

State Of Punjab And Anr vs Khan Chand on 17 December, 1973

Equivalent citations: 1974 AIR 543, 1974 SCR (2) 768, 1974 (1) SCC 549, AIR 1974 SUPREME COURT 543, 1974 2 SCR 768, 1974 CURLJ 138

Author: Hans Raj Khanna

Bench: Hans Raj Khanna, A.N. Ray, Kuttily Kurien Mathew, A. Alagiriswami, P.N. Bhagwati

PETITIONER:
STATE OF PUNJAB AND ANR.

Vs.

RESPONDENT:
KHAN CHAND

DATE OF JUDGMENT 17/12/1973

BENCH:
KHANNA, HANS RAJ
BENCH:
KHANNA, HANS RAJ
RAY, A.N. (CJ)
MATHEW, KUTTYIL KURIEN
ALAGIRISWAMI, A.
BHAGWATI, P.N.

CITATION:
1974 AIR 543 1974 SCR (2) 768
1974 SCC (1) 549

CITATOR INFO :

E&D	1976 SC1031	(28)
D	1976 SC1961	(8)
RF	1978 SC 597	(56)
RF	1979 SC 916	(54)
R	1979 SC1628	(21)
R	1980 SC1255	(12)
RF	1980 SC1561	(28)
RF	1980 SC2147	(63)
RF	1981 SC 487	(16)
R	1981 SC1829	(97)
RF	1981 SC2041	(8)
RF	1981 SC2138	(26, 27, 30, 31)
D	1982 SC 149	(1244)
R	1983 SC 130	(13)
R	1983 SC 624	(8)
RF	1984 SC1361	(19)
RF	1985 SC 551	(7)

R	1985 SC1416	(92,93)
R	1986 SC 180	(39)
RF	1986 SC 872	(71)
RF	1986 SC1035	(10)
D	1986 SC1955	(5)
E&D	1987 SC 294	(39)
RF	1987 SC1676	(17)
RF	1987 SC2359	(14,15)
RF	1988 SC 157	(9)
RF	1988 SC 354	(15)
RF	1988 SC 535	(22)
F	1989 SC1335	(52)
F	1989 SC1642	(25)
R	1990 SC 334	(104,107)
R	1990 SC1031	(12)
R	1990 SC1277	(46)
R	1990 SC1402	(29)
RF	1990 SC1480	(29)
R	1991 SC 101	(165,257)
RF	1992 SC 1	(133)
RF	1992 SC1277	(47)
F	1992 SC1858	(19)

ACT:

Constitution of India, 1950, Art. 14-If s. 2 of the East Punjab Movable Property (Requisitioning) Act, (15 of 1947) is violative of Art. 14.

HEADNOTE:

The truck of the respondent was requisitioned under s. 2 of the East Punjab Movable Property (Requisitioning) Act, 1947 for famine relief work. The section provides that the State Government, if it considers it necessary or expedient so to do, may requisition any movable property provided that no property used for the purpose of religious worship and no aircraft or any thing connected with aircraft, shall be requisitioned.

On the question of the constitutional validity of the section

HELD : (Per A. N. Ray, C.J., H. R. Khanna, A. Alagiriswami and P. N. Bhagwati, JJ. :) The Act confers arbitrary powers for requisitioning of movable property upon the authorities under the Act and no guidelines whatsoever have been prescribed for the exercise of the powers. The provision therefore falls within the mischief which Art. 14 of the Constitution is designed to prevent and hence is invalid.

In view of the complex nature of the problems a modern State has to face, it is but inevitable that matters of detail should be left to the authorities acting under an enactment. Discretion has therefore to be given to the authorities con-

cerned for the exercise of powers vested in them under in enactment. Such vesting does not by itself entail contravention of Art. 14. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines for the exercise of that discretion. The enactment must therefore prescribe the guidelines so that, within the framework of those guidelines the authorities can exercise their discretion. But discretion which absolute and uncontrolled degenerates into arbitrariness. If a Legislature bestows such untrammelled discretion on authorities, it abdicates its essential function, for, such discretion is bound to result in discrimination which is a negation of the ideal of equally enshrined in Art. 14. A statute need not itself make any classification of the persons or things for the purpose of applying its provisions, but may leave it to the Government to select and classify. In determining the validity of such a statute, the Court will not strike it down, merely because no classification appears on its face or because discretion is given to Government to make the classification. The Court will examine and ascertain if the statute has laid down any principle or policy for the guidance of the Government in the matter of classification; and it is only if the statute does not lay down any such principle or policy that the court will strike down the statute on the ground that it provides for the delegation of arbitrary and uncontrolled power to the Government which may result in discrimination. [774H]

(1) In the present case, the Act confers uncontrolled power on the State Government or the officers authorised by it to requisition any movable property except those excluded. No guidelines have been laid down in the Act regarding the object or the purpose for which the State Government or its officers may consider it necessary or expedient to requisition. The Act does not even require that the authority requisitioning the movable property should specify the purpose in the order of requisition. [773G]

(2) There is no provision in the Act that the power of requisitioning can be exercised only for a public purpose or in an emergency or in some special contingency. To read the words 'for a public purpose' in the section, when the words are not there, would amount to judicial legislation. [773H]

769

(3) It is open under the Act, for an authorised officer to requisition any movable property for any purpose. It is no answer to say that an officer would not do so when there is nothing in the Act which makes it impermeable for him to requisition any movable property for any purpose whatsoever. [774A-B]

(4) The power under the Act can be exercised not only by the State Government but by any of its officers to whom it may be delegated by the State Government. The Act does not specify that the delegate should not be an officer below a

particular rank and hence the powers of requisitioning could be conferred even upon a petty officer. [774D]

(5) No suitable machinery is provided in the Act for determining the compensation payable to the owner. According to s. 4. it shall be such amount as the State Government may determine. [774D-E]

(6) The fact that Act is a pre-Constitution Act makes no difference. The protection afforded by Art. 31(5) to pre-Constitution laws is against the challenge on the ground of contravention of Art. 31(2) and not against challenge on the ground of contravention of Art. 14. [774G]

(7) Both the conditions laid down in Pannalal Binjraj v. Union of India [1957] S.C.R. 233 are satisfied. There is every possibility of real and substantial discrimination under the impugned Act; and the Act impinges on the fundamental right of property. [776G-H]

(8) In adjudicating on the Constitutional validity of statutes, the courts discharge an obligation imposed on them by the Constitution and no judicial arrogance is involved. The Courts would be shirking their responsibility if they hesitate to declare the provisions of a statute unconstitutional when they are found to be violative of the articles of the Constitution. Abnegations in a matter where power is conferred to protect the interests of others against measures which are violative of the Constitution is not commendable and is fraught with serious consequences. [777D]

Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & Ors. [1959] S.C.R. 279 on pages 299 and Pannalal Binjraj v. Union of India, [1957] S.C.R. 233, followed.

Jayantilal Parshottamdas v. State of Gujarat. 11 Gujarat Law Reporter 403 Harishankar Bagla & Anr. v. The State of Madhya Pradesh [1955] 1 S.C.R. 380, Sri Ram Ram Narain Medhi v. The State of Bombay, [1959] 1 Suppl. S.C.R. 489, and P. J. Irani v. The State of Madras, [1962] 2 S.C.R. 169, distinguished.

Per Mathew J : (dissenting) With the proliferation of the functions of the State, it has become necessary to vest wide discretionary powers upon administrative organs of the State. Often it is practically useless to lodge power in a public functionary without giving him a large measure of discretion for, the situations which might arise in public affairs are multifarious and very often unpredictable and unforeseen. There is always a potential danger in vesting any discretionary power in any person as it is liable to be abused or exercised in a discriminatory manner, however much the legislature might try to hedge the power with safeguards. [781F]

(1) It is impossible for anybody to read the section as conferring a power to requisition any movable property for a purpose other than a public purpose.

(2) Nothing hinges upon the presence or absence of such phrases as 'public interest' 'public good', 'public

purpose', Courts and parties all assume that the legislature always wants protection of the public interest, to serve public causes and do things for public good or to exercise powers for public purposes, and, always intends that administrators act justly and reasonably whether the legislative says so or not in the statute. Government exists and its only title to exist is claim to advance the public good and serve the public interest. So, when the section said that the State Government may requisition if it considers 'necessary or expedient', it can only mean, when it considers 'necessary' or 'expedient' so to do public interest. This is implied in the section and when the purpose for which a power is given may not be specified in the Act, the Court is not prevented from inferring the purpose. The expression 'necessary' or 'expedient' used in the section

770

is sufficient to give an adequate guidance to the Government when read in juxtaposition with the implied Purpose of the concernment of the power. 'Necessary' means 'what is indispensable, needful or essential' and 'expedient means 'useful for affecting a desired result, fit or suitable for the purpose.' One has to appreciate the fact that the legislature, while laying down the policy or principle, is bound to keep in mind the nature of the problem that is to be tackled by the State Government. A variety of factors and circumstances arise for consideration in deciding whether a particular movable property should or should not be requisitioned. The legislature rightly decided that it would not serve the purpose if it were to define and describe all the relevant factors which have to be taken into account for requisitioning any movable property. It was not necessary for the legislature to supply the State Government with a more specific formula for its guidance where flexibility and adaptation to infinitely variable conditions constitute the essence of the legislative scheme. The expression 'necessary or expedient' read in conjunction with the public purpose implied in the section does canalise the exercise of the power and discretion of the Government. [780H. 781H; 782F]

(3)The validity of the section must be tested with reference to its terms and not what an officer to whom the State Government delegates the power under s. 8 might do in his quixotic vagaries. The presumption is that public functionaries will administer the law properly. Courts do not strike down a provision in a statute on the assumption that a person invested with power under it would, exercise it with an evil eye and unequal hand'. So long as courts are open in this country and the doctrine of abuse of power is there need be no apprehension that any power will be exercised arbitrarily or in a discriminatory manner merely because the power is apparently capable of being so exercised. It is perfectly open to the State Government or

an officer to whom the power is delegated to exercise it in a reasonable and non-discriminatory manner. The court's power is properly invoked if a person is actually aggrieved by the exercise of the power under the law. [785B]

(4) If the power which is conferred on the State Government under s. 2 of the Act is valid there is no objection to that power being delegated. It cannot be assumed that the State Government will delegate the power without due regard to the status of, the delegate in the official hierarchy. The vesting of the discretionary power in a State Government or in a high public dignitary is a guarantee that the power will be exercised on the basis of a reasonable standard for the purpose intended by the legislature. [785F]

(5) It is not contrary to the rule of law that powers should be vested in public officers for performing public functions. What the rule of law requires is that any abuse of power by public officers should be subject to the control of the courts. There is nothing unreasonable in granting power to meet unforeseen situations. If there are no guidelines for the exercise of the power the vesting of the power in a functionary need not be struck down. Unreasonableness is to be found in its exercise and not in its existence. [782F-G]

(6) Under Art. 31(5). being an existing law, the Act is not liable to be challenged on the score that it violates the fundamental right under Art. 31(2). It was not necessary for the Act to have expressly stated that the requisition of movable property could only be for a public purpose and to have fixed the amount of compensation or the principles therefore. [779H]

(7) In Pannalal Binjraj v. Union of India, [1957] S.C.R. 233 this Court held that a power which is discretionary is not necessarily discriminatory and abuse of power cannot be easily assumed where the discretion is vested in high officials. The Court was also of the view that there might be cases where improper execution of power will result in discriminatory treatment and injustice to the parties, but, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation; and where there is abuse of such power, the parties aggrieved are not without ample remedies under the law and what will be struck down in such cases will not be the provision which invests the authorities with such power but the abuse of power itself by the authorities. [783H]

(8) The attempt of the Court should be to preserve and not destroy. Respect for a coordinate branch of the Government as well as the presumption of constitutionality demands it. Before a duly enacted law can be judicially nullified, it
771

must be forbidden by some explicit restriction in the Constitution. The attitude of judicial humility which this consideration enjoins is not an abdication of the judicial function, but a due observance of its limits. A just

respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed. In determining the constitutionality of an Act, the Court should construe it in such a manner as to sustain it and every possible presumption will be indulged in for that purpose. [785C-E]

Gurhachan Singh v. State of Bombay, [1952] S.C.R. 737, Virendra v State of Punjab, [1958] S.C.R. 308, Jayantilal Parshottamdas v. State [1970] 11 Guj. L.R. 403. State of Bombay v. P. N. Balsara, [1951] S.C.R. 682, K. T. Moopil Nair v. State of Kerala, [1961] 3 S.C.R. 77 at 93 and Bidi Supply Co. v. The Union of India and Others, [1956] S.C.R. 267, referred to and explained. Pannalal Binjraj v. Union of India, [1957] S.C.R. 233, referred to and discussed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1730 of 1967.

From the judgment and order dated the 24th March, 1966 of the Punjab High Court in C.W. No. 26 of 1965 and Civil Appeals Nos. 1751-1753 of 1967.

From the judgment and order dated the 24th March, 1966 of the Punjab High Court in C.W. Nos. 627 to 629 of 1965 V. C. Mahajan and R. N. Sachthey, for the appellant. Shaukat Hussain, for the respondent.

The Judgment of A. N. Ray, C.J., H. R. Khanna, A. Alagiriswami and P. N. Bhagwati, JJ was delivered by Khanna, J. K. K. Mathew, J gave a dissenting Opinion. KHANNA, J.-This judgment would dispose of civil appeals No. 1730 and 1751, 1752 and 1753 of 1967 which have been filed on certificate by the State of Punjab against a Full Bench judgment of the Punjab High Court whereby section 2 of the East Punjab Movable Property (Requisitioning) Act, 1947 (East Punjab Act XV of 1947) (hereinafter referred to as the Act) was struck down on the ground of being violative article 14 of the Constitution. It was further held that section 2 was not severable from the rest of the Act and the other provisions of the Act were merely ancillary to the powers of requisitioning and acquisition of property contained in sections 2 and 3 of the Act. The High Court accordingly held the entire Act to be unconstitutional and void.

We may set out the facts giving rise to civil appeal No. 1730, because it is the common case of the parties that the decision in that appeal would govern the other three appeals also. The respondent in civil appeal No. 1730 is the owner of Tata Mercedes Benze truck No. 1607. On December 18, 1964 the District Magistrate Rohtak passed an order under section 2 of the Act requiring Khan Chand respondent to place the above truck at the disposal of the Executive Engineer Rohtak because the District Magistrate was of the view that trucks were necessary to carry road 'material for famine work.

It was also mentioned that compensation for the use of the truck would be paid at the rate fixed by the Government. The truck was thereafter taken into possession by the District Magistrate on December 19, 1964. The respondent thereupon filed petition under article 226 of the Constitution in the High Court challenging the validity of the above order of the District Magistrate. Prayer was also made to declare the provisions of the Act to be unconstitutional. The petition was resisted by the State of Punjab and the District Magistrate of Rohtak, who are the appellants before us, and the affidavit of the District Magistrate was filed in opposition to the petition. The petition was first posted for hearing before a single Judge who referred it to a Division Bench. The Division Bench, in view of the importance of the matter, referred it to Full Bench. The Full Bench examined the different provisions of the Act and found that section 2 of the Act was violative of article 14 of the Constitution as it gave unfettered and unguided power to the executive to interfere with the property rights of the citizen-, in an arbitrary manner. It was observed that the Act did not lay down any principle or policy for guidance in the exercise of the wide discretion conferred by it on the executive authorities. Section 2 of the Act was accordingly, as observed earlier, held to be violative of article 14 of the Constitution. As regards section 3 of the Act, it was observed that it could not come into operation without Section 2 being first invoked. The other provisions of the Act were held to be merely ancillary to the power of requisitioning and acquisition of property contained in sections 2 and 3 of the Act. As the Act was found to confer on the Government arbitrary and uncontrolled power to discriminate both between things and persons and as the discrimination was writ large on the face of the Act, the entire Act was held to be unconstitutional and void. The Act, it may be stated, replaced Ordinance V of 1947 which had been promulgated by the Governor of East Punjab on September 15, 1947. The Act was first published in the East Punjab Government Gazette on December 13, 1947. According to the preamble it was an Act to provide for the requisitioning and acquisition of movable property. Section 2, 3, and 4 of the Act read as under

"2. (1) The State Government, if it considers it necessary or expedient so to do, may by order in writing requisition any movable property and may make such further orders as may be necessary or expedient in connection with the requisitioning :

Provided that no property used for the purpose of religious worship and no aircraft or anything forming part of an aircraft or connected with the operation, repair or maintenance of aircraft, shall be requisitioned.

(2) Where the State Government makes any order under sub-section (1), it may use or deal with the property in such manner as may appear to it to be expedient.

3.(1) The State Government may at any time acquire any movable property requisitioned by it under section 2 by serving on the owner thereof, or, where the owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the said authority has decided to acquire it in pursuance of this section.

(2) Where a notice of acquisition is served on the owner of the property or published in the Official Gazette under subsection (1) then at the beginning of the day on which the notice is so served or published the property shall vest in the State Government free from all encumbrances and the

period of requisition thereof shall end.

4.The owner of any movable property requisitioned or acquired under this Act shall be paid such compensation as the State Government may determine."

Section 5 of the Act deals with release from requisition of the requisitioned property. Section 6 empowers the State Government to obtain information and to give directions with a view to requisitioning or acquiring any property or for the purpose of determining the amount of compensation payable under the Act. Section 7 enables the State Government to take or cause to be taken such steps and use or cause to be used such force as may be reasonably necessary for securing compliance with any order made under the Act. According to section 8, the State Government may by order notified in the Official Gazette, direct that any power conferred or any duty imposed on it by the Act shall in such circumstances and under such conditions as may be specified in the direction be exercised or discharged by such officer as may be specified. Section 9 prescribes the offences and penalties under the Act, while section 10 gives protection to persons acting under the Act against civil or criminal proceedings. Section 11 repealed Ordinance No. V of 1947.

Mr. Mahajan on behalf of the appellants has assailed the judgment of the High Court and has argued that the provisions of section 2 of the Act do not contravene article 14 of the Constitution. This contention, in our opinion, is not well founded. The relevant provisions of the Act have been reproduced above and from a perusal thereof we find that the Act confers uncontrolled power on the State Government or the officers authorised by it to requisition any movable property. The only property excluded from the purview of the Act is one used for the purpose of religious worship or an aircraft or anything forming part of an aircraft or connected with the operation, repair or maintenance of aircraft. No guidelines have been laid down in the Act regarding the object or the purpose, for which the State Government or the officers authorised by it may consider it necessary or expedient to requisition a movable property. It is not even the requirement of the Act that the authority requisitioning movable property should specify in the order the purpose for which it has become necessary or expedient to requisition that property. There is no provision in the Act that the power of requisitioning movable property can be exercised under the Act only for a public purpose nor is there any provision that powers under the Act can be exercised only in an emergency or in some special contingency-. It is open under the provisions of the Act for an officer authorised under the Act to requisition movable property for any purpose whatsoever. For example, it would be permissible under the provisions of the Act for the District Magistrate, who is an officer authorised under the Act, to requisition the furniture of any one within the district for use in the office of the District Magistrate. Likewise, it would be permissible for the District Magistrate to requisition any private car which may have caught his fancy for his own use. It is not necessary to go into the question as to whether the District Magistrate would ever use his powers under the Act for such purposes. Suffice it to say that there is nothing in the provisions of the Act which makes it impermeable for a District Magistrate to requisition movable property for any purpose whatsoever for which he considers it necessary or expedient to do so. The power conferred under the Act can be exercised not only by the State Government but also by the officers to whom it may be delegated by the State Government. There is nothing in the Act that the officer to whom the powers under the Act can be delegated must not be below a particular rank. The result is that the powers of requisitioning

a movable property, which are of a most comprehensive nature, can be conferred even upon a petty officer. No suitable machinery is also provided in the Act for determining the compensation payable to the owner of the movable property nor does the Act contains any guiding principles for determining the amount of compensation. According to section 4 of the Act, the compensation to be paid shall be such as the State Government may determine".

The drastic and unusual features of the Act which have been pointed out above highlight the fact that the Act confers arbitrary powers for requisitioning of movable property upon the authorities under the Act and that no guidelines whatsoever have been prescribed for the exercise of the powers of requisitioning. The total absence of guidelines for the exercise of power of requisitioning of movable property, in our opinion, vitiates section 2 of the Act. Arbitrariness and the power to discriminate are writ large on the face of the said provision of the Act and, in our opinion, that provision falls within the mischief which article 14 of the Constitution is designed to prevent. The fact that the impugned Act was enacted before the coming into force of the Constitution would not make any material difference. The protection afforded by article 31(5) to pre-Constitution laws is against the challenge on the ground of contravention of article 31(2); article 31(5) gives no immunity to pre-Constitution laws from attack on the ground that they violate article 14 of the Constitution. We may state that the vesting of discretion in authorities in the exercise of power under an enactment does not by itself entail contravention of article 14. What is objectionable is the conferment of arbitrary and uncontrolled discretion without any guidelines whatsoever with regard to the exercise of that discretion. Considering the complex nature of problems which have to be faced by a modern State, it is but inevitable that the matter of details should be left to the authorities acting under an enactment. Discretion has, therefore, to be given to the authorities concerned for the exercise of the powers vested in them under an enactment. The enactment must, however, prescribe the guidelines for the furtherance of the objects of the enactment and it is within the framework of those guidelines that the authorities can use their discretion in the exercise of the powers conferred upon them. Discretion which is absolute uncontrolled and without any guidelines in the exercise of the powers can easily degenerate into arbitrariness. When individuals act according to their sweet will, there is bound to be an element of 'pick and choose' according to the notion of the individuals. If a Legislature bestows such untrammelled discretion on the authorities acting under an enactment, it abdicates its essential function for such discretion is bound to result in discrimination which is the negation and antithesis of the ideal of equality before law as enshrined in article 14 of the Constitution. It is the absence of any principle or policy for the guidance of the authority concerned in the exercise of discretion which vitiates an enactment and makes it vulnerable to the attack on the ground of violation of article 14. It is no answer to the above that the executive officers are presumed to be reasonable men who do not stand to gain in the abuse of their power and can be trusted to use "discretion" with discretion. As mentioned on page 3 of Parliamentary Supervision of Delegated Legislation by John E. Kersell, 1960 Ed.

"The point is, however, that no one ought to be trusted with power without restraint. Power can be of an encroaching nature, and its encroachments are usually for the sake of what are sincerely believed to be good, and indeed necessary, objectives. Throughout history the most terrible form of tyranny has been the forcing on human beings of what someone believes to be good for them. The imposition of controls on

the use of delegated legislative authority, therefore, does not imply a deep suspicion of malevolent intentions. Human nature, being what it is, has to be protected against itself, and where power is concerned the very existence of the possibility of restraint, as we shall see, is a safeguard against abuses in which ends may be used to justify means and the good in intent becomes the evil in effect."

It has been observed by this Court in the case of *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar & Ors.*⁽¹⁾ that a statute may not make any classification of the persons or things for the purpose of applying its provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the question of the validity or otherwise of such a statute the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the Government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy for the guidance of the exercise of discretion by the Government in the matter of the selection or classification. After such (1) [1959] SCR 279 on page 299.

scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the Government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the Government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action under such law. A distinction which may also be kept in view was pointed out by this Court in the case of *Pannalal Binjraj v. Union of India*⁽¹⁾, which has been referred to by Mr. Mahajan. In that case this Court upheld the constitutional validity of section 5(7-A) of the Indian Income-tax Act, 1922 and held that the power vested in the Commissioner of income Tax or the Central Board of Revenue to transfer income-tax cases outside the area where the assessed resided or carried on business would not amount to a denial of equality before the law. The Court in this context observed :

"There is a broad distinction between discretion which has to be exercised with regard to a fundamental right guaranteed by the Constitution and some other right_which is given by the statute. If statute deals with a right which is not fundamental in character the statute can take it away but a fundamental right the statute cannot take away. Where, for example, a discretion is given in the matter of issuing licences for carrying on trade, profession or business or where restrictions are imposed on freedom of speech, etc. by the imposition of censorship, the discretion must be controlled by clear rules so as to come within the category of reasonable restrictions. Discretion of that nature must be differentiated from discretion in respect of matters not involving fundamental rights such as transfer of cases. An inconvenience resulting from a change of place or venue occurs when any case is transferred from one place to another but it is not open to a party to say that a fundamental right has been infringed by such transfer. In other words, the discretion vested has to be looked at from two points of view, viz., (1) does it admit of the possibility of any real and substantial discrimination, and (2) does it impinge on a

fundamental right guaranteed by the Constitution ? Article 14 can be invoked only when both these conditions are satisfied."

The view taken by the High Court in the present case, in our opinion, can be sustained because both the conditions laid down above have been satisfied. There is 'every possibility of real and substantial discrimination under the impugned Act. The Act further impinges on the fundamental right of property.

We find it difficult to accede to the contention that the requisitioning of movable property contemplated by section 2 of the Act is requisitioning of such property for a public purpose. The words "for a public purpose" do not find a mention in section 2 and it is, in our (1) (1957] S.C.R.233.

opinion, impermissible to construe that section in such a way as if those words were a part of that section. To read those words in the: section, even though those words are not there, would for all intents and purposes amount to judicial legislation. It may be mentioned that section 4 of the Land Acquisition Act, 1894 (Act 1 of 1894) which relates to the acquisition of land makes an express reference to the need for a public purpose. Likewise, section 3 of the Requisition. and Acquisition of Immovable Property Act, 1952 (Act 30 of 1952) purpose for which property could be requisitioned. If the purpose. Rule 75A of Defence of India Rules framed under section 2 of Defence of India Act, 1939 (Act 35 of 1939) also specified the purpose for which property could be requisitioned. It the purpose for which property can be requisitioned under the Act had been specified by saying that it should be a 'public purpose' or some other specified purpose, it might have been possible to sustain section 2 as was done by the Gujarat High Court in Jayantilal Parshottamdas v. State of Gujarat,(1) but as pointed out above, we find no specifications of any purpose at all in the section.

It would be wrong to assume that there is an element of judicial arrogance in the act of the courts in striking down an enactment. The Constitution has assigned to the courts the function of determining as to whether the laws made by the legislature are in conformity with the provisions of the, Constitution. in adjudicating the constitutional validity of statutes, the courts discharge an obligation which has been imposed upon them by the Constitution. The courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the articles of the Constitution. Articles 32 and 226 are an integral part of the Constitution and provide remedies for enforcement of fundamental rights and other rights conferred by the Constitution. Hesitation or refusal on the part of the courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any article of the Constitution as it is theirs to uphold its validity in case it is found' to suffer from no such infirmity. We may now refer to the other cases relied upon by Mr. Mahajan. In Harishankar Bagla & Anr. v. The State of Madhya Pradesh(2), this Court upheld the validity of

sections 3, 4 and 6 of the Essential Supplies (Temporary Powers) Act, 1946. It was observed that the Legislature must declare the policy of the law and the legal principles which are to control given cases and must provide a standard to guide- (1) Gujrat Law Reporter 403.

(2) [1955] 1 S. C. R. 380.

The officials or the body in power to execute the law. This Court in that context examined the various provisions of the Essential Supplies (Temporary Powers) Act, 1946 and found that the Legislature had laid down such a principle in the Act and that the said principle was the maintenance or increase in, supply of essential commodities and of securing equitable distribution and availability at fair prices. The preamble and the body of the sections of the aforesaid Act, it was observed, sufficiently formulated the legislative policy and the ambit and the character of the Act. This case can, hardly be of any assistance to the appellants because, as would appear from the above, the Legislature has not declared the policy of the law and the legal principles which are to govern the authorities in the exercise of the discretion vested in them under the Act with which we are concerned in the present case.

Another case referred to on behalf of the appellants is Sri Ram Ram Narain Medhi v. The State of Bombay(1) wherein the constitutional validity of the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956 was assailed. This Court on examining the provisions of the Act found that the Legislature had laid down the policy of the Act in the preamble and enunciated the broad principles in sections 5, 6 and 7 of the Act. The Court accordingly came to the conclusion that the Act had not conferred uncontrolled power on the State Government to vary the ceiling area of the economic holding. The Court in this context observed that where the Legislature settles the policy and broad principles of the legislation, there could be no bar against leaving the matters of detail to be fixed by the executive and such delegation of power could not vitiate the enactment. This case again can be of no help to the appellants because, as would appear from the above, the Legislature has not settled the policy and broad Principles of the legislation in the impugned Act in the present case. The last case to be relied upon on behalf of the appellants is that of P. J. Irani v. The State of Madras(2). In that case the constitutional validity of section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949 under which exemption could be granted to a building or class of buildings from the operation of all or any provision of the Act was assailed on the ground that the said section violated article 14 of the Constitution. This Court upheld the validity of that section on the ground that enough guidance was afforded by the preamble and the operative provisions of the Act for the exercise of the discretionary power vested in the Government. It was observed that the power under section 13 of the aforesaid Act for exempting any building or class of buildings was to be exercised in cases where the protection given by the Act caused hardship to the landlord or was the subject of abuse by the tenant. As the provisions of the impugned Act in the present case do not afford any guidance for the exercise of the discretionary power, the above case, in our opinion, cannot be of much assistance to the appellants.

There is no merit in these appeals which accordingly fail and are dismissed with costs. One set of hearing fee. (1) [1959] 1 Supp. S. C. R. 489.

(2) [1962] 2 S. C. R. 169, MATHEW, J. The ultimate question in these appeals is whether the provisions of s.2 of the East Punjab Movable Property (Requisitioning) Act, 1947 (East Punjab Act XV of 1947), hereinafter referred to as the Act, violate article 14 of the Constitution and are, therefore, bad.

Sections 2,3,4 and 5 of the Act provide "2. Requisitioning of movable property.-(1) The State Government, if it considers it necessary or expedient so to do, may by order in writing requisition any movable property and may make such further orders as may be necessary or expedient in connection with the requisitioning :

Provided that no property used for the purpose of religious worship and no aircraft or anything forming part of an aircraft or connected with the operation or maintenance of aircraft, shall be requisitioned.

(2)Where the State Government makes any order under sub-

section (1), it may use or deal with the property in such manner as may appear to it to be expedient.

3.Power to acquire requisitioned property.-(1) The State Government may at any time acquire any movable property requisitioned by it under section 2 by serving on the owner thereof or, where the, owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the said authority has decided to acquire it in pursuance of this section. (2)Where a notice of acquisition is served on the owner of the property or published in the Official Gazette under sub- section (1) then at the beginning of the day on which the notice is so served or published the property shall vest in the State Government free all encumbrances and the period of requisition thereof shall end.

4.Payment of compensation.-The owner of any movable property requisitioned or acquired under this Act shall be paid such compensation as the State Government may determine.

8.Delegation of functions.-The State Government may by order notified in the Official Gazette, direct that any power conferred or any duty imposed on it by this Act shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged by such officer as may be specified".

The Act is a pre-Constitution Act. As the provisions of s.299(2) of the Government of India Act, 1935, did not apply, the Act was a perfectly valid one when it was enacted. And, being an existing law, the Act is not liable to be challenged on the scope that it violates the fundamental right under article 31(2) (see article 31(5)). In other words, it was not necessary for the Act to have expressly stated that the requisition of movable property could only be for a public purpose and to have fixed the amount of compensation or the principles therefore. The question, therefore, is whether the High Court was right in holding that s. 2 of the Act is violative of article 14, of the Constitution and in striking down the whole Act for the reason that s. 2 is not severable from the rest of the provisions of the Act.

Let me take s. 2 and see whether the provisions thereof in any way violate article 14. That section confers power on the State Government if it considers it necessary or expedient so to do to requisition any movable property by an order in writing. The section does not state the purpose for which any movable property could be requisitioned. The High Court has, therefore, held that an unlimited discretion has been given to the State Government without any guideline to requisition movable property and that would lead to discrimination in the exercise of the power. I think it impossible for anybody to read the section as conferring a power to requisition any movable property for a purpose other than a public purpose. We must test the validity of the section with reference to its terms and not what an officer to whom the State Government delegates the power under s. 8 might do in his Quixotic vagaries. The illustrations of what a District Magistrate might do in his fancy might perhaps have some relevance to test the validity of the power of delegation conferred under s. 8 on the State Government but it has absolutely no relevance when we are considering the validity of s.2 where we are concerned only with the power conferred on the State Government. It is quite immaterial that the section does not specifically say for what purpose the power of requisition of movable property could be exercised. I should have thought that nothing hinges upon the presence or absence of such phrases as 'public interest', 'public good' or 'public purpose'. The substance is the same whether the legislature says 'deal with the problem,' or says 'deal with the problem in the public interest' or 'exercise the power for public good' or 'for public purpose'. Courts and parties all assume that the legislature always wants protection of the, public interest, to serve public cause and do things for public good or to exercise powers for public purpose and always intends that administrators act justly and reasonably whether the legislature says so in the statute or not (see, Kenneth Culp Davis, "Administrative Law Treatise", (1958) vol. 1, p. 87). Every legislative body must be presumed to favour the true, the good and above all the public interest and public good and whether it says so or not is of absolutely no consequence. Could any court have said or could any court say for that matter, on reading the section, that the power conferred on the State Government could be exercised for any private purpose? Government exists and its only title to exist is its claim to advance the public good and serve the public interest. So when the section said that the, State Government, if it considers, it necessary or expedient so to do, may by an order in writing requisition any moveable property, it can only mean, when it considers it necessary or expedient so to do in public interest or for public good or purpose. That is implied in the section. Nobody could or would, in the year of our Lord 1973, read the section in any other manner.

"The purpose for which a power is given may not be specified in the enabling Act, but that does not necessarily prevent the Court from inferring the purpose and holding that the power has been abused"(1).

Grant of discretionary power has been upheld in several cases by this Court on the ground of the high standing of the body or authority upon which the power was conferred. In Gurbachan Singh v. State of Bombay(2) Mukherjea, J. upheld the power of externment conferred on the Commissioner of Police, inter alia on the ground that-

"... This power is vested not in minor officials, but in top-ranking authorities like the Commissioner of Income Tax and the Central Board of Revenue, who act on the information supplied to them by the Income-tax officers concerned."

In *Virendra v. State of Punjab*(3), Das, C.J. said :

"... In the first place, the discretion is given in the first instance to the State Government itself and not to a very subordinate officer like the licensing officer as was done in *Dwarka Prasad's Case*.... It is true that the State Government may delegate the power to any officer or person but the fact that the power of delegation is to be exercised by the State Government itself was some safeguard against the abuse of this power of delegation".

In short, it appears to me that the vesting of the discretionary power in a State Govt. or in a high public dignitary is a guarantee that the power will be exercised on the basis of a reasonable standard for the purpose intended by the legislature.

With the proliferation of the functions of the State, it has become necessary to vest wide discretionary powers upon administrative organs of the State. A modern State cannot be carried on without vesting wide administrative or discretionary powers on public functionaries. Often it is practically useless to lodge power in a public functionary without giving him a large measure of discretion, for, the situations which might arise in public affairs are multifarious and very often unpredictable and unforeseen. There is always a potential danger in vesting any discretionary power in any person as it is liable to be abused or exercised in a discriminatory manner, however much the legislature might try to hedge the power with safeguards.

I think that the expression "necessary or expedient" used in the section is sufficient to give an adequate guidance to the Government when read in juxtaposition with the implied purpose of the conferment of the power. 'Necessary' means "what is indispensable, needful or essential" and 'expedient, means "useful for effecting a desired result, fit or suitable for the purpose". One has to appreciate the fact that the legislature, while laying down the policy or principle, is bound to (1) See Hood Phillips, "Constitutional and Administrative Law". pp. 623-24.

(2) [1952] S.C. R. 737.

(3) [1958] S. C. R. 308.

keep in mind the nature of the problems that is to be tackled by the State Government. A variety of factors and circumstances arise for consideration in deciding whether a particular movable property should or should not be requisitioned. The legislature rightly appears to have decided that it would not serve the purpose if it were to define and describe all the relevant factors which have to be taken into account for requisitioning any movable property.

Section 3(1) of the Essential Commodities Act, 1955, reads " 3(1) If the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or in- creasing supplies of any essential commodity." Section 3(1) of the Essential Supplies (Temporary Powers) Act XXIV of 1946 provides:

"3 (1) The Central Government, so far as it appears to it to be necessary or expedient for maintaining and increasing supplies of any essential commodity. In all these provisions the Central Government on which the power is conferred has to decide as a condition-precedent whether, it is necessary or expedient to exercise tile power in relation to the purpose sought to be attained and the legislature, having regard to the nature of the power and the purpose to be attained, had thought it fit to leave the exercise of the power flexible to attain the object and advisedly used the expression "necessary or expedient" for that purpose. Whether a particular requisitioning is expedient for a particular purpose or not may require many factors and shades of considerations to be taken into account. It was not necessary for the legislature to supply the State Government with a more specific formula for its guidance where flexibility and adaptation to infinitely variable conditions constitute the essence of the legislative scheme. I think the expression "necessary or expedient" read in conjunction with the purpose implied in the section, namely, public interest or purpose, does canalise the exercise of the power and discretion to be used by the Government(1).

It is not contrary to the rule of law that powers should be vested in public officers for performing public functions. What the rule of law requires is that any abuse of power by public officers should be subject to the control of courts. In *State of Bombay v. P. N. Balsara*,⁽²⁾ one question which fell for consideration was whether the provisions of sections 52, 53 and 139(c) of the Bombay Prohibition Act (Act 25 of 1949) were valid. Section 52 (of this Act empowered an authorised officer to grant licences, permits, etc. in cases not specifically provided for; section 53 dealt with the form in which and the conditions under which licences, etc., may be granted and s. 139(c) stated that the State Government may by general or special order exempt any person or class of persons or institution or class of institutions from the observance of all or any (1) See *Jayantilal Parshottamdas v. State* (1970) 11 Guj. L. R. 403.

(2) [1951] S. C. R. 682.

of the provisions of the Act or any rule, regulation or order made thereunder. The High Court of Bombay held these sections to be bad as they did not provide any guidance for the exercise of the powers. This Court, in appeal, held the sections to be valid by saying :

"A legislature while legislating cannot foresee and provide for all future contingencies,. and s. 52 does no more than enable the duty authorized officer to meet contingencies and deal with various situations as they arise. The same considerations will apply to sections 53 and 139(c)".

In enacting a general law it is not possible to foresee every situation or to envisage every contingency and to provide specially for it by excluding the operation of the law wholly or in part in respect of such situations or such contingencies. Power is, therefore, conferred by statutes on the executive to exempt persons or bodies from all or any of the provisions of an Act.

There is nothing unreasonable in granting a power to meet unforeseen situations. If there are no guidelines for the exercise of the power, the vesting of the power in a functionary need not be down. The unreasonableness is to be found in its exercise and not in its existence. I am aware that in *K. T. Moopit, Nair v. State of Kerala*(1), the Court without, referring to the view taken in *State of Bombay v. F. N. Balsara*(2) struck down s. 7 of the Travancore Cochin Land Tax Act, 1955, which gave power to the State Government to grant exemption from payment of land tax. I need only say that one can visualise several contingencies like drought, pestilence, etc. in which exemption from tax would be reasonable.

In *Bidi Supply Co. v. The Union of India and Others*(3) the majority judgment held that s. 5(7A) read with s. 22(2) of the, Indian Income Tax Act, 1922, did not authorise an omnibus transfer of cases and consequently, it was not necessary to consider the constitutional validity of s. 5 (7A) as the Income-tax authorities had, by an illegal executive order picked out the petitioner and transferred all his cases by an omnibus order unlimited in point of time. The order was clearly discriminatory as it was calculated to inflict considerable inconvenience and harassment on the petitioner. Bose, J. concurred in the result but held s. 5(7A) of the Indian Income Tax Act was ultra vires as offending articles 14.

In *Pannalal Binjraj v. Union of India*(4) it was held that the harassment and inconvenience caused to an assessee by transfer of his case was not conclusive, that the right to be assessed in a particular locality was not an absolute right but subject to the exigencies of tax collection and that even if there is a possibility of discriminatory treatment of persons falling within the, same group or category, such possibility cannot necessarily invalidate the piece of legislation. The Court said that a power which is discretionary is not necessarily (1) [1961] 3 S.C.R 77,93. (2) [1951] S.C.R. 682. (3) [1956] S.C.R. 267. (4) [1957] S.C.R 233.

discriminatory and abuse of power cannot be easily assumed where the discretion is vested in high officials. According to the Court there is a presumption that public officials will discharge their duties honestly and in accordance with the rules of law, that unless the contrary were shown, the administration of a particular law would be done not "with an evil eye and unequal hand." The Court was of the view that there might be cases where improper execution of power will result in discriminatory treatment and injustice to the parties, but, the possibility of such discriminatory treatment cannot necessarily invalidate the legislation and where there is an abuse of such power, the parties aggrieved are not without ample remedies under the, law and what will be struck down in such cases will not be the, provision which invests the authorities with such power but the abuse of the power itself. The Court said that there is a distinction between a discretion which has to be exercised with regard to fundamental rights guaranteed by the Constitution and ordinary rights given by statutes and that discretion vested in a functionary has to be looked at from two points of view, namely, "(1) Does it admit of the possibility of any real and substantial discrimination, and (2)

Does it impinge on a fundamental right guaranteed by the Constitution and that article 14 could be invoked only if both these conditions were satisfied". Article 14 confers a fundamental right, namely, the right to equality before the law. It is difficult to see why it is necessary for a person asserting that right to prove that another fundamental right has been violated. The concept of equality before the law does not vary with the nature of the right in issue. In other words, whether the right at stake is fundamental or not, is quite immaterial when we are considering the question of equality before the law. Be that as it may, this ruling, I think, is an authority for two propositions : (1) that even if a power is discretionary, it need not necessarily result in a discriminatory exercise of it and (2) that even if no guidelines are laid down for the exercise of discretionary power, the section which confers the power need not be struck down but only the actual exercise of power under it which is unreasonable or discriminatory.

Dealing with the Equality Clause in the Constitution of the U.S.A. Professor Willis has said : (1) "Perhaps the best view on the subject is that 'due process' and 'equality' are, not violated by the mere conference of unguided power, but only by its arbitrary exercise by those upon whom conferred (see *Plymouth Coal Co. v. Pennsylvania* (1914) 232 U.S. 531".

The theory behind this proposition is that although the conferment of discretionary power without guideline might result in its being exercised in a discriminatory manner, no one will presume that it will be so exercised. On the other hand, the presumption is that public functionaries will administer the law properly. Courts do not strike down (1) Willis, "Constitutional Law" pp. 586-87.

a provision in a statute on the assumption that the person invested with power under it would exercise it "with an evil eye and unequal hand". The heart of the matter is that in such a case the law itself is not bad, because it is capable of being administered in an impartial and reasonable manner as this case illustrates. So long as courts are open in this country and the doctrine of abuse of power is there, there need be no apprehension that any power will be exercised arbitrarily or in a discriminatory manner merely because the power is apparently capable of being so exercised. It is perfectly open to the State Government or an honest officer to whom the power is delegated to exercise it in a reasonable and nondiscriminatory manner. Why then should the court be anxious to strike down the law ? The court's power is properly invoked if a person is actually aggrieved by the exercise of the power under the law. We should not exercise our power to strike down a law on hypothetical considerations of what a bad officer might do. In determining the constitutionality of an Act, we would construe it in such a manner as to sustain it and every possible presumption will be indulged in for that purpose. Our attempt must be to preserve and not destroy. Respect for a coordinate branch of the Government as well as the presumption of constitutionality demands it. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction in the Constitution. Our duty of deference to those who have the responsibility for making the laws has great relevance in this context. The attitude of judicial humility which this Consideration enjoins is not an abdication of the judicial function. It is a due observance of its limits. As Marshall said : "No. questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts". And, as laid, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.

If the power which is conferred on the State Government under 2 of the Act is valid, I see no objection to that power being delegated. cannot assume that the State Government will delegate the power without due regard to the status of the delegate in the official hierarchy. We have not been referred to any case where it has been held that wide discretionary powers are bad for the reason that the State or any other body on which they have been conferred has power to delegate them to another body or person. The High Court has not passed upon the question whether the District Magistrate, in requisitioning the truck in question, was acting in an unreasonable or a discriminatory manner or the requisition of the truck was not for a public purpose. I think that the requisition of the truck by the District Magistrate was for a public purpose and that his action in so doing was perfectly reasonable. No other reason has been given by the High Court for declaring the provisions of s. 2 of the Act to be invalid. If section 2 is not invalid for the reasons given by the High Court, the ground on which the other provisions of the Act were struck down by the High Court will not survive.

In my view, the provisions of s. 2 do not violate article, 14 and are not invalid for that reason. I uphold the action taken by the District Magistrate and would allow the appeals with costs.

ORDER In accordance with the decision of the majority, the appeals are dismissed with costs. One set of hearing fee. V. P. S. Appeals dismissed.