(1953) 01 BOM CK 0009

Bombay High Court

Case No: Criminal Revision Application No''s. 500 and 642 of 1952

The State		APPELLANT
	Vs	
Zaverbhai Amaidas and Others		RESPONDENT

Date of Decision: Jan. 20, 1953

Acts Referred:

- Bombay Essential Article Restricted Acquisition and Possession Order, 1943 - Section 3(A)(1)
- Bombay Essential Supplies (Temporary Powers) and Essential Commodities and Cattle (Control) (Enhancement of Penalties) Act, 1947 - Section 2
- Constitution of India, 1950 - Article 246, 254, 254(2)
- Essential Supplies (Temporary Powers) Act, 1946 - Section 109(2), 11, 17(2), 2(1), 3
- Government of India Act, 1935 - Section 107, 107(2)

Citation: AIR 1953 Bom 371 : (1953) 55 BOMLR 387 : (1954) ILR (Bom) 117

Hon'ble Judges: Chagla, C.J; Chainani, J; Bavdekar, J

Bench: Full Bench

Advocate: H.M. Choksi, Government Pleader, for the Appellant; I.C. Dalal, Kusum Dalal and B.G. Pradhan, for the Respondent

Judgement

Bavdekar, J.

(1) Criminal Application for Revision No. 642 of 1952 arises from the admitted transport by the applicant of 7 1/2 Bengali maunds of juwar from his own village of Khanjorili to Mandvi on April 8, 1951. Such a transport without a licence is prohibited by Clause 5 (1) of the Bombay Foodgraius (Regulation of Movement and Sale) Order, 1949. The applicant raised a defence that he was transporting the grain under a permit issued by a Revenue Patel. But it has been found that the Revenue Patel had no power to issue a permit for this transport of the grain. It is not contended before us that that finding is wrong. But the learned advocate, who appears on behalf of the applicant, challenges the conviction of the applicant on two grounds. He says

that, in the first instance, in this case the learned Magistrate, who convicted the applicant, was not empowered to take cognizance of the offence, inasmuch as there was no report made by a public officer, as required by Section 11, Essential Supplies (Temporary Powers) Act, 1946. He says that, in the second instance, the conviction in this case was invalid, because the offence of contravening that Clause was punishable with seven years under Bombay Act No. 36 of 1947. Ordinarily, if there was no provision made specially for the trial of this offence, the offence would be triable only by a Court of Session under the Second Schedule of the Code in Criminal Procedure. But u/s 3 of Bombay Act No. 38 of 1947 certain Magistrates of the First Class specially empowered by the Provincial Government are given jurisdiction to try such offences. That has been the view which was taken by this Court in -- Akbaralli Tayaballi Vs. State, , it is contended on behalf of the applicant that in this case, however, the learned Magistrate, who tried the applicant, was not specially empowered under the provisions of Section 3 Of Bombay Act 36 of 1947. Consequently, he had no jurisdiction to try the offence.

(2) Criminal Application for Revision No. 500 of 1952 arises from an acquittal of the opponent of an offence u/s 7, Essential Supplies (Temporary Powers) Act, 1946. The charge against the opponent was that on April 3, 1950, the opponent was in possession of excess stock of wheat without a licence in contravention of Clause 3 (i) and 3-A (i) of the Bombay Essential Articles Restricted Acquisition and Possession Order, 1943. The opponent was convicted of this offence by the learned Additional Resident Magistrate, First Class, Baroda; but in appeal the learned Additional Sessions Judge held that the trial Magistrate had no jurisdiction to try this offence, inasmuch as he has not been specially empowered under the provisions of Section 3. Bombay Act No. 36 of 1947. The Government of the State of Bombay has applied in revision contending that it was not necessary that the trial Magistrate should have been specially empowered under the provisions of Section 3, Bombay Act No. 36 of 1947. The State contends that Section 2(1) of Bombay Act No. 35 of 1947, which prescribed an enhanced penalty of seven years for the contravention of an order made or deemed to have been made u/s 3 of the Act, is void on the ground that it is repugnant to the provisions of Section 7, Essential Supplies (Temporary Powers) Act, 1948, as it stood after its amendments from time to time by Acts of 1948, 1949 and 1950, the extent to which it is void being of course limited to the extent of the repugnancy. The grounds upon which it is contended that the repugnancy arises are that originally Section 7, Essential Supplies (Temporary Powers) Act, 1946, prescribed a maximum penalty of only three years for the contravention of an order made or deemed to have been made u/s 3 of the Act. Bombay Act No. 36 of 1947, described as an Act to provide for the enhancement of penalties for contravention of orders made under the Essential Supplies (Temporary Powers) Act, 1946, and the Bombay Essential Commodities and Cattle (Control) Act, 1948, prescribed an enhanced penalty of seven years for the same offence. This the legislature was not in a position to do, unless assent of the Governor General was obtained. Bombay Act

No. 36 of 1047 was consequently submitted for the assent of the Governor General, and his assent was obtained.

It is contended, however, on behalf of the State that subsequently the Central Legislature amended Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, from time to time. In the year 1948 in the case of orders relating to cotton textiles, it made a sentence of imprisonment obligatory. Under an Act of 1949, for the contravention of orders relating to foodstuffs, it made the sentence of imprisonment obligatory, unless the Court, for reasons to be recorded, was of the opinion that the sentence of fine only would meet the ends of justice. In August 1950, these amendments were incorporated into a new section, which replaced the old Section 7 as amended from time to time by the Acts of 1948 or 1949. Under that section, which is in force at the present moment, in case the contravention, is of an order u/s 3 relating to cotton textiles, the sentence of imprisonment is obligatory. In the case of a contravention of an order relating to foodstuffs, the sentence of imprisonment is obligatory, unless, for reasons to be recorded in writing, the Court is of the ooinion that sentence of fine would only meet the ends of justice and where the contravention is of an order prescribing the maximum quantity Of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrain exceeding twice the maximum quantity so prescribed the sentence of imprisonment is obligatory, and the maximum sentence of imprisonment, which is only three years in other cases of contraventions of orders made or deemed to have been made u/s 3, is prescribed as seven years. The State contends that inasmuch as the Central Legislature has, subsequent to the enactment of Bombay Act No. 36 of 1947, dealt again with the question of the imprisonment to be imposed for contraventions of orders and had failed to provide a maximum sentence of seven years for contravention of Section 3-A (i) of the Bombay Essential Articles Restricted Acquisition and Possession Order, 1943, unless he is in possession of foodgrains exceeding twice the maximum quantity prescribed by the order, there is a repugnancy between the Essential Supplies (Temporary Powers) Act, 1946 and Bombay Act 36 of 1947, and to the extent of that repugnancy the Bombay Act is void.

(3) It would be convenient to dispose of both the criminal applications by one Judgment, because if this argument in Criminal Application No. 500 of 1952 succeeds, then, in that case, the offence in application No. 642 of 1952 will be punishable only with a maximum term of imprisonment for three years and it would not, therefore, consequently bo necessary that the Magistrate, who tried the applicant in that application, should have been specially empowered under Bombay Act No. 36 of 1947.

(4) I shall take up first the question which is common to both the applications. Before doing so, it is necessary to state, however, that Section 7, Essential Supplies

(Temporary Powers) Act, 3946, was replaced in August 1950 by a composite section, which had incorporated the amendmants made into the original section from time to time by Acts of 1948 and 1949. But the offence under Criminal Application No. 500 of 1952 was committed before the enactment of this section. The question of repugnancy will have, therefore, to be considered, so far as this revision application is concerned, upon the Act as it stood before its amendment by Central Act No. 52 of 1950.

(5) Now, I have already mentioned what were the amendments made in the Act of 1946 by the Acts of 1948 and 1949. Sub-section (1) Of Section 7, Essential Supplies (Temporary Powers) Act, 1946, as it stood originally, was as follows:

"If any person contravenes any order made u/s 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both....."

The words dropped have no reference to the question before us being confined to the forfeiture of the property in respect of which the offence was committed. This section provided a maximum period of imprisonment of three years for contraventions of an order made u/s 3, and this will also include orders deemed to be made under that section. It appears that subsequently the Bombay legislature was desirous of providing an enhanced penalty for contravention of orders, so far as the Province of Bombay was concerned. It, therefore, enacted Act No. 36 of 1947, and provided for the contravention of orders made or deemed to be made under the provisions of Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, a maximum term of imprisonment of seven years. It also provided that, except for reasons to be recorded in writing, there shall be a minimum sentence of imprisonment for six months. But with that we will not have anything to do in the present case.

One point which has been made before us by Mr. Dalai, who appears for-the applicant in Criminal Application No. 642 of 1952, is that there is, as a matter of fact, no repugnancy, though tills Act was submitted to the Governor-General for his assent and his assent had been received. The argument is that the Central Act provided for a maximum term of imprisonment for three years. But it did not direct that the person, who had contravened the order, shall not be punished with imprisonment for a longer term. It was consequently permissible for the legislature of the Province of Bombay to enact Act No. 36 of 1947, which goes further than the Central Act, and provides a maximum term of imprisonment of seven years. The argument is usually described as the argument which says that there shall be no repugnancy, unless one Act says "do" what the other Act says "don''t." it has been well established, however, now that there may be created a repugnancy in cases whore there is not this type of inconsistency between the two enactments. This was pointed out by Isaacs J. of the High Court of Australia in -- ''Clyde Engineering Co. Ltd. v. Cowburn'', (1926) 37 CLR 466 (B). The test which he laid down, in order to

determine whether there is, or there is not, a repugnancy, was the test of "covering the field," a test recognised by their Lordships of the Privy Council in -- ''Grant Trunk Rly. of Canada, v. Attorney-General of Canada'', (1907) AC 65 (C). Their Lordships referred in that case to two earlier cases, -- ''Attorney-General of Ontario v. Attorney-General for the Dominion of Canada''. (1894) AC 189 (D), and -- Tennant v. Union Bank of Canada'', (1894) AC 31 (E). They then said that these two cases establish two propositions (p. 68) :

".....First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

This test of covering the field, which was leid down for the first time by their Lordships of tfte Privy Council, and was subsequently stressed by Isaacs J., in the Australian case referred to above, has met with general acceptance, and with respect, in our view, that is the test which must be applied in this case, in order to determine as to whether there was a repugnancy between Section 7 of the Essential Supplies (Temporary Powers) Act, 1946 and Section 2 (1) of Bombay Act No. 36 of 1947. It is quite true that the Central Legislature did not in express terms say by Section 7 (1) that a sentence of imprisonment of a longer duration than three years shall not be imposed. It has got to be remembered, however, that when enacting Section 7 (1) the Central Legislature was considering the question of what was the maximum sentence of imprisonment which may be imposed by a Court, when sentencing a person, who has contravened an order made u/s 3. To quote. the words of Isaacs J. In the Commonwealth case, when dealing with this question, the Legislature has dealt with the question not of "a" maximum, but "the" maximum. It is obvious, therefore, that on the question as to what was the maximum sen-tense to ne imposed for contravention of an order made or deemed to have been made u/s 3 of the Act, the Legislature applied its mind and covered the field when saying that the maximum shall be three years. When, therefore, Ihs Bombay Legislature attempted to deal with the same cues-tion by Section 2 (1) of Bombay Act No. 35 of 1947, a repugnancy arose. That was why the assent of the Governor General to Bombay Act No. 36 of 1947 was necessary. It was. however, obtained, and in consequence of such assent, Bombay Act No. 36 of 1947 would have operation notwithstanding the repugnancy.

(6) Subsequently, the Central Legislature from time to time amended Section 7 of its own Act. In my view, however, any attempt by the Central Legislature to amend its own legislation, not touching the repugnancy which was already regularised by the assent of the Governor General, would not affect the validity of Bombay Act 36 of 1947.

(7) it is true that u/s 107(2) of the Government of India Act the Dominion legislature had full powers to render the assent, of the Governor General nugatory by enacting

further legislation in regard to the matter, but the legislation, which would take away from the Provincial law its prevalence in the province, has to be on the game subject, in regard to which a repugnancy arose. In this case that means the Central Legislature had to deal again with the question of the maximum sentence to be imposed for the offence, for which the Provincial Legislature had provided a sentence of seven years. If it did not do so, but dealt with other matters leaving the maximum sentence where it was before, there would indeed remain a repugnancy, but that would be the one created before and sanctioned by the Governor General. There would be no repugnancy created afresh. When, therefore, it is contended that Section 2 (1) of Bombay Act No. 38 of 1947 became void owing to a repugnancy after the amendments made in the Central Act by the amendments of 1948, 1949 and 1950. what has got to be considered is, what exactly the central Legislature did in those years, and whether any repugnancy was created afresh by the enactments then passed.

(8) Now, in the year 1948, as I have already mentioned above, the legislature made the sentence of imprisonment obligatory, which was not the case before, when the contravention was of an order relating to cotton textiles. The method which it chose for making the sentence obligatory was as follows: it left Section 7 (1) main part (to distinguish it from the proviso, which followed) intact. Then, for the proviso which originally provided for compulsory forfeiture of the property in respect of which an offence was committed, when the contravention was of an order relating to foodstuffs, a new proviso was substituted. Clause (b) of the proviso was on the same subject-matter as the original proviso. Clause (a) by its first part made a sentence of imprisonment obligatory when the contravention was of an order relating to cotton textiles, and secondly made also obligatory forfeiture of at least Dart of the property in respect of which the order had been contravened. Now. It ii obvious that, when enacting this proviso in 1948 the Central Lesislature was not dealing with the question of the maximum sentence of imprisonment at all. The maximum sentence of imprisonment, which could be imposed, even when the contravention was of an order relating to cotton textiles. was under the provisions of Section 7 (1) three venrs. Section 7 (1) remained intact. Tne only thing which happened was thtat when enacts the new proviso in 1946. and making the sentence of imprisonment obligatory by Clause (a) (i) of the proviso, the Legislature repeated the words "for a term which nsav extend to three years" after the word "imnrisonment." But the words were repeated, so as to leave no doubt that the obligatory sentense which was provided could not exceed, as it could not have exceeded even other-wise. the maximum sentence of three veers provided by Section 7 (1). In my view the repetition of the words does not show that the Legislature was dealing with, when enacting Act No. 64 of 1948. the question of the maximum imprisonment to be awarded for contraventions of the orders made or deemed to have been made u/s 3.

(9) Then, we come to the Act of 1949, with which alone we will be concerned in Criminal Application No. 500 of 1952. That amendment replaced Clause (b) of the proviso to Section 7 (1) as it then stood with another Clause (b). It has got to be remembered that Clause (b) o&#65533; the. proviso, as it then stood, had relation to forfeiture of the property in respect of which the contravention had been made. This was dealt witn by Sub-clause (ii) of Clause (b) directed to be substituted, and may be omitted from consideration. Clause (i) of Sub-Clause (b) made a sentence of imprisonment obligatory for fee contravention of an order relating to foodstuffs. Here again, just as when enacting clause (a) of the proviso in 1943, the Legislature repeated alter the word ""imprisonment" the words "for a term which may extend to three years." But that did not alter the fact that Clause (b) (i) of the proviso dealt not with the question of the maximum terms of imprisonment, but with the question as to whether the sentence was to be obligatory or not. As I have already mentioned, the Legislature may well have stepped with the word "imprisonment," and then went on to add "and may in addition impose a sentence of fine, unless for reasons to be recorded it is of opinion that a sentence of fine only will meet the ends of justice." Here again, therefore, the Legislature was not dealing with the question of what should be the maximum term of imprisonment for contravention of an order made or deemed to have been made u/s 3, even when the order related to foodstuffs. In the result, therefore, the repugnancy which undoubtedly exists between Bombay Act No. 36 of 1947 and the Essential Supplies (Temporary Powers) Act, 1946, as amended from time to time up to and inclusive of Act No, 19 of 1949 was a repugnancy which had already been taken care of by the assent of the Governor-General obtained to Bombay Act No. 33 of 1947, when it was enacted, when amending Section , Essential Supplies (Temporary Powers) Act, 1946, in 1948 & 1949, the Central legislature did not do anything which, could be said to have created a repugnancy afresh between its own enactments and Bombay Act No. 38 of 1947.

It is contended, however, that, leaving aside for the moment the amendment of 1948, which refers to a contravention of an order relating to cotton textiles, with which we are not concerned in eitlier of the revision applications, when in 1949 the Central Legislature replaced Clause (b) of the proviso to Section 1 (1) by another Clause (b), it must have "known that the Bombay Legislature had, by Section 2 of Bombay Act No. 36 of 1947, provided a higher penalty of seven years for contravention of an order, among others, relating to foodstuffs. The former legislature was dealing with the question of imprisonment in regard to contraventions of orders relating to foodstuffs. Even so. It did not deem it fit to provide for contraventions of orders relating to foodstuffs a maximum term of imprisonment for seven years. It is said that when the Central Legislature, knowing what the Bombay Act had done, fai''cd to do so, a repugnancy arose afresh. But, in my opinion, a short reply to that argument is that the Central Legislature did indeed know that Bombay Act No. 35 of 1947 had prescribed the maximum term of

imprisonment for seven years [or contraventions of orders relating to foodstuffs, as it had provided for contraventions of other orders made or deemed to have been made u/s 3 of the Essential Supplies (Temporary Powers) Act. But it a!so must have known that the repugnancy was rendered innocuous by the assent which had been given by the Governor General to Bombay Act No. 36 of 1947. I am not suggesting that in case the Legislature had in 1949 again dealt with the Question of what should be the maximum term of imprisonment for offences of contravention of an order relating to foodstuffs, there would be no fresh repugnancy created. My point is that the mere fact that the legislature, knowing that the Bombay Act No. 33 of 1947 had provided for an enhanced penalty for contraventions of orders relating to foodstuffs as to other orders made, or deemed to have been made u/s 3 of the Act, failed to enact when amending the proviso to Section 7 (1) in 1949 a higher maximum for the sentence of imprisonment is not a sufficient ground for saying that there was a repugnancy created afresh, when the proviso to Section 7 (1) was amended in 1949.

(10) Then we come to the present section which has, as I have already mentioned, replaced in 1950 the old section. It is contended on behalf of the State that after its enactment the argument in favour of the contention that Section 7 (1) has become void owing to repugnancy is stronger, for the reason that at the time when the offence in this ease was committed Section 7 (1), which originally prescribed the maximum penalty for offences of contravention of an order made or deemed to have been made u/s 3 of the Act, was replaced. Whereas, formerly Sub-section (1) of Section 7 pro-.ided the maximum penalty for all offences of contraventions of orders made or deemed to have been made u/s 3 of the Act and the proviso provided for the obligatory sentences, after the amendments effected by Act No. 52 of 1950 we have now a section of which Sub-section (1) deals with contraventions of orders made u/s 3 relating to cotton textiles. Contravention of Sub-section (2) deals with orders u/s. 3 relating to foodstuffs. Subsection (3) deals with the remaining orders made or deemed to be made u/s 3 of the contravention of these orders. We will be concerned in the present case only with Sub-section (2) for the reason that in. this case the contravention is of Clause 5 (1), Bombay Poodgrains (Regulation of Movement and Sale) Order, 1949, and the offence committed is an offence in connection with foodstuffs. Now, it is pointed out on behalf of the State that Sub-section (2) of Section 7 has not got a separate clause or Sub-section providing for a maximum sentence of imprisonment followed by other clauses, whether in the form of proviso or not, providing for obligatory sentences. It is true indeed that Section 7 (2) dees provide for maximum sentences of imprisonment and direct that the sentence of imprisonment shall be obligatory. The obligatory sentence, however, is provided for in Clause (a) by adding after the words "shall be punishable with imprisonment for a term which may extend to three years", the words "and shall also be liable to flue, unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice".

It is said that, in the second instance, the new Section 7 (2) provides for a sen''ence of seven years, but that is only when the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons and the person contravening the order is found to have been in possession of food grain exceeding twice the maximum quantity so prescribed. It is contended that at least in 1950, when the Legislature provided for a maximum term of seven years for certain contraventions of the orders made or deemed to have been made u/s 3, it must be regarded that it had considered the question of the maximum sentence to be imposed when the contravention is of other orders relating to foodgrains, and it is said that consequently it must be taken that there was a fresh repugnancy created at least in 1950. Now, it is quite true that because the present Section 7 is a composite section incorporating in the original section the amendments made from time to time and also making certain other amendments, Sub-section (1) of Section 7, which had general application to contraventions of all sorts of orders made or deemed to have been made u/s 3, has disappeared now. Instead of providing by the opening Sub-section for the maximum term of imprisonment for contravention of all orders under s. 3, and then providing later by a proviso or otherwise for the sentence of imprisonment being obligatory, the new section divides by its three Sub-sections the orders u/s 3 into 3 classes, and each section deals with orders of each of the three classes. Sub-section (2) of the new section deals with orders regarding foodstuffs. Then, inasmuch as there is no longer in the new section any provision corresponding to old Section 7 (1) providing for a maximum term of imprisonment for contravention of all sorts of orders made or deemed to be made u/s 3, it combines so far as orders about foodstuffs are concerned the provisions of old Section 7, Sub-section (1) and Clause (b) to the proviso as it stood after its amendment in 1949, by which the sentence of imprisonment was made obligatory in case of contravention of all orders regarding foodstuffs. In my view, in considering whether in so recasting the section the Central Legislature dealt afresh with the question of the maximum sentence for contravention of orders regarding foodstuffs, we must consider the question from the point of view of substance and not from the point of view of form; and from the point of view of substance, it cannot be disputed that leaving aside for a moment a class of offences to be referred to nest hereinafter, the recasting of the section leaves the maximum sentence of imprisonment for contravention of orders u/s 3 regarding foodstuffs where it was before.

It is true that the Central Legislature has thought fit to provide by the proviso to the same Sub-section enhanced penalty for seven years where the contravention is of orders prescribing the maximum Quantity of any foodgrains that may lawfully be possessed by any person and the contravention is of a particular kind. But it appears to me that that does not alter the fact that the Legislature has not again dealt with the question of the maximum sentence of imprisonment in cases where the contravention is not of an order prescribing the maximum quantity of any

foodgrain, which may be possessed, or the contravention being of an order prescribing the maximum quantity of foodgrain, which may he possessed, the contravention is not by possessing foodgrain exceeding twice the maximum quantity prescribed. If we classify the offences of contravention of orders relating to foodgrain into two classes, class (a) to consist of contraventions of the orders prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person and the contravention is by possession of foodgrain exceeding twice the maximum quantity so prescribed, and class (n) of the other offences which may be committed in respect of orders relating to foodgrains made or deemed to have been made u/s 3. It is obvious that in 1950 the Central Legislature was dealing with the question of maximum sentence only with regard to offences comprised in class (a). Here, if the Central Legislature had prescribed, for example, another maximum, say, five years or eight years for these offences, to the extent of the repugnancy, Section 2 of Bombay Act No. 36 of 1947 would have become void. But so far as offences under CL (b) are concerned, the Central Legislature has left the maximum prescribed by it from the first untouched. It is still three years. That will be found from Sub-section (2), Clause (a) of Section 7. It is this subsection which really governs the present case and would have governed it if Bombay Act No. 36 of 1947 had not been enacted. Now, this clause of Section 7 (2) is merely a repetition upon the question of maximum imprisonment of the old Section 7 (1) with this difference that the words "shall be punishable" when read with what follows "unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice" make the sentence of imprisonment obligatory. So far as Section 7 (2) (a) is concerned, therefore, there is no alteration in the position as ft was when the Essential Supplies (Temporary Powers) Act was enacted except by the making of the sentence obligatory. In my view, therefore, even after the enactment of Act No. 52 of 1950 by the Central Legislature, there is no repugnancy created afresh. The repugnancy was trie old one which does not render Bombay Act No. 36 of 1947 Invalid, because the assent of the Governor-General as required in case of such repugnancy had. already been obtained.

(11) That would be sufficient to dispose of the argument that Section 2 of Bombay Act No. 36 of 1947 became void upon the enactment of the Central Act No. 19 of 1949, and if not then, at least when Act No. 52 of 1950 was passed. If it did not become void, then, in that case, the-offence could be tried only by a Magistrate specially empowered under s. 3 of Bombay Act No. 36 of 1947. As the Magistrate in this case was-not admittedly specially empowered, the conviction and sentence passed upon the applicant la-application No. 642 of 1952 must be set aside.

(12) it is not necessary, in that view of the case, to go into the second contention which has been made on behalf of the applicant in this application. But, in our view, tiiere is no substance in that contention. There was admittedly in this case before the Court which took cognizance of the offence a report in writing from the-Sub-Inspector who sent up a charge sheet. It is said, however, that the

Magistrate could not take cognizance upon the report, because the report did not show, in the first instance, what was the date upon which the applicant had transported grain from his village to another vitiage. Secondly, it did not even say what were the villages between which the grain was transported, and finally, it did not mention that the contravention was of Clause 5 (1) of Bombay Foodgrains (Regulation of Movement and Sale.) Order, 1949. Now, Section 11, Essential supplies (Temporary Powers) Act, 1946, states that before cognisance could be taken, there must be before the Court a report in writing of the facts constituting such an offence. It is denied that the requirement of the terms of the section are satisfied, but the section nowhere states that the report must state what was the offence which was committed, in the sense that it must quote the section by which the accused''s act was made penal. In case the offence was committed by contravention at an order which can be said to be made or deemed to have been made u/s 3, the section does not require that the report should mention what was the order or clause of the order which was contravened. All that the section requires is that the report should state the facts upon which it could be said that any clause of an order made or deemed to have been made under S- 3 was contravened, and those facts are mentioned in the present case. It is true that the date is not mentioned; nor is it mentioned from what village to What village the grain was being transported. But nothing obviously turned upon the date. Very often when framing a charge the exact date may not be known and may not be mentioned. Similarly, nothing depended again as to the names of the villages between which the transport took place. It is not as if clause 5 (1) of Bombay Foodgrains (Regulation of Movement and Sale) Order, 1949, prevents transport between villages of certain kinds. It prevents transport from one village to another. In our view, therefore, there was a report in writing of the facts constituting the oSences alleged to have been committed by the applicant before the Court.

(13) I shall now come to Criminal Revision Application No. 500 of 1952, in which the offence was committed before the enactment of Act No. 52 of 1950. I have already dealt with the question why the Central Acts of 1948 and 1949 did not create a repugnancy afresh. It was necessary, therefore, that the Magistrate, who tried the opponent in this application, should have been specially empowered. I would, therefore, dismiss the Revision Application.

Chainani, J.

(14) I regret I am unable to agree with the view taken by my learned brother on the question of repugnancy between the provisions of the Essential Supplies (Temporary powers) Act, 1946, as amended in 1949 and in 1950 and the provisions of the Bombay Essential Supplies (Temporary Powers) and the Essential Commodities and Cattle (Control) (Enhancement of Penalties) Act, 1947.

(15) in Criminal Application No. 642 of 1952, the applicant has been prosecuted for transporting jowar in, contravention of el. 5(1), Bombay Food-grains (Regulation of

Movement and Sale) Order, 1949. This order was issued u/s 3, Essential Supplies (Temporary Powers) Act, 1946. In Criminal Application No. 500 of 1952, the applicant has been prosecuted for being in possession of excess quantity of foodgrains in contravention of the provisions of the Bombay Essential Articles Restricted Acquisition and Possession Order, 1943. This Order was originally issued under the Defence of India Rules. After the expiry of the Defence of India Rules, the Order was continued in force by the Essential Supplies (Temporary Powers) Ordinance, 1S46, and was to be deemed to have been made under that Ordinance. That Ordinance was repeated by the Essential Supplies (Temporary Powers) Act. 1946. u/s 17(2) of this Act, any Order made or deemed to be made under the Ordinance and in force immediately before the commencement of this Act is to continue in force and is to be deemed to be an order made under the Act. Section 7 of this Act prescribes penalties for contravention of the orders made under this Act. The offences, for which the two applicants are being prosecuted, are therefore punishable u/s 7 of the Essential Supplies (Temporary powers) Act, 194G.

(16-17) Sub-section (1) of Section 7 of the Essential Supplies (Temporary Powers) Act, 1946. (hereinafter referred to as the Central Act) as it stood in 1946, ran as follows:

"7.(1) If any person contravenes any order made u/s 3, ne shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides, any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty :

Provided that where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall mate such direction, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole, or, as the case may be, a part, of the property."

Under this section, therefore, contravention of an order made u/s 3 was punishable with three years'' imprisonment. in 1947, the Bombay Essential supplies (Temporary Powers) and the Essential Commodities and Cattle (Control'' (Enhancement of Penalties) Act, 1917, (hereinafter referred to as the Bombay Act) was passed. This Act came into force on November 25, 1957, arrer receiving the assent of the Governor General. Sect-ion 2 of this Act provides ''inter alia'',

"Notwithstanding anything contained in the Essential Supplies (Temporary Powers; Act, 1945, whoever contravenes an order made or deemed to be made u/s 3 of the said Act,.....shall be punished with imprisonment for a term which may extend to seven years but shall not, except for reasons to be recorded in writing be less than six months and shall also be liable to fine."

This section therefore enhanced the punishment for contravention of an order relating to foodstuffs from 3 years imprisonment prescribed by section 7. Central Act to 7 years imprisonment. The provisions of this section were consequently

repugnant to the provision of section 7, Central Act. As, however, the Bombay Act had received the assent of the Governor General, it was to prevail u/s 107(2), Government of India Act, 1935, which was-in force in November 1947, when the Bombay Act was enacted. The relevant part of this section is as follows :

"107(2). Where a Provincial law with respect to one of the matters enumerated iu the Con-cm-rent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respcst to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact-further legislation with respect to the same matter."

(18) Under this section, the Bombay Act could prevail until there was "further legislation with respect to the same matter" by the Dominion or the Central Legislature. The material words are "further legislation" and not "different legislation." These words, in niv opinion, mean legislation enacted by the Central Legislature on the same master after the passing of thp Provincial law; which contained provisions repugnant to the Cen-i tral law. Under the Government of India Act. the Central Legislature could not repeal or modify a Provincial Act. The only way it could override it was by passing further legislation on the same subject. After a provincial law containing provisions repugnant to those of a Central law had come into force by receiving the assent of the Governor General the Central Legislature could eract fresh legislation on the same matter, con taining provisions similar to those made in the previous Central Act or provisions different from those previously enacted, in either case, it would have been "further legislation" on the same matter. In other words, it was open to the Central Legislature to determine whether the law on the subject should be as laid down in the Provincial Act or as previously laid down by it in the earlier Centra] Act. If the Central Legislature by enacting suitable provisions showed a clear intention that the law should be as previously laid down by it and not as enacted by the Provincial legislature, then that would be further legislation on the same matter and it would prevail over the Provincial law under Sub-section (1) of Section 107, Government of India Act, in my opinion, after a Provincial law enacting provisions repugnant to those of a Central Act had come into force by receiving the assent of the Governor General, the ''Central Legislature could again intervene in the matter and by passing a suitable enactment lay down that the law on the subject should be as enacted in the previous Central Act, and if it did so the Provincial law ceased to have effect,

(19) Section 3 of the Bombay Act provides,

"Notwithstanding anything contained in section 32 of the Code of Criminal Procedure, 1898. It shall be lawful for any Magistrate of the First Class ''specially empowered'' by the Provincial Government in this behalf and for any Presidency Magistrate to pass a sentence provided in section 2, for contravening any order

made or deemed to be made u/s 3 of the Essential Supplies (Temporary Powers) Act, 1946. or u/s 4 of the Bombay Essential Commodities and Cattle (Control Act, 1916, in excess of his powers u/s 32 of the said Code."

It has been held by this court in Akbaralli Tayaballi Vs. State, that in enacting this Section 3 the Legislature intended that the Magistrate referred to in the section should be the Court to try offences u/s 2(1) of the Act and that consequently such a Magistrate is competent to try such offences. A First Class Magistrate, specially empowered by the Provincial Government under the above section, could therefore try offences of contravention of orders relating to foodstuffs, even though they were punishable with 7 years imprisonment ,

(20) in 1948 a new proviso was substituted for the proviso to Section 7(1) of the Central Act. The new proviso consisted of two clauses. Clause (b), which is material for the purposes of this case, was in the following terms :

"(b) where tfag contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall direct that any property in respect of which the Order ha? been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in wilting it is of opinion that the direction should be made not in respect of the whole, or, as the case may be a part, of the property."

In 1949 the following was substituted for the above clause (b) by the Essential Supplies (Temporary Powers) Amendment, Act, 1949, which came into force on April 14, 1949,

"(b) Where the contravention is of an order relating to foodstuffs, the Court shall--

(i) sentence any person convicted of such contravention to imprisonment for a term ''which may extend to three years'' and may, in addition, impose a sentence of fine, unless for rea-sons to be recorded it is of opinion that a sen tence of fine only will meet the ends of justice, and

(ii) direct that any property in respect of which the order has been contravened or a part thereof shall be forfeited to His Majesty, unless for reasons to be recorded it is of opinion that such direction is not necessary to be made in respect of the whole, or, as the case may be, a part, of the property."

(21) This Act of 1949, therefore, made a sentence of imprisonment obligatory in cases of contravention of orders relating to foodstuffs, unless for reasons to be recorded the Court was of the opinion that a sentence of fine only would meet the ends of justice. The Act further provided that the maximum sentence of imprisonment in such cases should be three years. If the Central Legislature only wanted to make a sentence of imprisonment obligatory, it would have been sufficient to say that where the contravention was ot an order relating to the foodstuffs, the Court shall impose a sentence of imprisonment unless for reasons to be recorded it was of opinion that a sentence of fine only would meet the ends of

justice. It would not then have been necessary to go further and say that the sentence of imprisonment could extend to three years only. The provisions made in the Act of 1949 therefore show that the Central Legislature then came to the conclusion that even in cases of contravention of orders relating to foodstuffs, for which it made a sentence of imprisonment obligatory, the maximum sentence of imprisonment should be three years. This was therefore "further legislation" within the meaning of Sub-section (2) of Section 107, Government of India Act. Section 2 of the Bombay Act, being repugnant to the provisions of Section 7, Central Act, as amended in 1949, therefore became void and ceased to be in force, when tho amending Act of 1949 came into force on April 14, 1949.

(22) After April 14, 1949, offences of contravention of orders relating to foodstuffs were therefore punishable with three, years imprisonment only. Such offences could therefore be tried by any Magistrate of First Class and not only by a Magistrate of the First Class specially empowered in this behalf u/s 3 of the Bombay Act. The offence in Criminal Application No. 500 of 1952 was committed on April 3, 1950, and was therefore punishable with 3 years imprisonment only. It could therefore have been tried by the Additional Resident Magistrate, F.C., Baroda, who actually tried it, even though he was not specially empowered under the section referred to above. The view taken by the Sessions Judne in Criminal Application No. 500 of 1952 was, therefore, in my opinion, wrong. I would accordingly set aside the order passed by the Sessions Judge in that case & restore the order passed by the Magistrate convicting the accused u/s 7 of the Essential Supplies (Temporary powers) Act, 1946. The learned Magistrate had sentenced the accused to one month''s rigorous imprisonment & a fine of Rs. 200. Having regard to the facts that the offence was committed more than 2 years ago and that the accused is a young person of about 27 years of age, I would not send back the accused to Jail but would impose on him a fine of Rs. 200 only.

(23) in 1S50 . the Central Act was further amended by the Essential Supplies (Temporary powers) Amendment Act, 1050, which came into force on August 16, 1950. This Act substituted an entirely new Section 7 for the previous Section 7. Sub-section (3) of new Section 7 is in the following terms :

"7.(2) if any person contravenes any order u/s 3 relating to foodstuffs,--

(a) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the court is of opinion that a sentence of fine only will meet the ends of justice; and

(b) any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government, unless for reasons to be recorded the Court is of opinion that it is not neces-sary to direct forfeiture in respect of the whole or, as the case may be, any part of the property :

Provided that where the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrain exceeding twice the maximum quantity so prescribed, the Court shall--

(a) sentence him to imprisonment for a term which may extend to seven years and to a fine not less than twenty times the value of the foodgrain found in his possession, and

(b) direct that the whole of such foodgrain in excess of the prescribed maximum quantity shall be forfeited to the Government.

''Explanation''.--A person in possession of food-grain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this Sub-section."

After the enactment of this new section, the repugnancy which previously existed between Section 2 of the Bombay Act and Section 7 of the Central Act was removed as regards offences relating to the possession of foodgrains in quantities exceeding twice the maximum prescribed quantity. The repugnancy was not removed in regard to other offences, like the offence of transporting food-grains without a permit, with which the appli-cant in Criminal Application No. 642 of 1952 has been charged. Such offences continue to be punishable with three years imprisonment only land can therefore be tried by any Magistrate of the First Class and not only by a Magistrate of the First Class specially empowered in tills behalf.

(24) Even if it is held that the Essential Supplies (Temporary Powers) Amendment Act, 1949. was not "further legislation" within the meaning of Section 107(2) of the Government of India Act and that Section 2 of the Bombay Act did not consequently become void after the passing of the former Act, it cannot be disputed that the Central Legislature re-examined the whole question again in 1950, when it recast and substituted new Section 7 for the old Section 7 and laid down what sentences may be imposed for different kinds of offences relating to foodstuffs. The new Section 7 covers and occupies the whole field on the subject of the punishment to be awarded for such offences. This section provides that the maximum sentence of imprisonment for such offences should be 3 years, except when the oifence is one of possession of foodgraiu in excess cf twice the prescribed quantity, in which case the imprisonment may extend to 7 years Consequently at least after the amending Act of 1950 came into force on August 16, 1950. Section 2 of the Bombay Act became void in so far as it prescribes 7 years imprisonment for offences for contravention of orders relating to foodstuffs other than those of possessing food-grains in excess of twice the prescribed quantity. Offences like those of transporting foodgrains without a permit are therefore punishable with 3 years imprisonment only and can be tried by any Magistrate of the First Class.

(25) I would, therefore, confirm the conviction of and the sentence passed upon the applicant in Criminal Application No. 642 of 1952 and discharge the rule.

(Under Section 429, this matter was placed before the Hon''ble the Chief Justice for naming the Judge before whom it should be placed. The applications were heard by Chagla C. J., who delivered the following Judgment:)

Chagla, C.J.

(26) These two criminal revision applications have come before me because Bavdekar and Chainani JJ. who heard them differed in their conclusions. With regard to criminal revision application No. 643 of 1952. three persons were charged before the learned Resident. Magistrate, Bardoii, with having without psrmit or pass transported 15 maunds of jowar frcm the village of Khanjroli to Mandvi on 5-4-1951, and by doing so having contravened el. 5(1) of Bombay Foodgrains (Regulation of Movement and Sale) Order, 1949, which was issued u/s 3, Essential Supplies (Temporary Powers) Act (24 of 1946). The learned Magistrate acquitted two of the three accused and convicted the third. He appealed to the learned Sessions Judge, the Sessions Judge dismissed the appeal, and the accused came in revision to this Court. In criminal revision application No: 500 of 1952 the accused was charged with having committed an offence u/s 3(A)(1), Bombay Essential Articles Restricted Acquisition and Possession Order of 1943, which Order was issued u/s 1 of Act 24 of 1946, in that he was in possession of food in excess of what was permissible under the Order issued by the State Government. The learned First Class Magistrate, Baroda, convicted and sentenced him, but in appeal the learned Sessions Judge took the view that the Magistrate who tried him was not competent and therefore the order of conviction was a nullity. He, therefore, set aside the order of conviction and sentence and directed that the accused should be tried by a properly authorised Magistrate. The State of Bombay have come in revision from that order of the learned Sessions Judge. In both these revision applications the same question arises, and the question is whether the trial by a Magistrate who is not specially empowered under the Bombay Essential Supplies (Temporary Powers) and the Essential Commodities and Cattle (Control) (Enhancement of Penalties) Act (36 of 1947) is a legal trial. In order to decide that question the real question that has got to be considered and decided is whether Act 33 of 1947 wag applicable in respect of these offences after the Essential Supplies (Temporary Powers) Amendment Act (19 of 1943) and the Essential Supplies (Temporary powers) Amendment Act (52 of 1950) were passed- if Act 36 of 1947 was not applicable and the trial was governed either by Act 19 of 1949 or Act 52 of 1950, then it is not disputed that the Magistrate was a competent. Magistrate. If, on the other hand, the trial was governed, by Act 33 of 1917. It is again not disputed that the Magistrate was not a competent Magistrate and the order of conviction and sentence passed by him was without jurisdiction.

(27) Act 24 of 1946 was passed by the Central Legislature and by Section 7 it provided penalties for contravention of orders made u/s 3 of the Act and the

provision with regard to the penalties was that if any person contravened any order made u/s 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and it also gave the power to the Court to forfeit any property in respect of which the order was contravened. Therefore, Section 7 as it originally stood dealt wife contraventions of any order made u/s 3 and it provided one sentence and that was a maximum of three years'' imprisonment or a fine or both fine and imprisonment. It is unnecessary in those applications to consider the provision with regard to forfeiture- Then Bombay Act 36 of 1947 was passed. By Section 2 of that Act it was provided that notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act of 1946, whoever contravenes an order made or deemed to be made u/s 3 of the Act shall be punished with imprisonment for a term which may extend to seven years, but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine. Therefore it altered in two material respects the penal provision of Section 7 of Act 24 of 1946. It made the maximum sentence seven years and it also made it obligatory upon the Court to impose a sentence of fine, and further it provided for a minimum sentence of six months and the Court was bound to impose this minimum sentence except for reasons to be recorded in writing.

Then the Central Legislature passed the Essential Supplies (Temporary Powers) (Amendment) Act (64 of 1948) and that Act made no alteration with regard to the sentence provided for contravention of an order relating to foodstuffs with which we are concerned excepting with regard to forfeiture. Then the Central Legislature passed Act 19 of 1949 and with regard to contravention of orders relating to foodstuffs it made a provision to the effect that the Court shall sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may in addition impose a sentence of fine, unless for reasons to be recorded it is of opinion that a sentence of fine only will meet the ends of justice. Therefore the sentence of imprisonment for contravention of orders relating to foodstuffs was no longer discretionary as was the position under Act 24 of 1946. Then the Central Legislature enacted Act 52 of 1950 which came into force on 16-8-1950, and that Act recast the whole of Section 7 and it substituted a new section for the original Section 7, and the substantial change that it made in the position that obtained under Act 19 of 1949 was that it provided for a maximum sentence of seven years in cases of contravention of an order prescribing the maximum quantity of any foodgrain that may be lawfully possessed by any person or class of persons and the person contravening the order was found to have been in possession of foodgrain exceeding twice the maximum quantity so prescribed. In such cases it also provided for a fine not less than 20 times the value of the foodgrain found in his possession. The scheme of the new section was that Sub-section (1) dealt with contravention of orders u/s 3 relating to textiles, Sub-section (2) dealt with contravention of orders relating to foodstuffs, Sub-section (3) dealt with punishment for contravention of orders relating to any essential

commodity other than cotton textiles and foodstuffs, and Sub-section (4) dealt with failure to comply with directions given in Sub-section (4) of Section 3.

(28) Now, when the accused committed the offences with which they are charged, Act 24 of 1946 was in force as amended by the various Acts to which T have drawn attention and Bombay Act 36 of 1947 was also in force, and the contention of both Mr. Dalai and Mr. Fradhan on behalf of the accused is that the trial of the two cases should be regulated by the provisions of Act 36 of 1947 and not those of Act 24 of 1946 amended by subsequent Acts. If the trial is to be regulated by Bombay Act 35 of 1917, then the Magistrate trying the accused would have the power to sentence the accused, if they were convicted, to a term of imprisonment which may extend to seven years, and therefore it is clear that the learned Resident Magistrates who have tried these two eases would have no jurisdiction to try an offence punishable with imprisonment for 1 yesrs. It is only a Magistrate specially authorised u/s 3 of the Act who would have jurisdiction to try these two cases and admittedly tiie learned Magistrates who have tried these two cases were not authorised u/s 3 of Act 36 of 1947. In other words, the jurisdiction of the learned Magistrates was confined to trying cases in respect of offences the maximum sentence for which provided under the law was three years. Therefore, if the Magistrates attempted to try a case in respect of an oSence where the maximum sentence which could be swarded was seven years, they would be acting beyond their jurisdiction.

(29) Now the first question is whether Bombay Act 36 of 1947 and India Act 24 of 1946 both being valid Acts could be reconciled so that effect could be given to both these statutes. If they can be reconciled, then no further question arises, but if {hey cannot be reconciled and if they are inconsistent with regard to any of the provisions, then the next question that would arise is, how is the repugnancy between the provisions of the two Acts to be dealt with? in my opinion, it is perfectly plain that the provisions of the two Acts as they applied at the material date were entirely inconsistent and irreconcilable. Whereas Bombay Act 33 of 1947 provided for an accused convicted for contravening an order made u/s 3 to be punished with the maximum sentence-of seven years. Act 24 of J946 provided for the same offence the maximum sentence of three years. In other words, while Act 36 of 1947 empowered a properly constituted judicial authority to inflict the sentence upon an accused with regard to a particular offence up to seven years'' imprisonment, the Centra! Act conferred a much more limited authority upon a competent judicial authority trying a case with regard to an identical offence. The power given by the Central Act was restricted and limited to passing a sentence of three years'' imprisonment and no more. Mr. Dalai lias contended that there is no inconsistency between the two Acts because the Central Act, Act 24 of 1946, does not contain any provision against the Court imposing a higher sentence than three years, and inasmuch as there is no prohibition in that Act, the mandatory provisions of Act 36 of 1947 could be carried out without creating any repugnancy or irreconcilability or inconsistency with the Central Act. In my opinion, this contention is entirely

untenable. I do not understand how it could possibly be urged that the Central Act does not contain a prohibition against, a sentence higher than three years being imposed upon a person convicted of a particular offence. When the Central Act lays down the maximum sentence of three years, it by necessary implication contains a prohibition against a higher sentence being imposed upon the accused. There can be no doubt that if Act 24 of 1946 was alone in the field, any Court that imposed a sentence of more than three years in respsct of the offence mentioned in that Act would bs passing an illegal order. Therefore there is no doubt in my mind, whatever the result of that view may be, that there is a clear inconsistency between Act 36 of 1947 and Act 24 of 1948.

(30) I will now proceed to consider what the result of this inconsistency is. When Act 36 of 1947 was passed by the Bombay Legislature, the Government of India Act was in force, and I do not think that there can be much doubt that the Legislature was legislating upon a subject which is included in the Concurrent Legislative List. The subject may fall under Entry l, Entry 2 or Entry 15. I am not prepared to accept Mr. Dalal''s contention that the legislation was under the exclusive Provincial List. Mr. Dalai suggests that the subject-matter of legislation is covered by "administration of justice" falling under Entry I of List II. In my opinion this Act has nothing whatever to do with the administration of justice. It deals with criminal procedure & at most it deals with jurisdiction & powers of Courts. If, therefore, the legislation was on a Subject which fell in the Concurrent Legislative List, we must try and find out what effect legisla-lation in respect of a subject in the Concurrent list has upon an Act passed by the Central Legislature. This subject is dealt with in Section 107, Government of India Act. Sub-section (1) provides that where there is a repugnancy between a Provincial law and a Federal law, the Federal law shall prevail and the Provincial law to the extent of repugnancy shall be void. Sub-section (2) provides that if the Provincial law, having been reserved for the consideration of the Governor General or for the signification of His Majesty''s pleasure, has received the assent of the Governor General or of His Majesty, the Provincial law shall in that Province prevail, if the Provincial law is in respect to one of the matters enumerated in the Concurrent Legislative List and there is a repugnancy between til at law and an earlier Federal law or an existing Indian law. Therefore Sub-section (2) gives the power to the Provincial Legislature to amend a Federal or Indian law provided two conditions are satisfied, viz.. that the Provincial Legislature is dealing with a subject, mentioned in the Concurrent Legislative List and the law has been reserved for the consideration of the Governor General or His Majesty. Act 36 of 1947 satisfied the conditions laid down in Section 107(2) and therefore it effectively amended Act 24 of 1916.

(31) But Sub-section (2) goes on to provide that nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter; and there is a proviso to this subsection that if a Bill is introduced in the Central Legislature for making any provision repugnant to any Provincial law, such a Bill shall not be

introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion. Therefore, again it is clear that it was open to the Central Legislature to pass a law which was repugnant to Act 36 of 1947 provided the conditions laicl down in the proviso were satisfied. Mr. Dalai points out that there is nothing to show that any of the Acts referred to. Acts 64 of 1948, 19 of 1949 and 52 of 1950, received the previous sanction of the Governor General or of the President under our present Constitution. But the answer to that contention is that even if no such sanction was obtained, the absence of the sanction is cured by Section 109(2). Therefore, it is clear from these provisions to which I have referred that if there is a repugnancy between Bombay Act 36 of 1947 which is a Provincial or State law and Act 52 of 1950 which is a Central law or an Indian law, the Central or Indian law must prevail against the Provincial or State law. I may point out that under our Constitution provisions similar to and almost identical with Section 107, Government of India Act are incorporated. See Article 254 and also Article 255.

(32-33) The view taken by Bavdekar J. Is that the repugnancy between the Provincial Act and the Central Act was cured u/s 107(2) by obtaining the previous assent of the Governor General, and in the subsequent legislation the Central Legislature has not modified the provisions of law with regard to punishment of the offences with which we are dealing, and all that the Central Legislature has done is to re-embody the provisions which already existed prior to Act 36 of 1947. Therefore what is suggested is that the repugnancy having been cured and effect having been given to the Bombay law, that law continues to be operative inasmuch as the subsequent pieces of legislation passed by the Centre have not in any way affected or modified the law as contained in Act 36 of 1947. With very great respect to the learned Judge, I am not prepared to accept that contention. The test that must be applied, in my opinion,--and that is the only test-- is to look at both the laws, the State law and the Indian law, and to decide whether there is any inconsistency between them. If there is any inconsistency, then the provisions of Section 107 or Article 254 must be applied. Applying the test to Act 36 of 1947 and Act 52 of 1950, as I have already pointed out, there can be no doubt that there is a clear Inconsistency, and, therefore, the only question is whether u/s 107 or Art, 254 which of the two laws must prevail, and there can be no doubt that Act 52 of 1950 being a subsequent law & Parliament having the power to amend & modify the State law, the law passed by Parliament must prevail against the law passed by the Provincial Legislature in 1947. Even though by giving his assent the Governor General may have approved of Act 24 of 1946 being amended by Act 36 of 1947, there was nothing to prevent the Indian Legislature subsequently from again modifying the Bombay law and restoring the original Indian law even with regard to its application to the State of Bombay. Therefore, in my opinion, it is not right to read into Act 52 of 1950 a tacit approval by the Legislature of the amendment in Act 24! of 194S introduced by Bombay Act 36 Of 1947.

(34) Mr. Dalai asks me not to apply the doctrine of what is known as occupied field in deciding whether Act 38 of 1947 is repugnant to any of the provisions of Act 52 of 1950. The doctrine of occupied field was enunciated by Isaacs J. In

-- ''(1926) 37 C WLR 460 at p. 489 (B)'': "....If, however, a competent Legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another Legislature assumes to enter to any extent upon the same field."

Mr. Dalai points out that the Full Bench of the Patna High court has not accepted that test. See -- Mangtulal and Another Vs. Radha Shyam and Another, . Mr. Dalai has also drawn my attention to the judgment of the Federal Court in -- AIR 1939 74 (Federal Court) . Sulaiman J. at p. 84 deals with the question of repugnancy. Sulaiman J. refers to the rule laid down in -- ''Kutner v. Phillips'', (1891) 2 Q B 267 (H):

".....a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together.....Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied..... or unless there is a neces sary inconsistency in the two Acts standing together:"

In my opinion it is correct that as far as our Constitution is concerned, the doctrine of occupied field cannot be applied, if that doctrine means that if Parliament legislates on a particular subject and thereby occupies the field, the State Legislature is completely debarred from legislate on the same subject. The very fact that a particular subject is in the Concurrent List means that both Parliament and the state Legislature are entitled to legislate with regard to that subject. Therefore, Parliament cannot exclude or oust the State Legislature merely by legislating on any particular subject. Our Constitution clearly recognises the right of both Parliament and the State Legislature to legislate concurrently with regard to a subject mentioned in the Concurrent List, and therefore the doctrine of repugnancy we must apply here is not so stringent as would be applied in ''other countries where the constitutional position is different. In my opinion the repugnancy tnat has got to be found is the repugnancy in the actual provisions of the two laws and not with regard to tha subject matter of the two laws. Therefore the proper test is what was suggested by Sulaiman J. viz., whether effect can be given to the provisions of both the laws or whether both the laws can stand together. If effect, cannot be given to both the laws and both the laws cannot stand together, then the law made by Parliament must prevail as against the law made by the State Legislature.

(35) Applying that test to the facts of this case, can the provision contained in Act 52 of 1950 that the maximum sentence for a particular offence shall be three years, be given effect to along with the provision of the law contained in Bombay Act 35 of 1947 which provides that the maximum sentence for the same offence shall be

seven years? in my opinion it is impossible to contend that effect can be given to both these provisions of the law. It is equally clear that both these provisions cannot stand together, one must give way to the other, and the law is clear that it is the law of the State that must give in to the law of Parliament. In my opinion, therefore, Chainani J. was right when he took the view that the provisions Of Bombay Act 35 of 1917 with regard to the sentence to be imposed for offences under Act 24 of 1946 were repuenant to the provisions of Act 52 of 1950. If, therefore, Act 52 of 1950 is to prevail, the maximum sentence that can be imposed upon the accused in respect of the offences with which they are charged is three years. In that view of the case the learned Magistrate was competent to try the case and it could not be urged that the order of conviction passed by him was an order without jurisdiction.

(36) Mr. Pradhan has urged that in criminal revision application No. 500 of 1952 the offence is alleged to have been committed on 3-4-1950, before Act 52 of 1950 came into force, and Mr. Pradhan says that the position is different with regard to Act 19 of 1949. In my opinion the position is identical. Act 19 of 1949 is subsequent to Act 36 of 1947 and that Act expressly provides that where the contravention is of an order relating to foodstuffs, the Court shall sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may in addition impose a sentence of fine, unless for reasons to be recorded it is of opinion that a sentence of fine only will meet the ends of justice. Therefore this amend ment makes an alteration in the penalty provided under the original Section 7 with regard to this very offence. But whether there is an alteration or not. Act 19 of 1949 represents the fiat of the Central Legislature and the Central Legislature has passed a law subsequent to Act 36 of 1947 which provides for the sentence to be imposed where there is a contravention of an order relating to foodstuffs, and the sentence provided for by the Central Legislature is different from the sentence provided for by Act 36 of 1947. Act 36 of 1947 and Act 19 of 1949 cannot stand together, effect cannot be given to both these laws, and, therefore, even in the case of me accused in criminal revision application No. 500 of 1952, his trial must be governed by Act 24 of 1946 as emended by Act 19 of 1949 and not by Act 36 of 1947. Therefore in my opinion the learned Sessions Judge was in error in setting aside the conviction of the accused in criminal revision application No. 500 of 1952 and remanding the matter for trial.

(37) it is clear from the judgments of Bavdekar and Chainani JJ. that they were against the accused in criminal revision application No. 642 of 1952 on all other points urged by him, both with regard to his conviction and sentence, and Chainani J. makes it clear that if the view of the law was as he had stated, the revision application should be dismissed and the order of conviction and sentence upheld. I would, therefore, dismiss this revision application and confirm the order of conviction and sentence passed upon the accused.

(38) With regard to criminal revision applica tion No. 500 of 1952, the order of the learned Sessions Judge remanding the case will be set aside and the appeal will go back to the learned Sessions Judge with a direction that ho will dispose of it according to law.

(39) Order accordingly.