Sales Tax Officer, Cuttackand Another vs M/S. B. C. Patel & Co on 15 April, 1958

Equivalent citations: 1958 AIR 643, 1959 SCR 520, AIR 1958 SUPREME COURT 643

Bench: S.K. Das, A.K. Sarkar

PETITIONER:
SALES TAX OFFICER, CUTTACKAND ANOTHER

Vs.

RESPONDENT:
M/s. B. C. PATEL & CO.

DATE OF JUDGMENT:
15/04/1958

BENCH:
DAS, SUDHI RANJAN (CJ)
BENCH:
DAS, SUDHI RANJAN (CJ)
AIYYAR, T.L. VENKATARAMA
DAS, S.K.
SARKAR, A.K.
BOSE, VIVIAN

CITATION:
1958 AIR 643 1959 SCR 520

ACT:
Sales Tax-Notification enforcing the charge not wholly in consonance with the charging provision-Validity-Assessment for periods both before and after the Constitution-Legality-Orissa Sales Tax Act, 1947 (Orissa XIV Of 1947), s. 4--Constitution of India, Art. 186.

HEADNOTE:
This appeal by the Sales Tax authorities was directed against the judgment and order of the Orissa High Court, passed under Art. 226 of the Constitution, quashing five orders of assessment covering five quarters made against the respondents who carried on the business of collection and sale of Kendu leaves in the erstwhile Feudatory State of Pallaliara to which, on its merger into the province of Orissa on January 1, 1948, the provisions of the Orissa

Sales Tax Act, 1947, were extended on March 1, 1949. On the same date the Government of Orissa issued a notification under S. 4(1) of the Act which was in the following terms:

" In exercise of the powers conferred by sub-section (1) of Section 4 Of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947), as applied to Orissa State, the Government of Orissa are pleased to appoint the 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay

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under the said Act on sales effected after the said date Section 4 Of the Act, inter alia, provided : " (1) .... with effect from such date as the Provincial Government may by notification in the Gazette, appoint, being not earlier than 'thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified.... (2) Every dealer to whom sub-section (1) does not apply shall be liable to pay under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000 ".

The goods were admittedly delivered for consumption at various places outside the State and the Sales Tax Officer as well as the Assistant Collector in appeal, proceeding on the basis that the sales took place in the State, held that the respondents were liable to Sales Tax for all the five quarters, two of which fell before the commencement of the Constitution and three thereafter. The contention of the respondents before the High Court was that the notification under s. 4(1) Of the Act was invalid as it ran counter to the provisions of that sub-section and no part of that charging section could, therefore, come into force. It was further contended that the assessment for the three quarters following the commencement of the Constitution was invalid by reason or Art. 286 of the Constitution. The High Court found entirely in favour of the assessee :

Held (per Das C. J., Venkatarama Aiyar, S. K. Das and Vivian Bose, jj.), that the decision of the High Court in so far as it related to the three post-Constitution quarters was correct and must be upheld. The orders of assessment for those quarters contravened both Art. 286 of the Constitution and s. 30(r)(a)(1) of the Orissa Sales Tax Act and were without jurisdiction and must be set aside. So far as the two pre-Constitution quarters were concerned, the assessees were clearly liable under s. 4(2) of the Act.

Per Das C. J. and Venkatarama Aiyar J. The first part of the impugned notification, appointing the date from which the liability was to commence, was in consonance with s. 4(1) Of the Act and, therefore, clearly intra vires, whereas the second part, indicating the class of dealers on whom the

liability was to fall, went beyond that section and must, therefore, be held to be ultra vires and invalid. But since the two parts were severable, the invalidity of the second part could in no way affect the validity of the first part which brought the charging section into operation and the assessees were liable for the two pre-Constitution quarters under s. 4(1) as well.

Per S. K. Das and Vivian Bose JJ.-It would not be correct to say that the second part of the notification was a mere surplusage severable from the rest of the notification. Liability to pay the

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tax under s. 4(1) of the Act could arise only on the issue of a valid notification in conformity with the provisions of that sub-section and as there was no such notification the assessees were not liable under s. 4(1) Of the Act which did not come into operation. Subsections (1) and (2) Of s. 4 are mutually exclusive, and their periods of application being different both could not apply at the same time and no notification was necessary to bring into operation sub-s. (2) Of the Act.

The goods having been admittedly sold and delivered for consumption outside the State of Orissa, under Art. 286 (1)(a) read with the Explanation as also under S. 30(1)(a)(1) of the Act, the sales were outside the State of Orissa and, consequently, the assessment for the three post-Constitution quarters were without jurisdiction.

The State of Bombay v. The United Motors (India) Ltd., [1953] S.C.R. 1069 and The Bengal Immunity Company Limited v. The State of Bihar, [1955] 2 S.C.R. 603, relied on.

Per Sarkar J.-There could be no liability under s. 4(1) Of the Act till a date was appointed thereunder, and where the notification, as in the instant case, fixing such a date, was not in terms of that sub-clause, there was no fixing of a date at all and the sub-clause could not come into play and no liability could arise under it. It was impossible to ignore the second part of the notification in question as a mere surplusage since the notification read as a whole had one meaning and another without it. The Government could not be heard to say that what it had said in the notification was not what it actually meant.

Both the sub-clauses Of S. 4 having been brought into force at the same time by the same notification, they applied to all dealers together and contemplated a situation in which the liability of a dealer under sub-cl. (1) might arise. It was apparent from the scheme of the Act that sub-cl. (2) was not intended to have any operation till a date was appointed under sub-cl. (1) and a liability under it might have arisen.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 230 of 1956. Appeal by special leave from the judgment and order dated April 12, 1955, of the Orissa High Court in 0. J. C. No. 60 of 1952.

C. K. Daphtary, Solicitor-General of India, R. Ganapathi Iyer and R. H. Dhebar, for the appellants.

S. N. Andley, J. B. Dadachanji and Rameshuar Nath, for the respondent.

1958. April 15. The Judgment of Das C. J. and Venkatarama Aiyar J. was delivered by Das C. J. The Judgment of S. K. Das and Vivian Bose JJ. was delivered by S. K. Das J. Sarkar J. delivered a separate judgment. DAS C. J.-We agree that this appeal must be allowed in part but we prefer to rest our judgment on one of the material points on a ground which is different from that adopted by our learned Brother S. K. Das J. in the judgment which has just been delivered by him and which we have had the advantage of perusing.

The Orissa Sales Tax Act, 1947 (Orissa XIV of 1947), hereinafter referred to as the said Act received the assent of the Governor-General on April 26, 1947, when s. I of 'the Act came into force. On August 1, 1947, a Notification was issued by the Government of Orissa bringing the rest of the said Act into force in the Province of Orissa, as it was then constituted. Section 4, as it stood at all times material to this appeal, ran as follows:

> " 4(1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified:
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> Provided that the tax shall not be payable on sale involved in the execution of a contract which is shown to the satisfaction of the Collector to have been entered into by the dealer concerned on or before the date so notified. (2)Every dealer to whom subsection (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000. (3)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 Rs. 5,000 and such further period after the date of such expiry as may be prescribed and on the expiry of this latter period his liability to pay tax shall cease.
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> (4)Every dealer whose liability to pay tax has ceased under the provisions of sub-section (3) shall again be liable to pay tax under this Act with effect from the commencement of the year immediately following that during Which his gross turnover again exceeds Rs. 5,000."

On August 14, 1947, a notification was issued by the Government of Orissa appointing September 30, 1947, as the date with effect from which that sub-section was to come into force in the then province of Orissa.

On January 1, 1948, by a covenant of merger executed by its ruler, the feudatory State of Pallahara merged into the province of Orissa. In exercise of the powers delegated to it by the Government of India under what was then known as the Extra Provincial Jurisdiction Act, 1947, the Government of Orissa on December 14, 1948, issued a notification under s. 4 of that Extra Provincial Jurisdiction Act, extending the Orissa Sales Tax Act to the territories of the erstwhile feudatory States, including Pallahara which had merged into the province of Orissa. On March 1, 1949, a notification under s. 1(3) was issued by the Government of Orissa bringing ss. 2 to 29 of the said Act into force in the added territories. On the same day another notification was issued under s. 4(1) of the Act, which was in the following terms:

> In exercise of the powers conferred by Sub-section (1) of Section 4 of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947) as applied to Orissa State, the Government of Orissa are pleased to appoint the 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date."
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> It was after this notification had been. issued that the respondents were sought to be made liable to tax. The respondents were assessed under the said Act for five quarters ending respectively on September 30, 1949, December 31, 1949, June 30, 1950, September 30, 1950, and December 31, 1950. It will be noticed that the first two quarters related to a period prior to the commencement of the Constitution and the remaining three quarters fell after the Constitution came into force. The Sales Tax Officer, Cuttack having assessed the respondents to Sales Tax under the said Act for each and all of the said five quarters and the respondent's several appeals against the said several assessment orders under the said Act having been dismissed on April 12, 1952, the respondents filed a petition under Art. 226 of the Constitution in the Orissa High Court praying, inter alia, for a writ in the nature of a writ of certiorari for quashing the said assessment orders and for prohibiting the appellants from realising the tax so assessed or from making assessments on them in future. The contention of the respondents before the High Court was that the notification issued by the Government of Orissa on March 1, 1949, under s. 4(1) being invalid in that it ran counter to the provisions of that sub-section, no part of the charging section came into -force and consequently they were not liable to tax at all for any of the five quarters. As regards the three quarters following the commencement of the Constitution, they urged an additional plea, namely, that the assessment orders for those three quarters were invalid by reason of the provisions of Art. 286 of the Constitution. The High Court accepted both these contentions and by its judgment and order pronounced on April 12, 1955, cancelled the assessments. The Sales Tax Officer, Cuttack, and the Collector of Commercial Taxes. Cuttack, have appealed

against the judgment and order of the High Court. As regards the assessment orders for the three post' Constitution quarters, the decision of the High Court purports to have proceeded on the decision of this Court in the State of Bombay v. United Motors (India) Ltd. (1). We find ourselves in complete agreement with (1) [1953] S.C.R. 1069.

our learned Brother S. K. Das J. for reasons stated by him that the assessment orders for the three post Constitution quarters were hit by cl. (1) of Art. 286 and also s. 30 (1)

(a) (1) of the Act and were rightly held by the High Court to be without jurisdiction. It is with regard to the assessment orders for the two pre-Constitution quarters that we have come to a conclusion different from that to which our learned Brother has arrived. We proceed to state our reasons.

The impugned notification, as hereinbefore stated, was issued on March 1, 1949, under s. 4 (1) of the said Act. Under that sub-section every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5,000 would be liable to pay the tax under the Act on sales effected after the date " so notified ", that is to say, the date which the provincial Government might by notification in the Gazette appoint. It is clear, therefore, that s. 4 (1) by its own terms determined the persons on whom the tax liability would fall but left it to the provincial Government only to appoint the date with effect from which the tax liability would commence. It follows, therefore, that the only 'power conferred by s. 4 (1) on the Government was to appoint, by a notification in the Official Gazette, a date with effect from which the tax liability would attach to the dealers described and specified in the sub-section itself as the persons on whom that liability would fall. The Government of Orissa issued the notification, hereinbefore quoted, " in exercise of the powers conferred by sub-section (1) of section 4 " and appointed March 31, 1949, as the date with effect from which the tax liability would commence. It was none of the business of the Government of Orissa to say on what class of dealers the tax liability would fall, for that had been already determined by the sub-section itself Therefore, by the notification the Government of Orissa properly exercised its powers under sub-s. (1) in so far as it appointed March 31, 1949, as the date, but it exceeded its powers by proceeding to say that all dealers whose gross turnover during the year ending March 31, 1949, exceeded Rs. 5,000 should be liable to pay tax under the Act. This part of the notification clearly ran counter to the sub-section itself, for under that sub- section it is only those dealers whose gross turnover exceeded Rs. 5,000 " during the year immediately preceding the commencement of this Act " that became liable to pay the tax. For the purposes of the five assessment orders it made no difference whether the Act is taken to have commenced on December 14, 1948, when it was extended to the feudatory States by notification under s. 4 of the Extra Provincial Jurisdiction Act, 1947, or on March 1, 1949, when the notification under s. 1 (3) was issued, for in either case the year immediately preceding the commencement of this Act was April 1, 1947, to March 31, 1948. The position, therefore, is that by the earlier part of the impugned notification the Government of Orissa properly and rightly exercised its power in appointing March 31, 1949, as the date with effect from which the liability to pay tax under the Act would commence, but by its latter part did something more which it had no business to do, i. e., to indicate, contrary to the sub-section itself, that those dealers whose gross turnover during the year ending on March 31, 1949, would be liable to pay tax under the Act. The notification in so far as it purports to determine the class of dealers on whom the tax liability would fall, was certainly invalid. The question that

immediately arises is as to whether the whole notification should be adjudged invalid as has been done by the High Court and as is proposed to be done by my learned Brother S. K. Das J. or the two portions of the notification should be severed and effect should be given to the earlier part which is in conformity with s. 4(1) and the latter part which goes beyond the powers conferred by the subsection to the Government of Orissa should be rejected. Immediately the question of severability arises. Are the two portions severable ? We find no difficulty in holding that the portion of the notification which went beyond the powers conferred on the Government of Orissa is quite clearly and easily severable from that which was within its powers. It cannot possibly be said that had the Government of Orissa known that it had no power to determine the persons on whom the tax liability would fall it would not have appointed a date at all. In our view there is no question of the two parts being inextricably wound up. We, therefore, hold that the notification, in so far as it appointed March 31, 1949, as the date with effect from which liability to pay tax would commence was valid and the rest of the notification was invalid and must be treated as surplus without any legal efficacy. The result, therefore, is that the charging section was effectively brought into force and the entire charging section became operative and dealers could be properly brought to charge under the appropriate part of the charging section. It is true that the notification having also stated that the dealers, whose gross turnover exceeded 5,000 (luring the year ending March 31, 1949, would be liable to pay the tax, the sales tax authorities naturally applied their mind to the question whether during the year ending March 31, 1949, the gross turnover of the respondents exceeded the requisite amount, but did not inquire into the question whether the respondent's gross turnover exceeded Rs. 5,000 during the year immediately preceding the commencement of the Act which in this case was the financial year from April 1, 1947 to March 31, 1948. If the matter stood there, it would have been necessary to send the case back to the Sales Tax Officer to enquire into and ascertain whether the quantum of the gross turnover of the respondents during the last mentioned financial year ending on March 31, 1948, exceeded Rs. 5,000 or it did not. But a remand is not called for because it appears from the judgment under appeal that it was conceded that for the period April 1, 1949, till the commencement of the Constitution on January 26, 1950, the respondents would have been liable to pay sales tax provided a valid notification had been issued, under sub-s. (1) of s.

4. This concession clearly amounts to an admission that the gross turnover of the respondents during the financial year ending on March 31, 1948, which was the year immediately preceding March 31, 1949, exceeded Rs. 5,000. We have already held that the notification' issued under s. 4(1) in so far as it appointed March 31, 1949, as the date with effect from which the liability to pay sales tax would commence was good and valid in law. That finding coupled with the concession mentioned above relieves us from the necessity of remanding the case to the sales tax authorities. Even if we assume, contrary to the aforesaid concession, that the gross turnover of the respondents during the financial year ending on March 31, 1948, did not exceed Rs. 5,000 and, therefore, s. 4 (1) did not apply to them the respondents will still be liable to pay the sales tax for the two pre-Constitution quarters under s. 4 (2). For reasons stated above we hold that the assessment orders for the three post-Constitution quarters were invalid and we accordingly agree that this appeal, in so far as it is against that part of the order of the -High Court which cancelled the assessment orders for those three post- Constitution quarters, should be dismissed. We further hold that the assessments for the two pre-Constitution quarters were valid for reasons stated above and accordingly we agree in allowing this appeal in so far as it is against that part of the order of the

High Court which cancelled the assessment orders for the two pre-Constitution quarters Oil the ground that the notification issued under s. 4 (1) of the Act was wholly invalid. Under the circumstances of this case we also agree that the parties should bear their own costs in the High Court as well as in this Court. S. K. DAS J.-This appeal on behalf of the assessing authorities, Cuttack, has been brought pursuant to an order made on January 17, 1956, granting them special leave to appeal to this Court from the judgment and order of the High Court of Orissa dated April 12,1955, by which the High Court quashed certain orders of assessment of sales tax made against the respondent.

The short facts are these. The respondent, Messrs.B. C. Patel and Co., is a partnership firm carrying on the business of collection and sale of Kendu leaves. The firm has its headquarters at Pallahara, which was formerly one of the Feudatory States of Orissa and merged in the. then province of Orissa by a merger agreement dated January 1, 1948. The Sales Tax authorities, Cuttack, in the State of Orissa, assessed the respondent to sales tax in respect of sales of Kendu leaves which took place for five quarters ending on September 30, 1949, December 31, 1949, June 30, 1950, September 30, 1950 and December 31, 1950. It should be noted that two of the aforesaid quarters related to a period prior to the commencement of the Constitution, and the remaining three quarters were post-Constitution. The facts which the Sales Tax authorities found were (I.) that the respondent collected Kendu leaves in Orissa and sold them to various merchants of Calcutta, Madras and other places on receipt of orders from them, (2) that the goods were sent either f. o. r. Talcher or f. o. r. Calcutta, and (3) the sale price was realised by sending the bills to the purchasers for payment. The admitted position was that the goods were delivered for consumption at various places out- side the State of Orissa. The Sales Tax authorities proceeded on the footing that all the sales took place in Orissa even though the goods were delivered for con sumption at places outside Orissa. By five separate assessment orders dated May 31, 1951, the Sales Tax Officer, Cuttack, held that the sales having taken place in Orissa, the respondent was clearly liable to sales tax for the pre- Constitution period and, for the post-Constitution period, though the sales came within cl. (2) of Art. 286 of the Constitution, the respondent was liable to sales tax under the Sales Tax Continuance Order, 1950, made by the President. These findings were affirmed by the Assistant Collector of Sales Tax, Orissa, on appeal, by his order dated April 12, 1952. The respondent assessee then filed a petition under Art. 226 of the Constitution in the High Court of Orissa and prayed for the issue of a writ of certiorari or other appropriate writ quashing the aforesaid orders of assessment. The case of the respondent before the High Court was that the assessment orders., both with regard to the pre-Constitution and post-Constitution periods, were invalid and without jurisdiction. The High Court accepted the case of the respondent and held that the assessment orders for the entire period were invalid and without jurisdiction. The present appeal has been brought from the aforesaid judgment and order of the High Court of Orissa dated April 12, 1955.

Though before the Sales Tax authorities and in the High Court, an attempt was made on behalf of the respondent assessee to show that there were no completed sales in Orissa and what took place in Orissa was a mere agreement to sell, that question is no longer at large before us. The Sales Tax authorities found against the respondent on that question and the High Court did not consider it necessary to decide it on the petition filed by the respondent. The High Court proceeded on certain other grounds pressed before it by the respondent, and we proceed now to consider the validity of

those grounds. The grounds are different , in respect of the two periods, pre-Constitution, and post-Constitution, and it will be convenient to take these two periods separately.

But before we do so, it is necessary to state some facts with regard to the enactment and enforcement of the Orissa Sales Tax Act, 1947 (Orissa XlV of 1947), hereinafter referred to as the Act, in the old province of Orissa and the ex-Feudatory State of Pallahara. The Act received the assent of the Governor General on April 26, 1947, and was first published in the Orissa Gazette on May 14,1947. Section I came into force at once in the old province of Orissa and sub-s. (3) of that section said that " the rest of the Act shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint ". The Provincial Government of Orissa notified August 1, 1947, as the date on which the rest of the Act was to come into force in the province of Orissa. It is neces- sary at this stage to refer to the charging section, namely s. 4 of the Act, which is set out below as it stood at the relevant time:

> " 4. (1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified. (2) Every dealer to whom subsection (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000. (3)Every dealer who has become liable to pay tax under this Act shall continue to be so liable until the expire of three consecutive years, during each of which his gross turnover has failed to exceed Rs. 5,000 and such further period after the date of such expiry as may be prescribed and on the expiry of this latter period his liability to pay tax shall cease.
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> (4)Every dealer whose liability to pay tax has ceased under the provision of sub-section (3) shall again be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover again exceeds Rs. 5,000."

It is to be noticed that for a liability to arise under sub- s. (1) of s. 4, a notification by the Provincial Government is necessary, and the notification must fix the date from which every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified. Such a notification was issued for the old province of Orissa on August 30, 1947, and September 30,1947, was fixed as the date with effect from which every dealer whose gross turnover during the year ending March 31, 1947, exceeded Rs. 5,000 was made liable to pay tax under the Act on sales effected after the said date. This was the position in the old province of Orissa. We have already stated that the ex-Feudatory State of Pallahara was merged into the old province of Orissa by a merger agreement dated January 1, 1948. After the merger of Pallahara in the old province of Orissa, the Government of Orissa under the delegated authority of the Central Government and

exercising the powers under s. 4 of the Extra Provincial Jurisdiction Act, 1947 (XLVII of 1947) (as it was then called) applied the Act to the former Orissa States including Pallahara by a notification dated December 14, 1948. The only modification made in applying the Act to the Orissa States was to substitute the words " Orissa States "for the words "

> Province of Orissa ", wherever they occurred in the Act., By merely applying the Act to the Orissa States on December 14, 1948, all sections of the Act did not come into force in that area at once, since a notification under sub-s. (3) of s. 1 was necessary to bring into force ss. 2 to 29. Such a notification was issued on March 1, 1949. The notification was in these terms:
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> " In exercise of the powers conferred by sub-section (3) of section 1 of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947), as applied to Orissa States, the Government of Orissa are pleased to appoint the 1st day of March, 1949, as the date on which sections 2 to 29 of the said Act shall come into force The position therefore was this. Section 1 of the Act came into force in Pallahara on December 14, 1948, and the remaining sections came into force on March 1, 1949, namely, those sections which dealt with the liability of a dealer to pay sales tax, set tip a machinery for collection of the tax and dealt with other ancillary matters. A notification under sub-s. (1) of s. 4 was also necessary for a liability to arise under that sub-section in the said area, and such a notification was issued on March 1, 1949. That notification must be quoted in full, as one of the points for our decision is the validity of the notification. The notification read:
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> " In exercise of the powers conferred by sub-section (1) of section 4 of the Orissa Sales Tax. Act, 1947 (Orissa Act XIV of 1947), as applied to Orissa States, the Government of Orissa are pleased to appoint the 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date ".

Two other provisions of the Act must be referred to here. The word "dealer" is defined in s. 2(c) in these terms :

> " 'dealer' means any person who carries on the business of selling or supplying goods in Orissa, whether for commission, remuneration or otherwise and includes any firm or a Hindu joint family, and any society, club or association which sells or supplies goods to its members; ".

The word " year " is defined ins. 2(j) and means the financial year.

Now, with regard to the pre-Constitution period the High Court has found that the notification under subs. (1) of s. 4 dated March 1, 1949, was an invalid notification and therefore the respondent was not liable to tax under that subsection in respect of the transactions which took place in the

pre-Constitution period. The reason why the High Court has held that the notification in question was invalid must now be stated. The scheme of sub-s. (1) of s. 4 is, firstly, to fix a date, not earlier than thirty days after the date of the notification, from which the liability is to commence; and, secondly, to impose a liability on, every dealer whose gross turnover during the year immediately preceding the commencement of the Act exceeded Rs. 5,000. The tax liability is on transactions of sale which take place after the notified date (which must necessarily be after the commencement of the Act); but in determining on which class of dealers, the incidence of taxation will fall, the crucial period as mentioned in the sub-section itself is the year immediately preceding the commencement of the Act. Therefore, the subsection contemplates two. matters, one of which may be called the 'relevant date', and the other 'relevant period'. So far as the old province of Orissa was concerned, there was no difficulty. The notification fixed September 30, 1947, as the relevant date, and the year immediately preceding the commencement of the Act in the old province of Orissa was the relevant period, viz., the financial year 1946-47, i. e., April 1, 1946 to March 31, 1947. Therefore dealers whose gross turnover exceeded Rs. 5,000 in 1946-47, became liable under sub-s. (1) of S. 4 to tax on transactions of sale after September 30, 1947, in the old province of Orissa. The notification for the Orissa States, however, fixed March 31, 1949, as the relevant date ; but in determining the class of dealers who would be subject to the liability, it took the year ending March 31, 1949, as the relevant period. This was clearly a mistake, because under sub-s. (1) of S. 4 the crucial year is the year immediately preceding the commencement of the Act. The Act commenced in the Orissa States either on December 14, 1948, or on March 1, 1949, and the financial year immediately preceding was the year 1947-48, i. e., April 1, 1947 to March 31, 1948. The notification would have been in consonance with the subsection, if it had mentioned the year ending March 31, 1948, (instead of March 31, 1949) as the crucial year for determining the class of dealers who would be subject to the liability under sub-s. (1) of S. 4. This mistake in the notification is the ground on which the High Court held that the assessments for the two quarters of the pre-Constitution period were invalid and without jurisdiction. The learned Solicitor-General who has appeared for the appellants has conceded that a mistake was made in the notification. However, lie has argued-firstly, that the mistake was immaterial and secondly, that the assessment orders for the pre-Constitution period were justified under sub-s. (2) of s: 4. As to the first argument that the mistake was immaterial, he has submitted that the liability to tax arose tinder the sub-section and not under the notification, and any mistake in the notification did not affect such liability; lie has also submitted that the words and figures which gave rise to the mistake were mere surplusage and could be severed from the rest of the notification. We are unable to accept this argument. For a liability to arise under sub-S. (1) of S. 47 the issue of a;

notification is an essential prerequisite, and unless the notification complies with the requirements of the subsection, no liability to tax can arise under it. The notification not only fixed the relevant date, but fixed the relevant period for determining the class of dealers who would be subject to the liability. In doing so, it made a mistake, the result of which was that the notification was not in conformity with the law. We do not think that it can be severed in the way suggested by the learned Solicitor General.

Now, we come to the second argument whether the pre- Constitution assessment orders are justified under sub-s. (2) of s. 4. The High Court held that they were not, and gave two reasons for its view:

one was that, subsections (1) and (2) were mutually exclusive and the other was based on the opening words of sub-s. (2), which says that " every dealer to whom sub-section (1) does not apply etc." The High Court expressed the view that if the notification under sub- s. (1) were correctly drawn up, the subsection would have applied to the respondent ; therefore, the opening words of sub-s. (2) barred the application of the sub-section to the respondent. At first sight, there appears to be some force in this view. But on a closer examination we do not think that the view expressed by the High Court is correct. Sub- sections (1) and (2) are mutually, exclusive only in the sense that they do not operate in the same field ; that is, the relevant periods for their application are different. The relevant period for the application of sub-s. (1) is "

> the year immediately preceding the commencement of the Act."

Sub-section (2) however does not require any notification, and under it every dealer is liable to pay tax under the Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000. Obviously, the relevant period for the application of sub-s. (2) is the year immediately following that during which the gross turnover of a dealer first exceeded Rs. 5,000. The contrast between the two subsections is this: for sub-s. (1) the crucial year is the year immediately preceding the commencement of the, Act; but for sub-s. (2) the crucial, year is the year in which the dealer's gross turnover first exceeded Rs. 5,000. We agree that for the same relevant year both sub- sections (1) and (2) cannot apply, because sub-s. (2) says-"

> Every dealer to whom subs. (1) does not apply etc." Let us, for example, take the year 1946-47 in the old province of Orissa. That was the year immediately preceding the commencement of the Act in that area, and sub-s. (1) applied to all dealers whose gross turnover exceeded Rs. 5,000, first or otherwise, in that year; sub-s. (2) did not apply to such dealers even if their gross turnover exceeded Rs. 5,000 for the first time, in that year; because where sub-s.
>
> (1) applies, sub-s. (2) does not apply. But what is the case before us? The year immediately preceding the commencement of the Act in the Pallahara area was 1947-48, and sub-s. (1) would have applied to the respondent if the notification had mentioned that year. But it did not, and the result was that it was not necessary to find if the respondent's gross turnover exceeded Rs. 5,000 in 1947-48.

What was found was that the respondent's gross turnover exceeded Rs. 5,000 in 1948-49, that is, the year ending March 31,, 1949, which was not the year immediately preceding the commencement of the Act in the Pallahara area. Obviously, therefore, sub-s. (1) did not apply to the respondent; but he clearly came under sub-s. (2). The Act came into force in the Orissa States on March 1, 1949. By March 31, 1949, the respondent's - gross turnover exceeded Rs. 5,000. He was, therefore, liable to pay tax under sub- s. (2) with effect from the commencement of the year immediately following March 31, 1949, that is, from April 1, 1949. It has been argued for the respondent that the word `first' in sub-s. (2) means ` first' after the commencement of the Act. Assuming this to be correct, the respondent still comes under sub-s. (2) because even if the Act came into force on March 1, 1949, the respondent's gross turnover first exceeded Rs. 5,000 in the year ending March 31, 1949 which

was after the commencement of the Act.

We are, therefore, of the view that all the requirements of sub-s. (2) are fulfilled in this case, and the two assessment orders made against the respondent for the pre- Constitution period were validly made under sub-s. (2) of s. 4 of the Act. The effect of the invalid notification under sub-s. (1) was that there was no liability thereunder, and no dealers were liable to pay tax under that sub-section. But that did not mean that any dealer who properly came under sub-s. (2) was free to escape his liability to pay tax. Surely, the position cannot be worse than what it would have been if the Provincial Government had failed to issue a, notification under sub-s. (1).

We now turn to the post-Constitution period. The short ground on which the High Court held the assessment orders for this period to be invalid was based on the decision of this Court in The State of Bombay v. The United Motors (India) Ltd. (1) Said the High Court:

> " Clause (1) of Article 286 prohibited a State from taxing a sale unless such sale took place within the State as explained in the Explanation to the clause of the Article. Similarly, clause (2) of that Article restricted the power of a State to tax a sale which took place in the course of inter-State trade or commerce'. Doubtless, by virtue of the proviso to that clause an Order by the President may save taxation on such inter-State sales till the 31st March, 1951. The recent S.C. p. 252 hap, settled the law regarding the true scope of these two clauses of the Article. Where a transaction of sale involves inter-State elements if the goods are delivered for consumption in a particular State that State alone can tax the sale by virtue of clause (1) of that Article and by a legal fiction that sale becomes `intra-State sale'. Clause (2) of Article 286 applies to those transactions of sale involving inter-State elements which do not come within the scope of clause (1) of that Article. On the admitted facts of the present case, clause (1) of Article 286 would apply. The sales involve inter-

State elements inasmuch as the buyers are outside Orissa, price is paid outside Orissa and (1) [1953] S.C.R. 1069.

goods are delivered for consumption outside Orissa. Hence, by virtue of clause (1) of Article 286 as explained by their Lordships of the Supreme Court, the State of Orissa is not competent to tax such transactions of sale." The learned Solicitor General has rightly pointed out that in a later decision of this Court in The Bengal Immunity Company Limited v. The State of Bihar and Others (1), which was, not available to the High Court when it delivered its judgment, the view expressed in the United Motors, case (2) was departed from in so far as the earlier decision held that cl. (2) of Art. 286 of the Constitution did not affect the power of the State in which delivery of goods was made to tax inter-State sales or purchases of the kind mentioned in the Explanation to cl. (1) and the effect of the Expla- nation was that such transactions were saved from the ban imposed by Art. 286 (2). The learned Solicitor General, therefore, contends that on the basis of the later decision, the assessments made should be held to be valid under the Sales Tax Continuance Order 1950, made by the President, even though the sales took place in course of inter-State trade or commerce.

It is necessary to state here that by the Adaptation of Laws (Third Amendment) Order, 1951, made by the President in exercise of the power given by cl. (2) of Art. 372 of the Constitution, s. 30 was inserted in the Act to bring it into accord with the Constitution, from January 26, 1950. Section 30 which in substance reproduced Art. 286 of the Constitution, as it then stood, was in these terms-

> " 30. (1) Notwithstanding anything contained in this Act--
>
> (a) a tax on sale or purchase of goods shall not be imposed under this Act,
>
> (i) where such sale or purchase takes place outside the State of Orissa; or
>
> (ii) where such sale or purchase takes place, in the course of import of the goods into, or export of the goods out of, the territory of India;
>
> (b) a tax on the sale or purchase of any goods (1) [1955] 2 S.C.R. 603. (2) [1953] S.C.R. 1069.

shall not, after the 31st day of March, 1951, be imposed where such sale or purchase takes place in the course of inter-State trade or commerce except in so far as Parliament may by law otherwise provide.

(2) The explanation to clause (1) of Article 286 of the Constitution shall apply for the interpretation of sub- clause (i) of clause (a) of sub-section (1). We are of the view that the Bengal Immunity decision (1) does not really help the learned Solicitor-General to establish his contention that the assessments for the post-Constitution period were valid. The admitted position was that the goods sold were delivered for consumption at various places outside the State of Orissa. Therefore, under cl. (1) (a) of Art. 286 read with the Explanation as also under s. 30 of the Act, the sales were outside Orissa. It is true that the Bengal Immunity decision (1) took a view different from that of the earlier decision in so far as it held that inter- State sales were converted into intra-State sales by the Explanation; but it -was pointed out that the States' power with respect to a sale or purchase might be hit by one or more of the bans imposed by Art. 286. With reference to the different clauses of Art. 286, it was observed in the majority judgment of the Bengal Immunity decision(1):

> " These several bans may overlap in some cases but in their respective scope and operation they are separate and independent. They deal with different phases of a sale or purchase but, nevertheless, they are distinct and one has nothing to do with and is not dependent on the other or others. The States' legislative power with respect to a sale or purchase may be, hit by one or more of these bans. Thus, take the case of a sale of goods declared by Parliament as essential by a smaller in West Bengal to a purchaser in Bihar in which goods are actually delivered as a direct result of such sale for consumption in the State-of Bihar. A law made by West Bengal without the assent of the President taxing this sale will be unconstitutional because (1) it will offend Article 286 (1) (a) as the gale has taken place outside the territory by virtue of the (1) [1935] 2 S.C.R. 603.

Explanation to clause (1) (a), (2) it will also offend Article 286 (2) as the sale has taken place in the course of inter-State trade or commerce and (3)such law will also be contrary to Article 286 (3) as the goods are essential commodities and the President's assent to the law was not obtained as required by clause (3) of Article 286. This appears to us to be the general scheme of that article." (see pp. 638-639 of the report).

At p. 647 of the- report, it was further observed--

> " The operative provisions of the several parts of Article 286, namely, clause (1) (a), clause (1) (b), clause (2) and clause (3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another. On a careful and anxious consideration of the matter in the light of the fresh arguments advanced and discussions held oil the present occasion we are definitely of the opinion that the Explanation in clause (1) (a) cannot be legitimately extended to clause (2) either as an exception or as a proviso thereto or read as curtailing or limiting the ambit of clause (2)."

As to the President's order, it was stated at p. 656:

> " It will be noticed that under that proviso the President's order was to take effect " notwithstanding that the imposition of such tax is contrary to the provisions of this clause ". This non obstante clause does not, in terms, supersede clause (1) at all and, therefore, prima facie, the President's order was subject to the prohibition of clause (1) (a) read with the Explanation. "

Obviously, therefore, even on the Bengal Immunity decision. (1) the assessments for the post-Constitution period in this case were hit by cl. (1) (a) of Art. 286 as also s. 30 (1)

(a) (i) of the Act and were rightly held to be without jurisdiction.

The result, therefore, is that in our view this appeal should succeed in part, as we hold that the assessments for the -two quarters of the pre-Constitution period were valid under sub-s. (2) of s. 4 of the Act and the (1) [1955] 2 S.C.R. 603.

assessments for the post-Constitution period were invalid. In view of the divided success of the parties we further think that they should bear their own costs in the High Court and in this Court.

SARKAR J.-The respondents are a firm of merchants carrying on business in a part of the State of Orissa which was formerly the feudatory State of Pallahara. This State of Pallahara had merged in the Province of Orissa under an agreement with the Government of India, dated January 1, 1948. On December 14, 1948, the Government of Orissa under the powers conferred by s. 4 of the Extra Provincial Jurisdiction Act, 1947, and with the permission of the Government of India, issued a Notification applying the Orissa Sales Tax Act, 1947 (Orissa XIV of 1947), passed by the Legislature of Orissa, to the areas which previously constituted the feudatory States including Pallahara, then

merged in Orissa. The respondents were assessed to sales tax under this Act in respect of their sales which took place during five quarters between July 1, 1949 and December 31, 1950. They had appealed under the provisions of the Act to higher authorities from the original orders of assessment, but were unsuccessful. They then applied to the High Court of Orissa on November 11. 1952, for an appro- priate writ directing the Sales Tax Officer the assessing authority and one of the appellants herein, to refrain from realizing the tax or from giving effect to the assessment orders in any manner whatsoever and quashing such orders and also prohibiting future assessment. By its judgment delivered on April 12, 1955, the High Court allowed the petition and cancelled the assessment orders. From that judgment the present appeal has come to this Court. The question that I propose to discuss in this judgment is whether the respondents are liable to pay tax under the provisions of the Act in the circumstances which existed in this case and to which, I shall refer a little later. The sections of the Act under which the tax is sought to be levied are set out below:

> S.1. (1) This Act may be called the Orissa Sales Tax Act, 1947.
>
> (2) It extends to the whole of the Province of Orissa. (3)This section shall come into force at once and the rest of this Act shall come into force on such date as the Provincial Government may, by notification in the Gazette, appoint.

S.2. In this Act, unless there is anything repugnant in the subject or context,-

(j) " year " means the financial year.

S. 4. (1) Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the Gazette, appoint, being not earlier than thirty days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act exceeded Rs. 5,000 shall be liable to pay tax under the Act on sales effected after the date so notified:

> Provided that the tax shall not be payable on sale involved in the execution of a contract which is shown to the satisfaction of the Collector to have been entered into by the dealer concerned on or before the date so notified. (2)Every dealer to whom sub-section (1) does not apply shall be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover first exceeded Rs. 5,000. (3)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 Rs. 5,000 and such further period after the date of such expiry as may be prescribed and on the expiry of this latter period his liability to pay tax shall cease.
>
> (4)Every dealer whose liability to pay tax has ceased under the provisions of sub-section (3) shall again be liable to pay tax under this Act with effect from the commencement of the year immediately following that during which his gross turnover again exceeds Rs. 5,000.

It is conceded that the respondents are dealers within the meaning of the Act. The term " turnover " is defined in the Act but for the purpose of this judgment it can be taken in its popular sense. It is also unnecessary to consider ss. 5, 6, 7 and 8 of the Act, for nothing turns on them in this appeal.

Section I of the Act came into force in the Pallahara area on December 14, 1948, by virtue of the notification of that date mentioned earlier. Oil March 1, 1949, the Government of Orissa issued under s. 1 (3) of the Act a notification, being Notification No. 2267/F appointing that date as the date on which the, rest of the Act would come into force in the Pallahara area. It is not in dispute that March 1, 1949, has to be considered as the date of the commencement of the Act in the Pallahara area. That is the result of the definition of the commencement of an Act given in s. 2 (8) of the Orissa General Clauses Act, 1937. As will have been noticed s. 4 (1) of the Act required a date to be appointed before liability under it could arise. Such a date had been appointed by the Government of Orissa before the Act was applied to the areas previously belonging to the feudatory States and the Government felt that this appointment of a date would not be an appointment for these areas. The case before us has proceeded oil the basis that appointment was not a proper appointment under this section for these areas. In fact, the Government of Orissa had oil March 1, 1949, issued a Notification No. 2269/F, purporting to appoint a date under s. 4 (1) for the areas previously covered by the feudatory States including the Pallahara State, then merged in Orissa. That Notification is in these terms:

> In exercise of the powers conferred by sub-section (1) of Section 4 of the Orissa ,Sales Tax Act, 1947 (Orissa Act XIV of 1947), as applied to Orissa States, the Government of Orissa are pleased to appoint the. 31st March, 1949, as the date with effect from which every dealer whose gross turnover during the year ending the 31st March, 1949, exceeded Rs. 5,000 shall be liable to pay tax under the said Act on sales effected after the said date.

> might have retired from the contest on a re-appraisement of his prospects at the election as compared with those of the deceased contesting candidate. When death removed that contesting candidate from the field, a person who had given notice of retirement from the contest as aforesaid may as well re-consider his position and feel that as compared with the other surviving candidates he -would have fair prospects of success at the election and if an election is held after the countermanding of the poll by the returning officer, he might just as well put forward his candidature and it is provided that in that event he shall not be ineligible for being nominated as a candidate for election after such countermanding ; and there is perfectly good reason for the same, because otherwise, withdrawal or retirement might possibly be considered a disqualification or refusal to seek election.

> This brings us to the provisions as to retirement front contest under s. 55A. A candidate might not have withdrawn his candidature within the period prescribed and his name might have been included in the list of contesting candidates published by the returning officer under s. 38. Being thus a contesting candidate duly declared as such he would be entitled to go to the poll. He may, however, as a result of the

election campaign find himself in the predicament that his prospects at the election are meagre and he might even have to face the situation of having to forfeit his security deposit if he went to the poll. There may be a number of motives operating in his mind which it is not necessary to discuss and be may just as well withdraw his candidature and retire from the field. A locus poenitentiae is therefore given to him under s. 55A to retire from the contest by giving notice in the prescribed form which has to be delivered to the returning officer on any day not later than 10 days prior to the date fixed for the poll. If a candidate thus retires from the contest, he decides not to go to the poll and the provision is made in the rules for the correction of the list of contesting candidates so that no elector shall in the absence of necessary information waste his vote upon him. A copy of such notice is to be affixed by the returning officer to his notice board and in -the polling station "and each of the remaining, contesting candidates or his agent is to be supplied with such copy and the notice has also got to be published in the official gazette. Such retirement from contest might result in the number of remaining contesting candidates becoming equal to the number of seats to be filled and s. 55A (6) and (7) work out the situation as it would then obtain with reference to ss. 53 and 54 and provide that in that event the returning officer is to forth with declare such candidates to be duly elected to fill those seats and countermand the poll a fresh election being necessary only in the event of filling the remaining seat or seats, if' any.

If, however, a poll has to be taken under s. 53(1) in spite of the retirement of a contesting candidate or candidates from contest is aforesaid the process of election continues in spite of such retirement and the question any arise as to what would happen if any of the contesting candidates who has thus retired dies before the commencement of the poll. If there was nothing more, s. 52 would apply and the returning officer upon being satisfied of the fact of the death of the candidate Would have to countermand the poll and report the fact to the Election. Commission and also to the appropriate authority. Provision is therefore made in s. 55A (5) that any person who has given a notice of retirement under s. 55A (2) is deemed not to be a contesting candidate for the purposes of s. 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction however is that a position which otherwise would not obtain is deemed to obtain under those circumstances. Unless a contesting, candidate who had thus retired from the contest continued to be a contesting candidate for the purposes of election and the effect of the death of such contesting (Candidate was " contemplated in s. 52, it would not have been found necessary to enact s. 55A (5). It is because such a contesting, candidate who retires from the contest under s. 55A (2) continues to be a. contesting candidate for the purposes of election that it has been considered necessary to provide for the consequence of his death and to exclude such a candidate from the category of contesting candidates within the meaning of the term as used in s. 38 of' the Act, that is to say, candidates who were included in the list of validly nominated candidates and who had not with drawn their candidature within the period prescribed and who had been included in the list of' candidates prepared and published by the returning,

> officer in the manner prescribed. This provision, therefore warrants the conclusion that a contesting candidate whose name was included in the list under s. 38 but who retires from the contest under s. 55A (2) continues to be a contesting candidate for the purpose of the Act though by reason of such retirement it would be unnecessary for the constituency to cast its votes in his favour at the poll.

Such candidate continues to be contesting candidate for the purposes of the Act, notwithstanding his retirement from the contest under s. 55A (2).

When we come to the provisions of Part VI of the Act relating to disputes regarding election, we find that there is no definition given in s. 79 of the expression "

> contesting candidate ", though there are definitions of "

candidate " and " returned candidate " to be found therein. An election petition calling in question any election can be presented by any candidate at such election or any elector on one, or more of the grounds specified in ss. 100 (1) and 101 to the Election Commission and a petitioner in addition to calling in question the election of the returned candidate, or candidates may further claim a declaration that he himself or any other candidate has been duly elected. Where the petitioner claims such further declaration, he must join as respondents to his petition all the contesting candidates other than the petitioner and also any other candidate against whom allegations of any corrupt practices are made in the petition. The words " other than the petitioner " are meant to exclude the petitioner when he happens to be one of the contesting candidates who has been defeated at the polls and would not apply where the petition is filed for instance by an elector. An elector filing such a petition would have to join all the contesting candidates whose names were included in the list of contesting candidates prepared and published by the returning officer in the manner prescribed under s. 38, that is to say, candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidature within the period prescribed. Such contesting candidates will have to be joined as respondents to such petition irrespective of the fact that one or more of them had retired from the contest tinder s. 55A (2). If the provisions of s. 82 which prescribes who shall be joined as respondents to the petition are not complied with, the Election Commission is enjoined under s. 85 of the Act to dismiss the petition and similar are the consequences of noncompliance with the provisions of s. 117 relating to deposit of security of costs. If the Election Commission however does not do so and accepts the petition, it has to cause a copy of the petition to be published in the official gazette and a copy thereof to be served by post on each of the respondents and then refer the petition to an election tribunal for trial. Section 90 (3) similarly enjoins the Election Tribunal to dismiss an election petition which does not comply with the provisions of s. 82 or s. 117 notwithstanding that it has not been dismissed by the Election Commission under s. 85. Section 90 (3) is mandatory and the Election Tribunal is bound to dismiss such a petition if an application is made before it for the purpose.

Turning now to s. 117, we find that it is a provision relating to the deposit of security for the costs of the petition. When a petitioner presents an election petition to the Election Commission under s. 81 he is to enclose with the petition a Government Treasury receipt showing that a deposit of one

thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India in favour of the Secretary to the Election Commission as security for the costs of the petition. The Government Treasury receipt must show that such deposit has been actually made by him either in a Government Treasury or in the Reserve Bank of India; it must also show that it has been so made in favour of the Secretary to the Election Commission and it must further show that it has been made as security for the costs of the petition. These are the three requirements of the section which have to be fulfilled. The question, however, arises whether the words " in favour of the Secretary to the Election Commission " are mandatory in character so that if the deposit has not been made in favour of the Secretary to the Election Commission as therein specified the deposit even though made in a Government Treasury or in the Reserve Bank of India and as security for the costs of the petition would be invalid and of no avail. If, for instance, the petitioner made the deposit either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself and obtained a Government Treasury receipt in regard to the same, could it be contended that in spite of such a deposit having been made, the said Government Treasury receipt was not in conformity with the requirements of s. 117 and the petitioner could be said not to have complied with the requirements of that section so as -to involve a dismissal of his petition under s. 85 or s. 90 (3) ?

The extreme case illustrated above has been taken by us only in order to demonstrate to what lengths a literal compliance with the provisions of s. 117 can be pushed. The petition is to be presented to the Election Commission, the security for the costs of the petition has to be given to the Election Commission and s. 121 provides for an application to be made in writing to the Election Commission for payment of costs by the person in whose favour the costs have been awarded and yet, even though the deposit may have been made by a petitioner in favour of the Election Commission and a Government Treasury receipt evidencing the same be enclosed along with his petition the provisions of s. 117 of the Act can be said not to have been complied with merely because the deposit was made in favour of the Election Commission and not in favour of the Secretary to the Election Commission. The relationship between the Election Commission on the one hand and the Secretary to the Election Commission on the other need not be scrutinized for the purposes of negativing this contention. It is enough to say that such a contention has only got to be stated in order to be negatived. It would be absurd to imagine that a deposit made either in a Government Treasury or in the Reserve Bank of India in favour of the Election Commission itself would not be sufficient compliance with the provisions of s. 117 and would involve a dismissal of the petition under s. 85 or s. 90 (3). The above illustration is sufficient to demonstrate that the words " in favour of the Secretary to the Election Commission " used in s. 117 are directory and not mandatory in their character. What is of the essence of the provision contained in s. 11.7 is that the petitioner should furnish security for the costs of the petition, and should enclose along with the petition a (Government Treasury receipt showing that a deposit of one thousand rupees has been made by him either in a Government Treasury or in the Reserve Bank of India, is at the disposal of the Election Commission to be utilised by it in the manner authorised by law and is under its control and payable on a proper application being made in that behalf to the Election Commission or to any person duly authorised by it to receive the same, be he the Secretary to the Election commission or any one else. If, therefore it can be shown by evidence led before the Election Tribunal that the government Treasury receipt or the chalan which was obtained by the petitioner and enclosed by him along with

his petition presented to the Election Commission was such that the Election Commission could on a necessary application in that behalf be in a position to realise the said sum of rupees one thousand for payment of the costs to the successful party it would be sufficient compliance with the requirements of s. 117. No such literal compliance with the terms of s. 117 is at, all necessary as is contended for on behalf of the appellant before us. As regards the amendment of a petition by deleting the averments and the prayer regarding the declaration that either the petitioner or an other candidate has been. duly elected, so as to cure lie defect of nonjoinder of the necessary parties as respondents, we may only refer to our judgment * about Io be delivered in Civil Appeal No. 76 of 1958, where the question is discussed at considerable length. Suffice it to say here that the Election Tribunal has no power to grant such an amendment, be it by way of withdrawal or abandonment of a part of the claim or otherwise, once, an Election Petition has been presented to the Election (commission claiming such further declaration. Considering Civil Appeal No. 763 of 1957 in the light of the observations made above, we find that sundararaja Pillai whose name was included in the list of contesting candidates prepared and published by the returning officer under s. 38 but who retired from the contest under s. 55A (2) before the commencement of the poll was included in the expression "

> contesting candidate " used in s. 82 and was by reason of the first respondent claiming a further declaration that the second respondent had been duly elected, a necessary party to the petition. Inasmuch as he was not joined as a respondent, the petition was liable to be dismissed under s. 90(3) of the Act.
>
> This defect could not be cured by any amendment of the petition seeking to delete the claim for such further declaration and the Election Tribunal was clearly in error in allowing such amendment on the grounds disclosed in 1. A. No. 3 of 1957 or otherwise.
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> In regard to the deposit of security, however, the position was quite different. According to the evidence given by K. Nataraja Mudaliar, head accountant in. charge of the Madurai Taluk sub-Treasury, the amount was kept in the Election Revenue deposit and the monies were at the disposal of the Election Commission ; also that the Election Commission or anyone * Basappa v. Ayyappa, see p. 6ii, post.
>
> authorised by the Election Commission in that behalf could draw the said monies and no one else could withdraw the same without such authority. If that was so, there was sufficient compliance with the requirements of s. 117 and there could be no question of dismissing the petition for noncompliance with the provisions of that section. Having regard therefore to the conclusion reached above in regard to the non-compliance with the provisions of s. 82, Civil Appeal No. 763 of 1957 will be allowed, the orders of dismissal made by the High Court on the writ petitions Nos. 531 of 1957 and 532 of 1957 will be set aside, the orders passed by the Election Tribunal dated July 5, 1957, will be vacated and the Election Petition No. 147 of 1957 will be dismissed with costs. As the appellant has failed in his contention in regard to the provisions of s. 117, we feel that the proper order for costs should be that each

party do bear and pay his own costs here as well as in the High Court.

Civil Appeal No. 764 of 1957 also shares a similar fate. The first respondent therein did not join as party respondents to his petition the two candidates whose names had been included by the returning officer in the list of contesting candidates but who had subsequently retired from the contest before the commencement of the poll. They were necessary parties to the petition in so far as the first respondent had claimed a further declaration that he himself be declared duly elected under s. 101. The Election Petition No. 74 of 1957 filed by him, was thus liable to be dismissed for non-joinder of necessary parties under s. 90(3) of the Act.

This appeal will also be accordingly allowed, the orders passed by the High Court in Writ Petitions Nos. 573 and 574 of 1957 will be set aside, the orders passed by the Election Tribunal on July 13,1957, will be vacated and Election Petition No. 74 of 1957 will be, dismissed. The first respondent will pay the appellants costs throughout. So far as Civil Appeal No. 48 of 1958 is concerned, the difficulty which faces the appellant is that we have nothing on the record of the appeal to show what were the exact terms of the deposit made by the second respondent under s. If 7. The copy of the chalan which is cyclostyled at p. 45 of the record is deficient in material particulars and does not throw any light on the question. The appellant no doubt made an application to the Election. Tribunal to try his objection as regards the non-compliance with the provision,-, of that section as a preliminary objection and determine whether the second respondent had complied with the provisions of s. 117 and if not to dismiss his petition. The Election Tribunal, however, did not decide this preliminary objection but ordered that the trial of the petition (lo proceed. The High Court before whom the Writ Petition M. J. No. 480 of 1957 was filed also came to the same conclusion as it thought that the matter could be decided at the time of hearing itself and dismissed the application.

We are of opinion that both the Election Tribunal and the High Court were wrong in the view they took. If the preliminary objection was not entertained and a decision reached thereupon, further proceedings taken in the Election Petition would mean a full fledged trial involving examination of a large number of witnesses on behalf of the and respondent in support of the numerous allegations of corrupt practices attributed by him to the appellant. his agents or others working on his behalf; examination of a large member of witnesses by or on behalf of the appellant controverting the allegations made against him; examination of witnesses in support of' the recrimination submitted by the appellant against the 2nd respondent; and a large number of visits by the appellant from distant places like Delhi and Bombay to Ranchi resulting in not only heavy expenses and loss of time and diversion of the appellant from his public duty in the various fields of' activity including those in the House of the People. It would mean unnecessary harassment and expenses for the appellant which could certainly be avoided if the preliminary objection urged by him was decided at the initial stage by the Election Tribunal, We are therefore of the

opinion that the orders passed by the High Court in M. J. C. No. 480 of 1957 and by the Election Tribunal in Election Petition No. 341 of 1957 were wrong and ought to be set aside. The Election Tribunal will decide the preliminary objection in regard to the non- compliance with the provisions of s. 117 by the 2nd respondent in the light of the observations made above and deal with the same according to law. The parties will be at liberty to lead such further evidence before the Election Tribunal as they may be advised. The costs of both the parties, here, as well as in the courts below will be costs in the Election Petition to be dealt with by the Election Tribunal hereafter and will abide the result of its decision on the preliminary objection.

Appeal,s allowed.

Appeal No. 48 of 1958 remanded.