

# BERUBARI TRANSFER TO PAKISTAN

## PARLIAMENT NOT COMPETENT TO MAKE LAW

## SUPREME COURT'S REPLY TO REFERENCE

NEW DELHI, March 14.

A Special Bench of the Supreme Court to-day gave its opinion that the 1958 agreement between the Prime Ministers of India and Pakistan regarding the transfer of a part of Berubari Union and exchange of Cooch-Bihar enclaves amounted to cession of a part of Indian territory in favour of Pakistan and, therefore, Parliament was not competent to make law for implementation of the agreement under Article 3 of the Constitution.

The implementation of the agreement, the Court held, could be effected only by an amendment of the Constitution as provided under Article 368 of the Constitution.

The matter was referred to the Supreme Court by the President of India for its opinion under Article 143(1) of the Constitution.

Mr. Justice Gajendragadkar, giving the Court's opinion, said that even if Article 3(C) was given the widest interpretation, it would be difficult to accept the argument that it covered a case of cession of a part of national territory in favour of a foreign State.

This Article, His Lordship said, related to a case in which the area of a State was diminished by taking away a part of it but at the same time adding it to some other State increasing its area. The part of area taken away from a State could also be dealt with in any other manner according to the provisions of the Constitution. But, in fact, it continued to remain a part of Indian territory and did not cede from it to a foreign State.

"We have no hesitation", His Lordship added, "in holding that the power to cede national territory cannot be read in Article 3(C) by implication".

Parliament, His Lordship said, acting under Article 368 of the Constitution could make a law to give effect to and implement the agreement in question covering the cession of a part of Berubari Union No. 12 as well as some of the Cooch-Bihar enclaves which by exchange were to be given to Pakistan.

"If such a law is passed, then Parliament may be competent to make a law under the amended Article 3 to implement the agreement in question. On the other hand, if the necessary law is passed under Article 368 itself, that alone would be sufficient to implement the agreement", His Lordship held.

### REQUIREMENTS OF ARTICLE 368

Regarding the argument that if a law was passed under Article 368 and not under Article 3 to implement the agreement, it would in effect deprive the Legislature of West Bengal of an opportunity to express its views on the cession of the territory in question, the Court said that it was no doubt true but this incidental consequence could not be avoided.

The Court also made it clear that if the law in regard to the implementation of the agreement was to be passed under Article 368, it would have to satisfy the requirements prescribed by the said Article. Under this Article a Bill had to be passed in each House of Parliament by a majority of the total membership of the House and by a majority of not less than two-thirds of the House present and voting; that is to say, it should obtain the concurrence of a substantial section of the House which might normally mean the consent of the major parties of the House. That was a safeguard in such matters, the Court pointed out.

The agreement in question provides for division of the Berubari Union so as to give half the area to Pakistan and the other half to be retained by India. It also provided for exchange of old Cooch-Bihar enclaves in Pakistan and certain Pakistan enclaves in India.

### PROVISION IN NEHRU- NOON PACT

Under the Nehru-Noon pact of September, 1958 it was agreed that territories covered by the Bagge Award in the West Bengal-East Pakistan sector where demarcation had already been completed,

should be exchanged by 15th of January, 1959. The dispute relating to the Berubari Union in this sector was also settled. It was agreed that the Union would be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The Union has been in the possession of India since independence.

The President had referred the following three questions to the Supreme Court for consideration and report:

1. Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?

2. If so, is a law of Parliament relating to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary, in addition or in the alternative?

3. Is a law of Parliament relating to Article 3 of the Constitution sufficient for implementation of the agreement relating to exchange of enclaves or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary for the purpose, in addition or in the alternative?

Article 3 of the Constitution says:

Parliament may by law—

(a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State;

(Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.)

### SUPREME COURT'S OPINION

The Court answered the three questions as follows:

Q. 1: Yes.

Q. 2: (a) A law of Parliament relating to Article 3 of the Constitution would be incompetent;

(b) A law of Parliament relating to Article 368 of the Constitution is competent and necessary.

(c) A law of Parliament relating to both Article 368 and Article 3 would be necessary only if Parliament chooses first to pass a law amending Article 3; in that case Parliament may have to pass a law on those lines under Article 368 and then follow it up with a law relating to the amended Article 3 to implement the agreement.

Q. 3. Same as answers (A), (B) and (C) to question 2.

Referring to the fact that the Berubari Union was to be divided half and half and other relevant terms of the agreement, the Court said: "We have carefully considered all the clauses in the agreement and we are satisfied that it does not purport to be, and has not been, reached as a result of any interpretation of the award and its terms; it has been reached independently of the award and for reasons and considerations which appeared to the parties to be wise and expedient".

"Therefore", the Court added, "we cannot accede to the argu-

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ment urged by the Attorney-General that it does no more than ascertain and determine the boundaries in the light of the (Radcliffe) Award. It is an agreement by which a part of the territory of India has been ceded to Pakistan and the question referred to us in respect of this agreement must, therefore be considered on the basis that it involves cession or alienation of a part of India's territory".

The Court further said that the power to amend the Constitution under Article 368 inevitably included the power to amend Article 1 (which defined what shall be the territory of India) and that logically included the power to cede national territory in favour of a foreign State. If that was so, it would be unreasonable to contend that there was no power in the sovereign State of India to cede its territory and that the power to cede national territory, which was an essential attribute of sovereignty, was lacking in the case of India.

The court, therefore, rejected the contention that no legislative process could validate the agreement in question. But, the Court made it clear that the treaty-making power of a sovereign State (in regard to cession of territory) would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it.—PTI.