Rani Raj Rajeshwari Devi vs The State Of U.P. And Ors. on 30 March, 1954

Equivalent citations: AIR1954ALL608, AIR 1954 ALLAHABAD 608

JUDGMENT

Kidwai, J.

1. The petitioner, referred to in these proceedings as the Rani is the widow of Thakur Jai Inder Bahadur Singh, late Taluqdar of Mahewa who died on 14-11-1349.

2. on 1st July, 1923 Jai Inder Bahadur made a gift to the Rani of 8 villages assessed to a Government Revenue of Rs. 10,000/. Subsequently the Rani purchassed other properties also and was in possession of them till 11-5-1934 when the Court of Wards, U. P., assumed superintendence of her estate by virtue of declaration made by the Government under Section 8(1) (b) of the U. P. Court of Wards Act. When the new constitution of India came into operation, the Court of Wards was in possession and the Rani does not seem to have raised any legal objection to this continued possession, though after the death of her husband, she repeatedly petitioned the Government to release her estate on the ground that she could manage it herself.

3. On 2-4-1952 a decision was pronounced by a Division Bench of this Court -- vide Mrs. A. Cracknell v. State of Uttar pradesh', AIR 1952 All 746 (A), in which it was held that the provisions of Section 8(1) (b), of the U. P. Court of Wards Act, being in derogation of Articles 14, 15 and 19(1)(f) of the Constitution are null and void under Article 13(1) of the Constitution.

4. When this decision came to be known, the U. P. Government issued orders that all estates held by the Court of Wards under Section 8(1) (b) of the Court of Wards Act should be released unless their proprietors applied under Section 10, Court of Wards Act, and some estates were released in pursuance of this order. The Rani's estate was, however, not released in spite of her application and it seems that some modification was made in the original orders issued by the Government. The extent and effect of this modification was a matter of some dispute but this is immaterial for the purpose of these proceedings.

5. The Rani, not having been granted the relief to which she considered herself entitled by reason of the law as declared by the Division Bench of this Court in -- 'AIR 1952 All 746 (A)', has moved this Court to exercise its power under Article 226 of the Constitution and to issue "writs in the nature of mandamus, prohibition, quo warranto and certiorari, or such of them as may be appropriate for granting the under-mentioned reliefs :

"(1) That the opposite party may be directed to release the petitioner's estate forthwithy handing over to her all cash, securities and other moveable properties appertaining to her estate:

"(2) The opposite parties may be directed to submit, for examination by this Hon'ble Court, all records, correspondence and other relevant papers disclosing the dealings by the opposite parties of the petitioner's estate and its belongings since the enactment of the Constitution;

"(3) That after an examination of the relevant materials this Hon'ble Court may be pleased to direct the opposite parties to reimburse the petitioner for any losses arising from any illegal and unwarranted action of the opposite parties or any of them, and to pass such other orders as the ends of justice may require:"

6. An interim order was also prayed for and was issued by one of us by which the opposite parties concerned were directed "not to dispose of the funds belonging to the petitioner or appertaining to her estate and not to create any liabilities either on the petitioner or on her estate pending the disposal of this application."

7. The opposite parties were the State of the Uttar Pradesh, no doubt, as the authority having supervisory control over the Court of Wards, the Revenue Secretary U. P. Government, the XL P. Court of Wards, the President Court of Wards and the Deputy Commissioner who has control under the orders of the Court of Wards, over the Rani's estate. The Deputy Commissioner of Barabanki acting for the Court of Wards, Ganeshpur estate applied to be impleaded and that estate claiming to be a creditor of the Rani's estate would be seriously affected by the decision on this petition. This application was opposed but we considered it proper to grant it. Accordingly the Deputy Commissioner of Barabanki as representing the Ganeshpur estate, has also been impleaded as a party.

8. The petitioner's learned Advocate contended that Section 8 (1) (b), U. P. Court of Wards Act, was discrimination based on sex and had consequently become void at midnight on the night between 25th and 26th January 1960. He relied upon -- 'AIR 1952 All 746 (A)' in support of his contention. He further urged that, if it were held that the possession of the Court of Wards had not become unlawful she would have no remedy through the normal channel of a suit against the mala fide actions of the Court of Wards in flagrant disregard of her interests and that consequently this Court should issue such directions as appeared to it proper in order to restrain the highhandedness and arbitrary actions of the Court of Wards.

9. The State and the Revenue Secretary were represented before us by the Standing Counsel, Who addressed no arguments to us. The petition was however, vehemently opposed on numerous grounds by Sir Iqbal Ahmad who appeared on behalf of the other opposite parties. It is somewhat surprising that in spite of the serious conflict in the interests of the Ganeshpur estate, the petitioner's estate and the estate of her late husband (the Mahewa estate) which the arguments of Sir Iqbal Ahmad revealed the Court of Wards, which is at present in charge of all the estates did not

consider it proper to appoint separate representatives for the three estates as required by Section 56 of the Court of Wards Act which applies not only to suits but also to "proceedings."

10. Sir Iqbal Ahmad's contentions were:

(a) Assuming the decision in -- 'AIR 1952 All 746 (A)', to be correct it has application only to cases in which a notification under Section 8 (1) (b) of the Court of Wards Act is issued after the Constitution of India came into force and does not apply to render void a declaration lawfully made under the section at a time when Articles 13, 14, 15 and 19(1)(f) of the Constitution were not in force. In the present case since the declaration was made by the Government as long ago as 1934, it continued to be valid, the Constitution not being retrospective in its operation, and the possession of the Court of Wards under it was lawful and must be maintained.

(b) The case in -- 'AIR 1952 All 746 (A)' was wrongly decided because:

(i) There is a bias in favour of upholding a law and not declaring it void or ultra vires, a principle which has been ignored by the learned Judges in deciding the case;

(ii) Section 8 (1) (b) is not discriminatory 'against' females since the Court of Wards Act is a piece of benign legislation directed to preserve estates for their proprietors and facilities for the taking over of such estates by the Court of Wards are for the benefit of the proprietors:

(iii) Even if Section 8 (1) (b) of the Court of Wards Act be held to be discriminatory within the mischief of Article 15(1) the discrimination is not based only on the ground of sex taut also on other considerations;

(iv) Classification of citizens into various groups for the purposes of legislation is not forbidden and having regard to the state of affairs existing in India, the placing of women in a category by themselves in so far as the management of estate is concerned is a reasonable classification based on intelligent indicia and is not hit by Article 14 or 15(1) : and

(v) Article 19(1)(f) does not apply because the word "hold" used in that Article means "to own" and not "to possess".

(c) In any case the jurisdiction under Article 226 is essentially equitable and in the present case it would not be equitable to grant the relief claimed because the petitioner has acquiesced in the Court of Wards acting on her behalf and it would be inequitable to allow her to resile from that position; and

(d) Two conditions are requisite for the grant of relief under this Article, namely--

(a) The petitioner must have a legal right to the performance of a legal duty, the performance of which is claimed; and

(b) No other equally efficacious remedy is available to the petitioner:

In the present case both these requisites for the power of issuing writs are wanting.

11. We have derived considerable assistance from the arguments of the learned Advocates fat the parties who have placed before us numerous decisions from which the principles of law applicable to a case such as the present may be derived.

12. The first point that requires consideration in the present case is whether the grant of this petition is dependent upon giving a retrospective operation to the Constitution, since it was frankly conceded by the petitioner's learned Advocate that the Constitution has no retrospective operation--vide also -- 'Keshavan v. State of Bombay', AIR 1951 SC 128 (130) (B) and -- 'Janardan Reddy v. State of Hyderabad', AIR 1951 SC 217 (C). Indeed in so far as fundamental rights are, concerned they were created, and not merely recognised by the Constitution. Consequently, citizens had no fundamental rights in the sense in which they are now understood. If these fundamental rights came into existence, as such, on the enforcement of the Constitution, nothing done before 26-1-1950 can be said to have in-fringed any fundamental rights.

13. Further Article 367 of the Constitution makes the General Clauses Act of 1897 applicable for the purposes of interpreting the Constitution as it applies for the interpretation of an Act of the Legislature of the Dominion of India. Section 6 of the latter Act provides:

"Where this Act or any (Central Act) or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears, the repeal shall not "(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under any enactment so repealed; or "(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or "(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment as aforesaid;

"and any such legal proceedings or remedy may be Instituted, continued, or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

14. It has been held in -- 'AIR 1951 SC 128 (B)' that the effect of an amendment declaring a law void is to repeal that law as from the date on which the declaration is made. It does not render the law void from the date of its inception as happens when the law is ultra vires of the authority which enacted it. It was on this basis that Sir Iqbal Ahmad contended that the disability (which he treated

as an obligation or liability) incurred by the petitioner by reason of the declaration duly made under Section 8 (1) (b) of the Court of Wards Act would not be affected by declaring that provision void at a much later period of time.

15. This contention ignores a distinction between two classes of cases : (a) Cases in which the action has been completed and has become final or there is a "closed transaction" and in which the liability or obligation or penalty is imposed or incurred once for all as a result of that action; and (b) Cases in which the penalty or liability or disability is a continuing one and though it started before the Constitution came into operation, it continues even afterwards.

In the former case, the right to prosecute any legal proceedings for enforcement of the penalty or for obtaining the remedy continues even after the repeal of the enactment as if the repealing enactment had not been passed. In the latter case, although no completed action can be abrogated by reason of the repeal (or declaration that Act is void) the disability imposed by the repealed Act (or the Act declared void) cannot continue after its repeal because this would be giving to the Statute declared void prospective operation even after it has actually become void. This distinction will become clear when the decisions on which reliance has been placed are discussed.

16. The series of cases upon which Sir Iqbal Ahmad relied related to Article 14 of the Constitution and the Statutes impugned were challenged on the ground that they deprived particular individuals or classes of equality before the law and of the equal protection of the laws.

17. In 'AIR 1951 S.C., 128 (B), the continued validity of the Press (Emergency powers) Act of 1931 was challenged on the ground that it was repugnant to the provisions of Article 19(1)(a) of the Constitution and it was claimed that a prosecution under that Act which was pending at the date that the Constitution came into force could not be allowed to continue. This contention was not accepted and it was held by Das J. who delivered the judgment of the Chief Justice and of Patanjali Sastri and Chandrashekhara Aiyar JJ. that :

> "Article 13(1) cannot be read as obliterating the entire operation of the inconsistent laws, or to wipe them out altogether from the Statute Book, for to do so would be to give them retrospective effect, which, as we have said they do not possess. Such laws exist for all past transactions and for enforcing all rights and liabilities accrued before the date of the Constitution, because there is no fundamental right that a person shall not be prosecuted and punished for 'an offence committed before the Constitution came into force. So far as the past acts are concerned, the law exists 'although it does not exist with respect to the future exercise of fundamental rights".

It was said by Das J. in the course of his judgment:

> "In other words, 'on or after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights'."

18. In the same case the judgment of Mahajan J. (now C. J.) makes it clear that it was principally because declaring a law "void" was really its repeal and that Section 6 of the General Clauses Act governed such a case that the penalty already incurred before the Constitution came into operation could be enforced even after that event.

19. On the other hand, Fazl Ali J. (with whom Mukherjea J. agreed) did not accept the majority view and they held that the criminal prosecution could not be allowed to continue. At page 133 Fazl Ali J, says:

> "There can be no doubt that Article 13(1) will have no retrospective operation and transactions 'which are past and closed' and rights which have already vested will remain untouched. But with regard to inchoate matters which were still not determined when the Constitution came into force, and as regards proceedings whether not yet begun or pending at the time of the enforcement of the Constitution and not yet prosecuted to a final judgment, the very serious question arises as to whether a law which has been declared by Constitution to be completely ineffectual can yet be applied. On principle and on good authority, the answer to the question would appear to me to be that the law having ceased to be effectual can no longer be applied."

20. In spite of the observations of Fazl Ali J. I may be permitted to point out with respect that the fundamental right to "freedom of speech and expression" after the enforcement of the Constitution, i.e., after it had first come into existence, remained wholly unaffected by the prosecution launched in respect of an action which was penal under a valid law existing at the time when the action took place and when there were no fundamental rights. It is for this reason that Das J., points out that "there is no fundamental right that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force."

21. The decision under discussion thus unanimously adumbrates the following propositions:

> (a) That Article 13(1) has no retrospective operation with regard to transactions which are past and closed.
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> (b) that on and after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights;
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> (c) that in that particular there was no question of the infringement of any fundamental right after the date of the Constitution, but only meting out of punishment for something which had been done before the Constitution came into force at which time there were no fundamental right and consequently there was no question of the law having become void by reason of Article 13(1) at the time when the act was done. In the words of Mahajan J. (now C. J.) "a citizen must be possessed of a fundamental right before he can ask the Court to declare a law which is inconsistent with it void, but if a citizen is not possessed of the right, he cannot claim

the relief".

22. In 'AIR 1951 S. C. 217 (C)', the trial of certain persons had taken place before Special Tribunals constituted under Regulations issued in May and July, 1949 and they had been convicted for murder and for other offences before the Constitution of India came into operation. It was held in a unanimous decision pronounced by Fazl Ali J. that the Constitution not having any retrospective effect and the appeal of the petitioners having been dismissed by the High Court before the Constitution came into force "the conviction and the sentence of the petitioners had acquired finality in the fullest sense of terms before 26-1-1950 and by reason of this finality no one could question the validity of the convictions at the date when the Constitution came into force."

23. In -- 'Abdul Khader v. State of Mysore', AIR 1951 Mysore 72 (D), the question was whether trial by a Special Court infringed the provisions of Articles 14 and 21 of the Constitution and was consequently vitiated. It was held by two out of three Judges composing the Full Bench that whatever view may have been open had the trial taken place after the Constitution came into force this view could not be taken when trial had already finished and the case had already been disposed of before that date. Some remarks of Mallapa, J. are instructive on the question of classification & reference will be made to them later.

24. The last case upon which the learned Advocate for the opposite parties placed reliance in this connection is -- 'Chanderdeo Sharma v. State of Bihar', air 1951 Pat 75 (SB) (E). In that case, a notification had been issued on 14-7-1949 under the Press (Emergency Powers) Act (23 of 1931) forfeiting a Hindi Booklet. Thus, the action of the forfeiture was complete and was a "closed transaction" before new rights came into existence under the Constitution and the learned Judges held:

> "The Order of forfeiture had taken effect on a date before the Constitution of India came into force and it is difficult to say how the validity or otherwise of that order can be called in question with reference to a further right granted to every citizen of the Indian Union by the Constitution."

In this case also, the only fundamental right that could be infringed was that conferred by Article 19(1)(a) of the Constitution, i.e., the right "to freedom of speech and expression." since the forfeiture had already been completed before this fundamental right came into existence, there was nothing done which infringed the fundamental right created by the Constitution.

25. It will be noticed that in none of the above mentioned cases was any question of 'continued infringement' of a fundamental right after the commencement of Constitution involved. It was, however, contended on the basis of some remarks made in them that, since in the present case, the declaration had been made by the Government in 1934, long before the new Constitution came into operation, nothing in Articles 13(1), 14 and 15(1) of the Constitution could be allowed to affect the operation of that declaration. It was urged that in the same way as a person could still be detained in prison under a law which has become void in spite of Article 19(1)(d) he must continue to suffer from every other kind of liability. It will be seen that reliance was not placed upon this Article in any

of the cases to which reference has been made either by the eminent counsel who appeared or by the learned Judges who examined the relevant provisions with care. The reason for this is not far to seek : in the matter of individual liberty not only does Clause (5) of Article 19 provide an exception but the matter is in reality governed by Articles 20 to 22 of the Constitution. If the law makes a reasonable provision for the curtailment of the liberty of a citizen to move about in India that provision will by reason of Clause (5) of Article 19 be upheld. It cannot possibly be contended that a provision in the law that a person who had already been deprived of his personal liberty "according to the procedure established by law" as it existed at the time that he was so deprived, shall continue to be restricted so far as his movements were concerned is unreasonable.

26. In this connection, I may mention the decision of the Supreme Court in -- 'Rashid Ahmad v. The Municipal Board, Kahirana', AIR 1950 SC 163 (F), which escaped the notice of the learned Advocates for both the parties. In that case the validity of some by-laws framed by the Municipal Board of Kairana was challenged. The bye-laws provided that no one could carry on the business of a wholesale vegetable dealer within Municipal limits without a license and that he must carry on the business at the particular place or places fixed by the Board. They also provided that a monopoly could be granted to a Contractor to deal in wholesale transactions. There was no bye-law authorising the Board to grant licenses. It was held that the net result of those bye-laws was that the prohibition in the wholesale dealing with vegetables became absolute and there was a violation of the fundamental right conferred by Article 19(1)(g) since the restriction imposed was much more than a reasonable restriction. It was, therefore, held that the bye-laws relating to this matter had become void under Article 13(1) of the Constitution. In that case the bye-laws had been duly enforced from 1-1-1950 i.e., before the Constitution had come into force and it was contended on this basis that at the time when the Constitution came into force the petitioner had no longer any right to continue the business and that, therefore, his case was not governed by Article 19(1)(g). This contention was repelled and it was said:

> "There is no substance in this argument for, if it were sound, Article 19(1)(g) would only protect persons who were carrying on business before the Constitution came into force."

Their Lordships then proceeded to hold that in spite of the bye-law, the petitioner before them could after the enforcement of the Constitution carry on the business of wholesale dealer in vegetables at his house without a licence and that criminal proceedings instituted against him for infringement of the bye-law must be quashed.

27. The above case is, therefore, a clear authority for the proposition that a bye-law duly made and valid when it was enforced cannot be allowed to interfere with the exercise of fundamental rights after those rights have come into existence by the enforcement of the Constitution. An order or declaration made by the Government stands, in view of Article 13(3)(a) on the same footing and that too cannot be allowed to stand in the way of the enforcement of fundamental rights. Fundamental rights are conferred not only by Article 19 but also by Article 15. If the right conferred by this Article is infringed by any law (which includes orders) made by the State (which includes the Government) that law is rendered void by Article 13(1) and the discrimination against a citizen on the ground of

sex cannot be allowed to continue after the Constitution comes into force in spite of such a law or order.

28. The distinction between the two classes of cases to which I have referred in paragraph 15 is also made quite clear by reference to the cases upon which the petitioner's learned Advocate relied in connection with this part of the case. They are -- 'Sunil Kumar v. Chief Secy to the Govt. of West Bengal', AIR 1950 Cal 274 (SB) (G); 'Brahmeshwar Prasad v. State of Bihar', AIR 1950 Pat 265 (H); 'Brajnandan Sharma v. State of Bihar', AIR 1950 Pat 322 (FB) (I); 'Prahlad Jona v. State', AIR 1950 Orissa, 157 (FB) (J). Reference was also made to the decision of a Division Bench in -- "Trimbak Shivrudra v. The State', AIR 1950 Nag 203 (K).

29. All the above-mentioned cases arose under various Acts governing preventive detention. In all of them the orders of the authority empowered to order preventive detention had been passed and put into operation before the constitution came into force. It was held in all of them that the orders already passed had become void by reason of being in conflict with the Constitution and continued action under them was illegal. Directions were, therefore, issued in each case declaring the orders to be void. In each of the cases, the provisions of Articles 19(1)(d), 19(5), 21 and 22 were considered and because the orders were repugnant to them they were held to have become void under Article 13(1).

30. The earliest case in point of time is the decision of a Division Bench in -- 'AIR 1950 Nag 203 (K). In that case, a person had been detained under the C. P. and Berar Public Safety Act. It was held that the powers conferred upon the Provincial Government by the Act were to some extent wider than those permitted by the Constitution but that did not render the whole of the Act bad. It was remarked:

> "The power to detain a person, and the power to detain a person for an indefinite period are distinct and therefore, in our view the provision conferring the former is not rendered void because the provision conferring the latter is void."

The parts which were void were separable from those which were not and since the Act was still existent, it was a law which the President could in exercise of his powers under Article 373 modify. By the President's modification the order for preventive detention was to be limited in its direction to three months from 26-1-1950. It was consequently held that the detenu could not be released before the expiry of three months from 26-1-50.

31. The next case is the decision of a Division Bench of the Patna High Court reported in -- 'AIR 1950 Pat 265 (H)'. In that case a person was detained under an order lawfully issued before the Constitution came into force under the provisions of the Bihar Maintenance at Public Order Act (3 of 1950). The learned Chief Justice summarised the various provisions of the Act and held that they were in conflict with Article 22, Clauses (4) and (5) of the Constitution. He held that the void provisions could not be, separated from the valid provisions remarking at page 270:

> "Put crudely, the argument comes to this. If a law provides for a detention of six months but the Constitution says that no law can provide for detention for more than three months then that law is not wholly void, but can be regarded as a good law as regards detention upto three months. The fallaciousness of such an argument is at once apparent. It would mean not severing the bad portion from the good and leaving the latter, but substituting a new and different law in place of the old. In fact, it would mean legislation by the Court and the abolition of one law and the substitution for it of a new and different law."

It was accordingly held that the detenu could no longer be detained after 26-1-1950 and the order of the President issued under Article 373 could not affect this matter, since there could be no resuscitation of a dead law by such an order.

32. In -- 'AIR 1950 Cal 274 (G)' a Special Bench of the Calcutta High Court considered the Bengal Criminal Law Amendment Act of 1930. Under Section 2 (1) of that Act, it was provided that a person could be detained or restrictions imposed upon his movements if in the opinion of the Provincial Government there were reasonable grounds for believing that he

(i) is or was a member of an Association of which the objects and methods include the commission of any offence specified in schedule I of the Act;

(ii) is doing or was at any time instigated or controlled by a member of any such Association; and

(iii) is doing or did at any time any act to assist the operations of such an Association.

The powers were exercised according to the rules of business by a Deputy Secretary. Emphasis was laid upon the fact that the satisfaction had to be that of the Provincial Government and that the Courts could not Investigate the grounds. It was remarked that "the opinion of Provincial Government was subjective and not justifiable" and that the provisions of the impugned Act were most preposterous and were neither reasonable nor in the public interest so as to fall within Article 19(5). It was also found that there was a conflict with the provisions of Article 22 inasmuch as no limit was fixed to the period of detention. The same opinion was expressed as regards the severability of the various provisions and of the President's order issued under Article 373 as in the Patna case to which reference has already been made.

33. In -- 'AIR 1950 Orissa 157 (FB) (J)', the same view was expressed with regard to the Orissa Maintenance of Public Order Act and the President's order under Article 373 and had been expressed in the Patna case to which reference has been made in para, 29 and the detenus were ordered to be released at once.

34. In -- 'AIR 1950 Pat 322 (FB) (I)' two of the learned Judges composing the Full Bench reaffirmed the view taken by the Division Bench of their court in -- 'AIR 1950 Patna 265 (H)'.

Meredith, c. J. remarking at page 324 of the report:

> "But when a Court is prevented from, going into the merits it is for all practical purposes impossible to consider whether the order is in fact bona fide or mala fide. On the other hand, 'if the restrictive provisions in the Act are void, quite obviously the order made thereunder is void'."

35. The above cases are direct authority for the proposition that nothing in any law or order could stand in the way of the exercise of fundamental rights unless the case fell within any of the exceptions engrafted on to fundamental rights by Part III of the Constitution.

36. Sir Iqbal Ahmad contended that:

> (a) the learned Judges deciding these cases did not go into the question whether the Constitution had retrospective effect or not; and
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> (b) having regard to the decision of the Supreme Court in -- 'AIR 1951 SC 128 (B)' and -- 'AIR 1951 SC 217 (C)', which definitely rule that the Constitution does not derogate from anything lawfully done under the then existing law, they must now be deemed to be bad law.
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> (c) In those cases, the continued detention of the, persons concerned was a violation of the right conferred by Article 22(4) while in the present case by the continuance of the Superintendence of the estate by the Court of Wards no fundamental right is infringed.

37. It is true that in none of the five cases upon which Mr. Niamatullah relied was there any discussion as to whether the Constitution had retrospective effect but that is immaterial because the learned Judge did not hold that the Constitution in any manner affected the validity of the various laws up to the date of its enforcement: they only held that they could not continue valid after that date in so far as they infringed fundamental rights.

38. In the last mentioned case it was definitely laid down that an order stood or fell with the law under which it was passed. This is perfectly clear from the definition of "Law" in Article 13(3)(a) which is as follows:

> " 'Law' includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

Sir Iqbal Ahmad contended that the Ordinance, Order, bye-law etc. must be issued in pursuance of a legislating power delegated by the Legislature. There is, however, no warrant for the distinction because fundamental rights are to be safeguarded not only against legislative encroachments but against all possible encroachments at the hands of any public authority whatever and even from customs and usages. A reference to Article 12 will show that 'the State' includes not only the Government and Parliament of India but also " 'the Government and Legislature of each of the States and all local or other authorities' within the territory of India or under the control of the

Government of India." In Articles 14 and 15(1) with which we are primarily concerned, the State is prohibited from denying "equality before the law or the equal protection of the laws" and is forbidden to discriminate against citizens on any of the grounds mentioned. Since the word 'State' used in these articles includes the Government even executive orders passed by the Government which militate against fundamental rights must be held to be void by reason of Article 13.

(1) -- vide also the remarks of Patanjali Sastri C. J. in -- 'The State of West Bengal v. Anwar Ali Sarkar', AIR 1952 SC 75 at p. 79 (L).

39. Further, if Sir Iqbal Ahmad's contention that orders already issued by the Government under a law in force at the time can still stand in the way of the enjoyment of the fundamental rights conferred by Part III of the Constitution were accepted, it would lead to a most anamolous result. If before the enforcement of the Constitution, the appropriate legislature had enacted a law which had been duly assented to and promulgated, and which itself discriminated against a citizen on the ground of religion, sex or birth, e.g., by directing that no woman (or no Muslim woman) should appear in public without a veil or that persons born in a particular district should not be admitted to the Lucknow University, that law would automatically become void by reason of Article 13(1) and the disqualification imposed by it would come to an end. If, however, instead of the Act itself imposing the disqualification it authorised the Government of the State to prescribe the dress to be worn by women in public places or the persons who might be admitted to the Lucknow University and the Government had issued orders in the sense which I have mentioned earlier in this paragraph, before the Constitution came into force, the orders would still continue in force, although they militated against fundamental rights. In other words, a greater sanctity is sought to be attached to orders or notifications issued under an Act than attaches to the Act itself and it is sought to continue orders which are repugnant to fundamental rights, although it is agreed that the Act itself may be held to be void. Such a proposition has only to be stated to be rejected.

40. With regard to the contention that these cases must be deemed not to be good law by reason of the decisions of their Lordships in the Supreme Court in -- 'AIR 1951 SC 128 (B)' and -- 'AIR 1951 SC 217 (C)'. I have pointed out more than once that the two classes of cases are different. In the cases upon which Sir Iqbal Ahmad relies there was no question of a continuation of the infringement of fundamental rights after the enforcement of the Constitution, i.e., after the time when fundamental rights first came into existence. The remarks of Das, J. while delivering the judgment of the majority in -- 'AIR 1951 SC 128 (B)' clearly bring out the distinction. At page 130 of the report he says: "In other words, on or after the commencement of the Constitution no existing law will be permitted to stand in the way of the exercise of any of the fundamental rights" and again "so far as past acts are concerned the law exists notwithstanding that it does not exist with regard to the future exercise of fundamental rights."

41. As to the third contention of Sir Iqbal Ahmad on which he sought to differentiate the cases upon which Mr. Niamatullah relied in the present case, it is sufficient to say that fundamental rights are conferred not only by Article 19 but also by Article 15. Even if Article 19(1)(f) is not applicable (a point which will be considered later), Article 15 is, and, by reason of that Article, no discrimination by the State (including the Government) on the ground of sex can be allowed to continue after the

enforcement of the Constitution.

42. Before taking leave of this part of the argument it is necessary to refer to two more decisions, both of the Supreme Court, upon which Mr. Niamatulah relied. They are, -- 'Lachmandas v. State of Bombay', AIR 1952 SC 235 (M) and -- 'Syed Qasim Rizvi v. State of Hyderabad', AIR 1953 SC 156 (N). I have purposely left those decisions till the last because there is a point of distinction in them inasmuch as both of them related to a change in the law of procedure and emphasis was laid on the fact that a change of procedure must have immediate effect. It was accordingly held that, if the procedure adopted by the Special Tribunal concerned was not the same as that provided by the general law and was discriminatory to such an extent as to be a denial of the equal protection of the law, it could not be pursued after the enforcement of the Constitution since the law relating to it will have become void under Article 13(1). It was further held that if such discriminatory procedure continued to be followed even after the enforcement of the Constitution it would vitiate the trial.

43. Some remarks made in the judgment in the second of the cases do, however, throw some light on the matter under discussion. At page 162 of the report, Mukherjee, J. delivering his own judgment and the judgment of Patanjali Sastri, C. J. and Chandrasekhara Aiyar, J, says:

> "We may mention here that the impossibility of giving the accused the substance of a trial according to the normal procedure at the subsequent stage may arise not only from the fact that the discriminatory provisions were not severable from the rest of the act and that the Court consequently had no option to continue any other than the discriminatory procedure, or it may arise from something done at the previous stage which though not invalid at that time precludes the adoption of a different procedure subsequently. Thus, if the normal procedure is trial by jury or with the aid of assessors, and as a matter of fact there was no jury or assessor trial at the beginning, it would not be possible to introduce it at any subsequent stage. Similarly, having once adopted the summary procedure, it is not possible to pass on to a different procedure on later date. In such cases, the whole trial would have to be condemned as bad."

Again he says:

> "As regards the procedure to be followed by the Special Tribunal, the Regulation undoubtedly prescribes the procedure for summary trial by a Magistrate. If the tribuunal had adopted that procedure, we would have no other alternative but to declare the whole trial as invalid for although the summary procedure could not have been challenged as illegal prior to the coming in of the Constitution, it would not possibly have been changed to a different procedure after 26th January 1950. The entire procedure would then have to be held as invalid as conflicting with the equal protection clause'."

Bose and Ghulam Hassan, JJ. went still further.

44. Thus according to all the Judges composing the Bench, discrimination cannot be allowed to continue after the Constitution has come into force even if, in order to prevent this, something which was done before the Constitution came into operation and was perfectly valid when it was done, has to be undone. Thus, if the contention of Sir Iqbal Ahmed that neither Articles 14, 15 nor 19(1)(f) have been infringed, is rejected, the declaration or order of the Government under which the Court of Wards assumed superintendence of the petitioner's estate must be declared void as from the date of the enforcement of the Constitution though whatsoever was done by the Court of wards or whatever liabilities were imposed by the Court of wards before that date cannot be set aside.

45. This brings us to Sir Iqbal Ahmad's contentions questioning the correctness of the decision in 'AIR 1952 All 746 (A)'.

46. The first ground upon which that decision is attacked is that it has lost sight of the principle that, in the words of Fazl Ali, J., 'in -- Charanjit Lal v. The Union of India', AIR 1951 S. C. 41 at p. 45 (O)', "the presumption is always in favour of the constitutionality of an enactment, and the bur-den is upon him who attacks it to show that there has been a clear transgression of the constitutional principles:"

> It was, therefore, held in that case that it was for petitioners to show that the Act which had imposed restrictions upon the Sholapur Company was "arbitrary and unreasonable and that there were other companies in the country which should have been subjected to the same disabilities because the reasons which led the legislature to impose State Control upon the Sholapur Company are equally applicable to them."

See also -- 'Shyamakant Lal v. Rambhajan Singh', AIR 1939 P. C. 74 (P).

47. The above dicta only mean that if certain facts have to be proved to establish the fact that there is discrimination or that the law is unreasonable, it is for the person alleging this to establish it. Further, if there is any doubt as to the meaning of a Statute, that is to say, if there is any scope for interpretation, that interpretation will if possible be adopted which will make the Statute constitutional. It does not mean that a Statute should be misconstrued or that established facts should be ignored in order to hold a law to be of constitutional validity.

48. On the other hand, it must be remembered that the constitution attaches the greatest importance to fundamental rights. In the past, when India was under autocratic rule or the rule of a foreign power, citizens had no fundamental rights as such. They were penalised and discriminated against on various grounds, including religion, race, caste and sex. The constitution makers determined that the possession of "Fundamental rights" by all citizens and, to some extent by all denizens of the country is inherent in the very conception of a democratic State which India is declared to be and that it is necessary to guarantee them in order "to secure to all its citizens; 'justice', social, economic and political; 'Liberty' of thought, expression, belief, faith and worship; 'Equality' of status and of opportunity, and to promote among them all; 'Fraternity' assuring the dignity of the individual and the unity of the Nation."

In order to achieve this object, the written Constitution distinctly and explicitly forbids both legislative and executive interference by every authority having jurisdiction over India or any part of it with what are termed Fundamental Rights and it solemnly entrusts the prevention of any interference to the Supreme Court (by Article 32) and the various High Courts (by Article 226). It further forbids the suspension of the powers conferred upon the Supreme Court by Article 32 (vide Clause 4 of the Article) except after an emergency has been proclaimed under Article 352 (vide Article 359).

49. While, therefore, the courts cannot go out of their way to invalidate a law on the ground that it is in conflict with the constitution, they must be vigilant to protect fundamental rights and they cannot allow those rights to be whittled down and the same injustices, inequalities and discriminations to continue as existed before the enforcement of the Constitution. If then the court comes to conclusion that a particular enactment derogates from the fundamental rights conferred by the Constitution, as it did in AIR 1952 All 746 (A), it cannot allow any bias in favour of the constitutional validity of a law to uphold the law.

50. The next contention was that the learned Judges did not give adequate consideration to the fact that the Court of Wards Act was a benign measure the object of which was to benefit Zamindars by preserving their estates from destruction. It was urged that any discrimination that there might be in enabling the Court of Wards to assume superintendence of a woman more easily than that of a man was discrimination not 'against' but in favour of the woman. The same argument was advanced before the learned Judges in the case under consideration and was, if I might say so with respect, rightly rejected.

51. The benefit of the estate as such and the benefit of the proprietor for the time being of an estate are two different things. For instance, the proprietor of an estate may have no direct heir but only unknown distant collateral. He may, therefore, determine to enjoy his estate to the fullest possible extent even though this may lead to indebtedness or even to the sale of the estate. The taking away of the estate from him would not be a benign act so far as he is concerned though it may be a benign act from the point of view of the eventual successor.

52. In considering the nature of the provisions of an enactment, we are not concerned with any one but the immediate proprietor. So far as the proprietor is concerned, the consequences of the Court of Wards assuming superintendence have been lucidly stated in the recent case of -- 'Raghubir Singh v. Court of Wards, Ajmer', AIR 1953 SC 373 (Q) to which reference will have to be made again in dealing with the question whether the fundamental right guaranteed by Article 19(1)(f) of the Constitution has been infringed. At p. 374 of the report Mahajan J. (now C. J.) states :

> "The petitioner's right to hold the istimrari estate and his power of disposal over it stand abridged by the act of the Court of Wards authorized by these provisions. His right to manage the estate and enjoy possession thereof stands suspended indefinitely and until the time that the Court of Wards chooses to withdraw its superintendence of the property of the petitioner. During this period, he can only receive such sums of money for his expenses as the Court of Wards decides in its

discretion to allow."

It is clear that an enactment which has the above effects, as the U. P. Court of Wards Act has, on the rights of the proprietor cannot be said to be beneficial to the proprietor.

53. Further, a comparison between the provisions of Section 8(1) (b) and 8(1) (d) of the U. P. Court of Wards Act will clearly reveal that the discrimination is 'against' the woman. Clause 8(1) (b) simply classes as "disqualified proprietors" "females declared by the Local Government to be incapable of managing their own property"; while Clause 8(1) (d) is as follows : "persons declared by the Local Government to be incapable of managing or unfitted to manage their own property;

(i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property;

(ii) owing to their having been convicted of a non-bailable offence and being unfitted by vicious habits or bad character for the management of their own property;

(iii) owing to their having entered upon a course of extravagance;

(iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them:

> Provided that no such declaration shall be made under Sub-clause (iii) or (iv) unless the Local Government is satisfied:
>
> (a) that the aggregate annual interest payable at the contractual rate on the debts and liabilities due by the proprietor exceeds one-third of the gross annual profits of the property, and
>
> (b) that such extravagance or such failure to discharge the said debts and liabilities is likely to lead to the dissipation of the property."

Thus, it will be seen that, while it is left to the absolute discretion of the Government -- subjective and non-justiciable -- to declare a female proprietor unfit to manage her estate without any rules being laid down to determine what constitutes incapacity to manage, and she is not even allowed to represent her case before the declaration is made, in the case of a male not only must certain conditions be fulfilled before he can be declared unfit to manage his estate but he must be given the fullest opportunity to have his objections heard. Even though the law may be a benign one, there can be no doubt that the discrimination is against the female.

54. In this connection, the remarks of Mukherjea J. in AIR 1952 SC 75 (L) are very opposite. At page 89 the learned Judges says :

> "If a legislation is discriminatory and discriminates one person or class of persons against others similarly situated and denies to the former the privileges that are enjoyed by the latter, it cannot but be regarded as "hostile" in the sense that it affects injuriously the interests of that person or class."

Thus the denial to women of the right of representation and the absence in Section 8(1) (b) of the Court of Wards Act of any rules similar to those in Section 8(1) (d) cannot but be regarded as "hostile" to women and consequently the discrimination is 'against' women.

55. In the present case, one other factor exists which indicates that there has been a differentiation against a woman. According to the affidavit filed on behalf of the opposite parties, an enquiry was made under Section 9 of the Court of Wards Act into the indebtedness both of the petitioner and her husband. After the enquiry proceedings were taken against Jai Inder Singh under Section 8(1) (d) -- they could not be taken against him under any other section -- and he was given an opportunity of representing his case but, although action could be taken under the same provision against the petitioner also if the necessary conditions existed, it was not done. The inference is either that the state of her indebtedness was not such as to justify action under Section 8(1) (d) or that the Government did not desire to allow the petitioner any opportunity to represent her case. It is thus clear that an opportunity was allowed to the male -- which was deliberately denied to the female -- to show cause why they should not be deprived of the management of their estates. Thus, whatever may be said to the position generally, in the present case, there was a discrimination by the Executive on the ground of sex.

56. The next attack upon the decision in AIR 1952 All 746 (A) was that the learned Judges did not attach any significance to the use of the word "only" in Article 15(1). It was urged that if they had considered Section 8(1) (b), Court of Wards Act, in the light of this word they would have come to the conclusion that the discrimination was not based 'only' on sex. According to his contention, the discrimination, even if it is found that there is a discrimination, was based not only upon the sex of the person concerned but also upon the satisfaction of the Government that the person was incapable of managing her property.

57. It will be convenient to consider this objection together with the fourth objection, namely that all differentiation is not discrimination and that it is open to the State to classify citizens into categories provided the classification is reasonable and is based upon intelligible indicia. It is urged that in the present case both the conditions exist since it is a well-known fact that women generally are not such competent managers of property as men and are much more liable to be led astray and, therefore, for the purposes of management of property, they may legitimately be put in a class by themselves.

58. So far as the contention that the disqualification is based not only on sex but also on the satisfaction of the Government is concerned, that may be disposed of first. Section 8(1) (d) of the U. P. Court of Wards Act has already been quoted in extenso. It is clear that it applies to estates of males as well as females. It lays down certain standards which are to guide the Government in determining whether the person concern-ed is incapable of managing his or her property and it

allows to the person concerned a full opportunity of being heard.

If the necessary conditions exist, the estate of a female as well as that of a male may be placed in charge of the Court of Wards, but in the case of females something more is provided: it is, by Section 8(1) (b) of the Act, left at the absolute discretion of the Government, even if the conditions imposed by Clause (d) of the same subsection do not exist, to declare the proprietor incapable of managing her estate. This differentiation (to use a neutral term) is based solely on the sex of the proprietor and the fact that the differentiation is to be made by the Government and not by the Legislature is immaterial because the word "State" in Article 15 includes, by reason of Article 12, a Government also and differentiation by the Government is as much hit by Article 15 as differentiation by the Legislature. The fact that Government chooses to proceed in respect of an estate under Section 8(1) (b) of the Court of Wards Act and not under Section 8(1) (d) is based 'only' on the sex of the proprietor, since no action can be taken under Section 8(1) (b) against males. The differentiation by the Government is based 'only' on sex and this is all the more so in the present case as I have already pointed out in para 54 ante.

59. It now becomes necessary to consider whether the differentiation is "discrimination" or "classification" and whether the classification is reasonable or not. In this connection reliance has been placed upon certain decisions of the Supreme Court and of various High Courts relating to Article 14 of the Constitution and it has to be seen whether the same reasoning will apply.

60. Reliance was placed in this connection upon -- 'Yusuf Abdul Aziz v. State', AIR 1951 Bom 470 (B); -- 'Dattatraya v. State of Bombay', AIR 1953 Bom 311 (S); -- 'Girdhar Gopal v. State', AIR 1953 Madh-B 147 (T) and -- 'Sri Mahadeb Jiew v. Dr. B. B. Sen', AIR 1951 Cal 563 (U).

61. In the first mentioned case Section 497, I. P. C. was challenged as being discriminatory. The learned Judges took the view that owing to the fact that women were married at a very young age and that their husbands could have a plurality of wives, the Legislature took a lenient view, sympathetic and charitable view of the weakness of women in this particular case so that the discrimination was not based on sex only. They added :

> "In this connection we would like to add that it is possible to take the view that the alleged discrimination 'in favour of woman is saved by the provisions of Article 15(3)."

62. In the second case, the question raised was whether the reservation of seats for women in local bodies was bad as discriminatory. The learned Judges no doubt made some general remarks but they proceeded :

> "But the clear answer to Article 15(1) is Article 15(3) and that provides that nothing in this article shall prevent the State from making any special provision for women and children."

Thus in both the Bombay cases the decision proceeded on the basis that the discrimination was in favour of women and so it was saved by Article 15(3).

63. In AIR 1953 Madh-B 147 (T) the impugned law was Section 354, I. P. C., Dixit J. held : "If the discrimination is based not merely on any of the grounds stated in Article 15(1) but also on considerations of propriety, public morals, decency, decorum and rectitude, the legislation containing such discrimination, would not be hit by the provisions of Article 15(1).

> "It cannot be denied that an assault or criminal force to a woman with intent to outrage her modesty is made punishable under Section 354 not merely because women are women, but because of the factors enumerated above."

I respectfully agree with the above observations but they are not applicable to the present case, unless it comes under the next objection.

64. In 'AIR 1951 Cal 563 (U)', the discussion by the learned Judge does not reveal that there was a real reason why the discrimination was not against women though such a reason exists. It is that, while a man can be arrested in execution of a decree, a woman cannot be so arrested. It was, therefore, necessary for the law to provide some other method by which the decree-holder could eventually realise the money from a woman. Hence, Order 25, Rule 1, Civil P. C. is confined to women.

65. A very important decision on the significance of the word "only" (as used in Article 29(2) also relating to fundamental rights) is that of the Full Bench in -- 'Smt. Champakam Dorairajan v. State of Madras', AIR 1951 Mad 120 (V). In that case the Madras Government, finding that there were not sufficient vacancies for admission of students to Medical College, issued a circular making, what it considered, an equitable division of the vacancies available among the various classes of citizens of the State. Out of every 14 seats, 6 were to be filled by non-Brahmin Hindus, 2 to backward Hindu communities, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims.

The circular was challenged by various persons on the ground that it decided admission to persons only on the ground of religion or caste. It was sought to support the circular on the ground that the denial was not only on the ground of religion or caste, but as a matter of public policy based upon the provisions of Article 46 together with the paucity of the vacancies. It was held that much significance could not be attached to the word 'only' because even reading the Article without that word, the result would be the same. It was further held that the circular was bad because it infringed the clear and unambiguous terms of Article 15(1) since it discriminated against citizens only on the ground of religion, race, caste, sex, place of birth or any of them. The judgment states :

> " 'Discriminate against' means 'make an adverse distinction with regard to'; 'distinguish unfavourably from others' (Oxford Dictionary). What the article says is that no person of a particular religion or caste shall be treated unfavourably when compared with persons of other religions and castes merely on the ground that they

> belong to a particular religion or caste. Now what does the Communal G. O. purport to do? It says that a limited number of seats only are allotted to persons of a particular caste, namely Brahmins. The qualifications which would enable a candidate to secure one of those seats would necessarily be higher than the qualifications which would enable a person of another caste or religion, say, Harijan or Muslim to secure admission."

It was, therefore, held that the Communal G. O. was void.

66. This decision was upheld by the Supreme Court on appeal in -- 'State of Madras v. Champakam Dorairajan', AIR 1951 SC 226 (W).

Their Lordships say :

> "It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, e.g. (a) they are Brahmins, (b) Brahmins have an allotment of only two seats out of 14 and (c) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmins are concerned, but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom these reservations have been made. 'The classification in the Communal G. O. proceeds on the basis of religion, race and caste'. In our view, the classification made in the Communal G. O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Article 29(2)."

67. On the same principle, it must be held that Section 8(1) (b) of the U. P. Court of Wards Act enables the Government to declare a person to be unfit to manage her estate on the sole ground that she is a female. Further the decision provides an effective answer to the argument relating to reasonable classification which I will now proceed to consider.

68. In AIR 1951 SC 41 (O), the proposition was laid down :

> "It is undeniable that equal protection of the laws cannot mean that all laws must be quite general in their character and application. A Legislature empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular objects and must, for that purpose, possess large powers of distinguishing and classifying the persons or things to be brought under the operation of such laws, provided the basis of such classification 'has a just and reasonable, relation to the object which the Legislature has in view."

vide judgment of Patanjali Sastri J. (later C. J.) at page 49. The other learned Judges expressed the same view though they differed on the question of the validity of the impugned law -- The Sholapur Spinning and Weaving Company (Emergency Provisions) Act (28 of 1950) -- and as to the extent of the presumption as to Constitutional validity of an enactment.

69. The same view has been expressed in AIR 1952 SC 75 (L), but in that case it was held -- Patanjali Sastri (later C. J.) dissenting -- that the fact that the impugned Act "gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory."

vide judgment of Mukherjea J. at page 92. It was consequently held that the law infringed Article 14 of the Constitution and became void under Article 13(1).

70. Again in -- 'Kathi Raning Rawat v. State of Saurashtra', AIR 1952 SC 123 (X), while the principle that classification was upheld under Article 14, Patanjali Sastri C. J. expressed himself thus :

> "All legislative differentiation is not necessarily discriminatory. In fact, the word 'discrimination' does not occur in Article 14. The expression 'discriminate against' is used in Article 15(1) and Article 16(2), and it means, according to the Oxford Dictionary, 'to make an adverse distinction with regard to; to distinguish unfavourably from others'. Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, 'it may well be that the statute will, without more, incur condemnation' as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different."

71. Thus the decisions of the Supreme Court in AIR 1951 SC 226 (W) and AIR 1953 SC 123 (X) establish the proposition that, while classification is permissible, it cannot be classification based on any of the factors mentioned in Articles 15 and 16. In the present case, it is based on sex which is a factor on which discrimination is forbidden by Article 15. It is, therefore, bad without anything more having to be proved.

72. These decisions are based, if I might say so with respect, upon the language of the Constitution and are also in accordance with its spirit. The framers of the Constitution were citizens of India hailing from all parts of the country. They were fully aware of the difficulties, disabilities and prejudices which exist in various parts of the country. They decided that those difficulties should not operate against any one in the new India that is coming into being and that all prejudices which provide the basis for injustice to any class of citizens should be strictly suppressed. It was with this object that Articles 15 and 16 were given a place in the Part relating to Fundamental Rights. The framers of the Constitution knew full well that women were, in many parts of the country, still backward -- that is why under Article 15(3) legislation discriminating in their favour is permitted -- and yet they forbade discrimination against them. No evasion of the Constitution can be permitted

merely by calling an act classification and not discrimination.

73. In this view of the matter, it is not really necessary to discuss the question whether the classification is reasonable or not. A classification which the Constitution forbids cannot possibly be said to be reasonable. Moreover, it has been held in several cases, of which I need refer to only two, that a provision which leaves the choice to subjective discretion -- not justiciable -- of any executive authority is not reasonable.

74. In AIR 1950 Pat 322 (I), Meredith C. J. thus states the law :

> "Turning now to the question of fact whether the impugned provision imposes only reasonable restrictions, the answer must, I think, be in the negative, for the power of restriction contained in the provision is based, not oh any reasonable grounds, but upon the satisfaction of some individual who, so far as the wording of the Act is concerned, is completely amorphous; and the provision is in such terms that it is not open to the Court to examine the reasonableness or otherwise of orders passed. Upon the terms of the Act, all the Court can inquire into is the existence of the satisfaction, Quite clearly such a provision might conceivably be used merely to exclude political opponents, or, as is suggested in the present case, (I do not mean to say I accept the suggestion, I am not considering it.) to favour one of the two rival Trade Unions and suppress the other.
>
> 'A law which enables such things to be done is not, in my judgment, a reasonable law. There can be no presumption that an executive official will always act reasonably. There may be presumption that he will act bona fide; but that is a different thing. The test is, in my opinion, not what is actually done under the law, but what the law enables to be done. If the law enables orders to be passed which are unreasonable, and "yet are consistent with its terms, then that cannot be called a law operating to impose only reasonable restrictions. I used the word 'only' advisedly because it appears to me that if the law enables unreasonable action In any case, then it cannot be saved by Article 19(5). In my opinion, a law to satisfy the criterion imposed by Article 19(5) must be so framed as to leave it open to the Courts 'to apply the objective test of reasonableness to its operation'. This law is not so framed."

75. In AIR 1953 SC 373 (Q) the question related to the validity of a provision by reason of which a landlord who habitually infringed the rights of his tenant could have his estate taken over by the Court of Wards, with the previous sanction of the Chief Commissioner. The exercise of discretion could not be called in question in any Civil Court and no machinery was provided by the enactment for determining whether a landlord habitually infringed the rights of his tenant. It was held that this was in conflict with Article 19(1)(f) of the Constitution unless it fell under the exception contained in Article 19(5) that is to say, it was a reasonable restriction on the right to hold property. Mahajan J. (later C. J.) in delivering the judgment of the Court says, at page 375 of the report:

> "When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can, on no construction of the word "reasonable" be described as coining within that expression, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the ' executive, the citizen affected having no right to have recourse for establishing the contrary in a civil Court."

76. In the still more recent case, as yet un-reported, of -- 'Dwarka Prasad Laxmi Narain v. State of U. P.', (since reported in AIR 1954 SC 224 (Y)) the same learned Judge says: "A law or order, which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities cannot but be held to be unreasonable."

77. The provisions of Section 3(1) (b) of the Court of Wards Act similarly confer an uncontrolled and arbitrary power not open to challenge in a Civil Court, of declaring any proprietor -- provided she is a female -- unfit to manage her property. Even if it be considered that this is a permissible classification and discrimination, it is unreasonable and must be declared to be void.

78. The next ground of attack on the decision in AIR 1952 All 74 (A) is that it has applied Article 19(1)(f), which is not applicable on the ground that in this Article the word 'holds' means own and not possess. If a person is, therefore, deprived of her property Article 19(1)(f) is not infringed. The reply to this contention is provided by the decision of the Supreme Court in AIR 1953 SC 373 (Q), in which Mahajan J. (now C. J.) delivering the judgment of the Court says, at page 374 :

> "The contention that the provisions of Section 118 of Act XLII of 1950 read with the provisions of Regulation I of 1888 infringe the fundamental right of the petitioner guaranteed by Article 19(1)(f) of the Constitution, is, in our opinion, well founded and does not require any elaborate discussion. The petitioner's right to hold the istimrari estate and his power of disposal over it stand abridged by the act of the Court of Wards authorised by these provisions. 'His right to manage the estate and enjoy possession' thereof stands suspended indefinitely and until the time that the Court of Wards chooses to withdraw its superintendence of the property of the petitioner. During this period, he can only receive such sums of money for his expenses as the Court of Wards decides in its discretion to allow. Thus, the provisions of Section 112 of Act XLII of 1950 clearly abridge the fundamental right of the petitioner under Article 19(1)(f) and are to that extent void."

79. Thus the decision of the learned Judges in -- 'AIR 1952 All 748 (A)', cannot be challenged on this ground either, though this ground is not available to tile petitioner in the present case, since the petitioner, already having been deprived of the management and possession of her estate before the Constitution came into effect does not, by reason of Article 19(1)(f), though she does by reason of the other provisions to which I have referred, become entitled to be restored to possession any more than a person who has parted with proprietary rights become entitled to get back those "rights merely by reason of the enforcement of the Constitution.

80. Thus having considered all the objections taken to the correctness of the decision in -- 'AIR 1952 All 746 (A)', I see no reason to doubt the correctness of the law there laid down and I respectfully agree, with it.

81. It was next contended that the petitioner having acquiesced in the continued possession of the Court of Wards even after the enforcement of the Constitution she cannot now resile from that position. There has in fact been no such acquiescence because the petitioner made repeated requests after the death of her husband on 14-11-1949, both to the Government and to the Court of Wards for the release of her estate though not on constitutional grounds. Nevertheless in view of those requests, it cannot be said that she acquiesced in the continued possession of the Court of Wards.

82. Further the petitioner could not be expected to have become aware of the legal position under the Constitution immediately after the Constitution came into force and she could not have recourse to the remedy under Article 226 until she had been denied relief by the Government and the Court of Wards. Her petition to this Court on the 22-12-1953, coming only about eight months after the decision in -- 'AIR 1952 All 746 (A)', a decision the correctness of which was hotly contested even in these proceedings was pronounced, cannot be said to have been unduly delayed.

83. Even if there has been, any acquiescence, the Court of Wards, which holds the estate for the benefit of the petitioner and is no better than her agent having certain statutory powers, cannot be allowed to continue in possession as against the petitioner. Of course, if any third party can claim the aid of the equitable doctrine of estoppel by reason of the petitioner's conduct, it will be open to it to do so in properly instituted proceedings against the petitioner, though the Court of Wards representing the petitioner's estate cannot refuse to deliver possession to her after its possession has become illegal.

84. It was next urged that the petitioner had no legal right to obtain possession because, under the provisions of Section 44 of the Court of Wards Act the Court of Wards having taken possession cannot release the estate until all the debts have been liquidated and this has not happened in the present case. The contention is untenable. The Court of Wards Act only authorises the Court of Wards to deal with properties of 'wards' or in certain eventualities of those who succeed to or are heirs of wards.

The petitioner does not come within the last two categories in so far as her estate is concerned and the Court of Wards could only retain the property so long as the lady was a ward and no disqualification would attach to her once she has ceased to be a 'ward'. Section 3 defines a 'ward' as being a person who is a disqualified proprietor and whose property is under the superintendence of the Court of Wards. Thus the existence of two conditions is necessary in order to constitute a person a ward and in the present case only the second condition exists. If, as I have indicated above, the declaration by the Government that the petitioner is unfit to manage her estate has become void, the petitioner has ceased to be a disqualified proprietor. The first of the conditions requisite to constitute her a ward has, therefore, ceased and she can no longer be deemed to be a ward. The Court of Wards can thus no longer, under the very provisions of the Court of Wards Act, deal with her property nor do any of the limitations on the powers of 'wards' apply to her so that she becomes

free to manage and enjoy her property as she pleases and this she can only do if the wrongful possessor restores the property to her.

85. The non-availability of a remedy is not a 'sine qua non' of the exercise by the High Court of powers under Article 226 though it is generally agreed that if an equally efficacious remedy is available, the petitioner must have recourse to that remedy and not invoke the extraordinary powers of the High Court. In the present case, it is suggested that a suit for a declaration and a mandatory injunction should have been brought in a Civil Court. If such a suit had been brought no doubt the plea would have been taken that, under the provisions of the Court of Wards Act the petitioner cannot sue and that no Civil Court has jurisdiction to go into the validity of the exercise of discretion by the Government. In order to decide the continued constitutional validity of the declaration the matter would no doubt have to come before the High Court under Article 226 of the Constitution, but it would come in this round about way. Thus the remedy available would not be equally efficacious and undue delay would result.

86. It is to be noticed that the same objection could have been taken to grant of reliefs in -- 'AIR 1952 All 746 (A)', and in -- 'AIR 1953 SC 373 (Q)', but in both these cases the relief directing possession to be delivered to the petitioner was granted, in one case under Article 226 and in the other under Article 32. In this case also the same relief must be granted.

87. I, therefore, hold that after the enforcement of the Constitution, that is to say, as from 26-1-1950, the possession of the Court of Wards over the property of the petitioner has been illegal and that possession should be restored to her and the accounts of the petitioner's property and all the dealings of the Court of Wards with it and with its income should be explained to her.

88. The learned Counsel intimated that he desired leave to appeal to the Supreme Court and since an important question relating to the interpretation of the Constitution is involved, a certificate under Article 132 of the Constitution must be issued. The opposite parties are given one month's time within which to apply for stay of the execution of the order of delivery of possession. In the meanwhile, the Court of Wards will continue in possession but shall only continue the formal management of the estate and incur the minimum possible expenditure in this connection. It should keep the petitioner informed of all that is done in connection with the management and if any extraordinary expenditure is to be incurred in connection with the said management, it shall be done only with the concurrence in writing of the petitioner.

Similarly no portion of the property or the funds belonging to the petitioner or appertaining to the estate shall be transferred or burdened with any liability of any kind without the concurrence in writing of the petitioner. Should any litigation be pending against the petitioner's estate or should any suit be hereafter filed against the petitioner or her estate, the Court of Wards shall appoint such counsel to defend the said suit or suits as the petitioner nominates and shall pay their fee out of the petitioner's assets in its hand. It shall not be at liberty to compromise, refer to arbitration or leave undefended any such suit without the written concurrence of the petitioner.

89. The petitioner shall receive her costs of this petition from the Court of Wards representing the Mahewa estate and the Ganeshpur estate since it is principally for the benefit of these two estates that this petition has been contested. The petitioner shall not be called to pay any costs. Since the case has lasted several days, the fees of the Counsel appearing for the State shall be taxed at Rs. 500/-.

Randhir Singh, J.

90. I agree and have nothing to add.