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I have made a reference to sub-clause (iii) of clause 4 of the Punjab Control of Bricks Supplies Order, 1956, and I find that this order cannot be justified thereunder. There is no provision in the Control Order or in the rules made thereunder authorising the District Magistrate to refuse the grant of licence on the basis on which he has done and none has been pointed out to me by the learned counsel for the State. Therefore it is obvious that the refusal to grant the licence is wholly against law. The record smacks of the way in which the petitioner has been unjustly persecuted.

The result therefore, is that this petition is allowed and the District Magistrate is directed to grant the necessary licence to the petitioner. The petitioner will have his costs of this petition which are assessed at Rs. 50.

B.R.T.

FULL BENCH

Before S. S. Dulat, Inder Dev Dua and Daya Krishan Mahajan, JJ.

PRITAM KAUR,—*Appellant.*

versus

THE STATE OF PEPSU AND ANOTHER,—*Respondents.*

Letters Patent Appeal No. 22 of 1958

1962
———
June, 1st

Pepsu Court of Wards Act (No. 1 of 2008 Bk.)—Section 5(2)—Whether ultra vires *the Constitution of India—*Res judicata*—Decision by Court without jurisdiction—Whether operates as* res- judicata—Obiter dictum—*Whether operates as* res judicata—*Objection as to* res-judicata—*Whether can be waived.*

Held, that section 5(2) of the Pepsu Court of Wards Act, 2008 Bk., is *ultra vires* the Constitution. It is only the subjecive satisfaction of the Government or of the Deputy Commissioner which deprives the citizens of their property. The Act provides no machinery whereby any

right is granted to the citizens to agitate against that deprivation. There is no provision which allows them even to represent against the deprivation or to show that the conditions mentioned in sub-section (2) of section 5 of the Act are not satisfied and, therefore, their estate cannot be taken possession of by the Court of Wards. No right of appeal or revision is provided in the Act against an order passed under section 5 of the Act. That being so, it must be held that section 5(2) of the Pepsu Court of Wards Act offends Article 19 of the Constitution. Clause (a) of section 5(2) of the Act is also *ultra vires* Article 15 of the Constitution as it discriminates against a female on the ground of sex alone.

Held, that before a decision can operate as *res-judicata*, it must be a decision of a Court having jurisdiction.

Held, that a mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is an *obiter dictum* and cannot be said to be a decision on any issue, and is, therefore, not *res judicata*.

Held, that an objection based on the rule of *res judicata* can be waived.

Case referred by a Division Bench consisting of Hon'ble the Chief Justice G. D. Khosla and the Hon'ble Mr. Justice D. K. Mahajan, on 13th September, 1960, to the larger bench for decision of some important points involved in the case. The case was finally decided by the full bench, consisting of The Hon'ble Mr. Justice Dulat, Hon'ble Mr. Justice Dua and Hon'ble Mr. Justice Mahajan.

Letters Patent Appeal under Clause X of the Letters Patent of the Punjab High Court, Chandigarh, against the order, dated the 27th September, 1957, of Hon'ble Mr. Justice Bishan Narain, rejecting the appellant's petition (C.M. No. 163/P of 1956) under Article 226 of the Constitution of India.

K. N. TEWARI, ADVOCATE, for the Appellant.

C. D. DEWAN, ASSISTANT ADVOCATE-GENERAL, for the Respondents.

JUDGMENT

Mahajan, J.

MAHAJAN, J.—This is an appeal under Clause 10 of the Letters Patent and is directed against the order of Bishan Narain, J. passed in a petition under Article 226 of the Constitution praying that the estate be released from the Court of Wards on the ground that section 5(2) (a) of the Pepsu Court of Wards Act (No. 1 of 2008 Bk.) is *ultra vires* the Constitution of India. This appeal came up before me while sitting with the Chief Justice on the 13th of September, 1960, and it was ordered that it should be heard by a larger Bench. Consequently, this matter has been placed before the Full Bench.

The petitioner-appellant is one Smt. Pritam Kaur, widow of Mukand Singh, who was murdered on the 11th of April, 1928. Mukand Singh at the time of his death was possessed of considerable landed and house property. He left landed and other property in various villages in the erstwhile Jind State. He was survived on his death by two widows, that is, Smt. Pritam Kaur and Smt. Pavittar Kaur and three daughters from Smt. Pavittar Kaur. At the instance of Smt. Pavittar Kaur the Judicial and Home Committee of the erstwile State of Jind proposed on the 1st of June, 1928, that the estate of Mukand Singh should be placed under the superintendence of the Court of Wards. This proposal was accepted by the Cabinet of that State,—*vide* its order dated the 5th of July, 1928, with the result that the estate of Mukand Singh was taken possession of by the Court of Wards Jind State.

After the independence of India, the Rulers of the various East Punjab States including the State of Jind entered into a covenant whereby these States formed themselves into a Union known as the Patiala and East Punjab States Union. In pursuance of this covenant, Ordinance No. 1 of 2005 Bk. (The Patiala and East Punjab States Union Administration Ordinance, 2005 Bk.)

was promulgated. Section 3 of this Ordinance reads thus:—

"3. As soon as the administration of any Covenanting State has been taken over by the Raj Pramukh as aforesaid, all Laws, Ordinances, Acts, Rules, Regulations, Notifications, Hidayats, Firmans-i-Shahi, having force of law in Patiala State on the date of commencement of this Ordinance shall apply *mutatis mutandis*, to the territories of the said State and with effect from that date all laws in force in such Covenanting State immediately before that date shall be repealed :

Provided that proceedings of any nature whatsoever pending on such date in the courts or offices of any such Covenanting State shall, notwithstanding anything contained in this Ordinance or any other ordinance; be disposed of in accordance with the laws governing such proceedings in force for the time being in any such Covenanting State."

According to this Ordinance after the 20th August, 1948, all Jind laws had to come to an end and the Patiala laws were to become applicable. See in this connection section 1 and the preamble to the Ordinance). Thus after the 20th of August, 1948, the Court of Wards Jind State could not retain possession of the property of the petitioner and her co-widow. This Ordinance was replaced by the Patiala and East Punjab States Union General Provisions (Administration) Ordinance, 2005 (XVI of 2005 Bk.). Section 3 of the Ordinance No. 16 of 2005 Bk. is in these terms:—

"3. (1) As from the appointed day, all laws and rules, regulations, bye-laws and notifications made thereunder, and all other provisions having the force of

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law, in Patiala State on the said day shall apply, *mutatis mutandis,* to the territories of the State and all laws in force in the other Covenanting States immediately before that day shall cease to have effect:

Provided that all suits, appeals, revisions, applications, reviews, executions and other proceedings, or any of them, whether civil or criminal or revenue, pending in the Courts and before authorities of any Covenanting State shall, notwithstanding anything contained in this Ordinance, be disposed of in accordance with the laws governing such proceedings in force in any such Covenanting State immediately before the appointed day.

(2) * * * * *"

So far as the estate of the petitioner and her co-widow is concerned the Revenue Department of the Patiala and East Punjab States Union issued a notification (No. 58, dated the 20th of September, 1950) whereby the Deputy Commissioner, Sangrur, was to be in charge of the property of late Mukand Singh of Sangrur brought under the superintendence of the Court of Wards,—*vide* erstwhile Jind State Cabinet's order dated the 5th of July, 1928, on behalf of the Courts of Wards. This notification was published in the Pepsu gazette on the 1st of October, 1950. In the meantime the Constitution of India had come into force. The law under which the possession of the petitioner and her co-widow's estate was retained was the Patiala law or later on the Pepsu law. So far as both these enactments are concerned, their provisions are identical. The only difference is that certain consequential amendments have been made in the later enactment in view of the corresponding constitutional changes in the set-up to which the later law was to govern. It is not necessary to notice the various provisions of the Patiala Court

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of Wards Act, 2000 Bk., because, as I have already said, they are identical with the provisions of the Pepsu Act. Both the Acts relate to the same subject. The Pepsu Act by section 2 repealed the Patiala Act, 2000 Bk., and provided:—

> "Provided that all rules and appointments made, notifications and orders issued, authorities and powers conferred, farms and leases granted, rights acquired, liabilities incurred and other things done under the Act hereby repealed shall so far as may be, be deemed to have been, respectively, made, issued, conferred, granted, acquired, incurred and done under this Act."

Section 3(d) of the Pepsu Act defines landholder in the following terms:—

> "3(d).—'land-holder' means a person who possesses any interest in land, whether as proprietor, assignee of the land revenue, lessee of waste lands or otherwise;"

The impugned provision of this Act is section 5, which runs thus:—

> "5. (1) Any land-holder may apply to the Government to make an order directing that his property be placed under the superintendence of the Court of Wards, and, upon receiving any such application, the Government may, if it considers it expedient in the public interest so to do, make an order accordingly.
>
> (2) When it appears to the Government that any land-holder is—
>
> (a) by reason of being a female, or
>
> (b) * * * * * *
>
> (c) * * * * * *
>
> (d) * * * * * *

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incapable of managing or unfitted to manage his affairs, the Government may make an order directing that the property of such land-holder be placed under the superintendence of the Court of Wards:

Provided that such an order shall not be made on the ground stated in clause (c) or on the grounds stated in clause (d) unless such land-holder belongs to a family of political or social importance and the Government is satisfied that it is desirable, on grounds of public policy or general interest, to make such order.

(3) * * * * *".

The only other provisions that need be noticed are sections 11, 12 and 52 and they are in these terms:—

"11(1) For the purpose of satisfying himself as to whether, in respect of any land-holder,—

(a) the Government should be moved to make an order under sub-section (2) of section 5, or

(b) the Court of Wards should be moved to make an order under section 6, or for the purpose of making any report which may be called for in connection with any application of a land-holder under sub-section (1) of section 5, the Deputy Commissioner may make such inquiry into the circumstances of such land-holder as he may deem necessary, and, pending the taking of any such action, may issue such orders for the temporary custody and protection of the person or property, or both, of such land-holder, as he thinks fit.

(2) If the land-holder is a minor, the Deputy Commissioner may direct that the

person if any, then having the custody of the minor, shall produce him, or cause him to be produced, at such place and time as the Deputy Commissioner appoints, and may make such order for the future custody of the minor, pending the orders of the Court of Wards, as he thinks proper.

(3) If the minor is a female, who ought not to be compelled to appear in public, the direction under sub-section (2) shall require her to be produced in accordance with the manner and customs of the country.

(4) If the land-holder is alleged to be or is of unsound mind, the Deputy Commissioner shall make application to a competent Court with a view to an enquiry being made by such Court for the purpose of ascertaining whether such person is or is not of unsound mind and incapable of managing his affairs".

"12(1) For the purposes of every enquiry to be made or direction to be given, in pursuance of any of the provisions of this Act, the Deputy Commissioner may exercise all or any of the powers of a civil Court under the Code of Civil Procedure, 1908, in force *mutatis mutandis*, in the State."

"52(1) No suit shall be brought in any civil Court in respect of the exercise of any discretion conferred by this Act.

(2) No suit shall be brought against any officer or Government or any guardian, manager or servant appointed by and discharging the duties under a Court of Wards for anything done by him in good faith under this Act."

The rule-making section is section 54 and it is common ground that no rules have been framed under this Act and none was shown to us.

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The present petition was filed on the 3rd of October, 1956, and was dismissed by Bishan Narain J. on the 27th September, 1957. The learned Judge while dismissing the petition made the following observations with regard to the *vires* of section 5(2)(a) of th Pepsu Act:—

> "The provisions of law under which the present estate was taken under the Court of Wards in 1928 are not before me. The order of the 11th of April, 1928, does not in terms comply with section 5(2)(a) of the Act. In the absence of those provisions it is impossible to hold that the estate was taken under the superintendence of the Court of Wards under an Act which contravened the Constitution. It is impossible in the absence of those provisions of law to hold that the order in question is illegal as was suggested by the learned counsel in the course of his argument. I must, therefore, take it that the order of the 11th of April, 1928, is in accordance with law which was in force at that time. In any case, as was held by a Division Bench of this Court in *Raja Harmahendra Singh* v. *The Punjab State and another* (1), a valid order passed prior to the Constitution cannot become invalid merely because by the Constitution of India the Act has become *ultra vires*. A provision of law cannot be held to be *ultra vires* when I have not got its terms before me. * * * * * We are not concerned with the Pepsu Court of Wards Act in the present case. We are only concerned with the Jind Court of Wards Act as it was in force in 1928. The notification was under the Patiala Act and its validity has not been challenged in the petition or before me."

The learned Judge also held that the petition must fail because it was filed after an inordinate delay,

(1) A.I.R. 1953 Punjab 30.

i.e., nearly six years after the coming into force of the Constitution. Against this decision the present Letters Patent appeal has been preferred.

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At this stage it is also necessary to advert to another petition filed by this very petitioner, which is Civil Writ No. 794 of 1958 filed on the 29th of July, 1958. The main grievance in this petition was that the other widow, Smt. Pavittar Kaur, in collusion with the State of Punjab and the Financial Commissioner started to draw out funds with a view to prejudice and harm the rights of the petitioner. Thereafter the various sums that were drawn are mentioned and it is further stated that the petitioner applied to the State of Punjab and the Financial Commissioner that the other widow be not permitted to withdraw sums disproportionate to her share. In paragraph 23 of this petition, it is stated that the action of repondents 1 and 2 in making payment of Rs. 40,000 to respondent 3 and withholding the same amount from the petitioner *is ultra vires,* without jurisdiction, *mala fide,* hostile, discriminatory, and with bad motive on, amongst others, the following grounds. In the grounds, all possible objections were raised including the objection as to the *vires* of the Pepsu Court of Wards Act and in the end the folowing prayers were made:—

"(1) that the petitioner and respondent No. 3 being co-widows and owners in equal share of the property there is no basis in law or equity to discriminate between the case of petitioner and respondent No. 3;

(2) that it is feared that the Court of Wards if abolished without carrying out the requests as demanded by the petitioner would be in a bankrupt state of affairs leaving no funds for the use of the petitioner; and

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(3) that respondent Nos. 1 and 2 are under the influence of respondent No. 3 because of her relationship with the Chief Minister of Punjab, and as such they are dissipating the funds and passing them on by objectionable methods to respondent No. 3 in order to deprive the petitioner of her legitimate rights."

This petition came up for hearing before Chopra J. on the 27th of May, 1959, and was dismissed. The first prayer was rejected and it is not necessary to state the reasons for its rejection because they have no bearing on the present matter. With regard to the second prayer, which really embraced the *vires* of the Pepsu Act, the learned Judge observed as under:—

"The second prayer for release of the property from the superintendence of the Court of Wards has, in a way, become infructuous. As already noticed, respondents Nos. 1 and 2 have already agreed and decided to release the property and proceedings for implementing the decision are being taken. In the circumstances, the question of the vires of the Act becomes merely of an academic character."

In spite of this decision, the learned Judge went on to consider the vires of the Act and came to the conclusion that the Pepsu Act had no application to the facts of the case and as the possession of the land had been taken under the Jind Act, the vires of which were not called in question and also could not be called in question, it being a pre-constitutional law whereunder the petitioner had been dispossessed; the subsequent taking over the property by the notification of 1950 was merely an implementation of that order and not a fresh taking over of property. In this connection reliance was placed on the following observations of

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Mahajan J. (as he then was) in *Keshavan Madhavan Menon* v. *The State of Bombay* (2).

> "A citizen must be possessed of a fundamental right before he can ask the Court to declare a law, which is inconsistent with it, void; but if a citizen is not possessed of the right, he cannot claim this relief."

While dealing with section 5(2)(a) of the Pepsu Act, Chopra J. observed as under:—

> "Even if it be conceded that the order of assumption ought to be deemed to have been made under section 5 and its validity is open to challenge, I do not agree with the counsel that the order should be deemed to have been made under either of the two said clauses of the section. As already noticed, the order was made on some application presented by one of the two widows of S. Mukand Singh. The application is not now before us and we do not know its contents any more than what is contained in the order itself. It may not therefore, be possible to say that the order was not made on an application of the 'land-holder', as provided by sub-section (1) of section 5, or that it cannot be deemed to have been made under that or some other such provision of law. Constitutionality of sub-section (1) of section 5 is not being questioned. For that reason also the question of the constitutionality of clauses (a) and (b) of section 5(2) does not arise. Section 5(2), particularly, has no bearing to the facts of this case, as no reference to the 'land-holder' being a female and, therefore, 'incapable of managing or unfitted to manage her affairs' was made in the order."

(2) A.I.R. 1951 S.C.R. 228.

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With regard to the third prayer, the following observations were made by the learned Judge;—

> "As regards the last prayer, it is submitted that respondents Nos. 2 and 3 having now decided to release the property from their superintendence, they should be directed to take into account the excess payments made to respondent No. 3 and then to divide the property into equal shares. *Prima facie* the claim does appear to be just and equitable. However, the question remains whether any relief, on the basis of it, can and ought to be granted in this petition and at this stage of the proceedings before the Court of Wards. The Court of Ward's position is that the matter of accounting, division of the properties and extent of the respective shares of the claimants is being considered in the light of the order of assumption and the provisions of law on the point and no final decision has yet been arrived at. Respondent No. 3 disputes every bit of the petitioner's claim. In the circumstances, it would not be advisable, nay possible, to go into the merits of the claim or to express any opinion thereon. The question is one of fact on which the parties are not agreed and the matter is under consideration before the Court of Wards, which is possessed of the authority to decide it."

It will be in the fitness of things also to quote the concluding observations of the learned Judge. They are in these terms:—

> "I am inclined to agree that the Court of Wards has already taken too long over the matter, which does not seem to be very much complicated, and would express the hope that the proceedings shall be expedited and the matter decided

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without fear or favour and on no other considerations but merit."

It is in the year 1962 in the month of March that a notification releasing the estate from the Court of Wards has been issued. This notification would have made this petition infructuous, but for the fact that the learned counsel for the petitioner states that this notification is merely an eye-wash and the possession of the property has been handed over to the other widow to the detriment of the petitioner, in spite of a clear provision in the notification that it should be handed over to both the widows. An affidavit stating all these facts has been filed by the counsel for the petitioner whereby the notification releasing the estate does not give any relief to the petitioner, and, therefore, he prays that this petition be settled on the merits, and that is what has impelled us to decide this petition on the merits rather than to leave the matter for further controversy. It is noticeable that this petition which was filed in the year 1956 has taken nearly six years to get finally determined in this Court and we are not prepared now to leave the matter again in a nebulous state so that the authorities who decided to release the estate in the year 1959, as is clear from the decision of Chopra J. for reasons best known to them and which are quite patent, did not, in fact, release the same as late as March, 1962 may again adopt an attitude which may lead to further and unnecessary litigation.

This brings me to the contentions advanced by the learned counsel for the petitioner. His principal and the only contention is that section 5(2) of the Pepsu Act is *ultra vires* the Constitution. He urges that the petitioner has been deprived of the enjoyment of her property as a consequence of the notification of 1950 and, therefore, the same offends the provisions of Article 19(1)(f) of the Constitution and, therefore, violates the fundamental right of the petitioner guaranteed by the Constitution.

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Before the merits of the petition are considered in order to decide the principal question canvassed before us, it will be proper to dispose of a preliminary objection that has been raised by the learned counsel for the State. The objection is that the decision of Chopra J. in Civil Writ No. 794 of 1958 *inter partes* operates as *res judicata* and, therefore, concludes the appeal. The argument is that Chopra J., dealt with and decided the question of the vires of the Pepsu Act and, therefore, that decision which is *inter partes* operates as *res judicata* and the question that is now sought to be raised cannot be raised. Reliance is placed on a decision of the Supreme Court in *Daryao* v. *State of U.P.* (3). It is admitted that section 11 of the Code of Civil Procedure does not, in terms, apply but the general principles of *res judicata* being applicable, this Court cannot now in appeal decide the same question which was decided by Chopra J.

In order to settle the preliminary objection, it will be proper to set out the facts how the two petitions have proceeded. The present petition was filed on the 3rd of October, 1956. It was dismissed by Bishan Narain J. on the 27th of September, 1957. The present Letters Patent appeal was filed on the 12th of December, 1957. The petition which Chopra J. decided was filed on the 29th of July, 1958, and it was decided on the 27th of May, 1959. Bishan Narain J. had decided that the provisions of the Pepsu Act were not *ultra vires*.

Returning to the preliminary objection it is obvious that in view of the decision of Bishan Narain J., Chopra J. could not entertain and decide the same question. Therefore, Chopra J. had no jurisdiction to pronounce on the *vires of the* Pepsu Act. It seems that the decision of Bishan Narain J. was not brought to the notice of Chopra J. nor was it contended that the petition before Chopra J. at least regarding matters settled by Bishan Narain J. on the 27th of September, 1957,

(3) A.I.R. 1961 S.C. 1457.

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was incompetent. Therefore, the decision of Chopra J. on the matters settled by Bishan Narain J. would be without jurisdiction. See in this connection the observations of their Lordships of the Privy Council in *Joy Chand Lal Babu* v. *Kamalaksha Chaudhury* (4). Therefore, the decision of Chopra J., which in the circumstances must be held to be without jurisdiction, cannot operate as *res judicata*. It is not disputed that before a decision can operate as *res judicata*, it must be a decision of a Court having jurisdiction. Therefore, there is no merit in the preliminary objection.

There is another way of looking at the matter. I have already set out in detail how Chopra J. proceeded to decide the matter. The learned Judge held that in view of the Government's decision to release the estate from the Court of Wards the second prayer (*re* the *vires* of the Pepsu Act) had in a way become infructuous and in the circumstances the question of the *vires* of the Act was merely of an academic character. It will, therefore, be obvious that the decision on the *vires* of the Act by Chopra J. was merely *obiter* and, therefore, it cannot operate as *res judicata*. See in this connection the decision of the Privy Council in *Shankarlal Patwari* v. *Hiralal Murarka* (5), and page 300 of Chitaley's Civil Procedure Code, Vol. 1, where a large number of authorities are cited for the proposition that mere opinion of the Court on a matter not necessary for the decision of the case and not arising out of the issues before it is an *obiter dictum* and cannot be said to be a decision on any issue, and is, therefore, not *res judicata*. On this ground also the preliminary objection must be repelled.

There is also a third ground on which the preliminary objection must fail. When the matter came up for decision before Khosla C. J. and myself on 13th September, 1960, the objection

(4) A.I.R. 1949 P.C. 239.
(5) A.I.R. 1950 P.C, 80.

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as to *res judicata* was raised and in spite of it the matter as to the reconsideration of the *vires* of the Act was referred to the Full Bench with the observation that Chopra J. proceeded to decide the question after he had held that the decision on the same was not necessary. If that decision concluded the matter as is now contended, the reference to the Full Bench would have been meaningless and in any case the question would not arise. As the opposite party did not object to this course, it must be deemed to have waived the objection. It is not disputed and indeed cannot be, that objection based on the rule of *res judicata* can be waived. Thus on this ground also the objection fails.

Coming to the merits of the appeal, Bishan Narain J. refused to pronounce on the vires of section 5(2)(a) of the Act, on the ground that the estate was taken under the provisions of the Jind Court of Wards Act, which Act was not before him and further that a similar provision in the Punjab Court of Wards Act had been held to be valid by a Division Bench of this Court in *Raja Harmahendra Singh* v. *The Punjab State* (1). The learned Judge further went on to hold that he was not concerned with the Pepsu Court of Wards Act as the notification that was challenged was under the Patiala Act. After going through the petition we are of the view that certain assumptions made by the learned Judge are not warranted. The counsel for the petitioner does not and did not impugne the provisions of the Jind Court of Wards Act. That Act was repealed by Ordinance I of 2005 Bk., and this repeal was before the Constitution of India came into force; and the argument that the Jind law offended the Constitution was not, therefore open. The chief contention raised in the petition was that the 1950 notification whereunder the estate was handed over to the Deputy Commissioner for management could issue and was issued under the Patiala and East Punjab States Union Court of Wards Act after the coming into force of the Constitution, would be *ultra vires* Article 19(1)(f) of the Constitution. This Act it

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is urged cannot be justified on the ground that it puts reasonable restriction on the enjoyment of property. The Jind Law was a dead letter in the year, 1949. Section 3 of Ordinance I of 2005 Bk. made it so. Section 4 of this Ordinance and also of Ordinance XVI of 2005 Bk., which replaced it provides that any power conferred on any officer or authority under any law, rule, regulation or order made by any competent authority of a covenanting State prior to the commencement of this Ordinance *shall be deemed to have been made, constituted, or conferred as the case may be by a competent authority of the Government of the Union.* In other words, by this 'deeming provision whatever was done under the laws which had been repealed would from the date of the Ordinance be deemed to have been done under the corresponding laws of the Union. Therefore, this notification necessarily has reference to the Pepsu Court of Wards Act and it will stand or fall with that Act. Therefore, with all due respect to Bishan Narain J. it must be held that he is wrong in his view that he was not concerned with the Pepsu Court of Wards Act and was merely concerned with the Jind Court of Wards Act as it was in force in 1928 or that the notification was under the Patiala Court of Wards Act, and its validity had not been challenged in the petition.

This brings me to the real question that has been debated before us, namely, as to whether the provisions of section 5(2)(a) with which we are concerned in the present case are *ultra vires* the Constitution, that is Article 19 of the Constitution. On this matter, there is a direct decision of a Division Bench of the Pepsu High Court in *Benarsi Das Modi* v. *State of Pepsu* (6), wherein section 5(2)(a) excepting that there is an additional reason for striking down section 5(2)(a), namely, that it also offends Article 15 of the Constitution as it discriminates on grounds of sex. On the other hand, there are two decisions of this Court which run counter to the decision of the Pepsu High

(6) A.I.R. 1957 Pepsu 5.

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Court referred to above. These decisions are *Raja Harmahendra Singh* v. *The Punjab State* (1), and *Kuldip Singh* v. *The Punjab State* (7). The first decision was delivered before the decision of the Supreme Court in *Raghubir Singh* v. *Court of Wards Ajmer* (8), and the second after it. In the second decision the learned Judges did consider the decision of the Supreme Court in *Raghubir Singh's case* and distinguished it on two grounds, namely,—

(1) that "the Act of 1903 (the Punjab Court of Wards Act) has provided an adequate machinery for ascertaining whether the requirements of section 5(2) have or have not been complied with. Section 11 imposes an obligation on the Deputy Commissioner to enquire into the circumstances of the land-holder whose estate is to be taken under control and for the purpose of making such enquiries the Deputy Commissioner is at liberty to exercise all or any of the powers of a civil Court under the Code of Civil Procedure. If a Deputy Commissioner makes the appropriate enquiry and if Government makes an order on the basis of this enquiry, it cannot be said that the Court of Wards has assumed superintendence of the estate of a land-holder in its own discretion and on its own subjective determination"; and

(2) that "the law provided for the protection of the revenues of the State and for seeing that there is no discontentment among the tenants and, therefore, such a law cannot be said to be unreasonable interference with the fundamental rights of the citizens."

Both these matters have been thoroughly examined by the learned Judges of the Pepsu

(7) A.I.R. 1954 Punj, 247.
(8) A.I.R. 1953 S.C. 373.

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High Court and we are in respectful agreement with the observations made in the Pepsu decision. In our view the Supreme Court decision fully covers the present case and the following observations made by their Lordships of the Supreme Court are not only pertinent but would also show that the distinctions that the learned Judges sought to make in the *case of Kuldip Singh*, referred to above are not justified:—

"The learned Attorney-General canvassed for the validity of the provisions of section 112 on three grounds. He contended that the determination of the question whether a certain land-holder was a person, who habitually infringed the rights of his tenants did not depend on the opinion of the Court of Wards, but was a matter that could be agitated and canvassed in Civil Court. It was said that there were no words in the section from which it could be inferred that the determination of this fact depended on the subjective determination of the Court of Wards. It was emphasised that the section had not used the familiar language 'in its opinion' or words like that, which are usually employed to indicate whether a matter depends on the subjective determination of an authority or whether it can be agitated in a Civil Court. This contention, in our opinion, is not well-founded. As already pointed out, Act, 42 of 1950, has prescribed no machinery for the determination of the question whether a landlord is guilty of habitually infringing the rights of his tenants, and rightly so because section 112 of the Act is merely of a declaratory character and declares such a landlord as being under a disability and suffering from an infirmity. This declaration becomes operative and effective only

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when the Court of Wards in its discretion decides to assume superintendence of the property of such a proprietor.

"In other words, when the Deputy Commissioner or the Commissioner or the Chief Commissioner is of the opinion that such a proprietor should be deprived of possession of his property, this determination then operates to the prejudice of the landlord, but he cannot challenge the exercise of the discretion by these officers in view of the provisions of section 27 of Regulation I of 1888. The result then is that by the subjective determination of the Court of Wards, both the questions whether a particular person habitually infringes the rights of his tenants and whether his property should be taken over by the Court of Wards, stand settled and the landlord cannot have recourse to a Civil Court on these questions. The learned Attorney-General was not able to draw our attention to any provision in the Court of Wards Act or in Act 42 of 1950 which enabled the landlord held to be a habitual infringer of the rights of his tenants to have recourse to a Civil Court to test the correctness of the determination made by the Court of Wards. The provisions of Regulation I of 1888 clearly indicate the contrary.

It is still more difficult to regard such a provision as a reasonable restriction on the fundamental right. When a law deprives a person of possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can on no construction of the word 'reasonable' be described as coming within that expression, because it completely negatives the fundamental right

> by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse for establishing the contrary in a Civil Court."

It may be mentioned that it is the Government which decides in its own discretion whether a land-holder is incapable of managing or unfitted to manage his affairs for any of the reasons stated in sub-section (2) of section 5 of the Pepsu Act before it orders that the property of such a land-holder be placed under the superintendence of the Court of Wards. Section 11 of the Act on which the learned Judges of this Court relied merely deals with the enquiry by the Deputy Commissioner when he wants to make a recommendation to the Government or to the Court of Wards for taking the estate of a land-holder under the Court of Wards under sub-section (2) of section 5, or under section 6 of the Act. It has nothing to do when the Government or the Court of Wards itself wants to put the estate of a land-holder under the superintendence of the Court of Wards. How then it could be held that section 11 governs such taking over under sections 5 and 6 of the Act is beyond comprehension. There is nothing in the Act which makes it incumbent on the Government or the Court of Wards while acting under section 5(2) of the Pepsu Court of Wards Act offends an enquiry like the one as is contemplated in section 11 of the Act. Thus section 11 cannot, in any way, be said to provide any machinery as contemplated by their Lordships of the Supreme Court in *Raghubir Singh's case* and, therefore, would not save the impugned provision.

In any case, the enquiry under section 11 of the Act itself is not even incumbent on the Deputy Commissioner. It is merely meant for his own satisfaction. He may even be satisfied without an enquiry. There is nothing to prevent him from moving in the matter under section 11 of the Act without any enquiry. Therefore, there is no escape from the conclusion that it is only the

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subjective satisfaction of the Government or of the Deputy Commissioner which deprives the citizens of their property. The Act provides no machinery whereby any right is granted to the citizens to agitate against that deprivation. There is no provision which allows them even to represent against the deprivation or to show that the conditions mentioned in sub-section (2) of section 5 of the Act are not satisfied and, therefore, their estate cannot be taken possession of by the Court of Wards. No right of appeal or revision is provided in the Act, against an order passed under section 5 of the Act. That being so, in agreement with the decision of the learned Judges of the Pepsu High Court, it must be held that section 5(2) of the Pepsu Court Court of Wards Act offends Article 19 of the Constitution. Similar view has been taken by the Allahabad, Saurashtra and Rajasthan High Courts in respect of similar provisions in the Court of Wards Acts of these States. See in this connection, *Mrs. A. Cracknell* v. *State of U.P.* (9), *Rani Raj Rajeshwari Devi* v. *The State of U.P.* (10), *Jayantilal Laxmishankar* v. *The State of Saurashtra* (11), and *Bhagwat Singh* v. *State of Rajasthan* (12). We are in respectful agreement with the views expressed in these decisions.

The only further question that has to be determined is as to the *vires* of section 5(2)(a) apart from its *vires* under Article 19 of the Constitution. It has been argued, and rightly, that section 5(2)(a) of the Act offends Article 15 of the Constitution. To be a woman is an additional reason on the basis of which Government can deprive her of the management of her estate. In other words, if a man mismanages his estate, that mismanagement will not render his estate liable to be taken over by the Court of Wards unless his case falls under any one of clauses (b), (c) and

(9) A.I.R. 1952 All. 746.
(10) A.I.R. 1954 All. 608.
(11) A.I.R. 1952 Saur. 59.
(12) A.I.R. 1954 Raj. 131.

(d) of section 5(2) of the Act. Whereas in the case of a woman it can be so taken merely for the reason that she is a woman. This matter is not *res integra.* A similar question with reference to the U.P. Court of Wards Act came up for decision before the Allahabad High Court in *Mrs. A. Cracknell and Rani Raj Rajeshwari Devi's* cases. The learned Judges of the Allahabad High Court in *Rani Raj Rajeshwari Devi's case* observed as under:—

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> "A comparison between the provisions of sections 8(1)(b) and 8(1)(d) of the U.P. Court of Wards Act will clearly reveal that the discrimination is against the woman. While it is left to the absolute discretion of the Government-subjective and non-justiciale to declare a female proprietor unfit to manage her estate without any rules being laid down to determine what constitutes incapacity to manage, and she is not even allowed to represent her case before the declaration is made, in the case of a male not only must certain conditions be fulfilled before he can be declared unfit to manage his estate but he must be given the fullest opportunity to have his objections heard. Even though the law may be a benign one, there can be no doubt that the discrimination is 'against' the female. Thus the denial to woman of the right of representation and the absence in section 8(1)(b) of any rules similar to those in section 8(1)(d) cannot but, be regarded as 'hostile' to women and consequently the discrimination is 'against' women.
>
> Section 8(1)(d) of the U.P. Court of Wards Act applies to estates of males as well as females. It lays down certain standards which are to guide the Government in determining whether the person concerned is incapable of

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managing his or her property and it allows to the person concerned a full opportunity of being heard. If the necessary conditions exist the estate of a female as well as that of a male may be placed in charge of the Court of Wards, but in the case of females something more is provided: it is, by section 8(1)(b) of the Act, left at the absolute discretion of the Government, even if the conditions imposed by clause (d) of the same sub-section do not exist, to declare the proprietor incapable of managing her estate. This differentiation is based solely on the sex of the proprietor and the fact that the differentiation is to be made by the Government and not by the Legislature is immaterial because the word 'state' in Article 15 includes, by reason of Article 12, a Government also and differentiation by the Government is as much hit by Article 15 as differentiation by the Legislature. The fact that Government chooses to proceed in respect of an estate under section 8(1)(b) of the Court of Wards Act, and not under section 8(1)(d) is based only on the sex of the proprietor, since no action can be taken under section 8(1)(b) against males.

While classification is permissible it cannot be classification based on any of the factors mentioned in Articles 15 and 16. In the present case, it is based on sex which is a factor on which discrimination is forbidden by Article 15. It is, therefore, bad without anything more having to be proved.

A classification which the Constitution forbids cannot possibly be said to be reasonable. Moreover, it has been held that a provision which leaves the choice

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> to subjective discretion not justiciable of any executive authority is not reasonable.
>
> The provisions of section 8(1)(b) of the Court of Wards Act, confer an uncontrolled and arbitrary power, not open to challenge in Civil Court, of declaring any proprietor-provided she is a female-unfit to manage her property. Even if it be considered that this is a permissible classification and discrimination, it is unreasonable and must be declared to be void."

We are in respectfull agreement with these observations. Therefore, both on authority and on principle it must be held that section 5(2)(a) of the Pepsu Court of Wards Act is *ultra vires* Article 15 of the Constitution.

There is only one argument which remains to be noticed. It was contended on the authority of the decision of the Supereme Court in *D. K. Nabhirajah* v. *State of Mysore* (13), that the deprivation of the estate by the Court of Wards was under the Jind law and the act of deprivation having been completed and the provisions of the Constitution being not retrospective, therefore, there is no violation of the fundamental right of the petitioner by the continuation of that deprivation. We are unable to agree wtih this contention. That decision has no analogy or applicability to the facts of the preset case. Here the deprivation was continued by the 1950 notification. But for that notification the estate would have gone back to the petitioner after the repeal of the Jind Act and, in any case, the notification according to section 4 must be deemed to have been issued under the Pepsu Act, and the deprivation has been continued under that Act, by reason of the deeming provision and this has been done after the coming into force of the Constitution. That being so, the deprivation is

(13) A.I.R. 1952 S.C. 339.

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directly hit by the provisions of the Constitution and cannot be said to be a deprivation before the constitution came into force. Moreover, the petitioner can only be deprived of her property in accordance with law. Therefore, what we have to see is what is the law under which the petitioner is being deprived of her property is the Pepsu Law. Therefore, the question that straight-away arises for determination is whether that law is a valid law or not. If that law is a valid law, then the deprivation would be justified. If it is not, then the deprivation would be unjustified. We have already held that that law is not a valid law and, therefore, it follows that the deprivation is not justified. It may be mentioned that in the decision of the Supreme Court in *Nabhirajah's case* it was not urged that the law under which the owner had been deprived of the possession of the property was an unconstitutional law. It seems that a new law had been passed under which the possession could be continued and it was not agitated that new law was *ultra vires* the constitution. That is not the case so far as the Pepsu Court of Wards Act is concerned. Even if the Jind Law had stood and after the coming into force of the constitution its provisions had offended the constitution that law would have gone over-board in view of the provisions of Article 13(1) of the Constitution and any deprivation of property under that law would not have stood. That being so, the decision of the Supreme Court in *Nabhirajah's case* can have no bearing so far as the present controversy is concerned.

Before parting with this judgment, it may be pointed out that a similar law in the Punjab has been repealed. The reasons given for the repeal are:—

> "The Court of Wards Act, II of 1903, was enacted for the sole purpose of protecting big feudal families of social and political importance. With the attainment of independence and the acceptance of socialist ideology in the sphere

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> of administration, the Act is an anachronism. It has, therefore, been decided to repeal this Act".

It is hard to conceive why a similar law is retained for part of the Punjab State and that too for the territory of erstwhile Pepsu after the merger of Pepsu in the Punjab State. All that can be said is that one has just to read the petition to get the answer.

The result, therefore, is that this appeal is allowed, the decision of Bishan Narain J., is set aside and it is declare that section 5(2) of the Pepsu Act is *ultra vires* the Constitution. Therefore, the Pepsu Court of Wards cannot retain the possession of the petitioner's property. It is, therefore, directed that the petitioner be put forthwith in possession of the property belonging to her. I may make it clear that the property will include both land and the income from the land which has accumulated in the hands of the Court of Wards.

The petitioner will have her costs of this appeal as well as of the petition.

Dua, J.

DUA J.—Both of my learned brethren are agreed that section 5(2) of the Pepsu Court of Wards Act, is unconstitutional. *D. K. Mahajan* J., has written the main judgment and *Dulat J.*, has appended a brief note declining to grant the petitioner the relief claimed. Since it is agreed that section 5(2) of the above Act, is unconstitutional, it must, in my opinion, follow that the Punjab State is bound to release the property and deliver he same to its owner or owners. It was never the case of the State that the petitioner is not the owner of the property (as to of what part is immaterial) which is the subject-matter of these proceedings, for, had she got no interest in the property, the writ would have been incompetent. It is, therefore, somewhat difficult to appreciate on what ground of law or of equity, this Court would be justified in withholding its assistance, after holding the statute in question to be *ultra vires*. Merely issuing a notification is not enough in law

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and it would not, in my opinion, make the petition infructuous, if the petitioner's injury in substance affecting her fundamental right remains principally unredressed.

Dua, J.

I cannot help observing here that it would have been far more desirable for the learned Single Judge to have referred the matter to a larger Bench at the time when the case was argued before him, more than four years ago. There was indisputably a serious conflict between the views of a Division Bench of the Pepsu High Court (which is direct on the point) and two Division Benches of this Court. The Pepsu High Court, it is noteworthy, actually considered both the decisions of this Court and recorded a positive dissent. Certainty in law and promptitude in decisions on controversies relating to fundamental rights are highly commendable in a country like ours where the rule of law prevails.

After reading the two judgments, I am inclined to agree with the order proposed by D. K. Mahajan J.

Dulat, J.

DULAT J.—The appellant before us is one of the two widows of *S. Mukand Singh,* who died in 1928 and on whose death his estate consisting of considerable landed and other property was placed under the supervision of the Court of Wards in pursuance of an order of the Jind State Government. In 1948 the Jind State became a part of Pepsu and the Court of Wards continued to function, presumably under the Pepsu Court of Wards Act. In 1956 the two States of Pepsu and Punjab were merged together and the Court of Wards came under the control of the Punjab State. On the 3rd of October, 1956 the appellant filed the petition out of which the present appeal arises. The petition was under article 226 of the Constitution and the appellant claimed that the Pepsu Court of Wards Act, section 5, sub-section (2), was unconstitutional and she prayed, therefore, that the estate formerly belonging to S. Mukand Singh should be ordered to be released from the Court of Wards and handed over to the widows of S.

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Mukand Singh. This petition was dismissed by Bishan Narain J. and the appellant then filed the present appeal under clause 10 of the Letters Patent. It remained pending in this Court for considerable time and was finally referred by the Division Bench, which first heard it, to a larger Bench.

Before the appeal came up for final hearing, the Punjab Government issued a notification in March, 1962, releasing the estate from the Court of Wards and further ordering that possession of the property be handed over to the two widows. This act of the Punjab State renders the peittion infructuous in substance because the notification, which is a formal act of the State Government, grants to the appellant the precise relief which she claims in her petition. Mr. Tewari for the appellant, however, contends that although a notification has been issued by the State Government and the property has formally been released from the control of the Court of Wards and although possession too is ordered to be handed over to the widows of S. Mukand Singh, in actual fact the property has been handed over by the State Government to the other widow and not to the appellant and in this way the appellant has not obtained proper relief. These allegations raise new questions of fact, but, apart from that, it seems to me that the dispute now is between the appellant and the other widow and I do not see how the Punjab State or the Court of Wards comes into it. It seems to me, on the other hand, that the proper course in the altered circumstances would be to leave the appellant to seek her remedy in th ordinary Courts as the Punjab State and the Court of Wards no longer stand in her way. To issue a direction now to the State Government, that the property must be released from the Court of Wards and possession handed over to the appellant and the other widow would, in my opinion, be merely to beat the air. In these circumstances, although I agree that section 5(2) of the Pepsu Court of Wards Act offends article 15 of the Constitution as it discriminates against a female on the ground of sex alone, and the counter suggestion

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that such discrimination, is in favour of and not against a female, seems to me futile, I am not persuaded that on the facts as they now emerge this Court need issue any writ. I would, therefore, dismiss the appeal and leave the parties to bear their own costs throughout.

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ORDER BY THE COURT

This appeal is allowed, the decision of Bishan Narain J. is set aside and it is declared that section 5(2) of the Pepsu Court of Wards Act is *ultra vires* the Constitution. Therefore, the Court of Wards cannot retain the possession of the petitioner's property and it is directed that the petitioner be put forthwith in possession of the property belonging to her. The property will include both land and the income from the land which has accumulated in the hands of the Court of Wards. The petitioner will have her costs of this appeal as well as of the petition.

B.R.T.

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