

Pre-Legislative Briefing Service (PLBS)

The Enemy Property Second Bill, 2010: Select Issues

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1. Executive Summary

The Enemy Property (Amendment and Validation) Second Bill, 2010 (hereinafter “the Bill”) was introduced on the lapse of an eponymous Ordinance, which had been brought with the specific intention of amending the Enemy Property Act, 1968 (hereinafter “the Act”). The Act provided for a mechanism by which properties owned by designated ‘enemies’, i.e. nationals or firms belonging to hostile nations would be vested in a Custodian appointed by the central government for this purpose. The Ordinance and subsequently the Bill, were brought to clarify the legislative intention and facilitate the acquisition and management of the property vested in the Custodian, matters which have become complex owing to several judicial decisions. Specifically, it would seem that the effect of the Bill has been to overrule the Supreme Court judgment in the case relating to the properties of the Raja of Mahmudabad, an Indian citizen, whose properties had been designated as enemy properties owing to his father’s migration to Pakistan, till decided otherwise by the Supreme Court.¹

In this briefing document, we deal with three key issues relating to the present Bill. *First*, we find that though the Bill alters the basis of the Supreme Court judgment mentioned aforesaid, such alteration is not *per se* unconstitutional, unless it divests persons of rights vested in them as a consequence of the judgment. The Bill however by way of the proviso to Clause 14 [Section 26(1)(b) of the Act] has such an effect, rendering it unconstitutional. *Second*, the Bill in Clause 11 [Section 18C of the Act] suffers from the vice of excessive delegation in failing to lay down the legislative policy regarding to whom and for what purposes property can be divested by the central government. The laying down of broad policy in this regard is imperative if the vice of excessive delegation is to be averted. *Finally*, Clause 14 of the Bill [Section 26 of the Act] in making a classification between property divested by order of the central government on the one hand and property divested by court order and other means on the other, shows no rational nexus with the object of the legislation and may be found violative of Art. 14 of the Constitution.

In the final analysis, we find the Bill to be clear, coherent and effective in serving the aims and objectives it sets out. To the extent that it falls short of these standards, we recommend appropriate amendments, which will ensure both constitutionality as well as more effective conformity with it stated objectives.

¹ *Union of India v. Raja Mohammed Amir Mohammed Khan*, (2005) 8 SCC 696.

2. Whether the Bill is unconstitutional for overruling Supreme Court Precedent

a. Context

1. In *Union of India v. Raja Mohammed Amir Mohammed Khan*,² (hereinafter “*Raja of Mahmudabad case*”) the Supreme Court of India had the occasion to interpret and adjudicate on the un-amended Enemy Property Act 1968 (hereinafter “the Act”). Some of the significant findings of the court, on which its judgment turned, were:

- a. If a property is enemy property under Section 2(c) and subsequently an Indian citizen succeeds to it under the relevant law, the property will cease to be enemy property. The reason for this holding is that an Indian citizen cannot be termed as an ‘enemy’; thus, it follows that the property which he succeeds to will cease to be enemy property the moment he succeeds to it.

- b. While Section 18 empowers the Central Government to issue an order divesting the Custodian of a certain property, the provision does not take away the power of the court to order divesting of property from the Custodian where the property ceases to be enemy property, having being succeeded to by an Indian citizen. In other words the Court read Section 18 as not taking away the jurisdiction of the court to order divesting of property in a situation where the property ceases to be enemy property.

In the light of the legal position it set out, the Supreme Court ordered that the Custodian shall be divested of the properties of the Respondent in the given case.

2. The present amendment bill is primarily (though not exclusively) directed at altering the law as laid down in the Supreme Court in *Union of India v. Raja Mohammed Amir Mohammed Khan*. The provisions of the bill which seek to carry out such alterations are Clauses 2, 9, 10, 11 and 14. We shall now briefly survey these clauses:
 - a. Clause 2, by inserting Section 5(3) in the Act provides that the enemy property shall continue to be enemy property even if it is succeeded to by an Indian citizen. This, it will be readily apparent, is at variance with what the Supreme Court of India

² (2005) 8 SCC 696.

understood as enemy property. The court held that on succession by an Indian citizen, erstwhile enemy property ceases to be enemy property. The present amendment provides to the contrary.

- b. Clause 11 inserting a new Section 18B provides that no court shall have the power to divest the Custodian of any enemy property or to direct the Central Government to order the Custodian to divest such property. The Explanation to Section 18B provides that the court however will have the power to decide whether a property was enemy property or not. This again, it should be apparent, is at variance with the Supreme Court judgment. The court had held that the Court could order divestment if the property ceased to be enemy property. The new amendment provides that the court cannot do any such thing.
 - c. Clause 14 introduces Section 26 which provides that the provisions of the bill shall be *deemed* to have been in force for all material times. The bill gives a *retrospective* effect to its amendments dating back to the time the act had been enacted in 1968. This deeming fiction in effect holds that the act will have to be taken and read as including the amendments proposed by the bill. Thus the provisions shall be deemed to have been in existence even when the Supreme Court of India decided *Union of India v. Raja Mohammed Amir Mohammed Khan*. Reiterating a proposition that would in any event have logically followed from the above deeming fiction, Section 26 (1) (d) also provides that any divestment ordered in contravention of the bill shall stand nullified. In effect, the bill nullifies any divestment of property that may have been ordered by any court on an interpretation of the original act. It however says in proviso to Section 26(1)(b) that where the property has been handed over by the custodian, pursuant to a court order or otherwise, such properties shall be excluded from the remit of the bill. Thus if a property has already been handed over by the Custodian, the bill shall not have the effect of reverting that property to the Custodian.
3. It is abundantly clear that the bill *apparently* comes into conflict with the Supreme Court judgment in the following *three* ways: *first*, it seeks to alter the law laid down by the Supreme Court; *secondly*, it specifically nullifies the divestment of property ordered by the Court; and *thirdly*, it does so with retrospective effect. The question we shall now address is whether and in what way these actions of the legislature can be impugned on the ground of constitutional invalidity.

4. It will be argued that broadly as the bill stands it is constitutionally sound, *qua* its conflict with the Supreme Court judgment, *subject to one caveat*, that is, the Parliament cannot deprive a person of rights that have accrued to him by virtue of a final and binding judgment of the court, in a *lis inter partes*. Subject to this, the Parliament can introduce retrospective amendments, even introducing provisions which are at variance with the Supreme Court's interpretation of the law.

b. Retrospective application

5. It is a well-established principle that the Parliament is competent to enact statutes retrospectively.³ Thus the power of the Parliament to amend this statute with a deeming fiction that the amended provisions date back to the time of the enactment of the original statute, cannot be questioned *per se*. However this principle is subject to one limitation— that the retrospective amendment cannot deprive a person of rights that have accrued to him by virtue of a final and binding judgment of the court, in a *lis inter partes*. As stated by the Constitution Bench in *State of Madhya Pradesh v. Amalgamated Coal Fields Ltd.*,⁴ speaking through Shah J.:

“It is open to the Legislature *within certain limits* to amend the provisions of an Act *retrospectively* and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court.”

6. We shall discuss this crucial ‘limitation’ below in paragraphs 11-16, where we argue that acquired rights cannot be taken away. This, we submit, constitutes the sole objection in respect of the constitutionality of the bill *qua* its conflict with the Supreme Court judgment.

³ *Virender Singh Hooda v. State of Haryana*, (2004) 12 SCC 588.

⁴ (1970) 1 SCC 509.

c. Altering the Basis of the Supreme Court's interpretation

7. It is a fairly well-established principle that the Parliament can alter a Court's interpretation of a statute by a retrospective amendment, either by 'removing some defect' in the law or by 'altering the basis' on which the Court passed its judgment.⁵ The idea of 'removing a defect' is not pertinent for the purposes of the present analysis and hence we will limit ourselves to an examination of the idea of 'altering the basis'. 'Altering the basis' of a judgment involves more than barely nullifying the court's judgment. It involves changing the very premise on which the court's judgment was based. Hence if the court's judgment was premised on an interpretation of a certain provision, it is open for the Parliament to retrospectively amend that provision, in effect changing the *basis* on which the court had rendered its previous judgment.

8. In *A. Manjula Bhashini v. The Managing Director, AP Women's Cooperative Finance*,⁶ the Supreme Court held that

"It is also well settled that the legislature cannot by bare declaration, **without anything more**, directly overrule, reverse or override a judicial decision. However it can, in exercise of the plenary powers conferred upon it by Articles 245 and 246 of the Constitution, render a judicial decision ineffective by enacting a valid law **fundamentally altering or changing the conditions** on which such a decision is based. Such law can also be given retrospective effect with a deeming date or with effect from a particular date (emphasis supplied)."

9. In *Govt. of Andhra Pradesh v. Hindustan Machine Tools Ltd.*⁷, the Supreme Court, recognizing the permissibility of 'altering the basis' observed:

"It [State Legislature] has amended the definition of 'house' by the substitution of a new Section 2(15) for the old section and it has provided that the new definition shall have retrospective effect, notwithstanding anything contained in any judgment, decree or order of any court or other authority. In other words, it has removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances."⁸

⁵ *A. Manjula Bhashini v. The Managing Director, AP Women's Cooperative Finance*, (2009) 8 SCC 431.

⁶ (2009) 8 SCC 431.

⁷ (1975) 2 SCC 274.

⁸ See also *Tirath Ram v. State of Uttar Pradesh*, (1973) 3 SCC 585 where altering the basis of the judgment by the legislature was held valid.

10. Clause 2 of the Bill which inserts Section 5(3) in the act thereby introducing a new definition of enemy property, read with the retrospective deeming effect given to it by Clause 14, which inserts Section 26 in the Act does just this; it ‘alters the basis’ of the judgment. On the basis of this definition, no Court could have come to the conclusion as the Supreme Court did in *The Raja of Mahmudabad case*, since the definition expressly provides that a property shall remain enemy property notwithstanding the fact that the legal heir or successor is a citizen of India. It is this fundamental holding, that property belonging to an Indian national cannot be considered enemy property that had formed the basis of the previous judgment. Clause 2 expressly alters this basis and does not merely declare non-enforcement of the previous judgement. Hence insofar as the bill alters the Supreme Court’s interpretation and understanding of the term ‘enemy property’ it is *not* unconstitutional.

d. The crucial limitation: the impregnability of rights accrued in *lis inter partes*

11. We now move on to the area where, in our opinion, the bill runs into a constitutional hurdle. It will be recollected, we briefly stated, that the power to amend retrospectively was subject to one limitation: that the Parliament cannot deprive a person of rights that have accrued to him in virtue of a final and binding judgment of the court, in a *lis inter partes*. In other words, once a party succeeds in Court, the legislature cannot deprive him of the rights that have accrued to him by virtue of his success by making a law that nullifies that judgment. We shall now elaborate upon that limitation.

12. In *Re: Cauvery Water Disputes Tribunal*,⁹ the Supreme Court of India held that

“No legislature in the country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts....The legislature can change the basis on which a decision is given by the Court and thus *change the law in general*, which will affect a class of persons and events at large. It *cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone*. Such an act on the part of the legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers.”

⁹ [1993 Supp.(1) SCC 96(II)]

13. The Supreme Court's judgment, while allowing the legislature the power to 'alter the basis' retrospectively erects an important barrier that cannot be breached. It holds that it is always possible for the Parliament to change the law *in general* by a retrospective amendment by changing the basis. However the court adds that it cannot set aside an individual judgment of the Supreme Court. While in respect of the world at large a law can be retrospectively amended, as far as a party whose rights have been crystallised in a judgment of a court, the same cannot be overturned. Or what amounts to the same thing where a party has succeeded in the Supreme Court, the Parliament cannot undo the effect of that judgment *as far as that party is concerned* though it may change the law as far as the *rest of the world* is concerned. And the Supreme Court's reason for holding so is also transparent in the above quotation where it holds that 'No legislature in the country has power to ask the instrumentalities of the State to disobey or disregard the decisions given by the courts.' In *Mehal Chand Sethia v. State of West Bengal*,¹⁰ Mitter J in almost identical terms held,

'It[legislature] cannot declare any decision of a court of law to be void or of no effect.'

14. Relying on *Re: Cauvery Water Disputes Tribunal*, in *Virender Singh Hooda v. State of Haryana*,¹¹ the Supreme Court of India, while dealing with a retrospective amendment, which also altered the basis of a judgment held:

"[T]he Act...to the extent it takes away the appointments already made (some of the petitioners had been appointed much before enforcement of the Act, ten in number as noticed hereinbefore) in implementation of this Court's decision, would be unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution. *The law does not permit the legislature to take back what has been granted in implementation of the court's decision. Such a course is impermissible.*"

15. Here again the court emphasised the principle that we seek to underline here. The court held that there is no embargo on enacting retrospective amendments which 'alter the basis'; however it emphasised that it cannot take away the rights that have already accrued to a party by virtue of a binding Supreme Court judgment. The Supreme

¹⁰ 1969 (2) UJ 616 SC ; MANU/SC/0529/1969

| ¹¹ (2004) 12 SCC 588.

Court, regarding such an exercise as a usurpation of judicial functions and a violation of separation of powers has held it to be unconstitutional. We also find the same principle reiterated in a number of other judgments, notably, *D.Cawasji v. State of Mysore*,¹² *Madan Mohan Pathak v. Union of India*,¹³ and *S.R Bhagwat v. State of Mysore*.¹⁴

16. The bill seeks to render null and void the judgment of the Supreme Court of India in *The Raja of Mahmudabad case* in respect of the parties to that dispute, or at any rate seeks to impose *ex post* restrictions on the enjoyment of the property directed to be transferred to them by the Supreme Court. The second proviso to Section 26(1)(b) stipulates that where a property is divested from the Custodian by the order of a court **and** where the property has been returned, the property shall not re-vest(or continue to vest) in the Custodian. This proviso as it presently stands would be unconstitutional. Where a court has ordered divestment of property from the Custodian, but the Custodian has not acted on the order by actually returning the property, the present bill has the effect of re-vesting the property in the Custodian. This leads to an oddity; if the Custodian had acted on the court's judgment, the property will not re-vest in him but if he had not, it would re-vest in him. This in effect, privileges the action of the Custodian not having obeyed a court's order. More importantly the effect of this provision would be to unsettle rights of a party who in whose favour a court has decided in a *lis inter partes*. The provision stipulates that if the property has not been returned pursuant to the court's order it will re-vest in the Custodian. Thus the provision as it presently stands would be unconstitutional.

17. This anomaly comes about because of the use of the conjunctive 'and' the clause that follows it in the second proviso:

'Provided further that if any enemy property had been otherwise divested from the Custodian (by an order of a court or without any direction under section 18) *and* returned to the owner or his lawful heir before the commencement of the Enemy Property (Amendment and Validation) Second Act 2010...'

18. Even otherwise, the provisos require an Indian citizen who has received enemy property by virtue of a court order or by means other than a Section 18 order of the

¹² (1984) Supp SCC 490.

¹³ 1978 (2) SCC 50

¹⁴ 1995 (6) SCC 16.

central government, to furnish evidence that he is the lawful heir to the property and that he is a citizen of India by birth within six months of the amendment act coming into force. This too seeks to fetter the enjoyment of accrued rights as a consequence of the decision in *The Raja of Mahmudabad case*, with the clear possibility that such rights can be taken away if such documents are not submitted to the satisfaction of the central government and is unconstitutional.¹⁵

e. Recommendations

19. On the basis of the aforesaid arguments, it is submitted that the Hon'ble committee consider amending the second proviso to Section 26(b) along the following lines:

- a. Delete the clause 'and returned to the owner or his lawful heir' and sub-section (i) for denying the enjoyment of rights accrued to the beneficiaries of the Supreme Court decision in The Raja of Mahmudabad case;*
- b. Replace the words 'in any other case' in sub-section (ii) with the words, 'in cases where the owner or the lawful heir, as the case may be is not a citizen of India...'*

The amended second proviso after deletion should read as follows:

'Provided further that if any enemy property had been otherwise divested from the Custodian (by an order of a court or without any direction under section 18) before the commencement of the Enemy Property (Amendment and Validation) Second Act 2010...'

20. The effect of the amendment we propose here would be to ensure that the bill does not purport to unsettle rights and liabilities arising from a *lis inter partes* while the retrospective amendment holds good with respect to the rest of the world *in general*.

¹⁵ There may be other cases too of similar orders being passed by the Court which would be equally affected by sub-section (i) and (ii) of the proviso to Section 26(1)(b). However our research in this report is based on *The Raja of Mahmudabad case* alone and hence the recommendations are limited to sub-section (i).

3. Whether Clause 11 of the Bill suffers from the vice of excessive delegation

21. Clause 11 of the Bill seeks to insert section 18C in the principal Act which provides that the Central Government can direct that any or all enemy property vested in the Custodian shall be sold or disposed of as may be prescribed. It is submitted that Clause 11 is a case of excessive delegation by the Legislature liable to be challenged before a court of law. The primary focus of this argument is to define the extent to which delegation to the executive is permissible, in order to determine whether Clause 11 confines itself to these parameters.

a. Rationale and history of “delegated legislation”

22. One of the fundamental tenets of the Indian Constitution is the ‘Separation of Powers’ doctrine. As per this doctrine the State shall comprise three organs – the Legislature, the Executive and the Judiciary. All three organs have separate and distinct responsibilities with an elaborate system of checks and balances. The Legislature which consists of the representatives of the people is the only organ of the State that is responsible for laying down the law through binding legislations. The Executive is tasked with executing the law and enforcing the same. The Judiciary’s main function is to adjudicate any disputes that may arise in the formulation or execution of Parliamentary legislation and if need be even strike down legislation or executive action on the grounds that it violates the Constitution. Unlike the Constitution of the United States of America,¹⁶ the Indian Constitution does not have a precise

¹⁶ Article 1 of the Constitution of the United States of America clearly states that “All legislative powers herein granted shall be vested in Congress of the United States, which shall consist of a Senate and a House of Representative.” Similarly Article 2 of the same Constitution states that “The executive Power shall be vested in a President of the United States of America.” Article 3 states “The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”

articulation of the ‘separation of powers’ doctrine. However, the same has been read into the Indian Constitution by the Supreme Court in several precedents.¹⁷

23. A logical corollary of the ‘separation of powers’ doctrine is that the Executive cannot legislate and thus it would be unconstitutional for Parliament to delegate legislative powers to the Executive. However keeping in mind the realities of a parliamentary democracy and the pressures on Parliament this doctrine has been significantly watered down, in both the U.S.A. and India, by the Judiciary, to allow Parliament to delegate legislative powers to the Executive.¹⁸ The Supreme Courts of both countries have however placed significant safeguards to ensure that the Legislature does not completely abdicate its responsibility. The most significant of these safeguards is that the Legislature may not delegate any ‘essential legislative function’ to the Executive. Having said that it is important to point out that the quality of legislation in India and the U.S.A. is significantly different. While American legislation is becoming increasingly detailed, Indian legislations on the other hand are becoming increasingly brief with most functions being delegated to the Executive.

b. Limits of delegation of power

24. The most important decision in the post-independence era on the area of delegated legislations is the decision of the seven-judge bench of the Supreme Court in the case of *In re Delhi Laws Act*.¹⁹ In that case, the power of the Parliament to delegate its functions itself was questioned. The court rejected the argument that Parliament could never delegate any of its functions. Supporting the delegation of parliament’s power subject to certain restrictions the court further clarified that:

“The Legislature cannot part with its essential legislative function which consists in declaring its policy and making it a binding rule of conduct. A surrender of this essential function would amount to abdication of legislative powers in the eye of law... The Court can interfere if no policy is discernible at all or the delegation is of

¹⁷ *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, 1955 (2) SCR 225; *Chandra Mohan v. State of U.P.*, AIR 1966 SC 1987.

¹⁸ See generally Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, THE SUPREME COURT REVIEW, 225 (1991).

¹⁹ AIR 1951 SC 332.

*such an indefinite character as to amount to abdication, but as the discretion vests with the legislature in determining whether there is necessity for delegation or not, the exercise of such discretion is not to be disturbed by the Court except in clear cases of abuse.”*²⁰

25. Another seven-judge bench of the Supreme Court in *Harishankar Bagla*²¹ clarifying the requirement in *In re Delhi Laws Act* held that:

“the legislature must declare the policy of the law and legal principles, which are to control any given cases and must provide a standard to guide officials or body in power to execute the law. The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct.”

26. After these landmark decisions, the main issue in every case challenging delegated legislation has been with regard to the scope of the term ‘essential legislative function’. As already explained above the Supreme Court has held that ‘essential legislative function’ consists in the determination or choice of the legislative policy and formally enacting that policy into a binding rule of conduct. Therefore when challenging a provision of law on the ground that it excessively delegates powers it is necessary to first prove that Parliament has failed to highlight a clear policy guideline to set the standards for the Authority to whom power has been delegated. As will be explained below, the Supreme Court has been very liberal in the width of permissible delegated legislation and it usually makes every effort to read in a policy guideline into any legislation that is challenged on the grounds of excessive delegation of legislative powers. For instance in the case of *Registrar of Co-operative Societies, Trivandrum v. K. Kunjabmu*²² the Supreme Court held that legislative policy could be

²⁰ *In re Delhi Laws Act*, AIR 1951 SC 332 per Mukherjea J. The four main restrictions are as follows:

- (1) the legislature could empower the executive to extend to any area within the jurisdiction of such legislature any law or laws that might have been passed or would be passed by such legislature for other territories subject to its control,
- (2) the legislature could empower the executive to extend laws passed by other legislatures for territories to the territory subject to the control of such executive,
- (3) the legislature could empower the executive to make restrictions and modifications in a law of another legislature provided that the changes made by the executive are incidental and does not affect the essential features of the law; and
- (4) delegation of power to repeal or amend the law is impermissible.

²¹ *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465.

²² 1980 SCR (2) 260.

determined from a host of factors i.e. either express provisions of the statute, the scheme of the statute, the preamble or even the subject matter of the statute. In pertinent part the Supreme Court held the following:

“The Legislature may guide the delegate by speaking through the express provision empowering delegation or the other provisions of the statute, such as the preamble, the scheme or even the very subject-matter of the statute. If guidance there is, wherever it may be found, the delegation is valid.”

27. Further in the case of *Jyoti Pershad v. Union Territory of India*²³ the Supreme Court defined the broad scope of delegated legislation in the following manner:

“So long as the Legislature indicates, in the operative provisions of the statute with certainty, the policy and purpose of the enactment, the mere fact that the legislation is skeletal, or the fact that a discretion is left to those entrusted with administering the law, affords no basis either for the contention that there has been an excessive delegation of legislative power as to amount to an abdication of its functions, or that the discretion vested is uncanalised and unguided as to amount to a carte blanche to discriminate. If the power or discretion has been conferred in a manner which is legal and constitutional, the fact that Parliament could possibly have made more detailed provisions, could obviously not be a ground for invalidating the law.”

28. A comparison of two cases where discretion conferred on the state government to select cases to be tried by special courts was challenged, clarifies the true scope of the policy guideline that courts expect the legislature to lay down. In *Anwar Ali Sarkar*²⁴ the court found that the objective of the Act as it emerged from its preamble was to provide for ‘speedy trial’. This criterion was found to be too “*vague, uncertain and elusive*” since “*quick disposal is a thing which is desirable in all legal proceedings*”.
29. Another case, *Kathi Raning Rawat*²⁵ was decided on remarkably similar facts (entailing selection of case by the State Government to be tried by special courts), but the preamble in that case provided that the purpose of the Act was to provide for “*public safety, maintenance of public order and preservation of peace and tranquillity in the State of Saurashtra*”. The validity of this provision was upheld on the ground that the impugned ordinance had been passed to combat the increasing frequency of

²³ AIR 1961 SC 1602.

²⁴ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

²⁵ *Kathi Raning Rawat v. State of Saurashtra*, AIR 1952 SC 123.

certain types of regional crime. The two-fold classification on the lines of type and territory adopted in the impugned ordinance was held reasonable and valid. It was held that the reference to public safety, maintenance of public order and preservation of peace and tranquillity in the Preamble showed a definitive objective and furnished a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect the public safety, maintenance of public order and preservation of peace and tranquillity to refer to special courts.

30. It is obvious from the above discussion that the Supreme Court has given the Parliament considerable discretion in delegating its powers to the Executive. The only safeguard is that Parliament should attempt to provide within the legislation a policy statement to guide the Executive in the exercise of its powers especially when the fundamental rights of the citizens are in question. At the same time the 'essential legislative function' should not be delegated.

c. Vice of Excessive Delegation

31. Clause 11 of the bill, the intended section 18C of the act, does not lay down guidelines as to the persons to whom and also the purposes for which enemy property can or cannot be sold or disposed of. This is especially a significant issue in cases where no owner can be identified or there are multiple owners or multiple lawful heirs claiming the right to the said property. Given this, clause 11 provides a *carte blanche* to the Central Government in terms of persons to whom and purposes for which the enemy property can be sold or disposed of. Consequently, it is submitted that the clause suffers from the vice of excessive delegation to the Executive. Not identifying the potential beneficiaries/transferees or purposes for which the enemy property can be sold or disposed of is a serious omission by the Parliament which is tantamount to the Parliament abdicating its essential legislative function of laying down a clear legislative policy and enacting it into a binding rule of conduct for the Executive on the issue of selling or disposing of the enemy property.

32. Importantly, the current wording of clause 11 is very wide and does not disclose any policy guideline. As in the case of *Anwar Ali Sarkar*, the words “sold or disposed of” are not conditioned with a clear legislative policy, and therefore, is very likely to be challenged on the grounds of excessive delegation.

d. Recommendations

33. Therefore, to ward off any potential challenge to clause 11 on the grounds of excessive delegation, it is recommended that the clause be modified to include policy guidelines to the Central Government on who to sell or dispose of the enemy property, the purposes for which the enemy property can be sold or disposed of and the conditions under which it can be done.

34. First, the Parliament should limit the power of the Central Government to sell or dispose of the enemy property under the clause expressly in cases where there is no owner of the said property or where the owner is not identifiable. Second, the vice of excessive delegation can be removed either through a positive restriction – a list of persons to whom and purposes for which the enemy property can be sold or disposed of, or through a negative restriction – list of persons to whom or purposes for which the enemy property cannot be sold or disposed of. Since the rationale of the legislation is to vest enemy properties with the Custodian and facilitate management of the said properties, it may be prudent to adopt the latter course and provide guidelines as to whom, or purposes for which property should not be divested, as they would fall foul of the object and purpose of the act. With these modifications, the Parliament can absolve the intended section 18C of the vice of excessive delegation.

4. Whether Clause 14 of the Bill is Violative of Part III of the Constitution

35. Clause 14 (the intended Section 26) provides that any divestment of property from the Custodian would be returned to the custodian *unless* certain conditions were met during that divestment. Such conditions include where the divestment was due to an order of the Government under section 18 or where the divestment was made to an owner of heir who is a citizen of India by birth. Thus there might be situations outside of these, where the property has been transferred to an owner, but now has to be returned to the custodian.

36. In these situations, there is a question whether such taking away of property from a person is violative of the right to property. It is important to note that the right to property is no longer a *fundamental right*. It was deleted from Part III and a new right was inserted as Art. 300A by way of the 44th Amendment Act, 1978. Art. 300A remains a *constitutional right*. The difference between a fundamental right and a constitutional right is only that in the case of the latter one cannot approach the Supreme Court directly for an infringement of the right. Art. 32 (which allows a person to directly approach the Supreme Court) is reserved for fundamental rights. Art. 300A provides that

“No person shall be deprived of his property save by authority of law.”

This means that there must a statutory instrument, which authorises the acquisition of property. This is clearly the case here.

37. What is really at issue is whether there needs to be appropriate *compensation* to those whom the property has been transferred to. When there is a transfer of property to a person, there is then a *vested* right of that person in the property. Thus, when clause 26 says that certain divested property is to be retained by the Custodian, this means that the state is *depriving* that person of a vested right in property by re-acquiring it. This is the crux of the reason why the intended S. 26 raises an issue of constitutionality with regard to Art. 300A.

38. Now, Art. 300A, of course allows for the acquisition of property by the State. Because Art. 300A provides that property can only be taken away by “authority of law,” the law must pass muster of Art. 21 and Art. 14

independently. This is so because if the legislation falls foul of Art. 21 or Art. 14, it would not be a law at all. And if not a law, property would have been taken away from a person without the authority of law.

39. It has been held by the Supreme Court that the application of Art. 21 to the ‘acquisition of property’ can only be invoked where the deprivation is such that it amounts to a denial of the right to life or means or livelihood.²⁶ It is also to be noted that Art. 21 has an in-built standard of fairness and reasonableness. If this is so, *in cases where the acquisition of property amounts to taking a person’s livelihood away, the state would possibly need to provide some sort of recompense*. This is a fact specific issue and will turn on whether there is indeed a deprivation that falls foul of Art. 21. In general terms, it cannot thus be said that Clause 14 of the bill *per se* violates Art. 21 of the Constitution.

40. Art.14 provides for the right to equality. Clause 14 raises an equality issue in the following way. It divides property that has been divested from the custodian into two classes. In one [Section 26(1)(b) provisos] the property remains divested and in the other the property is to be returned to the Custodian [Section 26(1)(b) chapeau]. There is differential treatment of these two classes of property and Art.14 demands that a particular type of justification be given for this differential treatment.

41. Art. 14 as interpreted by the Supreme Court requires that the classification between any two different things (whether actions, property, or persons) must be based on some intelligible criteria that allows one to distinguish one group from the other. Further, this differentiation must have some rational nexus to purpose of the legislation.

42. It is easy how the first part is satisfied by clause 14. There is clearly an intelligible difference between the two classes of property created by clause 14. It provides that all property *except* that which has been divested by an order of the government or which has otherwise been divested in favour of an Indian citizen who is an owner or legal heir shall revert to the Custodian.

43. The question is whether this distinction bears any relation to the object of the enactment. It is submitted that this link is tenuous. The Enemy

²⁶ *State of Maharashtra v. Basantibai Mohan Lal Khetan*, AIR 1986 SC 1466.

Property Act was enacted in 1968 to ensure that *no* enemy alien could own property in India. The Act is to apply to *all* enemy property. The distinction between property belonging to legal heirs who are Indian citizens and those not, a distinction pointed out by the Supreme Court and made in the second proviso to Section 26(1)(b) is a distinction that is valid because those belonging to the former would no longer be enemy property and would be in line with the objective the Act. However, it seems difficult to justify a further distinction between different types of enemy property based on their method of divestment, i.e. whether they were divested by government by an order under S. 18 and those not. So the problem, in a nutshell becomes this. A government order (u/ S. 18) divesting to non-heirs is allowed under the act, but not if otherwise divested to non-heirs. Take the following example. Say a custodian sold off certain parts of the property for the maintenance of the rest. If this were done due to a government order this divestment would not be affected. However, if this were done pursuant to or given approval by a court order, this property would go back to the Custodian unless certain additional conditions were met. This does not seem to further the objectives of the enactment as originally understood, i.e. to vest property owned by enemy nationals in a Custodian created specifically for the purpose. Even the current Amendment Bill seeks to clarify the said legislative intention and allow the Custodian of Enemy Property to function effectively. Neither of these objectives of the Act supports a distinction between property divested by the government on the one hand, or other means, on the other.

44. If challenged, the courts would in all likelihood, not find this distinction between allowing property divested by a government order to remain divested, and not allowing property otherwise divested to be valid. The Supreme Court, for example, has held that where the object of a particular legislation was to improve pension benefits in old age, distinguishing between retirees on the basis of their date of retirement would violate Art. 14 of the Constitution.²⁷ In another case, the Supreme Court has held where land was being taken by the municipality to build a road, if the government was unable to show why particular pieces of land were being taken without compensation as opposed to others, Art. 14 would be violated as there was no

²⁷ *D.S. Nakara v. Union of India*, AIR 1983 SC 130.

nexus between the differentiation between properties and the object of the enactment.²⁸

45. Thus we can see that the Court is careful in trying to relate the objectives of an enactment and the classification made under it. In this light, the distinction Section 26 seeks to make between enemy properties based on the methods of their divestment has no clear relation with the object of the original act and amendment bill and may be struck down on the basis of Art. 14.

Recommendations

46. *Thus to avoid a challenge on grounds of Article 14 read with Article 300A of the Constitution it is recommended that Clause 14 (intended Section 26) be suitably modified to ensure that no difference is made in relation to the method of divestment of the property.*
47. *In the alternative, it is suggested that some policy justification be given in the statement of reasons as to why the current distinction is being made such that litigation and possible striking down of the clause may be avoided.*

²⁸ *Yogendra Pal v. Municipality, Bhatinda* AIR 1994 SC 2550.

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