Supreme Court of India
Oriental Gas Co. Ltd. & Ors vs State Of West Bengal on 12 September, 1978
Equivalent citations: 1979 AIR 248, 1979 SCR (1) 617
Author: O C Reddy
Bench: Chandrachud, Y.V. (Cj), Sarkaria, Ranjit Singh, Untwalia, N.L., Reddy, O. Chinnappa (J), Sen, A.P. (J)

PETITIONER:
ORIENTAL GAS CO. LTD. & ORS.

Vs.

RESPONDENT:
STATE OF WEST BENGAL

DATE OF JUDGMENT12/09/1978

BENCH:
REDDY, O. CHINNAPPA (J)
BENCH:
REDDY, O. CHINNAPPA (J)
SEN, A.P. (J)
CHANDRACHUD, Y.V. ((CJ)
SARKARIA, RANJIT SINGH
UNTWALIA, N.L.

CITATION:
1979 AIR 248 1979 SCR (1) 617
1979 SCC (1) 171
CITATOR INFO :
R 1983 SC1190 (14)
R 1984 SC 774 (15,16)
R 1986 SC1466 (11,12)

ACT:
Oriental Gas Company Act 1970-s. 8(1)(b) Capitalisation of net income for determining compensation payable-Validity of-Principles for determining compensation payable on acquisition of Public Utility Undertakings discussed.

HEADNOTE:
In 1958, the Government of West Bengal, being of the view that the appellant company which enjoyed a monopoly in the supply of gas in Calcutta was negligent in looking after the interest of the consumers appointed a Committee to enquire into the unsatisfactory condition of supply of gas in Calcutta and to suggest remedial measures, including valuation of the Undertaking for the purpose of taking it over. The Committee reported that the distribution system was in a bad state of disrepair and that the maintenance

system was in a very poor state. It recommended that the distribution system should be taken over immediately under the management of the Government to ensure and maintain supply of gas to consumers in Calcutta.

On the basis of this recommendation, the oriental Gas Company (West Bengal Act XV of 1960) was passed by the State Legislature. Section 3 of the Act provided for the taking over for a limited period of the management and control and subsequent acquisition of the Undertaking of the Company Section 7 provided for the acquisition of the Undertaking of the Company at any time within a period of five years. Section 8(1)(b) provided for payment of compensation for the acquisition of the Undertaking of the Company, by the method of cost less depreciation or the method of capitalisation whichever was less. Section 9(2) provided that the compensation should be paid in bonds carrying interest at 3% p.a. from the date of issue and payable in 20 equal annual instalments. The Act was amended in 1968. The amended Act provided for the determination of compensation on the basis of full market value of the Undertaking and payment of compensation in the shape of bonds carrying interest from the date of enactment of the 1968 Act. In 1970 the Act was again amended. It provided for the determination of compensation by the method of capitalisation and payment of compensation in bonds carrying interest from the date of acquisition.

Aggrieved by the method of determination of compensation the appellant filed a writ petition under Art. 32 of the Constitution questioning the vires of s. 8(1)(b) and s. 9(2) of the Act.

The petitioner contended that (1) the principle of capitalising net profit as the sole factor for determining compensation payable for the acquisition of a public utility undertaking was not a relevant principle because a public utility concern was under an obligation to provide services to the community irrespective of whether its activities resulted in profit or loss; (2) the choice of the period of five years immediately preceding the take over of the management and control of the company for the purpose of calculating the average annual income was arbitrary; (3) at the time when the Undertaking was
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acquired in 1962 the gilt edged securities were fetching 6% p.a. and therefore a higher multiplier than eight should have been provided and (4) the method of payment of compensation in the shape of bonds payable in twenty years at 3% interest had the effect of reducing the compensation to less than half of what was determined.

Dismissing the petition,

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HELD: (1) (a) The principles specified by the law for determination of compensation are beyond the pale of challenge, if they are relevant to the determination of

compensation and are recognised principles applicable in the determination of compensation for property compulsorily acquired and if the principles are appropriate in determining the value of the class of property sought to be acquired. The science of valuation of property recognised several principals or methods for determining the value to be paid as compensation to the owner for loss of his property. If an appropriate method or principle for determination of compensation was applied, the fact that by the application of another principle which was also appropriate a different value was reached, would not justify the court in entertaining the contention that out of the two appropriate methods, one more generous to the owner should have been applied by the Legislature. If several principles were appropriate and one was selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles was not open to challenge since the selection to be left to the wisdom of the Parliament. [633 F-H]

R. C. Cooper v. Union of India, [1970] 3 SCR 530 followed.

Case law discussed.

(b) It is well established that tangible and intangible property of a public utility undertaking may not necessarily be valued separately and it is a sound principle to treat them as indivisible aqud value the undertaking as an integrated whole. The authorities also treat capitalisation of net profit as one of the recognised principles of valuatior; of Public Utility Undertakings, though it may not be the best in the sense that it may not yield that result which is most advantageous to the owner of the undertaking. Any purchaser will put himself the question what profit does the undertaking make ? and how much should he invest to get the return. He may pay more if the prospects of better income in the future are bright and if the plant, machinery and buildings are in an excellent condition. He may pay less if the future is not so bright and if the plant, machinery and buildings are in a poor state and require replacement and repair. He may pay more if the undertaking is possessed of substantial, unencumbered properties. He may pay less if the lease of land on which the factory is located is about to expire. Thus the price may vary depending on various factors but the basic consideration is bound to be the profit-yielding capacity of the undertaking. [639 E, G-H]

In the instant case there is nothing in the writ petition to indicate that lands were purchased by way of investment and not for the purpose of gas works or that the lands were capable of being sold independently of the Undertaking. The petitioner's assertions are not borne out by any statement to that ecect in the petition. Therefore, there would be no justification now to allow the petitioner to amend the petition filed in 1971. Had there been

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any substance in this assertion the petitioner would have mentioned it prominently in the petition itself. It would not have taken it so many years to discover a circumstance claimed to be so very vital. The case of the petitioner right through had been that the principle of capitalisation of income was irrelevant. [640 C-E]

(2)(a). There is no force in the charge of arbitrariness. There is nothing wrong with the choice of the period of five years preceding the take-over for the purpose of calculating the average annual income. [640 F-G]

(b) If the legislature wanted to be unfair to the company, the previous year's profit could have been taken as criterion on the ground that the value to be ascertained was the value on the date of take-over and not somo hypotheticol anterior date, or instead of taking the average of the period of the proceeding five years the legislature could well have taken the average of the preceding three years. If either of these courses had been adopted compensation would be much less. Instead, the legislature fairly adopted a five year period for calculating the average annual income. It may be that in the historical part the undertaking was making much profit It may be that in the past there were lean years. Neither a specially fat nor a specially lean period from the past could properly be taken into account as that would be. irrelevant. The legislature was concerned with the value of the undertaking on or about the date of acquisition. It, therefore, very properly chose the period of five years immediately preceding The take-over. [640 H; 641 A-B]

Appleton Water Co. v. Railroad Commission, 154 Wis. 121, 148, 142, N.W. 476, 47 L.R.A. (N.S.) 770 referred to.

Eminent Domain by Alfred Jahr, Valuation by Bright, Principles and Practice of Rating Valuation by Roger Emeny and Hector M. Wilks referred to.

(3) There is equally no force in the argument that the legislature should have specified a higher multiplier than 'eight' in fixing the compensation. If the legislature thought that a. return of 12% in the case of large industrial undertaking such as the petitioner's was reasonable and on that basis adopted the multiplier 'eight', it is not for this Court to sit in judgment over that decision and attempt to determine a more appropriate multiplier. The use of the term 'normal cases' used in Cooper's case where this Court pointed out that capitalisation of the net annual value of the property at a rate equal in normal cases to the return from gilt-edged securities was an important method of determination of compensation, showed that it was not intended to lay down any invariable rule that whenever a method of capitalisation of net profits was adopted, return from gilt-edged securities was to be the basis. That should depend on a variety of circumstances such as the nature of the property, the normal return which could be expected on like

investment, the state of the capital market and several such factors. [641 G-H; 642 A]

JUDGMENT:

ORIGlNAL JURISDICTION: Writ Petition No. 343 of 1972. (Article 32 of the Constitution.) A. K. Sen, Anil Bhatnagar, K. Khaitan, S. R. Agarwal and Praveen Kumar for the Petitioners.

A. P. Chatterjee, Govind Mukhoty and G. S. Chatterjee for the Respondent.

The Judgment of the Court was delivered by CHINNAPPA REDDY, J. The old question "what is compensation" is back again, Fortunately, Constitutional Amendments and Judicial precedents have narrowed the scope for controversy. The question has arisen this way:

The appellant, the oriental Gas Company Ltd. was originally constituted in England by a deed of settlement in April 1853, as the oriental Gas Company for the purpose of manufacture, supply distribution and sale of fuel gas in Calcutta. It was later incorporated in accordance with the provisions of the English Joint Stock Companies Act, 1862. By a subsequent arrangement the control and management of the Company passed from British into Indian hands. Over the course of the years the Company acquired extensive properties and became the owner of large plants. machinery, buildings, lands pipelines, stores etc. 'the total market value of the appellants industrial undertaking was estimated by the appellant as on 22nd March, 1962, at Rs. 7,00,00,000/-. In 1958, the Government of West Bengal, being of the view that the Company which enjoyed a monopoly in the supply of Gas in Calcutta was negligent in looking after the interest of the consumers, appointed a Committee to inquire into the unsatisfactory condition of supply of gas in Calcutta and to suggest remedial measures including valuation of the undertaking for the purpose of taking over the gas supply undertaking. The Member of the Committee were: the Chief Secretary, the Sheriff of Calcutta, the Secretary, Commerce and Industries Department, the Administrator, Durgapur Project and the Director, Central Fuel Research Institute. The Committee was assisted by several experts. The Committee re-F ported that the present Gas Works in Calcutta including the distributing system was in a bad state of disrepair and a very poor state of maintenance. The Committee recommended that the Gas Works and the distribution system should be taken over immediately under the management of the State Govt. in order to ensure and maintain the supply of gas to the consumers in Calcutta. After the report of the Committee was received by the Government of West Bengal, the West Bengal Legislature enacted the oriental Gas Company Act (West Bengal Act XV of 1960) providing for the taking over for a limited period, of the management and control and the subsequent acquisition of the undertaking of the oriental Gas Co. Ltd. The "undertaking of the Company" was defined to mean "the properties of the company, movable or immovable other than cash balances and reserve funds but including works, workshops, plants, machineries, furniture, equipments and stores, and lands appertaining thereto, actually in use immediately before the commencement of this Act, or intended to be used, in connection with the production of gas or supply thereof in Calcutta and its environs;". Section 3 of the Act provided for the taking over of the management and control of the undertaking of the Company for a period of five years from the date

specified in a notification to be issued. Section 7 provided for the acquisition of the undertaking of the Company at any time within the period of the said five years. Section 8(])(a) provided for the payment of annual compensation during the period of the take over of the management and control of the undertaking of the Company. Section 8(1)(b) provided for the compensation payable for the acquisition of the undertaking of the Company. In the present appeal we are concerned with the compensation payable for the acquisition of the undertaking of the Company, that is, we are concerned with Section 8(1) (b) only. Section 8 (1) (1) as originally enacted was as follows:

> "8 (1) (b) in the case of acquisition of the undertaking of the company, the total compensation payable shall be a sum representing the purchase price of the undertaking of the company reduced by such depreciation as may he allowed by the Tribunal referred to in sub-section (2) after considering the period and the nature of the use and the present condition of the properties concerned on the date of vesting in the State Government under Section 7, or a sum representing eight times the average net income of the undertaking of the company over a period of five complete years preceding the year in which the undertaking of the company has been transferred to the State Government under clause (a) of Section 4 for the purpose of management and control, whichever is less. Explanation-In this sub-section-
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> (i) "Purchase price of the undertaking of the company" means the aggregate of the prices of the different parts of the undertaking of the company at the respective dates on which parts were purchased, acquired or constructed by the Company;
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> (ii) "net income of the undertaking of the Company" means the difference between the amount of gross revenue, receipts and other general receipts, accountable in the assessment of Indian Income-tax arising from, and ancillary or incidental to, the business of the company and the amount of expenditure incurred on the following-
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> (a) rents, rates and taxes,
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> (b) interest on loans and security deposits,
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> (c) maintenance and repair,
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> (d) collection charges,
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> (e) cost of management, including the remuneration of managing agents, if any,
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> (f) other expenses admissible under the law for the time being in force in the assessment of Indian income-tax and arising from, and ancillary or incidental to, the business of the Company, and
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> (g) such other expenses as may be prescribed by rules made under this Act".

Section 8(2) provided that the compensation was to be deter mined by a Tribunal to be appointed by the State Government. The decision of the Tribunal was subject to an appeal to the High Court. Section 9(2) provided that the amount of compensation was to be paid by the State Government in bonds carrying interest at the rate of 3% per annum from the date of issue and payable in 20 equal annual instalments.

Pursuant to the provisions of the oriental Gas Company Act, 1960, a notification dated 3rd October, 1960, was issued to take over the management and control of the undertaking for a period of five years. Later by a notification dated 22nd March, 1962, the undertaking of the oriental Gas Company Ltd., was acquired by the Government pursuant to the power vested in it by Section 7 of the Oriental Gas Company Act. In the meanwhile the Company filed a petition under Article 226 of the Constitution before the Calcutta High Court challenging the vires of the Act on various grounds. The Calcutta High Court dismissed the writ Petition upholding the validity of the Act. Ray, J. (as he then was) held: (i) The appellant has no legal right to maintain the petition (2) The appellant could not question the validity of the Act on the ground that its provisions infringed its fundamental rights under Articles 14, 19, and 31 in view of Article 31A(1)(b) of the Constitution; (3) The West Bengal Legislature had the legislative competence to pass the impugned Act by virtue of Entry 42 of List III of the Seventh Schedule to the Constitution; (4) Entry 25 of List IT also conferred sufficient authority and power on the State Legislature to make laws affecting gas and gas works; and (5) even if the Act inci-

dentally trenched upon any production aspect, the pith and substance of the legislation was gas and gas-work within the meaning of entry 25 of List II.

The Company preferred an appeal to the Supreme Court. The question relating to fundamental rights was not raised before the Supreme Court. The Supreme Court, while upholding the locus standi of the Company to file the Writ Petition, rejected the contention of the Company relating to the competence of the West Bengal State Legislature to pass the impugned Act. The decision of the Supreme Court was rendered on 5th February, 1962, and is reported in The Calcutta Gas Company (Proprietary) Ltd. v. The State of West Bengal and others(1).

As mentioned by us earlier, the undertaking of the Company was acquired on 22nd March, 1962, by a notification of that date. By further notification issued under Section 8 of the Act a Tribunal was constituted for the purpose of determining the compensation payable in respect of the acquisition of the undertaking. In August 1965, the oriental Gas Company Ltd. filed a petition under Article 226 of the Constitution challenging the provisions of the Act relating to compensation. The Writ Petition was, however, dismissed as withdrawn in May 1969 as the oriental Gas Company Act, 1960 was amended in the meanwhile by the President's Act is of 1968, the oriental Gas Company (Amendment) Act 1968. The Amending Act substituted a different provision for what was the original Section 8 (1) (b) . Section 8(1)(b) as amended by the President's Act is of 1968 was as follows:

> "8(1) (b) In the case of acquisition of the undertaking of the Company, the compensation payable by the State Government shall be determined in accordance

with the principles specified in the Schedule".

The schedule referred to in the amended Section 8(1)(b) was as follows:

"THE SCHEDULE [See Section 8 (1) (b)] Principles for determining compensation for acquisition of the undertaking of the company.

Paragraph 1:- The compensation to! be paid by the State Government to the Company in respect of acquisition of the undertaking thereof shall be an amount equal to the sum total of the value of the (1) [1962] Suppl. 3 SC.R. 1.

6-549 SCI/78 properties and assets of the Company as on the date of acquisition of the undertaking of the Company calculated in accordance with the provisions of paragraph II less the sum total of the liabilities and obligations of the Company as on that date calculated in accordance with the provisions of paragraph III, together with the interest on such amount calculated in accordance with the provisions of paragraph IV.

Paragraph II:-(a) The market value on the date of acquisition of the undertaking of the company;

(i) of any land or buildings;

(ii) of any plant, machinery or other equipment;

(iii) of any shares, securities, or other investments held by the Company;

(b) the total amount of the premiums paid by the Company up to the date of acquisition of the undertaking of the Company in respect of all leasehold properties reduced in the case of each such premium by an amount which bears to such premium the same proportion as the expired term of the lease in respect of which such premium shall have been paid bears to the total term of the lease;

(c) the amount of debts due to the Company on the date of acquisition of the undertaking of the Company, whether secured or unsecured, to the extent to which they are reasonably considered to be recoverable;

(d) the amount of cash held by the Company on the date of acquisition of the undertaking of the company, whether in deposit with a Bank or otherwise;

(e) the market value on the date of acquisition of the undertaking of the company of all tangible assets and properties other than those falling within any of the preceding clauses.

Paragraph III:- The total amount of liabilities and obligations incurred by the Company in connection with the formation. management and administration of the under taking of the Company and subsisting immediately before the date of acquisition of the undertaking of the company;

Provided that any of the properties, assets, liabilities or obligations of the Company as on the date of acquisition of the undertaking of the Company shall not include such properties or assets as were added, invested or acquired and such liabilities or obligations as were incurred in connection with such addition, investment or acquisition by the State Government during the period of management and control of the undertaking of the company.

Paragraph IV:- The interest referred to in Paragraph I shall be on the amount mentioned in the said paragraph for the period commencing from the date of vesting of the under taking of the Company under sub-section (2) of Section 7 and ending with the date immediately before the date of enactment of the oriental Gas Company (Amendment) Act, 1968, calculated at the average bank rate during the said period". It should also be mentioned here that Section 9(2) was also amended and it was provided that the Bonds should carry interest from the date of enactment of the amending Act and not from the date of issue. The main provisions of the amending Act relating to the determination and payment or compensation were, however, short lived. In 1970 the West Bengal Legislature passed the Oriental Gas Company (Amendment) Act, 1970 (West Bengal Act 6 of 1970) once again substituting a new Section 8(1) (b) and Section 9(2). The new Section 8(1) (b) was as follows:

> "8(1)(b) In the case of acquisition of the undertaking of the Company, the compensation payable by the State Government shall be a sum representing eight times the average net income of the undertaking of the Company over a period of five complete years preceding the year in which the under taking of the Company has been transferred to the State Government under clause
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> (a) of. Section 4 for the purpose of management and control.
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> Explanation:- In this sub-section, "net-annual income of the undertaking of the Company" means the difference between the amount of gross revenue receipts and other general receipts accountable in the assessment of Indian income-tax arising from, and ancillary or incidental to, the business of the Company and the amount of expenditure incurred on the following-
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> (a) rents, rates and taxes,
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> (b) interest on loans and security deposits,
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> (c) maintenance and repair,
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> (d) collection charges,
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> (e) cost of management, including the remuneration of. Managing Agents, if any,
>
> (f) other expenses admissible under the law for the time Being force in the assessment of Indian income-tax and arising from, and ancillary or incidental to, the

business of the Company".

The amended Section 9(2) provided for interest on the bonds from the date of vesting of the Undertaking of the Company under Section 7.

It is thus seen that the provisions of the oriental Gas Company Act as originally enacted in 1960 provided for the determination of compensation by the method of cost less depreciation, or the method of capitalisation and directed the payment of whichever was less, in the shape of bonds carrying interest at 3% from the date of issue of the bonds. The Act as amended in 1968 provided for the determination of compensation on the basis of the full market value of the undertaking and the payment of the compensation in the shape of bonds carrying interest from the date of the enactment of the Amendment Act of 1968 i.e. 7th May, 1968. The Act as finally amended in 1970 and as it now stands provides for the determination of the compensation by the method of capitalisation and the payment of the compensation in bonds carrying interest from the date of the acquisition. The appellant Company is aggrieved by the method of determination of compensation under the Act as amended in 1970 and has filed the present Writ Petition in this Court questioning the vires of Sections 8(1)(b) and 9(2) of the Act.

The submissions of Shri A. K. Sen, learned Counsel for the appellant were as follows: Article 31(2) of the Constitution as it stood on the date of the acquisition of the undertaking required the legislature to specify the principles on which compensation, i.e. a 'just equivalent' af what the owner had been deprived of, had to be determined. The principles so specified had necessarily to be relevant to the determination of such compensation. The principle of capitalising net profit as a sole factor was not a relevant principle in determining the compensation payable for the acquisition of a public utility undertaking. It might be a relevant principle to determine the value of the intangible assets of a public utility undertaking but was wholly irrelevant to determine the value of the tangible assets of a public utility undertaking. Section 8(1)(b) of the oriental Gas Company Act, as amended in 1970, therefore, offended article 31 (2) of the Constitution. The choice of the period of five years immediately preceding the take over for the purpose of calculating the average annual net profit was inappropriate as it did not reflect the true earning capacity of the undertaking. There were special reasons why the profits were low during the two or three years immediately preceding the takeover. The choice of the multiplier of eight was also not based on any relevant principle. The provision for payment in bonds payable in twenty years and carrying interest at 3% per annum at once had the effect of reducing the compensation in such a manner as not to approximate to what was determined. This too was violative of Article 31(2). Shri Sen relied upon the decision of this Court in Rustom Cavasjee Cooper v. Union of India(1) and passages from Alfred Jahr's Eminent Domain, Valuation and Procedure, American Jurisprudence Vol. 27 and American Law Reports 2nd series, Vol. 68.

A resume of Constitutional history and the story of the ding-dong legal battles that were fought may not be out of place here. It may help us to understand and, perhaps even to solve the problem before us. It will enable us to appreciate the relevance or irrelevance of the principle specified for determining compensation. Clauses (1) and (2) of Article 31 of the Constitution, as they stood originally, were as follows:

> "31. Compulsory acquisition of property.- (1) No person shall be deprived of his property save by authority of law.
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> (2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given".

The word 'compensation' occurring in Article 31(2) was not qualified by any adjective such as 'just' or 'fair' unlike Section Sl of the Commonwealth of Australia Constitution Act and the 5th Amendment to the Constitution of America, in both of which provisions, the qualifying adjective just is used. Even, so, in Bela Banerjee's case(2) the Supreme Court introduced the concept of a 'just equivalent' and held that compensation meant 'a just equivalent of what the owner had H (1) [1970] 3 S.C.R. 530.

(2) [1954] S.C.R. 558.

been deprived of. It was said that the principles to be laid down by the legislature to determine the compensation were to be subject to the 'basic requirement of full indemnification of the expropriated owner'. If the principles did not take into account 'all the elements which make up the true value of the property appropriated' the legislation was liable to be struck down. In other words what was to be given was full compensation on the basis of the market value of the property acquired. The decision was capable of creating great difficulty in the sense of discomfiting legislation for the taking over of big estates and the nationalisation of large industrial undertakings. In the words of Shah, J., in State of Gujarat v. Shri Shantilal Mangaldas & ors.(l), the decisions in Bela Banerjee's case and Subodh Gopal Bose's(2) case " .. were therefore likely to give rise to formidable problems, when the principles specified by the Legislature as well as the amounts determined by the application of those principles, were declared justiciable. By qualifying 'equivalent' by the adjective 'just', the enquiry was made more `controversial; and apart from the practical difficulties, the law declared by this Court also placed serious obstacles in giving effect to the directive principles of State policy incorporated in Art. 39".

So it was that Article 31 was amended by the Constitution 4th Amendment Act in 1955. `The second clause of Article 31 as amended by the Constitution 4th Amendment Act was as follows:

> "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any court on the ground that the compensation provided by that law is

not adequate."

The true effect of the amendment was that the adequacy of the compensation provided by 'the law was made non- justiciable. Again in the words of Shah, J., in Shantilals case, "A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the Constitutional declaration that the inadequacy of the compensation provided is not justiciable". The intended effect (1) [1969] 3 S.C.R. 341.

(2) [1954] S.C.R, 587.

of the amendment had, however been previously nullified to a large extent by the decisions in P. Vajravelu Mudaliar v. Special Deputy Collector, Madras & Anr.(1) (p. 614) and the Union of India v. The Metal Corporation of India Ltd. & Anr.(2) where it was reiterated that the word 'compensation' signified a, 'just equivalent' of what the owner has been deprived of.

In Vajravelu's case it was observed (at p. 626): "The fact that Parliament used the same expressions namely, "compensation" and "principles" as were found in Art. 31 before the Amendment is a clear indication that it accepted the meaning given by this Court to those expressions in Mrs. Bela Banerjee's case. It follows that a Legislature in making a law of acquisition or requisition shall provide for a just equivalent of what the owner has been deprived of or specify the principles for the purpose of ascertaining the 'just equivalent' of what the owner has been deprived of. If Parliament intended to enable a Legislature to make such a law.. without providing for compensation so defined, it would have used other expressions like 'price' 'consideration' etc." Having said that, Subba Rao, J., however, went on to say that the argument that because the word compensation meant 'just equivalent' for the property acquired, therefore, this Court could ascertain whether it was a 'just equivalent' would render the amendment of the Constitution nugatory. He observed that neither the principles prescribing the 'just equivalent' nor the 'just equivalent' could be questioned by the Court on the ground of the inadequacy of the compensation fixed or arrived at by the working of the principles. The matter was illustrated by the statement that the value of a' house which was acquired could be fixed in many ways: estimate by an Engineer, value rejected by comparable sales, capitalisation of rent etc. The application of (different principles might lead to different results. No one could insist that only that principle which yielded the highest result should be adopted. On the other hand the value of land acquired in 1950 could not be fixed on the basis of its value in 1930 or though 100 acres were acquired compensation would be given only for 50 acres. Principles so fixing the compensation would be irrelevant. Subba Rao, J., summarised the position thus (at p. 629):

> "If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation which do not (1) [1965] 1 S. C. R. 614.
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> (2) [1967] 1 S. C. R. 255.
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> relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and

> so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its powers. Briefly stated the legal position is as follows: If the question pertains to the adequacy of compensation, it is not justiciable; if the compensation fixed or the principles evolved for fixing it disclose that the legislature made the law in fraud of powers in the sense we have explained, the question is within the jurisdiction of the Court".

In Vajravelu's case the compensation to be paid was the value of the land at the date of the publication of the notification under the Land Acquisition Act or an amount equal to the average market value cf the land during the five years immediately preceding such date, whichever was less. It was also provided that compensation. was to be determine on the basis on the use to which the land was actually put on the date of publication of the notification and not on the basis of any potential value of the acquired land. This Court held that in the context of continuous rise of land prices owing to abnormal circumstances it could not be said that the fixation of average price during the preceding five years was not a relevant principle for ascertaining the value of the land on or about the date of acquisition. It was also held that though the potential value of the acquired land was generally an element to be considered in valuing land? the exclusion of such an element from consideration merely related to the inadequacy of the compensation and did not constitute a fraud on power so as to invalidate the provision. The decision amounted to this that while the principles specified should aim at the ascertainment of a just equivalent, the principles so aimed could not be said to be irrelevant merely because the application of some other principles might have yielded results more favorable to the owner of the acquired property.

In the case of Metal Corporation of India & Anr., Subba Rao, C. J., observed: "The law to justify itself has to provide for the payment of a 'just equivalent' to the land acquired or lay down principles which will lead to that result. If the principles laid down are relevant to the fixation of compensation and are not arbitrary, the adequacy of the resultant product cannot be called in question in a Court of law. The validity of the principles, judged by the above tests, falls within judicial scrutiny, and if they stand the tests, the adequacy of the pro duct falls outside its jurisdiction". Judging by those tests, the two principles specified for the ward of compensation in the Act impugned in that case namely "(i) compensation equated to the cost price in the case of unused machinery in good condition, and (ii) written down value as understood in the Incometax law as the value of used machinery" were held to be irrelevant to the fixation of the value of the machinery on the date of acquisition.

The case of Vajravelu and Metal Corporation of India & Anr.. were both considered in great detail in Shantilal's case. The decision in the case of Metal Corporation of India was expressly overruled and the two principles which were found to be irrelevant in Metal Corporation of India's case were held to be relevant principles for determination of compensation. The observations in Vajravelu's case suggesting that compensation meant a 'just equivalent' and that the principles to be specified must relate to ascertainment of a 'just equivalent' were held to be obiter. The effect of the amendments of Article 31(2) made by the Constitution 4th Amendment Act 1955 was stated to be as follows: D "it clearly follows from the terms of Art. 31(2) as amended that the amount of compensation payable, if fixed by the Legislature, is not justiciable,, because the challenge in such a case, apart from a plea of

abuse of legislative power, would be only a challenge to the adequacy of compensation. If compensation fixed by the Legislature-and by the use of the expression 'compensation' we mean what the Legislature justly regards as proper and fair recompense for compulsory expropriation of property and not something which by abuse of legislative power though called compensation is not a recompense at all or is something illusory is not justiciable, an the plea that it is not a just equivalent of the property compulsorily acquired, is it open to the Courts to enter upon an enquiry whether the principles which are specified by the Legislature for determining compensation do not award to the expropriated owner a just equivalent ? In our view, such an enquiry is not open to the Courts under the statutes enacted after the amendments made in the Constitution by the Constitution (Fourth Amendment) Act. If the quantum of compensation fixed by the I legislature is not liable to be canvassed before the Court on the ground that it is not a just equivalent, the principles specified for determination of compensation will also not be open to challenge on the plea that the compensation determined by the application of those principles is not a just equivalent. The right declared by the Constitution guarantees that com compensation shall be given before a person is compulsorily compulsorily of his property for a public purpose. What is fixed as compensation by statute, or by the application of principles specified for determination of compensation is guaranteed: it does not mean however that some thing fixed or determined by the application of specified principles which is illusory or can in no sense be regarded as compensation must be upheld by the Courts, for, to do so, would be to grant a charter of arbitrariness, and permit a device to defeat the constitutional guarantee. But compensation fixed or determined on principles specified by the Legislature cannot be permitted to he challenged on the somewhat indefinite plea that it is not a just or fair equivalent. Principles may be challenged on the ground that they are irrelevant to the determination of compensation but not on the plea that what is awarded as a result of the application of those principles is not just or fair compensation. A challenge to a statute that the principles specified by it do not award a just equivalent will be in clear violation of the constitutional declaration that inadequacy of compensation provided is not justiciable".

After Shantilal's case, the effect of the amendment of Article 31(2) by the Constitution 4th Amendment Act again fell to be considered by this Court in R. C. Cooper v. Union of India(l) a decision of the Full Court. There is a controversy whether this case was a retreat from the position taken in Shantilal's case. Later in Keshavananda Bharti's(2) case Shelat, Hegde, Grover, Jaganmohan Reddy and Mukherjee JJ., expressed the view that Cooper's case did not over rule Shantilal's case while Dwivedi and Chandrachud, JJ. expressed the view that Shantilal's case was in substance overruled by Cooper's case. This uncertainty which is said to have resulted from the decision e in Cooper's case led to the 25th Amendment of the Constitution.. As a result of the 25th Amendment Article 31(2) came to read as follows :

> "31(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for requisitioning or requisitioning of (1) [1970] 3 S.C.R. 530 (2) [1973] Suppl. S.C.R. 1.
>
> the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law; and no such law shall be called in question in any court on the

> ground that the amount so fixed or deter mined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash:
>
> Provided that in making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority referred to in clause (1) of article 30, the State shall ensure that the amount fixed or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause".

So much for Constitutional history. We are not concerned in this case. with the 25th Amendment. We are concerned with Article 31(2) as it stood after the 4th Amendment and before the 25th Amendment. On a question of interpretation or Article 31(2) the decision in Cooper's case, therefore, has the final word. In Cooper's case Shah, J., who spoke for the Court recognised the apparently conflicting views expressed in Vajravelu's case and E case but held, that both the lines of thought converged in the ultimate result that the principles specified by the law for determination of compensation were beyond the pale of challenge, if they were relevant to the determination of compensation and were recognised principles applicable in the determination of compensation for properly compulsorily acquired and if the principles were appropriate in determining the value of the class of property sought to be acquired. The provisions of the Banking Companies (Acquisition and Transfer of Undertaking) Act 22 of 1969 were struck down on the ground that relevant principles were not specified for the determination of compensation. Instead of providing for valuing the entire undertaking as a unit, the Act provided for determining the value, reduced by the liabilities, of only some of the components which constituted the undertaking. It also provided for different methods of determining compensation in respect of different components. Since the undertaking was sought to be acquired as a going concern the goodwill and the value of the un..expired long term leases had also to be included in the assets of the banks. These important components of the Undertakings were excluded. It was, therefore, held that the principles specified were irrelevant for the determination of compensation of Banking Companies. The Court, however, observed that the science of valuation of property recognised several principles or methods for determining the value to be paid as compensation to the owner for loss of his property and that if an appropriate method or principle for determination of compensation was applied, the fact that by the application of another principle which was also appropriate, a different value was leached, would not justify the Court in entertaining the contention that out of the two appropriate methods, one more generous to the owner should have been applied by the Legislature. It was observed that if several principles were appropriate and one was selected for determination of the value of the property to be acquired, selection of that principle to the exclusion of other principles was not open to challenge since the selection had to be left to the wisdom of the Parliament. The Court then went on to refer to some of tile important methods of determination of compensation, and observed (at p. 600 and 601):

> "The important methods of determination of compensation are-(i) market value determined from sales of comparable properties, proximate in time to the date of acquisition, similarly situate, and possessing the same or similar advantages and subject to the same or similar disadvantages. Market value is the price the property

may fetch in the open market if sold by a willing seller unaffected by the special needs of a particular purchase; (ii) capitalization of the net annual profit out of the property at a rate equal in normal cases to the return from gilt-edged securities. Ordinarily value of the property may be determined by capitalizing the net annual value obtainable in the market at the date of the notice of acquisition; (iii) where the property is a house, expenditure likely to be incurred for constructing a similar house? and reduced by the depreciation for the number of years since it was constructed; (iv) principle of reinstatement where it is satisfactorily established that reinstatement in some other place is bona fide intended, there being no general market for the property for the purpose for which it is devoted (the purpose being a public purpose) and would have continued to be devoted, but for compulsory acquisition. Here compensation will be assessed on the basis of reasonable cost of reinstatement; (v) when the property has outgrown its utility and it is reasonably incapable of economic use, it may be valued as land plus the break-up value of the structure. But the fact that the acquirer does not intend to use the property for which it is used at the time of acquisition and desires to demolish it or use it for other purposes is irrelevant; and (vi) the property to be acquired has ordinarily to be valued as a unit. Normally an aggregate of the value of A different components will not be the value of the unit.

These are, however, not the only methods. The method or determining the value of property by the application of an appropriate multiplier to the net annual income or profit is a satisfactory method of valuation of lands with buildings, only if the land is fully developed, i.e., it has been put to full use legally permissible and economically justifiable, and the income out of the property is the normal commercial and not a controlled return, or a return dcpreciated on account of special circumstances. It the property is not fully developed, or the return is not commercial the method may yield a misleading result.

xxx xxx But when an undertaking is acquired as a unit the principles for determination of compensation must be relevant and also appropriate to the acquisition of the entire under taking. In determining the appropriate rate of the net pro fits the return from gilt-edged securities may, unless it is otherwise found unsuitable, be adopted".

It is worthy of notice that Shall, J., very carefully refrained, throughout the discussion, from using the expression 'just compensation' or 'just equivalent' nor did he draw inspiration from any American or Australian cases. Realising the implication of the use of adjectives like 'just' or 'fair', he was content to use the expression 'compensation' and to say that the principle specified must be relevant for determination of compensation. F Dealing with the question whether compensation might be provided in the form of bonds, the Court said (at p. 608-

609):

"Compensation may be provided under a statute, other . than in the form of money . it may be given as equivalent of money, i.e., a bond. But in judging whether the law provides for compensation, the money value at the date of expropriation of what is given as compensation, must be considered. If the rate of interest compared with the ruling commercial rate is low, it will reduce the present value of the bond. The Constitution guarantees a right to compensation-an equivalent of the property expropriated and the right to compensation cannot be converted into a loan on terms which do not fairly compare with the prevailing com-

mercial terms. If the statute in providing for compensation devises a scheme for payment of compensation by giving it in the form of bonds, and the present value of what is deter mined to be given is thereby substantially reduced, the statute impairs the guarantee of compensation.

A scheme for payment of compensation may take many forms. If the present value of what is given reasonably approximates to what is determined as compensation according to the principles provided by the statute, no fault may be found. But if the law seeks to convert the compensation determined into a forced loan, or to give compensation in the form of a bond of which the market value at the date of expropriation does not approximate the amount determined as compensation, the Court must consider whether what is given is in truth compensation which is inadequate, or that it is not compensation at all. Since we are of the view that the scheme in Sch. II of the Act suffers from the vice that it does not award compensation according to any recognized principles, we need not dilate upon this matter further".

We may now examine the submissions of Shri A. K. Sen in the light of the principles enunciated in Cooper's case without confusing ourselves with imported expression like 'just compensation' or 'just equivalent'. Shri A. K. Sen's primary submission was that the principle of capitalising net profit as the sole factor for determining the compensation payable for the acquisition of a public utility Under taking was not a relevant principle. According to him a Public. Utility Undertaking was under an obligation to provide services to the community irrespective of whether its activities resulted in profit or loss It was subject to a rigid price control. It did not have the freedom to extend or curtail its activities based on consideration of profit. An Undertaking like the appellant's, he said, was bound to render services even in unprofitable lines of supply and areas. Therefore, the method of capitalising income was no. relevant to determine the compensation payable to a Public Utility undertaking. It might be relevant to assess the value of the intangible assets of the Public Utility Under taking but it was not relevant for valuing its tangible assets. Shri Sen invited our attention to certain passages from Alfred Jahr's Eminent Domain-Valuation and Procedure, Valuation by Bright, American Jurisprudence 2nd Edn.-Vol. 27 and American Law Reports-2nd series, Vol. 68. It is hardly necessary tc point out that American authorities are not of any avail on the question before us since the basic assumption of the American authorities is that what is payable is a 'just compensation' and every and all principles necessary to arrive at a 'just compensation' have to be applied. That, as we have seen, is not the position in India. What we have to see is whether the particular principle specified by the statute is a relevant principle. Even so we will refer to the

authorities cited by Shri Sen. These authorities themselves show that the method of capitalisation of net profit is an unquestionably relevant principle in assessing compensation. In fact the very argument of Shri Sen that the principle of capitalisation of net profit as a sole factor to determine compensation is not relevant, appears to us to imply that it is a relevant, principle alongwith others. C Alfred Johr in his Eminent Domain Valuation and Procedure, states in Section 66: "At the outset, we must bear in mind that when private property is acquired for public use under the power of eminent domain, just compensation must be paid to the owner. How is the just compensation determined ? That is the problem which we will discuss at some length". Dealing particularly with the question of valuation of Public Utilities, the author mentions the reasons why the principles of valuation in the case of acquisition of Public Utilities are sometimes different from those pertaining to the usual acquisitions. Then he proceeds to say that in estimating a 'just compensation' of Utility property consideration must be given to two types of properties, the tangible properties and the intangible properties. Tangible property such as land may be valued at the market value while property like plant etc. may have to be valued on the basis of original cost, cost of permutation, allowance for depreciation etc. In the case of intangible property the author states that the Courts do not indicate the method used in reaching the intangible item of 'going concern value' . and confesses that "there probably is none". After remarking that valuation of a going concern based on capitalisation of net earnings assumes too many contingencies, the author refers to the case of Appleton Water Co. v. Railroad Commission [154 Wis. 121, 148, 142, N.W. 476, 47 L.R.A. (N.S.) 770], where the Court said that the fundamental difficulty with an attempt to set a definite sum as representing going concern value is "that it is an attempt to divide a thing which is in its nature practically indivisible. The value of the plant and business is an indivisible gross amount. It is not obtained by adding up a number of separate items, but by taking a comprehensive view of each and all of the elements of property, tangible and intangible, including property rights, and considering them all, not as separate things, hut as inseparable parts of one harmonious entity".

Bright in his 'Valuation', deals with the question under the heading 'Capitalized Earning Power Versus So- Called Physical value as a measure of just compensation'. After referring to various difficulties ` in arriving at the just compensation on the basis of the method of capitalisation, the author ends the statement:

> "No doubt the practical objections urged by the courts . against capitalized earnings as a basis of valuation are well founded. But valuations based on replacement cost are indefensible if judged by the assumed objective of an award t in condemnation, which is to indemnify the owners of the property for the loss. Difficult as it is to determine fairly the value of a business enterprise by estimating its future earnings, no alternative method of valuation is acceptable, unless one is content to use the market prices of outstanding stocks and bonds".

In American Jurisprudence, 2nd Edn. Vol. 27, the discussion of the question of 'Measure and elements of compensation' starts in paragraph 266 with the sentence "the right of Eminent Domain cannot be exercised except upon condition that just compensation be made to the owner". In paragraph 339 the valuation of Public Utility properties is considered and the unique problems presented are mentioned. It is then said : no rigid measures can be prescribed for the determination

of 'just compensation' under all circumstances and in all cases..... The amount of net income actually received by a public utility company may and should be considered as a factor in determining the valuation, although such earnings are not conclusive, especially if a large sum would be necessary to put the plant in good condition. Capitalization of earnings, or the "economic" value, is a method of appraisal in condemnation cases which has met with approval in some jurisdictions, although usually rejected as a sole test. This test has its limitations (primarily because of the speculative factors involved). but is unquestionably relevant, particularly when attempting to measure the intangibles of a public utility".

In American Law Reports-2nd series-Vol 68, at pages 398- 399 it is stated that in valuing utility property various tests have been applied, alone and in combination, the usual method being the ascertainment of market value. It is then pointed out that there is a difference in ascertaining the market value for the purpose`sc of condemnation proceedings and for the purpose of rate-making. It is said: "In condemnation proceedings just compensation is the market value of the property taken. In rate-making cases, the standard or market value of the investment cannot be applied in determining just compensation, for the simple reason that marker value is dependent upon earning capacity and fluctuates with that capacity; consequently in determining what earning capacity is just, the market value of the investment which is a result of earning capacity cannot be utilised as a basis for the determination of what constitutes the reasonable or just earning capacity of the plant".

We may also refer to Principles and Practice of Rating Valuation by Roger Emeny and Hector M, Wilks. At page 197 of the 3rd edn., public utility undertakings are considered and it is said:

> 'Public Utility Undertakings were prior to 1950 valued by the profits method. This method was used because public utility undertakings were not generally speaking let, added to which they enjoyed some element of monopoly....insofar that there are public utility undertakings or quasi public utility undertakings which are not covered by a formula, and in the absence of rental evidence, it is probable that the profits method of valuation would be applicable. There is no shortage of case law to help the valuer when using the profits method for public utility undertaking".

It is thus clear from the very authorities cited by Shri Sen. that tangible and intangible property of a public utility undertaking, may not necessarily be valued separately and it is a sound principle to treat them as indivisible and value the undertaking as an integrated whole. The authorities also treat the capitalisation of net profit as one of the recognised principles of valuation of Public Utility Undertaking, though it may not be the best in the sense that it may not yield that result which is most advantageous to the owner of the undertaking. But we are not concerned with the question which principle will yield the result most advantageous to the owner of the undertaking but with the question whether the particular principle is a relevant principle at all. In the language used in 'American Jurisprudence' the principle of capitalisation of net income is "unquestionably relevant" even in the case of Public Utility Undertakings. Tn our view, it requires no authority to say that capitalisation of net income is a sound principle of valuation. Any purchaser will immediately put himself the question what profit does the undertaking make and how much should I invest to get the return' ? He may pay more if the prospects of better income in the future are bright and if the plant,

machinery and buildings are in excellent condition. He may pay less if the future is not so bright and if the plant, machinery and buildings are in a poor state and require immediate replacement and repair. He may pay more ll if the undertaking is possessed of substantial, unencumbered properties. He may pay less if the lease of the land on which the factory is located is about to expire. Thus the price may vary depending - on various factors but the basic consideration is bound to be the profit yielding capacity of the undertaking. Shri Sen asserted that the lands belonging to the company which were purchased by way of investment, can fetch a price of Rupees six to seven crores. There is nothing in the petition to indicate that any lands were purchased by way of investments and not for the purpose of gas works or that the lands are capable of being sold independently of the undertaking. Perhaps, no one will come forward to purchase land next to a gas works. Perhaps there are other factors which make the land unsale able or which depreciate the value of the land. We do not know. Suffice it to say that the assertion of Shri Sen is not borne out by any statement to that effect in the Writ Petition. Shri Sell suggested that the petitioner might be given an opportunity to amend the Writ Petition. We do not think we can do that. The acquisition was made in 1962. The impugned Act was passed in 1970. The Writ Petition was filed in 1971 and has been pending in this Court for sever years. If there was any substance in the present assertion, the petitioner would surely have mentioned it prominently in the Writ Petition. It would not have taken the petitioner so many years to discover a circumstance claimed by his Counsel to be so very vital. We do not think we will be justified in permitting any amendment at this stage. The case of the petitioner right through has been that the principle of capitalisation of income was irrelevant. With that submission we emphatically do not agree.

Shri Sen's next submission was that the choice of the period of five years immediately preceding the take over of the management and control of the Company for the purpose of calculating the average annual income was arbitrary as those five years were particularly lean years for the Company because of some special circumstances. The charge of arbitrariness is baseless. The five years immediately preceding the take over of the control and management of the Company were the years 1955-56, 1956-57, 1957-58, 1958-59 and 1959-60 during which years the profits according to the balance sheets of the Company, were Rs. 15,86,789, Rs. 13,81,177, Rs. 7,50,582, Rs. 1,64,158 and Rs. 1,82,123/- respectively. Now, if the Legislature wanted to be unfair to the Company, the last year's profit could have been taken as the criterion on the ground that the value to be ascertained was the value on the date of take over and not some hypothetical anterior date. Or, instead of taking the advantage of the period of the preceding five years, the Legislature could well have taken the average of the preceding three years. If that. We should not however be understood as having decided that A Section 9 (2) offends Article 31 (2) of the Constitution. Shri Chatterjee, learned Counsel for the State of West Bengal, argued that the earlier decision of the Calcutta High Court in the petition under Article 226 of the Constitution operated as res judicata. In the view that we have taken on the main question it is unnecessary to consider this argument except to say that there does not appear to be any substance in it. In the result the Writ Petition is dismissed with costs.

P.B.R. Petition dismissed.