Durgeshwar Dayal Seth vs Secretary, Bar Council And Ors. on 22 October, 1953

Equivalent citations: 1954CRILJ1485

JUDGMENT

Desai, J.

1. This is an application by Sim Durgeshwar Dayal Seth for the issue of a writ of mandamus to the-opposite-parties directing them to include his name in the new roll of Advocates without his paying any sum of money. The application is opposed by all the three opposae parties.

2. The applicant, who was called to the Bar on 18-11-35, was enrolled as an Advocate of the High Court of Judicature at Allahabad on 23-2-38 and his name was duly entered on the roll of Advocates of the same High Court under Section 8(2)(b) of the Indian Bar Councils Act, 1926. He has been practising regularly in the High Court, In 1948 the Governor-General issued the United provinces High Courts Amalgamation Order, 1948, amalgamating the High Court of Judicature at Allahabad and the Chief Court of Avadh and establishing a new High Court, though bearing the old name of the High Court of Judicature at Allahabad, and giving a right to all Advocates, who were entitled to practise either in the High Court at Allahabad or the Chief court of Avadh to practise in the new High Court. The State Legislature of Uttar Pradesh amended the Indian Bar Councils Act, 1926, in 1950. The effect of the amendment was that the old Bar Councils of Allahabad and Avadh were dissolved and provision was made for the creation of a new Bar Council for the new High Court. The State Government purporting to act under Section 1(3) of the Indian Bar councils Act, issued a notification on 24-5-1952 applying the provisions of Sections 7 to 16 of the Bar Councils Act, to the new High Court with immediate effect.

The State Amendment Act provided that until a Bar Council had been established for the new High Court, the Chief Justice could establish an 'ad hoc' Bar Council. Accordingly an 'ad hoc' Bar Council was established by the Chief Justice. Its Secretary Issued a notice on 6-1-1953 demanding a sum of Rs. 10/- from the applicant and other Advocates for entering their names in the new list of Advocates to be prepared by the new High Court. Another notice was issued by the Joint Registrar of the new High Court informing the applicant that unless he paid the sum of Rs. 10/- his name would not be placed on the new roll of Advocates. The petitioner contends, through this application, that he has already paid the sum of Rs. 10/- when he got his name entered on the roll prepared for the old High Court of Judicature at Allahabad, that he cannot be required to pay the sum again, that it is the duty of the new High Court to include his name on the new roll of Advocates without demanding any payment from him and that he is entitled to be recognized as an Advocate of the new High Court and to practise there. It was further contended that the State Amendment Act of 1950 was 'ultra vires' the State Legislature.

3. The Secretary of 'ad hoc' Bar Council, opposite-party No. 1, has filed a written statement opposing the application. He maintained that the notice demanding Rs. 10/- from the applicant is correct and that the applicant is bound to pay the amount if he wants his name to be entered in the new roll. He added, however, that his duty was simply to accept the money that was paid to him and inform the Registrar of the fact of the payment and that the roll is to be prepared by the Registrar arid not by himself.

4. The Indian Bar Councils Act, 1926, was enacted by the Indian Legislature to provide for the constitution and incorporation of Bar Councils for certain courts. The Act extends to all the provinces of India. Under Section 1(2), it was made applicable to certain High Courts of Judicature including that at Allahabad and to such other High Courts within the meaning of Clause (24) of Section 3 of the General Clauses Act, 1897, as the Provincial Government by notification in the official gazette, declare to be High Courts to which this Act applies. Sections 1, 2, 17, 18 and 19 of the Act came into force at once and by Section 1(3) the Provincial Government was empowered by notification to direct that the other provisions of the Act would come into force in respect of any High Court to which the Act applies on such date as it may by the notification appoint.

The main provisions of the Act are as follows : Under Section 3 for every High Court a Bar Council would be constituted which was to be a body corporate, having perpetual succession. Section 8 lays down that no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act, and requires the High Court to prepare and maintain a roll of Advocates of the High Court. In the roll are to be entered the names of all persons who were, as Advocates etc., entitled as of right to practise in the High Court immediately before the date on which Section 8 comes into force, provided that they paid a fee, payable to the Bar Council, of Rs. 10/-. Also the names of all other persons who have been admitted to be Advocates of the High Court are to be entered in the roll on payment of such fee as may be prescribed. The High Court is required to send to the Bar Council a copy of the roll. This is also provided in Section 8.

The Bar Council is authorised to make rules to regulate the admission of persons to be Advocates of the High Court, vide Section 9. The High Court is given the power by Section 10 to punish an Advocate for misconduct; the enquiry into the allegation of misconduct is to be made by a committee of the Bar Council, Every person whose name is entered in the roll of Advocates is entitled as of right to practise in the High Court of which he is an Advocate, vide Section 14. Power is given by Section 15 to a Bar Council to make rules in respect of the rights and duties of the Advocates of the High Court and their discipline and professionai misconduct. When Sections 8 to 16 are applied to any High Court, the Legal Practitioners Act of 1870 stands amended to the extent and in the manner specified in the schedule of the Act and if there is anything inconsistent with their provisions in the Letters Patent, they are deemed to have been repealed to that extent.

5. On the passing of the above Act, the Provincial Government issued a notification under Section 1(3) applying the rest of the sections of the Act to the High Courts then existing, the High Court of Judicature at Allahabad (which will be referred to as the old High Court) and the Chief Court of Avadh and Bar Councils were established for them. The applicant got himself admitted as an

Advocate-on payment of the fee & his name was entered on the roll prepared by the old High Court of Allahabad. Under Section 14 he acquired the right to practise in the old High Court.

6. By the Amalgamation Order of 1948 the old High Court and the Chief Court of Avadh wer» amalgamated and the two constituted one High Court (which will be known as the new High Court), bearing the same name as the old High Court. Clause 8 of the Order provided that any person who was an Advocate entitled to practise in either of the High Courts would be recognised as an Advocate entitled to practise in the new High Court, Clause 17 of the Order repealed the Letters Patent of the old High Court. The last clause 18 is to the effect that the Order will have effect subject to any provisions that may be made with respect to the new High Court by any Legislature or authority having power to make such provision.

7. The effect of the Amalgamation Order was to create a new High Court as a substitute for the old High Court and the Avadh Chief Court. The Order did not merely extend the territorial jurisdiction of the old High Court by adding to it the territory that was within the jurisdiction of the Avadh Chief Court. Though it did not expressly abolish the two courts, that was the effect of the provision of clause 3. When the two High Courts were amalgamated to constitute a new High Court, it meant that the two High Courts were abolished and in their place a new High Court was created. By chance the new High Court was given the same name that was borne by the old High Court. It could very well have been given a different name and then there could have been no doubt about the fact that a new High' Court was created.

The Order disposed of both the Courts in the same manner; if the Chief Court of Avadh was abolished or gone, the old High Court also was abolished or gone. There was nothing in its provisions to suggest that only the Chief Court of Avadh was abolished and that the old High Court continued though with extended territorial jurisdiction. The new High Court is to sit at Allahabad or at such other places in the Uttar Pradesh as the Chief Justice may appoint. The fact that it is to sit at Allahabad does not mean that it is a continuation of the old High Court.

8. When the new High Court was created, the Bar Councils Act had to be amended and at least & provision for the dissolution of the Bar Councils of the old High Court and the Chief Court of Avadh had to be made. It is mentioned in the statements of Objects and Reasons published in the U.P. Gazette Extraordinary dated 25-3-1950 that it was necessary to amend the Bar Councils Act, partly for the purpose of providing for the dissolution of the old Allahabad and Avadh Bar Councils and patrly to provide for the establishment of a Bar Council for the new High Court, that the Indian Bar Councils (U. P. Amendment and Validation of Proceedings) Ordinance, 1949, had expired and it was necessary to retain permanently on the statute book some of its provisions that opportunity was taken to make some additional provisions in the Act to provide for a more representative and expanded Bar Council and to make it a permanent body and that since the establishment of a new Bar Council might take some time, provision was made for an 'ad hoc' Bar Council.

The important provisions of the Amendment Act are the following :- Section 3 dissolves the old Allahabad and Avadh Councils with effect from 19-10-1949 and provides for the establishment of a Bar Council for the new High Court. Until a Bar Council has been established for the new High

Court, the Chief Justice has been given power by Section 5 to establish an 'ad hoc' Bar Council. Section 6 deletes the word "Allahabad" from Section 1(2) of the principal Act and adds the words "and the High Court of Judicature at Allahabad constituted by the U.P. High Court (Amalgamation) Order 1948" after the word "Patna". The effect of this Amendment is to make the principal Act applicable to the new High Court. Of Course it was open to the Provincial Government to achieve that object by simply issuing a notification in the Gazette, in exercise of the power conferred by that very provision, declaring the new High Court to be a High Court to which the Act applies. That act of the Provincial Government could not have been questioned on the ground of jurisdiction at all. But presumably because the Provincial Government wanted to make amendments in the principal Act by providing for the matters enumerated above it decided to pass an Act instead of issuing a notification making it applicable to the new High Court.

Under Section 1(2) of the principal Act, it had no power to make any modifications in the Act; the Act had to be applied to the new High Court as it stood or not at all. Section 4 of the principal Act dealing with the composition of Bar Councils was amended as also Section 5 dealing with election of members. By Section 9 a new provision was made for the compulsory retirement of a certain percentage of members every third year. Section 16 makes amendments in Section 6 dealing with the rule-making power of the High Court. Section 11 validates all proceedings taken, orders made and jurisdictions exercised by the Allahabad Bar Council between 26-7-48 and 26-3-50. Section 12 permits the continuation of all actions or proceedings commenced by or against the Allahabad and Avadh Bar Councils before 19-10-1949 and pending on that date. All property, funds and assets belonging to the two dissolved Councils are transferred by Section 13 to the Bar Council of the new High Court.

9. The Amendment Act having been passed after the commencement of the Constitution, its validity is to be tested by Article 246. Under that Article Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule and Parliament and the Legislature of any State have power to make laws with respect to any of the matters enumerated in List III. List I is known as the Union List and List III, as the Concurrent List. The entry to be considered in List I is No. 78 "constitution and organisation of the High Courts...; persons entitled to practise before the High Courts". The Amendment Act is not said to be with respect to any of the matters mentioned in List II, ("State list") and therefore, it is left out of consideration. In List III, there is entry No. 26 "legal, medical and other professions".

The matters dealt with in the principal and the Amendment Acts undoubtedly come within entry No. 26 of List III, but it was contended on behalf of the applicant and denied on behalf of the opposite parties, that the matters dealt with in the Amendment Act are included in entry No. 78 of List I. It was not disputed that according to the provisions of Article 246, if the matters are included in entry No. 78 of List I, Parliament has the exclusive power to make laws with respect to them and the Amendment Act passed by the Provincial or State Legislature would be invalid. The power of a State to make laws with respect to any of the matters enumerated in List III is subject to the exclusive power of Parliament, if it has any, to make laws with respect to the same matters. If parliament has the exclusive power, a State cannot make laws even if the matters are enumerated in List III.

10. The principles that a Court has to bear in mind when deciding whether a legislation comes within an entry of one list or an entry of another list are well settled. The problem always involves two questions, one of the interpretation of the entries of the two lists and the other of what the legislation purports to do. As regards the construction to be placed upon the entries in the rival lists it is to be assumed that the Union and the State Lists do not conflict and every attempt should be made to avoid a conflict. If necessary, the meaning given to one entry should be restricted in order to avoid overlapping. The meaning given to a general power in one entry may be restricted to give sense and efficacy to a power given by way of exception under an entry of another list. At the same time general language ought not to be cut down by far-fetched and impertinent limitations. The words "with respect to" mean the whole field of legislation.

In 'In the matter of C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938 AIR 1939 PC 1 (A) the Federal Court held that the Act was intra vires the Provincial Legislature because it was with respect to "taxes on the sale of goods", entry No. 48 of the Provincial List and not to "duties of excise on tobacco and other goods manufactured or produced in India", entry No. 45 of List I of the Government Of India Act. Gwyer, c. J. on page 5 quoted the following from - Citizens Insurance Co, of Canada v. Parsons (1881) 7 AC 96 (B) :

> It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together and the language of one interpreted, and, where necessary, modified by that of the other. In this way, it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain, and to give effect to all of them.
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> On page 8 he observed that a reconciliation should be attempted between two apparently conflicting jurisdictions by reading the two entrap together and by interpreting and, where necessary, modifying the language of one by that of the other. He proceeded :
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> If indeed such a reconciliation should prove impossible, then and only then will the non-obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.
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> It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an -overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation as would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess.
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> On page 10, the learned Chief Justice proceeded :

> It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another.... A general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect can be given to the latter in its ordinary and natural meaning.

Sulaiman, J. stated on page 21 :

> A difficulty may arise from the fact that some heads overlap as the groupings cannot be absolutely perfect. When overlapping is unavoidable, the provisions of Section 100 operate" (referring to Section 100 of Government of India Act corresponding to Article 246 of the Constitution).

11. In - Bhola Prasad v. Emperor AIR 1942 FC 17 (C) the Federal Court upheld the validity of the Bihar Excise (Amendment) Act of 1940 passed by a Provincial Legislature. By that Act, possession of intoxicating liquor by any person, subject to certain exceptions, was prohibited. It was held that a power to legislate with respect to intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs.

entry No. 31 of the Provincial List, included the power to prohibit intoxicating liquors throughout the province. Gwyer, C. J. remarked on page 19 that :

> A power to legislate with respect to intoxicating liquors could not well be expressed in wider terms.

12. The words "that is to say, the production ----other narcotic drugs" were held to be explanatory illustrative words and not words either of amplification or of limitation. It was said to be difficult to conceive a legislation with respect to intoxicating liquors and narcotic drugs which did not deal in some way or other with their production, manufacture etc., and those words were said to be apt to cover the whole field of possible legislation on the subject. Nicholes writes in his Australian Constitution, p. 241 that the words "with respect to" indicate the complete nature of a legislative power".

13. The Madras General Sales Tax Act of 1939 passed by Provincial Legislature was held to be valid in - Governor General in Council v. Province of Madras AIR 1945 FC 98 (D). The Act purported to levy a tax on first sales in Madras of goods manufactured or produced in India. It was held to come within entry No. 48 of the Provincial List "taxes on the sale of goods" and not within entry No. 45 of the Federal List "duties of excise on tobacco and other goods manufactured or produced in India". Lord Simonds observed on p. 100 :

> It is right first to consider whether a fair reconciliation cannot be effected by giving to toe language of the Federal Legislative List a meaning which, if less wide than it

> might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear.

14. The Act that was considered in - Kishori Shetty v. King AIR 1950 FC 69 (E) was the Bombay Abkari Act, which prohibited, without permit or licence, possession of any intoxicant or hemp in excess of a certain quantity. The Federal Court held that the Act was validly passed by the State Legislature because it was with respect to "intoxicating liquor and narcotic drugs" entry No. 31 of the Provincial List. It was stated by Patanjali Sastri J. (as he then was) that the power given under entry No. 31 was expressed in wide and unqualified terms and it was far-fetched to suggest that so far as the provision in the Bombay Abkari Act covered foreign liquors it was legislation with respect to import and export across customs frontiers mentioned in entry No. 19 of the Federal List. In - State of Bombay v. P.W. Balsara AIR 1951 SC 318 (F) Fazl Ali. J. laid down on page 322 that :

> Where there is a seeming conflict between an entry in List II & an entry in List I, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of Jurisdiction.
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> and relied upon the cases of the C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act (A) and - Governor General in Council v. Province of Madras (D).

15. The "pith and substance" doctrine has been laid down in a number of decisions. In - Governor-General in Council v. Province of Madras (D), Lord Simonds held on p. 99 that when a conflict arises between two lists, it is not the name of the tax but its real nature, its 'pith and substance' as it has sometimes been said, which must determine into what category it falls.

In 'Kishori Shetty's case (E)', Patanjali Sastri, J, said on page 75 :

> If an enactment according to its true nature; its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid, notwithstanding its incidental encroachment on a Federal subject.
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> Fazl Ali, J. observed in the case of F.N. Balsara (F)', at p. 322 that :
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> It is well established that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field; and therefore it is necessary to inquire in each case what is the pith and substance of the Act.
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> The pith and substance or the true nature and character of an Act is ascertained for the purpose of determining whether it is with respect to matters in this list or that list (ibid p. 322). In - Attorney-General for Ontario v. Attorney-General for Canada', 1912 AC 571 (G) the Judicial Committee laid down that :

> When the text is ambiguous, as for example when the words : establishing two mutually exclusive Jurisdictions are wide enough to bring a particular, power within either, recourse must, be had to the context and scheme of the Act.
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> This observation was relied upon by Gwyer, C.J. in the case of the 'C. P. & Berar Bales of Motor Spirit and Lubricants Taxation Act (A)'.

16. Judging the matter in the light of the principles laid down above, I have no doubt that the Amendment Act is a legislation with respect to "persons entitled to practise before the High Courts" entry No. 78 of List I. The principal Act and the Amendment Act both are legislations with respect to Advocates who are persons entitled to practise before High Courts. The Amendment Act comes within entry 26 of List III, but the real question, when there is said to be a conflict between List I and List III, is whether the legislation comes within List I or not. If it comes within List I, Parliament has the exclusive power even though it may come within List III as well. The provision in entry No. 78 of List I is by way of an exception to entry No. 26 of List III. The power conferred by entry No. 26 of List III is general but since there is a power conferred by entry No. 78 of List I with respect to persons entitled to practise before the High Courts, the general power must be read subject to that power and a legislation with respect to Advocates must be held to come within entry No. 78 of List I regardless of whether it comes within entry No. 26 of List III or not.

The Bar Councils Act dealt only with Advocates who are the persons entitled to practise before the High Courts. The Amendment Act applied the whole Act with some modifications to the new High Court, All persons claiming a right to practise before the new High Court are governed by the Amendment Act. But for the Amendment Act they would not have been governed by the principal Act because it applied to the old High Court which was in existence when it came into force and could not apply to the new High Court established subsequently (unless the State Government issued a notification under Section 1(2)). Had the Amendment Act not been passed the persons claiming a right to practise before the new High Court would not have been governed by the principal Act.

It does not matter how the Amendment Act has made the principal Act applicable to them. It does not matter if all the provisions of the principal Act, which are made applicable to them, have not been reproduced word by word in the Amendment Act. It does not matter if it has achieved its object simply by substituting the words "High Court of Judicature at Allahabad constituted by the U. P. High Court Amalgamation Order" in place of the word "Allahabad" in Section 1(2) of the principal Act. The object of the Amendment Act was to apply the principal Act with some modifications to the persons claiming a right to practise before the Court. Thus the pith and substance or the true nature and character of the Amendment Act is making a law regarding the rights and liabilities of persons entitled to practise before High Courts. The words "with respect to persons entitled etc." are wide enough to cover all legislation with respect to such persons. legislation which applies to all persons including persons entitled to practise before High Courts may not be said to be legislation with respect to per-sons entitled to practise before High Courts, but legislation which is exclusively applicable to such persons as regards their rights and liabilities is undoubtedly with respect to them.

The Arms Act or the Motor Vehicles Act applies to all persons including such persons and therefore may not be said to be laws with respect to such persons. If such persons are also governed by their provisions it is the incidental effect of them. The laws were not enacted to deal with them. They were enacted to deal with all persona and incidentally they became applicable to such persons also. But the Bar Councils Act and the Amendment Act dealt exclusively with persons entitled to practise before High Courts. The effect of the legislation felt by them was not an incidental effect. They were primarily intended to be affected by the Acts. I see no force in the contention of the learned Advocate General that the entry No. 78 only refers to qualifications required for practising before High Courts. The words "with respect to" are wide enough to cover the whole field of legislation which primarily affects in any manner persons entitled to practise before High Courts.

17. The learned Advocate General referred to Article 19(1)(g) and (6). All citizens have the right to practise any profession or to carry o$ any occupation. But this does not mean that the State cannot make any law relating to the professional qualifications necessary for practising any profession or carrying on any occupation. In List I there is entry No. 65; "Union agencies and institutions for, (a) professional, vocational or technical training". The learned Advocate-General contended on the basis of this provision that laws regarding qualifications only were contemplated to be on an all-India basis and nothing else. The words used in entry No. 78 are not "qualifications of persons entitled to practise before High Courts'". Merely because Parliament has the right to made-laws with respect to Union agencies and institutions for professional, vocational or technical training, it cannot be said that Parliament has the right to make laws under entry No. 78, only regarding qualifications of persons entitled to practise before the High Courts.

I see no connection between the entries Nos. 65-and 78 and do not think that any light on the interpretation of entry No. 78 is shed by entry No. 65 or Article 19(6). Article 19(6) deals only with the question whether a certain law can be made? or not and not with the question by whom it can be made.

18. The words "with respect to persons entitled to practise before the High Courts" do not mean-merely the question who shall be entitled to practise before the High Courts. They must not be mistaken for the words "right to practise before the High Courts". The Amendment Act, as a matter of fact, deals with the right of practice before the High Court and also the qualifications required by a person claiming the right. Under Section 8 of the principal Act made applicable to the new High Court under the Amendment Act no person is entitled as of right to practise in the High Court unless his name is entered in the roll of the Advocates maintained under the Act. Section 9 of the principal Act empowers Bar Councils to make rules to regulate the admission of persons to be Advocates of the High Court by prescribing-qualifications to be possessed by them and in other ways. Section 10 deals with the loss of the right to practise before the High Courts.

19. It was .conceded by the learned Advocate General that the whole of the principal Act could not be enacted by the State Legislature. He said that some provisions of it could be enacted by It, not others including Section 8. But he contended that the State Legislature has merely applied the provisions of the principal Act to the new High Court and hag not enacted those provisions. On the analogy of executive authorities extending the applicability of Acts made by Legislatures beyond toe areas or

the tenures fixed by the Legislatures, he argued that the State Legislature has not made a law with respect to persons entitled to practice before the High Courts even though the effect of it is to mane them governed by the principal, Act with modifications, The contention is unsound.

There is absolutely no analogy between what has been done in the present instance by the State Legislature and what is done by executive authorities in exercise of powers specifically conferred upon them by enactments. If a Legislature passes an enactment malting it initially applicable in a particular area or for a particular period and empowering executive authorities to extend it to other areas or beyond the period initially fixed and the executive authorities issue an order extending its applicability to other areas or beyond the period originally fixed, it may not be said that the Legislature has not made a law with respect to the other areas or for the extended period and it may not be said that it is the executive authorities who have made a law with respect to the other areas or for the extended period. But when a Legislature itself, expressly and after going through all the legislative formalities, enacts law, even though it may be in the form of adopting some law passed by some other Legislature for some other area, it is impossible to say that it has not made a law.

In the former case the appropriate Legislature has made a law which may be applied to other areas or beyond the period originally fixed by it and has left it to the executive authorities to determine those areas or the duration of the ex- tended period; in the other case no such law has been made by the Legislature enacting the adopted law. No authority was shown to us in which it might have been held that even when an enactment is made with due legislative formalities by a Legislature, it has not made a law. In the present instance the principal Act did not empower the State Legislature to apply its provisions to other High Courts by simply passing a resolution. The State Legislature did not pass the Amendment Act in exercise of any power conferred upon it under the principal Act. Therefore neither can it be urged that the Legislature enacting the principal Act has conferred any power upon the State Legislatures, nor can it be urged that the State Legislature by passing the Amendment Act has not made a law but simply exercised a power conferred upon it.

When executive authorities extend the applicability of an Act in pursuance of a power conferred by the Act, the whole law is deemed to have been laid down by the Legislature passing the Act and the executive authorities are simply deemed to have exercised the power and not made a law. But when a State Legislature makes an enactment, not purporting to do so in exercise of any power conferred upon it by another enactment and expressly in exercise of its law-making power, it cannot be said with any show of reason that it has done an executive act and not a legislative act. Merely because the doing of an act by the executive authorities is held in certain circumstances to be an executive and not a legislative act, it, cannot be said that whenever that act is done by a Legislature, it is not a legislative act.

20. The next contention of the learned Advocate-General was, if I have understood him correctly, that making a law adopting some law previously made by another Legislature, even with modifications, is not making a law with respect to the matters dealt with in the previous law. Every law that is made by a Legislature in order to be effective must be within its powers. What laws are within the powers of which Legislatures is laid down in Article 246 of the Constitution. A State Legislature has power to make laws with respect to only those matters that are exhaustively

enumerated in Lists II and III and has no power whatsoever to make laws with respect to any matter that cannot be found in them. A State Legislature has no residuary powers at all. Adopting a law made by another Legislature is not a matter to be found in Lists II and III. Therefore no law made by a State Legislature can be justified on the ground that though it is not with respect to any of the matters dealt with in Lists II and III, it is simply adopting a law Validly made by another Legislature.

As has been laid down one must have regard to the substance and not to the form of the enactment. Even though the form may be that of adopting a law made by another Legislature, in substance it is a law with respect to the matters dealt with in the adopted law. If a State Legislature has no power to make a law with respect to those matters, it has no power to adopt that law. If a Legislature cannot do anything directly, it cannot do it indirectly; if a State Legislature cannot directly enact a law with respect to a certain matter, it cannot do so indirectly by simply adopting a law made with respect to it by another Legislature.

21. In the present case the State Legislature has not merely adopted a law made by another Legislature, it has made substantial modifications in it. Thus the case is worse than that of adopting a law made by another Legislature. When executive authorities are empowered to extend an Act beyond a certain area or a certain period with such modifications as they may think fit and they extend it with modifications, even then the Act is held to be an executive act and not a legislative act. But that is because the modifications are presumed to have been within the framework of the Act. - 'In re Delhi Laws Act, 1912 AIR 1951 SC 332 (H), Fazl Ali, J. said on pp. 359, 360 :

> The modifications are to be made within the framework of the Act and they cannot be such as to affect its identity or structure or the essential purpose to be served by it.
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> In his view "the power of introducing necessary restrictions and modifications is incidental to the : power to apply or adapt the law". The modifications effected by the State Legislature in the Amendment Act, however, stand on a different footing. The State Legislature was bound by no rule to make only such modifications as were within the framework of the principal Act. Besides the discretion given to modify an Act is said, to be by no means absolute or irrevocable in the strict legal sense.
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> The Legislature is always in a position to see how the powers, which it has conferred, are being exercised, and if they are exercised injudiciously or otherwise than in conformity with its intention or they result in any inconvenience, it can always by another Act recall its powers. See - Empress v. Burah, 3 Cal 63 at p. 140 (PB) (I)', and -- 'In re Delhi Laws Act, (H) supra, at p. 360. The State Legislature when it enacted the Amendment Act was under no such check by the Union Legislature that had passed the principal Act. Therefore it is not possible to apply the doctrine of such decisions as - 'In re Delhi Laws Act (H)', in the present case and hold that the State legislature has not made a law by passing the Amendment Act. When it was not empowered by any other legislature to pass it, it could not possibly have passed it but in exercise of the legislative powers conferred by Article 246 it could not claim to

have passed it in exercise of powers conferred by any enactment,

22. I hold the Amendment Act to be 'ultra vires' the U. P. State Legislature.

23. The Amalgamation Order, Clause 17(c) lays down that "references in any Indian Law to either of the existing High Courts by whatever name shall, unless the context otherwise requires, be construed as reference to the new High Court". So it was contended on behalf of the opposite-parties that the reference to the High Court of Judicature at Allahabad in Section 1(2) of the principal Act would be construed as reference to the new High Court, that consequently the principal Act would apply to the new High Court and that even if the Amendment Act were declared to be 'ultra vires' the State Legislature, it would make no difference and the applicant would be bound to pay the fee if he wanted himself to be enrolled as an Advocate. The Amalgamation Order is to have effect "subject to any provision that may be made on or after the appointed day with respect to the new High Court by any Legislature or authority having power to make such provision" (see clause 18).

As the Amendment Act has been held to be 'ultra vires' and as no other provision has been made by any Legislature or authority having power to make such provision, the Amalgamation Order remains in force. It follows that Section 1(2) of the principal Act refers to the new High Court. But that seems to me to be the only effect; it has not the effect of conferring a power upon the new High Court to do afresh everything that the old High Court was empowered to do. Whenever the words, "The High Court of Judicature at Allahabad" are used in the Act they may be Interpreted to refer to the new High Court but it is quite a different thing to say that whatever the old High Court was required to do has to be done over again by the new High Court as the result of this interpretation and clause 17(c).

The provisions of the Act which require the High Courts to which it applies, to do certain acts use the words "High Court" and not "The High Court of Judicature at Allahabad." Therefore those provisions are not affected at all by Clause 17(c) and there arises no question of the new High Court's doing again or afresh what the old High Court was required to do. The clause simply interprets the words "the High Court of Judicature at Allahabad", and does not confer any powers upon the new High Court. There existed the Bar Councils at Allahabad and at Lucknow and so long as they were not dissolved, another Bar Council could not be created. The principal Act did not contain any provision for dissolution of a Bar Council. There cannot possibly be two Bar Councils for the same High Court under the Act. Therefore even if it could be said that the clause empowered the new High Court to do over again all the acts that were to be done by the old High Court, the context requires that a new Bar Council cannot be created so long as the old Bar Councils exist.

The proviso to clause 8(2) or the Amalgamation Order lays down that-

any person who, immediately before the appointed day, is an Advocate entitled to practise... in either of the existing High Courts, shall be recognized as an Advocate ...entitled to practise ...in the new High Court.

Thus the Amalgamation order itself preserved to all the Advocates the right to practise in the new High Court. Consistently with that provision it cannot be said that the right to practise in the new High Court depends upon fresh enrolment by a new Bar Council. The applicant had the right to practise in the old High Court on the appointed day and the proviso to Clause 8 (2) continued that right. Clause 17 (c) must be read in such a manner as to continue that right. In other words, it does not contemplate the creation of a new Bar Council and preparation of a new roll of Advocates of the new High Court. If a new roll is not to be prepared, there arises no question of payment of any fee. If the applicant's right to practise in the new High Court continued by the proviso to Clause 8(2), it cannot be made dependant upon his paying any fee. In the result I find that the Amalgamation Order does not authorise the preparation of a new roll of Advocates and the demand of a fee from those wishing to practise in the new High Court.

24. The applications must be granted and a writ of 'mandamus' should be issued to the opposite-parties 1 and 2 directing them to include or retain the name of the applicant in the roll of Advocates without his having to pay any sum of money. As the main dispute in the case was about the constitutionality of the U.P. Amendment Act and as it has been decided against opposite-party No. 3, I think the applicant should get his costs of these proceedings from it.

B. Mukerji, J.

25. I agree.