

(1968) 01 CAL CK 0010

Calcutta High Court

Case No: Civil Rule No. 3369 (w) of 1966

Sudhangshu Mazumdar and
Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision: Jan. 3, 1968

Acts Referred:

- Constitution of India, 1950 - Article 1, 1(3)(c), 11, 12, 13

Citation: 72 CWN 349

Hon'ble Judges: D. Basu, J

Bench: Single Bench

Advocate: Arun Kumar Dutt, Amar Prosad Chakraborti and Amar Nath Dhole, for the Appellant; B. Sen, Nani Coomar Chakraborti and Salil Dutt for Respondent No. 1, Ajit Kumar Dutt (Advocate General) and S.K. Roy Chowdhury, for the Respondent

Judgement

D. Basu, J.

The litigation before me has a history behind it starting from 1959, when the first Petition under Art. 226 of the Constitution, brought by a resident of the territory known as "Berubari" was dealt with by Sinha, J., (as he then was) of this Court in (1) Nirmal Bose v. Union of India, AIR 1959 Cal. 506. This petition was brought by one Nirmal Bose shortly after the Nehru-Noon Agreement (hereinafter referred to as "the Agreement") was executed on the 10th of September, 1958 (the relevant extracts from this Agreement are appended to the Constitution (Ninth Amendment) Act, 1960). This Agreement, in short, pro-vided for the division of the Berubari Union No. 12 which was in the possession of the Union of India into two halves, -- one of which was to go over to Pakistan. The petitioner complained that if this Agreement were implemented without legislation by the Indian Parliament, it would be depriving him of his property without legislation, which would be in contravention of the Constitution. The Court held that the Petition would have succeeded if the Petitioner could prove that Indian territory was going to be ceded without

legislation by the Indian Parliament, but the materials presented by the Petitioner were insufficient to hold that the demarcation contemplated by the Agreement involved a cession of Indian territory to Pakistan as distinguished from the settlement of a boundary-dispute. Subsequent to this decision, a controversy arose as to whether any legislation or constitutional amendment was necessary to implement the said Agreement and this led to a reference under Article 143(1) of the Constitution to the Supreme Court on the above question which was answered by the Court by its opinion reported in (2) [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#), -- In re. Berubari Union and Exchange of Enclaves. The Supreme Court opined that the Agreement in question involved a "cession of a part of the territory of India in favour of Pakistan" (p. 861, *ibid*) and that this could be effected only by an amendment of the Constitution under Article 368 and not by a mere Agreement. Parliament, accordingly, enacted the Constitution (Ninth Amendment) Act, 1960, on the 28th December 1960.

2. The substance of this amendment was that the portion of the Berubari Union (one of the items included in the said Agreement), which was sought to be ceded to Pakistan, was to be demarcated and after this demarcation was made the Central Government would notify a date as the "appointed day" from which the transfer would become effective and from that day item No. 14 of the First Schedule to the Constitution, which describes the territories of the State of West Bengal, would stand amended so as to exclude from the existing territories of the State, "the territories referred to in Part III of the First Schedule to the Constitution (Ninth Amendment) Act, 1960."

3. In short, the demarcation was to be made for the purpose of excluding from the territories of the State of West Bengal that portion of the Berubari Union which was sought to be ceded to Pakistan by the said Agreement. It would, in this context, be useful to refer to the definitions of "appointed day" and "transferred territory" as they appear in the Constitution (Ninth Amendment) Act, 1960 :

"(a) "appointed day" means such date as the Central Government may, by notification in the Official Gazette, appoint as the date for the transfer of territories to Pakistan in pursuance of the Indo-Pakistan agreements after causing the territories to be so transfer-red and referred to in the First Schedule demarcated for the purpose and different dates may be appointed for the transfer of such territories from different States and from the Union territories of Tripura;"

"(c) "transferred territory" means so much of the territories comprised in the Indo-Pakistan agreements and referred to in the First Schedule as are demarcated for the purpose of being transferred to Pakistan in pursuance of the said Agreements."

4. The physical division of the Berubari Union in terms of the Agreement and a demarcation of the divided portions was, accordingly, necessary in order to implement the Constitution Amendment Act. Upon the passing of the Constitution Amendment Act, some of the inhabitants of the Berubari Union brought a petition under Article 226 of the Constitution, challenging the legality of the attempted transfer of the Berubari Union, as referred to in the said Agreement and the Constitution Amendment Act, on the ground, inter alia, that the division envisaged therein was impracticable and prayed for the issue of a writ of mandamus, commanding the Respondents, including the Union of India and the State of West Bengal, to forbear from proceeding any further with the survey and demarcation of the area of the Berubari Union or to make over possession of any portion of the Union to Pakistan. The matter went up to the Supreme Court and the dismissal of the petition was upheld by the Supreme Court in the case of (3) [Ram Kishore Sen and Others Vs. Union of India and Others \(UOI\)](#), which decision was pronounced on the 11th August 1965.

5. The present Petitioners, who are also residents of the same Union, have now brought another petition under Article 226 of the Constitution on the 11th June 1966, challenging the validity of the proposed demarcation as un-constitutional on the grounds, inter alia, that they would be deprived of their rights of citizenships which they have acquired under the Constitution of India and they would be deprived of their property, comprising their hearth and home, without payment of compensation, as required by Article 31 (2) of the Constitution. It was alleged in the petition (paragraphs 28, 29) that the Respondents (the Union of India, through its Commonwealth Secretary; the State of West Bengal; the Collector of Jalpaiguri; the Commissioner of the Presidency Division) were going to start survey work from the 9th June 1966, and to construct 100 boundary pillars in the Berubari Union to effect the demarcation and to complete the transfer as envisaged by the Constitution (Ninth Amendment) Act.

6. Since Rule nisi was issued by this Court only upon hearing the Respondents upon notice of the application and the learned Advocate-General insisted upon reasons being given in the order of the Court, such reasons were given, indicating the issues which would have to be answered at the hearing of the Rule. Since the arguments of the parties have proceeded on the basis of the questions so raised in the interlocutory judgment reported in (4) [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), it would be convenient to take up those issues, with reference to the observations made and the materials referred to in the different paras, of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), which should be treated as part of the present judgment.

7. A most peculiar feature of this case is that at the hearing, the learned Advocate-General, appearing for the State of West Bengal (Respondent No. 2) supported the Petition without filing any affidavit. In view of this, the word

"Respondent" will hereinafter refer to the Union of India.

8. The constitutional question to be answered in this Rule is--

Whether compensation under Article 31(2) of the Constitution of India is to be provided for the petitioners before the demarcation, in implementation of the Constitution (Ninth Amendment) Act, takes place?

9. In order to answer this question it is necessary first to determine what is proposed to be done by the Agreement and the Constitution (Ninth Amendment) Act by way of implementing it. In paragraph 26 of (4) [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), I have pointed out that the Supreme Court has definitely laid down in (2) [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#), that the proposed transfer of half of Berubari was not "a mere ascertainment or determination of the boundary" between India and Pakistan but "amounted to cession or alienation of a part of Indian territory" (p. 865) "in a spirit of give and take in order to ensure friendly relations between the parties" (p. 853). This proposition not having been challenged at the hearing of the Rule before me, we must proceed on the premise that the Agreement and the Ninth Amendment Act constitute a cession or transfer of a part of Indian territory to Pakistan. The question before me now is whether Article 31(2) of the Constitution must be complied with before giving effect to the Ninth Amendment Act or, in other words, before completing the transfer proposed.

10. The answer to the above question involves an interpretation of Article 31(2), but before that certain other preliminary questions raised on behalf of the Respondent have to be dealt with. These are to the effect that even if Article 31(2) of the Constitution were otherwise attracted, no relief is available to the Petitioners in a Petition under Article 226, for other overriding reasons.

I. Whether the question is concluded by res judicata :

11. At the Rule stage, the Union of India urged in its affidavit-in-opposition to the application that "the entire matter has been set at rest and beyond controversy by the decision of the Supreme Court in the case of (3) [Ram Kishore Sen and Others Vs. Union of India and Others \(UOI\)](#), ." This contention was rejected by me in paragraphs 14-15 of (4) [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), with the observation that--

"..... the question of the right of the inhabitants to compensation under Article 31(2) has not been raised or dealt with at any earlier stage of this dispute, not to speak of the two Supreme Court cases. In those cases, the question determined by the Supreme Court was whether the Union of India had the power to cede territory; if so, what was the legitimate mode of doing it....."

12. Since this statement has not been questioned nor the plea or res judicata raised again in the affidavit-in-opposition to the Rule or by Mr. Sen at the hearing of the Rule, it must be taken that the Union of India does not intend to oppose the Rule on this technical ground. Nevertheless, I consider it necessary to reiterate the scope of the two decisions of the Supreme Court referred to because I have since come across an observation of Bachawat J. in his Lordship's judgment in (5) [I.C. Golak Nath and Others Vs. State of Punjab and Another](#), which I must note, in case that is relied upon on behalf of the Respondent hereafter.

13. A. As regards (2) [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#), (Ref. by the President of India on the Implementation of the Indo-Pakistan Agreement), it cannot be overlooked that it was a Reference under Article 143(1) and that the judgment of the Supreme Court constitutes an "opinion" on the specific questions which were referred to by the President to the Court. The "law" which was "declared by the Supreme Court" in such Opinion must be considered with reference to the questions included in the Reference. The situation which necessitated this Reference was summarised by the Court itself in paragraph 3 of the Report (ibid.) as follows:

"It appears that subsequently a doubt has arisen whether the implementation of the agreement relating to Berubari Union requires any legislative action either by way of a suitable law of Parliament relating to Article 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of Article 368 of the Constitution or both."

This doubt was formulated as Questions 1 and 2 of the Reference which related to Berubari and these Questions answered by the Court, holding, that, since the Agreement constituted a cession or transfer of Indian territory to Pakistan, it could not be effected without amending Article 1 and the First Schedule to the Constitution which specified the existing territory of India and that, therefore, it could not be done without an amendment of the Constitution under Article 368 paragraph 46, ibid).

Mr. Chatterjee, appearing on behalf of certain people's organisations which opposed the cession, raised two objections going to the root of the Union of India's power to cede (paragraphs 27, 30-31), namely, that --

(i) The Preamble of the Constitution of India indicated that its territory was inviolable and that the Government constituted by the people of India could not cede any part of the territory of India by any process whatever;

(ii) The express mention of the power to "acquire" territory in Article 1 (3) (c) indicated that there was no power to "cede" territory under our Constitution.

Both these objections were, however, rejected by the Court on the ground that the power to cede territory was an attribute of sovereignty which each State possessed,

irrespective of the absence of any express constitutional provision in that behalf.

14. It is evident that the question of the Fundamental Rights of the residents of the territory so ceded, including their right to be compensated, was never raised nor decided by the Court in this Opinion. In (5) [I.C. Golak Nath and Others Vs. State of Punjab and Another](#), however, Bachawat, J. makes this observation as to the Opinion in [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#), :

"The last case decided that the Parliament can under Article 368 amend Article 1 of the Constitution so as to enable the cession of a part of the national territory to a foreign power. The court brushed aside the argument that "in the transfer of the areas of Berubari to Pakistan the fundamental rights of thousands of persons are involved." The case is an authority for the proposition that the Parliament can lawfully make a constitutional amendment under Article 368 authorising cession of a part of the national territory and thereby destroying the fundamental rights of the citizens of the affected territory...."

In the Opinion, as reported in (2) [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#), I submit, I have not been able to find any passage to indicate that it was argued on behalf of the residents of Berubari that the Union of India could not cede the territory because their Fundamental Rights would be affected. Even if any such question had been raised in course of the hearing, that was not included in the Reference and the Court did not decide it. At any rate, the principle of res judicata cannot be invoked in such a case. The Court decided that the power to cede was a "sovereign power" which could be exercised by the State without any express constitutional provision conferring such power and the Court also negated the contention that the Preamble to the Constitution of India guaranteed the territorial extent of India to exclude any power to cede. But the Court did not consider nor decide whether, in exercising the power to cede, the Court must comply with the Fundamental Rights guaranteed by the Constitution. Incidentally (para. 31. *ibid.*) the Court observed that the hardship, if any, caused to the residents of the ceded territory was no legal bar to the exercise of the sovereign power to cede. At the same time, the Court pointed out that the exercise of the Sovereign power was subject to the limitations imposed by the Constitution, in these words (para. 31, p. 857, *ibid.*) --

"This power, it may be added, is of course subject to the limitations which the Constitution of the State may either expressly or by necessary implication impose in that behalf; in other words, the question as to how treaties by a sovereign State in regard to a cession of national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the country."

Gajendragadkar, J., (as he then was), speaking for the Court was, of course, thinking primarily of the limitations imposed by the Constitution on the mode of exercise of the treaty-making power but the Court did not say that other substantive limitations of the Constitution upon the exercise of any of the powers of the State were to be of no application because cession was to be made by means of a treaty; on the other hand, the concluding words of the passage just quoted make it clear that in the implementation of the treaty, after it was made, the State may have to comply with other limitations, such as the fundamental rights.

15. B. Coming now to (3) [Ram Kishore Sen and Others Vs. Union of India and Others \(UOI\)](#), --that Petition was brought, so far as Berubari was concerned, upon the ground that the Constitution Amendment Act was incapable of implementation inasmuch as its language was not clear as to how the Berubari Union was to be divided and mandamus was asked for to stop the survey proceedings for demarcation on that ground (pp. 646-7, *ibid*). This ground was rejected by the Court as "misconceived" (p. 650. *ibid*) and no other point was decided as regards Berubari. The plea of *res judicata* must accordingly fail.

II. Whether the Agreement constitutes an "Act of State" against the Petitioners so as to bar a claim in the Courts.

16. This plea was raised by the learned Advocate-General at the Rule stage and rejected by me in paragraphs 22-24 of (4) [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#). Since my reasons have been fully given there-in, nothing need be said in support of the proposition which is well-settled both at English common law and in India, that a plea of "Act of State" or "Reasons of State" is not available to a State against its own citizens before its municipal courts.

17. Even the common law maxim ♦*salus populi suprema lex*♦ is not applicable to the instant case because it is a case of voluntary gift of territory to 9. foreign State, not a capitulation to a superior Force at action, or a destruction impelled by the necessity of saving the State [vide (6) *U. S. v. Pacific Rail-road*, (1887) 120 U.S. 227(233-4)].

In the (7) *Burmah Oil Co. Case*, [(1964) 2 All. E.R. 348 (H.L.)],--to which I shall advert more fully here-after, some of the Law Lords (e.g., Lord Pearce at p. 394, *ibid*.), as an alternative argument, drew distinction between a case of emergency and a deliberate action taken before any fighting took place and stated that even if there existed any prerogative for destruction, without compensation, of the subject's property in the course of fighting with an enemy, no such right existed when there was no actual invasion and the property was destroyed in the interests of a proper defence or to prevent their being used by the enemy (p. 399G, *ibid*.). The principle upon which any such distinction could be made has been explained by Vattel, quoted in the *Burma Oil Co.*, case, thus: (a) In the case of destruction in the course of fighting, the loss is accidental and any particular individual who suffers loss of life

or property must consider it to be his individual misfortune. (b) But when the property is deliberately destroyed by the Sovereign, in the public interests, the entire community enjoys the benefit of such action and the loss should, therefore, be borne by the entire community. Even if such a principle could be imported into the case of cession (for which importation, the Constitution of India offers no support), something might have been said in favour of a cession or capitulation of territory which the Union of India might be obliged to make in case of a dishonourable treaty after defeat in a War,--may the Providence save us from any such situation, --but there cannot be any logic for refusing to distribute the burden of the loss over the entire community where the Union of India chooses to make a deliberate gift of a subject's property to a foreign State, in a time of peace, -- only to buy the goodwill of that State.

III. Whether the power to implement a treaty overrides Fundamental Rights.

18. It has been suggested, though not very clearly, in paragraph 13 of the counter-affidavit that Art. 253 of the Constitution dispenses with the limitation of the Fundamental Rights so far the implementation of a treaty is concerned. This plea is obviously without any substance.

As the counter-affidavit itself says, Art. 253 is aimed at overriding the federal distribution of powers for the purpose of implementation of a treaty which is a "national" as opposed to a State purpose; it has nothing to do with Fundamental Rights. Under Art. 246(3), a State has exclusive power to legislate with respect to matters included in List II. This provision is controlled by Art. 253, by virtue of which the Union Parliament is authorised to invade the State field, if necessary, for implementing a treaty. This provision, in fact, is a codification of the principle evolved by the American Supreme Court in the case of (8) *Missouri v. Holland*, (1920) 252 U.S. 416, interpreting the words "anything in the Constitution or laws of any State to the contrary notwithstanding" in Art. VI of the Constitution of the U.S.A. But, as has been held in other cases to be cited presently, this provision merely enlarges the federal power as against the States and does not override the other provisions of the federal Constitution which impose limitations on the executive or legislative organs of the United States.

19. In India, similarly, there is nothing in the Constitution to suggest that Parliament, while making a law to implement a treaty, can override the limitations imposed by provisions out-side Part XI of the Constitution which deals with the "Relations between the Union and the States". On the other hand, Art. 253 refers to the power of Parliament to make a "law" for the purpose of implementing a treaty, and such law must, therefore, comply with Art. 31(2), unless excepted out by an express provision. Since the executive power of the Union is normally co-extensive with its legislative power [Art. 73(1)(a)]. and subject to the fundamental rights by reason of Art. 12, the same limitation will apply.

20. We arrive at the same conclusion from another standpoint. The promotion of international peace and security is the political and moral obligation of the State in India, under Article 51 of the Constitution. But this does not absolve the State from complying with the Fundamental Rights, which constitute a legal fetter upon the powers of the State, executive or legislative (9) [The State of Madras Vs. Srimathi Champakam Dorairajan](#), ; (10) [Mohd. Hanif Quareshi and Others Vs. The State of Bihar](#), ; (5) Golak Nath's case, p. 1723, *ibid*). The reason is simple, namely, that the Constitution impose's the Fundamental Rights as the minimal guarantees for the protection of the people of India, who gave unto themselves the Constitution, in their individual status as against the collective authority, namely, the State to which the Directive Principles are addressed and various powers are conferred by the Constitution. The Fundamental Rights cannot, therefore, be overridden while implementing the Directive Principles (11) [In Re: The Kerala Education Bill, 1957. Reference Under Article 143\(1\) of The Constitution of India](#), . IV. Whether treaty-making. power overrides Fundamental Rights.

21. Analogous is the argument that treaty-making is an independent power and is therefore not subject to Fundamental Rights.

22. Every sovereign State has the power, at International law, to enter in-to a treaty with another sovereign State, by virtue of its sovereignty (Oppenheim, p. 882). But there is no reason why, in exercising the sovereign power, the treaty-making State cannot be subjected to procedural or substantive limitations imposed by its municipal law, including statutes and the Constitution of the land (Phillipson, Termination of War, p. 278; Oppenheim, p. 547).

23. A contention that the exercise of the treaty-making power should be immune from constitutional limitation was indeed raised in the U.S.A. and rejected. In (8) *Missouri v. Holland*, (1920) 252 US 416, Holmes, J. made it clear that though in the exercise of the treaty-making power, the federal government could invade the State sphere, it did not mean "that there are no qualifications to the treaty-making power" and that it would be subject to "prohibitory words.....found in the Constitution." Any doubts in this matter have been dispelled by Black, J. in the later case of (12) *Reid v. Covert*, (1957) 351 US 487 (357):

"There is nothing in this language (quoting Article VI) which intimates that treaties laws enacted pursuant to them do not have to comply with the provisions of the Constitution. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights..... to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V."

Here is a clear pronouncement that Fundamental Rights cannot be over-ridden by the mere exercise of the treaty-making power, and this view has been taken under a Constitution where there is an express provision in Article VI that ".....all treaties made..... under the authority of the United States shall be the supreme law of the land."

24. There being no provision in the Constitution of India comparable to Article VI of the American Constitution, the horizon here is more clear. A treaty can be given the force of law within this country only if it is made by law in exercise of the power conferred by Entry 14 of List I. Such law not being excluded from the definition of "law" in Article 13(3), will obviously attract the limitation imposed by clause (2) of Article 13 and thus be subject to the Fundamental Rights.

V. Whether cession, per se, is an exception to the obligation to pay compensation.

25. This, in fact, is the plea of "Act of State" in a different form. It has been contended that even though "reasons of State" may not be available as a plea to defend an action by a citizen against its own State in a municipal court, the exercise of the power of cession, as such, is an exception to the obligation to pay compensation because it is an attribute of "sovereignty" (vide [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#),). This contention is not acceptable, for various reasons.

26. (A) Apart from the particular provisions of our Constitution, it is not correct to say, juristically, that merely because the expropriation takes place by reason of the exercise of a "sovereign power" of the State there is no obligation to compensate. Such an assertion was raised in England but negated by two decisions of the highest authority [(13) A. G. v. De Keyser's Hotel, 1920 All ER 80 (HL); (7) *Burmah Oil Co. v. Lord Advocate*, (1964) 2 All ER 348 (HL)]. In both, it was asserted by the Crown that the exercise of the "War" power, emanating from the royal prerogative, constituted an absolute exception to the obligation to pay compensation for the taking of the land of a private owner by the Crown. It was clearly pointed out by the House of Lords in both cases that the two principles were separate from and independent of each other, -- the right of the Crown to take by virtue of its prerogative or sovereign powers and the obligation to pay compensation to the subject. Merely because the right of the Crown to take is unquestionable, it does not necessarily follow that the individual whose property is taken should suffer instead of the burden being distributed over every member of the political society whose interests the Sovereign re-presents [vide (13) *De Keyser's* case, pp. 84, 89, 97, 99, 100, 103-4, 105-6; (7) *Burmah Oil Co.* case, pp. 352, 383-4, 390], As Lord Parmoor said in (13) *De Keyser's* case,--

"Assuming that there is a public necessity to take possession of land for administrative purposes in connection with public defence, there can be no reason why this necessity should be urged as an answer to a claim of compensation" (p.

106); "..... the claim to compensation assumes that the entry on and the taking of possession of the hotel are legally justifiable"

It is sometimes supposed that the decision in De Keyser's case rested on the fact that there was in existence a statute which provided for the payment of compensation for taking of private property for defence purposes and that, accordingly, the Crown could no longer use its prerogative not to pay. This assumption, however, is not sound inasmuch as Lord Sumner emphatically negated it in (13) De Keyser's case (pp. 103-4) -

"Is it to be supposed that the legislature intended merely to give the executive..... the power of discriminating between subject and subject, enriching one by electing to proceed under the statute and impoverishing another when it requisitions under the alleged prerogative ? To presume such an intention seems to be contrary to the whole trend of our constitutional history for over 200 years..... in truth, prerogative can at most extend to taking, and stands quite apart from payment. There is no prerogative right to elect not to pay."

At any rate, any such supposition must end since the (7) *Burmah Oil Co. case*, (ibid), which was decided on the footing that there was no statute to provide for compensation in that case in respect of which prerogative was claimed not to pay compensation (vide p. 354B, ibid). It was, on the other hand, laid down that a right to confiscate, without payment of compensation, must be founded on statute, to be shown by those who asserted any such right (p. 389, ibid).

As observed in paragraph 47 of (4) [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), , the sovereign right of a State to cede any part of its territory was unquestionable but that was no reason why such sovereign power could not be exercised after due compliance with the constitutional rights of its own citizens. As regards the exercise of the English sovereign's power to make a treaty, Halsbury (3rd Ed., Vol. 7, para. 607) says --

".....the plea.....that the matter involves the construction of treaties, affords no valid defence to an action against officers of the Crown for interference with the private rights of a British subject....."

27. It is true that it would be inconvenient to a State to carry on its sovereign activities in the international sphere if it has to meet domestic demands, such as payment of compensation, before giving legal effect to its sovereign acts. To any such argument, I can only reproduce the answer given by the American Supreme Court in (12) *Reid v. Covert*, (1957) 354 US 1.--

"The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our

Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes."

Nor is the failure of a Sovereign to implement an international agreement owing to domestic reasons unknown in the international sphere. We have the illustrious example of President Wilson's failure to implement the Peace Treaties at the end of World War I. It may make the defaulting State liable for reparation, in proper cases, but that is no reason why the constitutional guarantees should be silenced by the treaty-making power (vide Pritchett, American Government, 1959, p. 336).

28. Nor is there anything anti-national or undemocratic involved in the very suggestion that compensation should be payable by the State for an act of cession which it is competent to do as a sovereign. The concept of "compensation" rests on the "equitable" principle that where a private owner must necessarily be expropriated for public purposes, in the collective interest, "the burden shall not fall on the individual but shall be borne by the community" [Lord Moulton in De Keyser's case, 1920 All ER 80(100)] or that "the sacrifice of one's property for the common good be compensated by the rest" [Lord Pearce in the *Burmah Oil Co. case*, (1964) 2 All ER 348(383); see also p. 358, *ibid*].

29. Before adverting to the law under our Constitution, we may turn to the USA particularly in view of my observations in paragraphs 55 and 56 of (4) [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), . There I said that neither party had succeeded in citing "a single instance where the United States has ceded an inch of its territory to a foreign State" and that if any such instance could be brought it would show that the United States Government had compensated the inhabitants of the ceded territory in accordance with the Fifth Amendment, before giving effect to the treaty of cession.

In pursuance of the above observation, the Petitioners have produced the text of a Convention of 1963 (with connected papers) by which an area of 366 acres in the Chamizal Area has been ceded by the USA to Mexico and it appears from the text of this Convention that prior to giving effect to the Convention, American Government have evacuated the American citizens occupying the ceded territory and paid them compensation for "acquiring" their lands and structures for giving effect to the cession. It has been contended by Mr. Sen that compensation had to be paid by the U. S. Government in this case only because of the special terms of this treaty, namely, that the territory ceded would pass to the new State "in absolute ownership, free of any private titles or encumbrances of any kind" (Article 4).

The argument of Mr. Sen is that it is because by this Convention, the U. S. Government stipulated to transfer the private titles of its citizens in the ceded territory, it had to "acquire" that title and to pay compensation but that where the treaty of cession does nothing more than to transfer the sovereignty and does not

expressly stipulate that private titles would also pass to the new State, as in the disputed Agreement with Pakistan, -- the properties of the inhabitants of the ceded territory need not be acquired by the ceding State. It was further argued by Mr. Sen, in this context, that vacant possession had to be delivered by the U. S. Government in the case of the Chamizal Area only because some constructions would be necessary in the channel which formed the boundary between the two countries, which might cause a flood leading to the loss of the homes of the inhabitants of that territory.

The making of new constructions may be a part of the scheme which required the cession, but the history of the Convention appended to its text, as produced by the Petitioners, show that the object of the cession was to fix the international boundary between the U. S. A. and the Mexico by an amicable settlement between the two Governments by exchange of some territory lying within their respective jurisdictions and that in coming to such settlement, the heads of the two countries agreed that --

"respect for the rights and interests of the people affected on both sides of the border should be a principal consideration in reaching a solution," and with this object in view, the U. S. Government not only re-settled the inhabitants of the Chamizal area which it was going to cede and paid them compensation but further stipulated in the Convention that the American citizenship and the other legal rights of the inhabitants of the ceded territory would remain unimpaired by the cession (article 11). No consideration for the residents of Berubari appears to have been made before entering into the disputed Agreement. Be that as it may, even if it be that compensation was paid by the American Government in the case of the Chamizal Convention because vacant possession was stipulated to be delivered of the ceded territory, Mr. Sen has not been able to refer to a single other instance where an inch of American territory has been ceded without payment of compensation to the American citizens residing in the territory to be ceded.

30. (B) Coming to our Constitution, it has been urged by Mr. Sen that the only limitations that our Constitution imposes upon the power of making a treaty, including a treaty of cession, are procedural and that there is no substantive limitation on this power as may be found in some other Constitutions of the world. My attention has, in this behalf, been drawn to Article 53 of the Constitution of the Fifth French Republic of 1958 which says, *inter alia*, --

"No cession.....of territory shall be valid without the consent of the populations concerned."

The absence of any such provision in our Constitution, indeed, leads to the conclusion that the consent of the Petitioner is not required to give the Agreement in question any validity either at International law or the municipal law of India. But the Petitioners do not make any such contention.

The only claim of the Petitioners is that the Respondent must provide for payment of compensation to them before giving any effect to the Agreement and the Constitution Amendment Act which has been enacted to implement that Agreement.

31. As I have already said, since a treaty can have any validity under the municipal law of India to affect its citizens only if a law is made by Parliament in exercise of its powers under Entry 14 of List I of Schedule I, to the Constitution and any such law shall be valid only if it is in conformity with the Fundamental Rights included in Part III. Once therefore it is established that a particular treaty-making law involves a transfer which attracts Article 31(2), it cannot be maintained that it should be exempted from the requirements of Article 31(2) because it is a treaty of "cession". The reason is obvious, namely, that Article 31 constitutes a complete code as to the obligation to pay compensation where the property of an individual is sought to be compulsorily acquired for public purposes, together with the exceptional cases where there is no right to such compensation even if such acquisition may have taken place, and these exceptions are specified in clause (5). Cession does not find place within cl. (5). Applying the maxim "expressio unius est exclusio alterius" therefore, it must be held that if "cession" otherwise satisfies the requirements of clause (2) of Art. 31, it cannot be excepted out of the obligation to pay compensation because it involves the exercise of a "sovereign" power. The independent sovereign powers which are excepted by clause (5) are --

(i) The power of taxation or assessment of revenue [(14) [Raja Jagannath Baksh Singh Vs. The State of Uttar Pradesh and Another](#), ; (15) [Rani Ratna Prova Devi Rani Saheba of Dhenkenal Vs. State of Orissa and Another](#),].

(ii) The power to impose a "penalty".

(iii) The power to take private property for the promotion of public health or the prevention of danger to life or property.

(iv) The power to implement agreements with other States, such as Pakistan, for the purpose of protecting "evacuee property", (16) [Bawa Hariqir Vs. Assistant Custodian, Evacuee Property, Bhopal](#), .

It is to be noted the last-mentioned exception belongs to the domain of International Law and, if the implementation of a treaty or agreement of cession were intended by the Constitution-makers to be similarly excepted from the obligation to pay compensation, there was no reason why they did not mention that as an additional item in cl. (5).

32. Mr. Sen, on behalf of the Respondent, argues that "cession" has not been mentioned as an exception in cl. (5) of Article 31 simply because it does not affect the private property rights of the inhabitants of the ceded territory, as does "penalty" or "taxation" which are mentioned in cl. (5) of Article 31. This brings us to

the core of the arguments advanced on behalf of the respondent that cession only transfers "sovereignty" over the ceded territory and does not affect private rights of the inhabitants at all.

This argument fails to make a distinction between International law and municipal law (vide Oppenheim, Ch. IV, pp. 37 et seq.). While the proposition just asserted is quite good at International law, it overlooks the effects of the cession at municipal law under which only the question of compensation to the private owners of the ceded territory may possibly arise.

33. (a) It has already been pointed out at paragraphs 46 et seq of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), that while under the municipal law of a State, the private ownership of a land may belong to individuals who have acquired it by inheritance, purchase or the like. under International law, the superior title, in relation to other nations vests only in the State within which such land exists. This is explained at pp. 52-53 of Hall's Treatise on International Law (1924), by using the expressions "immediate" and "ultimate" property:

"...the immediate property which is possessed by individuals is to be distinguished from the ultimate property in the territory of the State.... which is vested in the State itself."

The distinction between the alternate title is also maintained by our Constitution. Thus, Article 298 of the Constitution empowers the State to "acquire, hold and dispose" of property "for any purpose". It is hardly necessary to point out that this provision does not override the requirements of the municipal law for such acts but assumes that the State will comply with those requirements, while exercising any of these acts. If, for instance, the municipal laws requires that land can be transferred only by a registered deed, nothing in Article 298 empowers the State to make a valid transfer without such deed. For the same reason, if the immediate title in the property sought to be acquired by the State is vested in a subject, the State will acquire by purchase the property subject to such title of the subject so long as that is not terminated according to law; and, similarly, if the State seeks to dispose of tenanted land in favour of another Sovereign, it can do so only on payment of compensation to the tenants who have got a right to be compensated for the loss of their immediate title under municipal law.

(b) I have stated earlier that there may be cases where the State owns both the ultimate and immediate titles to a property, as in the case of khas land in which there is no inferior holder. In such a case, the right of the State to transfer is unfettered by any obligation to compensate inasmuch as there is no-body to be compensated. This distinction between Government owned land and privately owned land is brought out in the opinion of Brewer J. in (17) U. S. v. Lynah, (1902) 188 US 445, which I have already reproduced in para. 69 of (4) [Sudhangsu](#)

Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others, ;

"...there is a vast difference between a proprietary and a Governmental right. When the Government owns property, or claims to own it, it deals with it as owner.....Very different from this proprietary right of the Government in respect to property which it owns is its Governmental right to appropriate the property of individuals.

All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property--. So, the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when the Governmental right of appropriation.....is exercised, it shall be attended by compensation?"

(c) International Law recognises only the ultimate title of the State and has nothing to do with the immediate proprietary rights of a subject under municipal law, simply because the Law of Nations recognises only the State and some other international organisations as legal entity. There is no other legal person entitled to rights under International Law (Oppenheim, 1966, pp. 6, 19-20, 118, 261; Dias and Hughes, p. 499). In the words of Oppenheim, p. 19?

"As a rule, the subjects of rights and duties arising from the Law of Nations are States solely and exclusively".

(d) Since International Law is concerned only with those rules of conduct which govern sovereign States in their relations and conduct towards each other (Salmon, Jurisprudence, 1948, p. 33), it has little to say as to the relationship between a State and its own subjects, which belongs to the domain of municipal law (Oppenheim, pp. 13, 19--20, 37),

It is, therefore, vain to expect, from treatises on International law anything about the subject's right to compensation for any act done by his own State. And it is on this background that we must understand the statements on books of International law that cession involves only a transfer of sovereignty (Oppenheim, pp. 166, 547, f. n. 1).

It is exclusively from the standpoint of International law and the succession of State rights under it that Oppenheim explains the effects of cession thus--

"When in consequence of war or otherwise one State cedes a part of its territory to another....., succession takes place with regard to such international rights and duties of the predecessor as are locally connected with the part of the territory ceded....."

(pp. 165-6, *ibid*).

At the same time, Oppenheim always maintains the distinction between the position at International and municipal law. While he says that under the Law of Nations each sovereign State is competent to transfer its sovereignty over a part of

its territory to another (p. 54, *ibid.*), he is careful to observe that --

"if such municipal rules contain Constitutional restrictions on the Government with regard to cession of territory, these restrictions are so far important that such treaties of cession concluded by Heads of States or Governments as violate these restrictions are not binding" (p. 547).

(e) Under International law, each independent State has "sovereignty" which includes territorial supremacy, that is to say, supremacy over persons and property within the territory comprising the State, without interference from any other external authority (Oppenheim, pp. 287, 325, 452). The sovereignty of a State, it is to be further noted, is confined to its own territory and cannot extend to the territory of another State (pp. 295, 328, *ibid.*). When one State cedes a part of its territory to another, the latter acquires this sovereignty and supremacy over the territory so ceded and that is the meaning of international succession resulting from cession. As soon as the cession is completed, the ceding State shall cease to have any legal authority over the ceded territory and its residents such as the Petitioners and will be powerless to give them any protection in any manner whatever, because there cannot be two sovereigns over same territory (p. 452, *ibid.*).

(f) The main burden of the argument of Mr. Sen, however, is that the Petitioners would not be deprived of their title or possession as a result of the cession and that the disputed lands will remain in situ even after the cession so that the Petitioners will continue to en-joy the disputed lands under the new Sovereign as before. But that is not the position at law. Even Oppenheim, who says that "the transfer of sovereignty by cession does not ipso facto affect rights of private property", adds that "subsequent legislation of the new sovereign may affect them" (p. 550, f. n. 1). If, further, the new Sovereign has unfettered power at law to make any such legislation, immediately after the cession, to denude the Petitioners of their immediate title and possession, it is only a pretension to urge that the "property" of the Petitioners remains in tact after the cession. because, as I shall show presently, the juristic concept of "property" is not a lump of clay but a bundie of rights which constitute the legal rights of property because they are enforced by the Sovereign and even against itself when such right of property is a fundamental right. That the power of the new State over the inhabitants of the ceded territory and their property is absolute and unfettered and that it is not bound to recognise any of their pre-cession rights has been elaborately explained at paragraphs 43, 50--52 of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), .

(g) As I said at the Rule stage ([Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#),) all the confusion on the subject-matter of this Rule has been caused by the failure to appreciate the different between municipal and international law. On this point, what Aus-tin said almost a century ago is not far from the truth even today. He said that --

"the law obtaining between nations is not positive law" (Jurisprudence, p. 231) because it is set

"by general public opinion"

and not by the command and sanction of a political sovereign (p. 340, *ibid*). A sovereign State who is not subject to any legal limitation (p. 217), *ibid*) imposed by the law of nations, because the attribute of sovereignty is that it is not subject to the command of any superior power :

"Supreme power limited by positive law, is a flat contradiction in terms" (p. 270; p. 346).

The similar comment of Holland that "International law is the vanishing point of jurisprudence" has not lost its wit after the lapse of near about a century. Notwithstanding the pious wishes of philosophers and scholars, the truth remains that while municipal law is enforced by the Sovereign there is no legal sanction behind the Rules of International law, and the respect given to it by sovereign States is only a matter of "consent", or, at best "practice" (Oppenheim, pp. 14, 261; Dias and Hughes, *Jurisprudence*, 182-3, 500). Even if a State incurs an obligation by a treaty, it is free to act contrary to such obligation under its municipal law and even to undertake new legislation to that effect because of its "sovereignty" (Oppenheim, pp. 119, 123, 286-7).

Whatever respect or persuasion a rule of International law may carry with the municipal court of a country, it is not binding on the latter (Oppenheim, pp. 37, 268) and no rule of municipal law can be altered by anything done under International law (p. 37, *ibid*).

34. On behalf of the respondent strong reliance has been placed on the following observations of the American Supreme Court in the case of (18) U. S. v. Percheman, (1833) 7 Pet. 51(88) --

"A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him. Lands he had previously granted, were not his to cede. Neither party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals, condemned by the practice of the whole civilised world. The cession of a territory by its name from one sovereign to another,..... would be necessarily understood to pass the sovereignty only, and not to interfere with private property."

This passage, however, does not undermine but supports the propositions arrived at in this judgment, namely,--

(a), At International law, cession only transfers the "imperium" and there is no transfer of the "dominium" (as Macnair puts it, *Law of Treaties*, 1961, p. 331).

(b) At International law, therefore, the acquiring States respect the proprietary rights of the inhabitants of the ceded territories, as a matter of practice, because such conduct on the part of the acquiring State would be condemned by the "civilised world".

(c) At municipal law, however, the new State has the absolute power to confiscate or otherwise affect the private rights of the inhabitants of the territory after cession, regardless of the condemnation of the civilised world, and, if it so does. the inhabitants shall have no remedy from any court of law. This was explained in no unmistakable terms by Lord Halsbury in (19) *Cook v. Sprigg*, (1899) AC 572(578) ?

"It is no answer to say that by the ordinary principles of International law private property is respected by the sovereign which accepts the cession..... All that can be properly meant by such a proposition is that according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation."

It is to be noted that, apart from the general observation, just quoted, the decision in *Percheman*'s case primarily rested on the rule of construction based on "special enumeration" or *expressio unius.....*". The conclusion that private property was not sought to be conveyed was drawn by the court from the term in the treaty of cession, by which public buildings were sought to be conveyed?

"The adjacent islands....., all public lots and squares, vacant lands, public edifices, fortifications..... and other public buildings which are not private property..... are included in this article."

Quoting this term (p. 87 of 7 Pet. 51), the Supreme Court observed -

"This special enumeration could not have been made had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of "buildings" could not have been limited by the words "which are not private property", had private property been included in the cession of the territory."

This is the legal part of the reasoning upon which the decision rested. The general observation, upon which the Respondent relies, is merely a statement of the "usage" of civilised nations, which the Court was inclined to abide by, in the circumstances of *Percheman*'s case. This case related to acquisition of territory by the U. S. A. from Spain, by a treaty of cession. The American Supreme Court held that out of respect for the practice of civilised nation, United States should recognise the private title created by a royal grant from Spain prior to the cession in favour of the U. S. A. But the U. S. A. was legally free not to recognise the pre-cession legal rights and obligations and the American Supreme Court has indeed up-held the power of such refusal in cases like (20) *Vilas v. City of Manila*, (1911) 220 US 345.

35. If the inhabitants of the ceded territory were so safe after cession, the early doctrine that no State should cede any part of its territory without the consent of the inhabitants affected could never have had its origin (vide paras. 48 and 51 of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#),). Vattel (quoted in Fenwick, International Law, Indian Ed., p. 362) went to the extent of saying--

"A nation has no right to barter away their (its members) allegiance and their liberty for certain advantages which it hopes for in return."

Though modern International law does not acknowledge that there is any such legal fetter upon the Sovereign's right to cede, yet the moral restraint is still recognised by the Sovereigns themselves by making express stipulations in the treaties of cession to safeguard the rights of their erstwhile citizens (para. 49 of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#),). It follows that where the ceding State is not careful enough to provide for such stipulations, as in the instant case, morally speaking, it should not contend that it has no obligation to compensate its citizens for the loss of their existing property rights, which though contingent, is legally irresistible by any act on the part of either those citizens or of the ceding State.

36. We are, of course, concerned with legal and not moral rights of the citizens to compensation. For the present, we conclude that though at International law, the private rights of the inhabitants of the ceded territory are not instantly affected, they shall have no legal rights to assert against the new State under its own municipal law to which the said inhabitants shall be subject from the moment after the cession is completed.

VI. Whether the Constitution (Ninth Amendment) Act overrides Article 31(2).

37. Assuming that Article 31(2) of the Constitution requires that the residents of Berubari must be compensated before the territory can be transferred to Pakistan, it is contended on behalf of the Respondent that any such requirement has been abrogated or superseded by the enactment of the Constitution (Ninth Amendment) Act.

The substance of the argument of Mr. Sen on this point is that since the question of the proposed cession was brought before Parliament while passing the Constitution Amendment Act, the question of any liability to pay compensation to the residents of Berubari must be deemed to have then been considered by Parliament and rejected, and where has thus been a pro tanto repeal of Article 31(2) by implication.

Neither the disputed Agreement nor the Constitution Amendment Act however makes the least mention as to the effects thereof on the residents of the territory proposed to be transferred to the foreign State, -- not to speak of compensation. That is why in paragraphs 53-54 of [Sudhangsu Mazumdar and Others Vs. C.S. Jha](#),

[Commonwealth Secretary and Others,](#), I suggested that the answer to this question might be forthcoming when the Union of India filed its affidavit in return to the Rule nisi. Unfortunately, however, nothing is to be found in any of the affidavits filed on behalf of the Union of India to the effect that the question of the private rights of the inhabitants was considered by Parliament at the time of passing the Ninth Amendment Act. On the other hand, the plea raised therein is that --

(a) No compensation is payable because cession, per se, is a case standing outside the obligation to pay compensation.

(b) Even if any such obligation existed under Article 31(2), that has been abrogated by the passing of the Constitution (Ninth Amendment) Act.

The first of the contentions has already been dealt with and rejected by me.

As to the second plea, -- that Article 31(2) has not been expressly repealed or abrogated to any extent by the Constitution Amendment Act is patent on its face. An implied abrogation might perhaps be urged, -- but I do not consider it necessary to make any pronouncement in that behalf, -- if it was shown that the question of compensation was considered and negatived by Parliament, sitting as a constituent body under Article 368 of the Constitution. But, as already stated, no statement on this point is to be found in the counter-affidavits filed by the Union of India.

So far as the right of "Eminent Domain" under the American Constitution is concerned, it is not exercised until a law is passed by the Legislature, when, again, the obligation to compensate under the Fifth Amendment would instantly arise as a condition for the validity of such legislation. This is evident from the following observation of Cooley (Constitutional Law, 4th Ed., p. 409) --

"But although the right is inherent in sovereignty, it lies dormant until legislation is had, defining the occasions, methods, conditions and agencies under and by means of which it may be exercised."

Such legislation would also be required for cession of territory (vide McNair on Treaties, 1961, p. 80).

Little authority is required to show that when any such legislation is made, it must comply with the condition imposed by the Fifth Amendment (21) Long Island Water Supply Co. v. Brooklyn, (1897) 166 US 685).

The same is the situation under Article 31(2) of our Constitution even today, for if an act of the State amounts to "compulsory acquisition", within the meaning of clauses (2) and (2A) of Article 31, it can be effected only "by authority of law", as clause (2) now expressly requires. As soon as any such legislation is undertaken, the obligation to compensate under the latter portion of clause (2) will fasten to it.

38. But the question whether an amendment of the Constitution is a "law" within the meaning of Article 13 (2)-(3), and consequently within the meaning of Article 31,

-- has itself be-come the subject of serious controversy. The question was answered in the negative in the case of (22) Sankari Prasad v. Union of India, (1952) SCR 89(106), by drawing a distinction between ordinary law and constitutional law. That decision has, however, been overruled by the majority in (7) [I.C. Golak Nath and Others Vs. State of Punjab and Another](#), holding that a Constitution Amendment Act is nothing but a "law" coming under Articles 13 and 245 and that, accordingly, it is invalid if it is repugnant to any of the Fundamental Rights.

Notwithstanding this view, however, the majority refused to strike down the 17th Amendment, applying the doctrine of "prospective overruling". Ultimately it was laid down that the proposition that a Constitution Amendment Act could not override a Fundamental Right would operate as a fetter upon Parliament acting as a constituent body only in respect of Amendment Acts passed subsequently to the decision in Golak Nath.

Applying the resultant in Golak Nath's case, it might be argued that the Ninth Amendment of the Constitution cannot be struck down even though it may contravene Article 31(2), because this Amendment Act is prior to the decision in Golak Nath.

The argument is, however, of no avail because the Ninth Amendment Act has not negated the obligation to pay compensation and that question as I have already said, was not considered at all while it was enacted. In fact, if we examine the history of this Amendment, it will be apparent at once that it was not undertaken to solve the question of compensation to the residents of Berubari but to solve a different question altogether, namely, whether the transfer of this territory could be effected by a mere international agreement or required legislation by Parliament or an amendment of the Constitution itself, in the manner laid down in Article 368. The question, in short, was confined to the proper procedure to be adopted for the purpose of excluding Berubari from the "territory of India" as defined in Article 1 and as described in Sch. I to the Constitution.

The Supreme Court itself stated in (3) [Ram Kishore Sen and Others Vs. Union of India and Others \(UOI\)](#), --..... "the Ninth Constitution Amendment Act has been passed by Parliament in the manner indicated in the Opinion of this Court on the said Reference," meaning the Reference in (2) [In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143\(1\) of The Constitution of India](#), , where it was held that ?

"..... if any part of the national territory was intended to be ceded, a law relating to Article 3 alone would not be enough unless appropriate action was taken by the Indian Parliament under Article 368" (ibid).

In (2) AIR 1960 SC 644 it was no-where held that by the exercise of the power of cession or by the amendment of the Constitution necessary to exclude the ceded territory from India, the constitutional requirement to compensation to the

residents affected by the transfer could be overridden.

Secondly, it was not necessary that the compensation must be provided for by the very Constitution Amendment Act which provides for the transfer. It can be done by separate legislation undertaken at any moment before the transfer is completed and the Petitioners are thereby affected.

39. In paragraph 2 of the [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), it was observed by me that the proposed act of demarcation against which the Petitioners have obtained this Rule, is an "executive act", which is "liable to be restrained until Article 31(2) is complied with, either by paying them compensation in terms of an existing law of land acquisition or by making a law which provides for such compensation.....". That the proposed demarcation is an "executive act" has been disputed in paragraph 10 of the affidavit-in-opposition. No reasons have, however, been advanced either in the affidavit or at the hearing why it should be regarded otherwise. Neither the Agreement nor the Ninth Amendment Act is self-executory. By the mere passing of the Constitution Amendment Act the transfer of the disputed territory has not been completed. In fact, until the "division" directed to be made by paragraph 3 of the Second Schedule of the Amendment Act is made, it has not been physically ascertained what particular parcel of the Berubari Union is to go over to Pakistan. Such division or demarcation by the Government officials concerned is obviously an executive act. It is, course contended that the demarcation is nothing but an implementation of the Constitution Amendment Act. That may be so, but that does not answer the question at issue, once it is held that the proposed transfer involves "compulsory acquisition" and that the Amendment Act has not negated the liability to pay compensation, inasmuch as its scope and object was different.

In (23) [Bhagat Ram and Others Vs. State of Punjab and Others](#), it was observed that the process of "acquisition" was not complete until the individual owner was dispossessed and the possession was given to the allottees of the Panchayat in whose favour the property was sought to be transferred by the impugned legislation.

In the instant case, similarly, the process of transfer and the acquisition involved therein shall not be complete until the land is physically divided on the appointed day, and until then neither the sovereignty is transferred to Pakistan nor are the Petitioners affected thereby. Even at International law, the title of the new Sovereign is not complete and valid until this is done; "the owner-State cannot exercise its territorial supremacy until it has taken physical possession of the ceded territory" (Oppenheim, p. 550, *ibid.*).

Petitioners are, therefore, entitled to pursue their claim for compensation at any moment until the cession is completed that is until the executive act of demarcation to effect the transfer of the disputed territory takes place; until then the lands

proposed to be ceded by the Constitution Ninth Amendment Act are unascertained and the Agreement and the Amendment Act remain inoperative.

40. Considering all the above factors, it is not possible to hold that Art. 31(2), assuming that applies to the Petitioners' case, has been impliedly abrogated by the mere passing of the Ninth Amendment Act.

VII Whether Article 31(2) is attracted by the proposed cession.

41. This is the substantive constitutional question involved in this case.

At the outset, it may be pointed out that there is no question of application of the expressions "requisitioning" or "take possession of", in the instant case. The only point for determination is whether the proposed acts of the Respondent involve the "compulsory acquisition" of the Petitioners' property. If it does, there is little to stand in the way of the Petitioners' success, for,--the preliminary objections being out of the way, -- it is not contended on behalf of the Respondent that the Ninth Amendment Act or any other law proposes to compensate the Petitioners who are going to be affected by the cession of that territory to Pakistan.

42.. As to what was meant by the word "acquired" in cl. (2) of Article 31, there was no indication in the original Constitution itself and the meaning was sought to be arrived at by the Courts by interpretation. An express interpretation clause has since been inserted, being cl. (2A), by the Constitution (Fourth Amendment) Act, 1955, so that the meaning of the word "acquired" is now to be sought from the language of cl. (2A). The text of cl. (2) was also amended by the same Amendment Act to make this clear. The contention of the Respondent is that the proposed cession and the acts necessary to implement it does not come within the preview of cl. (2A). In order to determine (sic) this question, it is necessary to re-produce the text of cl. (2), prior to and after the Amendment of 1955, together with cl. (2A).

(a) Clause (2) as it stands after the amendment is shown graphically thus:

Before amendment

After amendment

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

(b) The new clause (2A) says?

"(2A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property.

(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate.

notwithstanding that it deprives any person of his property.

Thus, Clause (2A) offers an explanation or definition of compulsory "acquisition." which is exclusive : In order to satisfy the requirements of Article 31(2), the law must "provide for the transfer of ownership" of the property in question to the State, which, in the instant case, refers to the Union of India. We are, therefore, to determine --

(i) Whether the Constitution Amendment Act proposes to "transfer the ownership" of the disputed property;

(ii) Whether such transfer is in favour of the Union of India.

43. A. I shall take up the second of these questions first. Assuming for the time being that there is a transfer involved in favour of Pakistan, it is patent that the Union of India cannot make any such transfer without first transferring the ownership of the property from the Petitioner to itself, for, nobody can give to another anything which does not belong to himself. Cession does not introduce any exception in this behalf. We should, in this content, recall the distinction pointed out

by me elsewhere between the immediate and ultimate title to a property. Where both the immediate and ultimate titles to a property under municipal law belongs to the Sovereign, as in the case of Crown lands in England or khas lands in India, the State is free to make a voluntary gift of such property, including both the titles, by cession effected by means of a marriage contract or testamentary disposition, as happened in days of yore (Cf. Oppenheim, p. 549). But where the property is leased out to tenants or the subjects of the ceding State have acquired the immediate title to the property, by inheritance, purchase or other modes of acquisition recognised by its municipal law, the ceding State cannot, directly or indirectly, transfer the immediate title to the foreign State without getting such title first to itself; and as soon as that is sought to be done, the municipal law in a country like India will require that the State must purchase the immediate title by paying the expropriated subject the price, if it takes by agreement, or the compensation, if it is to take place by what is known as "compulsory purchase" or acquisition in the exercise of the Sovereign's power of Eminent Domain.

44. I have already explained that, under the municipal law, as a result of the cession, it would be competent for the Government of Pakistan to deal with the disputed lands as their absolute owner, in complete disregard of the existing rights of the Petitioners. The rights of the Government of Pakistan under its municipal law would in no way be less than what would have happened if the lands were vested in that Government by a direct act of the Government of India. Such vesting the Government of India could arrange for only after acquiring the disputed lands from the Petitioners. This is the reason why I hold that the proposed cession involves a transfer of the ownership of the Petitioners to Pakistan through the Union of India.

In this context, Mr. Sen argues that delivery of vacant possession is not a necessary concomitant of cession; where that is stipulated by the treaty of cession, some prior action to acquire the title of the subject in possession may be necessary and the question of payment of compensation may possibly arise in such a case, in a country like India. I fail to appreciate, however, the difference at law between a Case where delivery of vacant possession is a condition of the treaty of cession itself and the case where the acquiring state is competent to take possession by ousting the erstwhile subjects of the ceding State, the very moment following the cession. From the standpoint of these subjects it is little consolation that their ouster is not stipulated in the treaty. From the standpoint of the (sic)ceding State also it makes little difference if the power of the acquiring State follows from the act of cession without more and if the ceding State could not transfer the immediate title to the new State by a direct act without compensating its subjects under its municipal law.

I shall presently show that as a result of the cession, Pakistan will acquire all the rights of a full owner at municipal law which would have followed if the ownership of the ceded lands had been directly vested by the Government of India to Pakistan.

46. It is now established that, if the State seeks "to take the property of one and vest it in another without compensation," to quote the words of Subba Rao, J. (as he then was) in (24) [Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others](#), it would constitute a fraud on the requirements of Article 31(2), because such a device would, obviously, be "expropriatory" in character (p. 939, *ibid.*). In (25) *Vajravelu v. Sp. Dy. Collector*, AIR 1965 SC 1917 (1022, paragraph 11), it has been clearly laid down that the introduction of Art. 31A (1) (a) has not rendered Article 31(2) into a dead-letter inasmuch as the scope of Article 31A(1) (a), as construed by the Court, is confined to "agrarian reform". Where, therefore, there is no scheme of agrarian reform involved, the State cannot expropriate the property of one to give it to another, as was held to have happened in the case of the legislation impugned in the second (24) [Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others](#), Subba Rao, J. observed--

"The contrary view would enable the State to divest a proprietor of his estate and vest it in another without reference to any agrarian reform..... Such acts have no relation to land-tenures and they are purely acts of expropriation of citizen's property without any reference to agrarian reform."

Nor is the above position dislodged by the case of (26) [Ranjit Singh and Others Vs. State of Punjab and Others](#), where the Court held, on the facts, that the impugned legislation aimed at "agrarian reform" as properly interpreted, but the legislation involved the giving of the lands of a proprietor to the village Panchayat, without going through the process of acquisition by or transfer of ownership to the State. Had the Court held that the scheme of consolidation of holdings in pursuance of which such transfer was provided for did not constitute "agrarian reform", the Court would have come to the same conclusion as in Kochuni's case -- (*ibid.*) inasmuch as the following was the observation of the Court as regards the Kochuni decision, at p. 638 of [Ranjit Singh and Others Vs. State of Punjab and Others](#), --

"No doubt, Kochuni's case..... considered a bare transfer of the rights of the sthanee to the tarwad without alteration of the tenure and without any pretence of agrarian reform, as one not contemplated by Article 31A, however liberally construed. But that was a special case and we cannot apply it to cases where the general scheme of legislation is definitely agrarian....."

This observation is to be read in the background of the points to be decided in the appeal which was before the Supreme Court and the decision of the High Court which the Supreme Court affirmed.

47. Of course, the Constitution itself authorises the State to confiscate an individual's property by way of penalty, without incurring the liability to pay compensation (cl. 5 (b) (i) of Article 31), which is laid down in cl. (2). But that is a penalty imposed for some offence, and such is not the case here. The Petitioners or any other resident of the territory of India have not committed any offence. Hence,

if cl. (5) is excluded, there is nothing to authorise the Union of India to give away the property of the Petitioners to foreign State, without paying them compensation under cl. (2). What amounts to confiscation is a question of substance even after the Fourth Amendment. This has been held in a number of cases in relation to what is compensation; the principle is no less applicable to determine what constitutes "acquisition" or "transfer of ownership". It has been held that if the State provides an illusory compensation or compensation determined according to irrelevant principles, it would constitute "confiscation" or a fraud on the Constitutional obligation to pay compensation for acquiring private property for a public purpose. What cannot be done directly cannot be done indirectly. The observations of the Supreme Court in this behalf in (27) Kunnathat v. State of Kerala, AIR 1962 SC 552 (559) are worth reproduction :

"That the provisions aforesaid of the impugned Act are in their effect confiscatory is clear on their face. Taking the extreme case, the facts of which we have stated in the early part of this judgment, it can be illustrated that the provisions of the Act, without proposing to acquire the privately owned forests in the State Kerala after satisfying the conditions laid down in Article 31 of the Constitution, have the effect of eliminating the private owners through the machinery of the Act.....The legal consequences of his making a default in the payment of the aforesaid sum of money will be that the money will be realised by the coercive processes of law. One can easily imagine that the property may be sold at auction and may not fetch even the amount for the realisation of which it may be proposed to be sold at public auction. In the absence of a bidder forthcoming to bid for the offset amount the State ordinarily becomes the auction purchaser for the realisation of the outstanding taxes. It is clear, therefore, that apart from being discriminatory....., the Act is clearly confiscatory in character and effect. It is not even necessary to tear the veil, as was suggested in the course of the argument, to arrive at the conclusion that the Act has that unconstitutional effect."

In the case of (28) [Maharana Shri Jayvantsinghji Ranmalsinghji etc. Vs. The State of Gujarat](#) , the majority of the Court stated the doctrine as follows :

"It appears to us that the true scope and effect of the provisions of ss. 3, 4 and 6 of the impugned Act.....is to considerably reduce the purchase price payable to the Petitioners and this has been secured by the device of defining permanent tenant in such a way that the tenure-holder has no real opportunity of contesting the claim of the tenants. In that view of the matter, the impugned Act.....does not fall within any entry of List II or List III of the Seventh Schedule to the Constitution, and is a piece of colourable legislation..... Under the guise of defining a permanent tenant or changing a rule of evidence what has been done is to reduce the purchase price which became payable to the tenure-holders on April 1, 1957",

48. The Union of India contends that there is no question of any fraud on the Constitution being committed by it in the instant case. But numerous are the cases

in which it has been laid down that no ill motive is necessarily involved in the doctrine of "fraud on power" or the allied doctrine of "malice at law" or mala fides. If the State seeks to expropriate the property of an individual, even though for a public purpose, without paying compensation, there would be a fraud on the constitutional obligation imposed by Article 31 (2) (29) [Ajit Singh Vs. State of Punjab and Another,](#) subject to which only such expropriation is permissible as observed in (27) [Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another,](#)]. It is urged on behalf of the Union of India that it has not proposed to "acquire" the land of the Petitioner, but that is exactly the "fraud on the Constitution", if the instant case is shown to be one where the Government of India should have resorted to "acquisition proceedings" before transferring the disputed territory to Pakistan. No provision in the Constitution authorises the State to confiscate or expropriate the property of an individual, except by way of penalty [Article 31(5) (b) (ii)], and to ascertain whether the State has done so, the Court is entitled to scrutinise the law. So observed the Supreme Court in (30) [Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another,](#) :

"The Legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The Legislature, can-not overstep the field of its competency, directly or indirectly. The Court will scrutinise the law to ascertain whether the legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it."

Thus, in (29) [Ajit Singh Vs. State of Punjab and Another,](#) , it was observed that to transfer the owner-from the individual proprietor to another by an act of the State, without first "vesting" the property in the State itself constitutes a fraud on the Constitution or a colourable use of the power conferred by it, because it is a device "to escape the concept of "acquisition to avoid the payment of compensation".

49. The mode in which the subject's property is sought to be appropriated by the State is immaterial for attracting the constitutional obligation to compensate. It is also immaterial whether it is sought to be done directly by enacting a law to that effect or indirectly by an executive act without any legislation. In (17) U. S. v. Lynah, (1902) 188 U. S. 445, it was indeed con-tended that the constitutional obligation to compensate did not arise until Congress made a law authorising the appropriation of the citizen's property. This argument was rejected by the American Supreme Court in these words (p. 466, *ibid.*) --

"The action which was taken, resulting in the overflow and injury to these plaintiffs, is not regarded as the personal act of the officers, but as the act of the Government.....although there may have been no specific act of Congress directing the appropriation of this property of the plaintiff's, yet that which the officers of the Government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the Government."

(B) But the most important element still to be considered is whether the proposed cession involves a "transfer" of ownership within the meaning of cl. (2A) of Article 31,

(i) The first thing to be noted is that though the word "transfer" is not defined in the Constitution, it is not used in the sense it is used in an enactment such as the Transfer of Property Act. Prima facie, it does not refer to a transfer by an agreement of parties as by means of a conveyance, for, the very expression "compulsory acquisition" indicates that the transfer is otherwise than by consensus. Where it takes place by agreement between the parties, their respective rights would be governed by the terms of such Agreement and no constitutional provision would be required to compensate owner who has to part with his property.

"Transfer" in cl. (2A) of Article 31, thus, obviously refers to transfer by operation of law or some unilateral action on the part of the Sovereign and the clause has already been interpreted to include a case where by statute a specified officer was given the right to reclaim a land in derogation of the rights of the owner (31) [State of Bhopal and Others Vs. Champalal and Others](#), .

(ii) Secondly, it is to be noted that the "transfer" in this context need not be effected directly, e. g., by directing that the land is vested in the State. Transfer may be effected "indirectly", if the result is the same, for instance, where the State is the landlord of an estate and there is a lease of that property which the State extinguishes by a law; "it would properly fall within the category of acquisition by the State because the beneficiary of the extinguishment could be the State" vide (29) [Ajit Singh Vs. State of Punjab and Another](#), .

(iii) The next thing which cannot be overlooked is that the word used in cl. (2A) is "transfer" and not "use". Hence, in order to attract the obligation to compensate it is not necessary that the property should, after the acquisition, be used or enjoyed by the acquiring State itself.

It has been pointed out in numerous cases that the obligation comes in where there is a public purpose to be served by such appropriation of the individual's property, which simply means "the general interest of the community as opposed to the particular interest of individuals" and the land so acquired need not be made available to the public at large (32) *Hamabai v. Secretary of State for India*, AIR 1914 P.C. 20; (33) [The State of Bihar Vs. Sir Kameshwar Singh](#), . It is now established that it is competent for the State to take A's property simply to give it to B, provided only there is public purpose behind such expropriation of A [(34) [The State of Bombay Vs. Bhanji Munji and Another](#), ; (35) [The State of Bombay Vs. R.S. Nanji](#), ; (36) [Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others](#),].

50. In other words, there may be an "acquisition" at law within the meaning of Article 31(2), even where the property is not actually vested in the State but "the ownership in such property is transferred to another body which.....is an entity

different from the proprietor himself" [Hidayatullah, J. in (29) [Ajit Singh Vs. State of Punjab and Another](#), ; also (23) Bhagat Ram v. State of Punjab, AIR 1967 SC 827 (930)].

In the instant case, the Petitioners' lands are sought to be given away to Pakistan in order to fulfill the moral obligation of the Union of India to carry out the Directive contained in Article 51, i.e., the promotion of international amity, which, of course, is a "public purpose".

(iv) Let us now advert to the meaning of the word "ownership" in cl. (2A) of Article 31. It must be taken to mean the private title of the individual under the municipal law as distinguished from the superior title of the State under International law.

(a) It has been pointed out earlier that while the private ownership of a land may belong to individuals who have acquired it by inheritance, purchase or the like, the superior title, in relation to other nations, vests only in the State within which such land exists.

(b) But even under municipal law, the subject's title is subject to the overriding right of the Sovereign, but with the obligation to compensate. This is brought out in the following words of Grotius, quoted at p. 359 of the (7) *Burmah Oil Company case* (ibid.) ?

".....the property of subjects belongs to the State under the right of eminent domain; in consequence the State, or he who represents the State, can use the property of subjects, and even destroy or alienate it, not only in case of direct need (ex summa necessitate),.....but also for the sake of public advantage. But.....when this happens, the State is bound to make good at public expense the damage to those who lose their property."

This passage alone should serve as a complete answer to the argument advanced by Mr. Sen that, juristically, cession, per se, forms an exception to the concept of compensation. It is true, as Grotius observes that, in exercise of its superior title the Sovereign can even alienate the property to another, in the public interests, but in such a case, the State must compensate the private owner for the loss of his ownership. If the concept of "transfer to the State" be assumed to be a necessary ingredient of the requirement to compensate, it must be pointed out that in the foregoing case, such transfer has taken place because the State cannot alienate the ownership of the subject without getting such private ownership first transferred to itself. What the doctrine of Eminent Domain gives the Sovereign is the right to so alienate in the exercise of its superior title, but the inferior title cannot be transferred without compensating the private owner.

(c) Let us now examine the effects of the proposed cession in favour of Pakistan.

51. It has been explained in paras. 43-44 of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#), that --

As between the residents of the ceded territory and the new Sovereign, i.e., Pakistan in the instant case, the cession would constitute an "Act of State", so that the Petitioners would not be entitled to enforce any of their existing rights, including rights of property against Pakistan, and that it would be entirely at the pleasure of Pakistan to recognise or not any of the existing rights of the Petitioners [(37) [Pema Chibar alias Premabhai Chhibabhai Tungal Vs. Union of India and Others \(UOI\)](#), and the other cases cited in paragraph 43(a) of [Sudhangsu Mazumdar and Others Vs. C.S. Jha, Commonwealth Secretary and Others](#),].

The result, in short, will be that the rights of property belonging to the Petitioners which are enforceable against the Union of India or any State Government shall not be enforceable against Pakistan in any court of law, and will thus cease to be "legal rights" as understood in Jurisprudence.

Ownership, as books of Jurisprudence [of Pollock, *ibid.*,.....pp. 166 et seq.] will show, consists of a bundle of rights, including the right to an exclusive control over the thing owned; a better right to possess and enjoy it; the right to alienate it. Now, Pakistan may after the cession, take possession of the Petitioners' property by ousting them, without any legal formality and, not acting under colour of any legal process. The Petitioners shall have no legal remedy if Pakistan thus denudes the Petitioners of all their property rights to be exercised by that State or its agents, without any cause and without payment of any compensation, while the Petitioners certainly have their remedies before the courts of law now, if this is sought to be done by the Government of India.

(d) Though elementary, it is better to recall that a legal "right" is "freedom allowed or power conferred by law" and that power is "the power of getting one's due by process of law..... a right of action", as Pollock explains (First Book of Jurisprudence, pp. 59, 61). The means to enforce a legal right is a court of justice set up by the State which provides the law which creates or maintains a law (p. 54, *ibid.*) and a right in rem like a right of property is binding against the whole world. When the right is a fundamental right, as the right of property is in India, such right is binding against the State itself and it cannot destroy or change such right, except in so far as permitted by the Constitution itself, by any State action (as defined in Art. 12),-- legislative, executive or other-wise. The absolutist theory of law not being binding against the Sovereign itself whose command it is, is no longer acknowledged in England (*vide* Pollock, p. 61 not to speak of India where the Part containing Fundamental Rights has been incorporated into the written Constitution only to make these rights binding upon the State as defined in Article. 12.

As I have stated earlier, a right is a legal right only because the Sovereign recognises and enforces them. It ceases to be a right when the Sovereign has the option to recognise it or not as will happen after the disputed territory is transferred to the sovereignty of Pakistan. Even the contents of a right of property or the rights of an owner, are such as are declared by the municipal law of the land [Pollock,

Jurisprudence, pp. 86, 159; Dias & Hughe's Jurisprudence, 1957, pp. 342; (5) [I.C. Golak Nath and Others Vs. State of Punjab and Another](#), . Ownership has, thus, been defined by Pollock as "the entirety of the powers of use and disposal allowed by law" (p. 166, *ibid.*). Today, the Petitioners are clothed with a definite bundle of such powers recognised by the Indian law which constitutes their ownership over the lands in dispute in this Rule. All this is liable to be thrown to the winds by Pakistan as soon as the cession is completed. It is difficult to agree, therefore, that the cession would transfer to Pakistan only the sovereignty over the disputed lands; when the entire bundle of the proprietary rights of the Petitioners are liable to be extinguished or appropriated by Pakistan, the dominium over the disputed property will belong to Pakistan after the cession, under the municipal law of that State, while the sovereignty will be transferred to that State under International law.

52. This dominium which Pakistan will acquire after cession is not merely the "dominium eminens" (eminent domain) which every Sovereign possesses to acquire its subjects' property for public purposes, on payment of compensation, but that dominium which a subject himself enjoys over the property,-- regardless of the rights of the Petitioners. Though, as a result of the cession the Petitioners will become the subjects of Pakistan involuntarily, they shall have no such legal safeguards as the other subjects of Pakistan may have.

This is the reason why I hold that the proposed act of cession by the Government of India causes a transfer of the ownership of the Petitioners to Pakistan through the Union of India.

(e) It is contended by Mr. Sen, next, that even if in the eye of law, the result of the cession is a loss of the Petitioners' property rights, it can at best constitute a "deprivation" of the property of the Petitioners so as to attract cl. (1) of Article 31, but not cl. (2).

53. This brings us to the effects of the Constitution (Fourth Amendment) Act, but before taking up that topic, I would refer to the theory of "benefit to the estate" evolved by Hidayatulla, J. in [I.C. Golak Nath and Others Vs. State of Punjab and Another](#), , under which even after the introduction of Cl. (2A), deprivation of the citizen's property by the State may involve "compulsory acquisition" so as to attract cl. (2) of Article 31, if the State is benefited by a deprivation which causes a transfer of the owner's rights:

".....deprivation of property of any person is not to be regarded as acquisition or requisition unless the benefit of the transfer of the ownership or right to possession goes to the State or to a corporation owned or controlled by the State."

It is not difficult to see how the Union of India would be benefited by the proposed transfer of half of Berubari to Pakistan. The Union of India seeks to purchase the friendship of Pakistan by giving this territory because international peace is one of the objectives of the State in India, according to Article 51 of the Constitution. The

Union of India, and the people of India would thus be benefited if this objective is allowed to be fulfilled by proposed transfer; if so, it is the entire community and not the Petitioners alone who should bear the burden.

(f) It is true that the wide interpretation which the Supreme Court gave to cl. (2) of Article 31 has been curtailed by the changes introduced by the Constitution (Fourth Amendment) Act.

But in order to ascertain the scope of these changes, it is necessary to see the circumstances which led to this Amendment, Act. They have been fully explained by the Supreme Court itself, with reference to the pre-existing law to remedy the defects of which the Amendment was brought in,-- in the case (36) [Kavalappara Kottarathil Kochuni and Others Vs. The State of Madras and Others](#), , and I need only refer to the observations made therein. These, in brief are --

(i) The Amendment was introduced in order to override the interpretation given to the original Article by the majority of the Supreme Court in the case of (38) *State of West Bengal v. Subodh Gopal*, (1594 SCR 587, which was followed in (39) [Dwarkanadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others](#), and (40) [Saghir Ahmad Vs. The State of U.P. and Others](#), .

The majority view, in short, was that both the clauses (1) and (2) of Article 31 dealt with the same subject, namely, the protection of the subject against arbitrary deprivation of his property by the State (p. of 1954 SCR 608); that "deprivation" in cl. (1) included a case of "substantial abridgement of the rights of ownership" (p. 618, *ibid.*); that even where a substantial abridgement of the rights of the owner took place as a result of the exercise of the other powers of the State, such as the "police" power or the power to regulate, it amounted to "taking possession of within the meaning of original cl. (2) and compensation must be paid for such deprivation (pp. 611-2, *ibid.*); that acquisition in clause (2) may take place otherwise than by transfer of title.

This view was sought to be superseded by the Fourth Amendment.

Since the makers of the Fourth Amendment Bill appear to have adopted the concurrent view of Das J. in (38) *Subodh Gopal*'s case, it is necessary to summarise the opinion of Das J. in order to ascertain what the Amendment sought to achieve. The opinion of Das J. (p. 638) was --

(i) Clauses (1) and (2) of Article 31 dealt with two different subjects:

Clause (1) dealt with deprivation of property in the exercise of the police power and enunciated the restriction which our Constitution-makers thought necessary to be placed on the exercise of that power, namely, that it could be exercised only by authority of law as distinguished from an executive fiat.

Clause (2), on the other hand, dealt with the power of eminent domain and lays down the limitation subject to which only such power could be exercised, namely, payment of compensation.

(ii) Clause (2) had no application where the deprivation of property took place otherwise than by the process of acquisition which involves "a transfer of the entire title from the owner to the State or a third party for whom the State acquires the property" (p. 657, *ibid.*).

(iii) Deprivation in exercise of Police power, which came under cl. (1), did not involve acquisition or taking possession of under cl. (2) and, accordingly, no compensation was payable in such cases.

As observed by the Court itself in the Kochuni case (AIR 1966 SC 1080 at p. 1091), the Fourth Amendment Act adopted the view of Das J. and laid down that cl. (2) applied only to the case of "acquisition and requisition" which were defined in the new cl. (A), and not for deprivation or injury to property however serious that might be, if that took place otherwise than by transfer of the ownership or the right to possession of the property. The expression "transfer of ownership" has, however, not been explained, and judicial interpretation, therefore, still remains necessary. As I have already said, this transfer does not mean a transfer by an agreement or conveyance but a transfer effected by the coercive power of the State. To quote the words of Das J. ?

"When the acquisition by the State is effected by agreement after negotiation there is a regular conveyance transferring the title from the vendor to the State. Even where the acquisition by the State is effected by the coercive process of exercising its sovereign power the idea of purchase is nevertheless present, for there is a vesting of the property in the State by operation of law."

I have stated earlier that the same result of compulsory acquisition may take place also where, instead of vesting the property in itself at the first instance, the State transfers the property from the private owner to a third party outright, because the constitutional obligation to compensate under cl. (2) can-not be avoided by such indirect device.

54. The only certain conclusion that can be arrived at on the scope of the Fourth Amendment Act is that since this amendment, any case of de-privation caused by the exercise of the "police power" of the State will not attract cl. (2). It is relevant to see, in this context that all the cases, since the amendment, where cl (2A) has so far been applied to except a law from the pale of Article 31(2) are instances of the exercise of the regulatory power of the State, which is otherwise referred to as the "police power of the State", e.g. --

(a) the power to regulate the relationship of landlord and tenant (41) [[N. Vajrapani Naidu and Another Vs. The New Theatre Carnatic Talkies Ltd. Coimbatore,](#)];

(b) the power to regulate a business by licensing (42) [Glass Chatons Importers and Users" Association Vs. Union of India \(UOI\)](#), or issue of permits (30) [Gullapalli Nageswara Rao and Others Vs. Andhra Pradesh State Road Transport Corporation and Another](#), or exercise of the power conferred by the Constitution itself in Article 19 (6) (ibid.);

(c) the power to regulate the management of some endowed property (43) [Guru Datta Sharma Vs. State of Bihar](#), ; (44) [The Board of Trustees, Ayurvedic and Unani Tibia College, Delhi Vs. The State of Delhi and Another](#), ; (45) [Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others](#), .

If this be the only object of introducing cl. (2A), it is abundantly clear that the instant case is not one of an incidental injury to a private owner resulting from the exercise of the regulatory power by the State. The Union of India is, in substance, taking the property of the Petitioners to give it to Pakistan. Das J. explained the meaning of the Police power in contradistinction of Eminent Domain thus:

".....eminent domain takes property for use by the public or for the benefit of the public, while the police power prevents people from so using their own property as to injure others..

The primary purpose of police power is protection or prevention....." (p. 664).

In the case of eminent domain, on the other hand --

".....the public purpose is one which the State has to set out to fulfill as its own obligation and the State takes possession on its own account to discharge its own obligation."

I have demonstrated that in the instant case, the Union of India seeks to transfer the Petitioners' property to discharge its obligation arising out of the Agreement with Pakistan.

55. It is true that various exceptions have been introduced in Article 31, as it stands to-day but, subject to these exceptions, Article 31(2) still maintains that the State cannot "confiscate" an individual's property even for a public purpose (25) [P. Vajravelu Mudaliar Vs. Special Deputy Collector, Madras and Another](#), . It is to be noted that this interpretation of the object of Article 31(2) has been given by the Supreme Court in a number of cases even after the Fourth Amendment of the Constitution by which the adequacy of compensation was made non-justiciable vide (27) [Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another](#), ; (28) [Maharana Shri Jayvantsinghji Ranmalsinghji etc. Vs. The State of Gujarat](#), . This only demonstrates that we cannot forget that "a right of confiscation must be clearly shown to exist before the law will give effect to it" [Lord Pearce in the (7) *Burmah Oil Company case*, (1964) 2 All E.R. 348 (389)].

56. It may be mentioned incident-ally that it has been held by the highest authority in England, in the (7) *Burmah Oil Company case*, (1943) 2 All E.R. 348, that the power of Eminent Domain of a State includes the power to destroy a property and that, accordingly, compensation is payable not only where it takes the property for some public use but also where it destroys the property altogether for a like purpose. As Lord Reid observed (p. 355, *ibid.*).

".....it was rightly not argued that the fact the property is taken for destruction and not for use can make any difference".

Similar are the observations of Hodson at p. 381 and of Lord Pearce at p. 393. This conclusion can be arrived at only if it is held that the State cannot destroy a private owner's property without first transferring the ownership to itself, though indirectly or in fiction. Lord Pearce made this clear (p. 393, *ibid.*) --

"..... for the purposes of English common law I prefer the reasoning.... that the destroyed property was clearly appropriated to winning the war as animals, food and supplies requisitioned for that end. It has not been contended before us that the deliberate destruction of property to deny it to the enemy is any less a taking than is the acquisition of it for use. Nor do I think that such a distinction is valid at common law. Both alike are taken for military purposes."

Of course. I should mention in this context, that in the U. S. A., it has been held in (46) 17. *S. v. Caltex*, (1952) 344 US 149, without overriding earlier authorities (which are noted by the House of Lords in the *Burmah Oil Co. case* and commented upon), that mere destruction of property for defence purposes does not amount to "taking" within the meaning of the 5th Amendment to the American Constitution.

57. Under our Constitution, after the Fourth Amendment Act, a case of destruction may have to be excluded from the purview of clause (2), because clause (2A) assumes the existence of a property which is sought to be acquired. We are, however, relieved of the trouble of pursuing the case of destruction, because the instant case is not one of destruction of property. It is a case where the corpus of the property remains in tact, but is transferred to the command of a foreign sovereign. In the context of such a case, I have referred to the English decision in the *Burmah Oil Co. case* only to show that the doctrine of Eminent Domain is not necessarily confined to a direct transfer of title, but also includes cases where the private owner is affected because the State has done something indirectly which it could do only after getting the title transferred to itself.

The observation of Lord Pearce, just quoted (page 394 of (1964) 2 All ER 348) that English common law does not make any distinction between the different forms of taking to give rise to the liability to compensate is merely a corollary from the wide principle that what cannot be done directly cannot be done indirectly and that when this is sought to be done in an indirect manner, common law will treat it in the same way as it would have done had it been done directly and overtly. That this

proposition remains true in India even after the insertion of clause (2A) may be made clear by one illustration. Suppose, the State, instead of transferring to itself a land, through the procedure laid down in the law of Land Acquisition, provides by an enactment that A's lands shall henceforth be enjoyed by a public ins-situation, such as a School, which is "not a Corporation owned or controlled by the State." This is a case which would not literally attract clause (2A), but there is hardly any doubt that such a law, if it does not profess to compensate A would be struck down as contravening Article 31(2), inasmuch as the State cannot give the land to the public institution without first acquiring the title of A or, in other words "transferring the ownership" of A to itself (cf. (29) [Ajit Singh Vs. State of Punjab and Another, \).](#)

58. I, therefore, conclude that the cession of the disputed properties of the Petitioners which is sought to be implemented by the impugned demarcation, involves "compulsory acquisition" of those properties by the Union of India within the meaning of clause (2) of Article 31 and that, accordingly, the Respondents cannot be allowed to carry on the impugned acts until a law is made by the competent Legislature to provide for compensation to the Petitioners for the properties so acquired. The Rule is made absolute accordingly but without any order as to costs. Let an order in the nature of mandamus do issue restraining the Respondents from announcing the "appointed day" within the meaning of clause (2A) of the Constitution (Ninth Amendment) Act, 1960 and from constructing any pillars to demarcate Berubari Union No. 12 for the purpose of effecting the transfer of the portion of that" Union to Pakistan until a law is passed by the appropriate Legislature providing for payment of compensation to the Petitioners in respect of their disputed properties.

On the oral application on behalf of the Union of India, a certificate be granted for leave to appeal to the Supreme Court under Article 132(1) of the Constitution as this case involves a substantial question of law as to the interpretation of Article 31(2) of the Constitution.