. Barai v. Henry Ah Hoe and Anr. reported in T. Barai Vs. Henry Ah Hoe and Another, where the Supreme Court considered the scope of Article 254 of the Constitution of India. The next one is Pt. Rishikesh and Another Vs. Salma Begum (Smt), . That is also on the same principle regarding Article 254. The third one is State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., That is a case regarding legislative competence. It is not necessary to discuss the other cases cited at the bar on behalf of the Respondents. They are on the same points and that aspect of the matter has been considered in detail in the judgment.

78. Mr. Jam, learned Counsel for Respondents argued that the impugned Act is in violation of Article 31 A(1)(d) of the Constitution of India. Article 31A(1)(d) is with regard to extinction or modification of voting rights of Directors or "shareholders, managing agents, secretaries and treasurers, managing directors, directors or managers etc. The amendment seeks to protect any such law and provides that no question of infringement or any fundamental right will arise if such rights are affected by any law. One can have a look vy4th regard to the passage and misuse as detailed in Ram Krishna Dalmia v. Mr. Justice S.R. Tendulkar reported in 1959 BomLR . The present Act has got nothing to do with Article 31A(1)(d). So, this contention is devoid of any merit.

79. Another argument is advanced by Mr. Jain, learned Counsel for Respondents relying on 0. Hood Phillips'' Constitutional and Administrative Law, Sixth Edition at page 596 which is as follows:

In so far the common law powers of public authorities are part of the royal prerogative the jurisdiction of the Courts over them was asserted in such cases as the case of Monopolies (1602), the case of Proclamation (1610) and the Zamora. In Laker Airways Ltd. v. Department of Trade, Lord Denning M.R. asserted that a discretionary prerogative power has to be exercised for the public good and the Court was entitled to see that the power was "used properly and not improperly or mistakenly," a dictum which has been described as heralding "new vistas of judicial control. As regards the innumerable statutory powers, the question is one of interpretation of the statute concerned. The acts of a competent authority must fall within the four comers of the powers given by the legislature. The Court must examine the nature, objects and scheme of the legislation, and in the light of that examination must consider what is the exact area over which powers are given by

the section under which the competent authority purports to act. The difficulties which may arise are illustrated by Daymond v. South West Water Authority, where the House of Lords held, by a majority of three to two, that a power to fix such charges as the anteriority may "think fit" did not authorise the levying of a charge for sewage services on an occupier of property which was not connected to a public sewer.

The learned Author has pointed out how and when Court may interfere. He has pointed out that inter alia on following grounds Court may interfere (i) abuse of power, ii) umeasonable use of power, iii) violation of principle of justice and in these heads, he mentions two grounds:

a) A man may not be a judge in his own case;

b) Audi alteram partem.

Lastly, he mentions fairness. Nothing has been brought home that the impugned Act is to be struck down on the anvil of the principles noted by the Author. So, this contention fails.

80. Accordingly, we hold as follows:

i) the impugned Act is within the legislative competence of the State Legislature;

ii) The impugned Act does not violate any of the provisions of the Central Acts and the pith and substance of the Act is absolutely different from any of the Central Acts to which repugnancy is claimed;

iii) that the impugned Act is not a colourable piece of legislation.

81. In view of that matter, both the Writ Appeals are allowed. The unpugned judgment dated 19.7.97 passed by the learned Single Judge in CRs 283 and 6 of 1997 shall stand set aside and quashed. We hold that Bharat Hydro Power Corporation Limited (Acquisition of Transfer and Undertakings) Act, 1996 is a valid'''' piece of legislation.