State Of Rajasthan & Ors vs Basant Nahata on 7 September, 2005

Equivalent citations: AIR 2005 SUPREME COURT 3401, 2005 (12) SCC 77, 2005 AIR SCW 4456, 2006 (1) CTLJ 19, 2005 (7) SCALE 164, (2005) 4 CTC 606 (SC), (2005) 8 JT 171 (SC), 2005 (2) UJ (SC) 1366, 2005 (8) SRJ 512, 2005 (8) JT 171, 2005 (6) SLT 609, (2005) 35 ALLINDCAS 378 (SC), (2005) 6 SCJ 552, (2005) 6 SUPREME 243, (2005) 2 WLC(SC)CVL 556, (2005) 4 ALL WC 3085, (2006) 1 CIVLJ 575, (2005) 7 SCALE 164

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Bench: Ashok Bhan, S.B. Sinha

CASE NO.:
Appeal (civil) 7800 of 2001

PETITIONER:
State of Rajasthan & Ors.

RESPONDENT:
Basant Nahata

DATE OF JUDGMENT: 07/09/2005

BENCH:
Ashok Bhan & S.B. Sinha

JUDGMENT:

J U D G M E N T S.B. SINHA, J:

Constitutionality of Section 22-A of the Registration Act (The Act) as amended by the State of Rajasthan as also the notifications issued by it in terms thereof are in question in this appeal which arises out of a judgment and order dated 28.11.2000 passed by a Division Bench of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Writ Petition No. 3554 of 1999.

FACTS:

The Respondent herein is a resident of town of Bikaner. He was a Khatedar tenant of agricultural lands situated at Chak No. 13 KYD, Square No. 110/24, Killa No. 1 to 25 Bighas, Tehsil Khajuwala, District Bikaner. He appointed one Sukhdeo Singh as his attorney authorizing him to look after his lands, cultivate the same and to do all other

acts, deeds and things including mortgage or sell the same, get the requisite deeds and documents registered, by a deed of Power Of Attorney dated 16.7.1999. The said deed was presented before the Sub-Registrar, Bikaner on 30.7.1999 for the purpose of registration which was refused by making an endorsement on the document that the same could not be registered in terms of the Government Notification dated 26.3.1999 published in the Rajasthan Gazette dated 1.4.1999 as amended on 22.4.1999 whereby and whereunder registration of such documents have been prohibited as being 'opposed to public policy'.

The said notifications were said to have been issued by the State of Rajasthan in exercise of its power conferred upon it under Section 22-A of the Act.

The Respondent herein questioned the constitutionality of Section 22- A of the Act as inserted by the legislature of Rajasthan as also the aforementioned notifications by filing a writ petition before the Rajasthan High Court.

HIGH COURT:

By reason of the impugned judgment the Rajasthan High Court declared Section 22-A of the Act as inserted by the Rajasthan Amendment Act, 1976 being Act No. 16 of 1976 as unconstitutional and consequently the notifications as contained in annexures 3, 4, 6 and 7 of the writ petition were also quashed. The Sub-Registrar was also directed to register the power of attorney dated 16.7.1999 which was presented on 30.7.1999 within two weeks from the date of presentation of the copy of the order.

The High Court in its impugned judgment, inter alia, held that Section 22-A of the Act confers arbitrary powers on the State Government to determine as regard declaring a particular document being opposed to public policy. It was opined that the question as to whether a transaction is opposed to public policy or not can be determined only by the courts and not by the Sub-Registrar. The impugned legislation invades the right of a citizen to deal with the property and, thus, is wholly arbitrary and unreasonable. The object of registration of a document is not achieved by the impugned legislation. The Act deals with the deeds and documents and not transactions and in that view of the matter non-registration of a document per se cannot be said to be opposed to public policy.

SECTION 22-A OF THE ACT AND THE NOTIFICATIONS:

Section 22-A of the Act reads as under:

"Documents registration of which is opposed to public policy (1) The State Government may, by notification in the Official Gazette, declare that the registration of any document or class of document is opposed to public policy.

(2) Notwithstanding anything contained in this Act, the registering officer shall refuse to register any document to which a notification issued under sub-section (1) is applicable."

The Notifications contained in annexures 3,4,6 and 7 of the Writ petition are as under:

"Annexure/3 1 April, 1999 "S.O.7. In exercise of the power conferred by section 22-A of the Indian Registration Act, 1908 [Central Act No. XVI of 1908] P.S. applicable in the State of Rajasthan, the State Govt. hereby declares that the registration of the following classes of documents is opposed to public policy.

Any power of attorney authorizing the attorney to transfer any immovable property for a term in excess of six months or irrevocable or where the term is not mentioned."

[No. F.2(2)FD/Tax-Div/99-189] By order of the Governor, Sd/-

Dy. Secretary to Govt."

"Annexure/4 April 22, 1999 "S.O. 62 In exercise of the powers conferred under Section 22-A of the Indian Registration Act, 1908 [Central Act No. XVI of 1908] as applicable in the State of Rajasthan, it is expedient to amend the Notification No. F.2[3] FD-Tax-Div/99-189 dated 26.3.1999 as under;

In place of the phrase "six months" in the above notification, the phrase "Three years" is substituted.

[No. F.2(FD/TAX-DIV/99-213] By order of the Governor, Sd/-

(Shikhar Agarwal) Dy. Secretary Govt."

"Annexure/6 26th March, 1999 S.O. 484:- In exercise of the powers conferred by Section 22-A of the Registration Act, 1908 (Central Act No. XVI of 1908), as applicable in the State of Rajasthan, the State Govt. hereby declares that the registration of any of the following documents is opposed to public policy:-

Power of Attorney authorizing the execution of the sale deed, gift, mortgage or any other document of transfer of immovable property presentation for registration before any office other than the Sub-Registrar or Registrar respectively in whose District or Sub-District the whole or some part of the property to which such power of attorney relates is situated.

[No. F.2[3] FD/TAX-DIV./99-186].

By order of the Governor, Sd/-

Dy. Secretary Govt."

"Annexure/7 22nd April, 1999 S.O. 60. In exercise of the powers conferred under section 22-A of the Indian Registration Act, 1908 [Central Act No. XVI] as applicable in the State of Rajasthan, it is expedient to amend the notification No. F.2[16]FD/Tax Div./99-186 S.O. 484 dated 26.03.1999 in the public interest as under:

AMENDMENT @@ After the words 'authorising' following words are added:

"Other than the power of attorney executed in favour of brother or sister or son or daughter or father or mother or husband or wife or grand sons or grand daughter".

[No. F.2[3]FD/Tax Div./99-212] By order of the Governor, Sd/-

Dy. Secretary Govt."

PROCEEDING BEFORE THIS COURT:

This Court while hearing the matter having regard to the fact that similar amendments have been carried out by the other States and would have wide repercussions directed issuance of notice to the States of Bihar, Gujarat, Karnataka, Maharashtra and Meghalaya. Pursuant to the said directions, the intervenor States including the States of Maharashtra, Gujarat, Jharkhand, Meghalaya, etc. appeared and made their submissions.

SUBMISSIONS:

The learned counsel appearing on behalf of the Appellant and the intervenor States raised inter alia the following contentions:

(i) That a presumption is attached in favour of a validity of a statute and it would be for the person to establish who alleges violation of fundamental or other rights for impinging upon the constitutional validity of Section 22-A of the Act.

(ii) A legislation directing compulsory registration of a document and / or refusal to register the same being a matter of policy so as to enable the State to regulate registration of document or class of documents could not be interfered by the High Court.

(iii) The terminologies 'opposed to public policy' or 'public interest' carry precise meaning having regard to the provisions of Section 23 of the Indian Contract Act, Section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961, Section 3(1) of U.P. (Temporary Control of Rent and Evictions) Act, 1947 and Section 34(2)(b)(ii) of Arbitration and Conciliation Act, 1996 and, thus, cannot be said to be

wholly arbitrary.

(iv) In exercise of its power of judicial review the superior courts would not invalidate a statute only on the ground that guidelines have not been laid down by the legislature for making subordinate legislation or that the legislature has abdicated its essential legislative function in favour of executive but in a given case may strike down only the notifications issued by the State if it be found to have exceeded its jurisdiction in that behalf. In any event as such guidelines can be found out either from the preamble or from other provisions of the Act, the same need not be stated in the offending provision itself.

THE ACT:

The Act was enacted to consolidate the enactments relating to the Registration of Documents. Prior to enactment of the said Act, the provisions relating to registration of documents were scattered in seven enactments. The Act was enacted in terms of Entry 18, List II and Entry 6, List III of the Seventh Schedule of the Constitution of India. It mainly deals with the necessity of getting a document registered in India so as to make them valid and even if they are executed outside India to provide for registration thereof after their first arrival in India.

Section 17 of the Act enumerates the instruments registration of which is compulsory under the Act whereas Section 49 encompasses the effect of a failure to register. Registration of documents, however, is not confined only to documents relating to immovable property but also for the documents dealing with other matters as for example adoption. Section 17 of the Act has been amended inter alia by the State of Rajasthan. The State of Rajasthan, however, inserted Section 17(1)(f) and 17(1)(g) with effect from 18.9.1989 and made the registration of agreement to sale and irrevocable power to attorney relating to transfer of immovable property in any way a compulsorily registerable document. Section 18 provides for optional registration of documents specified therein. Section 22 provides for description of houses and land by reference to Government maps or surveys.

Several States, however, as noticed hereinbefore, inserted Section 22-A. In terms of Sub-Section (1) thereof, the State Governments have been authorized to issue a notification declaring that the registration of any document or class of document would be opposed to public policy. Sub- section (2) of Section 22-A starts with a non-obstante clause stating that notwithstanding anything contained in the Act, the registering officer shall refuse to register any document for which a notification issued under Sub- section (1) is applicable.

Section 32 occurring in Part VI provides for presentation of documents for registration. Section 33 deals with power of attorney recognizable for the said purpose. Part XI of the Act deals with the duties and powers of registering officers. Part XII deals with documents which a Sub-Registrar may refuse to register which, inter alia, refers to a document relating to property, which was not situated

within the district of the Registrar or which ought to be registered in the office of Sub-Registrar or on the ground of denial of execution. An appeal from such orders of the Sub- Registrar is provided for under Sub-section (2) of Section 72. Even as against the order of Registrar a suit is maintainable. However, if and when a document is refused to be registered by the Sub-Registrar in terms of Sub-section (2) of Section 22-A of the Act, evidently no appeal would lie.

POWER OF ATTORNEY :

> A grant of power of attorney is essentially governed by Chapter X of the Indian Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well-known, a document of convenience.
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> Besides the Indian Contract Act, the Power of Attorney Act, 1882 deals with the subject. Section 1A of the Power of Attorney Act defines power of attorney to include any instruments empowering a specified person to act for and in the name of the person executing it. Section 2 of the said Act reads, thus:
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> "Execution under power-of-attorney The donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.
>
> This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force."

Execution of a deed of power of attorney, therefore, is valid in law and subject to the provisions of the Act is not compulsorily registerable.

PRESUMPTION AS TO CONSTITUTIONALITY OF A STATUTE:

> Indisputably, there exists a presumption as regard constitutionality of a statute. Rule of presumption in favour of constitutionality, however, only shifts the burden of proof and rests it on the shoulders of the person who attacks it. It is for that person to show that there has been a clear transgression of constitutional principles [See Charanjit Lal Chowdhury Vs. the Union of India and others AIR 1951 SC 41 : 1950 SCR 869]. But this rule is subject to the limitation that it is operative only till the time it becomes clear and beyond reasonable doubt that the legislature has crossed its

> limits. This rule in its application as principle of construction means that if two meanings are possible then the courts will reject the one which renders it unconstitutional and accept the other upholding the validity of the impugned legislation.
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> In Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and others [AIR 2001 SC 72 : (2001) 4 SCC 139], it was stated:
>
> "9. A statute is construed so as to make it effective and operative. There is always a presumption that the legislature does not exceed its jurisdiction and the burden of establishing that the legislature has transgressed constitutional mandates, such as those relating to fundamental rights, is always on the person who challenges its vires. Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution it must be allowed to stand as the true expression of the national will Shell Co. of Australia v. Federal Commr. of Taxation. The aforesaid principle, however, is subject to one exception that if a citizen is able to establish that the legislation has invaded its fundamental rights then the State must justify that the law is saved. It is also a cardinal rule of construction that if on one construction being given the statute will become ultra vires the powers of the legislature whereas on another construction which may be open, the statute remains effective and operative, then the court will prefer the latter, on the ground that the legislature is presumed not to have intended an excess of jurisdiction."

Hence, the said principle of presumption is not an absolute rule but it is also subject to limitations. Its application in interpretation can only be applied to resolve a conflict when two interpretations are possible and not when there is only one leading to the conclusion that the delegated legislation is unguided and excessive. If the provisions are unconstitutional a mere presumption which decides the burden of proof cannot save them.

In Craies on Statute Law, seventh edition at page 95, it is stated:

> "The first business of the courts is to make sense of the ambiguous language, and not to treat it as unmeaning, it being a cardinal rule of construction that a statute is not to be treated as void, however, oracular. This was thus laid down by Bowen L.J. in Curtis v. Stovin: "The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule viz. that, if possible, the words of an Act of Parliament must be construed so as to give a sensible meaning to them. The words ought to be construed ut res magis valeat quam pereat." And Fry L.J. added: "The only alternative construction offered to us would lead to this result that the plain intention of the legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt this construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect."

DELEGATED LEGISLATION:

The necessity of the legislature's delegating its powers in favour of the executive is a part of legislative function. It is a constituent element of the legislative power as a whole under Article 245 of the Constitution. Such delegation of power, however, cannot be wide, uncanalised or unguided. The legislature while delegating such power is required to lay down the criteria or standard so as to enable the delegatee to act within the framework of the statute. The principle on which the power of the legislature is to be exercised is required to be disclosed. It is also trite that essential legislative functions cannot be delegated.

The procedural powers are, therefore, normally left to be exercised by the executive by reason of a delegated legislation.

LAW OPERATING IN THE FIELD :

We have been taken through a large number of decisions by the learned counsel appearing on behalf of the parties beginning from Re: Delhi Laws Act, 1912 [1951 SCR 747] to Andhra Bank vs. B. Satyanarayana and Others, [(2004) 2 SCC 657], but it may not be necessary to deal therewith separately in great detail.

In Re: Delhi Laws Act (supra) this Court in no unmistakable terms stated that the legislature may utilize any outside agency to the extent it finds necessary for doing things which it is unable to do itself or finds inconvenient to do which would mean such things which are ancillary to the main enactment and necessary for the full and effective exercise of its power of legislation. Justice Mukherjea, in his opinion, stated:

"It cannot be said that an unlimited right of delegation is inherent in the legislative power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated is the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the Courts cannot and should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case."

As regard delegated power to "restrict and modify", it was held:

"delegation cannot extend to the altering in essential particulars of laws which are already in force in the area in question."

"The power to 'restrict and modify does not import the power to make essential changes. It is confined to alterations of a minor character such as are necessary to make an Act intended for one area applicable to another and to bring it into harmony with laws already in being in the State, or to delete portions which are meant solely for another area. To alter essential character of an Act or to change it in material particulars is to legislate, and that, namely the power to legislature, all authorities are agreed, cannot be delegated by a Legislature which is not unfettered."

Vivian Bose, J., however, speaking for a Constitution Bench of this Court in Rajnarain Singh vs. The Chairman, Patna Administration Committee, Patna and Another [1955 (1) SCR 290] analysed the opinions of different learned Judges in Re: Delhi Laws Act (supra) and culled out the majority view thus:

"..that an executive authority can be authorized to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy."

In Hamdard Dawakahan and another Vs. the Union of India and others [AIR 1960 SC 554] Krishna Mohan (P) Ltd. vs. Municipal Corporation of Delhi and Others [(2003) 7 SCC 151]. this Court held that vague or uncanalised or unguided power would render the delegation bad in law.

The legal position has been explained by a Constitution Bench of this Court in Kishan Prakash Sharma and Others vs. Union of India and Others [(2001) 5 SCC 212] holding :

"...The legislatures in India have been held to possess wide power of legislation subject, however, to certain limitations such as the legislature cannot delegate essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature cannot delegate uncanalised and uncontrolled power. The legislature must set the limits of the power delegated by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Thus the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature. The legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. When the Constitution entrusts the duty of law-

making to Parliament and the legislatures of States, it impliedly prohibits them to throw away that responsibility on the shoulders of some other authority "

[See also Ajoy Kumar Banerjee and Others etc. vs. Union of India & Others [(1984) 3 SCC 127], Agricultural Market Committee vs. Shalimar Chemical Works Ltd. [1997) 5 SCC 516], Krishna Mohan (supra).

Our attention, however, has been drawn to a decision of this Court in Ramesh Birch and Others etc. vs. Union of India and Others [1989) Supp. (1) SCC 430] wherein Ranganathan, J. speaking for a 2-Judge Bench while construing the provisions of Section 87 of the Reorganisation Act empowering the Central Government to extend with such restrictions or modifications as it may think fit any enactment which is in force in a State at the date of notification to the Union Territory of Chandigarh observed:

"23. But, these niceties apart, we think that Section 87 is quite valid even on the "policy and guideline" theory if one has proper regard to the context of the Act and the object and purpose sought to be achieved by Section 87 of the Act. The judicial decisions referred to above make it clear that it is not necessary that the legislature should "dot all the i's and cross all the t's" of its policy. It is sufficient if it gives the broadest indication of a general policy of the legislature. If we bear this in mind and have regard to the history of this type of legislation, there will be no difficulty at all "

Their Lordships in the fact and circumstance of the case were of the view that such delegation of power being confined to a 'transplantation of law' and not 'enacting a law' shall be valid.

Our attention has also been drawn to a Constitution Bench decision of this Court in Seth Nand Lal and Another Vs. State of Haryana and Others [1980 (Supp) SCC 574] for the proposition that unless the provisions are so vague, the same cannot be declared unconstitutional.

In that case, the Constitution Bench of this Court was concerned with certain provisions of Haryana Ceiling on Land Holdings Act, 1972 and the validity thereof was upheld in the touchstone of Articles 31-A and 31-B of the Constitution of India opining that the impugned Act was within the legislative competence of the State. The question as regard vagueness of definition of 'family' etc. came up for consideration and it was held that the legislature is legally entitled to create legal fiction for the purpose of the said Act.

ANALYSIS:

There cannot be any doubt whatsoever that the court shall not invalidate a legislation on the ground of delegation of essential legislative function or on the ground of conferring unguided, uncontrolled and vague powers upon the delegate without taking into account the preamble of the Act as also other provisions of the statute in the event they provide good means of finding out the meaning of the offending

statute. This aspect of the matter has been considered in some details in People Union for Civil Liberties and Another vs. Union of India and Others [(2004) 2 SCC 476] and Andhra Bank vs. B. Satyanarayana and Others, [(2004) 2 SCC 657] in which one of us was a member.

But preamble and statement of object and reason can only be looked into when there is vagueness or ambiguity present in the language of the Act as in Arnit Das vs. State of Bihar [(2000) 5 SCC 488] wherein this Court has held :

"22. All this exercise would have been avoided if only the legislature would have taken care not to leave an ambiguity in the definition of "juvenile" and would have clearly specified the point of time by reference to which the age was to be determined to find a person to be a juvenile. The ambiguity can be resolved by taking into consideration the Preamble and the Statement of Objects and Reasons. The Preamble suggests what the Act was intended to deal with. If the language used by Parliament is ambiguous the court is permitted to look into the Preamble for construing the provisions of an Act (Burrakur Coal Co. Ltd. v. Union of India). A Preamble of a statute has been said to be a good means of finding out its meaning and, as it were, the key of understanding of it, said this Court in A. Thangal Kunju Musaliar v. M. Venkatachalam Potti. The Preamble is a key to unlock the legislative intent. If the words employed in an enactment may spell a doubt as to their meaning it would be useful to so interpret the enactment as to harmonise it with the object which the legislature had in its view "

So it is only when the language is itself capable of more than one meaning, then the preamble or the statement of objects and reasons can be looked into and not when something is not capable of given a precise meaning as in case of 'Public policy'. Even if the Statement of Objects and Reasons is looked into to ascertain its meaning then also there is nothing therein which can be said to be related to morality or public policy. We have, furthermore, not been shown as to how the preamble or any other provisions of the Act would provide for any guideline in construing Section 22-A of the Act. The principal contention raised on behalf of the counsel for the Appellants, as noticed hereinbefore, is that the terminology 'opposed to public policy' itself provide for such guidelines.

The phraseology 'in the interest of public health' came up for consideration before a Division Bench of this Court in Godwat Pan Masala Products I.P. Ltd. and Another vs. Union of India and Others [(2004) 7 SCC 68], wherein it was held that it cannot operate as an incantation or mantra to get over all the constitutional difficulties posited. As regard application of doctrine of 'res extra commercium' in relation to tobacco, the court held that the same is a matter of legislative policy and must arise out of an Act of legislature and not by a mere notification issued by an executive authority. It is always in the domain of judiciary to interpret what is morality at a given point of time and this power can not be given to executive.

Finality cannot be attached to decisions of executive when such things are in exclusive domain of judiciary as stated in State of Kerala and Others vs. Travancore Chemicals and Manufacturing Co.

and Another [(1998) 8 SCC 188] observing:

> "13. Section 59-A enables the Government to pass an administrative order which has the effect of negating the statutory provisions of appeal, revision etc. contained in Chapter VII of the Act which would have enabled the appellate or revisional authority to decide upon questions in relation to which an order under Section 59-A is passed. Quasi-judicial or judicial determination stands replaced by the power to take an administrative decision. There is nothing in Section 59-A which debars the Government from exercising the power even after a dealer has succeeded on a question relating to the rate of tax before an appellate authority. The power under Section 59-A is so wide and unbridled that it can be exercised at any time and the decision so rendered shall be final. It may well be that the effect of this would be that such a decision may even attempt to override the appellate or the revisional power exercised by the High Court under Section 40 of the Act as the case may be. The section enables passing of an executive order which has the effect of subverting the scheme of a quasi-judicial and judicial resolution of the lis between the State and the dealer."

We are not oblivious of the decisions of this Court laying down the proposition of law that the statute dealing with fiscal matters and / or laying down a provision or enforcing the doctrine of social justice adumbrated in the Directive Principles of State Policy as contained in Part IV of the Constitution of India ordinarily would not be interfered with by the superior courts in exercise of their power of judicial review. The Act is neither a fiscal statute nor deals with any matter falling under Part IV of the Constitution of India.

PUBLIC POLICY:

> The words 'Public policy' or 'opposed to public policy', inter alia, find reference in Section 23 of the Indian Contract Act, Section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961, Section 3(1) of U.P. (Temporary Control of Rent and Evictions) Act, 1947 and Section 34(2)(b)(ii) of Arbitration and Conciliation Act, 1996.
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> By reason of the said provisions the judiciary has been conferred with power to determine as to the factors of public policy which may form the basis for interference with a contract or award.
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> It may not be necessary for us to deal with extensively the case laws dealing with the relevant provisions of the said statutes but it would not, in our opinion, be correct to contend that public policy is capable of being given a precise definition. What is 'opposed to public policy' would be a matter depending upon the nature of the transaction. The pleadings of the parties and the materials brought on record would be relevant so as to enable the court to judge the concept as to what is for public good or in the public interest or what would be injurious or harmful to the public good or

the public interest at the relevant point of time as contra-distinguished from the policy of a particular government. A law dealing with the rights of a citizen is required to be clear and unambiguous. Doctrine of public policy is contained in a branch of common law, it is governed by precedents.

The principles have been crystallized under different heads and though it may be possible for the courts to expound and apply them to different situations but it is trite that the said doctrine should not be taken recourse to in 'clear and incontestable cases of harm to the public though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world'. [See Gherulal Parakh vs. Mahadeodas Maiya and Others [AIR 1959 SC 781 :

1959 (2) SCR 406] In Zoroastrian Cooperative Housing Society Ltd. and Another vs. District Registrar, Cooperative societies (Urban) and Others [(2005) 5 SCC 632], however, this Court observed:

"In the context of Section 23 of the Contract Act, something more than a possible or plausible argument based on the constitutional scheme is necessary to nullify an agreement voluntarily entered into by a person."

It was further observed:

"Normally, as stated by this Court in Gherulal Parakh v. Mahadeodas Maiya, the doctrine of public policy is governed by precedents, its principles have been crystalised under the different heads and though it was permissible to expound and apply them to different situations it could be applied only to clear and undeniable cases of harm to the public. Although, theoretically it was permissible to evolve a new head of public policy in exceptional circumstances, such a course would be inadvisable in the interest of stability of society."

A contract being "opposed to public policy" is a defence under section 23 of the Indian contract Act and the courts while deciding the validity of a contract has to consider:

a) Pleadings in terms of Order VI, Rule of the Code of Civil Procedure.

b) Statute governing the case

c) Provisions of Part III and IV of the Constitution of India

d) Expert evidence, if any.

e) The materials brought on record of the case.

f) Other relevant factors, if any.

A party in a suit against whom illegality is pleaded also gets an opportunity to defend himself. Hence this essential function to decide on what is public policy can not be delegated to executive through a subordinate legislation.

The legislature of a State, however, may lay down as to which acts would be immoral being injurious to the society. Such a legislation being substantive in nature must receive the legislative sanction specifically and not through a subordinate legislation or executive instructions.

The phraseology 'opposed to public policy' may embrace within its fold such acts which are likely to deprave, corrupt or injurious to the public morality and, thus, essentially should be a matter of legislative policy.

The said phraseology came up for consideration before this Court in Central Inland Water Transport Corporation Limited and Another vs. Brojo Nath Ganguly and Another etc. [(1986) 3 SCC 156] where a note of caution has been sounded that it being a 'very unruly horse', once when gets astride one does not know how far it would carry him. The question as to whether the statement as regard the validity of a contract on the ground that it is opposed to public policy must normally be viewed within the parameters fixed therefor by longstanding authorities or precedents but in deciding a case it may not be covered by such authorities and lacking precedents, the preamble of the Constitution or the principles underlying the fundamental rights and the Directive Principles in our Constitution can be taken recourse to. This Court in Rattan Chand Hira Chand vs. Askar Nawazjung (Dead) by Lrs. and Others [(1991) 3 SCC 67] quoted the following from Prof. Winfield's Article "Public Policy in the English Common Law" :

> "Some judges appear to have thought it [the unruly horse of public policy] more like a tiger, and refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community."

It was further observed:

> "All courts have at one time or the other felt the need to bridge the gap between what is and what is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute or a document or of an action of an individual which is certain to subvert the societal goals and endanger the public good."

In Chitty on Contracts, 28th edition at page 838, it is stated:

> "Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups : first, objects which are illegal by common law or by legislation; secondly, objects injurious to good government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to marriage and morality; and fifthly, objects economically against the public interest. This classification is adopted primarily for case of exposition. Certain cases do not fit clearly into any of these five categories."

The learned author observed that doctrine of public policy is somewhat open-textured and flexible which has been the cause of judicial censure of the doctrine and has been seen by the courts as being vague and unsatisfactory, a treacherous ground for legal decision, a very unstable and dangerous foundation on which to build until made safe by decision as also being not immutable, stating that the commercial practice which was once permissible may be found to be mischievous and vice-versa.

In Cheshire, Fifoot & Furmston in their Law of Contract, Fourteenth Edition at page 407 states:

> "Assuming, then, that contracts vitiated by some improper element must be divided into two classes, how are the more serious examples of 'illegality' at common law to be distinguished from the less serious? Which of the contracts that have been frowned upon by the courts are so patently reprehensible so obviously contrary to public policy that they must be peremptorily styled illegal? Judicial authority is lacking, but it is submitted that the epithet 'illegal' may aptly and correctly be applied to the following six types of contract:
>
> A contract to commit a crime, a tort or a fraud on a third party.
>
> A contract that is sexually immoral.
>
> A contract to the prejudice of the public safety. A contract prejudicial to the administration of justice. A contract that tends to corruption in public life. A contract to defraud the revenue.
>
> There remain three types of contract which offend 'public policy', but which are inexpedient rather than unprincipled.
>
> A contract to oust the jurisdiction of the court. A contract that tends to prejudice the status of marriage. A contract in restraint of trade."

Prof. Winfield in his article "Public Policy in the English Common Law" reported in 42 Harvard Law Review 76 stated:

> "First among these is the principle that it cannot conflict with existing Parliamentary legislation. It may be useful in resolving a doubtful point in the interpretation of an enactment. But there cannot be public policy leading to one conclusion when there is a statute directing a precisely opposite conclusion. Moreover, where a rule of the common law is itself clear, arguments based upon public policy are beside the mark, however useful and admissible they may be where a new or doubtful question arises. There has been a noticeable tendency to regard public policy as a last resort for molding the law."

Despite the words of caution that the court's duty is to expound the law and not expand, new heads of illegality of contract being opposed to public policy have been found out and in any event there exists such a possibility. [See Nagle Vs. Feilden, (1966) 2 QB 633 and Newcastle Diocese (Church Property Trustees Vs. Ebbeck (1960) 34 ALJR 413].

A doctrine which is so vague or uncertain, in our opinion, thus, cannot and does not provide any guideline whatsoever. Furthermore, the executive while making a subordinate legislation cannot be permitted to open new heads of public policy in its whims. Towards opposed to public policy, therefore, do not lay down any guidelines to render it constitutional. Execution of power of attorney per se is not invalid. On the other hand, it is lawful.

The notifications issued by the State of Rajasthan themselves show that the uncertain position to which the parties to a transaction evidenced by a deed or a document can be put to. By the notification dated 1st April, 1999, any power of attorney authorizing the attorney to transfer any immovable property for a term in excess of six months or irrevocable or where the term is not mentioned was declared to be opposed to public policy; whereas by reason of a subsequent notification dated 22nd April, 1999 in place of six months, three years was substituted. Similarly, by a notification dated 26th March, 1999, power of attorney authorizing the execution of the sale deed, gift, mortgage or any other document of transfer of immovable property presentation for registration before any office other than the Sub-Registrar or Registrar respectively in whose District or Sub- Distrct the whole or some part of the property to which such power of attorney relates was declared as opposed to public policy which was amended by a notification dated 22nd April, 1999 exempting such power of attorney executed in favour of brother or sister or son or daughter or father or mother or husband or wife or grand sons or grand daughter.

Execution of a power of attorney in terms of the provisions of the Indian Contract Act as also the Power of Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.

CONCLUSION :

> We have noticed hereinbefore that the State of Rajasthan inserted Section 17(1)(f) and (g) in the Act making the registration of agreement to sale and irrevocable power of attorney relating to transfer of immovable property in any way a compulsorily registrable document. The State went further to amend Article 23 of the Second Schedule of the Stamp Act, 1899 making an agreement to sale of immovable property and irrevocable power of attorney or any other instrument executed in the course of conveyance, etc. with possession to be deemed to be a conveyance and stamp duty is chargeable thereon accordingly. According to the State, despite such enactments sales were being made by seller on the basis of a power of attorney with a right to sell the property and such powers of attorney were being executed for an unspecified period. A transaction between two persons capable of entering into a contract which does not contravene any statute would be valid in law. The State of Rajasthan does not make such transactions illegal. The Indian Contract Act or the Power of Attorney Act have not been amended. Execution of a power of attorney per se, therefore, is not illegal. Registration of power of attorney except in cases falling under Section 17(1)(g) or 17(1)(h) is not compulsorily registrable. Sections 32 and 33 of the Indian Registration Act also do not bar any such registration.

The Act only strikes at the documents and not at the transactions. The whole aim of the Act is to govern documents and not the transactions embodied therein. Thereby only the notice of the public is drawn.

In M.E. Moolla Sons, Ltd. (in Liquidation) Vs. Official Assignee, Rangoon and others [AIR 1936 PC 230], while commenting on section 17 and section 49 of the Act, it was stated:

> "It is to be observed upon a comparison of these different sections that while the Registration Act only requires certain documents to be registered on pain of the consequences entailed by S. 49, T.P. Act, by S. 54 enacts that (with a limited exception) the sale of immovable property can be made only by registered instrument. The provisions of the Registration Act by themselves would not operate to render invalid a mere oral sale. On the other hand the somewhat wide phrase "any interest .to or in immovable property" which occurs in Cl. (b), S.17(1), Registration Act, does not occur in S. 54 of the other statute."

[See also K. Panchapagesa Ayyar and another Vs. K. Kalyanasundaram Ayyar and Others, AIR 1957 MADRAS 472] Similar view has been taken in Syed Abdullah Sahib Vs. Syed Rahmatulla Sahib alias Baji Sahib and others [AIR 1960 MADRAS 274] stating:

> "14. The Transfer of Property Act requires that certain transactions should be effectuated only by registered instruments. Apart from the provisions contained in that enactment, the obligation to register arises only under the Registration Act. Under the latter Act registration is made obligatory in respect of certain specified class of documents, but there is nothing to require a transaction to be effected by a registered instrument. Section 17 of the Registration Act enumerates the documents

> which require registration.
>
> The necessity for registration under that Act would depend upon what a document is or what it purports to be. A bargain or an arrangement between the parties may comprise several transactions. The question whether there should be a writing or registration would depend on each of the transactions and not on their cumulative result."

Hence, Section 22-A of the Act through a subordinate legislation cannot control the transactions which fall out of the scope thereof.

We have noticed hereinbefore the effect of a power of attorney under the Indian Contract Act or the Power of Attorney Act. A subordinate legislation which is not backed up by any statutory guideline under the substantive law and opposed to the enforcement of a legal right, in our opinion, thus, would not be valid.

The question can be considered from another angle. A person may not have any near relative or is otherwise unable to attend the office of the Sub-Registrar or Registrar within whose jurisdictions the property is situated. He may even be out of the country. In absence of any substantive provisions contained in a parliamentary or legislative act, he cannot be refrained from dealing with his property in any manner he likes. Such statutory interdict would be opposed to one's right of property as envisaged under Section 300 A of the Constitution of India.

The scope and effect of public policy has been construed differently by this Court in different cases; see for example Renusagar Power Co. Ltd. vs. General Electric Co. [(1994) Supp. (1) SCC 644] and Oil and Natural Gas Corporation Ltd. vs. Saw Pipes Ltd. [(2003) 5 SCC 705].

Hence, it becomes amply clear that it is not possible to define Public policy with precision at any point of time. It is not for the executive to fill these grey areas as the said power rests with judiciary. Whenever interpretation of the concept "public policy" is required to be considered it is for the judiciary to do so and in doing so even the power of the judiciary is very limited.

Even for the said purpose, the part dealing with public policy in Section 23 of the Indian Contract Act is required to be construed in conjunction with other parts thereof.

A further question which arises is whether having regard to the doctrine of separation of powers what is essentially within the exclusive domain of the judiciary can be delegated to the executive unless policy behind the same is finally laid down.

A thing which itself is so uncertain cannot be a guideline for any thing or cannot be said to be providing sufficient framework for the executive to work under it. Essential functions of the legislature cannot be delegated and it must be judged with touchstone of Article 14 and Article 246 of the Constitution of India. It is, thus, only the ancillary and procedural powers which can be delegated and not the essential legislative point.

The contention raised on behalf of the Appellants herein that the State, being higher authority, having been delegated with the power of making declaration in terms of Section 22-A of the Act, would not be abused is stated to be rejected. Such a question does not arise herein as the provision has been held to be ultra vires Articles 14 and 246 of the Constitution of India.

The contention raised to the effect that this Court would not interfere with the policy decision is again devoid of any merit. A legislative policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review. [See Cellular Operators Association of India and Others vs. Union of India and Others (2003) 3 SCC 186 and Clariant International Ltd. and Another vs. Securities & Exchange Board of India (2004) 8 SCC 524] For the reasons aforementioned, we do not find any merit in this appeal which is dismissed accordingly. No costs.

So far as amendments made by other States are concerned, we are of the opinion that any order passed by a Sub-Registrar or Registrar refusing to register a document pursuant to any notification issued under Section 22-A of the Act would not be reopened.