PETITIONER:
UNION OF INDIA AND ORS.

Vs.

RESPONDENT:
SUKUMAR SENGUPTA AND ORS.

DATE OF JUDGMENT03/05/1990

BENCH:
MUKHARJI, SABYASACHI (CJ)
BENCH:
MUKHARJI, SABYASACHI (CJ)
KANIA, M.H.
SHETTY, K.J. (J)
SAIKIA, K.N. (J)
AGRAWAL, S.C. (J)

CITATION:
1990 AIR 1692 1990 SCR (3) 24
1990 SCC Supl. 545 JT 1990 (2) 297
1990 SCALE (1)924

ACT:
Constitution of India, 1950: Articles 1, 3, 368 and Constitution (Ninth Amendment) Act, 1960--Agreements of 1974 and 1982-Implementation of--Teen Bigha--Whether involves cession of Indian territory to Bangladesh--Sovereignty over Dahagram and Angarpota--Whether arises.

HEADNOTE:
The Indian Independence Act, 1947 had set up two independent dominions known as 'India' and 'Pakistan'. A Boundary Commission was appointed to determine the boundaries of the two dominions, As a result of its Award, certain areas of India became, after the partition, enclaves in East Pakistan. Similarly, certain East Pakistan enclaves were found in India. Dehagram and Angarpota were two such Pakistani enclaves in India.

In view of the Award, Berubari Union No. 12 was treated as part of the Province of West Bengal. Near about 1952, Pakistan alleged that under the Award the Berubari Union should really have formed part of East Bengal. Eventually, in 1958 the Prime Ministers of India and Pakistan entered into an agreement settling certain boundary disputes. The agreement inter alia provided for the division of Berubari Union No. 12 between India and Pakistan and exchange of Indian enclaves in Pakistan and Pakistan enclaves in India.

Doubts arose regarding the implementation of the 1958 agreement. Therefore, in exercise of the powers conferred upon him by clause (1) of Article 143 of the Constitution, the President of India referred the matter to the Supreme Court.

In the light of the opinion rendered by the Supreme Court in Re: The Berubari Union and Exchange of Enclaves, [1960] S.C.R. 3 250, the Constitution (Ninth Amendment) Act, 1960 was passed to give effect to the transfer of the territories as envisaged in the 1958 agreement.
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By an official notification, 17th January 1961 had been appointed as the day for the transfer of the territories of

India by way of exchange with the territories of Pakistan in the western region. No further appointed day was notified so far as the eastern border of India was concerned.

In 1966, writ petitions challenging the validity of the transfer of territories as stipulated in the Ninth Amendment were dismissed by this Court in Ram Kishore Sen & Ors. v. Union of India, [1966] 1 S.C.R. 430.

On or about the 16th May, 1974 an agreement was entered into between the Prime Ministers of India and Bangladesh. This agreement inter alia provided that India will retain half of Berubari Union No. 12, which under the 1958 agreement was to be transferred to Pakistan, and in exchange Bangladesh will retain the Dahagram and Angarpota enclaves. The agreement further provided that India will lease in perpetuity to Bangladesh a small area near 'Tin Bigha' for the purpose of connecting Dahagram and Angarpota with Panbari Mouza of Bangladesh. The 1974 agreement, however remained unimplemented.

Thereafter, in October 1982 an understanding was reached between the two governments in respect of 'lease in perpetuity' by India of the said area near 'Tin Bigha' to enable the Bangladesh government to exercise her sovereignty over Dahagram and Angarpota. It was further agreed that the 1982 agreement would be an integral part of the earlier agreement of 1974. It was also agreed that the sovereignty over the leased area shall continue to vest in India.

Clause 9 of the 1982 agreement provided that India would have no jurisdiction over Bangladesh nationals in respect of any offence committed in the area, and the same shall be dealt with by the Bangladesh law enforcing agency only.

In 1983, Writ Petitions were filed in the Calcutta High Court challenging the validity of the agreement. The learned Single Judge dismissed the writ petitions (Sugandhra Roy v. Union of India, A.I.R. 1983 Cal. 483). The learned Single Judge held that (i) Ninth Amendment in so far as it related to exchange of the enclaves in eastern India had not come into being; (ii) implementation of the agreements of 1974 and 1982 did not involve cession of any Indian territory to Bangladesh; (iii) no exclusive or legal possession of Tin Bigha was being transferred

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to Bangladesh; (iv) there was no question of transfer of sovereignty of India wholly or partially in respect of the said area; (v) certain privileges only had been conferred on Bangladesh and its nationals under the said agreement which otherwise they would not have; (vi) as Dahagram and Angarpota would remain as parts of Bangladesh territory, the agreements were necessary to enable Bangladesh to exercise its sovereignty in full over the said enclaves; and (vii) in spite of the said agreements India would retain sovereignty, ownership and control over Tin Bigha.

Regarding clause 9 of the 1982 agreement, the learned Single Judge held that the conferment of this power under the agreement to Bangladesh and abdication of any such power by India, by itself, did not amount to transfer of sovereignty in respect of the area. The learned Single Judge, however, noted that merely by virtue of the agreement and without any amendment of the existing Indian law it might not be legally possible to take away existing jurisdiction of the law enforcing agencies of India or the Indian courts.

An appeal was filed before the Division Bench. It was contended before the Division Bench that (i) the 1974 agreement specifically provided that the same would be suitably ratified but it had not been ratified; (ii) in the absence of any ratification of the agreement of 1974, India and

Bangladesh could not enter into the subsequent agreement in 1982 on the basis of the agreement of 1974; (iii) by reason of the agreement of 1958 between India and Pakistan, which was sanctioned by the Ninth amendment to the constitution, there was automatic exchange of the Pakistani enclaves in the eastern part of India with the Indian enclaves in eastern Pakistan; (iv) neither India nor Bangladesh had formally terminated the treaty of 1958 and as such in so far as the provisions of the said agreement of 1958 concern Berubari union No. 12 and the Cooch Behar enclaves, including Dahagram and Angarpota, they could not be given a go-by in the manner purported to have been done, and a further amendment to the Constitution was necessary; and (v) the use of the expression 'residual jurisdiction' in clause 9 of the agreement of 1962 indicated that Indian only retained residual sovereignty over the area and the defacto arid real sovereignty in the area had been surrendered to Bangladesh.

The Division Bench repelled these contentions. The Bench however was of the view that the agreements of 1974 and 1982 providing for exchange of territories would have to be noted in the relevant schedules to the Constitution before any appointed day could be notified in

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respect of the territories to be transferred to Bangladesh. According to the Division Bench, this was necessary in order to retain Berubari in India.

Disposing of the appeal, this Court.

HELD: (1) The Division Bench came to the correct conclusion that in so far as the eastern border of India was concerned, the Ninth Constitutional amendment had not become part of the Constitution as no appointed day had been notified, and in that view of the matter, the decision to allow Bangladesh to retain Dahagram and Angarpota under the 1974 and 1982 agreements did not amount to cession of Indian territory in favour of Bangladesh. [45A-B]

A.K. Roy, etc. v. Union of India & Anr., [1982] 2 S.C.R. 272: Maganbhai Ishwarbhai Patel v. Union of India & A nr., [1969] 3 S.C.R. 254, referred to.

(2) The Division Bench was pre-eminently right in arriving at the conclusion that there was no automatic transfer of Dahagram and Angarpota to India under the 1958 agreement in the absence of a notified appointed day, and consequently both defacto and dejure these enclaves remained part of East Pakistan and subsequently Bangladesh. [44G-H]

(3) The Division Bench had held that the agreements of 1974 and 1982 did not amount to cession of territory or abandonment of sovereignty. If that is the position, no constitutional amendment was required for the arrangements entered into either by the agreement of 1974 or 1982. The Division Bench was therefore in error in expressing a contrary view. [44B-C]

(4) In that view of the matter, the agreements of 1974 and 1982 did not require to be suitably notified or included in the official gazette. Therefore, there was no cause to direct the legislature to amend or pass suitable laws. [52B]

State of Himachal Pradesh v. Umed Ram Sharma, [1986] 2 S.C.C. 68; State of Himachal Pradesh v. A parent of a Student of Medical College, Simla & Ors., [1985] 3 S.C.R. 676, referred to.

(5) The expression 'lease in perpetuity' has to be understood in the context of and with reference to the objects of the agreement. The object of the lease was to allow access to Bangladesh to Dahagram and

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Angarpota for the purpose of exercise of her sovereignty

over and in the said areas. Having examined the rights in the agreements, these do not amount to lease or surrender of sovereignty as understood in the international law. [47B-D]

Associated Hotels of India Ltd. v.R.N. Kapoor, [1960] 1 S.C.R. 368, referred to.

(6) The Division Bench rightly held that the recital in a deed could not operate as an estoppel against the specific terms and conditions thereof. On a construction of the agreements, the Division Bench came to the correct conclusion that the agreements of 1974 and 1982 together in their entirety must be judged. [47F]

(7) An agreement between two countries might be ratified not only by a subsequent formal agreement but by actual implementation or by conduct, and read properly, the subsequent agreement did ratify the previous agreement. [46G-H]

(8) The Division Bench rightly held that under the said agreements, specific and limited rights were being granted to Bangladesh. Such rights were not exclusive and the aggregation thereof would not amount to a lease, as is commonly understood in favour of Bangladesh. [49D-E]

(9) Certain restrictions had been imposed on India over its absolute sovereignty in the area to serve the purpose in favour of and in the interest of Bangladesh. These are, however, self-imposed restrictions. On a proper construction of the agreements of 1974 and 1982 and the individual clauses, it cannot be said that as a result of the said agreement, India had surrendered its sovereignty over the said area of Teen Bigha in favour of Bangladesh or that Bangladesh has become the sovereign over the said territory to the exclusion of India. [49G-H]

(10) Sovereignty is a quality of right. It is a bundle of rights. It depends on the facts and the circumstances of each case. Apart from anything else, the specific clause in the agreement of 1982 that sovereignty over the area shall continue to vest in India stands in the way of a contrary construction. [50A-B]

Panama Canal's case Hudson Cases & Ors. Materials on international Law, 3rd Edition, 1951 pp 222-3, distinguished.

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(11) 'Sovereignty' has been defined as "the supreme authority' in an independent political society. It is essential, indivisible and illimitable. However, it is now considered and accepted as both divisible and limitable. Sovereignty is limited externally by the possibility of a general resistance- Internal sovereignty is paramount power over all action, and is limited by the nature of the power itself. [41E-F]

(12) In the present and modern context sovereignty has and must have a more restrictive meaning than it had in the earlier centuries when on the emergence of individual national States, no limits on the power of States, were acknowledged. Any State in the modern times has to acknowledge and accept customary restraints on its sovereignty inasmuch as no State can exist independently and without reference to other States. Under the general international law the concept of interdependence of States has come to be accepted. Even without the said agreements of 1974 and 1982, so long as Dahagram and Angarpota remain part of Bangladesh, the latter under the general international law and customs would have a right to access to the said enclose through the territory of India. [50C-E]

(13) Amicable and peaceable settlement of boundary disputes are in the interests of the international community. The older and absolute ideas of 'sovereignty and inde-

pendence has thus necessarily to be modified in the dawn of the 21st century. A perpetual right to passage and other incidental rights given to Bangladesh for the limited purpose for exercising the sovereignty over her own two enclaves within the territory of India and/or if imposed restrictions on itself by India does not tantamount to transfer of interests in India- [52E-F]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2833-35 of 1987.

From the Judgment and Order dated 19.9.1986 of the Calcutta High Court in A.F.O. No. 102 of 1984 in M.A. Nos. 3036 and 3062 of 1983.

Soli J. Sorabjee, Attorney General and N.S. Hegde, Additional Solicitor General, Gopal Subramanium, Ms. A. Subhashini and P. Parmeshwaran for the Appellants.

S.S. Khanduja, Y.P. Dhingra and B.K. Satija for the Respondents.

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The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, CJ. This appeal by special leave arises from the judgment and order of the Division Bench of the High Court of Calcutta dated 19th September, 1986.

The Indian Independence Act, 1947 (hereinafter referred to as 'the Act') was passed by the British Parliament. This Act came into force on and from 15th August, 1947, which was the appointed day and under the Act, as from the appointed day, two independent dominions were to be set up in place of the existing India known, respectively as 'India' and 'Pakistan'. Two independent dominions were set up in place of the existing Indian Union. Section 3(1) of the Act provided, inter alia, that as from the appointed day the Province of Bengal as constituted under the Government of India Act, 1935 shall cease to exist and in lieu thereof two new provinces known respectively as 'East Bengal' and 'West Bengal' shall be constituted under section 3(3) of the Act. Under section 3(3) of the Act, it was provided that the boundaries of the new provinces as aforesaid shall be such as may be determined whether before or after the appointed day by the award of a Boundary Commission appointed or to be appointed by the Governor General in that behalf. On 30th June, 1947, the Governor General made an announcement that it had been decided that the Province of Bengal and Punjab shall be partitioned. Accordingly, a Boundary Commission was appointed, inter alia, for Bengal consisting of Sir Cyril Radcliffe as the Chairman. So far as Bengal was concerned, the material terms of reference provided that the Boundary Commission should demarcate the boundaries of the two parts of Bengal on the basis of, inter alia, the contiguous areas of Muslims and non-Muslims. The Commission held its enquiry and made an award on August 12, 1947, i.e., three days before the appointed day. The Chairman gave his decision regarding the demarcation of boundary line in respect of District of Darjeeling and Jalpaiguri in para 1 of Annexure 'A' which provided that a line was to be drawn in a particular manner. The Award directed that the District of Darjeeling and so much of the District of Jalpaiguri as lies north of the said line shall belong to West Bengal but the Thana of Phatgram and any other portion of Jalpaiguri District, which lies to the East or South, shall belong to East Bengal. Problem arose subsequently regarding the Berubari Union No. 12 Which was situated in the Police Station Jalpaiguri

in the District of Jalpaiguri, which was at the relevant time a part of Raisahi Division of Bengal. After the partition, Berubari Union formed part of the State of West Bengal and had been governed as such. The Constitution of
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India was declared to be passed on 26th November, 1949. As provided by Article 394 of the Constitution, only certain Articles came into force as from that date and the remaining provisions came to be in force from January 26, 1950. Article 1 of the Constitution provided that India, that is, Bharat shall be a Union of States and that the States and the territories thereof shall be the States and their territories specified in Parts A, B and C of the First Schedule. West Bengal was shown as one of the States in Part A. It was further provided that territories of the State of West Bengal shall comprise the territory which immediately before the commencement of the Constitution was comprised in the Province of West Bengal. As already pointed out in view of the said award, Berubari Union No. 12 was treated as part of the Province of West Bengal and as such has been treated and governed on that basis. Subsequently, certain boundary disputes arose between India and Pakistan and a Tribunal was set up for the adjudication and final decision of the said disputes. However, the same had nothing to do with the present case and the question of Berubari Union or the Cooch Behar enclaves or Pakistani enclaves in the east was not the subject-matter of the same. But the said question was raised by the Government of Pakistan in the year 1952. Admitted position is that during the whole of this period, the Berubari Union continued to be in the possession of the Indian Union and was governed as part of West Bengal. Near about 1952, Pakistan alleged that under the Award, the Berubari Union should really have formed part of East Bengal. In September, 1949, Cooch Behar had become part of the territory of India and was accordingly included in the list of Part C States at Serial No. 4 in the First Schedule to the Constitution. On the 31st December, 1949, the States Merger (West Bengal) Order, 1949, was passed. It was provided in the said order, inter alia, that Indian state of Cooch Behar would be administered in all respects as if it was a part of the Province of West Bengal, on and from the 1st January, 1950, thereby the erstwhile State of Cooch Behar was merged with West Bengal and began to be governed as if it was a part of West Bengal. The State of Cooch Behar was thereafter taken out of the list of Part C States, in the First Schedule to the Constitution and added West Bengal in the same Schedule. Certain areas which formed part of the territories of the former Indian State of Cooch Behar and which had subsequently become part of the territories of India and then of West Bengal became after the partition enclaves in Pakistan. Similarly, certain Pakistan enclaves were found in India. Dahagram and Angarpota (now Bangladesh), were the Pakistani enclaves in India. The Prime Ministers of two countries entered into an agreement settling certain disputes including the Bernbari Union and the enclaves in
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the East Pakistan in 1958. Two items in Para 2 of the said Agreement were items 3 and 10. These were as follows:

"Item No. 3:--Berubari Union No. 12

"This will be so divided as to give half the area to Pakistan, the other half adjacent to India being retained by India. The Division of Berubari Union No. 12 will be horizontal, starting from the north-east corner of Debiganj Thana. The division should be made in such a manner that the Cooch Behar enclaves between Pachagar Thana of West Bengal

will remain connected as at present with Indian territory and will remain with India. The Cooch-Behar Enclaves lying between Boda Thana of East Pakistan and Berubari Union No. 12 will be exchanged along with the general exchange of enclaves and will go to Pakistan."
Item No./O:--"Exchange of old Cooch-Behar Enclaves in Pakistan and Pakistan Enclaves in India without claim to compensation for extra area going to Pakistan, is agreed to."

Subsequently, there was doubt as to whether the implementation of the 1958 Agreement relating to Berubari Union and the exchange of Enclaves requires any legislative action either by way of a suitable law of the Parliament relatable to Article 3 of the Constitution or in accordance with the provisions of Article 368 of the Constitution or both. Accordingly, in exercise of the powers conferred upon him by clause (1) of Article 143 of the Constitution, the President of India referred the following three questions, to this Court for consideration:

(1) Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?

(2) If so, is a law of Parliament relatable to Article 3 of the Constitution sufficient for the purpose or is an amendment of the Constitution in accordance with Article 368 of the Constitution necessary in addition or in the alternative?

(3) Is a law of Parliament relatable to Article 3 of the Constitution sufficient for implementation of the agreement relating to the exchange of Enclaves or is an amendment of the Constitution in accordance with Art. 368 of the Constitution
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necessary for the purpose in addition or in the alternative?

This Court answered the questions as follows. So far as question no. 1 Was concerned, it was answered in affirmative. So far as second question was concerned, this Court answered it by saying that a law of Parliament relatable to Art. 3 of the Constitution would be incompetent and a law of Parliament relatable to Art. 368 of the Constitution is competent and necessary and also by saying that a law of Parliament relatable to both Article 368 and Art. 3 would be necessary only if Parliament chooses first to pass a law amending Art. 3 as indicated above; in that case Parliament may have to pass a law on those lines under Art 368 and then follow it up with a law relatable to the amended Art. 3 to implement the agreement. Question NO. 3 was also answered as aforesaid. The said decision is reported in Re. The Berubari Union and Exchange of Enclaves [1960] SCR 3 250. Ninth Amendment to the Constitution was made thereafter. The Objects and Reasons of the Constitution (Ninth Amendment) Act, 1960 stated that the Indo-Pakistan agreements dated September 10, 1958, October 23, 1959, and January 11, 1960, which settled certain boundary disputes relating to the borders of the State of Assam, Punjab and West Bengal, and the Union Territory of Tripura involved transfer of certain territories to Pakistan after demarcation. The Act amended the Constitution to give effect to the transfer of those territories. After setting out the title of the Act, which was called the Constitution (Ninth Amendment) Act, 1960, it provided the definitions and amendments to the First Schedule to the Constitution. In 1966, writ petitions were filed challenging the validity of the proposed demarcation as also raised the question as to whether the proposed transfer of Berubari Union would result in deprivation of citizenship and property without compensation. The writ petitions were

dismissed eventually by this Court. The said decision is reported in Ram Kishore Sen & Ors. v. Union of India & Ors., [1966] 1 SCR430.

In 1971, a sovereign independent State known as 'Bangladesh' came into existence which comprised of the territory previously known as East Pakistan or East Bengal. On or about the 16th May, 1974, an agreement was entered into by and between the Prime Ministers of India and Bangladesh regarding the land boundary and related matters including transfer of enclaves. Article 1 para 12 of the said Agreement provided that Indian enclaves in Bangladesh and Bangladesh enclaves in India should be exchanged expeditiously excepting the enclaves mentioned in para 14 without claim to compensation for the additional area, going to Bangladesh. Thereafter, an understanding was reached

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in October, 1982, between the two Governments in connection with the "lease in perpetuity" in terms of item 14 of Article 1 of the 1974 Agreement. In 1983, writ petitions were filed in the Calcutta High Court. In September, 1983, the learned Single Judge of the Calcutta High Court dismissed the writ petitions holding, inter alia, that the implementation of the 1974 and 1982 agreements did not involve cession of Indian territory to Bangladesh. The said judgment in Sugandha Roy v. Union of India & Ors., is reported in AIR 1983 Cal. at p. 483. It was held therein that there being no Gazette Notification fixing any "appointed day" within the meaning of Ninth Constitution Amendment in respect of the Eastern India, particularly the Berubari Union and the Pakistani enclaves, and no Gazette Notification having yet been issued, it was clear that 9th amendment so far as it related to exchange of the enclaves in Eastern India has not come into effect by virtue of the said Ninth Amendment in view of the fact that it was expressly provided in the said 9th Amendment that only from the "appointed day" the Schedule to the Constitution shall be amended and there being no "appointed day" in respect of the territories in the Eastern India, the First Schedule to the Constitution remained unamended in so far as eastern India is concerned particularly the Berubari Union and the enclaves of the Dahagram and Angarpota and, as such, neither in fact nor in law there was any accession to India in respect of the two enclaves and they remained part of Pakistan (now Bangladesh) as they were before in spite of 1958 Nehru-Noon Agreement and Ninth Amendment. Therefore, the implementation of the 1974 and 1982 Agreements which provided, inter alia, that the two enclaves would not be exchanged would not amount to cession of any Indian territory which would require any Constitutional amendment. Even if one proceeded on the basis of the 1958 agreement entered into by India and Pakistan so far as it related to the territories of eastern India remained effective and valid after the emergence of Bangladesh. 1t was open to India and Bangladesh to enter into a fresh treaty modifying the 1958 agreement and that was actually what had happened in the present case. India and Bangladesh had, by the said 1974 and 1982 agreements and to the extent indicated therein terminated and/or modified the earlier Treaty of 1958 in respect of inter alia, southern portion of Bernbari Union and the two enclaves in question. In such a case, even if it could be said that it was the obligation of the Government of India to make endeavour to foster respect for the 1958 treaty as contemplated by Article 5 i(c) that did not prevent the Government of India from entering into the 1974 and 1982 agreements and modifying the earlier treaty particularly having regard to the fact that the 1958

agreement so far as it related to transfer of
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southern portion of Berubarl Union and the exchange of enclaves in question was not given effect to any time and the Ninth Amendment to that effect was never brought into force. The Court, further, held that when by 1974 agreement read with 1982 agreement Bangladesh Government had been given the facility of using the Indian area known as "Teen Bigha" in the manner contemplated by those agreements to be discussed in detail later, the implementation of those two agreements would not involve cession of any territory to Bangladesh in respect of Teen Bigha. Not merely that no exclusive possession of that area was sought to be transferred to Bangladesh and no legal possession at all was being transferred. There was no question of transfer of sovereignty, wholly or partially, in respect of the said area. What had merely been done was to enable the Government of Bangladesh and its nationals to exercise certain rights in respect of the said area, i.e., Teen Bigha, which otherwise they would not have been entitled to do. That was being so allowed because instead of exchange of these enclaves along with others as contemplated by 1958 Agreement, it was agreed that these two enclaves would remain as part of Bangladesh. The Court, further, held that it was clear that the reason was that in spite of the 1958 agreement and in spite of the Ninth Amendment, which had not been given effect to, the southern portion of Berubari Union had to be retained by India. As these two enclaves were to remain as part of Bangladesh territory, these two agreements had made some provisions to enable Bangladesh to exercise its sovereignty in full over these two enclaves. This is also clear by 1982 agreement, the Court held. Thus, the implementation of these two agreements, so far as Teen Bigha was concerned, did not amount to cession of the said territory or transfer of sovereignty in respect of the same and did not require any constitutional amendment.

There was an appeal before the Division Bench of the High Court. The Division Bench referred to the relevant authorities and the interpretation of 1974 and 1982 agreements made by the learned Single Judge which were not disputed before the Division Bench. The Division Bench in judgment under appeal affirmed the decision of the learned Single Judge. The findings and interpretation of the agreements of 1974 and 1982 were also not disputed before us. We are also of the opinion that that is the correct position in law and on facts.

As mentioned hereinbefore, on or about 16th May, 1974, an agreement was entered into by and between Government of India and the Government of the People's Republic of Bangladesh. The said agreement was signed by late Smt. Indira Gandhi, as the then Prime
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Minister of India for and on behalf of the Government of India and Sheikh Mujibar Rehaman, the then Prime Minister of Bangladesh, signed the said agreement for and on behalf of the Government of People's Republic of Bangladesh. It was recorded in the preamble of the agreement that the same concerned the demarcation of the land boundary between India and Pakistan and related matters, and that the two Governments were aware that friendly relations were existing between the two countries and that it was desired to define the boundary more accurately at certain points and to complete the demarcation thereof. Items 12 and 14 of Article 1 of the Agreement relevant to the proceedings before us, as mentioned before, were as follows:

"Item No. 12:--
The Indian enclaves in Bangladesh and the Bangladesh enclaves in India should be exchanged expeditiously, excepting the enclaves mentioned in paragraph 14 without claim to compensation for the additional, area going to Bangladesh."
Item No. 14:--
"India will retain the southern half of south Berubari Union No. 12 and the adjacent enclaves, measuring an area 2.64 square miles approximately, and in exchange Bangladesh will retain the Dahagram and Angarpota enclave, India will lease in perpetuity to Bangladesh and area of approximately 178 metres x 65 metres near 'Tin Bigha' to connect Dhagram with Panbari Mouza (S. Patram) of Bangladesh."

Article 5 provided that the agreement shall be subject to notification by the Government of India and Bangladesh and Instruments of rectification shall be exchanged as early as possible. It may, however, be stated as was noted by the Division Bench of the Calcutta High Court that the agreement dated 11th May, 1974 was also not implemented. Subsequently, letters passed between the Ministry of Foreign Affairs, Government of Bangladesh and the Ministry of External Affairs, Government of India, both dated the 7th October, 1982 in which it was recorded that with reference to the earlier agreement between Government of Bangladesh and the Government of India concerning the demarcation of land boundary between the two countries, signed on the 16th May, 1974, the following understanding
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had been reached between the two Governments in respect of lease in perpetuity by India of the said area of 178 metres x 85 metres near 'Teen Bigha' to connect Dahagram with Mouza Panbari in Bangladesh. The understanding recorded was as follows:
"Clause 1:--
"The lease in perpetuity of the aforementioned area shall be for the purpose of connecting Dahagram and Angarpota with Panbari Mouza (P.S. Patgram) of Bangladesh to enable the Bangladesh Government to exercise her sovereignty over Dahagram and Angarpota."
Clause 2:--
"Sovereignty over the leased area shall continue to vest in India. The rent for the lease area shall be Bangladesh Re. 1 (Bangladesh Taka one) only per annum. Bangladesh shah not however be required to pay the said rent and Government of India hereby waives its right to charge such rent in respect of the leased area."
Clause 3:--
"For the purposes stated in para 1, Bangladesh shall have undisturbed possession and use of the area leased to her in perpetuity."
Clause 4:--
"Bangladesh Citizens including Police, Para Military and Military personnel along with their arms, ammunition equipment and supplies shall have the right of free and unfettered movement in the leased area and shall not be required to carry passports or travel documents of any kind. Movement of Bangladesh goods through the leased area shall also be free. There shall be no requirement of payment of customs duty tax or levy of any kind whatsoever or any transit charges.
Clause 5:--
"Indian citizens including police, par Military and
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Military personnel along with arms ammunition equipment and supplies shall continue to have right of free and unfettered

movement in the leased area in either direction. Movement of Indian goods across the leased area shall also be free. For purpose of such passage the existing road running across it shall continue to be used. India may also build a road above and or below the surface of the leased area in an elevated or subway form for her exclusive use in a manner which will not prejudice free and unfettered movement of Bangladesh citizens and goods as defined in para 1 and 4 above.

Clause 6:--"The two Governments shall co-operate in placing permanent market along the parameters of the leased area and put up fences where necessary."

Clause 7:--

"Both India and Bangladesh shall have the fight to lay cables, electric lines, water and sewerage pipes etc. over or under the leased area without obstructing free movement of citizens or goods of either country as defined in parts 4 and 5 above.

Clause 8:--

"The Modalities for implementing the terms of the lease will be entrusted to the respective Deputy Commissioners of Rangpur (Bangladesh) and Cooch Behar (India). In case of Differences, they refer the matter to their respective Governments for resolution.

Clause 9:--"In the event of any Bangladesh/Indian national being involved in an incident in the leased area, constituting an offence in law, he shall be dealt with by the respective law enforcing agency of his own country, in accordance with its national laws. In the event of an incident in the leased area involving nationals of both countries the law enforcing agency on the scene of the incident will take necessary steps to restore law and order. At the same time immediate steps will be taken to get in track with the law enforcing agency of the other country. In such cases, any Indian national apprehended by a Bangladesh law enforcing agency shall be handed over forthwith to the Indian side and Bangladesh national apprehended by an Indian law enforcing agency shall be handed over forthwith to the Bangladesh side. India will retain residual jurisdiction in the leased area."

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It was further confirmed by the letters that the same would continue as an agreement between the two Governments and would be an integral part of the earlier agreement of 1974 concerning the demarcation of land boundary between India and Bangladesh and other related matters.

Construing clauses 2 and 3 of the agreement of 1982, the learned Single Judge in the Calcutta High Court in the judgment under appeal had held that there was no question of lease or exclusive possession of Bangladesh of the said area. The undisturbed possession and use of the said area granted to Bangladesh under the said agreement of 1982 had to be read in the background of the purpose of the agreement, namely, connecting Dahagram and Angarpota with Panbari Mouza of Bangladesh to enable the Bangladesh Government to exercise sovereignty over Dahagram and Angarpota. The learned Single Judge had further held that such undisturbed possession and use did not mean exclusive possession but merely meant that there would be no interference with the exercise of rights conferred by the agreement on Bangladesh Government and its nationals. The learned Single Judge had held that no transfer of possession of the area was contemplated under the agreement.

Construing clause 9 of the agreement, the learned Single Judge had held that under the said clause where persons were involved in any criminal offence in the said area, if they

were all Indian nationals, the matter would be taken up by the Indian law enforcing agency. If the same involved only Bangladesh nationals the same would be dealt with by the Bangladesh law enforcing agency only. But where both Bangladesh and Indian nationals were involved in any incident, the law enforcing agency of each State would take up the matter to the exclusion of the other. The learned Single Judge had held that the said clause conferred certain important rights to Bangladesh and took away some important rights of the Government of India, its law enforcing agencies, the courts in India and Indian citizens. At present, the law enforcing agencies of India and the Indian Courts alone had exclusive jurisdiction in respect of such matters. The learned Single Judge had held that if the agreement was implemented the existing Indian law

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and the machinery for enforcing such law would not be available in the area so far as Bangladesh nationals were concerned. India would have no jurisdiction over Bangladesh nationals in respect of any offence committed in the area. The learned Single Judge, however, held that conferment of this power under the agreement to Bangladesh and abdication of any such power by India, by itself did not amount to transfer of sovereignty in respect of the area. But the learned Judge noted that merely by virtue of the agreement and without any amendment of existing Indian law it might not be legally possible to take away existing jurisdiction of the law enforcing agencies of India or the Indian courts.

The Division Bench of Calcutta High Court correctly noted that the learned Single Judge came to the following conclusions:

(a) Implementation of the agreements of 1974 and 1982 did not involve cession of any Indian territory to Bangladesh.

(b) No exclusive or legal possession of Tin Bigha was being transferred to Bangladesh.

(c) There was no question of transfer of sovereignty of India wholly or partially in respect of the said area.

(d) Certain privileges only had been conferred on Bangladesh and its nationals under the said agreements which otherwise they would not have.

(e) As Dahagram and Angarpota would remain as pans of Bangladesh territory, the agreements were necessary to enable Bangladesh to exercise its sovereignty in full over the said enclaves.

(f) In spite of the said agreements India would retain its sovereignty, ownership and control over Tin Bigha.

It was contended before the Division Bench that the agreement between India and Bangladesh of 1974 provided specifically that the same would be suitably ratified. But it had not been ratified. It was urged that in the absence of any ratification of the agreement of 1974, India and Bangladesh could not enter into the said subsequent agreement in 1982 on the basis of the agreement of 1974. It was submitted that the said agreement of 1982 could not stand by itself. Learned Advocate had submitted before the Division Bench that under clause

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14 of the agreement of 1974, it was clearly recorded that India would lease in perpetuity to Bangladesh the said area of Teen Bigha to connect Dahagram with the Panban mouza in the main land of Bangladesh. The subsequent agreement of 1982 was entered into between the two countries for implementing the earlier agreement of 1974 and had to be construed in the background of the latter. Several other con-

tentions were urged on behalf of the Union of India and the appellants before the Division Bench. All the contentions were noted by Mr. Justice D.K. Sen, as the learned Chief Justice then was, who delivered the main judgment of the Division Bench in the judgment under appeal. He also noted the decision of this Court in Associated Hotels of India Ltd. v. R.N. Kapoor, [1960] 1 SCR 368 on the question of lease and licence and also the decision of this Court in the Presidential Reference noted above. The decision of this Court in Maganbhai Ishwarbhai Patel v. Union of India & Anr., [1969] 3 SCR 254, which dealt with the cession of Rann of Kutch to Pakistan, was also noted. This Court had reiterated there that a treaty really concerned the political rather than the judicial wing of the State. When a treaty or an award after arbitration comes into existence, it had to be implemented and this can only be if all the three branches of Government to wit the Legislature, the Executive and the Judiciary, or any of them, possess the power to implement it.

On the question of 'sovereignty', reliance was placed before us on 'A Concise Law Dictionary' by P.G. Osborn, 5th Edition, p. 297, where 'sovereignty' has been defined as "the supreme authority" in an independent political society. It is, essential, indivisible and illimitable. However, it is now considered and accepted as both divisible and limitable, and we must recognise that it should be so. Sovereignty is limited externally by the possibility of a general resistance. Internal sovereignty is paramount power over all action within, and is limited by the nature of the power itself.

At p. 94, J.G. Starke in 'Introduction to International Law', 9th Edition, explains the position as under:

"Normally a State is deemed to possess independence and 'sovereignty' over its subjects and its affairs, and within its territorial limits 'Sovereignty' has a much more restricted meaning today than in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised States, few limits on State autonomy were acknowledged. At the present time there is hardly a State

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which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus most States are members of the United Nations and the International Labour Organisation 'ILO', in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the residuum of power which it possesses within the confines laid down by international law."

In a practical sense, it has been noted, sovereignty would be largely a matter of degree. Reference, in this connection, has been made to the following authorities on the following aspects of international law:-

International Law, D.P.O. Connell, 2nd Edn. Vol.I page 552.

Customary Restraints on Sovereignty:

"A survey of actual servitudes is instructive when approaching the more general question or customary restraints on sovereignty in the interests of neighbourly relations, because they disclose the categories of situations susceptible of customary law treatment. With the exception of fisheries, those treaties instanced as servitudes all give effect to the notion of freedom of access or of transit. The subject-matter may be broken down into a consideration of the general principles of access and transit, and then specific investigations of rivers and canals as media of

transit. ' '
Freedom of access and transit:
"The classical writers from Vittoria on were unanimous in their view that a State must permit others to trade with it, and hence must grant them access and right of transit, and the opinion was maintained in spite of a mercantilis theory of trade."
Access to enclaves:
"There is cogency in the argument that a State has a right of access across alien territory to its enclaves area and in
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fact enclaves have only survived because of the grant of necessary facilities, so that all enclaves are servitudes. Whether, in the absence of actual agreement there is a right of access was undecided by the International Court of Justice in the rights of passage case because it found that existing practice in the instant situation was the appropriate guide and it was unnecessary to resort to general international law. The lesson on the face is that free access means in fact limited access, but the fact remains that even though the territorial State has a discretion to regulate and authorise the exercise of rights these none the less remain rights."
In the actual case the Court allowed a latitude of discretion to India which narrowed down, in some respects almost to vanishing point, the admitted right of access. In particular there was a dissent on the question whether armed forces were entitled to access.
"The Development of International law, by International Court Sir Herson Lauterpacht, 1958".
"A number of cases decided by the Court are instructive not so much as pointing to a restrictive interpretation of rights of sovereignty as, in affirming its divisibility and capacity for modification, in denying to it and rigid quality of absoluteness.
The result in accordance with what is the essence of the system of mandates and trusteeship is to stress the functional divisibility of sovereignty and, then, the absence from it, notwithstanding doctrinal logic, of any rigid element of absoluteness.
However, it is believed that the recognition by the Court of such situations, involving as they do the separation of some functions and attributes of sovereignty from others, is bound, apart from affirming the relative nature of sovereignty, to be beneficial for the development of international law and the peaceful adjustment of territorial and political problems. Unless autonomy and delegated exercise of sovereignty are made distinguishable both in fact and in law from outright cession of territory, it may be
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difficult to secure for them the place to which they are entitled as an international institution rendering possible territorial arrangements and adjustments short of cession. The convenience of a rigid dichotomy of full sovereignty and the entire absence thereof is probably deceptive."
In the fight of authorities on International Law as noted above, and the factual findings noted above, we are of the opinion that the Division Bench came to the correct conclusion that the decision to allow Bangladesh to retain Dahagram and Angarpota under the agreements of 1974 and 1982 would not amount to cession of any part of the territory of India in favour of a foreign State. The Division Bench after examining the record came to the conclusion that both defacto and dejure Dahagram and Angarpota remained part of the East Pakistan and subsequently Bangladesh. If that is the

position, then undiputedly there was no question of cession of any part or any territory by the agreements of 1974 and 1982. This is a finding which is factually concluded. We are of the opinion, that it is factually correct, and not disputed before us by the respondents.

The Division Bench next considered whether by reason of the agreement of 1958 between India and Pakistan, which was sanctioned by the Ninth amendment to the Constitution, there was automatic exchange of the Pakistan enclaves in the eastern part of India with the Indian enclaves in eastern Pakistan. The Division Bench did not accept this position. The Division Bench noted that so far as the western border of India and Pakistan is concerned, the agreement of 1958 between India and Pakistan has been given effect to. By an official notification, 17th January, 1961 was appointed as the day for the transfer of the territories of India by way of exchange with the territories of Pakistan in the western region. No further appointed day was notified so far as the eastern border of India was concerned and the provisions of the 1958 agreement so far as the eastern region of India was concerned remained unimplemented. The Division Bench held that there was no automatic transfer of Dahagram and Angarpota to India under the 1958 agreement between India and Pakistan in the absence of a notified appointed day. We are of the opinion that the Division Bench was pre-eminently right in the conclusion it arrived. It is not also disputed before us that legally that was the position. Ninth amendment had not become part of the Constitution as no appointed date was notified. In this connection, reliance may be placed on the decision of this Court in A.K. Roy, etc. v. Union of India & Anr., [1982] 2 SCR 272. Consequently, Dahagram and Angarpota remained

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and still remain part of the territory of East Pakistan and subsequently Bangladesh. This position has been recognised by both the Governments of India and Bangladesh in the two subsequent agreements of 1974 and 1982. In the aforesaid view of the matter, the decision to allow Bangladesh to retain Dahagram and Angarpota does not amount to cession of Indian territory in favour of Bangladesh. This is well settled. The Division Bench has so held in the judgment under appeal. No argument was advanced before us challenging the aforesaid finding. Having regard to the facts found and the position of law, we are of the opinion that the High Court was right in this aspect of the conclusion.

The next question that falls for consideration is whether the agreement of 1958 between India and Pakistan which was sanctioned by the Ninth Amendment to the Constitution in 1960 became a final treaty binding on India and Bangladesh. It was also accepted that neither India nor Bangladesh has formally terminated the said treaty of 1958 and as such it was contended before the Division Bench that in so far as the provisions of the said agreement of 1958 concern Berubari Union No. 12 and the Cooch Behar enclaves including Dahagram and Angarpota were concerned, they could not be given a go-by in the manner purported to have been done. It appears, as the Division Bench found, that the said agreement between India and Pakistan in 1958 was never implemented so far as the border between West Bengal and East Bengal was concerned. The Division Bench held that it was always open to States to enter into new treaties or to vary or modify existing treaties by fresh agreements. To the extent the 1958 agreement between India and Pakistan remained unimplemented, the Division Bench held that it was open to India and Bangladesh to enter into a new treaty and to

modify such unimplemented provisions of the earlier treaty and this had been done by the subsequent agreements entered into between India and Bangladesh in 1974 and 1982. Under the said two later agreements, the provision of the earlier agreement of 1958 stood partially modified and superseded. This view was supported by the statement of law by D.P.O'Connell in 'International Law', 2nd Edition, Vol. I, pages 272,278 and 279. The Division Bench has so held. We are in agreement with this view. No contrary view was canvassed before us.

As mentioned hereinbefore, it is clear from the said agreements of 1974 and 1982 that the transfer of territories which were sanctioned under the Ninth Amendment of the Constitution will not be given effect to. Bernbari No. 12 which was intended to be given to East
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Pakistan would not be given to Bangladesh and Dahagram and Angarpota which were intended to be transferred to India would be retained by Bangladesh. The question, is, whether to the extent as aforesaid, a further amendment to the Constitution was necessary. The Division Bench was of the view that the subsequent agreements of 1974 and 1982 providing for exchange of territories would have to be noted in the relevant Schedules to the Constitution before any appointed day could be notified in respect of the territories to be transferred to Bangladesh. This was necessary in order to retain Berubari in India, according to the Division Bench.

Learned Attorney General has contended before us that this was not necessary and it was not conceded before the Division Bench that such amendment of the Constitution was called for. We are of the opinion that learned Attorney General is right in his submission. After having perused the entire judgment it appears to us that what the learned Attorney General had conceded before the Division Bench was that if the agreements of 1974 and 1982 amounted to cession of territory that would have required constitutional sanction or amendment. In view of the position in International law for the reasons mentioned hereinbefore, the Division Bench has held that there was no cession of territory. If that is the position and we are of the opinion that it is so, and further in view of the fact that no appointed day was notified and the Ninth Amendment to the Constitution has remained a dead letter and had not become effective, no constitutional amendment was required for the arrangements entered into either by the agreements of 1974 and 1982. The Division Bench, in our opinion, was in error in expressing a contrary view.

A question had been raised before the Division Bench that as the agreement between India and Bangladesh of 1974 specifically and categorically required ratification, whether India and Bangladesh could have entered into the subsequent agreement of 1982 recording their understanding on the earlier agreements regarding Teen Bigha. This point, according to the Division Bench was of little substance. The later agreement of 1982 between India and Bangladesh by itself includes therein certain clarifications. The agreement between two countries might be ratified not only by a subsequent formal agreement but by actual implementation or by conduct and read properly, in our opinion, these two subsequent agreements did ratify the previous agreement. The submission that the agreement between India and Bangladesh of 1974 was a personal treaty between late Smt. Indira Gandhi and Late Sheikh Mujiber Rahaman and by reason of their

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deaths, the said treaty came to an end, was of no substance was rejected by the Division Bench and was not pressed before us. The agreement of 1974 was a treaty between two sovereign countries, India and Bangladesh and real treaty as understood in International law.

The expression 'lease in perpetuity' used in the two agreements of 1974 and 1982 occurring in the recital is binding on the parties to the said document. Odgers Construction of Deeds and Statutes had been cited as an authority in support of this contention. But it has to be borne in mind that the expression 'lease in perpetuity' has to be understood in the context of and with reference to the objects of the agreements concerned. The meaning attributed to the expression 'lease in perpetuity' in private law can not be properly imported for the purpose of construing a document recording an agreement between two sovereign States acting as high contracting parties, where neither of them is bound by the private law of the other. For the same reason, it is not necessary to decide whether the said agreements of 1974 and 1982 amounted to or resulted in the grant of a licence by India in favour of Bangladesh under Indian law or within the meaning of the Indian Easement Act. This question has to be examined on the terms and conditions recorded in the said agreements and in the context of International Law to determine what rights are being conferred on the respective States thereunder. In that view of the matter, the nomenclature used and the expressions recorded would not by themselves be of much significance. This view is supported by the observations of Ian Brownlie in 'Principles of Public International Law', 2nd Edition.

The use of the expression 'lease in perpetuity' in the recital of the agreement of 1982 and whether such recital operates as an estoppel against the parties is not of particular significance. In any event, the Division Bench held that the recital in a deed could not operate as an estoppel against the specific terms and conditions thereof. On a construction of the agreement, the Division Bench came to the conclusion that the agreements of 1974 and 1982 together in their entirety keeping in view the background must be judged. An important and significant fact in the background of which the said agreements had been entered into between India and Bangladesh was that the two areas Dahagram and Angarpota, now intended to be retained by Bangladesh, were enclaves wholly encircled and enclosed by the territories of India. If Bangladesh had to retain and exercise its sovereignty over these areas, her access to the said areas was imperative and necessary. It is with that object, namely, to allow access to Bangladesh to Dahagram and Angarpota for the purpose of exercise of her sovereignty over and in

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the said areas, the said agreements had been entered into. It must be understood in that light and appreciated in the background of desire to maintain friendly and neighbourly relationships between two sovereign States. In the agreement of 1974, it was only recorded that India would lease in perpetuity to Bangladesh the said area at Teen Bigha to connect Dahagram and Panbari Mouza of Bangladesh. Terms and conditions of the intended lease were not set out in the agreement of 1974. In the subsequent agreement of 1982, it was clarified by the two Governments as to what would be the said 'lease in perpetuity'. The object of the said lease had again been specifically set out in clause 1 of the agreement of 1982. The other clauses of the said agreement which recorded also the terms and conditions of the transaction

have to be understood in the background and context of the said object. In clause 3 of the agreement of 1982, no doubt it was recorded that Bangladesh shall have undisturbed possession and use of the area leased but the said clause also categorically recorded that such possession and use would be for the purposes stated in clause 1.

In clause 2 of the agreement of 1982, it was specifically recorded that sovereignty over the leased area would continue to vest in India. This meant that Bangladesh would not exercise sovereignty over the said area. This is a specific declaration by the two States and there was no reason why this particular clause should be ignored or overlooked and the effects and implications thereof minimised. Clause 2 further indicated that under the said agreement only limited rights were being granted to Bangladesh and not all or all absolute rights over the territory involved, which would result in the surrender of sovereignty over the area by India. No right to administer the said territory had been given to Bangladesh. The specific rights which had been given to Bangladesh under the said agreements were, inter alia, the right of free and unfettered movement over and across for passage through the leased area. This right would be available to Bangladesh citizens including police, para military, and military personnel who would be entitled to move to the leased area with supply and equipment including arms without passport or travel documents. A further right of movement of goods over and through the area without payment of customs duties or other similar tax or levy has been conferred by the agreement. Having examined the rights in the agreements, we are of the opinion that this did not amount to lease or surrender of sovereignty as understood in the international law. In the Panama Canal's case (See Hudson, Cases. Cases & Other Materials on International Law, 3rd Edition, 1951, pp. 222-3. See also lan Brownlie's Principles of Public International Law, 3rd Edn., p. 116) a lease was

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granted to the United States in perpetuity. The United States was given the occupation and control of the area concerned over and below the surface for the construction and protection of the canal. Moveover, the United States was allowed under the lease to exercise over the canal zone all rights, power and authority which it would possess if it were the sovereign of the territory. These are not the terms of the agreement before us. In the instant case, the major right which had been conferred on Bangladesh was the right of free movement over the area. The right of undisturbed possession and use of the area under the agreement of 1982 has to be understood in the context of the right of free movement. It appears to us that it is not possible to hold that Bangladesh would have a right to occupy permanently the area or to construct buildings and fortification therein or to lay railway lines through the area. If such rights are sought to be exercised by Bangladesh in the area, the same would interfere with rights of free movement in the area of Indian citizens and of Indian goods. As the right to free movement over the area by both the countries are being retained or granted, therefore, neither country and in particular, Bangladesh can generally occupy or block any part of the area. The Division Bench held that under the said agreements, specific and limited rights were being granted to Bangladesh. Such rights were not exclusive and the aggregation thereof would not amount to a lease, as is commonly understood in favour of Bangladesh. We are of the opinion that the Division Bench was right in the view it

took.

A fortiorari, the said transaction did not amount to cession of the said area of Teen Bigha in favour of Bangladesh. Cession as understood in international law would result in an actual and physical transfer of the said area to Bangladesh following which Bangladesh would have the exclusive right to treat the said transferred territory as part of its own territory and exercise full control, dominion and right over the same. This is not the position or the situation which is contemplated under the agreements. The rights intended to be conferred on Bangladesh under the said agreements, would amount to what is known as "servitude" in International law. Certain restrictions had been imposed on India over its absolute sovereignty in the area to serve purpose in favour of and in the interest of Bangladesh. These are, however, serf-imposed restraints. On a proper construction of the agreements of 1974 and 1982 and the individual clauses, it cannot be said that as a result of the said agreements, India had surrendered its sovereignty over the said area of Teen Bigha in favour of Bangladesh or that Bangladesh has become the sovereign over the said territory to

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the exclusion of India. Sovereignty is a quality of right. It is a bundle of rights. It depends on the facts and the circumstances of each case. Apart from anything else, the specific clause in the agreement of 1982 that sovereignty over the area shall continue to vest in India stands in the way of a contrary construction. This clause distinguishes the concessions in the instant case from the grant in favour of the United States in Panama case (supra), where the United States received all right, powers and authority within the zone of lease which it could possess and exercise if it were the sovereign of the territory leased. The statements on the relevant aspect of International law in the authoritative text books noted earlier indicated that in the present and modern context sovereignty has and must have a more restrictive meaning that it had in the earlier centuries when on the emergence of individual national States, no limits on the power of states were acknowledged. See 'Introduction to International Law' by Strake (supra). Any State in the modern times has to acknowledge and accept customary restraints on its sovereignty inasmuch as no State can exist independently and without reference to other States. Under the general international law the concept of inter-dependence of States has come to be accepted. Even without the said agreements of 1974 and 1982, so long as Dahagram and Angarpota remain part of Bangladesh, the latter under the general International law and customs would have a right to access to the said enclave through the territory of India. It is this international practice and customs which has been recognised in the said agreements except that the military, paramilitary and police of Bangladesh with arms, ammunitions and equipments have also been given a right of passage through the area. The concessions given to Bangladesh over the said area might amount to servitudes suffered by India in its territory, as known in international law. See the observations of Oppenheim, 8th Edition, p. 537-538 and also Max Sorensen in Manual of Public International Law, 1968 Edition, which states that the acceptance of servitudes does not represent any negation of sovereignty. The term "servitude" means nothing more than accepted restrictions and grant of servitude does not amount to cession of territory. The Division Bench was unable to accept the contention that the use of the expression 'residual jurisdiction' in

clause 9 of the agreement of 1982 indicates that India only retained residual sovereignty over the area and the defacto and real sovereignty in the said area has been surrendered to Bangladesh. The said expression in clause 9 refers to nothing more than the jurisdiction to be exercised by India in respect of incident occurring in the said territory involving law and order, which may or may not amount to.

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commission of a criminal offence. The fact that certain old disputes between India and Pakistan regarding the said 12 thanas in the Sylhet District of Assam have not been settled with Bangladesh by the said agreements of 1974 and 1982 and that might remain pending is of no relevance to the legality and validity of the said agreements. The Division Bench expressed the view that perhaps the letters of the two countries will take remedial measures. On clause 9, it was submitted that the Bangladesh national committing an offence in the said area of Teen Bigha involving another Bangladesh national would be dealt with by the law enforcing agency of Bangladesh in accordance with the laws of Bangladesh. If the said territory remains a part of the territory of India, then in such cases, the law enforcing agency and the courts in India would not exercise their normal jurisdiction in respect of an offence committed by a Bangladesh national in the territory of India. This may necessitate suitable changes in the laws of India.

The Division Bench for the reasons indicated above, made the following order:

"The respondents before implementation of the said agreements of 1974 and 1982 are directed:

(a) To amend the Constitution of India suitably so that the Berubari Union is not transferred to Bangladesh along with the other territories as contemplated by the 9th Amendment of the Constitution. The agreements of 1974 and 1982 are directed to be suitably noted or recorded in the relevant Schedules to the Constitution authorising the transfer of the territories to Bangladesh and not Pakistan.

(b) To take steps for acquisition and acquire the land owned by Indian Citizens in the said area in accordance with law;

(c) To consider and effect suitable amendment of Indian Law and in particular, the Indian Penal Code and the Criminal Procedure Code as presently applicable in the said area of Tin Bigha.

The appeals are disposed of as above. There will be no order as to costs."

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We are of the opinion that so' far as clause (a) of the ordering portion of the judgment is concerned, this was not warranted. There was no need to amend the Constitution of India so that the Berubari Union No. 12 is not transferred to Bangladesh along with other territories as contemplated by the Ninth Amendment to the Constitution. Ninth Amendment to the Constitution has not come into effect. Therefore, the agreements of 1974 and 1982 did not require to be suitably notified or included in that official gazette. The Division Bench has held that there was no cession of territory. There was no abandonment of sovereignty and, therefore, no constitutional amendment was necessary in view of the facts mentioned hereinbefore.

Justice Monjula Bose delivered a separate but concurring judgment. She held that sovereignty over the area, in fact, continued to be vested in India. She further held that there was no intention on the part of India to give Bangladesh either occupation or possession of Indian territory as such, but merely "undisturbed possession" and for the express

purpose of "connecting Dahagram with Panbari Mouza of Bangladesh to enable Bangladesh to exercise sovereignty over Dahagram and Angarpota and for no other purpose. We reiterate the views of the said learned Judge that the complexities of modern developed societies need peaceful co-existence, if the world is to survive. Amicable and peaceful settlement of boundary disputes are in the interests of the international community. The older and absolute ideas of sovereignty and independence has thus necessarily to be modified in the dawn of the 21st century. A perpetual right of passage and other incidental rights given to Bangladesh for the limited purpose for exercising the sovereignty over her own two enclaves within the territory of India and/or if imposed restrictions on itself by India does not tantamount to transfer of interest in land. No constitutional amendment was necessary in view of the fact that 9th amendment had not come into effect as there was no appointed day fixed by the Parliament and the principles enunciated by the decision of this Court in A.K. Roy's case (supra). Learned Attorney General submitted that the Division Bench was in error in directing changes and constitutional amendment as it has purported to do. In A.K. Roy's case (supra), this Court indicated the contention at p. 272 of the report that the Government would be compelled to exercise its power to issue notification as to at what date the law has to come into effect. There under section 1(2) of the 44th Amendment Act, it shall come into force on such date as the Central Government may, by notification in the Official Gazette appoint and different dates may be appointed for different provi-
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sions of the Act and thus leaving, to the Government to fix date in this case cannot be interfered and since the appointed day had not been fixed, the Ninth Amendment has not come into force.

In that view of the matter, the directions by the Court to amend the law cannot and should not be given. See in this connection the observations of this Court in State of Himachal Pradesh & Anr. v. Umed Ram Sharma & Ors., [1986] 2 SCC 68. In State of Himachal Pradesh v. A parent of a Student of Medical College, Simla & Ors., [1985] 3 SCR 676, this Court at p. 684 of the report reiterated that the Court cannot group the function assigned to the executive and the legislature under the Constitution and cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it or assume to itself a supervisory role over the law making activities of the executive and the legislature. The Court having held that 9th Amendment to the Constitution has not come into effect and there being no cession of any part or territory or abandonment of sovereignty, there was no cause to direct the legislature to amend or pass suitable laws. The Division Bench transgressed its limits to that extent. See in this connection the observations of this Court in State of Himachal Pradesh v. Umed Ram Sharma, (supra) at pp. 78 and 79 of the report.

We are of the opinion that the directions of the Division Bench of the Calcutta High Court to that extent may be deleted in clause (a) of the ordering portion. So far as to take steps for acquisition and to acquire the land owned by Indian citizens in the said area in accordance with laws is concerned, it was wholly unnecessary because there was no land owned by the Indian citizens which was required to be acquired. So far as clause (c) of the ordering portion is concerned, the Government has already taken steps and has agreed to take steps to amend the law. But the implementation of the agreements is not dependent on such steps being

taken.

While we modify the judgment and order of the Division Bench, we must observe that this was really a fight over non-issue. The Division Bench categorically held that there was no cession of territory and no lease in perpetuity. If that is so, without the change in the law or change in the Constitution, the agreement should have been implemented fully and we hope that will be done for the restoration of the friendly relations between India and Bangladesh.

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Before we conclude, we must observe that Mr. Khanduja, counsel for respondent submitted that if the will of the people expressed that such agreement should be implemented then his client has no objection to such implementation. That is the good attitude to adopt.

The appeal is disposed of in the aforesaid light and deleting the aforesaid directions of the Division Bench and the appeal is allowed to the extent. There will be no orders as to costs.

R.S.S. Appeals disposed of.

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