CHAPTER VII

RESIDUARY POWER

UNDER THE GOVERNMENT OF INDIA ACT 1935

An ideal arrangement

7.1 A logical scheme for the division of powers between the federal centre and the units is to have a list of enumerated powers given either to the centre or to the units, with the residue to the other. If a concurrent scheme of powers is also envisaged, in addition to the list of enumerated powers, a list of concurrent powers may also be necessary. However, such neat divisions are not obtained in practice. The prevailing political pulls and pressures, and the bargaining for power preceding the division, would all be reflected in the distribution of powers actually obtaining in the constitutions.

7.2 In the Government of India Act, as we have already seen, there were two exclusive lists, namely, a list of federal powers, a list of provincial powers, and a concurrent list with regard to which both the Provinces and the Federation had competence. The residuary powers, however, were not allocated either to the Federation or to the Provinces but was under Section 104 of the Government of India Act, 1935, reserved to be allocated by the Governor-General in his discretion to the Federation or to the Provinces.

7.3 It may be recalled that in the Constituent Assembly, though the initial proposal was to have a federal centre of

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1. See paras 1.12, 1.13, 1.17, 1.18 and 1.20 ante.
2. See para 1.30 ante.
enumerated powers with residuary powers to the Provinces and States, after the decision for partition of India, it was decided to have a strong centre and as one of the steps for that purpose to allocate residuary powers to the Centre. This decision would have meant that there was no need to have the Union subjects enumerated in detail in List I. It would have been sufficient if the exclusive state powers and the concurrent powers were mentioned. The attempts to revise the drafts on this basis seems to have been given up at the insistence of Dr. Ambedkar, who maintained that the States, which were about to join the Federation, wanted to know more about the Federal powers than a vague description that the Federation would have a residuary power.

7.4 So we have in the Constitution a distribution of powers similar to the one in the Government of India Act with the difference that the residuary powers are now given to the Centre.

3. See para 1.38 ante, and C.A.D. Vol.IX, p.856. Ambedkar said: "Theoretically I quite accept the proposition that when anything which is not included in List II or List III is by a specific article of the Constitution handed over to the Centre, it is unnecessary to enumerate these categories which we have specified in List I. The reason why this is done is this. Many States people, and particularly the Indian States at the beginning of the labours of the Constituent Assembly, were very particular to know what are the legislative powers of the Centre. They wanted to know categorically and particularly; they were not going to be satisfied by saying that the Centre will have only residuary powers. Just to allay the fears of the Provinces and the fears of the Indian States, we had to particularise what is included in the symbolic phrase "residuary powers". That is the reason why we had to undergo this labour, notwithstanding the fact that we had article 223". (Article 223 in the draft corresponds to article 248 in the Constitution).
The function of the residuary power as disclosed in the cases

7.5 The function of the residuary power in the matter of resolving conflicts between the Federal power and the State power has been different under the Government of India Act and under the Constitution. Under the Government of India Act, there was no compulsion to find a particular power either with the Federation or with the Provinces.

7.6 In Manikkasundara Bhattach v. R.S. Nayudu the appellant was a devotee aggrieved by the entry of certain harijans in a temple, and the respondent, the executive officer and the trustee of the temple, who did not object to the alleged defilement of the temple. Since the Madras Temple Entry Authorisation and Indemnity Act, 1939, (22 of 1939), had indemnified the offence committed, if any, in entering the temple, the appellant was forced to challenge the validity the Act itself. His argument was developed on the following lines.

7.7 The entry that appeared to grant the power was entry 34 of List II. This was as follows:

"34— Charities and charitable institutions; charitable and religious endowments".

The other entries that seemed relevant were:

"List II, entry 33— The incorporation, regulation, and widening-up of corporations other than corporations specified in List I; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies."

"List II, entry 9— Trusts and Trustees".

The temple in question was obviously a religious institution. The only aspects of religion on which legislative power was conferred were 'religious endowment' in entry 34 and 'religious associations' in entry 33. Since some aspects of religion had been specifically mentioned in these entries, and religious institutions was not one of them, the Provincial Legislature was not competent to pass a law with respect to the religious institutions. In view of the specific grant of power with regard to some aspects of religion, religion as a whole would not also be within 'charities' in entry 34 of List II or 'trusts' in entry 9 of List III.

7.8 Spence C.J. however, held that entry 34 was wide enough to include such power. The reference to charitable institutions and charitable and religious endowments was only illustrative and not restrictive. If entry 34 in List II were limited to religious endowments, and entry 33 in List II to religious associations, and entry 9 in List III were not applicable to religious institutions, the power to legislate in respect of religious institutions would not be there in the Central and Provincial Legislatures, but in the residuary power under section 104. The Chief Justice thought that, when the Government of India Act, 1935 had considered legislation on several aspects of religious matters, it would not be correct to infer that the power to legislate on religious institutions was withheld by omission. Pointing

5. The undesirability of keeping religious charities and institutions outside social control, which the acceptance of the appellant's arguments would have meant, seems to have been in the mind of the judge, though not made explicit in the judgment.
out that the presence of section 104 in the Government of India Act 1935, regarding omitted subjects of legislation, would make it difficult for the principles governing the construction of the British North American Act directly applicable to the Government of India Act, the learned judge observed:

"In the Canadian Constitution Act, there is no provision in respect of omitted subjects of legislation. Every subject must be held to be either within the legislative powers of the Dominion Parliament or of the Provincial Legislatures. In the Constitution Act, S.104 has been inserted for the very purpose of enabling legislation to be enacted in respect of subjects omitted from the three Lists in Schedule VII. There is not therefore the same necessity for courts in India to find that a subject must be comprised within the entries in the Lists. But when there is a choice between two possible constructions of an entry or entries, one of which will result in legislative power being conferred by some entry or entries in the Lists and the other in a finding of no existing power, but if legislation is required that recourse must be had to section 104, the first construction should on principles analogous to those applied to the Canadian Constitution be preferred".

This shows that a resort to the residuary power should be made only after the power could not be found in an enumerated entry according to the normal principles of interpretation though there was not the same necessity as in Canada, in view of section 104, of finding the power either in the Federal or Provincial Lists.

7.9 The same attitude was revealed in a dictum of the Federal Court. In *Subrahmanyan v. Muttuswami* the Advocate-General of India who appeared for the appellant argued before the Federal Court that the Madras Agriculturists Relief Act, 1938 (4 of 1938), which had scaled down debts of agriculturists dealt with matters outside all the Lists and could therefore be sustained only on the residuary power. In fact on a proper interpretation the Act in question would have fallen under List II or List III. Turning down the argument of the Advocate General, Suleiman J. observed:

"But resort to that residual power should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a non descript".

7.10 In *Basudeva v. Rex* the failure of the U.P. Government to obtain authorisation of the Governor General under section 104 of the Government of India Act 1935, proved fatal to the validity of the U.P. Prevention of Black Marketing (Temporary Powers) Act, 1948. This Act had authorised preventive detention to prevent blackmarketing. According to entry I of List I the Dominion Legislature was empowered to provide for preventive detention for reasons of State connected with

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7. A.I.R. 1941 F.C. 47. See para 2.27 ante for facts of the case.
8. Ibid, at p.55.
10. as the Federal Legislature under the Government of India Act, 1935 modified and adapted by the Indian Independence Act, 1947 and the Indian Provisional Constitution Order, 1947 was called.
defence, external affairs or relations with acceding States. Under entry I of the Provincial List, Provincial Legislature might provide for preventive detention for reasons connected with maintenance of public order. The challenge was that the Act was beyond the competence of the Provincial Legislature. An attempt to sustain the validity of the Act by reference to the preamble which had recited that "It is expedient in the interest of the maintenance of public order to make the provision" was not accepted. It was insisted that to bring the Act within the first entry of List II the operative provisions of the Act should be in pith and substance within that entry. Prima facie, there was no connection between public order and black-marketing. That black-marketing might lead to food riots did not in reality establish any connection between black-marketing and maintenance of public order. The connection must be direct and clear as between cause and effect, and not remote and doubtful. Since the authorisation of the Governor-General under section 104(1) of the Government of India Act 1935 was not obtained, the U.P. Act was ultra-vires and the order of preventive detention of Basudeva contrary to section 491 of the Criminal Procedure Code warranted release on the habeas corpus petition.

7.11 An appeal was taken by the State to the Federal Court. Patanjali Sastri J. speaking for the court held that black-marketing was "so remote in the chain of relation to

public order". The connection must be real and proximate, not far fetched or problematical. Preventive detention to prevent black-marketing was therefore not within the scope of entry 1 of List II. The appeal therefore failed. The learned judge made no reference to the residuary power as, in the absence of authorisation by the Governor-General under section 104 of the Government of India Act, 1935, there was no attempt to sustain the validity of the Act on the basis of the residuary power. If there was such authorisation, the Act would have been held to come under the residuary power.

7.12 Tan Bug v. Collector of Bombay is another instance where a State Government's action in requisitioning property was held to be bad for want of authorisation under section 104. The premises on which the business of a Chinese restaurant was carried on was requisitioned by the Collector under Section 2(2)(xxiv) of the Defence of India Act, 1939 and rule 75(a) of the Defence of India Rules. Bhagawati J. held that requisition was neither specifically mentioned in, nor incidental to, any of the entries in the Lists. The Central Legislature had no power to legislate with respect to the same in the absence of a suitable authorisation by the Governor-General in Council even though there was a proclamation of emergency by the Governor-General under section 102(1) of the Government of India Act.

13. See para 2.20 ante.
a review of the provisions of the Act, Das J. held for a unanimous court that the Act did not provide for the granting of licence or maintenance of works for generating or transmitting energy or for supply of electrical energy as one would expect to find in a law dealing with electricity. The Act did not also make any provision for the incorporation, regulation, or winding up of a trading corporation. On the contrary, it was abundantly clear from the long title, the preamble and the sections, that it was in pith and substance nothing but an Act proving for the acquisition of an electrical undertaking. His Lordship observed:

"...although Parliament expressly entrusted the Provincial Legislature with power to make a law with respect to compulsory acquisition of land it did not straightaway grant any power, either to the Federal Legislature or the Provincial Legislature, to make a law with respect to compulsory acquisition of a commercial or industrial undertaking but left it to the discretion of the Governor-General to empower either of the Legislatures to enact such a law. There is no suggestion that the Governor-General had, in exercise of his discretionary powers under Section 104, authorised the Madras Legislature to enact the impugned Act and, therefore, the Act was, 'prima facie', beyond the legislative competency of the Madras Legislature".16

7.15 The case is important for this chapter because a serious attempt to read the power of compulsory acquisition of any property, land or commercial or industrial undertaking,

15. Mahajan C.J., Mukherjea, Bose and Ghulam Hasan JJ. were the other members of the Bench.
16. Ibid at p.293.
as an ancillary or incidental power available under every entry of legislative power was made here. The Supreme Court did not uphold this argument on the ground that the power of compulsory acquisition of land given by entry 9 of the Provincial Legislative List would in that case be superfluous. Since the power of acquisition could not be read as incidental to an entry of legislation and since no power of acquisition had been conferred on the Federal Legislature by a specific entry, and since the only specific power of acquisition conferred on Provincial Legislature was in respect of the compulsory acquisition of land, there was no power either in the Federal or Provincial Legislature for the compulsory acquisition of industrial or commercial undertaking. As there was no authorisation under section 104, the Provincial Act was ultra vires, and hence the decision of the Madras High Court was reversed.

The result of the scrutiny of the cases

7.16 From the above cases under the Government of India Act the following propositions may be held to have emerged.

Firstly, the presence of section 104 reserving residuary powers at the command of the Governor-General would

make it unnecessary for the courts to strain to locate a legislative power either in the Federation or in the Provinces. Secondly, the usual rules regarding the interpretation of entries, namely, of allowing the plenary power and incidental and ancillary powers, would be valid even though there is this residuary power. Thirdly, if two interpretations are possible, one of which will sustain the validity of an Act without reference to the residuary powers that should be preferred.

UNDER THE CONSTITUTION 1950

7.17 As noted earlier, the Constitution of India has specifically vested the residuary power as an exclusive head of power in the Union by entry 97 of List I of the Seventh Schedule and article 248 of the Constitution. The ad hoc allocation of residuary power by the Governor-General as in the case of the Government of India Act, 1935 has therefore been discarded. Though in view of the exhaustive enumeration of subjects in the Lists it was thought that the role of the residuary power was an extremely limited one, events have proved that this has not been so. The residuary power has been increasingly pressed into service in connection with the

18. For example, T.T. Krishnamachari said in the Constituent Assembly: "Now if you ask me why we have really kept the residuary power with the Centre and whether it means anything at all, I will say that it is because we have gone to such absolute length to enumerate the powers of the Centre and of the States and also the powers that are to be exercised by both of them in the concurrent field. . . . I think the vesting of the residuary power is only a matter of academic significance today". C.A.D. Vol.XI, p.953.
resolution of conflicts of power between the Union and the States. The chief uses of the residuary power as evidenced by the case-law are dealt with below.

As an alternate ground to sustain Union power

7.18 It is well-known that the grant of legislative power carries with it all necessary ancillary powers. In certain cases when the power of the Union was challenged and it could have been sustained on the doctrine of ancillary powers, the availability of the residuary power has lent an additional argument to support the Union power.

7.19 In Abraham v. Assistant Sales Tax Officer the question was whether animals and birds in captivity (monkeys, mines and parrots in the instant case) could be treated as movable property and as 'goods' within the meaning of section 2(d) of the Central Sales Tax Act, 1956. P.T. Raman Nair J. held that the animals and birds in captivity were 'goods' within the section 2(d) of the Central Sales Tax Act 1956.

Even if it were assumed that animate things did not come within the definition of article 366(12) of the Constitution, and the sale in question would not fall within entry 54 of List II or

20. 2(d)- "goods" includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and certificates.
21. Article 366(12): "goods" includes all materials, commodities, and articles.
22. 54- Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.
entry 92A of List I, it would come within entry 97 of List I, namely the 'residuary' entry. To levy a tax on such sale would be within the competence of Parliament. One would suggest that the ratio decidendi of the decision is to be based on the second holding.

7.20 In M/s. Rungta Engineering & Construction Co. Ltd. v. Income Tax Officer it was argued that Parliament had no power to enact the Income Tax Amendment Act, 1954 (33 of 1954) which introduced sub-sections 1-A to 1-D in Section 34 of the Income Tax Act making escaped income in respect of periods prior to Indian Independence liable to assessment. Bachwati J. held that the tax in question would still be a tax on income within the meaning of entry 82 of List I. Even if it were assumed that it was not a law with respect to income tax, since the Act in question was not a law with respect to any matter enumerated in the Concurrent List or the State List, the Parliament had the legislative competence to pass the Act under residuary powers.

7.21 Similarly, in Lakshmana v. Additional Income Tax Officer, the validity of sections 2(6A)(a) and 12(1B) of the Income Tax Act, 1922 (as amended by the Finance Act, 1955)

23. 92A- Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
entry 97 of List I and went on further to state that there was no objection for the Parliament incorporating the provisions under the Income Tax Act which called for the exercise of power under two or more entries in List I. This it is respectfully submitted is bad advice, for, it encourages clumsy legislation. Of course nothing prevents Parliament from clubbing together provisions regarding preventive detention under entry 9, List I, and preventive innoculation for inter-State quarantine under entry 81, List I, in one law on the ground that it has competence under the Constitution; but none should encourage the practice. These thoughts must have prompted Hidayatullah J. for, in his concurrent judgment he held that the annuity deposit scheme was in pith and substance referrable to entry 82 relating to taxes on income and incidental matters, and there was no need to resort to residuary powers and thereafter he made the following observations regarding the use of residuary powers:

"The very frequent reliance on entry No.97 makes me say these few words. That entry, no doubt, confers residuary powers of legislation or taxation but it is not an entry to avoid a discussion as to the nature of a law or of a tax with a view to determining the precise entry under which it can come. Before recourse can be had to entry No.97 it must be found as a fact that there is no entry in any of the three Lists under which the impugned legislation can come. For if the impugned legislation is found to come under any entry in List II, the residuary entry will not apply. Similarly, if the impugned legislation falls within any entry in one of the other two Lists recourse to the residuary entry
will hardly be necessary. The entry is not a first step in the discussion of such problems but the last resort. One cannot avoid the issue by taking its aid unless such a course is open. It is always necessary to examine the pith and substance of any law impugned on the ground of want of legislative competence with a view to ascertaining the precise entry in which it can come. The entries in the three Lists were intended to be exhaustive and it would be a very remote chance that some entry would not suit the legislation which is impugned".27

7.23 A challenge to the validity of the Payment of Bonus Act, 1965 was repelled by the Supreme Court. It was held that the power of the Parliament to fix minimum bonus flowed from its jurisdiction over industrial and labour disputes, welfare of labour including conditions of work and wages. The court did not hold that the fixation of minimum bonus was legal under any of the above powers. But then it added that if the above powers were held to be insufficient, the residuary powers of the Parliament must lend validity to the Act. One wonders whether this is going to be a refrain in this class of cases.

7.24 The competence of the Parliament to introduce section 2-A in the Industrial Disputes Act, 1947 by the Amendment Act of 1955 (35 of 1955) according to which the dismissal

27. Ibid, at p.624. That the learned judge is not averse to make legitimate use of the residuary power is clear from Second Gift Tax Officer, Mangalore v. D.H. Nazareth, A.I.R. 1970 S.C. 999. See para 7.33 infra.
etc. of an individual workman could be deemed to be an industrial dispute, was upheld by the Madras and Delhi High Courts. It was held that the Act was sustainable under entry 22 of List III and that even if entry 22 of List III was held not wide enough to treat an individual dispute an industrial dispute, the Parliament could enact the amendment in question in exercise of its residuary powers.

7.25 The challenge to the validity of the Beedi and Cigar Workers (Conditions of Employment) Act, 1966 (No.32 of 1966) in M/s. C.P. Patel v. State of Maharashtra was repelled by Deshmukh J. on the ground that the impugned Act fell principally under entry 24 of List III, and partly under entries 7, 22 and 23 of the same list. Hence it was unnecessary to resort to the residuary entry. However, if it were necessary to resort to residuary entry it would undoubtedly cover the legislation in question.

7.26 Criticising the Supreme Court's opinion in the Berubari opinion that the territory of India could be transferred to a foreign power only by a constitutional
to agrarian reforms. In 1956 Himachal Pradesh was merged in Punjab and article 240 of the Constitution was amended. The Parliament passed the validating Act in question with a view to save the agrarian reforms enacted by the irregularly constituted Assembly of Himachal Pradesh. The Supreme Court upheld the validity of the Act on the ground that legislation seeking to remove the disability of members of a Legislative Assembly of a Part C State arising because of the failure to issue a notification under the Representation of People Act was not covered by any item in the Concurrent List or in the State List and hence it was covered by the residuary power of the Union Parliament under entry 97 of List I.

7.28 In *Pio Fernandes v. Union of India* the validity of the Goa, Daman and Diu (Opinion Poll) Act, 1966 was challenged. Jetley J.C. held that the decision of the Supreme Court in *Mithan Lal v. State of Delhi*, that in the case of Part C State, Parliament had under article 246(4) of the Constitution power to make laws on any matter notwithstanding that such matter was included in State List, applied to the case on hand. Therefore, though there was no specific entry in the Lists regarding opinion poll, Parliament had the power to enact the Act in question under the residuary power and under article 246(4).

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Power of constitutional amendment as residuary power

7.29 In *L.C. Golaknath v. State of Punjab* the Supreme Court had held that the power of the Parliament to amend the Constitution was derived from article 248 read with entry 97 of List I and that article 368 dealt only with the procedure for amendment. However, in view of the 24th Amendment of the Constitution and the Supreme Court’s pronouncement in *Kesavan Bhara thi v. State of Kerala*, article 368 should be held to include both the power and procedure for amendment and there is no case for invoking a residuary power for constitutional amendment. It is also doubtful whether the residuary power can be relied upon by Parliament to call a new Constituent Assembly for the purpose of constitutional revision.

A State Act challenged as violating the residuary power

7.30 The foundation of the Calcutta City Civil Courts was questioned in this case by attacking the vires of the Calcutta City Civil Court Act, 1953 (No. xxi of 1953) and of the amendment of 1969 conferring additional jurisdiction. It was contended that under article 247 of the Constitution only Parliament had the power to set up additional courts, or that such a power belonged to Parliament under the residuary powers. Sabyasachi Mukherjee J. for the Division Bench, confirming P.K. Banerji J., held that the Act in question was

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covered by expressions "administration of justice" and "constitution and organisation of courts" in entry 3 of the State List. It was also pointed out that resort to residuary power should be made only as a last refuge and that where two constructions were possible one of which would avoid resort to residuary power, and the other would not, the former should be preferred.

RESIDUARY TAXING POWERS

7.31 The maximum use of the residuary powers has been made in the field of taxing powers. Since taxing powers have been specifically mentioned in the Lists such a power cannot be inferred as ancillary or incidental to any other entry relating to legislation. Again, taxing powers have been given only in the exclusive fields and there is no taxing power in the concurrent field. These factors seem to have made the resort to the residuary power for sustaining the validity of taxing measures. The chief uses of residuary powers in these fields are discussed below.

Gift tax

7.32 The competence of the Parliament to enact the Gift Tax Act, 1958 (18 of 1958) for levying a tax on gifts of agricultural land was sustained by the Kerala and Madras High Courts, on the basis of the residuary powers. Both these

High Courts held that the power to impose a tax on gift of agricultural land could not be held to be incidental to the power to legislate with respect to land under entry 18 of List II. Nor could that power be comprehended within entry 47 of List II relating to duties in respect of succession to agricultural land. In Shyam Sunder v. Gift Tax Officer on a similar reasoning, the Allahabad High Court held that a tax on land and buildings was distinctly different from a tax on gift of land, and that legislation in respect of a tax on gift of land and buildings would not fall under entry 49 of List II, namely, tax on land and buildings. The Gift Tax Act was validly passed by Parliament under article 248 read with entry 97 of List I.

However, in D.H. Nazareth v. Gift Tax Officer, the Mysore High Court held that the power to levy a gift tax on lands and buildings, particularly on agricultural land (gift of coffee plantation in the instant case) was reserved to the State Legislature under entries 18 and 49 of List II, and that Parliament had no power to do so under entry 97 of List I. On appeal by the Government, the Supreme Court reversed the decision of the Mysore High Court. Hidayatullah C.J. held that the entries in the Lists did not follow a logical classification or dichotomy, and must be regarded as enumeratio simplex of broad categories bound to overlap occasionally.
It was usual to examine the pith and substance of the legisla-
tion in solving questions about legislative competence. If
the legislation was not covered by any entry when examined in
that fashion, it would belong to the residuary power.

7.34 In Sudhir Chandra Nawn v. Wealth-Tax Officer, Calcutta it was held that entry 49 of List II referred to a
tax on the ownership of lands and buildings and not to a tax,
like wealth tax, where lands and buildings were taken only as
a measure. This decision must be held to have impliedly
overruled the judgment of the Mysore High Court under appeal.
Sustaining the validity of the Gift Tax Act, 1958 under the
residuary power the learned Chief Justice observed:

"The pith and substance of Gift Tax Act is to
place the tax on the gift of property which may include
land and buildings. It is not a tax imposed directly
upon lands and buildings but is a tax upon the value of
the total gifts made in an year which is above the exempted
limit. There is no tax upon lands or buildings as
units of taxation. Indeed the lands and buildings are
valued to find out the total amount of the gift and
what is taxed is gift. A gift tax is thus not a tax on
lands and buildings as such which is a tax resting upon
general ownership of lands and buildings but is a levy
upon a particular use, which is transmission of title
by gift. The two are not the same thing and the
incidence of tax is not the same. Since Entry 49 of
State List contemplates a tax directly levied by reason
of the general ownership of lands and buildings, it
cannot include the gift tax as levied by Parliament.

Excise duty on the use of rubber

7.35 In M/s. Jullundur Rubber Goods Manufacturers' Association v. Union of India the validity of the Rubber Amendment Act, 1960 (xxi of 1960) by which the excise duty payable under the Rubber Act, 1947 could be collected by the Rubber Board either from the owners of estates or from the manufacturers by whom the rubber was used, was challenged. It was contended that the levy of an excise duty from the manufacturers or users of rubber was outside the ambit of entry 84 of List I under which excise duty could be levied on goods manufactured or produced in India. The appellants were an association of chappal manufacturers who used rubber for the manufacture of chappals. The Supreme Court speaking through Grover J. held that excise duty was primarily a duty on the production or manufacture of goods within the country with its ultimate incidence on the consumer, and could be levied at any convenient stage. What was called excise duty on the use of rubber "will be a kind of non-descript tax which has been given the nomenclature of the duty of excise", which the Parliament could validly impose under the residuary powers.

47. Ibid, at p.1002.
49. Ibid, at p.1593.
Irregular sugarcane cess levied by State

7.36 The residuary powers have been pressed into service even for sustaining, though indirectly, the irregular exercise of taxing power by the States. In Diamond Sugar Mills Limited v. State of U.P., it may be recalled, the Supreme Court held that the premises of a factory was not a "local area" within the meaning of entry 52 of List II. The Uttar Pradesh Sugarcane Cess Act, 1956 which had levied cess on the entry of cane into the premises of a factory for use, consumption or sale therein on the basis that the premises of a factory was a 'local area' was therefore struck down. On the basis of this decision, the M.P. High Court struck down the M.P. Sugarcane Regulation of Supply and Purchase Act, 1958 (No.1 of 1959) which had levied a similar cess. The Central Act, the Sugarcane Cess (Validation Act) 1961 (No.38 of 1961) was passed which by section 3 validated levy of a cess on sugarcane under 10 Acts in 7 States including the one under the M.P.Act.

7.37 In Jaora Sugar Mills v. State of M.P. the validity of the central legislation was questioned. Gajendragadker C.J. delivering the judgment of the Supreme Court held that section 3 of the Central Act did not merely validate the invalid State Acts, because it would not have been competent for Parliament

51. See para 2.10 ante.
52. "Taxes on the entry of goods into a local area for consumption, use or sale therein".
to confer jurisdiction on State Legislatures in that way, but had included all the States and Notifications in the Central Act at all material times by virtue of section 3. Parliament had the power to levy the cess as had been levied in the invalid State Acts, under article 248 read with entry 97 of the List II.

This case shows that the Union can always, if it is so disposed, go to the rescue of the State to sustain invalid State legislation by invoking the residuary powers. This really adds a new dimension to co-operative federalism.

Sales tax on works contract

7.38 In *State of Madras v. Gannon Dunkerley & Co.* the Supreme Court had upheld as we have already seen, the judgment of the Madras High Court that under entry 48 of List II of the Government of India Act, 1935 (entry 54 of List II of the Constitution) a Province could not levy a sales tax on the materials used in building contract as there was no sale as defined in the Sale of Goods Act. But this decision given on a statute passed by the Provincial Legislature under the Government of India Act, 1935 had no application to a Part C State even when the Provincial law extended to a Part C State. Under section 2 of the Part C States (Laws) Act 1950, Bengal Finance (Sales Tax) Act, 1941 was extended to Delhi, the effect of which was to levy a sales tax on building contract. This

55. See para 2.11 ante.
extension was challenged on the basis of the Gannon Dunkerley decision. T.L. Venketarama Iyer J. held that in the case of Part C States there was no need to invoke the residuary taxing power referred to in article 248(2) which had application only as between the Union and the States mentioned, in Parts A and B, and that in the case of Part C State, Parliament had competence to enact under article 246(4) a law levying a sales tax on works contract and it was immaterial if the result was achieved by an enactment of the Parliament or by extending a Part A State Act under the Provisions of the Part C States (Laws) Act, 1950.

7.39 Similarly resort to the residuary power is unnecessary in the case of some pre-constitution laws on taxation. The validity of the Travancore-Cochin General Sales Tax Act (published in the Gazette on 17-1-1950 and came into force on 30-5-1950) was called in question. It had defined sale for the purpose of sales tax to include "a transfer of property in goods involved in the execution of a works contract". The Act was challenged as ultra-vires based on the Gannon Dunkerley decision. Ansari C.J. held that the Union Parliament was competent to levy sales tax in question under the residuary powers under entry 97 of List I. The T.C. Act though came into operation after the Constitution came into force was passed before the Constitution and was saved by article 372. Hence under article 277 a State could

continue to levy the sales tax until a contrary provision was made by Parliament.

Expenditure tax

7.40 The Andhra Pradesh High Court upheld the validity of Expenditure Tax Act, 1957 as expenditure tax which was not specifically provided for in any of the entries in List II or List III, was within the ambit or scope of entry 97 of List I. So long as it was a tax on expenditure, the mere fact that in furtherance of the legislative intent and object, the expenditure on which the tax was sought to be levied was not necessarily confined to the expenditure actually incurred by the assessee himself (in this case it had included the expenditure of his wife) did not render it other than an expenditure tax. On appeal, the Supreme Court upheld the validity of the Expenditure Tax Act, 1957 on the ground that it did not fall within entry 62 of List II, but under the residuary powers.

Wealth tax

7.41 There was a conflict of decisions in various High Courts regarding the validity of the Wealth Tax Act, 1957.

In Jugal Kishore v. Wealth Tax Officer, Special Circle it was held by the Allahabad High Court that section 3 of the Wealth Tax Act, 1957 which imposed a wealth tax on Hindu undivided family was intra-vires the Parliament under article 248 read with entry 97 of the List I. Jagdish Shah J. held that a Hindu undivided family was included in the term 'individual' in entry 86 of List I and, if not, the tax on Hindu undivided family was sustainable under article 248 read with entry 97 of List I. Gurtu J. held that entry 86 did not include Hindu undivided family and hence the Act had to be sustained on the residuary power. Upadhyay J. however, held that the word "individual" in entry 86 did not include a Hindu undivided family. What had been left out of entry 86 could not be included in the residuary power. The Wealth Tax Act should therefore be declared ultra-vires the powers of the Parliament.

7.42 An argument that the levy of wealth tax on Hindu undivided family would not be covered by entry 86 of List I was repelled by the Bombay, Andhra Pradesh, Kerala and Mysore High Courts. Before the Kerala High Court an argument that entry 46 of List II or entry 49 of List II was attracted by the

66. "Taxes on agricultural income".
67. "Taxes on lands and buildings".
Wealth Tax Act was rejected. There was no tax on agricultural income as such but only on the net wealth. A tax on land and building referred to in entry 49 of List II, based on the annual or capital value was only a measure adopted to ensure the justness or reasonableness of the levy. In the case of a tax on the capital value under entry 86 of List I such value itself was the base or object of the levy. In all these cases the courts thought that it was not necessary to uphold the validity of the Wealth Tax Act on the alternative ground urged by the Government, viz., that the Act could be sustained under residuary powers. In Banarasi Dass v. Wealth Tax Officer the Supreme Court held that capital value of assets of individuals in entry 86 of List I included Hindu undivided family. It was held in subsequent cases that a tax on the capital value under entry 86 of List I would not come under entry 49 of List II. The former one was not directly on lands and buildings, but only on the capital value of assets, which might include lands and buildings, whereas the latter one was a direct tax on lands and buildings even if the capital value was adopted as a measure of tax. Hence the two fields of legislation referred to by the two entries did not overlap.

In Union of India v. H.S. Dhillon the competence of Parliament to include the capital value of agricultural land for the purpose of computing net wealth for the imposition of the wealth tax was in question. The pronouncement of the Supreme Court in this important case by a bench of seven judges of the Supreme Court has given a new approach in the interpretation of the Legislative Lists.

The Finance Act, 1969 amended the Wealth Tax Act, 1957 and included the capital value of agricultural land for the purpose of computing net wealth. The Punjab and Haryana High Court held that the amendment was beyond the legislative competence of Parliament in view of the specific exclusion of agricultural land in entry 86 of List I. The majority of the Supreme Court noted that though agricultural land was specifically excluded in entry 86 of List I it did not fall within any entry in the State List. It was noticed that all the matters and taxes which had been excluded from List I, except tax on the capital value of agricultural land under entry 86 of List I, fell specifically within one or other of the entries in List II. Thus while taxes of agricultural income was excluded from entry 82 of List I they were included in entry 46 of List II, duties of excise excluded in entry 84 of List I were included in entry 51 of List II, agricultural

land exempted in entry 81 of List I was included in entry 48 of List II and agricultural land exempted from the incidence of duties in respect of succession to properties was included in entry 47 of List II. It was really not the exclusion of an item from enumerated entries in List I that denied the competence to the Union to legislate with respect to that matter but its inclusion in the State List.

7.45 In support of this position, a reference was made to the Constituent Assembly Debates and in particular to the speech of Shri T.T. Krishnamachari to the effect that after the exhaustive enumeration of the fields of legislation in the Lists there seemed to be only one power left out, which could be exercised under residuary power in future, namely, the capital levy on agricultural land.

7.46 The conclusion was also supported on the analogy of the Canadian Constitution which with regard to the division of powers was similar to the one adopted in the Constitution. In the case of a doubt whether a particular power was available to the Parliament of Canada the question to be asked was whether it belonged to the Province. If the power did not belong to the Province it would belong to the Dominion. So was the case in India too. If a particular power did not belong to the State it should necessarily be with the Union. The fact that a particular item was excluded from the enumeration of powers in the Union List would not alter this.

position as there could not be a category of powers which did not belong either to the State or to the Union. No subject was kept outside the full legislative sovereignty shared between the Union and the States. Once it was decided that a tax on the capital value of agricultural land could not come within entry 49 of List II, such tax should belong to the Union.

7.47 The majority also distinguished between a tax on the capital value of assets which would come within entry 86 of List I and a tax on wealth. In the case of the former tax though there should be aggregation it was not necessary to provide for the deduction of debits in ascertaining the capital value of assets whereas in the case of a wealth tax (i.e., a tax on the net wealth of a person) there should be provision for the deduction of the general liabilities of the person and the liabilities in respect of particular assets.

7.48 G.K. Mitter J. in his concurring judgment held that the expression "capital value of assets" could only mean the market value of assets less any encumbrances charged thereon. The expression did not take in either the general liabilities of the individual owning them or in particular the debts owned in respect of them. The subject-matter of legislation by Wealth Tax Act was therefore not covered by entry 86 but by entry 97 of List I. Article 248(1) also made it clear beyond doubt that "any other matter" in entry 97 were those not covered by entries in List II or III.

7.49 J.M. Shelat, A.N. Ray and I.D. Dua JJ. delivering a dissenting judgment held that the amending Act fell under
entry 86 of List I and not under the residuary power under article 248 read with entry 97 of List I. The basis of the wealth tax was the capital value of the assets held by an assessee on the relevant valuation date. The fact that a particular tax included one or more of the assets such as agricultural land or allowed from its incidence certain deductions such as, debts and liabilities, pertained to the field of computation and the true basis of the tax was the capital value of the assets. A valid tax including agricultural land could not be imposed under entry 86 which was the only entry authorising such a tax in view of the specific exclusion of agricultural land. They also doubted the support derived from the analogy to the Canadian Constitution and the reference to the Constituent Assembly Debates.

7.50 It may be seen that the minority judgment has not answered the question whether a wealth tax on agricultural land would come within the State's sphere. Exclusion from a particular entry in the Union List would not by itself take it outside the Union's purview unless the power would come within the State's sphere. Therefore, the minority judgment, it is submitted, has not answered a basic question connected with the distribution of powers as there cannot be a power which does not belong to the Union and to the States. The position now reached by judicial interpretation is the same as the one envisaged by Alladi Krishnaswamy Ayyar when he suggested a redrafting of the provisions of the draft Constitution governing the distribution of powers, after it become
known that the residuary powers would be vested in the Centre, and which was given up on the assurance of Dr. Ambedker that an elaborated enumeration of the central power was necessary for the information of the States intending to accede to the federation. Hereafter any question regarding the competence of the Union power should be answered by asking whether the power in question really belongs to the State. If it does not, then it belongs to the Union. Entries 1 to 96 in the Union List are only illustrative of the residuary powers vested in the Union Parliament and may be of some assistance in defining the enumerated powers in the State List or Concurrent List.

7.51 It is interesting to compare this landmark decision with the decision of the High Court of Australia in the famous Engineer's Case where it was held that "the specific grant of power must be defined before the residue can be defined". Now any question about the Union power, which in fact is a residuary power, would raise the question: "residue of what?", and would invite the answer: "the residue of what has been given to the States". Hence the logical step in determining a question about the Union power would be to enquire whether the power in question belongs to the State. Specific enumeration in the Union List in entries 1 to 96 may be helpful in determining the extent of the specific grant of power to the State and hence

73. See para 7.3 ante.
74. (1920) 28 C.L.R. 129.
of the residuary powers of the Union. The stand that resort to the residuary power may be had only when all the category of enumerated powers in the three Lists have been exhausted is no longer valid.

RESIDUARY POWER AND COLOURABLE LEGISLATION

7.52 The presence of residuary power has sometimes refuted arguments based on colourable legislation. Thus it was held that Parliament had under the residuary powers the power to legislate in respect of compulsory deposits, to order opinion poll in Goa, levy a sugarcane cess and thereby to validate the irregular levy by the State. An argument that Parliament tried to do indirectly what it could not do directly was not accepted as the competence of the Parliament was sustainable under the residuary power.

THE RESIDUARY POWER AND THE DOCTRINE OF OCCUPIED FIELD

7.53 Since the residuary power is an exclusive power there is no scope for applying the doctrine un-occupied field. In other words, even if the Parliament has not occupied the residuary field by its legislation there is no question of the States occupying the field. Such a step on the part of a State would be ultra vires its legislative competence. In fact no such case seems to have ever come up in which the

States sought to justify their exercise of legislative powers on the basis of the doctrine of unoccupied field in residuary powers.

CONCLUSION

7.54 The residuary powers which were supposed to have very limited scope in view of the elaborate enumeration of the topics of legislation in the three Legislative Lists in the Constitution have turned out to be not so limited. Particularly, in the field of taxation, the resort to residuary powers to justify wealth, gift, expenditure etc. taxes shows that it has added a new dimension to the Union power. Since the important decision of the Supreme Court in Union of India v. H.S. Dhillon, a new approach in the constitutional interpretation of the legislative entries has been opened. Hereafter there is no need to justify the exercise of Union power on the basis of one or more entries in the Union List, all that is enough is to show that the power in question does not belong to the State. This logical way of approach to the entries has really rendered superfluous the detailed enumeration of powers in List I though it may still serve some purpose in showing the scope of Union's residuary powers and for determination of the scope of the specifically enumerated powers in the state and concurrent fields.

7.55 It is well-known that in interpreting the provisions of sections 91 and 92 of the Canadian Constitution 79.

the distribution of powers the Privy Council gave primacy only in respect of the specifically enumerated powers referred to in section 91. Though the general residuary power of the Dominion was also entitled by the constitution to the same status as its enumerated exclusive powers, in the case of a conflict between the enumerated Provincial power in section 92 and the general residuary power of the Dominion in section 91, the Privy Council gave primacy to the former. Added to this the extended interpretation of "Property and Civil Rights" in section 92 has transferred in effect the residuary power from section 91 to section 92. In India, the residuary power has received its due constitutional treatment, as an exclusive Union power which has primacy over the State and Concurrent powers. It is unlikely that a position similar to that of Canada will develop in India with regard to the residuary powers. The residuary power in India has sharpened further the dominant position of the Centre. It is hoped that it will not encourage careless drafting of Union legislation.