Supreme Court of India
Indian Aluminium Co. Etc. Etc vs State Of Kerala & Crs on 2 February, 1996
Equivalent citations: 1996 AIR 1431, JT 1996 (2) 85
Author: K Ramaswamy
Bench: Ramaswamy, K.

PETITIONER:
INDIAN ALUMINIUM CO. ETC. ETC.

Vs.

RESPONDENT:
STATE OF KERALA & CRS.

DATE OF JUDGMENT: 02/02/1996

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
G.B. PATTANAIK (J)

CITATION:
1996 AIR 1431 JT 1996 (2) 85
1996 SCALE (1)780

ACT:

HEADNOTE:

JUDGMENT:

WITH CIVIL APPEAL NOS. 2771-2822 OF 1996

[Arising out SLP [C] Nos. 10334/95, 10335/95, 10697-98/95, 11267/95, 11268-70/95, 111318/95, 11319/95, 11321/95, 11322/95, 11340/95, 11655/95, 17898/95, 18047/64/95, 18471/95, 3512/96 [CC 3235/95], 3514/96 [CC 4093/95], 8077/95, 8297/95, 8305/95, 8446-48/95, 8488/95, 8490/95, 8826/95, 8846/95, 8878/95, 9055/95, 9077/95, 9079/95, 9083/95 & 9205/95] J U D G M E N T

Ramaswamy. J.

Leave granted in all the special leave petitions. This batch of appeals by special leave arises from common judgment dated November 22, 1994 of the Kerala High Court made in O.P. No.5957 of 1987 and batch.

By Section 36 of Finance Act 1978, the Central Excise and Salt Act, 1944 [for short, the Excise Act] was amended to impose central excise duty on electricity under Item II-E in the Ist Schedule to the Excise Act and fixed 2 paise per kilo watt of electricity unit. Consequently, the Kerala State Electricity Board [KSEB] was liable to pay excise duty on electricity generated and produced by it. To recoup that loss, the Government of Kerala, exercising its power under Section 3 of the Kerala Essential Articles Control [Temporary Powers] Act, 1961, issued an order. By clause [4] of the said order, surcharge at the rate of 2.5 paise per unit of electrical energy was levied on all Supplies of electrical energy made by the KSEB either directly or through licensees of Extra High Tension [EHT] and High Tension [HT] consumers. Thereunder, the licensees were allowed to retain 1% of the anount collected as collection charges. On October 1, 1984, the Government of India had withdrawn the levy of excise duty on electricity. The Government of Kerala in supersession of its Order dated April 6, 1979 had notified the State Electricity Supply [Kerala State Electricity Board and licensees Area] Surcharge Order, 1984 effective from October 1, 1984. Under clause [4] of the said Order all supplies of electrical energy made by KSEB either directly or through licensees, were liable to surcharge at the rate fixed at 2.5 paise per unit. In the explanatory note it was stated that though excise duty was discontinued, the State Government desired to continue the levy of surcharge. The EHT and HT consumers had filed writ petitions challenging the validity of the 1984 Order. Pending writ petitions, on August 1, 1988, the State Government discontinued the levy of surcharge with effect from that date by issuing an Ordinance called the Kerala Electricity Duty [Amendment] Ordinance, 1988 which later on became an enactment. The rate of electricity duty was 30% of the price of energy. Later, it was revised to 10 paise per unit for HT consumers and 6.5 paise per unit for EHT consumers. After a representation was made through the Association of the HT and EHT consumers, the Government of Kerala decided to discontinue the surcharge on the electricity duty of 10 paise per unit. On September 27, 1988, a Division Bench of the High Court in Chakolas Spinning & Weaving Mills Ltd. v. K.S.E. Board (1988 [2] KLT 680] held that the levy of surcharge is in substance a compulsory exaction intended to enrich the coffers of the State and in effect partakes the character of a tax on electricity. The Government, acting as a delegate under the Kerala Essential Articles Control Act, 1986 [Act 16 of 1986], is not competent to impose any tax. A writ of mandamus was issued directing refund of excise duty collected from those writ petitioners before the High Court. The Kerala State Electricity Supply [Kerala State Electricity Board add Licensees Area] Surcharge Order, 1984 was declared ultra vires the power of the State Government. The said judgment was confirmed by this Court dismissing the Special Leave Petitions in limine.

At this stage, it may be necessary to mention that the Essential Articles [Control] Act, 1963 was amended and Act 13 of 1988 was enacted. It is also relevant to note that exercising the power under Entry 53 of List II of the Seventh Schedule, the Kerala State legislature had enacted Kerala Electricity Duty Act, 1963 and Rules were made to levy electricity duty at varying rates. Orders were passed by this Court on April 13, 1989 dismissing the SLP [C] Nos.4256-66 of 1989. The Governor of Kerala, exercising power under Article 213 of the Constitution issued Ordinance called the Kerala Electricity Surcharge [Levy and Collection] Ordinance, 1989 which later on became enactment, viz., Act 22 of 1989 [for short, "the Act"]. Under the Act, the appellants are liable to pay 2.5 paise per unit of electrical energy supplied. The appellants challenged the same by filing the writ petitions. The High Court upheld the validity of the Act and the Order. Thus these appeals by special leave.

Shri K.K. Venugopal, learned senior counsel for the first appellant contended that the Act levies tax on supply of electrical energy. It is not a tax either on sale or consumption of electrical energy. Entries 26 and 27 of List II [State List] of the Seventh Schedule to the Constitution empower the State legislature, subject to Entry 33 of List ITI [Concurrent List] to enact law empowering levy of surcharge on supply and distribution of goods and trade and commerce therein. Entry 53 of the State list empowers the State legislature to enact the law on sale or consumption of electricity. Having made the law under Entry 26 or 27, using the appropriate language for levy and collection of excise duty on supply of electricity, the Act cannot be construed to be one made under Entry 53 of the State List. He further contended that the word 'supply' has its own connotation. Equally, 'sale' and 'consumption' of electricity bear different connotations. The State legislature having enacted the Electricity Duty Act, 1963, imposes duty on electricity @ 30% and reduced it to 10% by later amendment and discontinued the levy of excise duty from August 1, 1988, and the so-called duty not having been passed on to the public exchequer, the Act was made only as a colourable device to avoid refund of excise duty to the tune of Rs.15 crores wrongly collected from the consumers. The Act admittedly is not an amendment to the Excise Act. The excise duty is levied on supply of electricity. If excise duty is construed to be a tax under Entry 53, the Electricity Duty Act, 1963 being earlier to the Act and both occupying the same field, as a special component of the tax on electricity, the later Act prevails over the earlier. Therefore, the State legislature did not intend to have the earlier enactment, viz., Electricity Duty Act, superseded by the Act which imposes levy of only 2.5 paise per unit of electrical energy. Therefore, the imposition is not a tax but a duty on supply of electricity. This deduction could be drawn from the language employed in the Act itself. Otherwise, nothing prevented the legislature to use such a language as impost on sale and consumption of electricity. The express language employed shows that they intended to levy duty on supply of electricity. The Act was not intended to be one made under Entry 53 but one under Entry 27. He sought support from previous judgments of this Court upholding the power of the legislature under Entries 21 and 26 imposing duty on supply of electric energy in 1968 Order from the State of Kerala and under similar provisions in other States.

Shri R.F. Nariman, learned counsel for some other appellants contended that the legislature is devoid of power to enact Section 11 of the Act validating the levy with retrospective effect which is blatant encroachment upon judicial power of the Courts. Judicial review being basic structure of the Constitution, Section 11 is ultra vires the Constitution. Even assuming that it could enact a law after Chakolas' case [supra], it could do so only prospectively but it could not nullify the writ of mandamus issued by the High Court. The law is anti-judgment validation directly overruling the judgment which was upheld by this Court. Therefore, Section 11 is unconstitutional. He contended that after Pathak's case [infra], the legislature has no power to amend the law.

Shri K.V. Vishwanathan, learned counsel for some other appellants contended that the effect of Section 11 would be that any judgment to be rendered by the Court in future would be nullified and in effect would tantamount to legislative declaration prohibiting judicial review, a basic feature of the Constitution. In other words, the legislature adjudicates upon the disputes and gives a legislative declaration of the law which is impermissible under the scheme of the distribution of the sovereign powers between the legislature, the executive and the judiciary.

Shri T.L. Vishwanatha Iyer, learned senior counsel for the State contended that the language employed and the title of the Act are not conclusive. Legislature derives power from Entry 53 to make the Act. It is law on sale or consumption of electricity. In Chakolas case [supra] the Division Bench of the High Court declared that impost is compulsory exaction for the benefits to the State and had declared that the executive was not competent to issue the predecessor Order under the Essential Articles [Control] Act. Section 3 thereof had not given express power to the Government to levy and collect excise duty. Consequently, the levy was declared ultra vires. The legislature acted thereon and enacted the Act. Though the words" sale or consumption" of electricity have not expressly been used in the Act and repeated as excise duty on supply of electricity duty, being in the nature of a tax impost and being a compulsory exaction for benefits to the State, it is a tax. The legislature, therefore, enacted law under Entry 53 of List II of the 7th Schedule.

There is no hiatus between supply and consumption of electricity. As soon as the electrical energy passes off from the meter of the consumer, electricity is consumed. From the moment of consumption it becomes sale. It is, therefore, in substance a tax on consumption and sale of electricity. He further contended that the legislature having competence to enact the law, equally has power to enact prospectively and retrospectively. The foundation that it is a duty levied under the Order, as held in Chakolas case, had been removed making it a tax, the base of invalidity pointed out by the Court had been removed by enacting the Act and having removed the vice the Act has given retrospective effect to it. It is not a direct encroachment on the power of judicial review but is one of legislative arrangement exercising its sovereign power to amend the law and validate all past transactions. Therefore, Section 11 is not ultra vires the Constitution.

The legislature did not put any express embargo on the power of judicial review nor a declaration to that effect finds place in any of the provisions of the Act. Though it is open to the judiciary to declare the law; the effect thereof could suitably be removed. Resultantly, there is no invalidity in the impost as electricity duty. The Electricity Duty Act and the Act operate in the same field. The former as principal Act; the Act is in the nature of an enactment imposing tax on duty. Both operate harmoniously in the respective fields without colliding in their operation.

Shri G. Vishwanatha Iyer for the Board contended that the KSEB had been receiving substantial financial assistance from the Government and the impost and the collection of the tax went to the credit of the public exchequer except 1% in the form of collection charges which goes to the account of KSEB. Instead of granting refund to the appellants the State retrospectively enacted the law. The validation Act merely intended to retain the collection already made not only from the appellants but also from every other consumer. Retrospective validation was made to avoid cumbersome process of refund and recollection. There is no embargo on the exercise of the power of judicial review either by this Court or the High Court.

The primary question, therefore, is: whether the impugned Act enacted by the State legislature is one under Entry 53 of the State List, viz., "Taxes on the consumption or sale of electricity". Indisputably, the title of the Act as well as the charging Section 3 employ the words 'duty on supply of electricity. Under Article 246 [3] of the Constitution, every State legislature has explicit power to make law for that State with respect to the matters enumerated in List II [State List of the Seventh

Schedule to the Constitution. The State's power to impose tax is derived from the Constitution. The Entries in the three Lists of the Seventh Schedule are not power of legislation but merely fields of legislation. The power is derived under Article 246 and other related Articles of the Constitution. The legislative fields are of enabling character designed to define and delimit the respective areas of legislative competence of the respective legislatures. There is neither implied restriction imposed on the legislature nor is any duty prescribed to exercise that legislative power in a particular manner. But the legislation must be subject to the limitations prescribed under the Constitution.

In Navinchandra Mafatlal v. The Commissioner of Income- Tax, Bombay [(1955) 1 SCR 829 at 836-37], the controversy was whether the expression "capital gain" used in the Income-tax Act, inserted by Section 12B of Income-tax Act, 1922 and Government of India Act, 1935, includes "income" under Entry 54 of list I [Union List]. A Constitution Bench of this Court had held that the cardinal rule of interpretation is that the words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing the words in a constitutional enactment conferring legislative power, the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude. It was accordingly held that the "capital gain" is an income under that Act.

In Banarasi Das etc. v. The Wealth Tax Officer, Spl. Circle, Meerut [AIR 1965 SC 1387 at 1389], another Constitution Bench, interpreting the word 'individuals' as used in Entry 86 of List I and the Wealth Tax Act, while dealing with the question whether Hindu family would include an individual, this Court reiterated that the words used in the Entries of the Seventh Schedule must receive their widest interpretation. It was further held that it would be unreasonable to approach the task of interpretation in a narrow or restrictive manner.

In Baldeo Singh v. Commissioner of Income-tax Delhi & Ajmer [AIR 1966 SC 736 at 742] interpreting the provisions of Income-tax Act, 1922 this Court had held that payment of dividend is a form of income. The Act was made to prevent avoidance of super-tax. Therefore, the entries in that Act and the words used thereunder must be construed liberally to prevent avoidance of the tax.

In M/s. Burmah Construction Co. v. The State of Orissa & Ors. [AIR 1962 SC 1320], after this Court had decided in State of Orissa v. Oriental Paper Mills Ltd. [AIR 1962 SC 1320], after this Court had decided in State of Orissa v. Oriental Paper Mills Ltd. [AIR 1961 SC 1438], the Orissa Sales Tax Act, 1947 was amended and Section 14 restricting grant of refund of tax inappropriately and illegally collected, was challenged. This Court had held that "if the power to legislate in respect of tax comprehends the power to legislate "in respect of refund of tax improperly or illegally collected", imposition of restrictions on the exercise of the right to claim refund will not be beyond the competence of the Legislature. Granting refund of tax improperly or illegally collected and the restriction on the exercise of that right are both ancillary or subsidiary matters relating to the primary head of tax on sale of goods". The provisions of Section 14 of the Act were, therefore, not held ultra vires the State Legislature.

In The Madurai District Central Co-operative Bank Ltd. v. The Third Income Tax Officer, Madurai [AIR 1975 SC 2016], when the annuity scheme was enacted in the Finance Act, competence of the

Parliament in that regard was questioned. This Court had held that Income-tax Act is a permanent statute. Finance Act passed every year prescribes the rates at which the tax is to be charged under the Income-tax Act. The annuity is only one of the benefits for deduction of the income-tax in calculation of the income chargeable to tax. While so interpreting, this Court had given wide interpretation and upheld the power of the Parliament under Article 246 [11 read with Entry 82 of List I.

In Hoechst Pharmaceuticals Ltd. & Anr. etc. v. State of Bihar & Ors. [(1983) 3 SCR 130] relied on by Shri Venugopal, the question arose whether levy of surcharge on sales-tax and prohibition from passing on the liability thereof to purchasers was void in terms of the opening words of Article 246 [3] of the Constitution for being in conflict with the Drugs [Price Control] Order made under Section 3 of the Essential Commodities Act. In interpreting the respective legislative fields of the Parliament and the State legislature (Concurrent List), with a view to subserve the power of the respective legislatures to enact law, restrictive interpretation was adopted by a three-Judge Bench of this Court. It, therefore, cannot be understood that in respect of taxing statute, restictive interpretation would be put up.

In view of the legal position referred to hereinbefore, it must be held that the words 'sale or consumption' used in Entry 53 of the State List and the Act made in exercise of the power under Article 246 [3] of the Constitution, would receive wide interpretation so as to sustain the constitutionality of the Act unless it is affirmatively established that the Act is unconstitutional.

When the vires of an enactment is challenged, it is very difficult to ascertain the limits of the legislative power. Therefore, the controversy must be resolved as far as possible, in favour of the legislative body putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude. The Court is required to look at the substance of the legislation. It is equally settled law that in order to determine whether a tax statute is within the competence of the legislature, it is necessary to determine the nature of the tax and whether the legislature had power to enact such a law. The primary guidance for this purpose is to be gathered from the charging section. It is the substance of the impost and not the form that determines the nature of the tax.

In District Board, Dehra Dun v. Damodar Dutt [ILR (1944) All. 611], the Allahabad High Court, while considering the constitutionality of Professions Tax Limitation Act, 1941 and Section 2 thereof, had held that the name given to a tax did not matter. What had to be considered was the pith and substance of it. The High Court had held that in pith and substance the impugned rax was one which attracted the provisions of Section 2 of that Act. That ratio was upheld by this Court in Pandit Ram Narain v. State of U.P. & Ors. [1956 SCR 664 at 673] and it was held that the title of the Act and the words used therein were not conclusive but the pith and substance of the statute needed to be looked into.

The doctrine of pith and substance, though applied in determining the true character of the statutes under List III [Concurrent List] of the respective legislative topics of the State legislature and the Parliament, it was extended for consideration of the true character of the legislation even under the same legislative list. In all cases, therefore, the name given by the legislature in the impugned

enactment is not conclusive on the question of its competence to make it. It is the pith and substance of the legislation which decides the matter which needs to be decided with reference to the provisions of the statute itself.

In Chaturbhai M. Patel v. Union of India & Ors. [AIR 1960 SC 4251, another Constitution Bench had held that in every case where the legislative competence of the legislature in regard to a particular enactment was challenged with reference to the entries in the various lists, it was necessary to examine the pith and substance of the Act and if the matter came substantially within an item in the Central List, it could not be deemed to come within an entry in the Provincial list.

The question, therefore, is: whether in pith and substance the Act is one imposing tax on the sale or consumption of electrical energy supplied to the consumer? It is true that in Northern India Caterers (India Ltd. v. Lt. Governor of Delhi [(1979) 1 SCR 557] and M/s. Gannon Dunkerley & Co. & Ors. v. State of Rajasthan & Ors. [(1993) 1 SCC 364] this Court had held that the expression tax on the sale or purchase of goods" in Entry 54 of the State List included a tax on the transfer of property in goods, whether as goods or in some other form] involved in supplying food in a restaurant or in the execution of a works contract and power to impose tax leviable thereon would be under Entry 54 of the State List. It was held that it was not liable to tax since there was no transfer of property in goods. The Parliament amended the Constitution and enacted clause [29- A] of Article 366 so as to bring it in conformity with Entry 33 of List III of the Seventh Schedule, introducing a legal fiction of tax on sale or purchase of goods including the transfer of property in goods, whether as goods or in some other form, involved in execution of the works contract or otherwise than in pursuance of the contract of property in goods for cash, deferred payment or other valuable consideration.

It is common knowledge that for HT and EHT industries a sub-station at the place of manufacture or establishment or at its convenient place is set up and electricity is supplied to the sub-station and a minimum guarantee of payment is ensured therefor under the contract. But the question is whether the word 'supply' used in Section 3 of the Act would be construed to mean 'consumption' or 'sale' of electricity. From the sub-station, electricity is connected to the industrial units through the meter put up in the factory. Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical high-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place. It is true that in the definitions given in the New Encyclopaedia Britanica, Vol. 4, p.842 cited before us, distinction between supply and consumption is stated but adopting a pragmatic and realistic approach, we are of the considered view that as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously With the supply. There is no hiatus in its operation. Simultaneously sale also takes place. Charge will be quantified at a later date as per the recorded meter reading or escaped metering, as the case may be. The word `supply' used in the charging Section 3 should, therefore, receive liberal interpretation to include sale or consumption of electricity as envisaged in Entry 53 of the State List.

It is true that when water supplied by the municipality to the consumers through their water mains, flows from the mains through the water meter and into the pipes fitted into the house and from there water is supplied from tap fitted to the pipes. Thus there is hiatus between supply and consumption. When water is actually used there would be consumption though water supplied gets recorded when water passes through the meter from the water mains. But the analogy thereof to the supply, consumption and sale of electric energy is inappropriate as it cannot be separately stored after the supply but before consumption or sale thereof. However, water can, incidentally be stored or remain in pipe for use and after tap is opened it is consumed. Even if it percolates it may be a loss to the consumer. This operation thereof is inapt. Its analogy to electricity is, therefore, inapt and inappropriate.

The question then is: whether The Electricity Duty Act gets eclipsed with the passing of the Act occupying the same field as the Act? In Bisra Stone Lime Company Ltd. & Anr. etc. v. Orissa State Electricity Board & Anr. [(1976) 2 SCR 307] it was held that surcharge on electricity is an additional tax. "The word 'surcharge' is not defined in the Act, but etymologically, inter alia, surcharge stands for an additional or extra charge or payment. Surcharge is thus a super-added charge, a charge over and above the usual or current dues". The term 'surcharge' in substance is an addition to the stipulated rate of tariff. The nomenclature, therefore, does not alter the position.

In CIT v. K. Krinivasan [(1972) 4 SCC 526], The question arose whether the term "income-tax" as defined in Section 2 of the Finance Acts 1964 would include surcharge and additional charge, wherever provided. This Court had held that the word surcharge includes additional tax. The whole proceeds of any such charge were to form part of the revenue of the State. In C.V. Rajagopalachariar v. State of Madras [AIR 1960 Mad 543], in the context of the Madras Land Revenue Surcharge Act , 1954 and the Madras Land Revenue (Additional Surcharge) Act, 1955, interpretation of the word 'surcharge' came up for consideration. The ratio of the said case is that 'surcharge' includes an excess or additional burden or amount of money charged in excess of the land revenue and, therefore, it was held to be an additional land revenue. That ratio was approved by this Court in Sarojini Tea Co. (P) Ltd. v. Collector of Dibrugarh [(1992) 2 SCC 156]. Considering, in extenso, this Court had held in paragraph 16 that "the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. The nature of such imposition is the same, viz., land revenue on which it is a surcharge". It would thus be settled law that surcharge is additional duty or tax imposed in addition to the original levy, on the same topic.

In A.B. Abdul Kadir & Ors. etc. v. State of Kerala [(1976) 2 SCR 690], the Finance Act, 1950 had extended the Central Excise and Salt Acts 1944 to Part B State of Travancore Cochin and repealed the Cochin Tobacco Act, 1909 and the Tobacco Act [1 of 1087]. Thereafter, a system of licensing was introduced by which the licensees were required to pay a specified fee in respect of tobacco imported into the State. The appellants thereafter had challenged in the High Court the collection of the licence fee for the period. The Act was declared ultra vires and a refund was ordered to be made of the fees so collected. When the appellants thereafter filed a writ petition claiming refund pending writ petitions Kerala Luxury Tax on Tobacco [Validation] Acts 1964 was enacted by the State legislature to provide for the levy of luxury tax on tobacco and validated the levy and collection of

the fees for licences within the specified period which had received the assent of the President. When the validity thereof was challenged on the anvil of Article 304 (b) of the Constitution, this Court had held that the levy was sought to be made as a luxury tax as a different character on the production and manufacture of the tobacco was justified and that, therefore it was within, the legislative competence to enact the law refusing refund of the collections illegally collected.

Levy of duty goes into the public revenue. It is an impost, a compulsory exaction for the benefit to the coffers of the public exchequer and, therefore, it is a tax. The Act in pith and substance is a tax on sale or consumption of electrical energy. Therefore, the Act falls in Entry 53 and does not fall in Entry 27 of the State List of the Seventh Schedule to the Constitution. The State legislature, therefore, validly enacted the Act under Article 246 [3] of the Constitution.

The next question is: whether the validation provision contained in Section 11 is constitutional? Section ll of the Act reads thus:

"11. Validation.

> [1] Notwithstanding anything to the contrary contained in any judgment, decree or order of any court, the levy and collection of surcharge by the Board or other licensees on or after the 1st day of October, 1984 and before the 1st day of August, 1988 under the Kerala State Electricity Supply [Kerala State Electricity Board and Licensees, Areas Surcharge Order, 1984, shall be deemed to be, and deemed always to have been validly levied and collected as if the said Order was a notified order under Section 3 of this Ordinance; and accordingly-
>
> (a) all acts, proceedings, or things done by the Board or other licensees in connection with such levy, collection and remittance of surcharge shall, for all purposes be deemed to be, and deemed always to have been, done or taken in accordance with this Ordinance;
>
> (b) no suit or other proceeding shall be maintained or continued in any court for the refund of any such surcharge, and
>
> (c) no court shall enforce a decree or order directing the refund of any such surcharge.
>
> [2] For the removal of doubts, it is hereby declared that nothing in sub-section [1] shall be considered as preventing any person from claiming refund of any surcharge already paid in excess of the amount due from him under the order referred to in sub-section [1]."

A reading thereof clearly indicates that notwithstanding anything to the contrary contained in any judgment, decree or order of any court.. the levy and collection of surcharge by the Board or other licensees on or after the 1st day of October. 1984 and before the 1st day of August, 1988 under the

Kerala State Electricity Supply [Kerala State Electricity Board and Licensees Area] Surcharge Order, 1984, shall be deemed to be, and deemed always to have been validly levied and collected as if the said Order was a notified order under Section 3 of the [Act 22 of 1984]. Accordingly all acts, proceedings or things done by the Board or other licensees in connection with such levy collection and remittance of surcharge shall, for all purposes be deemed to be, and deemed always to have been, done or taken in accordance with the Act. Sub section [2] removes the doubts declaring that nothing in sub-section [l] shall be considered as preventing any person from claiming refund of any surcharge already paid in excess of the amount due from him under the order referred to in sub-section [l].

It is seen that the Act does not limit to the period covered under Section 11 of the Validation Act, Section 3, with a non obstante clause provides that notwithstanding anything to the contrary contained in any agreement entered into with any consumer or the conditions of service agreed by the Board, the Government may by notified order provide for the levy and collection of surcharge on all HT and EHT supplies of energy made by the Board whether directly or through licensees at such rates not exceeding ; paise per unit as may be specified therein etc. It is an Act to remain operational in future. Admittedly, the Act is a permanent statute operating prospectively and retrospectively validating past transactions as if they have been made, entered into or transacted under the Act.

While making the Validation Act, as seen, Section 6 provides for recoveries and Section 7 provides for penalties. Section 8 prescribes offences by companies and Section 9 gives rule making power to effectuate the purpose or the Act by making rules enumerated thereunder to give effect to the provisions of the Act. Section 10 provides protection of actions taken by the officers in good faith. Section 4 deals with books of accounts to be maintained by the licensees and Section 5 authorises officers for inspection of the books of accounts maintained by the licensees. It would thus be clear that the Act is a complete and self-contained code in itself.

The question, therefore, is whether Section 11 is an anti-judicial power interfering with or encroaching into judicial review entrusted to the Courts, a basic feature of the Constitution and whether it directly overrules the judgment of the High Court? In view of specific stand and vehement contention that the legislature can, under no circumstance, nullify mandamus or direction issued by a court, we have to survey the decided cases in which relevant principles were laid by this Court. The primary question is whether the legislature has trespassed and trenched into the preserve of the basic feature of judicial review, The principle of power of validation vested in the legislature is no longer res integral. A Constitution Bench of this Court in Shri Prithvi Cotton Mills Ltd. 8 Anr. v. Broach Borough Municipality & Ors. [(1970) 1 SCR 388] which is an erudite leading judgment on this topic, laid by an unanimous Constitution Bench of five Judges that Section 17 of the Bombay Municipal Boroughs Act, 1925 empowers the municipality to levy 'rate on building or lands or both situate within the municipality. The Rules made under the Act applied the rates on the percentage basis on the capital value of lands and buildings. In Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad [(1964) 2 SCR 608] this Court had held that the term 'rate' must be given the special meaning it had acquired in English law and must be confined to an impost on the basis of the annual letting value; it could not be validly levied on the basis of capital value though capital value could be used for the purpose of working out the annual letting value.

Thereafter, Gujarat legislature amended the Act and enacted Gujarat Imposition of Tax by Municipalities [Validation] Act, 1963. Section 3 thereof which validated past assessments and collections an rate, on lands and buildings on the basis of capital value or a percentage of capital value, was declared valid, despite any judgment of a court or Tribunal to the contrary. Future assessment and collection on the basis of capital value for the period from and after the Validation Act, was authorized. Section 99 was enacted in the Gujarat Municipalities Act to provide for the levy of a tax on lands and buildings "to be based on the annual letting value or the capital value or a percentage of capital value of the buildings or lands or both". The same was questioned and the High Court dismissed the writ petition. On appeals when the constitutionality thereof was challenged, this Court observed as under:

> "...When a legislature sets out to validate a tax declared by a court to be Illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impuse the tax, for, if it does not. the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because, the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by reenacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the reenacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation.
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> If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it recovers the defect which the courts had found in the existing law and makes adequate provisions in the Validating law for a valid imposition of the tax".

This Court upheld the constitutionality of the impugned enactment.

The validity of the validating Act is to be judged by the following tests: [i] whether the legislation enacting the validating Act has competence over the subject matter; [ii] whether by validation, the legislature has removed the-defect which the court had found in the previous law [iii] whether the validating law is inconsistent with the provisions of Chapter III of the Constitution. If tests are satisfied, the Act can confer jurisdiction upon the Court with retrospective effect and validate the past transactions which were declared to be unconstitutional. The legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a Court without properly removing the base on which the judgment is founded.

In State of Orissa v. Oriental Paper Mills Ltd [AIR 1961 SC 1438]. the Oriental Paper Mills assessee had successfully challenged the assessability of the sales tax. After the judgment was delivered by this Court in State of Bombay v. United Motors India Ltd [1953 SCR 1063], the State legislature enacted Section 14A and incorporated by way of an amendment Act 25 of 1958 to the Orissa Sales Tax Act. When the constitutionality thereof was challenged on refusal to grant refund of the tax paid under the invalid law, contending that Section 14A deprived the assessee of the common law right to claim refund of the amount paid as tax under the invalid law, this Court had held that the legislature was competent to exercise the power in respect of the subsidiary or ancillary matters of granting refund of tax inappropriately or illegally collected. Therefore, Section 14A validating the illegal collection and refusal of the refund was upheld as valid. It was also held that it was not in violation of Article 19 [1] (f) of the Constitution.

In M/S Misrilal Jain v. State of Orissa & Anr. [(1977) 3 SCC 212], a larger Bench of seven Judges was required to construe the provisions of Orissa Taxation [on Goods Carried by Roads or Inland Waterways] Act, 8 of 1968. By a judgment dated August 10, 1967 this Court had declared the Orissa Taxation [on Goods Carried by Roads or Inland Waterways] Act, 1962 as invalid since it did not cure the defect from which the Orissa Taxation [on Goods Carried by Roads or Inland Waterways] Act, 7 of 1959 had suffered. It was further held that the State was not entitled to recover any tax. Under the Validation Act 8 of 1968 the imposition of the same levy which the State had unsuccessfully attempted to levy earlier was validated. After the enactment of the Bill, previous assent of the President was obtained removing the defect pointed out earlier. In para 6, it was unanimously held by the Bench that the legislature cured the constitutional vice from which the Act of 1959 suffered, by obtaining the requisite sanction of the President and thus armed, it imposed as new tax though with retrospective effect. The imposition of the taxes or validation of the action under void law is not the function of the judiciary and therefore, by taking these steps the legislature cannot be accused of trespassing on the preserve of the judiciary. Courts have to be vigilant to ensure that non-compliance of power so thoughtfully conceived by our Constitution is not allowed to be upset but the concern for safeguarding the judicial power does not justify conjuring up trespassers for invalidating laws. If the vice from which an enactment suffered is cured by due compliance with the legal or constitutional requirements, the legislature has the competence to validate the enactment and such validation does not constitute an encroachment on the function of the judiciary. It was held at page 218 that the legislature can pass laws with retrospective effect nullifying the mandamus

issued by the Court.

In M/S Tirath Ram Rajindra Nath Lucknow v. State of U.P. & Anr. [(1973) 3 SCC 585], Section 3 of the U.P. Sales Tax Acts 1948 imposes multi-point sales tax on the sale of certain goods. Section 3-A empowered the Government to levy sales tax on some of the goods "at such single-point in the series of sales by successive dealers" as may be prescribed by the State Government. Rules had been made whereunder State got power to impose sales tax on the total turnover of the sale of bricks at the point of sale by the manufacturer. The U.P. Sales Tax Act (Amendment and Validation) Ordinance, 1970 was amended substituting such single point of sale as the State Government may specify. In Gurnamal v. U.P. [26 STC 270], the Allahabad High Court had held that before attracting Section 3-A, the goods must have been the subject matter of multiple sales. The notification did not fall within the purview of Section 3-A as bricks were sold directly to the consumers by the manufacturers. Section 3-A(1) was amended with retrospective effect by U.P. Sales Tax (Amendment and Validation) Act, 1970. The validity thereof was questioned. The High Court had held that Section 3 A(1), as amended was unconstitutional as it delegated essential legislative functions to the State Government. Allowing the appeal and upholding the validity, this Court had held that "this Court has pointed out in several cases the distinction between encroachment on the judicial power and nullification of the effect of a judicial decision by changing the law retrospectively. The former is outside the competence of the legislature but the latter is within its permissible limits." The legislature had not purported either directly or by necessary implication to overrule the decision of the Allahabad High Court. On the other hand it had accepted the decision as correct but had removed the basis of the decision by retrospectively changing the law.

In The Govt. of A.P. & Anr. v. Hindustan Machine Tools Ltd. [AIR 1975 SC 2037], the respondent had constructed its factory and other buildings within the limits of Gram Panchayat 'K' without its permission. Gram Panchayat passed a resolution to collect permission fee from the respondent on the capital value of the factory building at a specified rate. They also imposed house tax and demanded payment for the period 1966 to 1969. The writ petition was filed challenging the power to levy house tax and other fees. The A.P. High Court issued a mandamus prohibiting the Gram Panchayat from collecting the amounts. The High Court had held that as per the definition of the house under the Act, the factory and other building was not a house. Against the judgment an appeal was filed in this Court. Pending appeal, the legislature amended the definition of "house" with retrospective effect so as to eliminate the impediment on which the High Court rested its judgment. It also made validation of the actions by Section 4 of the Validation Act with retrospective effect. On that basis when it was contended in this Court for the respondent that the legislature had overruled or set aside the judgment of the High Court and it was constitutionally g impermissible, a Bench of three Judges had held that the State legislature had not overruled or set aside the judgment of the High Court. It had amended the definition of the house by substituting a new section in the place of an old one, providing a new definition which had retrospective effect, notwithstanding anything contained in any judgment, decree or order of the court or other authority. In other words, this Court had held that the legislature removed the basis of the decision rendered by the High Court so that the decision could not have been given in the altered circumstances.

In I.N.Saksena v. The State of M.P. [(1976) 3 SCR 237], the State Government amended its memorandum to compulsorily retire a government servant on attaining the superannuation of 58 years. However, it empowered the Government to retire a government servant on his attaining the age of 55 years. Subsequently, statutory rules under proviso to Art.309 of the Constitution were framed. However, the clause to retire a government servant on attaining the age of 55 years was not incorporated, though the superannuation was retained at 58 years. The appellant, judicial officer was compulsorily retired on his completion of 55 years. He successfully challenged the order of retirement which was upheld by this Court. A Constitution Bench of this Court had held that the distinction between legislative act and judicial act is well-known. The adjudication of the rights of the parties is a judicial function. The legislature has to lay down the law prescribing the norms or conduct which will govern the parties and transactions to require the Court to give effect to that law. Validating legislation which removes the norms of invalidity of action or providing remedy is not an encroachment on judicial power. Statutory rule made under the proviso to Article 309 was upheld. The legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision at any time in exercise of the plenary power confer on the legislature by Arts.245 and 246 of the Constitution. It can render a judicial decision ineffective by enacting a valid law on a topic within its legislative field, fundamentally altering or changing with retrospective, curative or fulfilling effect, the conditions on which such a decision is based. In Hari Singh & Ors. v. The Military Estate Officer and Anr. [(1973) 1 SCR 515], prior to 1958 two alternative modes of eviction under Public Premises Act were available. When the eviction was sought of an unauthorised occupant by summary procedure the constitutionality thereof was challenged and upheld. The Act was subsequently amended in 1958 with retrospective operation from September 16, 1958. Thereunder only one procedure for eviction was available. It was contended to be a legislative encroachment of judicial power. A Bench of three Judges held that the legislature possessed competence over the subject matter and the Validation Act could remove the defect which the court had found in the previous case. It was not the legislative encroachment of judicial power but one of removing the defect which the Court had pointed out with a deeming date.

In A.B. Abdul Kadir & ors. etc.v. State of Kerala [(1976) 2 SCR 690] in the previous decision rendered in A.B. Abdulkadir & Ors v. The State of Kerala & Anr. [(1962) Supp. 2 SCR 741], the Cochin Tobacco Act and the Rules made thereunder and the similar Acts were in substance corresponding to the Central Excise and Salt Act, 1944. The Cochin Tobacco Act stood repealed on April 1, 1950. Consequently, there was no law operating to pay licence fee. The Rules made in the 1950 and 1951 and the repealed Act were held void ab initio. Thereafter, Kerala State legislature enacted Kerela Luxury Tax on Tobacco [Validation] Act, 1964. Section 5 thereof validated the levy and demand changing the character of the levy from fee to the tax. When the constitutionality of the Validation Act was challenged, a three-Judge Bench had held that the State Legislature had competence to enact luxury tax on tobacco and to recover the tax in the shape of licence fee for vend and stocking of tobacco. The legislature, therefore, has competence to convert the of character of collection "from impermissible excise duty into permissible luxury tax" which would not render the Act unconstitutional. Only conditions are that the levy should be of a nature which can answer to the description of luxury tax" and the State legislature should be competent to enact the law for recovery of luxury tax. It was held that both the conditions were satisfied. Accordingly the impugned enactment was upheld as valid. Validation Act can also be provided for retrospective operation of

the said provision validating the law which had been found to be invalid.

In Central Coal Fields Ltd. v. Bhubaneswar Singh [(1984) 4 SCC 429] this Court had declared that the sale price of the stock of extracted coal lying at the commencement of the appointed date had to be taken into account to determine the profit and loss during the period of management of the mines by the Central Government taken over under Section 3 of the Coking Coal Hines [Nationalisation] Act, 1972. Thereafter, Coal hines Nationalisation Laws [Amendment] Act, 1986 was enacted. In Section 10, sub-section (2) of the principal Act, amount payable as compensation was to be deemed to include and demmed always to have included the amount required to be paid to the owner in respect of coal in stock on the date immediately before the appointed date. It was contended that the deeming provision was encroachment on the judicial power and was, therefore, unconstitutional. Repelling the contention in Bhuvaneswar Singh & Ors. v. Union of India [(1994) 6 SCC 77], a three-Judge,Bench of this Court had held that when the validating legislation removed cause of the validity it could not be considered, to be an encroachment on judicial power. Any action in exercise of the power under the enactment which has been declared to be invalid by that Court cannot be made valid by validating Act by merely saying so unless the defect which has been pointed out by the Court is removed with retrospective effect. Unless the invalidity or lack of validity pointed out by the Court is removed by subsequent enactment with retrospective effect. the binding nature of the judgment of the Court cannot be ignored.

Same is the view taken in Udai Ram Sharma v. Union of India [(1968) 3 SCR 41], Krishan Chandra Gangopadhyaya v. Union of India [(1975) Supp. SCR 151], Hindustan Gum and Chemicals Ltd. v. State of Haryana [(1985) Supp. 2 SCR 630], UtkaL Contractors and Joinery [[P] Ltd v. State of Orissa [(1988) 1 SCR 314] and approved by this Court in Bhubaneshwar Singh's case [supra].

In State of Orissa & Anr. v. Gopal Chandra Rath & Ors.- [(1995) 6 SCC 242] in the context of service law, validating statute with retrospective effect was affirmed by this Court.

In Janapada Sabha, Chhindwara etc. v. The Central provinces syndicate Ltd. & Anr. etc. [(1970) 3 SCR 745], this Court in its earlier decision in The Amalgamated Coalfields Ltd. v. The Janapada Sabha, Chhindwara [(1963) Supp. 1 SCR 172] had held that the expression "first imposition" occurred in Section 51 [2] of the C.P. and Berar Local Government Act, 4 of 1920. The imposition of levy at the rate of 9 paise per tonne was declared illegal. Direction was issued restraining the Government to recover the same. The Madhya Pradesh Act, 1964 was made and Section 3 thereof validated the invalid imposition assessment and collection of cess. A Constitution Bench had held that Act 18 of 1964 is a piece of clumsy drafting. By a fiction, it deemed the Act of 1920 and the Rules framed thereunder to have been amended without disclosing the text or even the nature of the amendment; nor was there any indication that the invalid notification must be deemed to have been issued validly under Section 51 [2] of the 1920 Act without the sanction of the local Government. It was, therefore, held that it is plain that the legislature attempted to overrule or set aside the decision of this Court. It was open to the legislature under the Constitutional scheme within certain limits, to amend the provisions of the Act retrospectively and to declare what the law shall be deemed to have been. But it was not open to the legislature to say that the judgment of the Court properly constituted and rendered, shall be deemed to be ineffective and "the interpretation of the law shall

be otherwise than as declared by the Court.

In The Municipal Corporation of the City of Ahmedabad & Anr. v. the New Shrock Spg. & Wvg. Co. Ltd. etc. etc. [(1970) 2 SCC 280], in a previous proceeding like the respondent therein, this Court in New Manek Chowk Spinning & Weaving Mills Co. Ltd. & Ors. v. Municipal Corporation of the City of Ahmedabad & Ors. [(1967) 2 SCR 678] struck down the rules framed under the Bombay Provincial Municipality and Corporation Act, 1948 permitting the Corporation to value the land and building on flat rate method. Writ of mandamus issued directing the municipality to treat the relevant entries as assessment books for the relevant years, was held to be invalid and cancelled. Section 152-A was amended by Gujarat Amendment Act, 1968. When it was challenged, this Court had pointed out that the Corporation was not entitled to withhold the amounts illegally collected and writ of mandamus was issued directing the refund. Again, sub-section [3] of Section 152-A was introduced validating the collections by Gujarat Amendment and Validation Ordinance, 1969 authorizing the Corporation and its officers to refuse to refund the amount of tax illegally collected; despite the orders of this Court as well as of the Gujarat High Court, this Court had held that the legislature had no power to disobey or disregard the decision given by the courts. Section 152-A [3] was declared unconstitutional.

In State of Tamil Nadu & Anr. v. M. Rayappa Counder [AIR 1971 SC 231] in a writ, the Madras High Court had held that the State had no power to reassess the escaped turnover under the Entertainment Tax Act, 1939. In 1966, Amendment Act containing a validating provision was introduced by Section 7 thereof. This Court had held that the said section did not change the law retrospectively. It attempted to validate invalid assessments and to overrule the decision of the High Court. Section 7 was, therefore, held invalid.

In Madan Mohan Pathak v. Union of India & Ors. etc. [(1978) 3 SCR 334], on the basis of a settlement, bonus became payable by the LIC to its Class III and Class IV employees. In a writ, a single Judge of the Calcutta High Court issued mandamus directing payment of bonus as provided in the settlement. During the pendency of Letter Patent Appeal, LIC [Modification of Settlement] Act, 1976 was enacted denying bonus payable to the employees. The appeal was withdrawn. The validity of 1976 Act was challenged in this Court under Article 32 of the Constitution. A Bench of seven Judges had held that the Parliament was not aware of the mandamus issued by the Court and it was declared that the 1976 Act was void and writ of mandamus was issued to obey the mandamus by implementing or enforcing the provisions of that Act and directed payment of bonus in terms of the settlement. It was pointed out that there was no reference to the judgment of the High Court in the statement of objects and reasons, nor any non obstante clause referring to the judgment of the Court was made in Section 3 of the Act Attention of the Parliament was not drawn to the mandamus issued by the High Court. When the mandamus issued by the High Court became final, the 1976 Act was held invalid. Shri R.F. Nariman laid special emphasis on the observations of learned Chief Justice Beg who in a separate judgment had pointed out that the basis of the mandamus issued by the Court could not be taken sway by indirect fashion as observed at page 743, C to F. From the observations made by Bhagwati, J. per majority, it is clear that this Court did not intend to lay down that Parliament, under no circumstance, has power to amend the law removing the vice pointed out by the Court. Equally, the observation of Chief Justice Beg is to be understood in the context that as

long as the effect of mandamus issued by the Court is not legally and constitutionally made ineffective, the State is bound to obey the directions. Thus understood, it is unexceptionable. But it does not mean that the learned Chief Justice intended to lay down the law that mandamus issued by court cannot at all be made ineffective by a valid law made b the legislature, removing the defect pointed out by the Court.

Subsequently, notice was issued on March 3, 1978 by the LIC to the workmen under Section 19 [2] of the Industrial Disputes Act declaring its intention to terminate the settlement on the expiry of the period of two months from that date. Another notice was issued under Section 9A of that Act intending to effect a change from June 1, 1978 in the conditions of service of the workmen. The Central Government on May 26, 1978 issued a notification under Section 49 of the LIC Act substituting a new Regulation for the existing Regulation. Simultaneously, an Amendment on the similar lines was made in 1957 Order adding a new clause in sub-section [2] of Section 11 of the LIC Act. All of them came to be challenged by filing a writ petition under Article 226 of the Constitution which was allowed by the High Court. Per majority, this Court had held in The Life Insurance Corporation of India v. D.J. Bahadur & Ors. [(1981) 2 SCR 1083] that the entire attempt was to avoid compliance of the mandamus issued by the Calcutta High Court and, therefore, it was declared invalid. It directed the LIC to give effect to the terms of the settlement of 1974 relating to bonus until superseded by a fresh settlement and industrial award or relevant legislation.

Thereafter, the LIC [Amendment] Act, 1981 was enacted. Sub-section [2] of Section 48, [2A], [2B] and [2C] were added providing regulation by the other provisions in respect of terms and conditions of service of the employees w.e.f. January 31, 1981. Sub section [2B] empowered the LIC to make rules under clause (cc) of sub-section [23 to include power to give retrospective effect to such rules and to amend by way of addition, variation or repeal, the regulations of the other provisions contained in sub-section [2A] with retrospective effect but not from June 20, 1979. Sub-section [2C] provided validating clause with usual language. The same was challenged under Article 32 of the Constitution and this Court understood in that perspective it in A.V. Nachane & Anr. v. Union of India & Anr. [(1982) 2 SCR 246] while upholding the validation with effect from the date the Amendment had come into force, declared the retrospective legislation as unconstitutional holding that the rules sought to abrogate the terms of 1974 settlement relating to bonus which would be complied with pursuant to the mandamus issued by the High Court. Rule 3 sought to supersede the terms of 1974 settlement which could not make the writ petition issued by the Court nugatory in view of the decision in M.M. Pathak's case [supra] and the Amendment did not have the effect of nullifying the writ of mandamus issued by the Calcutta High Court and in The directions in Bahadur's case did not stand neutralised.

In D. Cawasji & Co., Mysore v. State of Mysore & Anr [(1984) Supp. SCC 490] the High Court in writ filed by the appellant had held that the State Government was devoid of power under Section 19 of the Sales Tax Act to collect sales tax and excise duty which is not a part of the selling price. Mandamus for refund was issued. Appeal filed in this Court was withdrawn and the Sales Tax [Amendment] Act was enacted enhancing sales tax from original 6% per cent to 45 per cent with retrospective effect. Section 3 validated he previous assessments. This Court struck down the Amendment so far as it related to retrospectivity pointing out that the lacuna pointed out by the

Court was not cured and the judgment could not be nullified by legislative amendment.

In State of Haryana & Ors. v. Karnal Co-op.Farmers' Society Ltd & Ors. [(1993) 2 SCC 363 Punjab Village common Lands [Regulation] Act, 1961, the pre-existing law was invalidated under 1961 Act. Shamilat deh land was not defined to achieve certain objects which did not find place in the repealed Acts and 1961 [Amendment] Act declared that the definition shall be deemed to have applied to all lands which are shamilat deh as defined in 1961 Act with a non obstante clause. The validity thereof was challenged. This Court held that the Amendment Act was unconstitutional abrogating the civil court's orders in respect of the lands covered by the definition of shamilat deh.

In Re: Cauvery Water Disputes Tribunal [(1993) Supp. 1 SCC 96] the Inter-State Water Disputes Tribunal constituted under Inter-State Water Disputes Act, 1956 under Article 262 directed the Karnataka State by an interim order to release water to Tamil Nadu. The Governor passed Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 nullifying the Tribunal's order. On a reference, a Constitution Bench had held that by Article 262 of the Constitution, the power of this Court under Article 131 and all other powers had been taken away and vested in the Tribunal. The Tribunal's order was binding on the disputant States. The Ordinance interfered with the obligatory process of the Tribunal. Therefore, it amounted to interference with the judicial power of the State vested in the Tribunal. It ran counter to the binding decisions of the Court regarding the Tribunal's power to grant interim relief. Accordingly, it was declared unconstitutional. It may be pointed out at this stage that this decision is on the anvil of constitutional operation of the special Tribunal constituted pursuant to the directions issued under the Inter-State Water Disputes Act which itself was made under the Constitution, conferring exclusive power on the Tribunal to adjudicate inter-State water disputes.

In S.R.Bhagwat & Ors. v. State of Mysore [(1995) 4 SCC 16] the controversy related to Karnataka State Civil Services [Regulation of Promotion, Pay and Pension] Act, 1973. A Division Bench of the High Court allowed the writ petitions and directed collection of the pay, posts, seniority and promotion with all consequential benefits of par with their juniors. The Act was made denying financial benefits as directed by the Division Bench which became final. They were challenged under Article 32 and this Court held that a writ of mandamus or directions which had become final could not be nullified empowering the State to review such judgments and orders. Therefore, all the provisions of the impugned Act were held ultra vires the powers of the State legislature.

From a resume of the above decisions the following principles would emerge:

[1] The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transaction and require the court to give effect to them;

[2] The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary, [3] In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the

law.

[4] Courts in their concern and endeavor to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free-play in their joints so that the march of social progress and order remain unimpeded. The smooth balance built with delicacy must always maintained;

[5] In its anxiety to safeguard judicial power, it is unnecessary to be overjealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

[6] The Court, therefore, need to carefully scan the law to find out: (a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

[7] The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the Court or the direction given for recovery thereof.

[9] The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.

Considered from these perspectives, the question is: whether Section 11 can answer the tests laid down hereinbefore. It is seen that the duty was collected under an order made in exercise of Section 3 of the Essential Articles Act and it was held to be not a tax but a duty for the benefit of KSEB. That duty being a compulsory exaction for the benefit of public exchequer is a tax. Duty on supply of electricity was declared to be additional burden and a levy within Entries 26 and 27 of List II, subject to Entry 33 of List III [Concurrent List]. Duty is an additional burden and partakes the character of a tax. Entry 53 of List II [State List] empowers the State Legislature to impose tax on consumption or sale of electricity. It is, therefore, a compulsory exaction for the benefit of the Revenue. Therefore, it is an additional tax in the form of a duty under the Act. The vice pointed out in Chakolas case has been removed under the Act. Consequently, Section 11 validated the invalidity pointed out in Chakolas case removing the base. In the altered situation, the High Court would not have s rendered Chakolas case under the Act. It has made the writ issued in Chakolas case ineffective. Instead of refunding the duty illegally collected under invalid law, Section 11 validated the illegal collections and directed the liability of the past transactions as valid under the Act and also fastened liability on the consumers. In other words, the effect of Section 11 is that the illegal collection made under invalid law is to be retained and the same shall now stand validated under the Act. Thus considered, we hold that Section 11 is not an incursion on judicial power of the Court and

is 8 valid piece of legislation as part of the Act.

As already seen, the specific case of the State and the Board is that the State has been expending its public money for the effective functioning for the KSEB and the duty under the Act is flowing into the public exchequer and, therefore, it is not a duty for the benefit of KSEB coming under Essential Articles Act. Equally, it is not either a threat to the power of judicial review or form of restraint to exercise the power of judicial review over legislative action. It is true that under the Electricity Act which admittedly has been enacted under Entry 53 of the State List, the rate of duty, as amended, is 10 per cent. As stated above, under the To duty is an additional impost in the nature of compulsory exaction for the benefit of public exchequer. When we look into the provisions of the Act it is clear that levy and collection of additional duty is not discontinued as contended by Shri Venugopal. As held above, the Act is a complete code in itself and operates retrospectively. Therefore, both the Acts operate harmoniously and do not collide in their operation since 1984 Act is the principal Act and the Act is in addition to, but not in substitution of the principal Act. Therefore, 1984 Act does not get eclipsed with the passing of the Act.

Under these circumstances, we hold that the Act is valid. The direction with regard to the refund of duty for the period which the Act did not seek to cover, has already been given by the High Court and no appeal has rightly been filed by the State. Therefore, to that extent that order has become final. We need not dwell upon it.

The appeals are accordingly dismissed, but in the circumstances without costs.