# IN THE HIGH COURT OF DELHI

## CIVIL WRIT PETITION NO. 388 OF 1971
## (AND THREE OTHER WRIT PETITIONS)

**Date of Decision : March 5, 1991.**

SHITAL PARSHAD JAIN THROUGH : MR. P.N. LEKHI WITH MR. M.K. GARG, ADVOCATE

VERSUS

UNION OF INDIA AND OTHERS THROUGH: MR. S.K. MAHAJAN WITH
MR. GULAB CHANDRA ADVOCATE.

**CORM** :

The Hon' ble Mr. Justica M.C. Jain, Chief Justice
The Hon' ble Mr. Justice Arun Kumar

1. Whether Reports of local papers may be allowed to see the judgement ?

   Yes.

2. To be referred to the Reporter or no ?

   Yes

3. Whether their Lordships wish to see the fair copy of the Judgement ?

**(M.C. Jain, C.J.)**

The petitioners in the aforesaid four writ petitions have sought a declaration that the Governor General' s order No. 179 of 1836 is not law or law in force or existing law. There are other prayers as well but the learned counsel for the petitioners has confined his arguments in respect of the aforesaid prayer only, although, interalia, the petitioners have also sought a declaration that notice of resumption issued under the aforesaid order to the petitioners for resumption of the grant is illegal and null and void and that the notices may be quashed. The two writ petitions relate to the bungalows situated in Jullunder

cantonment, and the two bungalows are situated in the Agra Cantonment in the other two writ petitions. According to the respondents, the land comprised in these bungalow are held by the petitioners and their predecessors in interest under the "Old Grant" tenure or term. So, they are liable to be resumed under Governor General' s order in council.

That question so far as this court is concerned stands concluded by a Division Bench of this Court in Shri Raj Singh V. The Union of India and other, AIR 1973 Delhi 169. However, Shri P.N. Lekhi, learned counsel for the petitioners submitted that the question of the aforesaid Governor General' s order having statutory force has not been considered by the Division Bench in its correct perspective. We shall be considering the submissions advanced by Shri Lekhi. However, we may first deal with the historical evolution of the power of the legislation which came to be vested in the Governor General-in-Council.

The Regulating Act of 1773 for the first time conferred on the Governor General in Council power to make and issue rules, ordinances and regulations by Section XXXVI.

The first vital change was made by the Government of India Act, 1833, whereby plenary powers of legislation were granted to the Governor General of India in Council. The plenary powers were as large and of the same nature as those of the British Parliament itself subject only to such reservations as were required for safeguarding the Constitutional system and other essential methods. We may here quote the relevant provisions of the charter Act of 1833 on legislative reforms, as are set out in the treatise "Reading in the constitutional History of India 1757-1947" by S. V Desikachar :

> XLIII. And be it enacted. That the said Governor General in Council shall have power to make Law and Regulations for repealing, amending, or altering any Laws or Regulations whatever now in force or hereafter to be in force in the said Territories or any Part there of, and to make Laws and Regulations for all Persons, whether British or Native, Foreigners or others, and for all Courts of Justice, whether established by His Majesty' s Charters or otherwise, and the Jurisdictions thereof, and for all places and things whatsoever within and throughout the whole and every part of the said Territories, and for all Servants of the said

company within the Dominions of Princes and States in alliance with the said company: save and except that the said Governor General in Council shall not have the power of making any Laws or Regulations which shall in any way repeal, vary, suspend or affect any of the Provision of this Act, or any of the provisions of the Acts for punishing Mutiny and Desertion of officers and Soldiers, whether in the Service of His Majesty or the said Company, or any provisions of any Act hereafter to be passed in any wise affecting the said company or the said Territories or the Inhabitants thereof or any Laws or Regulations which shall in any way affect any prerogative of the Crown, or the Authority of Parliament, or the Constitution or Rights of the said Company, or any part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland where on may depend in any Degree or Allegiance or any person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the said Crown over any part of the said Territories.

XLIV. Provided always, and be it enacted that in case the said Court of Directors, under such Control as by this Act is provided shall signify to the said governor General in Council their Disallowance of any Laws or Regulations by the said Governor General in Council made, then and in every such Case, upon Receipt by the said Governor General in Council of Notice of such Disallowance, the said Governor General in Councils shall forthwith repeal all Laws and Regulations so disallowed.

XLV. Provided also, and be it enacted, That all Laws and Regulations made as aforesaid, so long as they shall remain unrepealed, shall be or as such Force and Effect within and throughout the said Territories as any Act of Parliament would or ought to be within the same Territories and shall be taken notice of by all Courts of Justice other than the court of Justice whatsoever within the same Territories, in the same manner as any public Act of Parliament would and ought to be taken notice of: and it shall not be necessary to register or publish in any Court of Justice any Laws or Regulations made by the said Governor General in Council.

XLVI. Provided also, and be it enacted, that it shall not be lawful for the said Governor General in council, without the previous sanction of the said Court of Director, to make any Law or Regulation whereby Power shall be

given to any Court of Justice established by His Majesty' s Charters, to sentence to the punishment of Death any of his Majesty' s natural-born Subjects born in Europe, or the children of such Subject, or which shall abolish any of the Courts of Justice established by his Majesty' s Charters.

LI. Provided always, and be it enacted, That nothing herein contained shall extend to affect in any way the Right of Parliament to make Laws for the said Territories and for all the Inhabitants thereof: and it is expressly declared that a full, complete and constantly existing Right and Power is intended to be reserved to Parliament to control, supersede, or prevent all proceedings and Acts whatsoever of the said Governor General in Council, and to repeal and alter at any Time and Law or Regulation whatsoever made by the said Governor General in Council, and in all respects to legislate for the said Territories and all the Inhabitants thereof in as full and ample a Manner as if this Act had not been passed: and the better to enable Parliament to exercise at all Times such Right and power, all laws and Regulations make by the said Governor General in Council shall be transmitted to England, and laid before both Houses of Parliament, in the same manner as is now by Law provided concerning the Rules and Regulations made by the several Governments in India."

It would appear from the above provisions that the Governor General in Council was given comprehensive powers to make Laws and Regulations for the whole country subject to limitations prescribed and the Laws so made were to take effect as Acts without the necessity of registration or publication in any Court of Justice. From the provisions of the Charter Act, 1833, reproduced above, it is clear that the Governor General in Council was given the powers to make Laws and Regulations for repealing, amending or altering any Laws or Regulations, which are in force or to be enforced in Company' s territories and also for all persons and for all Courts of Justice and for all places and things whatsoever within and throughout the Company' s Territories, for all servants of the Company, as Articles of war for the Government of the Native Officers and Soldiers in the Military Service of the Company, and for the Administration of Justice by Courts-martial. There were limitations on the comprehensive legislative authority that the laws which were to be made should not in any way repeal, vary or suspend or affect any; of the provisions of the Act of 1933 or the Act for punishing mutiny and desertion of officers and soldiers and laws should not be made which

may affect the Crown or the authority of Parliament or the Constitutional rights of the Company or any part of the unwritten laws or regulations of United Kingdom. The Governor General in Council was further obliged to repeal all Laws or Regulations in respects of which notice of disallowance is received by the Court of Directors. Prof. C.L. Anand in his treatise on Constitutional Law and History of Government of India has dealt with the evolution of Administration by the Government of India prior to the Independence of India. It is not necessary to refer to various Charters and Acts in force prior to the Charter Act of 1833 as the order in question dates back to 1836 after the promulgation of the Charter Act, 1833. Having vested with comprehensive legislative power, it is to be seen as to whether the order in question has a statutory force and is law in force. Order no. 179 dated 12th September 1836 reads as under:

"FORT WILLIAM, 12th September, 1836.
No. 179 of 1836:

Occupation of land and disposal of premises and buildings. The Governor General of India in Council is pleased to rescind the various orders now in force in this Presidency in regard of the occupation of ground and the disposal of premises or buildings, situated within the limits of military cantonments and to substitute for them the following regulations, which is to have effect from the date of its promulgation at the different stations of the Bengal Army:-

1. **Application for land - Alteration of boundaries or sites and closing or opening of roads.** All applications for unoccupied ground for the purpose of being enclosed, built upon or in any way appropriated to private purposes, such ground being within the limits of a military Cantonment, are in the first instance, to be made to the Commanding Officer of the station through the usual channel ; and in no case are the boundaries of compounds to be changed, old roads closed or new ones opened without the sanction of the Commanding Officer.

2. **Certificate by Commanding Officer.** As the health and comfort of the troops are paramount considerations, to which all others must give way, the Commanding Officer will be held responsible that no ground is

occupied in any way calculated to be injurious to either, or to the appearance of the cantonment, and in forwarding any application for a grant, he must certify that it is not objectionable in those or any other respects.

3. **Orders of Government Required.** When no objection occurs, the application is to be forwarded through the prescribed channel, by the Commanding Officer of the station, to the Quarter Master General of the Army, who if the Commander-in-chief approves, will submit it for the orders of the Government.

4. **Form of Application.** All such applications are to be in the annexed form marked A.

5. **Grants to be registered and noted on plan.** All grants are to be registered by the Officer of the Quarter Master General' s Department attached to the division, and at the stations where no such officer may be present, by the executive officer of public works, to whom also in such cases, applications for ground are to be addressed, and all grants are to be immediately noted upon the plan of the cantonment in the Quarter Master General' s office.

6. **Conditions of Occupancy.** No ground will be granted except on the following conditions, which are to be subscribed by every grantee, as well as by those to whom his grant may subsequently be transferred:

**Resumption of land**

Ist. The Government to retain the power of resumption at any time on giving one month' s notice and paying the value of such building as may have been authorised to be erected.

**Land belongs to Government - Land cannot be sold by grantee-Transfer of houses between military officers.**

2nd. The ground, being in every case the property of Government, cannot be sold by the grantee; but houses or other property there on

situated may be transferred by one military or medical officer to another without restriction, except in the case of reliefs, when, if repaired, the terms of sale or transfer are to be adjusted by a Committee or Arbitration.

**Arbitration in case of transfer on relief.- Transfer of house of civilian.**

3rd. - If the ground has been built upon, the buildings are not to be disposed of to any person, of whatever description, until the consent of the officer Commanding the station shall have been previously obtained under his hand.

4th. - When it is proposed, with the consent of the General Officer, to transfer possession to a native, should the value of the house, buildings or property to be so transferred exceeds Rs. 5,000/- the sale must not be effected, until the sanction of Government shall have been obtained through His Excellency the Commander-in-Chief.

7. **Houses claimable for purchase or hire at option of owner - Committee of Arbitration** - All houses in a military cantonment being the property of persons not belonging to the army, which may be deemed by the Commanding Officer of the station suitable, from their locality, for the accommodation of officers, shall be claimable for purchase or for hire at the option of the owner; in the former case at a valuation, and in the latter at a rent, to be fixed, in case of the parties disagreeing by a Committee of Arbitration constituted as follows:-

8. **Composition of Committee of Arbitration-Appeal.** - The Committee is to be composed of one civil officer, the principal one, if practicable, at or in the vicinity of the station, the Commanding Officer of the Cantonment, and an officer belonging to the station to be named by the proprietor of the premises; and their decision, whether relating to the terms of purchase or rent, is to be conclusive, unless it shall be reversed by Government, for whose orders the proceedings of the Committee are to be submitted, through His Excellency, the Commander-in-Chief, whenever, the proprietor of the premises which they have valued is dissatisfied with their award.

9. **Arbitration in case of transfer as on relief.** When the houses of the officers of one crops are to be transferred to those of another, as on the occasion of a relief, if a difference of opinion should arise as to the fair terms of transfer, the price shall be fixed by a Committee of Arbitration constituted as in the last paragraph, but to which, in such cases, there is to be given an additional member to be named by the intending purchaser.

10. **No appeal -** In this case, there is to be no appeal, and the decision of the Committee of Arbitration is to be final."

If first paragraph of the aforesaid order is read, it would appear that earlier various orders have been rescinded and in their place, the Regulations mentioned in the said order have been substituted from the date of the promulgation of the said order i.e. from 12.9.1836. Although source of power is not mentioned in the first para of the order, but still from the tenor of the order, it would appear that it has been promulgated in the form of Regulations. That gives a clear indication that the Regulations have been issued or promulgated in exercise of the legislative authority vested in the Governor General of India in Council. The Regulation deals with as to how applications are made for unoccupied ground for the purpose of being enclosed, built upon or in any way appropriated to private purposes such ground being within the limits of a military cantonment. In what form the application is to be made and how such applications are to be processed are provided in the said regulations. What is further provided in the Regulations are the conditions of occupancy. It makes a provision in respect of resumption of land and also a provision is made with regard to award of compensation in respect of the super-structure. If the compensation is disputed, the question is to be referred to a Committees of Arbitration. The decision of the Committee of Arbitration was to be conclusive unless it is reversed by the Government. The reading of the whole order would go to show that the Regulations have been issued in exercise of the law making power. Earlier orders were issued which have been rescinded to be substituted by ' Regulation' which was an accepted form of legislation.

From the provision contained in Section 45 of the Government of India Act, 1833, it would appear that all Laws and Regulations made in exercise of the legislative power so long as they remain unrepealed, shall be of the same force and effect as any Act of Parliament, and shall be taken notice of by all Courts of

Justice whatsoever within the territories in the same manner as any public Act of the Parliament, would and ought to be taken notice of. Thus, the laws and regulations if they remain unrepealed shall have the force of Acts of Parliament.

It is true that under Section XXXIX of the Charter Act, 1833, the executive power vested in the Governor General of India in council which provides, "the superintendence, direction and control of the whole civil and military government of all the said territories and revenues in India shall be and is hereby vested in a Governor general and counsellors, to be styled "The Governor General in Council."

The question is whether Governor General' s Order No. 179 of 1836 is issued in exercise of the power under Section XXXIX. Shri P.N. Lekhi submitted that all regulations enacted in a year had to be numbered, registered and published. Reference was made to ' Outlines of Indian Legal History' by Shri M.P. Jain, pages 189-190. And after 1833, the nomenclature of laws was ' Acts' and not ' Regulations' as stated in ' A Short History of the Judicial System of India and some Foreign counties' by Shri Harihar Prashad Dubey. Suffice it to say that on the basis of form alone it cannot be found that the regulations made under Order no. 179 of 1836 were not law and were only executive orders issued under Section XXXIX of the Charter Act of 1833. Had it been simply an executive order, the expression ' regulations' would not have been used as by that time, the expression ' Regulation' had assumed an accepted meaning as law made in exercise of legislative power.

After 1833 Charter, the relevant Act is the Government of India Act, 1858. Shri P.N. Lekhi, referred to the following provisions of the Government of India Act, 1858:

> "LIX. <u>All Orders of the Court of directors or Board of control given before commencement of this Act to remain in force</u> - All orders, Regulations and Directions lawfully given or made before the Commencement of this Act by the Court of Directions or by the Commissioners, for the Affairs of India shall remain in force; but the same shall, from and after the commencement of this Act, be deemed to be the Order, regulations, and Directions under this Act, and taken effect and be construed and be subject to Alteration or Revocation accordingly."

"LXIV. Existing provisions to be applicable to Secretary of State in Council dtd. All Acts and Provisions Now in force under charter or otherwise concerning. India shall, subject to the provisions of this Act, continue in force, and be construed as referring to the Secretary of State in council in the Place of the said company and the Court of Directors and court of proprietors thereof; and all Enactments applicable to the Officers and Servants of the said Company in India, and to Appointments to Office or Admissions to Service by the said Court of Directors, shall subject to the provisions of this Act, remain applicable to the Officers and Servants continued and to the officers and servants appointed or employed in India, and to Appointments to Office and Admission to service under the Authority of this Act."

According to Shri P.N. Lekhi, after the promulgation of the Government of India Act, 1858, 1833 Act stood repealed and only orders, regulations and directions given or made by the Court of Directors or by the Commissioners for the Affairs of India before the commencement of the Act 1858 would remain in force and no other orders, regulations and directions shall remain in force. He further submitted on the basis of the provisions contained in Section 64 that only those Acts and provisions under any Charter or otherwise if they relate to the whole of India, shall remain in force subject to the provisions of Government of India Act, 1858 and they will be construed as referring to the Secretary of the State of Council in the place of the company, Court of Directors and Court of Proprietors, According to Shri Lekhi, Government General' s order No. 179 ceased to have force after the promulgation of the Government of India Act, 1858, viewed in the light of the provisions contained in Section 59 and 64 of the Government of India Act, 1858. It may be stated here that Section 64 of the Government of India Act, 1858 saves all existing provisions and they shall continue to have force subject to the provisions of 1858 Act. However, under Section 64, it is provided that the Acts and Provisions mentioned there in relate to the Company, the Court of Directors and the Court of Proprietors then in their place, they will be construed as referring to the Secretary of State in Council. So far as Section LIX is concerned, it saves the orders and regulations and directions made by the court of directors or by the Commissioners of the affairs of India. So these provisions do not at all deal with the laws or regulations made by the Governor General of India in Council. It may be stated here that although the Government of India Act, 1833 is superseded by the promulgation of the Government of India Act, 1858,

to the extent provisions are made therein, but 1858 Act does not in any way repeal the laws and regulations made by the Governor General of India in Council. The Government of India Act, 1833 in fact came to be repealed by the Government of India Act, 1915. Section 130 of the 1915 Act repealed the Acts specified in the fourth schedule to the extent mentioned in the third column of that Schedule. Section 130 of the 1915 Act reads as under :-

" 130. The Acts specified in the Fourth Schedule to this Act are hereby repealed, to the extent mentioned in the third column of that schedule:

**Provided that this repeal shall not affect-**

a. the validity of any law, character letters patent, Order in Council, warrant, proclamation, notification, rule, resolution, order, regulation, direction or contract made, or form prescribed, or table provided under any enactment hereby repealed and in force at the commencement of this Act, or

b. the validity of any appointment or any grant or appropriation of money or property made under enactment hereby repealed, or

c. the tenure of office, conditions or service, terms of remuneration of right to pension of any officer appointed before the commencement of this Act.

(Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations, or orders made under any such enactment, or in any letters patent or other document, to any enactment repealed by this Act. shall for all purposes be construed as references to this Act, led or to the corresponding provision thereof.)

(Any reference in any enactment in force in India, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any letters patent or other documents to any Indian legislative authority, shall for all purposes be construed as reference to the corresponding authority constituted by this Act.)

The provision has saved all laws and regulations which are in force at the commencement of 1915 Act. The relevant entry in the Fourth Schedule is as under :

**FOURTH SCHEDULE**
**Acts Repealed**

| Sessions and chapter | Short Title | Extent of Repeal |
|---|---|---|
| ..... | ..... | ..... |
| ..... | ..... | ..... |
| 3&4 Will.4. C.85 | The Govt. of India Act, - 1833 | The whole Act, except Sec. 112 |
| ..... | ..... | ..... |

From the provision of Section 130 of the 1915 Act, it is clear that the Laws and Regulations which were in force were not repealed. Rather they were saved and even the provision of section 112 of the 1833 Act was not repealed, and this legal position continued, even after 1915. Section 321 of the Government of India Act, 1935 repealed the earlier Government of India Act, 1915 but Section 292 thereof saved the existing law. Section 292 reads as under :-

"292. Existing law of India to continue in force- Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before

the commencement of part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

The Indian Independence Act, 1947 also saved the laws of British India and of the parts thereof existing immediately before the appointed day by Section 18. Section 18(3) is as follows:-

18. Provisions as to existing laws, etc.....

1. .....

2. .....

3. Save as otherwise expressly provided in this Act, the laws of British India and of the several parts thereof existing immediately before the appointed day shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf."

After the commencement of the Indian Constitution, the position remained the same as Article 372 of the Constitution saved the existing laws by providing,

"372. Continuance in force of existing laws and their adaptation - (1) Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

2. For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provided that the law shall, as from such date as may be

specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

3. Nothing in clause (2) shall be deemed -

a. to empower the President to make any adaptation or modification of any law after the expiration of (three years) from the commencement of this Constitution: or

b. to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause."

Thus the saving which was provided by Section 130 of the 1915 Act continued to remain in force till the enforcement of the Constitution of India. The division Bench of this Court in Raj Singh' s case (supra) dealt with the question in paras 7,8,9,10 and 11 as under :-

7. What is the nature of the regulations contained in Order 179 of 1836 ?. Two answers are possible, namely,

a. that they are statutory regulations issued under Section 43 of the Government of India Act, 1833; and

b. that they are only administrative instructions not issued under any statute.

In support of the first view, it may be pointed out that Section 43 of the Government of India Act, 1833 expressly stated as follows:-

"That the Governor General in Council shall have power to make Laws and Regulations for repealing, amending or altering any laws and Regulations whatever now in force."

The preamble of Order 179 of 1836 purports to rescind the various orders in force till then and to substitute for them the regulations

promulgated thereby.

8. Secondly, the word "regulation" was used for statutory regulations in the later 18th and the earlier 19th century of the regime of the East India Company supervised by the British Government of India. The power to issue regulations was given to the Governor General by the Regulating Act, 1772 as also by the subsequent Acts including the Government of India Act, 1833. The first two volumes of the statute book of those years contained the Bengal regulations and it is only in the third volume that Acts occur along with the Regulations. The position was analogous to the one which obtained in mediaeval England prior to the emergence of the formal Parliament enactment. C.K. Allen in his "Law in the Making", 7th Edn, page 476 quotes the following observation of Professor Plucknett:-

"The great concern of the Government was to govern, and if in the course of its duties legislation became necessary, then it was effected simply and quickly without any complication or formalities."

The learned author then states:-

"These governmental Acts go by a bewildering variety of names ..... ' statute' is a less frequent term than most of the others, and seems to have meant ' something decided on' a provision of a public document, rather than the whole document itself."

Section 45 of the Government of India Act, 1833 states that "all Laws and Regulations made as aforesaid, shall be of the same force and effect within and throughout the said Territories as any Act of Parliament would.". Section 65 of the Government of India Act, 1858 continued "all Acts and provisions now (then) in force." The regulations contained in Order 179 of 1836 were "provisions" of statutory nature and were continued by the Act of 1858. Section 130 of the Government of India Act, 1915 repealed the Government of India Act 1858 but provided that the repeal was not to affect the validity of any "Regulations" issued thereunder and in force at the commencement of the Government of India Act, 1915. These Regulations, therefore, continue in force thereafter, on the principle embodied in Section on 24 of the General Clauses Act, 1897, these

Regulations were continued in force unless and until they were repealed or they were inconsistent with some later enactment. They would, therefore, be deemed to be in force in view of Article 272(1) of the Constitution.

9. Thirdly, the words in the preamble of the Order such as "to rescind the various orders now in force" "the following regulations, which are to have effect from the date of its promulgation" indicate that the orders which were rescinded and also the regulations which were promulgated were both of a statutory nature. Such language is not used for mere administrative instructions.

10. Fourthly, all or almost all Bengal Regulations have been regarded as statutory in their nature. These are also Bengal Regulations and there is no reason why they alone should be regarded as purely administrative.

11. Lastly, it is true that the preamble does not expressly state that the regulations were issued under Section 43 of the Government of India Act, 1833. But it is well established that if the power to issue regulations vested in the Governor General in Council thereunder, then even without the recital of the source of the power the regulations would be deemed to have been issued thereunder. The same view has been expressed by the Allahabad High Court in Sri Harain Khanna V. The Secretary of State for India in Council. First Appeal No. 166 All 723) by Bannet, Acting C.J. and Verma, J. and Smt. Bhagwati Devi V. The President of India, civil Misc. Writ Petn. Eo. 520 of 1969 decided on 26.11.1971 (All) by Lokur.J.

On the other hand, the Central Government or rather their legal advisers do not seem to have appreciated the above legal position but have proceeded on the assumption that these are executive orders and not statutory regulations. The reason seems to be that these regulations were repeated in Bengal Army Regulations 1855, 1873 and 1880. Army Regulations India, 1887 and the Cantonment codes of 1895 and 1912. It is to be investigated whether the latter were issued under any statue or not. When the Cantonment Act, 1925 was passed, clauses (a) and (b) of sub-section (2) of Section 280 empowered the Central Government to make Rules relating to the grant of cantonment land and conditions on which it should be granted. It is to be noted that by the time the Cantonment Codes of 1895 and 1912 came to be formed, the policy of the Government had

undergone a change. It was then decided that the cantonment land should be granted not on the "old grant" terms but as leases. But the "old grant" terms continued to govern the grants previously made, This is shown by Rule 6(iii) of the Cantonment Land Administration Rules, 1937 which is as follows:-

"Class "B" (3) Land, which is held by any private person under the provisions of these rules, or which is held or may be presumed to be held under the provisions of the Cantonment Code of 1899 or 1912 or under any executive orders previously in force subject to conditions under which the Central Government reserve or have reserved to themselves the proprietary rights in the soil."

The words "executive orders previously in force" used therein would show that the "old grant "terms were understood to be executive in their nature. Similarly on 20th March, 1970, the President issued an executive order laying down the policy for resumption of grants and leases. The very fact that under the "old grant" terms, a grant could be resumed at the pleasure of the Government while under the Presidential order it could be resumed according to the "old grant" terms provided that the resumption was necessary for a public purpose would show that the Presidential Order modified the "Old grant" terms administratively. In so far as such modification was inconsistent with the "old grant" terms, it could be effective on the assumption that the "old grant" terms themselves were administrative. The Allahabad High Court in Raghubar Dayal V. Secretary of State for India in council, ILR (1924) 46 All 427 = (AIR 1924 All. 415) and Thakur, J. of the High court of Himachal Pradesh in Durga Das Sud V. Union of India, AIR 1972, HP 26, have expressed the view that the ' old grant' terms were executive in their nature. In the present case, it is not necessary to decide which of the above two views is to be referred. For our decision would be the same on either of the alternative hypotheses.

The Division Bench reached the conclusion that the Order no. 179 has a statutory force and is an existing law or law in force.

This question also came up for consideration before the Full Bench of Allahabad High court in **Mohal Aggarwal V. Union of India and others.,** AIR 1979 Allahabad, 170 (Lucknow Bench). The question was, whether the Bengal Army Regulation Governor General Order No. 179 dated September 12, 1836 continues to be law in force in India even after the enforcement of the

British Statues (Application to India) Repeal Act (LVII of 1960). Shri Hari Swarup, J. speaking for the Courts traced the history of all the relevant Acts and answered the question in the affirmative. It would appear from the question referred to the Full Bench that the Governor General' s Order No. 179 was held to be ' Law in force' taking that particular Order to be law.

Shri S.K. Mahajan, learned Government Counsel also referred to the Division Bench decision of the Patna High Court in **Jahanara V. Government of India,** Civil Writ case no. 1947 of 1970 and four other petitions decided on 22nd September, 1973. In that case, the Governor General' s Order No. 179 was inter alia, challenged and one of the contentions was that issuance of notices under the Governor General' s Order no. 179 of 12th September, 1836 had no force of law, as the said order was superseded by various subsequent Acts. This contention was negatived and it was held that there was no merit in the contention advanced by counsel appearing on behalf of the petitions. The Division Bench comprised of Mr. Justice Shambhu Prasad Singh and Hon' ble Mr. Justice B.D. Singh, considered the nature of the grant to the predecessor in interest of the petitioners and reference was made to the terms of the grant and the decision of the Division Bench in Raj Singh' s case, (supra).

Shri Lekhi, learned counsel for the petitioners, submitted that although this court has already held that the Governor General' s Order in question has a statutory force as it was promulgated in exercise of the legislative authority but he submitted that regulations were not made in the form of a Governor General' s Order. By reference to some decisions reported in Moore' s Indian Appeals, he tried to emphasise that the regulations used to be made by the British Parliament. Shri Lekhi referred to **Maha-Rajah Mitter jeet Singh. Vs. The Heirs of the Late Ranee. Widow of Rajah Juswant Singh.** 1842 Moore' s Indian appeals, page 42. There is a reference to regulation of 1844. **Rajah Deedar Hossein Vs. Rance Zuhoor-oon Nissa,** Moore' s Indian Appeals, page 441, was a matter under Regulations 11 of 1773 and 12 of 1800. From the citation of these cases, in our opinion, it cannot be said that the form of legislation was only in the manner as has been contended by Shri P.N. Lekhi. A perusal of the Governor General' s Order 179 dated 12.9.1836 would show that nowhere in that order, it is stated that it is ' Governor General' s Order' . It simply gives the ' no' and its ' date' . As it was a Regulation made by the Governor General of India in council, so on that basis, it came to be described as the Order of the Governor

General of India in Council, so on that basis, it came to be described as the Order of the Governor General of India in council. So, we do not find any force in this submission of Shri P.N. Lekhi that the form of legislation was a different one than the form which we find in order No. 179 of 1836.

The other submissions of Shri P.N. Lekhi as well are without any force. What were saved by section LIX and LXIV were the Orders, Regulations and Directions of the Court of Directors or the commissioners for the Affairs of India. That does not mean that regulations made by the Governor General of India in Council were repealed. The Acts and provisions made under the charter or otherwise need not be concerning whole of India. We have already adverted to this aspect earlier. However, we may further state that the Laws and Regulations enacted or promulgated by the Governor General of India in Council were not repealed by the 1858 Act. On the contrary, by the 1915 Act, they were saved by the provisions contained in Section 112. The very fact that 1833 Act was repealed by 1915 Act shows that by the 1858 Act, 1833 Act was not repealed. There may be a case of implied repeal of any inconsistent provisions. But in any case, by Section 130 of the 1915 Act, all Regulations which were in force at the commencement of that Act were saved. We do not agree with the submission of Shri P.N. Lekhi that with the repal of the charter Act of 1833 and subsequent constitutional statutes, laws made in exercise of the legislative power also stood repealed. That may be true of ordinary laws when they are repealed but the same is not true when the constitutional statutes are repealed. There are two decisions supporting the contention of Shri P.N. Lekhi. One is **Raghbar Dayal V. Secretary of State,** AIR 1924 A11., 415, but that stands overruled by the Full Bench Decision in Mohan Agarwal V. Union of India and others (supra). So, no support can be taken from the decision in Raghbir Dayal' s case. Another S.B. decision is of Himachal Pradesh High Court in Durga Dass Sud and another V. Union of India and others, AIR 1972 H.P. 26. In that case, no doubt, it was held that the Governor General' s Order no. 179 of 12.9.1836 was purely an executive order without any statutory sanction behind it. So, it was not an existing law. The action of the Military Estates Officer in resuming the possession of the land and the building of the petitioner was held to be illegal and that it had no sanction of any statutory law. We are unable to agree with the view taken in that decision for the reasons which have already been considered above. The other two decisions are namely, **Phiroze Tenulzi Anklesaria v.H.C. Vashistha and others,** AIR 1980 Bom.9, and **Union of India vs. Purshotam Dass Tandon**

**and another,** 1986 (Supp) S.C.C. 720. These decisions have turned on the merits of the question relating to ownership and title and while examining that question the evidentiary value of the entries in the General Land Register regarding old grant tenure has been considered. They do not directly deal with the question of statutory character of the Governor General' s order.

Thus, in the light of what we have considered above, we are clearly and firmly of the opinion that Governor General' s Order in Council no. 179 dated 12.9.1836 had a statutory force and is existing law and law in force. No other contention has been advanced before us. There is no force in these petitions and so, they are hereby dismissed, leaving the parties to bear their own costs.

Sd/- M.C. Jain
Chief Justice

March 5, 1991.
hcs

Sd/- Arun Kumar
Judge.