

## POWER TO ACQUIRE PROPERTY

*R. S. Gae\**

SINCE 1950 the power of acquisition has been invoked frequently by Parliament and State Legislatures. This power has been the subject-matter of litigation in a large number of cases both before the Supreme Court as well as the High Courts. In the short time available at my disposal I shall deal with some of the aspects regarding the power of acquisition of property by Parliament and State Legislatures. This speech is not intended to deal with article 31(2) of the Constitution imposing restrictions and limitations on the power to acquire property.

The power of acquisition under the Constitution is contained in one entry, namely, entry 42 of the Concurrent List. It provides for "the acquisition and requisitioning of property", and thus both Parliament and State Legislatures are competent to make laws with regard to the said subject-matter. As the entry deals with acquisition of property, interesting questions of constitutional law arise as to whether Parliament can acquire any property for any public purpose whatsoever including the state purpose and similarly the State Legislatures can acquire any property for any public purpose including the Union purpose.

In this connection I would first of all point out briefly the history regarding entry 42 of the Concurrent List, which was substituted by the Constitution (Seventh Amendment) Act, 1956 for the original entry. Before the entry was amended the Constitution contained three separate entries, namely, (1) entry 33 of the Union List which empowered Parliament to make laws with respect to "acquisition or requisitioning of property for the purposes of the Union", (2) entry 36 of the State List which empowered the State Legislatures to make laws with respect to "acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III" and (3) entry 42 of the Concurrent List which dealt with "principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given." As already observed by me by the Seventh Amendment entry 42 of the Concurrent List was amended and entry 33 of the Union List and entry 36 of the State List were omitted.

It has been urged that as the present entry 42 of the Concurrent List does not contain any reference whatsoever regarding the acquisition of

---

\* Law Secretary, Government of India. The present article is based on the speech delivered at The Indian Law Institute on March 4, 1971.

property for the purposes of the Union or for the purposes of the State or for any other public purpose, Parliament can acquire property for any public purpose whatsoever even including the purposes of the State. In my view, as I shall shortly point out, such a construction of the constitutional provisions is against the scheme of the Constitution and the federal structure on which our Constitution is framed. It also goes against the scheme of distribution of legislative powers between Parliament and State Legislatures.

The purpose of acquisition has gained importance regarding industries. As you are all aware some time back there were interesting debates both in Parliament and State Legislatures on the question as to whether Parliament is competent to acquire any property for a State purpose. So far as industries are concerned the power of legislation in this behalf is vested in the State Legislatures under entry 24 of the State List, but at the same time this power is subject to the provisions of entries 7 and 52 of the Union List. Entry 7 is not relevant in the present case. Entry 52 empowers Parliament to make laws with respect to industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Reading entry 24 of the State List along with entry 52 of the Union List, it is clear that the power of the State Legislatures to make laws with respect to industries is limited and is subject to the power of Parliament under entry 52 of the Union List.

Once the declaration is made regarding any industry the control of which is declared by Parliament by law to be expedient in the public interest, the industry in respect of which such a declaration is made is taken outside the purview of the legislative power of the State Legislatures and becomes subject to the legislative power of Parliament. The legislative power of the State Legislatures to make laws with respect to industries so declared is taken outside their purview and is so to say, included in the Union List and becomes the power of Parliament. Thus once a declaration is made by Parliament by law regarding an industry under entry 52 of the Union List, the legislative power in respect of the controlled industry as a whole is divested from the State Legislatures and is vested in Parliament. In such an event, Parliament acquires an exclusive power to make laws with respect to the controlled industry as a whole and in all its aspects and to that extent the power of the State Legislatures is taken away from the State List.

If an industrial undertaking is to be acquired, the acquisition may be for a Union purpose or a State purpose. In view of entry 42 of the Concurrent List a law relating to the acquisition of industrial undertakings can be enacted by Parliament as well as State Legislatures. The question arises as to whether there is any demarcation of the power available in this behalf, insofar as an industry is declared by Parliament by law to be one the control of which by the Union is expedient in the public interest or is in other words a controlled industry. Once such a declaration is made by Parliament, the legislative power available to State Legislatures

in this behalf under entry 24 of the State List is as already pointed out by me taken away from them and becomes exclusively available to Parliament. When an industrial undertaking pertaining to a controlled industry is to be acquired, the power of acquisition in this behalf is available only to Parliament. The acquisition in such a case would be acquisition for the purpose of the Union, namely, the purpose specified in entry 52 of the Union List. Hence the conclusion is inevitable that once an industry is declared by Parliament by law to be a controlled industry the acquisition of industrial undertakings pertaining to such industry can only be made by Parliament by law by virtue of the power available to it under entry 42 of the Concurrent List as read with entry 52 of the Union List. In other words 'acquisition of property' under the former entry can only be made by the appropriate Legislature for a purpose which falls within its legislative field.

I will next point out the serious consequences which may ensue if the constitutional position as explained above be not accepted. It is apprehended that in such a case State Legislatures could nationalise controlled industries, even though the declaration regarding such industries has been already issued by Parliament by law under entry 52 of the Union List. Thus the State Legislature of U.P. could nationalise the sugar industry, the State Legislature of Bihar could nationalise the iron and steel industry, the State Legislature of Maharashtra or Gujarat could nationalize the textile industry, the State Legislature of Assam could nationalize the tea industry, the State Legislature of Mysore could nationalise the coffee industry, etc., even though all these industries are controlled industries by virtue of the declarations issued by Parliament by law under entry 52 of the Union List. If the power of acquisition in respect of the industries which are declared as controlled industries be available to State Legislatures, it is not difficult to visualise the difficulties which might arise on nationalisation of such industries by them. The well-known rule of construction of constitutional entries is that the entries in Legislative Lists should be construed harmoniously so as to give full force and effect to all the provisions contained therein, having regard at the same time to the federal structure of the Constitution. The construction of Legislative entries as proposed above would seriously affect the federal structure of the Constitution. This could hardly be within the purview of the scheme of the Constitution as enacted by the Constituent Assembly and such a construction should not for obvious reasons be accepted.

The source of the legislative power for acquisition of property is contained in entry 42 of the Concurrent List. However, this power is not exclusive, but is subject to certain qualifications and limitations imposed by the Constitution for the purpose. Some of the limitations imposed in this behalf are contained in article 31(2) of the Constitution. One of the limitations imposed by that article is that compulsory acquisition of property must be for a public purpose. Other limitations are not relevant

for the purpose of this speech. Regarding the meaning of 'public purpose', suffice it to say that it is the presence of the element of the general interest of the community in an object, as opposed to the particular interest of the individual, that transforms such object into a public object. 'Public purpose' as used in article 31(2) includes the purpose of the Union and the purpose of the State. The Union purposes and State purposes are treated as species of public purposes. Union purposes are purposes relating to matters as to which the Union Parliament or the Union executive is entitled to exercise legislative or executive powers. Similar definition may be given to the purposes of the State. The acquisition of industrial undertakings pertaining to a controlled industry would be an acquisition of property for the purpose of the Union, namely, the purpose contemplated by entry 52 of the Union List and hence Parliament alone would be competent to make laws in the matter.

If the view be taken that Parliament is competent to acquire any property for any public purpose whatsoever, whether the purpose be a purpose of the Union or a purpose of the State, that would lead to anomalous results. On the basis of this proposition Parliament can acquire by law undertakings pertaining to minor ports, even though 'minor ports' is a subject included in the State List. Similarly Parliament can acquire by law undertakings pertaining to fishery, even though 'fishery' is a subject included in the State List. Parliament can also acquire by law Writers Building at Calcutta where the Secretariat of the Government of West Bengal is functioning and thereby paralyse the effective functioning of the State Government. Parliament can also acquire by law any agricultural land whatsoever, even though 'land' forms a part of the State subject. The Centre can thus make a great deal of inroads into the autonomy of a State and *vice versa*. Any such construction of the entries in Legislative Lists would lead to serious conflicts between the Union and the States. The construction of the provisions contained in the Constitution should be such as to avoid as far as possible any conflict between the Union and the States. It should be such as to give full force and effect to the various provisions contained in the Constitution.

Applying the above principles of construction well-known in the constitutional law, the conclusion is irresistible that Parliament has exclusive power to make laws to acquire property only for Union purposes and that State Legislatures have exclusive power to make laws to acquire property only for State purposes. In other words acquisition of property under entry 42 of the Concurrent List can only be made by the appropriate Legislature for a purpose which falls within its legislative field.

I shall next deal with article 298 of the Constitution. This article was also amended by the Constitutional (Seventh Amendment) Act, 1956, It now provides that the executive power of the Union and of the States shall extend to the acquisition, holding and disposal of property for any purpose whatsoever. Further the executive power of the Union in so far as the purpose relates to the State legislative power is subject in each State to

laws made by the State Legislature and *vice versa*.

It may be urged that when Parliament has amended article 298 providing that the acquisition of property can be made for any purpose, the article empowers the Union and the States to acquire property for any public purpose whatsoever, whether or not such acquisition relates to a matter within the legislative competence of Parliament or a State Legislature, subject no doubt to any law enacted by the appropriate Legislature for the purpose. Article 298, merely extends the executive power of the Union and States and has nothing to do with the legislative power of Parliament or State Legislatures regarding 'acquisition of property', being the subject-matter dealt with by entry 42 of the Concurrent List. In my view it is not correct to say that article 298 as now worded means that Parliament can acquire by law any property for any public purpose including the State purpose and that State Legislatures can acquire by law property for any purpose including the Union purpose. The view that the acquisition of property can only be made by an appropriate Legislature for a purpose falling within its legislative field seems to gain support from some of the observations made by the Supreme Court in the majority judgment in the *Bank Nationalisation case*. It would be out of place to go into this aspect of the matter in detail in this speech.

We have already seen that the power to acquire property may be exercised concurrently by the Union and the States. In order to avoid the conflicting exercise of power in this behalf the founding fathers of the Constitution deemed it proper to impose some restrictions or limitations on the power of State Legislature regarding the enactment of laws for compulsory acquisition of property as referred to in article 31(2) of the Constitution. For the purpose of article 31(3) it provides that any such law shall not be effective, unless it has been reserved for the consideration of the President and has received his assent. The main object of this provision is to see that such law does not come into conflict with any existing law or a law made by Parliament. If such law comes into conflict with any existing law or a law made by Parliament, the President may be well advised by his Council of Ministers that he should withhold his assent thereto. Thus the conflict regarding the exercise of powers of acquisition in respect of the same subject-matter simultaneously by the Union and the State can be avoided by having recourse to the said article. In other words in so far as the acquisition of property by the States is concerned the Constitution itself provides safeguards in the matter. There are no such safeguards provided where the acquisition of property is by the Union.

At the same time a note of caution is essential in the matter. In spite of article 31(3), it is felt that in practice it would not be appropriate on the part of the President to withhold his assent in every case of a State legislation regarding acquisition of an industrial undertaking, simply because the acquisition relates to an industry, the control of which by the Union is declared by Parliament by law to be expedient in the public

interest. If he does so, that would lead to a conflict between the Union on the one hand and the States on the other, more so when the Ministries in some of the States belong to political parties different from the political party in power at the Centre. In a federation it is essential that such conflicts are as far as possible avoided. Frequent invoking of the President's power on the advice of his Ministry to withhold his assent to State Bills under article 31(3) would seriously go to affect the Centre-State relationship and thereby hamper the smooth functioning of democracy in the country. This should be avoided.

You are aware that last year interesting discussions took place both in Parliament and the State Legislature of U.P. regarding the nationalisation of sugar industry in that State. Though there is some conflict of views on the subject, I would briefly explain the constitutional position as I understand the matter. 'Sugar' is one of the scheduled industries, *i.e.*, an industry as to which the declaration has been made by Parliament. The declaration as to the expediency of control by the Union as contemplated by entry 52 of the Union List has been made by section 2 of the Industries (Development and Regulation) Act, 1951. Such declarations have been also made by other statutes. The Act of 1951 specifies broadly in a schedule various industries under 38 headings, sugar being one of them. On a careful analysis of constitutional provisions it follows that the acquisition of industrial undertakings pertaining to the sugar industry can only be made by Parliament by law, under entry 42 of the Concurrent List as read with entry 52 of the Union List.

In this connection the question arises whether it would be competent for Parliament to nationalise the sugar industry in one or more States only. It is now well settled that though article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. Such classification must be based on intelligible differentia which distinguish persons or things grouped together from others left out of the group and such differentia must have a reasonable relation to the object sought to be achieved by the statutory provision in question. The classification may be based on geographical considerations or it may have reference to objects or occupations or the like. Where the application of unequal laws is reasonably justified for historical reasons, a geographical classification founded on these historical reasons would be upheld. Having regard to these principles, special features pertaining to the sugarcane grown in one or more States, the quality of sugar produced in the State, development and benefit to the sugar industry in the State, financial position relating to sugarcane factories, the machinery by which the sugar is produced and other similar considerations may form the basis of a valid classification for the purposes of article 14. In some such circumstances it would be competent for Parliament to enact laws for acquisition of industrial undertakings pertaining to the sugar industry in one or more States. Thus the nationalization of the sugar industry in one or more States

is permissible and it is not necessary that such nationalization should be made for the whole country.

The next question is whether the nationalization of controlled industries can be made only in the joint-stock sector. In this connection the Directive Principles of State Policy contained in article 43 of the Constitution may be noted. This article provides that the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas. Differential treatment of co-operative societies has been upheld by the Courts in several cases. In view thereof acquisition of industrial undertakings pertaining to a controlled industry in the joint-stock sector, leaving out the co-operative sector, is based on a valid classification and is not, therefore, discriminatory under article 14 of the Constitution.

The further question is whether the acquisition or compulsory transfer of the industrial undertakings pertaining to a controlled industry from the joint-stock sector to the co-operative sector is permissible under the Constitution. Article 31(2A) refers to the definition of compulsory acquisition of property. There must be the transfer of ownership of the property to the State or to a State-owned corporation. If a property is compulsorily transferred to a person other than the State or a State-owned corporation, that cannot be treated as compulsory acquisition of property within the meaning of the said article. Though the concept of compulsory acquisition of property is known to the Indian law, the concept of a 'compulsory transfer' of property from one person to another is not known to our system of law. In view thereof any law regarding the compulsory transfer of property from the joint-stock sector to the co-operative sector would amount to deprivation of property as contemplated by article 31(1) and would not, therefore, be competent unless the tests laid down in article 19(5) are duly complied with. For the purpose it must be shown that the restrictions provided by the law are reasonable restrictions imposed in the interests of the general public.

Before I may end my speech I would summarise my conclusions on the subject of 'power to acquire property' under the Constitution as under:—

(1) Parliament can acquire by law under entry 42 of the Concurrent List property for a purpose relating to any matter enumerated in the Union List.

(2) State Legislatures can acquire by law under the said entry property for a purpose relating to any matter enumerated in the State List.

(3) Parliament and State Legislatures can both acquire by law under the said entry property for a purpose relating to any matter enumerated in the Concurrent List.

(4) On Parliament making a law declaring that it is expedient in the public interest that the Union should take under its control specified industries as contemplated by entry 52 of the Union List, the industries so declared and covered by law made for the purpose are virtually taken out of the State List and put in the Union List.

(5) Declaration as contemplated by entry 52 of the Union List has

been made by section 2 of the Industries (Development and Regulation) Act, 1951, whereby the industries specified in the First Schedule to that Act came under the control of the Union and thus became controlled industries. There are other Acts too which have made similar declarations.

(6) Once the declaration is made by Parliament under entry 52 of the Union List, the legislative power in respect of all matters relating to a controlled industry is divested from the State Legislatures and is vested in Parliament.

(7) Article 298 does not mean, and cannot be construed to mean, that Parliament or a State Legislature can enact a law acquiring any property for any purpose of the Union or for any purpose of the State respectively.

(8) Acquisition of property made under entry 42 of the Concurrent List in relation to a controlled industry is the acquisition of property for the purpose of the Union, namely, the purpose of the matter contained in entry 52 of the Union List.

(9) Parliament alone and not the State Legislatures, would be competent to make laws with respect to acquisition of industrial undertakings pertaining to a controlled industry.

(10) Acquisition of individual industrial undertakings pertaining to a controlled industry in one or more States would not attract the inhibition of article 14 if such acquisition is based on a valid classification made for the purpose, such as on geographical or historical considerations.

(11) Acquisition of industrial undertakings pertaining to a controlled industry in the joint-stock sector only, leaving out the co-operative sector, would not necessarily be discriminatory under article 14 of the Constitution.

(12) Compulsory transfer of industrial undertakings pertaining to a controlled industry from the joint-stock sector to the co-operative sector would amount to deprivation of property, requiring compliance with the provisions of article 31(1) and would not be competent unless the tests laid down in article 19(5) are also complied with.

In the end it may be added that the question regarding the power of Parliament to compulsorily acquire property for any public purpose whatsoever was actually raised in the Supreme Court in the *Bank Nationalization case*. However, it was left open and not answered by the Court. Having regard to the discussions held in the Supreme Court and the way in which the constitutional provisions have been construed by the Court, the conclusion in my view seems to be that Parliament is competent to acquire property only for Union purposes and similarly State Legislatures are competent to acquire property only for State purposes. Though as observed above this view gains support from some of the observations made by the Supreme Court in the said case, the issue will no doubt have to be decided by the Court in future and the law declared by it on the subject will be binding on all the Courts.