Bombay High Court Nirmala L. Mehta vs A. Balasubramaniam, ... on 29 April, 2004 Equivalent citations: (2004) 191 CTR Bom 8, 2004 269 ITR 1 Bom Author: R Lodha Bench: R Lodha, J Devadhar JUDGMENT R.M. Lodha J. 1. The petitioner is a citizen of India and is a resident of Mumbai. In the month of August, 1987, she won a lottery of the Government of Sikkim having a prize money of Rs. 6,30,000. The Government of Sikkim deducted income-tax in the sum of Rs. 62,088 as per Sikkim tax laws from the prize money of Rs. 6,30,000 and the balance amount of Rs. 5,67,912 was paid. The petitioner filed a return of income on June 30, 1988, declaring total income of Rs. 55,630. She declared the prize money of the lottery received from the office of the Director of State Lotteries, Sikkim. After deducting a sum of Rs. 5,000 therefrom under Section 10(3) of the Income-tax Act, 1961, she showed the prize money of Rs. 6,25,000 from the lottery. The petitioner in her return claimed deduction of Rs. 62,088 on the ground that the said sum was deducted as income-tax at source while making the payment of Rs. 5,67,912. The Assessing Officer, however, did not give credit for the said sum of Rs. 62,088 as the tax deducted from the prize money of the lottery by the Sikkim State Government was not paid to the Indian treasury and tax was not deducted as per Section 199 of the Income-tax Act, 1961. The petitioner approached the Commissioner of Income-tax, Bombay City IV, in his revisional jurisdiction under Section 264. When the revision petition was filed by the petitioner before the Commissioner of Income-tax, her thrust in challenging the assessment order was that she should have been given credit for TDS certificate of Rs. 62,088. At the time of hearing, the petitioner raised additional grounds, inter alia, that no tax was payable by the petitioner on the prize money of the Sikkim lottery under the Income-tax Act, 1961. 2. The Commissioner of Income-tax, Bombay City IV, by his order dated June 25, 1991, modified the order of the Assessing Officer only to the extent holding that the prize money of the lottery needed to be reduced by Rs. 62,088 as the assessee did not receive the said amount. The Commissioner of Income-tax held that the additional ground regarding taxability under the Indian Income-tax Act cannot be permitted to be raised at the stage of hearing of the revision. It is this order of the Commissioner of Income-tax, Bombay City IV, passed on June 25, 1991, that is under challenge before us in the writ petition. 3. At this stage itself it may be noticed that Sikkim became the 22nd State of the Indian Union by and under the Constitution (36th Amendment) Act, 1975, with effect from April 26, 1975. The short history behind Article 371F (special provision with respect to the State of Sikkim) is succinctly summarised by the learned author Shri Durga Das Basu in his book entitled Shorter Constitution of India (Thirteenth edition, 2001) thus : "During British days, Sikkim was an Indian State, under a hereditary monarch called Chogyal, subject to British paramountcy. When India became independent, there was a section of public opinion in Sikkim for merger with India. But the Princely Rule of that State and its strategic position stood in the way. Hence, after the lapse of paramountcy, a treaty was entered into between Sikkim and the Government of India, by which the latter undertook the responsibility with regard to the defence, external affairs and communications of Sikkim. Sikkim thus became a Protectorate of the

Union of India. In May, 1974, the Sikkimese Congress decided to put an end to monarchical rule, and the Sikkim Assembly passed the Government of Sikkim Act, 1974, for the progressive realisation of a fully responsible Government in Sikkim and for furthering its relationship with India. The Sikkim Assembly next, by virtue of its powers under the Government of Sikkim Act, passed a resolution–expressing its desire to be associated with the political and economic institutions of India and for seeking representation for the people of Sikkim in India's Parliamentary system. The Constitution (35th Amendment) Act, 1974, was promptly passed to give effect to this resolution. The main provisions of this Amendment Act included– (i) Sikkim would not be a part of the territory of India, but an 'associate State', which, was brought within the framework of the Indian Constitution by inserting Article 2A and the 10th Schedule in the Constitution. (ii) Sikkim would be entitled to send two representatives to the two Houses, whose rights and privileges would be the same as those of other members of Parliament, except that the representatives of Sikkim would not be entitled to vote at the election of the President or Vice-President of India. There is little doubt that the 35th Amendment Act, 1974, introduced innovations into the original scheme of the Constitution of India. There was no room for any 'associate State' under the Constitution of 1949. The criticism of the introduction of the status of an 'associated State' into the Indian federal system has, however, lost all practical significance, because Sikkim has shortly thereafter been admitted into the Indian Union as the 22nd State in the First Schedule of the Constitution of India, and both Article 2A and the 10th Schedule, which were added by the Constitution (35th Amendment) Act, 1974, were omitted by the Constitution (36th Amendment) Act, 1975, which followed in quick succession, and was given retrospective effect from April 26, 1975. We shall now advert to this later development. While the Indian Parliament was enacting the Constitution (35th Amendment) Act, the Chogyal resented and sought to invoke international intervention. This provoked the progressive sections of the people of Sikkim and led to a resolution being passed by the Sikkim Assembly on April 10, 1975, declaring that the activities of the Chogyal were prejudicial to the democratic aspirations of the people of Sikkim and ran counter to the Agreement of May, 1974, executed by the Chogyal. The Assembly further declared and resolved that : 'The institution of the Chogyal is hereby abolished and Sikkim shall henceforth be a constituent unit of India, enjoying a democratic and fully responsible Government.' This resolution of the Assembly was submitted to the people of Sikkim for their approval. At the referendum so held, there was an overwhelming majority, and the Chief Minister of Sikkim, on behalf of his Council of Ministers, urged the Government of India to implement the result of the referendum. This led to the passing by the Indian Parliament of the Constitution (36th Amendment) Act, 1975, which was later ratified by the requisite number of States under Article 368(2), proviso. By the 36th Amendment Act, Sikkim was admitted into the Union of India as a State, by amending the First and the Fourth Schedules, Articles 80-81, and omitting Article 2A and the 10th Schedule, as stated earlier. Article 371F has, thereafter, been inserted to make some special provisions relating to the administration of Sikkim to meet the

special needs and circumstances of that State." 4. In the backdrop of the brief history that led to the insertion of Article 371F in the Constitution of India with effect from April 26, 1975, we may now refer to Article 371F to the extent it is relevant. "371F. Notwithstanding anything in this Constitution.– . . . . (k) all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority ; (l) for the purpose of facilitating the application of any such law as is referred to in Clause (k) in relation to the administration of the State of Sikkim and for the purpose of bringing the provisions of any such law into accord with the provisions of this Constitution, the President may, within two years from the appointed day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon, every such law shall have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law . . ." 5. In State of Sikkim v. Surendera Prasad Sharma, , the special provisions relating to the State of Sikkim as provided in Article 371F came up for consideration before the Supreme Court. The Supreme Court in paragraphs 15, 20 and 21 held thus (pages 2352 and 2356) : "15. Now we have already noticed that the Establishment Rules of 1974 were promulgated by the Chogyal of Sikkim as its absolute monarch for regulating the appointments to the Civil Services of the State and they were undoubtedly in existence before Sikkim acquired the status of an associate State by the 35th Amendment and a full-fledged State of the Indian Union by the 36th Amendment In view of the developments and political activity that had preceded these constitutional changes to bring the people of Sikkim within the mainstream of a democratic polity, certain provisions in the nature of transitory provisions had to be made. They are to be found in Article 371F. This article begins with a non obstante clause which, to the extent relevant and contextually permissible, applies to all the clauses of that article and cannot be read as limited in its application only to those clauses which run contrary to the provisions of the Constitution. The article is a special provision relating to the State of Sikkim. The article begins with a non obstante clause and goes on to add in Clause (f) that Parliament may, with a view to protecting the rights and interests of different sections of the population of Sikkim make provision for the number of seats in the legislative Assembly of the State of Sikkim which may be filled by candidates belonging to such sections, etc. This provision was scrutinised by this court in Poudyal's case, to which we have referred earlier. By majority the constitutional validity of this provision was upheld by this court in that case. For our purpose, however, Clause (k) of Article 371F is relevant which we have extracted earlier. That clause provides that notwithstanding anything in the Constitution, all laws in force immediately before the appointed day in the territories comprised in the State of Sikkim or any part thereof shall continue in force therein until amended or repealed by a competent Legislature or other competent authority, On a plain reading of this provision it becomes clear that all laws which were in force prior to April 26, 1975, in the territories now falling

within the State of Sikkim or any part thereof were intended to continue to be in force until altered or repealed. Although the expression 'all laws in force' has not been defined the said expression must receive its ordinary, natural and grammatical meaning. The latter part of the clause–'until amended or repealed by a competent Legislature or other competent authority'–is indicative of the fact that the said expression was not intended to be confined to only legislative enactments but also laws which could be altered or amended or repealed by 'other competent authority', i.e., other than the Legislature itself. This supplies a clear indication that the said expression is wide enough to include subordinate legislations, e.g., rules, regulations, orders, etc. The expression 'existing law' is defined by Article 366(10) to include any rule, regulation, bye-law, etc., and we think the expression 'all laws in force' means all existing laws. But quite apart from the definition in Article 366(10), on a plain reading of Clause (k) in which this expression occurs, it seems clear to us that the said expression is wide enough to include the Establishment Rules of 1974, If any authority is needed reference could be made to the decision of this court in Edward Mills Co. Ltd., Beawar v. State of Ajmer, ; wherein a similar expression used in Article 372 was construed. There can, therefore, be no doubt that the Establishment Rules of 1974 which were in force in the territories comprised in the State of Sikkim prior to April 26, 1975, would stand covered by the expression 'all laws in force' used in Clause (k) of Article 371-F and would continue in force even after the appointed date as existing law until amended or repealed. This meaning given to the said expression is consistent with the definitions of 'existing law' and 'law', employed in the Adaptation of Sikkim Laws (No. 1) Order, 1975. In the proviso to Rule 4(4) extracted earlier there is reference to Sikkimese nationals and non-Sikkimese nationals. The said proviso posits that non-Sikkimese nationals may be appointed only when suitably qualified and experienced Sikkimese nationals are not available and further provides for replacement of such non-Sikkimese nationals by Sikkimese candidates as and when the latter become available. The High Court has refused to construe the said proviso to mean local residents of Sikkim were to be preferred to non-residents of Sikkim. The High Court answers the contentions thus : 'But even with the aid of these provisions, it is not possible to construe the expression "Sikkimese-nationals" as "locals" or permanent residents of Sikkim, as one can be a national of one country without being a resident in that country and may in fact be a permanent resident of another country with his domicile, whether of origin or of choice, in that country.' And caps the same as under : 'I have already noted that the provisions of Rule 4(4) of the Sikkim Government Establishment Rules, quoted hereinbefore, provided for preferential treatment to Sikkimese nationals in matters relating to employments or appointments under the then Government of Sikkim and that with the incorporation of Sikkim as a component State in the Union of India with effect from April 26, 1975, Sikkimese nationality having ceased to exist as a politico-legal concept, the preference sought to be given by Rule 4(4) has become ineffective and unworkable.' With respect we find it difficult to accept this highly technical approach. In the first place since this was an existing law which was continued in force, it would naturally contain expressions which were

in vogue before the appointed day. These expressions had to be understood in the sense in which they were defined in the Sikkim Subjects Regulations, 1961. Regulation 3 defines Sikkim subjects and regulation 7 explains who shall not be Sikkim subject. Therefore, if the expressions 'Sikkimese nationals' and 'non-Sikkimese nationals' used in the proviso to Rule 4(4) are read and understood in the context of the provisions of the aforesaid regulations, the difficulty expressed by the learned judge in the High Court would appear to be imaginary. 20. From what we have said earlier it is crystal clear that certain political developments of considerable significance to the people of Sikkim had preceded its merger into the Union of India. This merger was based on certain solemn assurances given to the people of India. The constitutional provisions cannot be read as torn from the historical developments which preceded the merger. The laws which were in force immediately before merger were enacted at a time when Sikkim was under the Chogyal's rule and could not, therefore, be in accord with the constitutional mandates of the free democratic republic. Therefore, to give effect to the political commitments and assurances given to the people of Sikkim, special provisions had to be made in respect of the new State of Sikkim by the insertion of Article 371F in the Constitution. Just as in the case of Article 35(b), this provision also had to begin with a non obstante clause to grant temporary immunity from the other provisions of the Constitution. If it were not to be so, the laws in force in the erstwhile territory of Sikkim would conflict with the provisions of the Constitution and would be hit by Article 13. But at the same time it must be realised that the said article does not use the phraseology of making the same subject to the provisions of the Constitution. It must also be borne in mind that Article 2 does not make use of a non obstante clause and, therefore, the terms and conditions prescribed thereunder must accord with the other constitutional requirements. Thus Article 371F occupies a special position to cope up with a special situation with a special historical backdrop. 21. Article 371F, is as stated earlier, a special constitutional provision with respect to the State of Sikkim. The reason why it begins with a non obstante clause obviously is that the matters referred to in the various clauses immediately following required a protective cover so that such matters are not struck down as unconstitutional because they do not satisfy the constitutional requirement. Unless such immunity was granted 'the laws in force' would have had to meet the test of Article 13 of the Constitution. This being the objective, existing laws or laws in force came to be protected by Clause (k) added to Article 371-F. The said laws in force in the State of Sikkim were, therefore, protected, until amended or repealed, to ensure smooth transition from the Chogyal's rule to the democratic rule under the Constitution. Inherent in Clause (1) is the assumption that many of such existing laws may be inconsistent with the Constitution and, therefore, the President came to be conferred with a special power to make adaptations and modifications with a view to making the said rule consistent with the Constitution. Of course this power had to be exercised within two years from the appointed day. If any adaptation or modification is made in the law in force prevailing prior to the appointed day, the law would apply subject to such adaptation and modification. It is thus obvious that the adaptation and

modification made by the President in exercise of this special power does not have the effect of the law ceasing to be a law in force within the meaning of Clause (k) of Article 371F. Therefore, on the plain language of the said provision it is difficult to hold that the effect of adaptation or modification is to take the law out of the purview of Taws in force'." 6. It would be, thus, seen that existing laws or laws in force in the State of Sikkim came to be protected by Clause (k) added to Article 371F until amended or repealed to ensuresmooth transition from the Chogyal's rule to the democratic rule under the Constitution. In so far as Clause (1) is concerned, the inherent underlying idea behind the said provision is the assumption that many of such existing laws may be inconsistent with the Constitution and, therefore, the President of India came to be conferred with the power to make adaptation and modification with a view to making such law consistent with the Constitution of India. The adaptation or modification made by the President in exercise of the special power as provided in Clause (1) does not have the effect that the existing laws cease to be the law in force within the meaning of Clause (k) of Article 371F. By virtue of Clause (n), an Indian Act or enactment specified in the President's notification extends to Sikkim, superseding the constitutional law even without any repeal of that Sikkim law. 7. The President of India in exercise of his powers conferred by Clause (n) of Article 371F of the Constitution, extended to the State of Sikkim, the Income-tax Act, 1961, vide Notification No. S. O. 1028(E), dated November 7, 1988 (see [1989] 176 ITR (St.) 222), with effect from April 1, 1989. However, the commencement of the Income-tax Act, 1961, was deferred (See Section 26 of the Finance Act, 1989 : [1989] 177 ITR (St.) 182.–Ed.) for one year making it effective from April 1, 1990, applicable from the assessment year 1990-91 and onwards. 8. The legal position that emerges, thus, is that the Income-tax Act, 1961, was made applicable and came into force in the State of Sikkim from the assessment year 1990-91 (previous year 1989-90) and on the coming into force of the Income-tax Act, 1961, the Sikkim Income-tax Manual, 1948, stood repealed. 9. The short question before us is : whether the prize money of Rs. 6,30,000 from the lottery of the Government of Sikkim won by the petitioner in the month of August, 1987, is chargeable to tax under the Income-tax Act, 1961. 10. At the time the petitioner won the lottery of the Government of Sikkim, Sikkim was a component State of the Union and the prize money was won by the petitioner within the territory of India. As the prize money was won in the month of August, 1987, the relevant assessment year was 1988-89. The President of India in exercise of his powers conferred under Clause (n) of Article 371F extended the Income-tax Act, 1961, for the first time for the assessment year 1990-91 as the Income-tax Act, 1961, came into force in the State of Sikkim with effect from first April, 1990. Until then, all laws including the income-tax law in force immediately before the State of Sikkim became a component State of the Indian Union were in operation. Immediately before the State of Sikkim became component State of the Indian Union, income-tax in Sikkim was governed by the Sikkim Income-tax Manual, 1948. Thus, for the assessment year 1988-89 (the previous year during which the petitioner won the lottery of the Sikkim Government) the said income was chargeable to tax

under the Sikkim Income-tax Manual. It was for this reason that the Office of the Director of State Lotteries, Government of Sikkim, Gangtok, deducted a sum of Rs. 62,088 towards Sikkim income-tax from the prize money of Rs. 6,30,000 and paid the remaining amount of prize money to the petitioner. 11. It is advantageous to refer to the income-tax deduction certificate dated August 31, 1987, issued by the Director of State Lotteries, Government of Sikkim, to the petitioner. The copy of the said certificate (marked x for identification purpose) was handed in by learned counsel for the petitioner during the course of arguments. The said certificate reads thus : "Office of the Director of State Lotteries, Government of Sikkim, Gangtok (Sikkim). Income-tax Deduction Certificate No. 52/FIN/LOT. Certificated that a sum of Rs. 62,088 (rupees sixty two hundred eighty eight) has been deducted towards Sikkim income-tax from the prize money of Rs. 6,30,000 (rupees six lakhs thirty thousand) payable to Smt. Nirmala Labh Shanker Mehta, Bombay-26, as first prize in ticket No. N-503303 in seventh draw of Snow Lion Weekly Lotteries. The prize money less income-tax has been remitted to the said Smt. Nirmala Labh Shanker Mehta by demand draft No. 035569 dated August 28, 1987. (Sd.) ..... Director of Lotteries, Government of Sikkim". 12. It would be, thus, seen that the income-tax from the prize money of Rs. 6,30,000 was deducted as per the Sikkim Income-tax Manual, 1948, and the remaining amount of the prize money was paid to the petitioner. The prize money was won by the petitioner from the lottery floated by one of the States of the Indian Union. The petitioner won the prize money within the territory of India, though in the said territory a special income-tax law, viz., Sikkim Tax Manual, 1948, was applicable. The said prize money won by the petitioner has been charged to tax as per the law applicable in the Sikkim State where the prize money was won. The Income-tax Act, 1961, was not applicable at the relevant time in Sikkim. So long as the Income-tax Act, 1961, did not become applicable to the State of Sikkim, Income-tax Act, 1961, could not be applied to the income earned in Sikkim. In the circumstances, we have no hesitation in holding that the prize money won by the petitioner from the lottery of the Government of Sikkim could have been charged to tax only in accordance with then existing income-tax laws in the State of Sikkim and could not be charged to tax under the Income-tax Act, 1961. 13. The problem arose because the petitioner in her return for the assessment year 1988-89 filed on June 30, 1988, offered the prize money of the lottery to tax rather a fundamental error of law on the part of the assessee, but that error of law once detected by the petitioner, it was urged before the Commissioner of Income-tax that the prize money earned by the petitioner could not be taxed under the Income-tax Act, 1961. It is true that it v/as at a later stage that such contention was raised by the petitioner, but the said contention was a pure question of law and the Commissioner of Income-tax ought to have considered the said contention on its merits and ought not to have declined to entertain it on the ground of delay. There cannot be any estoppel against the statute, Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax

is levied or collected without authority of law. 14. The Constitution Bench of the Supreme Court in Amalgamated Coalfields Ltd. v. Janapada Sabha, , held thus (page 965) : "It may be stated at the outset that the tax now impugned has been imposed by the local authority from March 12, 1935, and that the first occasion when its validity was attacked was in only 1957, though if the petitioners are right in their submissions their acquiescence might not itself be a ground for denying them relief. Before however we set out the points urged by the learned Attorney-General in support of the petition, it would be convenient if we narrate briefly the history of the levy of this tax." 15. The Supreme Court, thus, held that acquiescence to an illegal tax for a long time is not a ground for denying the party the relief that he is entitled to. In the instant case, therefore, it may be held that merely because the petitioner offered the prize money won in the lottery of the Sikkim Government, to tax under the Income-tax Act, 1961, that shall not take away her right in contending that the said prize money was not chargeable and assessable to tax under the Income-tax Act in the revisional jurisdiction. The said prize money was chargeable to income-tax under the Sikkim Tax Manual that held the field at the relevant time and the income-tax from the prize money as per the then existing Sikkim Income-tax Manual was deducted. 16. The order dated June 25, 1991, passed by the Commissioner of Income-tax, Bombay City IV, Bombay, therefore, cannot be sustained and in the light of what we have observed above, the assessment order dated November 29, 1989, for the assessment year 1988-89 shall have to be reworked out as per this order. 17. Consequently, the writ petition is allowed. The assessment order dated November 29, 1989, (exhibit B) and revisional order dated June 25, 1991, (exhibit F) are quashed and set aside. Respondent No. 2 or the successor-Assessing Officer having jurisdiction in the matter is directed to work out the petitioner's assessment for the assessment year 1988-89 afresh as per this order. 18. Since the respondents have not chosen to appear, no order as to costs.