

Polaki Motors And Ors. vs State Of Orissa And Ors. on 14 October, 1992

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Bench: S. Ranganathan, B.P. Jeevan Reddy, V. Ramaswami

JUDGMENT

V. Ramaswami, J.

1. In the Writ Petitions filed in the year 1983 the constitutional validity of the Orissa Additional Sales Tax (Amendment and Validation) Ordinance, 1983 is questioned. In Writ Petition Nos. 207 to 211 of 1984 and 1302 of 1986 the constitutional validity of the Orissa Additional Sales Tax (Amendment and Validation) Act, 1983 (Act 22 of 1983) which replaced the Ordinance is in question. Civil Appeal No. 4596 of 1990 has been filed against the judgment of the Orissa High Court in which the constitutional validity of Orissa Act 22 of 1983 was upheld. The arguments in the writ petitions and the civil appeal therefore related to the vires of the Orissa Act 22 of 1983 which we will hereinafter referred to as the 'Validation Act'.

2. The writ petitioners and the appellants in the Civil Appeal are registered dealers under the Orissa Sales Tax Act, 1947 (hereinafter referred to as the Principal Act'). Section 4 imposes the liability to pay tax in accordance with the provisions of the Principal Act on every dealer whose gross turnover during the fiscal year exceeds Rs.50,000/-, 'Gross turnover' is defined in Section 2(dd) as meaning the total of the turnover of sales and turnover of purchases. "Turnover of Sales" is defined in Section 2(i) as meaning the aggregate of amounts of prices and tax, if any, received and receivable by a dealer in respect of sale or supply of goods other than those declared under Section 3-B of the Principal Act effected or made during a given period. 'Turnover of purchases' is defined in Section (2)(j) as meaning the aggregate of the amounts of purchase price paid and payable by a dealer in respect of the purchase or supply of goods or classes of goods declared under Section 3-B. However, under Section 5, tax is payable by the dealer only on his taxable turnover at the percentage notified by the Government from time to time. Under Section 3-B the Government may from time to time by notification declare any goods or class of goods to be liable to tax on turnover of purchases but there

is a proviso which says no tax will be payable on the sale of such goods or class of goods declared under this Section. Section 6 enables the Government by notification to exempt from tax the sale or purchase of any goods or class of goods and likewise withdraw any such exemption. Section 7 provides that notwithstanding anything to the contrary in the Act the State Government may subject to such condition or restriction by notification exempt in whole or in part any class of dealers from the payment of tax or allow any class of dealers to defer from payment of tax. Section 8 which is relevant for the purpose of this decision may be quoted and that reads as follows:

8. Power of the State Government to prescribe points at which goods may be taxed or exempted.

Notwithstanding anything to the contrary, in this Act, the State Government may prescribe the points in the series of sale or purchases by successive dealers at which any goods or classes or descriptions of goods may be taxed or exempted from taxation and in doing so may direct that sales to or purchases by a person other than a registered dealer shall be exempted from taxation:

Provided that the same goods shall not be taxed at more than-one point in the same series of sales or purchases by successive dealers.

Explanation. Where in a series of sales, tax is prescribed to be levied at the first point, such point in respect of goods despatched from outside the State of Orissa shall mean and shall always be deemed to have meant the first of such sales effected by a dealer liable under the Act after the goods are actually taken delivery of by him inside the State of Orissa.

3. It may be seen from the scheme as contained in the provisions of Principal Act, if the goods are not exempted under Section 6 either the sale or purchase could be taxed and not both. In the case of goods covered by the notification under Section 3-B the tax is levied on the purchase and in the case of other taxable commodities on the sale. Section 8 which has an over-riding effect by reason of the opening non-obstinate clause in that section restricts the levy of either the sales tax or purchase tax to a single point in the same series of sales or purchases by successive dealers of the same goods. Though Section 4 as such does not restrict the power of the Government to levy multi point tax since that provision was expressly made subject to Section 8 and also by reason of the non-obstante clause in Section 8 the levy of tax at a single prescribed point and prohibition against levy of tax at more than one point is the scheme of the Act. It may also be seen that the Principal Act provided a tax on the taxable turnover and not on the gross turnover.

4. The State Legislature enacted the Orissa Additional Sales Tax Act, 1975 (Act 24 of 1975) which levied an additional tax on the tax payable by a dealer under the Principal Act. This Act came into force from the 1st of April, 1975. As the subsequent amending Act which we are going to notice and the impugned Validation Act were with reference to this enactment, it is better we set out Sections 2, 3 and 4 of this Act in full.

2. (1) The tax payable by a dealer for a year under the Orissa Sales Tax Act, 1947 (hereinafter referred to as the said Act) shall be increased by an additional tax at the rate of-

(a) two per cent of the tax, if his gross turnover for that year does not exceed one lakh of rupees;

(b) three per cent of the tax, if his gross turnover for that year exceeds one lakh of rupees but does not exceed five lakhs of rupees;

(c) five per cent of the tax, if his gross turnover for that year exceeds five lakhs of rupees: Provided that where in respect of declared goods the tax payable by such dealer under the said Act together with the additional tax payable under this sub-section exceeds the maximum percentage of the sale or purchase price thereof specified, from time to time, under Clause (a) of Section 15 of the Central Sales Tax Act, 1956 the rate of additional tax in respect of such goods shall be reduced to such an extent that the tax and the additional tax together shall not exceed such maximum percentage of the sale or purchase price of such goods.

Explanation:- 'Declared goods' shall have reference to declared goods as defined in the Central Sales Tax Act, 1956.

(2) The provisions of the said Act shall, mutatis mutandis apply in relation to the said additional tax as they apply in relation to the tax payable under the said Act.

(3) Notwithstanding anything contained in the said Act, no dealer referred to in Sub-section (1) shall be entitled to collect the additional tax payable under this Act.

3(1) Any dealer who collects the additional tax payable under this Act, in contravention of the provisions of Sub-section (3) of Section 2 shall be punishable with fine which may extend to one thousand rupees.

(2) No court inferior to that of a Judicial Magistrate of the first class shall try an offence under this Act.

4(1) The State Government may make rules for carrying out the purposes of this Act. (2) All rules made under this Act shall, as soon as may be after they are made, be laid before the State Legislature for a total period of fourteen days which may be comprised in one session or in two or more successive sessions and if during the said period the State Legislature makes modifications, if any, therein, the rules shall thereafter have effect only in such modified form, so, however that such modifications shall be without prejudice to the validity of anything previously done under the rules.

It may be seen from the reading of those provisions that the additional sales tax payable by dealer was in the nature of an enhancement of their liability to pay tax under the Principal Act by specified percentage but they were prohibited from passing on the incidence of additional tax to the

purchasers. The validity of this provision was never questioned but in fact a similar enactment of the Tamil Nadu Additional Sales Tax Act, 1970 was upheld by this Court in *S. Kodar v. State of Kerala*. On an interpretation of the provisions of the Orissa Act, this Court in the case of *Ashok Service center and Ors. v. State of Orissa*, was of the view that the additional tax thus levied being only an enhancement of the tax payable under the Principal Act by a specified percentage it did not effect the general scheme of the Principal Act including the principle of single point levy contained in Section 8 thereof and that the two Acts, namely, the Principal Act and the Additional Sales Tax Act had to be read together in order to make the provisions contained in the Act effective. In fact it was held that it is not an independent Act in that sense and the Legislature instead of incorporating the provisions in the Principal Act have provided for the additional levy in a separate enactment. It is only a matter of style. The Act will have to be read subject to the provisions of the Principal Act.

5. The State Legislature enacted in 1979 the Orissa Additional Sales Tax (Amendment) Act, 1979 (Act 3 of 1979) which came into force in 1.4.1979. This Act substituted Sections 2 and 3 of the Additional Sales Tax Act by two new Sub-sections (2) and (3), which read as follows: ' "2. In this Act, unless the context otherwise requires;-

(a) 'declared goods' shall have the same meaning as in Clause (o) of Section 2 of the Central Sales Tax Act, 1956;

(b) words and expressions used but not defined shall have .the same meanings as are respectively assigned to them in the Orissa Sales Tax Act, 1947 (hereinafter referred to as the said Act).

3. (1) Every dealer shall, in addition to the tax payable by him for a year under the said Act, be liable to pay additional tax at such rate not exceeding one percent of his gross; turnover for that year, as may be notified, from time to time by the State Government: Provided that no additional tax as aforesaid shall be payable on that part of the gross turnover which relates to sale and purchase of declared goods:

Provided further that the State Government may by notification, subject to such conditions and restrictions, if any, exempt any class of dealers or the turnover relating to any goods ; or class of goods from the levy of the additional tax and likewise withdraw any such exemption.

(2) The provisions of the said Act shall, mutatis mutandis apply in relation to the said additional tax as they apply in relation to the tax payable under the said Act.

By a notification dated 23rd March, 1979 the State Government notified, in exercise of: the powers under Section 3 of the Amending Act, 1979 the rate of additional tax payable at one-half per cent of the annual gross turnover. The Assessing Officers took the view that under the Amending Act, 1979 every dealer was liable to pay additional tax on his annual 'gross turnover' irrespective of its taxability under the Principal Act and that the new levy was in the nature of multi-point tax, A number of writ petitions were filed in the High Court of Orissa challenging among others the constitutional validity of the amending Act, 1979. The High Court dismissed these writ petitions

holding that under the Principal Act the dealer is liable to pay sales tax on the basis of his taxable turnover which is determined in the manner prescribed under the Act while under the 1975 Act as amended in 1979 the liability of the dealer is with reference to his gross turnover and that it was competent to the Sovereign legislature to adopt a different base and a different scheme from the Principal Act because they are two different independent enactments. Being an independent Act it could not read subject to the provisions of the Principal Act. The assessee preferred appeals in this Court and they were disposed of in the judgment reported in *Ashok Service center v. State of Orissa*. The point for determination by this Court in that batch of appeals was whether the levy of additional tax under the Additional Sales Tax Act as amended by Additional Sales Tax (Amendment) Act, 1979 is a single point levy or a multi point levy. After a consideration of the relevant provisions this Court held that the view of the High Court that the Additional Sales Tax Act as amended in 1979 was an independent Act having nothing to do with the Principal Act was not correct and that it had to be read together to be effective. After a consideration of the relevant provisions of the Principal Act and the impugned Additional Tax (Amendment) Act this Court held:

- i) the word 'dealer' referred to in Section 3(1) of the amending Act should be understood as a dealer who is liable to pay tax under the Principal Act as provided in Section 4(1) of the Principal Act;
- ii) the gross turnover referred to in Section 3(1) of the Amending Act should be understood as that part of the gross turnover which is taxable under the Principal Act;
- iii) by reasons of the Sub-sections (2) and Section (3) of the Amending Act Section 8 of the Principal Act which is given an over-riding effect by the use of non-obstante clause, is applicable to the levy of additional tax also;
- iv) if the object of the Amending Act was to make the additional tax a multi point levy nothing was easier than using the appropriate words in the Act by excluding the application of Section 8 of the Principal Act expressly in Section 3(2) of the Amending Act.

6. In that view this Court ultimately summarised the resultant position as follows:

In view of the foregoing we hold that any dealer who is not liable to pay tax under the Principal Act either by reason of his not having sufficient gross turnover or by reason of exemption given under Section 7 of the Principal Act is not liable to pay additional tax under the Act. If a dealer is exempted by the State Government under the second proviso to Section 3(1) of the Act he is also not liable to pay the additional tax under the Act. If the turnover of a dealer relating to any sales or purchases of goods is exempted under Section 6 of the Principal Act, such turnover cannot be subjected to the levy of additional tax under the Act by virtue of Section 3(2) of the Act. The Government Notification S.R.O. 410/79 dated March 23, 1979 issued under the second proviso to Section 3(1) of the Act exempting the turnover relating to goods

whose turnover is exempted from payment of tax under Section 6 of the Principal Act from payment of additional tax under the Act, is, therefore, redundant. The turnover in respect of goods whose sales or purchases are not taxable under the Principal Act in the hands of any dealer by reason of Section 8 of the Principal Act is not liable to the payment of additional sales tax under the Act. The turnover in respect of sales and purchases of declared goods is not taxable under the Act by reason of the first proviso to Section 3(1) of the Act. Any other turnover which is exempted by the State Government under the second proviso to Section 3(1) of the Act is also not taxable under the Act. The levy of the additional tax on the gross turnover of a dealer under Section 3 of the Act is subject to these conclusions.

7. After this judgment the State Legislature enacted the Orissa Additional Sales Tax (Amendment and Validation) Act, 1983 (Act 22 of 1983). The writ petitions, as already stated, were filed in this Court under Article 32 questioning the constitutionality of this Validation Act and the Ordinance which preceded it. The Civil Appeal is against the judgment of the High Court which upheld the validity of the Validating Act.

8. Section 2 of the Validation Act substituted with effect from the 1st day of April, 1979 for Section 3 of the Orissa Additional Sales Tax Act, 1975 as amended in 1979 the following section:

3. (1) Notwithstanding anything contained in Sections 4, 5 and 8 of the said Act, every dealer, whose gross turnover exceeded twenty-five thousand rupees during the period not exceeding twelve months immediately preceding the 1st day of April, 1979 or between the said date and the thirtieth day of June, 1981 or whose gross turnover for a period not exceeding twelve months exceeded fifty thousand rupees on or after the 1st day of July, 1981 shall be liable to pay the additional sales tax at such rate not exceeding one per cent of his gross turnover as may be notified from time to time by the State Government: Provided that no additional sales tax as aforesaid shall be payable on that part of the gross turnover which relates to sale and purchase of declared goods.

(2) Every dealer who has become liable to pay tax under this Act, shall continue to be so liable until the expiry of three consecutive years during each of which his gross turnover has failed to exceed fifty thousand rupees and such further period after the date of the said expiry as may be prescribed and his liability to pay tax under this Act, shall cease on the expiry of the prescribed period:

Provided that in calculating the period of three consecutive years, the part of a year during which a dealer became first or again liable shall be excluded.

(3) Where a dealer liable to pay tax under this Act, starts a new business, partnership, firm or concern, whether by changing the constitution, style or the name of the previous business, partnership, firm or concern or otherwise, either singly or jointly with any other person; such newly started business, partnership, firm or concern shall, notwithstanding anything contained in this section but always subject to the

other provisions of this Act, be liable to pay tax on his gross turnover from the date of commencement of the said business, partnership, firm or concern, as the case may be.

(4) A dealer, who is not liable to pay tax under the foregoing sub-sections, shall nevertheless be liable to pay tax on his gross turnover if such dealer has voluntarily or provisionally registered himself under the said Act, or if such dealer is liable to pay tax or registered as a dealer under the Central Sales Tax Act, 1956.

(5) All the provisions of the said Act, excluding those contained in Sections 4, 5, 8, 29 and 29A but including those relating to appeal, revision, reference and penalty shall mutatis mutandis apply in relation to the additional sales tax payable under this Act." Section 3 of the Validation Act further provided:

3. Notwithstanding anything contained in any judgment, decree or order of any Court or other authority to the contrary, any assessment, re-assessment, levy or collection of additional sales tax or imposition of penalty made, any action taken or thing done of purported to have been done under the Principal Act before commencement of this Act shall be deemed to have been made, taken, done under and in furtherance of the Principal Act as amended by this Act.

9. The argument of Mr. M.L. Verma, learned Senior Counsel appearing for some of the writ petitioners was that the scheme of the Principal Act of 1947 was of a levy of tax at a single prescribed point and prohibition against levy of tax at more than one point. This tax was also payable on the taxable turnover and not on the gross turnover. This Court in the decision in *Ashok Service and Anr. v. Sales Tax Officer (supra)* has interpreted the Additional Sales Tax Act, 1975 as amended by the Amending Act, 1979 as not levying additional tax on the gross turnover but levied additional tax on the taxable turnover as determined under the Principal Act. This Court also had taken the view that the additional Tax Act could not be considered as an independent statute and that both the enactments have to be construed together and while doing so give effect to the provisions of the Additional Sales Tax Act which is a latter one in preference to the provisions of the Principal Act wherever the Act had manifested an intention to modify the Principal Act. It is on the basis of these interpretations this Court in the earlier decision held that the Additional Sales Tax Act does not conflict with a scheme of single point taxation as envisaged in the Principal Act. However, under the present Validation enactment Section 3 of the Additional Sales Tax Act seeks to over-ride even the charging sections under the Principal Act by making Section 3 of the Additional Sales Tax Act operate notwithstanding anything contained in Sections 4, 5 and 8 of the Principal Act. The additional tax is now levied on the gross turnover and not on the taxable turnover which will amount to a multi point tax going against the very scheme of the Principal Act, and it is no longer possible to treat the Additional Sales Tax Act as supplement or ancillary to the Principal Act. In the circumstances, therefore, it may not be possible to read both the Principal Act and the Additional Sales Tax Act together and the effect of it is that both the Acts taxed the same transaction and that would be an unreasonable restriction affecting their fundamental right to carry on business.

10. Before considering this argument of the learned Counsel let us consider what was the defect in the earlier Act which the Validation Act seeks to remove or remedy and whether the Validating Act has achieved that purpose. The statement of Objects and Reasons in introducing the Bill seeking amendment of the Additional Sales Tax Act by the Validation Act reads as follows:

The Orissa Additional Sales Tax Act, 1975 was introduced from the 1st day of April, 1975 with a view to mobilising additional resources for the State. The scheme of Additional Sales Tax was rationalised with effect from the 1st day of April, 1979 by the Orissa Additional Sales Tax (Amendment) Act, 1979 by levy of additional tax on gross turnover of dealers which was multi point in nature.

2. The Supreme Court of India in their judgment dated 18.2.1983 in the case of Ashok Service center v. State of Orissa held that the additional tax imposed under the Orissa Additional Sales Tax (Amendment) Act, 1979 which is an extension of the Orissa Sales Tax Act, 1947 cannot be a multi point levy since the Orissa Sales Tax Act, 1947 envisages a single point levy. It was also observed that the multi point levy of additional tax was not clear in the State of Objects and Reasons of the Orissa Additional Sales Tax (Amendment) Bill.

3. In order to cure the defects in the statute and validate the levy and collection of additional tax, two Ordinances, viz. the Orissa Additional Sales Tax (Amendment and Validation) Ordinance, 1983 (Orissa Ordinance No. 5 of 1983) and the Orissa Additional Sales Tax (Second) Amendment Ordinance, 1983 (Orissa Ordinance No. 7 of 1983) have been promulgated and it is proposed to retain the provisions of the said Ordinance by enacting a suitable Bill to amend the Orissa Additional Sales Tax Act, 1975.

4. The Bill seeks to achieve the above objective.

This Court in the earlier decision held that since Section 3(2), as it then stood, provided that the provisions of the Principal Act shall mutatis mutandis apply in relation to the additional tax as they apply in relation to the tax payable, Section 4, 5 and 8 of the Principal Act in terms were attracted to the levy of additional tax. Since those provisions, in particular Section 8, contemplated a single point levy of tax at the prescribed point it is not possible or permissible to need the charging section in the Additional Sales Tax Act as in conflict with the Principal Act and therefore the charging provision in the Additional Sales Tax Act should have to be run down so as to make additional tax leviable on the taxable turnover alone. As assessments under the Act were made on the basis that additional tax is leviable on the gross turnover and the provisions of Section 8 of the Principal Act did not apply to the levy of additional tax, the State Legislature has stated in the statement of Objects and Reasons that as the reason for enacting the Validation Act and also that it was intended to cure the defects pointed out in the earlier judgment.

11. Under Section 3 of the Act the dealer is liable to pay additional sales tax at such rate not exceeding one per cent of his gross turnover. The words and expressions used in the Additional

Sales Tax Act but not defined therein shall have the same meaning as defined in the Principal Act. 'Gross Turnover' is defined in the Principal Act as meaning the total of turnover of sales and turnover of purchases. Excluding the turnover relating to sale and purchase of declared goods under the Central Act the gross turnover on which additional sales tax is payable would thus include within it turnover taxable under the Principal Act, the second or subsequent sales which are not taxable under the Principal Act and goods or class of goods exempted under Section 6 of the Principal Act. Only dealers who are exempted under Section 7 of the Principal Act would not be liable to pay the additional tax as provided under Section 3 of the Validation Act. Thus in effect it means, in respect of the taxable turnover under the Principal Act, that the additional tax is an increase of the tax levied thereon and is valid as held in the earlier decision. In respect of the second or subsequent sales and the goods exempted under Section 6 of the Principal Act the tax is levied at not more than one per cent on the value of the goods purchased and sold by the dealers. It is a tax on the aggregate of the sales effected by a dealer during a year. What was taxable turnover of one dealer may become part of the gross turnover of his purchaser as the sale by the dealer in that case may be a second or subsequent sale. Thus successive transactions become liable for levy of additional tax and the levy becomes multi point. The Act does not follow the scheme of single point levy provided under the Principal Act in respect of this tax.

12. Sections 4, 5 and 8 of the Principal Act are the main provisions which prohibited the multi point levy. In order to give effect to the multi point scheme Section 3 of the Additional Sales Tax Act as amended provides that the levy of additional sales tax under that section would be "notwithstanding anything contained in Sections 4, 5 and 8" of the Principal Act. Subsection (5) of Section 3 which corresponds to Section 3(2) prior to its amendment by the Validation Act while providing that the provisions of the Principal Act mutatis mutandis apply in relation to the additional sales tax payable expressly excluded the applicability of Sections 4, 5, 8, 29 and 29-A of the Principal Act. This Court on the earlier occasion in Ashok Service center's case (supra) observed:

If the State Legislature wanted that the new levy i.e. the additional tax should be a multi point tax which had to be paid by every dealer irrespective of the fact that the entire annual gross turnover in his hands may not be liable to bear the tax under the Principal Act, it would have expressly said so as it would have amounted to a substantial departure from the general scheme of the Principal Act as set out in the proviso to Section 8 thereof which stipulated that no goods should suffer tax which could be passed on to the purchaser at more than one point in the same series of sales or purchases by successive dealers to which the people of the State of Orissa had become accustomed. If the object of the amendment was to make the additional tax a multi point levy, nothing was easier than using the appropriate words in the Act by excluding the application of Section 8 of the Principal Act expressly in Section 3(2) of the Act. In the absence of any such words in the Act, by reason of Section 3(2) of the Act, we have to construe that Section 8 of the Principal Act which is given an over-riding effect by the use of the non-obstante clause is applicable to the levy of additional tax also.

By use of non-obstante clause in Section 3(1) and expressly excluding the operation of the provisions of Sections 4, 5, 8, 29 and 29A of the Principal Act in Section 3(5) also the State Legislature has achieved its twin objectives of levying additional tax on gross turnover and at multi points, dehors the scheme of single point sales tax on taxable turnover under the Principal Act.

13. The further argument of the learned counsel was the Additional Sales Tax Act as now amended is not a supplement to the original Act, and that it is an independent statute and that the legislative competence would have to be tested as an independent taxing enactment. Even so the impugned Act cannot be held to be beyond the legislative competence. Both these enactments deal with the topic of levy sales tax on sale or purchases which is within the legislative competence of the State Legislature. Both the levies come under the same topic of taxes on the sale or purchase of goods under Entry 54 List II. Instead of levying the tax under one enactment the State has chosen to levy the same under two different enactments. By choosing some transactions of sale of goods alone for levy of sale tax in the first instance the legislature does not exhaust its legislative power in the field of tax on sale of goods. The law does not require the entire gamut under the topic of tax on sales to be covered in the first or one enactment itself on peril of losing its legislative competence on that topic or field. Legislature may choose certain goods alone or certain dealers or class of dealers alone for purposes of levy. Later certain other goods or dealers or class of dealers may be included in the taxation net or some already in the net omitted. Rates of tax, points of taxation and single point and multi point scheme are all subject to legislative changes, additions and modifications. If the State Legislature at the time of enactment of the Principal Act had provided in the charging section that certain transactions are liable to single point levy and certain other transactions are liable for multi point levy and yet other transactions are exempted and if some dealers or a class of dealers or the purchasers or a class of purchasers are exempt and others not exempt no exception to such levy could have been taken. Will it make any difference if same thing is done under two different enactments or more than one enactment? It is not correct to state that because the Principal Act contemplated a single point levy it is not open to the State ; Legislature to adopt a multi point levy at a different stage or take certain specific transactions or gross turnover for multi point taxation. As held by this Court in *Kodur v. State of Kerala* 1958 SCR 121 it is also not necessary that the dealer should be enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sales of goods. There being no legal or constitutional bar for a combination of single point levy and a multi point levy and levying of additional tax, there is no infirmity or constitutional inhibition which would invalidate the impugned Validation Act.

14. It was then contended by the learned Counsel for the assesseees that during the pendency of the civil appeals filed against the judgment of the High Court of Orissa holding the provisions of the Amending Act, 1979 as *intra vires*, when the assesseees sought an interim stay of realization of tax sought to be recovered, this Court passed the following order on 4.10.1982:

In the circumstances of this case, the stay is vacated. The respondents will file an undertaking within a month from today that in case they fail in these appeals and the appeals are allowed, then the entire money realised shall be refunded to the appellants with interest at the rate of 12% per annum within three months from the

disposal of these appeals.

The respondents in those appeals, namely, the State of Orissa filed an undertaking through the Special Officer-Cum-Deputy Secretary, Finance Department of the Government of Orissa on the 2nd December, 1982 to the effect that the Government "undertake that in case they fail in these appeals and the appeals are allowed then the entire amount of additional sales tax realised from the appellants shall be refunded to the appellants with interest at the rate of 12% per annum within three months from the disposal of these appeals." It is stated by the assesseees that when they applied for refund they were rejected on the ground that in view of the Ordinance, later replaced by the Validation Act, the assessments have become valid and the assesseees are not entitled for refund. The learned Counsel contended that firstly the respondents are bound to honour their undertaking to this Court regardless of the effect of the Validation Act and they cannot be permitted to violate their undertaking; secondly, the Ordinance and the Act could not affect the solemn undertaking given to this Court in those cases which were the subject matter of appeals in the earlier proceedings though the Act may apply in respect of those who were not parties in the earlier proceedings and in respect of all prospectively. The learned Counsel further submitted that the State Government in fairness should first refund the amount which he calls illegally collected then assess or reassess or reopen assessments, as the case may be, in accordance with the Act as amended by Act 22 of 1983 and collect any tax due.

15. It is well settled that the power to amend and to validate actions taken under statutes not sufficiently comprehensive to sustain those actions is a power ancillary or subsidiary to the power of legislation on any subject matter within the competence of the State Legislature. It is also settled law that the legislature has the power to legislate retrospectively and also validate invalid laws, or invalid executive acts and notifications.

16. The impugned amending and Validating Act was enacted to remedy the defects pointed out by this Court in Ashok Service center Case. The object of the Act was not only to amend the law from a past date but also to protect and validate actions already taken. By enacting retrospectively a valid and legal taxing provision the law creates a fiction that the assessments made and the tax collected are under the new re-enacted law. Once the amended provision is given retrospective operation, the fiction operates and it was not necessary to specifically provide that all assessments made or actions taken or notifications issued under the Act before amendment shall be deemed to be made, taken nor issued under the new provision though the legislatures as in this case often resort to such practice. As observed by Lord Asquith in East and End Dwellings Co. Ltd. V. Finsbury Borough Council (1952 AC 109) which was quoted and followed by this Court in M.K. Venkatachalam, ITO and Anr. v. Bombay Dyeing and Mfg. Co. Ltd. (1958 SC 875):

if you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or

accompanied it. One of those in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

Thus the effect of retrospectively amending the provisions would, for all legal purposes, be that amended provisions shall be deemed to have been included in the original Act from 1.4.1979 and all consequences and incidences which if this amended provision had been there since 1.4.1979 has to be carried to its logical conclusion.

17. By reason of amending Act the earlier assessments levying additional tax on gross turnover has become valid and enforceable. It may also be noticed that the earlier decision of this Court did not invalidate the assessments as such and what was held was that the additional tax was payable on the taxable turnover by a dealer who is liable to pay tax under Section . 3(1) of the Principal Act. It means that assessment proceedings will have to be reopened if necessary and the taxable turnover to be determined and that tax payable will have to be ascertained and demand be issued. But only after that is done, if any amount is refundable, the Government will be bound to refund the same. However before that could be done the Ordinance and the Amending Act came into force, made the liability to pay additional tax on the total turnover or gross turnover and by every dealer which was the basis on which the earlier assessments were made and therefore the assessment itself became valid. The decision in Municipal Corporation of the City of Ahmedabad, etc. v. New Shorock Spg. Wvg. Co. Ltd., etc relied on by the learned Counsel has no application. In that case the original property tax assessment was made on 'flat rate' method. This Court struck down the rules framed under the Bombay Provincial Municipal Corporations Act permitting the Corporation to value the lands and buildings on the flat rate method and set aside the assessments made on that basis. By an Amending Act the Corporation was enabled to assess or reassess in accordance with the provisions of the Act and the rules as amended by the Amending Act as if the said Act had been in force during the year for which such tax is to be assessed or reassessed. In view of the fact that the Court had earlier set aside the assessments and that in the light of new amended provisions a new assessment or reassessment will have to be made, the Court held that the Corporation cannot retain the amount collected earlier as property tax under the old unamended provisions. This Court was of the view that before a Corporation can retain any amount collected as property tax there must be an assessment according to law. The situation in our case is different. Not only the earlier assessments were not cancelled but also this Court held that it was valid to the extent it taxed the taxable turnovers. The Validating Act was given retrospective operation and by Section 3 which has been extracted above also provided that the assessments shall be deemed to have been made in furtherance of the Additional Sales Tax Act as amended by the Amending the Validation Act. In the circumstances it could not be stated that there was any violation of the undertaking by the Government. We do not find also any substance in the submissions of the learned Counsel for the petitioners that either the validation Act was not applicable to their case in view of the undertaking or that there was any violation of the undertaking given by the Government in the earlier cases.

18. Mr. Vinoo Bhagat, the learned Counsel appearing for the appellant in Civil Appeal No. 4596 of 1990 while supporting the arguments of the learned Counsel for the petitioners in the other cases

further contended that no machinery has been created under the Additional Sales Tax Act, as amended by the Amending and Validation Act, for assessment and collection of additional tax and that therefore the Act is unenforceable and assessment orders made under the earlier enactments cannot be treated as legal and valid. The argument was that the Commissioner has delegated in exercise of his powers under Section 17 only certain of the powers under specified Sections in the Principal Act in the Notification dated 30th August, 1947 and no powers of the Commissioner under the Additional Sales Tax Act have been delegated to anyone at any time. His further submission was that the assessments to additional sales tax are made under Rule 5 of the Orissa Additional Sales Tax Rules, 1975 and not under Section 12 and that therefore in the absence of delegation by the Commissioner of his powers as assessing authority under Rule 5 of the Additional Sales Tax Rules no Sales Tax Officer acting under the Principal Act has power or jurisdiction to make any assessment under the Additional Sales Tax Act.

19. Section 3(5) of the Additional Sales Tax Act made all the provisions of the Principal Act including those relating to appeal, revision, reference and penalty as applicable in relation to the additional sales tax payable. Rule 2(c) of the Orissa Additional Sales Tax Rules, 1975 defines 'Assessing Authority' as meaning the Assessing Authority under the Orissa Sales Tax Act, 1947. Rule 5 of the said Rules requires the assessing authority assessing tax under the Principal Act to simultaneously assess the amount of additional tax payable by a dealer and pass an order and Rule 7 of the said Rules states that save as otherwise expressly provided in the Additional Sales Tax Rules the provisions of the Orissa Sales Tax Rules, 1947 shall mutatis mutandis apply in respect of all the procedural and other matters incidental to the carrying out of the purposes of the Act. Therefore, all the assessment and collection provisions under the Principal Act and the Rules framed thereunder are attracted and would apply for the assessment and collection of the additional tax as well. The notification issued under Section 17 of the Principal Act delegating the powers of the Commissioner therefore would automatically apply in so far as the officers authorised to assess and collect are concerned. There was no need for a further delegation of power in respect of the Orissa Additional Sales Tax are concerned. The point raised by the learned Counsel in this connection is, therefore, devoid of any merit.

20. For the foregoing reasons the Writ Petitions and the Civil Appeal are liable to be dismissed and they are accordingly dismissed. Rule nisi is discharged. However, there will be no orders as to costs.