Supreme Court of India
S. Sundaram Pillai, Etc vs V.R. Pattabiraman Etc on 24 January, 1985
Equivalent citations: 1985 AIR 582, 1985 SCR (2) 643
Author: S M Fazalali
Bench: Fazalali, Syed Murtaza

PETITIONER:
S. SUNDARAM PILLAI, ETC.

Vs.

RESPONDENT:
V.R. PATTABIRAMAN ETC.

DATE OF JUDGMENT24/01/1985

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
VARADARAJAN, A. (J)
MUKHARJI, SABYASACHI (J)

CITATION:
1985 AIR 582 1985 SCR (2) 643
1985 SCC (1) 591 1985 SCALE (1)74
CITATOR INFO :
F 1992 SC 184 (6)

ACT:
Rent Control-Tamil Nadu Buildings (Lease and Rent Control) Act 1960, sec. 10(2 J(i)-Proviso and Explanation-Scope of-Wilful default Meaning of.

HEADNOTE:
Section 10 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960(for short, the Tamil Nadu Act) deals with the eviction of tenants and postulates that a tenant shall not be evicted whether in acquisition of a decree or otherwise except in accordance with the provisions of s.10 or ss. 14-16 Section 10(2)(i) of the Tamil Nadu Act provides for the eviction of a tenant on the ground of non-payment of rent. It lays down that where the Controller is satisfied that the tenant has not paid or tendered the rent within 15 days after the expiry of the time fixed in the Agreement y f tenancy or in the absence of any such Agreement, by the last date of the month next following that for which the rent is payable, he (tenant) undoubtedly commits a default The proviso to sub-s.2 provides that in any case falling in clause (i), if the Controller is satisfied that the tenant's

default to pay or tender rent was not wilful, he may, notwithstanding anything contained in s.11, give the tenant a reasonable time, not exceeding 15 days to pay or tender the rent due by him to the landlord upto the date of such payment or tender and on such payment or tender the application shall be rejected. The Explanation which was added by Act 23 of 1973 to the said proviso stipulates that for the purpose of sub-s-2 of s 10, default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months notice by the landlord claiming the rent.

In Civil Appeals Nos. 1178 of 1984, 1992 of 1982, 2246 of 1982 and 1659 of 1982, the respondents-landlords issued notices to the appellants-tenants demanding the amount of rent in arrears and thereafter filed eviction petitions against the appellants-tenants, inter alia, on the ground of "wilful default". All the appellants-tenants complied with the notices issued by their respective landlords except the appellant-tenant in Civil Appeal No. 1659 of ]982 where he made part payment only. However in Civil Appeal 3668 of 1982 and 4012 of 1982 the respondents-landlords had filed eviction petitions against the appellantstenants without issuing such notices before filing of eviction petitions. In all the

644

appeals, the Madras High Court passed and/or confirmed, as the case may be, the orders of eviction holding that the ground of`willful' default mentioned in section 10(2)(i) had been proved against the tenants. Hence these appeals by special leave. The common question of law involved in these appeals was as to what is the interpretation of the term "wilful default" in the Explanation to the Proviso of sub-s.2 of s. 10 of the Tamil Nadu Act.

Counsel for the appellants-tenants contended (i) that despite the explanation it is open to the court on an appraisement of the circumstances of each case to determine whether or not the default]t was wilful and in doing so it cannot be guided wholly and solely by the Explanation which is merely clarificatory in nature and (ii) that mere non-payment of arrears of rent after issue of two months' notice cannot in all circumstances automatically amount to a wilful default if the non-payment does not fulfil the various ingredients of the term "wilful default". On the other hand it was argued by counsel for the respondents-landlords (i) that the very purpose of the Explanation is to bring about uniformity in court decisions by laying down a conclusive yardstick in the shape of the Explanation and once it is proved that after issue of two months' notice if the tenant does not pay the arrears within the stipulated period of two months, he is liable to be ejected straightaway.

On the question of interpretation of the terms`wilful default' appearing in the proviso to s.l0(2) of the Tamil

Nadu Act coupled with the Explanation, the Court,
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HELD: Per Fazal Ali and A. Varadarajan JJ. (majority)

1. Though the Court is concerned mainly with the Tamil Nadu Act, yet in order to understand the contextual background of the words `wilful default' and its proper setting, it Will be useful to refer to those Acts which contain the term wilful default' either in a negative or in positive form. These Acts are (l) A P. Buildings (Lease, Rent and Eviction) Control Act of 1960, the Orissa House Rent Control Act 1967 and the Pondichery Buildings Lease and Rent Control Act 1969, (hereinafter referred to as the A.P. Act, Orissa Act and Pondicherry Act respectively). Although the default contemplated by these Acts is wilful yet it has been put in a negative. Form which undoubtenly gives sufficient leeway to the tenant to get out of the rigors of the statutory provision the relevant provisions of these Acts relating to eviction of tenants on the ground of 'wilful default' in payment of rent contemplate that a default simpliciter would not be sufficient to evict the tenant but it must further be shown that the default was not wilful. These Acts are however, silent on the mode and the manner in which a court may decide as to what is wilful and what is wilful. Thus these Acts have left it to the courts to decide this question. So far as the Tamil Nadu Act is concerned, it makes a marked improvement by broadening the ambit of 'wilful default' in the proviso to s. 10(2) which is further clarified by an Explanation added to it subsequently. Before coming to any conclusion it may be necessary to examine the exact meaning of the words 'wilful default' as also the interpretation and the scope of the Proviso and the Explanation. [657H; 658A]

2. The words 'wilful default' would mean a deliberate and intentional default knowing fully well the legal consequences thereof. A consensus of the
645
meaning of the words `wilful default' appears to indicate that default in order to A be wilful must be intenional, deliberated and calculated and conscious, with full knowledge of legal consequences flowing therefrom. [660B; 661A-B]

`A Dictionary of Low' by L.B. Co zon, page 361; Words and Phrases volume 11-A (Permanent Edition) page 268; Words and Phrases Vol. 45, pages 296. Webster's Third New International Dictionary Vol. III page 2617 and Volume I page 590 and Black's Law Dictionary(4th Edn.) page 1773 referred to.

3. The well established rule of interpretation of a proviso is that a proviso may have three e . rate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted the in which but for the proviso would b. within the purview

of the enactment. In other words, a proviso cannot be ton apart from the main enactment nor can it be use, to nullify or set at naught the real object of the main enactment. Whil interpreting a proviso sure be taken that it is used to remove special cases from the general enactment and provide for them separately In short, generally speaking a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself. To Sum up, a proviso may serve four different purposes:

1. qualifying or excepting certain provisions from the main enactment;

2. it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

3. it may be embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

4. it may be used merely to act as an optional addenda to the enactment with the sale object of explaining the real intendment of the statutory provision. [661D-E; 664C-D; 665H; 666A-C ]

Craies in `Statute Law' (7th Edn.) Page 218, Odgers in 'Construction of Deeds and Statutes' (Fifth Edn.) 317, 318. Sarathi in Interpretation of Statutes' page 294-2951. referred to.

Local Government Board v. South Stoneham Union [1909] A.C. 57. Ishverlal Thakorelal Almala v. Motiobhai Nagjibhai [1966] I SCR 367. Madras and Southern Maharatta Railway Co. Ltd. v. Bezwada Municipality. AIR 1944 C71. West Derby v. Metropolitan Life Assurance Co. [1897] AC 647. Rhodda Urban district Council v Taff Vale Railway Co. [1909] AC 253 and Jennings and Another v KellY [1940] AC 206 referred to.

Commissioner of Income Tax, Mysore, etc v. Indo Mercantile Bank Ltd. [1959] Z Supp. SCR 256, Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha [1962] 2 SCR 159 State of Rajasthan
646
v. Leela Jain [1965] I SCR 276, Sales Tax officer, Circle 1, Jabalpur v. Hanuman Prasad [1967] I SCR 831, commisioner of Commercial Taxes and Ors. v. R.S. Jhaver and Ors. [1968] I SCR 148, Dwarka Prasad v Dwarka Das Saraf [19761 1 SCC 128 and Hiralal Rattanlal etc. v. State of U.P. and Anr. etc. [19731 I SCC 216 relied upon.

4. The next question is as to what is the impact of the Explanation on the Proviso which deals with the question of wilful default It is now well settled that an explanation added to a statutory provision is not a substantive proviso,o in any sense of the term but as the plain meaning

of the word itself shows, it is merely meant to explain or qualify certain ambiguities which may have crept in the statutory provision. From a conspectus of the authorities, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself;

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful;

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment; and

(e) it cannot, however, take away a statutory right with which any person , under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

[666F-G ; 668G-H; 669A-C]

Sarathi in Interpretation of Statutes, p. 329; Swarup in Legislation and Interpretation' pages 297-298 and Bindra in 'Interpretation of Statutes' (5th Edn.) page 67, referred to.

Burmah Shell Oil Storage and Distributing Co. Of India Ltd. and Anr. v. Commercial Tax Officer and Ors. [1961] I SCR 902, Bihta Cooperative Development Cane Marketing Uaion Ltd. and Anr. v. The Bank of Bihar and Ors. [1967] 1 SCR 848 and Dattatraya Govind Mahajan and Ors v. State of Mahararashtra and Anr [1977] 2 SCR 790 relied upon.

5(1). Although almost every State has its own Rent Act, neither the Explanation nor the statutory clause concerning the term 'wilful default' is mentioned therein. These Acts seem to proceed only on the simple word default' and perhaps to buttress their intention they have laid down certain guidelines to indicate the grounds of ejectment wherever a default takes place. Looking generally at such Acts, they seem to have first provided statutorily a particular date or time when the tenant on being inducted under the contract of tenancy, is to pay the rent. Such a provision may or may not be against the contract of the tenancy

647

and if it is to that extent, it overrides the contract, This, therefore, gives sufficient notice to any tenant inducted in any premises that he must pay the lent according

to the yardstick set out by the Act, failing which he runs the risk of being evicted for default. Some Acts, however, have provided a particular number of defaults to enable the Rent Controller or Court to find out whether such a default would entitle the landlord to get an order of eviction There are some other Acts which have made rather ingenious and, apt provisions for expediting the process of eviction in case of default by providing that whenever a suit for eviction is filed against a tenant on the ground of default, the tenant in order to show his bona fides must first deposit the entire rent, arrears and cost in the court of the Rent Controller where the action is field on the very first date of hearing, failing which the court or the authority concerned would be fully justified in striking down the defence and passing an order of eviction then and there. The dominant object of such a procedure is to put the tenants on their guard. It is true that such provisions are rather harsh but if a tenant goes on defaulting then there can be no other remedy but to make him pay the rent punctually unless some drastic step is taken. These Acts, therefore, strike a just balance between the rights of a landlord and those of a tenant. For deciding the present cases, it is not necessary to go either into the ethics or philosophy of such a provision because the Court is concerned with statutes having different kinds of provisions. The relevant provisions of the A.P., Orissa and Pondichery Acts are almost in pari materia the proviso to Section 10(2) of the Tamil Nadu Act. The only difference between the Tamil Nadu Act and the other Acts is that whereas an Explanation is added to the proviso to s.l0(2) of the Tamil Nadu Act, no such Explanation has been added to the provisions of the other three Acts. Hence the Court has to consider the combined effect of the proviso taken in conjunction with the Explanation. From an analysis of the various concomitants of the Explanation, the position seems to be that-

(a) there should be a default to pay or tender lent; E

(b) the default should continue even after the landlord has issued two months' notice claiming the arrears of rent; and

(c) if, despite notice, the arrears are not paid the tenant is said to have committed a wilful default and consequently liable to be evicted forthwith.

[669E H; 670A-D, F-G] F

5 (ii) The Explanation, does not at all take away the mandatory duty cast on the Controller in the Proviso to decide if a default is wilful or not. Indeed if the landlord chooses to give two months notice to his tenant and he does not pay the rent, then, in the absence of substantial and compelling reasons, the Controller or the court can certainly presume that the default is wilful and order his eviction straightaway. There is no force in the view that

whether two months notice for payment of rent is given or not, it will always be open to the Controller under the Proviso to determine the question of 'wilful default' because that would render the very object of explanation otiose and nugatory. [673D-E]

6. Two factors mentioned in s.10(2)(i) seem to give a clear notice to a tenant as to the mode of payment as also the last date by which he is legally supposed to pay the rent. This, however, does not put the matter beyond controversy because before passing an order of eviction under the proviso, it must also be

648

proved that the default was wilful and if the Controller is of the opinion that the default in the circumstances and facts of the case was not wilful, in the sense that it did not contain any of the qualities or attributes of a wilful default as indicated, he may give the tenant a reasonable time, not exceeding 15 days, to pay the entire rent and if this is complied with, the application for ejectment would stand rejected. The difficulty, however . is created by the Explanation which says that once a landlord gives a Iwo months' notice to his tenant for paying the arrears of rent but the tenant continues in default even thereafter, then he is liable to be evicted. There is a good deal of force in this argument which has its own advantages. In the first place, it protects the court from going into the intricate question as to what is a wilful default and whether or not the conditions of a wilful default have been satisfied which, if permitted would differ from case to case and court to court. But the difficulty is that if such a blanket ban is put on the court for not examining the question of wilful default once the conditions laid down in the Explanation are satisfied then it would undoubtedly lead to serious injustice to the tenant. A subsidiary consequence of such an interpretation would be that even though the tenant, after receipt of the notice, may be wanting to pay the arrears of rent but is unable to do so because of unforeseen circumstances like, death, accident, robbery, etc. which prevent him from paying the arrears, yet under the Explanation he has lo be evicted. Another difficulty in accepting the first view, viz., if two month's notice is not given, the tenant must not be presumed to be a wilful defaulter, is that in such a case each landlord would has to maintain a separate office so that after every default a two months' notice should be given and if no notice is given no action can be taken against a tenant. The correct view in the matter is in the following terms.

(i) Where no notice is given by the landlord in terms of the Explanation, the Controller. having regard to the four conditions spelt out in this judgment has the undoubted discretion to examine the question as to whether or not the default committed by the tenant is wilful, If he feels that any of the conditions mentioned is lacking or that the

default was due to some unforeseen .circumstances, he may give the tenant a chance of locus paenitentiae by giving a reasonable time, which the statute puts at 15 days, and if within that time the tenant pays the rent, the application for ejectment would have to be rejected.

(ii) If the landlord chooses to give two months' notice to the tenant to clear up the dues and the tenant does not pay the dues within the stipulated time of the notice then the Controller would have no discretion to decide the question of wilful default because such a conduct of the tenant would itself be presumed to be wilful default unless he shows that he was prevented by sufficient cause or circumstances beyond his control in honouring the notice sent by the landlord.

[671G-H; 672A-D; F; 673F-H; 674A-B]

N. Ramaswami Reddiar v. S.N. Periamuthu Nadar, 1980 Law Weekly (vol. 93) p. 577 and Khivaraj Chordia v. C. Maniklal Bhattad AIR 1966 Madras 67 approved.

Rajeswari v. Vasumal Lalchand AIR 1983 Madras 97, referred to.

7. In the light of the above principles and tests to be applied by courts in deciding the question of wilful default, the Court allowed Civil Appeals Nos. 1178 of 1984, 1992 of 1982 and 2246 of 1982 and dismissed rest of the appeals. [678B]

649

Per Mukharji.j. (dissenting) A

l(i) Default has been construed in various ways depending upon the context. ' Default' would seem to embrace every failure to perform part of one's contract or bargain. It is a purely relative term like negligence. It means nothing more, nothing less. than not doing what is reasonable under the circumstances not doing something which you ought to do. having regard to the transaction. Similarly, default in payment imports something wrongful, the omission to do some act which, as between the parties, ought to have been done by one of them. It simply means non-payment, failure or omission to pay. Default happens in payment of rents under various contingencies and situations. Whether the default is wilful or not is also a question of fact to be proved from evidence, direct and circumstantial drawing inferences from certain conduct. If the Courts are free to decide from varying circumstances whether default was wilful or not, then divergence of conclusions are likely to arise one judicial authority coming to the conclusion from certain circumstances that the default was wilful, another judicial authority coming to a contrary conclusion from more or less same circumstances. That creates anomalies. In order to obviate such anomalies and bring about a uniform standard that Explanation explains the expression, wilful" and according to the Explanation added, a default to pay or tender rent small be construed", as wilful if the default by the tenant n th- payment of rent

continues after issue of two months' notice by the landlord claiming the rent. If that is the position, in a case where the landlord his given notice to the tenant claiming the rent and the tenant has not paid the same for two months, then the same must be construed as wilful default, whatever may be the cause for non-payment. Whether in a particular case default is wilful or not, must be considered in accordance with the definition provided in the Explanation to Proviso to sub-section (2) of section 10 of the Act. If it was intended that the courts would be free to judge whether in a particular set up of facts, the default was wilful or not where no notice has been given, then in such a case there was no necessity of adding this Explanation to the Proviso which-is a step to the making of the findings under clause (l) of sub-section (2) of section 10 of the Tamil Nadu Act. It is well-settled that Legislature does not act without purpose or in futility.

[680E-G; 681B-E; 682E-F]

_ ._ Stroud's Judicial Dictionary Vol. 1. Third Edition. page 757, Prem's Judicial Dictionary. Vol. 1 196 t page 483. The Dictionary of English Law page 597 Fakir Chander Datt and Other v. Ram Kumar Chatterji Indian Appeals. Vol XXXI. p. l9 n referred to,

I(ii) If a definition is provided of an expression, then the courts are not free to construe the expression otherwise unless it is so warranted by the use of the expression such as "except otherwise provided or except if the context otherwise indicates." There is no such expression in the instant case. There may be in certain circumstances intrinsic evidence indicating otherwise. Here there is none. [682C-D]

2(i) The expression "shall be construed" would have the effect of providing a definition of wilful default in the proviso to sub-section (2) of section 10. According to the explanation, a default to pay or tender rent "shall be construed",

650

as wilful if the default by the tenant in the payment of rent continues after issue of two months' notice by the landlord claiming the rent. If that is the position, in a case where the landlord has given notice to the tenant claiming the rent and the tenant has not paid the same for two month's, then the same must be construed as wilful default, whatever may be the cause for non-payment. The Legislature has chosen to use the expression "shall be construed as wilful" if after a notice by the landlord for two months' failure to pay or tender rent on the part of the tenant continues, and if it is wilful then under sub-section(2) clause (1) read with the proviso as explained by the Explanation, the Controller must be satisfied and give an order for eviction. The Legislature has provided an absolute and clear definition of 'wilful default' Other circumstances cannot be considered as wilful default. It is

true that Legislature has not chosen to use language to indicate that in no other cases, the default could be considered to be wilful except one default case which has been indicated in the Explanation. But it is not so necessary be cause Legislature has defined 'wilful default by the expression that default to pay or tender rent shall be construed' meaning thereby that it will mean only this and no other. Therefore, a default will be construed as wilful, only where the landlord has given notice and two months have expired without payment of such rent.
[682 B-R-C; H; 681 D-F; 683A]

2(ii)Statutory provisions must be construed, if it is possible, that absuridity and mischief may be avoided. Where the plain and literal interpretation of a statutory provision produces a manifestly absurd and unjust result, the court might modify the language used by the Legislature or even ('o some violence to it so as to achieve the obvious intention Or the Legislature and produce rational construction and just results. Ironing out the creases is possible but not rewriting the language to serve a notion of public Policy held by the judges [683C: 684B]

2(iii) Where two constructions are possible, one which avoids anomalies and creates reasonable results should be preferred but where the language is clear and where there is a purpose that can be understood and appreciated for construing in one particular manner, that is to say, avoidance of divergence of judicial opinions in construing wilful default and thereby avoiding anomalies for different tenants, it would not be proper in such a situation to say that this definition of wilful default was only illustrative and not exhaustive. The Proviso to sub-section (2) of section 10 cannot be cons trued as illustrative when the Legislature has chosen to use the expression "shall be construed". [683D-F]

In the aforesaid view ot the matter, the individual appeals are disposed of accordinglY. that is to saY. OnlY those appeals of tenants are dismissed where eviction orders were passed after two months' notice had been given and there was continuance of default, and the rest of the appeals are allowed. 1685B-C]

Seaford Court Estates Ltd. v. Asher [1949] 2 All E.R. 155 at pages 164 (CA), Regina v. Barnet London Borough Council Ex parte Nilish Saah, 1983 (2) Weakly Law Reports p. 16 at p. 30., Carrington and others v. Therm-a-Stor Ltd. 1983 (1) Weakly Law Reports p. 138 at p. 142. referred to.
651

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1178 of From the Judgment and Order dated the 15th July, 1982 of the High Court of Madras in Civil Revision Petition No. 3396 of 1981.

AND Civil Appeal No. 6211 of 1983 From the Judgment and Order dated the 5th November, 1982 of the High Court of Andhra Pradesh in Civil Revision Petition No. 2477 of 1982.

WITH Civil Appeal No. 1992 of 1982 From the Judgment and Order dated the 17th December, 1981 of the High Court of Madras in Civil Revision Petition No. 152 of 1981 .

WITH Civil Appeal No. 1959 of 19X2 From the Judgment and Order dated the 14th December, 1981 of the High Court of Madras in Civil Revision Petition No. 1630 of 1980.

WITH Civil Appeal No. 3668 of 1982 From the Judgment and Order dated the 20th October, 1982 of the High Court of Madras in Civil Revision Petition No. 4087 of 1982.

WITH Civil Appeal No. 2246 of 1982 From the Judgment and Order dated the 5th November, 1981 of the High Court ot Madras in Civil Revision Petition No. 1397 of 198(' AND Civil Appeal No. 4012 of 1982 From the Judgment and Order dated the 23rd November, 1982 of the High Court of Madras in Civil Revision Petition No. 3983 of 1981 Y. S., Chitale and P. N. Ramalingam for the Appellant in Civil Appeal No. 1178 of 1984.

P.G. K. K Mani, V. shekher and P.R. Setharaman for the Respondents in Civil Appeal No. 1178 of 1984 A.K. Sen and A.T.M. Sampath for the Appellant in Civil Appeal No. 6211 of 1983.

T.V.S. Narasimhachari for the Respondent K Ramkumar for the Appellant in Civil Appeal No. 1992 of A. T. M. Sampath for the Respondent.

A. S. Nambiar for the Appellant in Civil Appeal No. 1659 of 1982.

K S. Ramamurthy, and A.T.M. Sampath, for the Appellant- in Civil Appeal No. 3668 of 1982.

C. S. Vaidianathan and K. K Mani for the Respondents.

M. G. Ramachandran, and A.V. Rangam for the Appellant in Civil Appeal No. 2246 of 1982.

T. S. Krishnamurthy Iyer for the Respondent. T. S. Krishnamurth Iyer. and S. Balakrishna for the Appellant in Civil Appeal No. 4012 of 1984.

Padmanbhan and D.N. Gupta for the Respondent in Civil Appeal No. 4012 of 1982.

The following Judgments were delivered FAZAL ALI, J. These appeals invlove more or less an identical point of law relating to the interpretation of the term 'wilful default' appearing in the proviso to section 10 (2) of the Tamil Nadu Buil dings (Lease and Rent Control) Act, 1960 (hereinafter referred to as the 'Act') coupled with the Explanation which seeks to explain the intent Or the proviso. We have heard counsel for the parties at great length and a large number of authorities have been cited before us in support of both the parties.

Before we take up the points of law involved in these appeals we would briefly narrate the bare facts of each of these cases in order to test the correctness of the points argued before us.

In Civil Appeal No. 1178 of 1984, the respondent- landlord let A out the suit premises No. 3-B, New No 2-B, Davidson Street, Broadway Madras, to the appellant-tenant on a monthly rent of Rs. 600 for non-residential use. The appellant, despite repeated reminders, did not pay the rent for the period from October 1978 to August 1979. The respondent filed a suit on 2 12.79 for evicting the appellant on two grounds wilful default in payment of rent, and (2) material acts of waste committed in the building.

It may be mentioned here that before filing a suit for eviction of the appellant, the respondent on 17.9.79 sent a two months` notice to the appellant. through his Advocate to clear up the dues. The appellant on receipt of the notice paid up the amount of the arrears, amounting to Rs. 6,600 on 3.10.79, i.e., within the stipulated period of two months. But, the respondent contended that in view of the past conduct of theappellant he was guilty of wilful default within the meaning of proviso to s. 10 (2) of the Act.

So far as this appeal is concerned, as the entire rent had been paid up in pursuance of the notice dated 17.9.79 even prior to the filing of the suit, it is manifest that on the date of filing of the suit no cause of action in presenti having arisen, the suit should have been dismissed on this short ground alone as being not maintainable. As indicated above, it was not open to the landlord after having received the entire amount of arrears before filing of the suit to have filed a suit for past conduct of the tenant. This appeal, therefore, merits dismissal on this ground alone.

In Civil Appeal No. 6211 of 1983, the respondent- tenants were given the suit premises No. 171582, Ward B, Old corresponding No. 2, New No. 5181582 Abid Road, Hyderabad, on a monthly rent of Rs. 225 which was, by mutual consent, increased to Rs. 275 per month in the year 1964. From 1.7.66, the rent was again agreed to be increased to Rs. 300 per month. The appellants-landlord filed a suit under s. 10 of the Andhra Pradesh Buildings (Lease, Rent and Eviction Control) Act, 1960 on 12.11.71, against the respondents for eviction on three grounds; (1) wilful default by the tenants in payment of rent for the months of September, October and November 1971 (total amount being Rs. 900, (2) the tenants sublet the premises to one Hanumantha, and (3) that the premises were required bona fide for their own use. However, during toe pendency of the matter, the original landlords sold away their interest in the property in favour of the present appellants before us and, therefore, the question of bona fied requirement abated there itself.

The Rent Controller upheld both the grounds of wilful default and subletting. Aggrieved by the said decision, the respondents-tenant filed an appeal to the Chief Judge, City Small Causes Court, Hyderabad and the learned Chief Judge by his judgment held that wilful default in payment of rent for the month of September 1971 as also the question of sub letting was proved. Against this decision of the Chief Judge, City Small Causes, the respondents filed a revision petition in the High Court. It is not in dispute that the rent from September, 1971 on wards has not been paid and that by the time the eviction petition was filed, the default was only for the month of September 1971. The High Court agreed with the lower courts with regard to wilful default for the month of September, 1971

and reversed the finding with regard to subletting but on the ground of wilful default ordered eviction of the respondents.

In civil Appeal No. 1992 of 1982, the respondent- landlord filed an eviction petition against the appellant- tenant on the grounds of wilful default and the premises needing repairs. However, the second ground was not pressed and the only point which survived for deter mination was whether there was any wilful default on the part of the appellant. The brief facts are that the appellant became a tenant under the father of the respondent in 1953 at a monthly rent of Rs. 15 which was subsequently mutually agreed to be increased to Rs. 49 per month. The respondent contended in his petition that the appellant became a defaulter in payment of the rent as he did not pay the rent for the months of June 1977 to January 1978. The respondent also issued a notice on 16.1.78 demanding the dues amounting to Rs. 392. The appellant sent a detailed reply on 30.1.78 alongwith a Bank Draft for Rs. 392 which was, however, not encashed by the respondent and returned to the appellant subsequent to the filing of an eviction petition which was filed on 11.8.1978.

The Rent Controller found the tenant to be a wilful defaulter and consequently order his eviction. However, on appeal the Appellate Authority reversed the finding of the Rent Controller and accepted the plea of the tenant that as he was ill he was not able to pay the rent. In revision, the High Court did not agree with the finding of the Appellate Authority and restored the finding of the Rent Con troller and ordered the eviction of the appellant, holding that the explanation offered by the tenant could not be accepted as his sons were carrying on the business in the same premises and nothing pre vented them from paying the rent to the landlord of the appellant was ill.

In Civil Appeal No. 1659 of 1982, the respondent- landlord filed an eviction petition against the appellant- tenant in respect of a nonresidential premises on two grounds: (1) wilful default in payment of rent from 1.5.77 to 31,8.77, and (2) bona fide requirement for personal use. The Rent Controller, after an equiry, ordered eviction of the tenant on both the grounds and the Appellate Authority confirmed the findings of the Rent Controller. The landlord issued a lawyer's notice on 1.9.77 to the tenant to clear up the dues. After receipt of the notice the tenant paid the rent of two months' only and for the remaining two months the tenant could not offer any satisfactory explanation and, therefore, the High Court in revision agreed with the findings of both the courts below in regard to wilful default of payment of arrears of rent and ordered eviction of the tenant on this ground alone. The High Court, however, did not agree with the findings of the courts below with regard to bona fide requirement of the landlord and held that the landlord could not ask for a non-residential portion for residential purposes having leased it out for a non-residential purpose.

In Civil Appeal No. 3668 of 1982, the appellant took out the premises from the respondent for non-residential use on a monthly rent of Rs. 350. There was some misunderstanding between the parties over payment of rent and as a result of which it was agreed that the tenant would deposit the rent in the Bank. The respondent landlord filed an eviction petition on 1.4.1980 in the court of the Rent Controller, after verifying from the Bank, that the tenant had not deposited the rent for the months of January and February 1980, thereby committing a wilful default. The authorities below found against the arrangement of depositing the rent in the Bank and ordered the eviction of the appellant on the ground of wilful default. The High Court upheld the decision of the courts below

and held that the appellant had wilfully defaulted in the payment of rent and ordered the eviction of the appellant.

In Civil Appeal No. 2246 of 1982, the respondent- landladies let out the premises to the tenant-appellant for non-residential use on a monthly rent of Rs. 105. The respondents filed an eviction petition on 2.11.76 against the tenant on the ground of wilful default for non-payment of rent for the period from January 1976 to September 1976, i.e., for a period of 9 months. But before filing the eviction petition, the respondents on 6.7,1976 issued a notice to the tenant to pay the dues and on 17.7.76 the appellant paid a sum of Rs. 630 which was accepted by the landladies without prejudice. The Rent Controller found that the default in payment of rent was not wilful and therefore dismissed the appl.cation of the landladies. On appeal, the Appellate Authority reversed the finding of the Rent Controller and held that the default, was wilful. In revision, the High Court did not agree with the contention of the appellant that he was not wilful defaulter as immediately after filing of the eviction petition he had paid the entire arrears even before the serving of summons The High Court held that there was no satisfactory explanation by the tenant for nonpayment of rent for the period from January to June 1976 before the issue of notice Even after the payment of rent the tenant committed further default till the petition for eviction was filed on 2.11.76. The high Court, therefore, upheld the finding of the Appellate Authority and ordered eviction of the tenant on the ground of wilful default.

In civil appeal No. 4012 of ' 1982, the appellant is in occupation of the residential premises bearing No 17 (New No 59), Burkit Road T. Nagar, Madras on a monthly rent of Rs. 325 payable according to English calendar month. The respondent filled an eviction petition against the appellant on the ground of wilful default and bona fide requirement for her own occupation. It was stated on behalf of the respondent-landlady that the appellant committed wilful default in payment of rent from June 1976 onwards and after repeated demands a sum of Rs. 1000 was paid by him on 1.4.1977. He had paid rent for five months to the Income Tax Department on behalf of the respondent but he did not produce any receipt evidencing payment to the Income Tax Department. Assuming that the appellant had made the said payment, the respondent further contended that from February 1977 to July 1978 the appellant was in arrears, thereby committing a wilful default. The Rent Controller did not agree with the contentions of the respondent and held that the default was not wilful and the requirement for own Occupation of the landlay was not bona fide. On appeal, the Appellate Court came to the conclusion that the tenant had committed wilful default in payment of rent from May 1976 onwards as on 1.4.77 and from December 1976 as on 10.4.77. However, the appellate authority was of the view that the respondent had not been able to prove her case for bona fide requirement. But, on the around of wilful default, the eviction of the appellant was ordered. In reviston, the High Court agreed with the findings of the Appellate Court and confirmed the eviction of the appellant on the ground of wilful default.

From a detailed survey of the provisions of the various Rent Acts prevailing in the States and various Union Territories of our country, it appears that the provisions regarding eviction for default A in payment of rent are not uniform and differ from State to State. Some Acts do not mention `wilful default' at all, some mention it in a negative form while some put it in an affirmative form. To cut the matter short, from a review of the various Rent Acts the position that emerges is that the

provisions relating to eviction are couched in three different types of default-

> (1) Acts which expressly mention 'wilful default' without defining the same, (2) Acts which do not mention the words 'wilful default' at all but confer a right on the landlord to evict the tenant on pure and simple default after a certain period of time when the rent has become due, which is also different in different States, (3) Acts which use the expression 'wilful default' but in a negative form rather than in an affirmative form. D These are the A.P. Buildings (Lea5e, Rent and Eviction) Control Act of 1960, The Orissa House Rent Control Act, 1967 and the Pondicherry Buildings (Lease & Rent Control) Act, 1969 (hereinafter referred to as the 'A P.

Act, 'Orissa Act' and 'Pondicherry Act' respectively) The last category of the Acts is the Tamil Nadu Act, which is the Statute in question and which makes a marked improvement by broadening the ambit of 'wilful default' in the proviso to s. 10 (2) which is further clarified by virtue of the Explanation added to the said proviso by Act No 23 of 1973. There are other Rent Acts which not only use the expression 'wilful default' but which also give a sort OF a facility to a tenant even for an ordinary default to pay the entire rent together with interest, on payment of which the suit for eviction is dismissed or, at any rate, they contain provisions by which even if a suit for eviction is filed, the tenant is required to pay the entire arrears of rent, costs and interest, failing which his defence is struck out and the suit for eviction is decreed automatically.

In these circumstances, for the purpose of the present cases, it is not necessary for us to make a roving enquiry into or carry on a detailed survey of the Acts which do not use the term 'wilful default'. We might usefully refer only to those Acts which contain the term 'wilful default' either in a negative or in a positive form. These Acts, as already indicated, are the A.P., Orissa, Pondicherry and the Tamil Nadu Acts. Though we are concerned mainly with the Tamil Nadu Act yet in order to understand the contextual background of the words 'wilful default' and its proper setting, we might briefly examine the relevant provisions of the aforesaid Acts. Section 10 (2) of the A.P. Act is the only provision which confers protection to the tenant from eviction under certain conditions. Proviso to that sub-section runs thus:

> "Provided that in any case falling under clause
>
> (i), if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may notwithstanding anything in section 11, give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him to the landlord up to the date of such payment or tender and on such payment or tender, the application shall be rejected."

It may be noticed that although the default contemplated by the Act is wilful yet it has been put in a negative form which undoubtedly gives sufficient leeway to the tenant to get out of the rigours of the statutory provision. The proviso to s.7 (2J of the Orissa Act is similarly worded and the relevant portion of which runs thus:

> "Provided that in any case falling under clause
>
> (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful."

Pondicherry Act is another statute which also contains the word 'wilful' in a negative form, the relevant portion of which runs thus:

> "Provided that in any case falling under clause
>
> (i) if the Controller is satisfied that the tenant's default to pay of tender rent was not wilful..."

The aforesaid Acts undoubtedly contemplate that a default simpliciter would not be sufficient to evict the tenant but it must further be shown that the default was not wilful. The Act, however is silent on the mode and the manner in which a court may decide as to what is wilful and what is not wilful. Thus, the Act has left it to the courts to decide this question. So far as the Tamil Nadu Act is concerned, it clearly defines as to what is 'wilful default'. Proviso to s. 10 (2) of the Act runs thus:

> "Provided that in any case falling under clause
>
> (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding anything contained in section 11, give the tenant a reasonable time, t not exceeding fifteen days, to pay or tender the rent due by him to the landlord up to the date of such payment or tender and on such payment or tender, the application shall be rejected."

This proviso was clarified by an Explanation added to it by Act No. 23 of 1973 which provides a clear criterion to determine as to what is wilful default and what is not. in this connection, it was submitted by counsel for the tenants that despite the Explanation it is open to the Court on an appraisement of the circumstances of each case to determine whether or not the default was wilful and in doing, so it cannot be guided wholly and solely by the Explanation which is merely clarificatory in nature. If the Court in the circumstances of each case finds that the default is not wilful then it can come to this finding despite the Explanation. On the other hand, the argument ot the counsel for the landlords is that the very purpose of the Explanation is to briny about uniformity in court decisions by laying down a conclusive yardstick in the shape of the Explanation which says that a default would be wilful only if the landlord gives two months' notice to the tenant and the tenant does not pay the rent after the expiry of this period. In other words, the argument seems to be that the Explanation is to be read into the proviso so that the word 'wilful' will have to be defined and interpreted in accordance with the criterion laid down by the said Explanation, i.e., 'issue of two months' notice.' The arguments merits consideration but before coming to any conclusion it may be necessary for us to examine the exact meaning of the words 'Wilful default' as also the interpretation and the scope of the Proviso and the Explanation. Prima facie, there seems to be some force in the argument of the counsel for the tenants that unless the conditions of the Explanation are fulfilled,

whatever may be the nature of the default, it cannot be a 'wilful default' as contemplated by the Proviso.

Before, however, going into this question further, let us find out the real meaning and content of the word 'wilful' or the words 'wilful default'. In the book 'A Dictionary of Law' by L.B. Curzon, at page 361 the words 'wilful' and 'wilful default' have been defined thus:

> 'Wilful'-deliberate conduct of .l person who is a free agent, knows what he is doing and intends to do what he is doing.

'Wilful default'-Either a consciousness of negligence or breach of duty; or a recklessness in the performance of a duty. In other words, 'wilful default' would mean a deliberate and intentional default knowing full well the legal consequences thereof.

In Words and Phrases', Volume 11 A (Permanent Edition) at page 268 the word 'default' has been defined as the non-performance of a duty, a failure to perform a legal duty or an omission to do something required. In volume 45 of 'Words & Phrases', the word 'wilful' has been very clearly defined thus: 'Wilful'-intentional; not incidental or involuntary: -

> - done intentionally, knowingly, and purposely, without justifiable excuse as distinguished from an act done carelessly; thoughtlessly, heedlessly or inadvertently:
>
> - in common parlance word 'wilful' is used in sense of intentional, as distinguished from accidental or involuntary.
>
> P. 296 - "Wilful" refers to act consciously and deliberately done and signifies course of conduct marked by exercise of volition rather than which is accidental, negligent or involuntary.

In Volume III of Webster's Third New International Dictionary at page 2617, the word 'wilful' has been defined thus:

> "governed by will without yielding to reason or with out regard to reason; obstinately or perversely self-willed."

The word 'default' has been defined in Vol. I of Webster's Third New International Dictionary at page 590 thus;

> "to fail to fulfil a contract or agreement, to accept a responsibility; to fail to meet a financial obligation."

In Black's Law Dictionary (4th Edn.) at page 1773 the word 'wilful' has been defined thus:

> "Wilfulness" implies an act done intentionally and designedly; a conscious failure to observe care; Conscious; knowing; done with stubborn purpose, but not with malice.
>
> The word "reckless" as applied to negligence, is the legal equivalent of "willful" or "Wanton".

Thus, a consensus of the meaning of the words 'wilful default' appears to indicate that default in order to be wilful must be intentional, deliberate, calculated and conscious, with full knowledge of legal consequences flowing therefrom. Taking for instance a case where a tenant commits default after default despite oral demands or reminders and fails to pay the rent without any just or lawful cause, it cannot be said that he is not guilty of wilful default because such a course of conduct manifestly amounts to wilful default as contemplated either by the Act or by other Acts referred to above.

The next question that arises for consideration is as to what is the scope of a proviso and what is the ambit of an Explanation either to a proviso or to any other statutory provision. We shall first take up the question of the nature, scope and extent of a proviso. The well established rule of interpretation of a proviso is that a proviso may have three separate functions. Normally, a proviso is meant to be an exception to something within the main enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment In other words, a proviso cannot be torn apart from the main enactment nor can it be used to nullify or set at naught the real object of the main enactment.

Craies in his book 'Statute Law' (7th Edn.) while explaining the purpose and import of a proviso states at page 218 thus:

> "The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it...The natural presumption is that, but for the proviso, the enacting part of the section would have included the subject- matter of the proviso."

Odgers in 'Construction of Deeds and Statutes' (Fifth Edn.) while referring to the scope of a proviso mentioned the following ingredients:

> P. 317 "Provisos-These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it." P. 318 "Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment. "
>
> Sarathi in 'Interpretation of Statutes' at pages 294-

295 has collected the following principles in regard to a proviso:-

(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a repeal of the section as the proviso speaks the later intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation; but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision."

In the case of Local Government Board v. South Stoneham Union,(') Lord Macnaghten made the following observation:

"I think the proviso is a qualification of the preceding enactment, which is expressed in terms too general to be quite accurate."

In Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai(2) it was held that the main object of a proviso is merely to qualify the main enactment. In Madras & Southern Maharatta Railway Co. Ltd. v. Bezwada Municipality,(3) Lord Macmillan observed thus: (1) [1909] A C. 57.

(2) [1966] 1 SCR 367.

(3) ATR 1944 P.C. 71.

> "The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case."

The above case was approved by this Court in Commissioner Of Income Tax, Mysore, etc. v. Indo Mercantile Bank Ltd.,(l) where Kapur, J. held that the proper function of a proviso was merely to qualify the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the main enactment. In Shah Bhojraj Kuverji Oil Mills & Ginning Factory v. Subhash Chandra Yograj Sinha,(2) Hidayatullah, J, as he then was, very aptly and succinctly indicated the parametres of a proviso thus:

> "As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule."

In West Derby v. Metropolitan Life Assurance Co.(3) while guarding against the danger of interpretation of a proviso, Lord Watson observed thus:

> "a very dangerous and certainly unusual course to import legislation from a proviso wholesale into the body of the statute."

A very apt description and extent of a provio was given by Lord Oreburn in Rhodda Urban District Council v. Taff Vale Railway Co.(q) where it was pointed out that insertion of a proviso by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a proviso may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before. To the same effect is a later decision of the same Court in Jennings add Another v. Kelly(5) where it was observed:

> "We must now come to the proviso, for there is, I think, no doubt that in the construction of the section the (1) [1959] 2 supp. SCR 256.
>
> (2) [1962] 2 SCR 159.
>
> (3) [1897] AC 647.
>
> (4) [l909] AC 253.
>
> (5) [1940] AC 206.
>
> whole of it must be read and a consistent meaning if possible given to every part of it The words are "provided that such licence shall be granted only for premises situate in the ward or district electoral division in which such increase in population has taken place". There seems to be no doubt that the words "such increase in

> population" refer to the increase of not less than 25 per cent of the population mentioned in the opening words of the section "

While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.

In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have other wise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself.

Apart from the authorities referred to above, this Court has in a long course of decisions explained and adumbrated the various shades; aspects and elements of a proviso. In State of Rajasthan v. Leela Jain,(') the following observations were made:

> "So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part." In the case of Sales Tax Officer, Circle 1, Jabalpur v.

Hanuman Prasad(2), Bhargava, J. Observed thus:

> "It is well-recognised that a proviso is added to a principle clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded."
>
> In Commissioner of Commercial Taxes and Ors. v.

R.S. Jhaver and Ors.,(3) this Court made the following observations:

> (1) [1965]1 S C.R. 276.
>
> (2) [1967] I S.C.R. 831.
>
> (3) [1968]1 S.C.R. 148.

"Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself "

In Dwarka Prasad v. Dwarka Das Saraf,(l) Krishan Iyer, J. speaking for the Court observed thus: B "There is some validity in submission but if, on a fair construction, the principal provision is clear, a proviso can not expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case If the rule of construction is that prima facie a proviso should be limited in its operation to the

subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

In Hiralal Rattanlal etc. v. Staie of U.P. and Anr.(2) etc. this Court made the following observations:

> "Ordinarily, a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so-called proviso has substantially altered the main section."
>
> We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes: (1) [1976]1 S.C.R. 128.
>
> (2) [1973] 1 S.C.C.216.
>
> (1) qualifying or excepting certain provisions from the main enactment;
>
> (2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable; (3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and (4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.

These seem to be by and large the main purport and parameters of a proviso.

So far as the Act in question is concerned, the matter does not rest only on the question of wilful default, but by an amendment (Act No. 23 of 1973) an Explanation, in the following terms, was added to the proviso to section 10 (2) of the Act:

> "Explanation-For the purpose of this sub-section, default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent."

We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of wilful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in

any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in 'Interpretation of Statutes' while dwelling on the various aspects of an Explanation observes as follows:

> "(a) The object of an explanation is to understand the Act in the light of the explanation.
>
> (b) It does not ordinarily enlarge the scope of the original A section which it explains, but only makes the meaning clear beyond dispute."

(P. 329) Swarup in 'Legislation and Interpretation' very aptly sums up the scope and effect of an Explanation thus:

> "Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or substract from it. Thus an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain .. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa."

(P.P. 297-298.) Bindra in 'Interpretation of Statutes' (5th Edn.) at page 67 states thus:

> "An explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an explanation only explains and does not expand or add to the scope of the original section.. The purpose of an explanation is, however, not to limit the scope o the main provision.. The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An 'explanation' must be interpreted according to its own tenor ."

The principles laid down by the aforesaid authors are fully supported by various authorities of this Court. To quote only a few, in Burmah Shell Oil Storage and Distributing Co. Of India Ltd. and Anr. v. Commercial Tax Officer and Ors.(l) a Constitution Bench decision, Hidayatullah, J. speaking for the Court. Observed thus:

> "Now, the Explanation must be interpreted according to its own tenor, and it is meant to explain cl.(1)(a)of the (1) [1961] I S.C.R. 902.
>
> Article and not vice versa. It is an error to explain the Explanation with the aid of the Article, because this reverses their roles."

In Bihta Cooperative Development Cane Marketing Union Ltd. and Anr. v The Bank of Bihar and Ors(i)., this Court observed thus:

"The Explanation must be read so as to harmonise with and clear up any ambiguity in the main section, It should not be so construed as to widen the ambit of the section."

In Hiralal Rattanlal's case (supra), this Court observed thus:

"On the basis of the language of the Explanation this Court held that it did not widen the scope of clause (c) But from what has been said in the case, it is clear that if on a true reading of`an Explanation it appears that it has widened the scope of the main section, effect be given to legislative intent notwithstanding the fact that the Legislature named that provision as an Explanation."

In Dattatraya Govind Mahajan and Ors. v. State of Maharashtra and Anr(2)., Bhagwati, J. Observed thus:

"It is true that the orthodox function of an explanation is to explain the meaning and effect of the main provision to which it is an explanation and to clear up any doubt or ambiguity in it.. Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any a priori considerations."

Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is-

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so a- to make it consistent with the dominant object which it seems to subserve,
(1) [1967]1 S.C.R. 848.

(2) [l977]2 S C.R. 790.

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.

Having, therefore, fully discussed the main scope and ambit of a proviso and an Explanation, we shall now proceed to elucidate the various provisions of the Act and other Acts. We have already discussed that although almost every State has its own Rent Act, neither the Explanation nor the statutory clause concerning the term 'wilful default' is mentained therein These Acts seem to proceed only on the simple word 'default' and perhaps to buttress their intention they have laid down certain guidelines to indicate the grounds of ejectment wherever a default takes place.

Looking generally at such Acts, they seem to have first provided statutorily a particular date or time when the tenant on being inducted under the contract of tenancy, is to pay the rent. Such a provision may or may not be against the contract of the tenancy and if it is to that extent, it overrides the contract. This, therefore, gives sufficient notice to any tenant inducted in any premises that he must pay the rent according to the yard-stick set out by the Act, failing which he runs the risk of being evicted for default. Some Acts, however, have provided a particular number of defaults to enable the Rent Controller or Court to find out whether such a default would entitle the landlord to get an order of eviction. There are some other Acts which have made rather ingenious and, if we may say so, apt provisions for expediting the process of eviction in case of default by providing that whenever a suit for eviction is filed against a tenant on the ground of default, the tenant in order to show his bona fides must first deposit the entire rent, arrears and cost in the court of the Rent Controller where the action is filed on the very first date of hearing, failing which the court or the authority concern-

ed would be fully justified in striking down the defence and passing an order of eviction then and there. The dominant object of such a procedure is to put the tenants on their guard. It is true that such provisions are rather harsh but if a tenant goes on defaulting then there can be no other remedy but to make him pay the rent punctually unless some drastic step is taken. These Acts, therefore, strike a just balance between the rights of a landlord and those of a tenant. For deciding these cases, it is not necessary for us to go either into the ethics or philosophy of such a provision because we are concerned with statutes having different kinds of provisions.

With this little preface we would now examine the working and relevant provisions of the Act alongwith similar provisions contained in the other three Acts, viz., A.P., Orissa, and Pondicherry Acts, which are almost in pari materia the proviso to s. 10 (2) of the Act. The only difference between the Act and the other Acts is that where as an Explanation is added to the proviso to s. 10 (2) of the Act, no such Explanation has been added to the provisions of the other three Acts; hence we have now to consider the combined effect of the proviso taken in conjunction with the Explanation.

We may, therefore, extract the Explanation again to find out what it really means and to what extent does it affect the provisions of the Proviso:

> Explanation-For the purpose of this sub-section, default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent;"

If we analyse the various concomitants of the Explanation, the position seems to be that-

> (a) there should be a default to pay or tender rent,
>
> (b) the default should continue even after the landlord has issued two months' notice claiming the arrears or rent,
>
> (c) if, despite notice, the arrears are not paid the tenant is said to have committed a wilful default and consequently liable to be evicted forthwith.

The question is; do these three conditions whittle down the effect of the proviso or merely seeks to explain the intendment of a wilful default ? One view which may be possible and which form the basis of the argument of the connsel for the tenants is that mere non-

payment of arrears of rent after issue of two months' notice cannot in A all circumstances automatically amount to a wilful default if the nonpayment does not fulfil the various ingredients pointed out by us while defining the term 'Wilful default'. The other view which has been canvassed before us by the counsel for landlords is that in view of the Explanation once it is proved that after issue of two months' notice if the tenant does not pay the arrears within the stipulated period of two months he is liable to be ejected straightaway. Another view is that such an interpretation would be extremely harsh and penal in nature because if, after receipt of the notice, the tenant is not able to pay the arrears due to circumstances beyond his control, of which the court is satisfied it will be putting a serious premium or handicap on the right of the tenant. In the same token, it was argued that if such an interpretation is put on the Explanation then the entire provisions of the Proviso become otiose thus rendering the said Proviso nugatory.

Another aspect that must be stressed at this stage is that where a tenant has committed default after default without any lawful or reasonable cause and the said defaults contain all the qualities of a wilful default, viz., deliberate, intentional, calculated and conscious, should he be given a further chance of locus paenitentiae ? After hearing counsel for the parties at great length, we feel that although the question is difficult one yet it is not beyond solution. If we keep the objects of the proviso and the Explanation separate, there would be no difficulty in deciding these cases.

To begin with, s. 13 (2) (i) of the Act lays down that where the Controller is satisfied that the tenant has not paid or tendered the rent within 15 days after the expiry of the time fixed in the Agreement of tenancy or in the absence of any such Agreement, by the last date of the month next following that for which the rent is payable, he (tenant) undoubtedly commits a default. Two factors mentioned in s. 10 (2) (i) seem to give a clear notice to a tenant as to the mode of payment as also the last date by which he is legally supposed to pay the rent. This, however, does not put the matter beyond controversy because before passing an order of eviction under the proviso, it must also be proved

that the default was wilful and if the Controller is of the opinion that the default in the circumstances and facts of the case was not wilful, in the sense that it did not contain any of the qualities or attributes of a wilful default as indicated by us above, he may give the tenant a reasonable time, not exceeding 15 days, to pay the entire rent and if this is complied with, the application for ejectment would stand rejected. The difficulty, however, is created by the Explanation which says that once a land lord gives a two months' notice to his tenant for paying the arrears of rent but the tenant continues in default even thereafter, then he is liable to be evicted. There is a good deal of force in this argument which has its own advantages. In the first place, it protects the court from going into the intricate question as to what is a wilful default and whether or not the conditions of a wilful default have been satisfied which, if permitted would differ from case to case and court to court. But the difficulty is that if such a blanket ban is put on the court for not examining the question of wilful default once the conditions laid down in the Explanation are satisfied then it would undoubtedly lead to serious injustice t-l the tenant. A subsidiary consequence of such an interpretation would be that even though the tenant, after receipt of the notice, may be wanting to pay the arrears of rent but is unable to do so because of unforseen circumstances like, death, accident, robbery, etc., which prevent him from paying the arrears, yet under the Explanation he has to be evicted.

Another view which, in our opinion, is a more acceptable one and flows from the actual words used by the proviso is that where the Explanation does not apply in the sense that the landlord has not issued two months' notice, it will be for the Court to determine in each case whether the default is wilful having regard to the tests laid down by us and if the Court finds that default is wilful then a decree for eviction can be passed without any difficulty.

Another difficulty in accepting the first view, viz., if two months notice is not given, the tenant must not be presumed to be a wilful defaulter, is that in such a case each landlord would have to maintain a separate office so that after every default a two months' notice should be given and if no notice is given no action can be taken against a tenant. We are unable to place such an unreasonable restriction on the landlord to give two months' notice after every default which may or may not be possible in every case. A correct interpretation, in our opinion, would be that where-

> (1) no notice, as required by the Explanation, is given to the tenant, the Controller or the court can certainly examine the question whether the default has been wilful and to such a case the Explanation would have no application, (2) where the landlord chooses to issue two months' notice and the rent is not paid then that would be a conclusive proof of the default being wilful unless the tenant proves his incapability of paying the rent due to unavoidable circumstances.

B The argument of the counsel for landlords was that even if a notice under the Explanation is given that does not take away the jurisdiction of the proviso to determine whether or not the default has been wilful if it contains the qualities and attributes referred to above because what the Explanation does is merely to incorporate an instance of a wilful default and is not conclusive on the point and would have to be construed by the court in conjunction with the conditions mentioned in the proviso. We are, however unable to go to this extreme extent because that will actually thwart the

object of the Explanation. As we read the Explanation, it does not at all take away the mandatory duty cast on the Controller in the proviso to decide if a default is wilful or not. Indeed, if the landlord chooses to give two months' notice to his tenant and he does not pay the rent, then, in the absence of substantial and compelling reasons, the controller or the court can certainly presume that the default is wilful and order his eviction straightaway. We are unable to accept the view that whether two months' notice for payment of rent is given or not, it will always be open to the Controller under the proviso to determine the question of wilful default because that would render the very object of Explanation otiose and nugatory. We express our view in the matter in the following terms:

> (1) Where no notice is given by the landlord in terms of the Explanation, the Controller, having regard to the four conditions spelt out by us has the undoubted discretion to examine the question as to whether or not the default committed by the tenant is wilful. If he feels that any of the conditions mentioned by us is lacking or that the default was due to some unforeseen circumstances, he may give the tenant a chance of locus paenitentiae by giving a reasonable time, which the statute puts at 15 days, and if within that time the tenant pays the rent, the application for ejectment would have to be rejected.
>
> (2) If the landlord chooses to give two months' notice to the tenant to clear up the dues and the tenant does not pay the dues within the stipulated time of the notice then the Controller would have no discretion to decide the question of wilful default because such a conduct of the tenant would itself be presumed to be wilful default unless he shows that he was prevented by sufficient cause or circumstances beyond his control in honouring the notice sent by the landlord.

We would, however, refer to some case law on the question of wilful default as interpreted by the Madras High Court because there appear to be three decisions of the Madras High Court taking some what contrary views. In Rajeswari v. Vasumal Lalchand(1) it was held that non- payment of rent amounted to such supine and callous in difference on the part of the tenant as to amount to a wilful default. However, the learned Judge does not appear to have noticed the effect of the Explanation to s. 10 (2) introduced in 1973. This decision undoubtedly supports the view that a wilful default is not merely a pure and simple default but a default which is per se deliberate and intentional. In N. Ramaswami Reddiar v. S.N. Periamuthu Nadar,(2) Explanation to the proviso to s. 10 (2) of the Act was expressly considered and Ratnam, J. Observed as follows:

> "A reading of the Explanation indicates that it is not exhaustive of all cases of wilful default, but it specifies only one instance where the default should be construed as wilful. If a tenant does not pay the rents at all for a considerable time and the landlord files a petition for an order of eviction on the basis that the tenant had committed wilful default without issuing any notice, then, in the absence of any other explanation by the tenant, the default should be construed as wilful, in spite of the fact that the landlord had not chosen to issue a notice to the tenant claiming the rents. In this view, I hold that counsel for the petitioner cannot be of any assistance to him."

We feel ourselves in complete agreement with the view taken by the learned Judge On the interpretation of the proviso read with the Explanation. In the case of Khivraj Chordia v. G. Maniklal Bhattad.(3) Ramamurti, J. has drawn a very apt and clearcut distiction (1) AIR 1983 Madras 97.

(2) [1980] Law Weekly (vol. 93) 577 (3) AIR 1966 Madras 67 between a simple default and a wilful default and has pointed out A that in order to be a 'wilful default' it must be proved that the con duct of the tenant was such as would lead to the inference that his omission was a conscious violation of his obligation to pay the rent. In this connection, the learned Judge observed thus:

> "The decisions of this court have reportedly pointed B` out that there is a clear difference in law between default and wilful default and that non-payment of rent within the time specified by the Act, though would amount to default, cannot by itself be treated as wilful default, and that if the rent was paid after the expiry of the time in the following month within a short time thereafter, the default cannot be said to be wilful to warrant the punishment of eviction Keeping in mind the main object of the enactment, namely, prevention of unreasonable eviction of tenants, the principle that emerges from the several decisions is that for default to be regarded as wilful default, the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay r the rent or reckless indifference. If the default was due to accident or inadvertence or erroneous or false sense of security based upon the conduct of the landlord himself, the default cannot be said to be wilful default."

Having, therefore, enunciated the various principles and tests to be applied by courts in deciding the question of wilful default we now proceed to decide the various appeals filed before us. The brief facts of each appeal have already been narrated in the opening part of our judgment and we would like to sum up our conclusions flowing from the facts found by, the High Court in each case.

In civil appeal No. 1178 of 1984, it would appear that though the tenant had committed a default but he had paid the entire rent well before the filing of the suit by the landlord. In fact, the suit for eviction was filed by the landlord not on the ground of pending arrears but to penalise the tenant for having defaulted in the past. Such a suit cannot be entertained because once the entire dues are paid to the landlord the cause of action for filing of a suit completely vanishes. Hence, the suit arising out of civil appeal No. 1978 of 1984 must be dismissed as being not maintainable and the order of ejectment passed by the High Court is hereby set aside. H In civil appeal No. 6211 of 1983, having regard to the tests and the criteria laid down by us there can be no doubt that wilful default in the payment of arrears to the tune of Rs. 900 has been proved and as there is nothing to show that the arrears were not paid or withheld due to circumstances beyond the control of the tenant, the order of eviction passed by the High Court is confirmed, and the appeal is allowed.

In civil appeal No. 1992 of 1982, a somewhat peculiar position seems to have arisen. It is true that, to begin with, the tenant did not pay the rent for the months of June 1977 to January 1978 which led the landlord to issue a notice on 16.1.78 demanding payment of arrears amounting to Rs. 392. The tenant within 15 days of receipt of the notice (on 30.1.783 sent a detailed reply to the landlord and

enclosed a Bank Draft of Rs. 39.2 which was, however, not encashed by the landlord and returned to the tenant after filing of the eviction petition, for reasons best known to him. Therefore, since the tenant had already complied with the notice within the stipulated time envisaged by the Explanation to Proviso to s. 10 (2) of the Act, by no stretch of imagination could be called guilty of wilful default. On the other hand, the conduct of the landlord in filing a suit and not encashing the Bank Draft was motivated with a view to get a decree for eviction on false excuse. Such a state of affairs could not be countenanced by the court. In these circumstances, we are of the opinion that the arrears having been paid through the Bank Draft, the question of eviction of the tenant did not arise nor did the question of default come into the picture merely because the landlord wanted to harass him by filing an eviction petition. The High Court was, therefore, clearly in error in passing the decree of ejectment against the tenant. We, therefore, allow the appeal and set aside the order of the High Court evicting the tenant.

In civil appeal No. 1659 of 1982, as it was clearly a case of wilful default on the part of the tenant we affirm the order of the High Court evicting the tenant and dismiss the appeal.

In civil appeal No. 3668 of 1982, some dispute arose between the parties as to whether the rent was to be deposited in Bank, resulting in the filing of the present suit for eviction on 1.4.80 in the court of the Rent Controller by the landlord after verifying from the Bank that the tenant had not deposited the rent for the months of January and February 1980. This default, in our opinion, was undoubtedly deliberate, conscious and without any reasonable or rational basis and the High Court was perfectly right in holding that the tenant A was guilty of wilful default and passing a decree for ejectments. As no notice was given by the landlord, Explanation to proviso to s. 10 (2) of the Act does not apply at all. The appeal is accordingly dismissed.

In civil appeal No. 2246 of 1982, the respondent- landladies had let out the premises to the tenant at a monthly rent of Rs. 105. A petition for eviction was filed by them on 2.11.76 for non-payment of rent by the tenant from January 1976 to September 1976, a period of 9 months. But, we might state here that before filing the eviction petition, the respondents had issued a notice on 6.7.76 asking the tenant to pay the dues, which the tenant paid on 17 7.76, i.e., within 10 days of the receipt of the notice, which was accepted by the landladies without any prejudice. The Rent Controller held that the default was not wilful as in pursuance of the notice the payment had already been made. The Appellate Authority reversed the finding of the Rent Controller and held that the default was wilful. The High Court in revision upheld the order of eviction O n the ground that there was no satisfactory explanation for non- payment of rent for the period January to June 1976. In coming to this finding, the High Court was clearly in error because the tenant had already deposited the entire dues including the rent from January to June, on 17.7.76. Thus, the question of wilful default could not arise nor could it be said that the default was either conscious or deliberate or international. Moreover, in view of the Explanation since the tenant had paid the amount within the time of the notice, there could be no question of wilful default. This fact seems to have been completely overlooked by the High Court. We, therefore, allow the appeal and set aside the order of the High Court directing eviction of the tenant.

In civil appeal No. 4012 of 1982, the tenant occupied the premises at a monthly rent of Rs. 325. It appears that the tenant defaulted in payment of tent from June 1976 onwards and after repeated demands, only a sum Or Rs. 1000 was paid by him on 1.4 77. leaving a substantial balance of arrears unpaid. The plea of the tenant that he had made payments to the Income Tax Department has not been proved, nor did the tenant have any right under the contract to pay any amount to the Income Tax Department and if he did so on his own, he must he held responsible for his conduct. Even so, the landlord contended that right from February 1977 to July 1978, the appellant was in arrears without any lawful cause. This was, therefore, a clear case of wilful default where the tenant did not pay the rent deliberately, consciously and intentionally. In these circumstances, the High Court was fully justified in holding that the default was wilful and affirming the decree passed by the Appellate court. The appeal is accordingly dismissed.

The result is that all the appeals are disposed of as indicated above but in the circumstances there will be no order as to costs in any of the appeals. Civil Appeal No. 5769 of 1983 already stands disposed of in terms of our Order of September 12,1984.

SABYASACHI MUKHARJI, J. With great respect to my learned brothers, I regret I am unable to agree on the construction put on the expression 'wilful default' in the Explanation to the Proviso of sub-section (2) of section 10 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. It may be borne in mind that The Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 hereinafter called the 'Act' was an Act to amend and consolidate the law relating to the regulation of letting of residential and non- residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Tamil Nadu. The Act was from time to time amended and was last amended by Act 1 of 1980. By Act 23 of 1973, an Explanation was added to the Proviso to sub-section (2) of section 10 of the Act.

Section 10 of the Act deals with the eviction of tenants. In order to appreciate the scheme of the section and the meaning of the expression 'wilful' introduced by the Explanation to the Proviso of sub-section (21 of section 10, we have to examine the provisions of section 10 and the various sub-sections of the section. As mentioned hereinbefore section 10 deals with the eviction of tenants and postulates that a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of section 10 or sections 14 to 16. For these appeals we are not concerned with the provisions of sections 14 to 16.

The first Proviso to sub-section (l) of section 10 stipulates that the said sections 14 to 16 would not apply to a tenant whose land lord is the Government- The second Proviso also provides that if the tenant denies the title of the landlord or claims right of permanent tenancy, the Controller shall decide whether the denial or claim is bona fide and if he records a finding to that effect, the landlord shall be entitled to sue for eviction of the tenant in a Civil Court and the Court may pass a decree for eviction on any of the grounds mentioned in the said sections, notwithstanding that the Court finds that such denial does not involve forfeiture of the lease or that the claim is unfounded. Sub-section (2) of section 10 of the Act deals with the procedure which a landlord must follow in order to evict his tenant. It provides that a landlord should apply to the Controller for a direction for eviction if he wants it and, if the Controller, after giving the tenant a reasonable opportunity of showing cause

against the application, is satisfied with any of the various conditions which are stipulated in clause

(i), (ii), (iii), (iv), (v), (vi) and (vii) then he shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not satisfied, he shall make an order rejecting the application. The Proviso to sub-section (2) of section 10 is as follows:

> "Provided that in any case falling under clause
>
> (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding any thing contained in section 11, give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him to the landlord up to the date of such payment or tender and on such payment or tender, the application shall be rejected."

The Explanation which was added by Act 23 of 1973 to the said Proviso stipulates that for the purpose of this sub-section, default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent. It is this Explanation that falls for consideration in these appeals. Clause (i) of sub-section (2) of section 10 of the Act requires the Controller to be satisfied that the tenant has not paid or tendered rent due by him in respect of the building within fifteen days after the expiry of the time fixed in the agreement of the tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable. For the purpose of these appeals, it is not necessary to consider the grounds of eviction mentioned in other clauses of sub-section (2) of section 10 of the Act. If the Controller is satisfied of any of the grounds mentioned in clause (i) to clause (vii) of sub-section (2) of section 10, then the shall, so the section stipulates, make an order directing the tenant to put the landlord in possession of the building and if he is not so satisfied, he shall make an order rejecting the application; the Proviso provides that in any case falling under clause (i) which we have noted hereinbefore, if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding anything contained in section l l, give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him to the landlord upto the date such payment or tender and on such payment or tender, the application shall be rejected. The Explanation which is the subject matter of interpretation before us and which was added, as noted before, by Act 23 of 1973 by section 10, stipulates that for the purpose of the said sub-section, namely sub section (2) of section 10, default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent. The question, therefore, is-can the default be construed as wilful under any other circumstances apart from default continuing after the issue of two months' notice by the landlord claiming the rent ? In other words, for the purpose of this section, will the wilful default be only when notice has been given by the landlord and two months have expired and the tenant has not paid the rent ? My learned brethren say that there may be other circumstances constituting wilful default. With respect, I differ. I will briefly note the reasons.

As I read the provision, it appears to me that there must be satisfaction of the Controller whether default was wilful and a default will be construed as wilful, in my opinion, only where the landlord has given notice and two months have expired without payment of such rent. Default has been construed in various ways depending upon the context. 'Default' would seem to embrace every failure to perform part of one's contract or bargain. It is a purely relative term like negligence. (See in this connection Stroud's Judicial. Dictionary Vol. 1, Third Edition, page

757). It means nothing more, nothing less, than not doing what is reasonable under the circumstances; not doing something which you ought to do, having regard to the transaction. Similarly, default in payment imports some thing wrongful, the omission to do some act which, as between the parties, ought to have been done by one of them. It simply means non-payment, failure or omission to pay. (See Prem's Judicial Dictionary, Vol. I, 1964 page 483). Earl Jowitt defines 'default' as omission of that which a man ought to do. (See The Dictionary of English Law. page

597).

The Privy Council in the case of Fakir Chander Dutt and Others v. Ram Kumar Chatterji(1) observed that 'Default' did not necessarily A mean breach of contractual obligation, but simply non-payment of rent by a person capable of protecting his tenure by doing so.

Default happens in payment of rents under various contingencies and situations. Default is a fact which can be proved by evidence. Whether the default is willful or not is also a question of fact to be proved from evidence, direct and circumstantial, drawing inferences from certain conduct. If the Courts are free to decide from varying circumstances whether default was wilful or not, then divergence of conclusions are likely to arise, one judicial authority coming to the conclusion from certain circumstances that the default was wilful, another judicial authority coming to a contrary conclusion from more or less same circumstances. That creates anomalies. In order to obviate such anomalies and bring about a uniform standard, the explanation as I read, explains the expression 'wilful' and according to the Explanation added, a default to pay or tender rent "shall be construed", as wilful if the default by the tenant in the payment of rent continues after issue of two months' notice by the landlord claiming the rent If that is the position, in a case where the landlord has given notice to the tenant claiming the rent and the tenant has not paid the same for two months, then the same must be construed as wilful default, whatever may be the cause for non-payment-bereavement on the date of payment in the family of near or dear ones or serious heart attack or other ailment of the tenant or of any person sent by the tenant to pay the rent cannot be excused and cannot be considered to be not wilful because the legislature has chosen to use the expression "shall be construed as wilful" if after a notice by the landlord for two months, failure to pay or tender rent on the part of the tenant continues, and if it is wilful then under sub-section (2) clause (i) read p with the proviso as explained by the Explanation, the Controller must be satisfied and give an order for eviction. The question is whether in other cases, that is to say, in cases where admittedly or by other facts or aliunde the Court comes to the conclusion that the default is wilful, for instance, in a case where there is chronic default, regular defaults or habitual defaults, the two months' notice is necessary or not. It was the argument on behalf of the respondents that in those circus- stances such notice was not necessary and this is the view which has found acceptance by my learned Brethren: I

am unable to agree, (1) Indian Appeals, Vol. XXXI, p. 195.

with respect. If in cases where there are genuine and bona fide reasons for failure or non payment of rent which cannot be excused after two months' notice to pay rent, then other causes which lead to inference of wilful default cannot also be construed as 'wilful default' in the context of the Explanation. The legislature has provided an absolute and clear definition of 'wilful default'. Other circumstances cannot be considered as wilful default.

In my opinion, the expression "shall be construed" would have the effect of providing a definition of wilful default in the proviso to sub-section (2) of section 10.

If a definition is provided of an expression, then the Courts are not free to construe the expression otherwise unless it is so warranted by the use of the expression such as "except otherwise provided or except if the context otherwise indicates". There is no such expression in the instant case. There may be in certain circumstances intrinsic evidence indicating otherwise. Here there is none.

The whole scheme of section 10 is that in order to be entitled to eviction on the ground of arrears of rent, the ingredients of which the Controller must be satisfied are;

(a) default, (b) default was wilful. Whether in a particular case default is wilful or not, must be considered in accordance with the definition provided in the Explanation to Proviso to sub-section (2) of section 10 of the Act. If it was intended that the Courts would be free to judge whether in a particular set up of facts, the default was wilful or not where no notice has been given, then in such a case there was no necessity of adding this Explanation to the Proviso which is a step to the making of the findings under clause (1 of sub-section (2) of section 10 of the Act. It is well-settled that the Legislature does not act without purpose or in futility.

lt was contended on behalf of the landlords that the Legislature has not used the expression default to pay or tender rent shall be construed as wilful only if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent- It is true that legislature has not chosen to use language to indicate that in no other cases, the default could be considered to be wilful except one case which has been indicated in the Explanation.

As I read the Explanation it is not so necessary because Legislature has defined 'wilful d fault' by the expression that 'default to pay or tender rent shall be construed' meaning thereby that it will mean only this and no other. My learned brethren have given instances of difficulties and hardships, if the other defaults, that is to say, default apart from tenant not paying after the expiry of notice by the landlord are not considered as wilful default. It is true that there may be hardships and many problems might arise. I share the apprehension of these problems and hardships but I find no justification to read that these hardships of which Legislature must have been aware, were also intended to be covered by the Explanation. It appears to me that the meaning is clear about the purpose of introduction of the Explanation, i.e, to obviate the difficulties and divergence of judicial opinions depending upon varying circumstances, the legislature has provided a uniform definition to the concept of 'wilful default'. It is true that where two constructions are possible, one which

avoids anomalies and creates reasonable results should be preferred but where the language is clear and where there is a purpose that can be understood and appreciated for construing in one particular manner, that is to say, avoidance of divergence of judicial opinions in construing wilful default and thereby avoiding anomalies for different tenants, one judge taking a particular view on the same set of facts, another judge taking a different view on the same set of facts, in my opinion, it would not be proper in such a situation to say that this definition of wilful default was only illustrative and not exhaustive. I cannot construe the expression used in the Explanation to the Proviso to sub-section (2) of section 10 as illustrative when the Legislature has chosen to use the expression "shall be construed". It has been observed that statutory provisions must be so construed, if it is possible, that absurdity and mischief may be avoided. Where the plain and literal interpretation of statutory provision proviso produces a manifestly absurd and unjust result, the Court might modify the language used by the legislature or even do some violence to it so as to achieve the obvious intention of the legislature and produce rational construction and just results. (See v. in this connection the observations in the case of Bhag Mal Vs. Ch. Prabhu Ram and Others (Civil Appeal No. 1451 (NCE) of 1984). Lord Denning in the case of Seaford Court Estates Ltd. v. Asher(l) has observed:

"If the makers of the Act had themselves come across this

1. [1949] 2 All E.R. 155a 164(CA) ruck in the texture of it, how would they have straightened i out ? He must then do as they would have done A judge must not alter the material of which it is woven, but he can and should iron out the creases."

Ironing out the creases is possible but not re-writing the language q to serve a notion of public policy held by the judges. Legislature must have legislated for a purpose by Act 23 of 1973 and used the expression "shall be construed" in Explanation in the manner it did.

The fact that in interpreting the statutory language, judges should avoid policy as an approach was emphasised by Lord Scarman in the decision of the House of Lords in the case of Regina v. Barnet London Borough Council Exparte Nilish Shah.(l) User of policy in interpretation of statutory language, Lord Scarman observed, was an impermissible approach to the interpretation of statutory language. Judges should not interpret statutes in the light of their own views as to policy. They may, of course, adopt a purposive interpretation if they can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy.

In the case of Carrington and Others v. Therm-a-Stor- Ltd,(2) the Master of the Rolls observed that "If regard is had solely to the apparent mischief and the need for a remedy, it is only too easy for a judge to persuade himself that Parliament must have intended to provide the remedy which he would himself have decreed if he had legislative power. In fact Parliament may not have taken the same view of what is a mischief, may have decided as a matter of policy not to legislate for a legal remedy or may simply have failed to realise that the situation could ever arise. This is not to say that statutes are to be construed in blinkers or with narrow and legalistic literalness, but only that effect should given to the intentions of Parliament as expressed in the statute, applying the normal canons

of construction for resolving ambiguities or any lack or clarity."

1. 1983(2) Weekly Law Reports, 16 at 30.

2. 1983 (1) Weekly Law Reports 138 at 142.

In the aforesaid view of the matter, I would construe the expression 'wilful default' in the Explanation to Proviso to subsection (2) of section 10 of the Act in the manner l have indicated. In that view of the matter, I would decide the appeals accordingly, that is to say, l would agree with my learned brethren in the order passed in those cases where eviction orders have been passed after two months' notice had been given and there was continuance of default by the tenant thereof. Appeals which have been disposed of on the basis of wilful default as understood in the manner indicated in the aforesaid observations of mine, I respectfully agree. Appeals which have been disposed of on wilful default other than in the manner I have indicated hereinbefore, I respectfully differ. The individual appeals are disposed of accordingly. There will be no order as to costs.

M.L.A. Appeals dismissed.

fair return on the 'capital employed' which is to be exempted from A tax under sub-section (1) of Section 80J, the owner's capital alone should be taken into account and borrowed monies should be excluded. Even in regard to the provisions of the above mentioned four statutes, an argument could well be advanced that borrowed monies are as much part of capital employed in the undertaking as the owner's capital and when monies are borrowed on payment of interest by way of hire charges, they become part of the owner's capital originally brought in by the owner and there is no reason why capital partaking of the samd characteristics as the fair return should not be allowed on it. This has precisely been the argument advanced on behalf of the assesses in support of their contention that 'capital employed' must include borrowed monies in sub-section (1) of Section 80J. But this argument has not prevailed with the Legislature in the enactment of any of the above-mentioned four statutes and despite this argument the Legislature has chosen to exclude borrowed monies in computing the 'capital employed' or the capital of the company for determining what should be regarded as fair return, so that profits in excess of such fair return may be subjected to additional tax. The Central Board of Revenue cannot therefore be accused of any irrationality or whimsicality in providing that fair return on the 'capital employed' eligible for exemption under subsection :1) of Section 80J should be calculated by applying the statutory percentage to the owner's capital, that is, the paid up share capital and reserves without taking into account long term borrowings or for the matter of that, any borrowed monies and debts. We cannot appreciate the contention of Mr. Palkhivala that when the Legislature was offering a tax incentive it could not have intended that the tax incentive should be measureable by reference only to the owner's capital and that borrowed capital should b e left out of account, because that would, in the submission of Mr. Palkhivala, result in favouring the affluent assessees who are able to employ their own capital and discriminate against the indigent who have to borrow funds to finance their undertakings. Having regard to the legislative practice and usage referred to by us, it is obvious that if the Legislature intended that the capital employed' must include long term borrowings, the Legislature would not have used the flexible expression 'capital employed' but would have expressed itself unambiguously by providing

that the 'capital employed' shall include long term borrowings. It is clear from the language used by the section that the Legislature proceeded on the basis that the expression 'capital employed' has no fixed definite meaning including or excluding long term borrowings and deliberately chose to leave it to the Central Board of Revenue to prescribe how the 'capital employed' shall be computed or in other words, what items shall be included and what items excluded in computing the 'capital employed' and by incorporating Rule 19A with retrospective effect in Section 80J by the Finance (No. 2) Act 1980, the Legislature clearly expressed its aproval of the manner of computation of the 'capital employed' prescribed by the Central Board of Revenue by making sub-rule (3) of Rule 19A. The consequence of this interpretation would undoubtedly be that the assessees would get relief only with reference to their own capital and not with reference to any monies which might have been borrowed by them for employment in the undertaking but that is a matter of policy which clearly falls within the province of the Executive and the Courts are not concerned with it. It is obvious that the Central Board of Revenue intended-and having regard to the retrospective amendment of Section 80J by Finance Act (No. 2) of l980 that must also be taken to be the intention of the legislature-that the assessees should be given relief only with reference to their own capital and not with reference to any borrowed monies, presumably because the object of giving relief was to encourage assessees to bring out their own monies for starting new industrial undertakings and the intention was not that the assessees should be given relief with reference to monies which did not belong to them but which were borrowed from financial institutions and other parties and which would have to be repaid.

Mr. Palkhivala then contended that if sub-section (1) of Section 80J were construed as leaving it to the Central Board of Revenue to prescribe what items shall be included and what items excluded in computation of the 'capital employed' it would be vulnerable to attack on the ground of excessive delegation of legislative power and would consequently be void. We do not think there is any substance in this contention, for there is in the present case no question of excessive delegation of legislative power. The essential legislative policy of allowing relief to an assessee who starts a new industrial undertaking or business of a hotel and declaring the period for which such relief shall be granted, is laid down by the Legislature itself in the various sub-sections of Section 80J and all that is left to the Central Board of Revenue to prescribe is the manner of computation of the 'capital employed' with reference to which the quantum of the relief is to be calculated. It is only the details relating to the working of the exempting provision contained in Section 80J which are left by the Legislature to be determined by the Central Board of Revenue. This is clearly permissible without offending the inhibition against excessive delegation of legislative power. It must be remembered that Section 80J enacts an exemption in a taxing statute and a certain margin of latitude is always allowed to the Executive in working out the details of exemption in a such taxing statute. It was laid down by this Court as far as back as 1959 in Pt. Banaarsi Dass Bhanol v. State of Madhy a Pradesh(l).

> "Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like."

So also in Sitaram Bishambardas and Ors. v. State of U.P. and Ors.(Z) this Court upheld the validity of Section 3D (1) of the U.P. Sales Tax Act 1948 which authorised the levy of a tax on the turnover of first purchases made by dealer or through a deal r acting as a purchasing agent, in respect of such goods or class of goods and at such rates, subject to a maximum, as may from time to time be notified by the State Government and Hegde, J. speaking on behalf of the Court observed: E 'It is true that the power to fix the rate of a tax is a legislative power but if the legislature lays down the legislative policy and provides the necessary guidelines, that power can be delegated to the executive. Though a tax is levied primarily for the purpose of gathering revenue, in selecting the objects to be taxed and in determining the rate of tax, various economic and social aspects, such as the availability of the goods, administrative convenience, the extent of evasion, the impact of tax levied on the various sections of the society etc- have to be considered. In a modern society taxation is an instrument of planning. It can be used to achieve the economic and social goals of the State For that reason the power to tax must be a flexible power. It must be capable of being modulated to meet the exigencies of the situation. In a Cabinet form of Government, the executive (1) (1959) S.C.R. 427.

(2) [1972] 2 S.C.R. 141. H is expected to reflect the views of the legislatures. In fact in most matters it gives the lead to the legislature. However, much one might deplore the "New Depotism" of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which ha e made it absolutely necessary for the legislatures to entrust more and more powers to the Executive. Text book doctrines evolved in the 1 9th century have become out of date. Present position as regards delegation of legislative power may not be ideal, but in the absence of any better alternative, there is no escape from it. The legislatures have neither the time, nor the required detailed information nor even the mobility to deal in detail with the innumerable problems arising time and again. In certain matters they can only lay down the policy and guidelines in as clear a manner as possible."

The validity of Section 3D of the U.P. Sales Tax Act 1948 was again challenged before this Court in Hiralal Ratan Lal v. State of U.P. and Anr (1) the same ground that it suffered from the vice of legislative power and again, the challenge was negatived by this Court with the following observations:

> "The only remaining contention is that the delegation made to the executive under s. 3D is an excessive delegation. It is true that the legislature cannot delegate its legislative function, to any other body. But subject to that qualification, it is permissible for the legislature to delegate the power to select the persons on whom the tax is to be levied or the goods or the transactions on which the tax is to be levied. In the Act, under s. 3 the legislature has sought to impose multi-point tax on all sales and purchases. After having done that it has given power to the executive, a high authority and which is presumed to command the majority support in the legislature; to select for special treatment dealings in certain class of goods. In the very nature of things, it is impossible for the legislature to ennumerate goods. dealings in which Sales. Tax or Purchase tax should be imposed. It is also impossible for the legislature to select the goods which should be subjected to (1) [1973] 2 S.C.R. 502.

> a single point sales or purchase tax. Before making such selections several aspects such as the impact of the levy on the society, economic consequences and the administrative convenience will have to be considered. These factors may change from time to time. Hence in the very nature of things, these details have got to be left to the executive."

The principles laid down in these observations from the decided cases clearly govern the present case and conclusively repel the contention or Mr. Palkhivala that if sub-section (1) of Section 80J were construed in the manner suggested by the learned Attorney General on behalf of the Revenue, it would be rendered void on the ground of excessive delegation of legislative power. the Legislature having laid down the legislative policy of giving relief to an assessee who is starting a new industrial undertaking or the business of a hotel. had necessarily to leave it to the Central Board of Revenue to determine what should be the amount of capital employed that should be required to be taken into that account for the purpose of determining the quantum of the relief allowable under the Section. What should be the quantum of the relief allowable to the assessee would necessarily depend upon diverse t`actors such as the impact of relief on the industry as a whole, the response of the industry to the grant of the relief, the adequacy or inadequacy of the relief granted in promoting the growth of new industrial undertakings, the state of the economy prevailing at the time, whether it is buoyant or depressed and administrative convenience. These are factors which may change from time to time and hence in the very nature, of thin as, the working out of the mode of computation of the 'capital employed' for the purpose of determining the quantum of the relief must necessarily be left to the Central Board of Revenue which would be best in a position to consider what should be the quantum of the relief necessary to be given by way of tax incentive in order to promote setting up of new industrial undertakings and hotels and for that purpose, what amount of the 'capital employed' should form the basis for computation of such relief.

Moreover, it may be noticed that under Section 29(, of the Income Tax 1961 every Rule made under the Act is required to be laid before each House of Parliament so that both Houses of Parliament have an opportunity of knowing what the rule is and considering whether any modification should be made in the rule or the rule should not be made or issued and if both Houses agree in making any modification in the rule or both Houses agree that the H Rule should not be made or issued, then the Rule would thereafter have effect only in such modified form or have no effect at all. as the case may be. Parliament has thus not parted with its control over the rule making authority and it exercises strict vigilance and control over the rule making power exercised by the Central Board of Revenue. This is a strong circumstance which militates against the argument based on excessive delegation of legislative power. This view receives considerable support from the decision of the Privy Council in Powell v.Appollo Company Limited(1) where the Judicial Committee, while negativing the challenge to the constitutionality of Section 133 of the Customs Regulation Act of 1879 which conferred power on the Governor to impose tax on certain articles of import, observed as follows:

> "It is argued that the tax in question has been imposed by the Governor and not by the Legislature who alone had power to impose it. But the duties levied under the Order-in V Council are really levied by the authority of the Act under which the Order

> is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. In these circumstances, their Lordships are of opinion that the judgment Of the Supreme Court was wrong in declaring Section 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature.
>
> The same approach was adopted by this Court in D. S.

Grewal v. State of Punjab(2) where upholding the validity of Section 3 of the All India Services Act 1951 which was challenged on the ground of excessive delegation of legislative power, Wanchoo, J. speaking on behalf of the Court said:

> "Further, by s. 3 the Central Government was given the power to frame rules in future which may have the effect of adding to, altering, varying or amending the rules accepted under s.4 as binding. Seeing that the rules would govern the all-lndia services common to the Central Government and the State Government provision was made by s.3 that rules should be framed only after consulting the State

(1)11885]10 A.C. 282.

(2)11959] Supp. 1 S.C.R. 792.

Governments. At the same time Parliament took care to A see that these rules were laid on the table of Parliament for fourteen days before they were to come into force and they were subject to modification, whether by way of repeal or amendment on a motion made by Parliament during the session in which they are so laid. This makes it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate. It will thus be seen that there is no question of excessive delegation of legislative power in the present case and, even on the view as to interpretation taken by us, sub-section (1) of Section 80J cannot be assailed as unconstitutional on the ground of excessive delegation of legislative power. We must therefore hold that subrule (3) of Rule 19A in so far as it provided for exclusion of borrowed monies and debts and particularly long-term borrowings in computation of the 'capital employed' could not be said to be outside the rule making authority conferred on the Central Board of Revenue under sub-section (1) of Section 80J and was a perfectly valid piece of subordinate legislation.

That takes us to the second point urged by Mr. Palkhivala relating to the dimension of time in regard to the expression 'capital employed'. The argument of Mr. Palkhivala was that the concept of 'capital employed' in respect of the previous year is a concept which compels attention to the reality of the capital used during the whole year and not merely on the first day of the computation period and therefore Rule 19A in so far as it provided for computation of the 'capital employed' as on the first day of the computation period was ultra vires the rule making authority of the Central Board of Revenue under sub- section (1) of Section. 80J This argument of Mr. Palkhivala is also unsustainable and must be rejected. It may be noted that when sub-section (1) of Section 80J speaks of 'capital employed' in an industrial undertaking or business of a hotel, it does not refer to 'capital employed' during the previous year but it uses the expression 'capital employed' in respect of the

previous year, There is a vital difference between the expression "during the previous year" and the expression "In connection with the previous year". The argument of Mr. Palkhivala would have had great force if the reference in sub-section (1) of Section 80J would have been to 'capital employed' during the previous year- Then it could have been contended with considerable plausibility that the 'capital employed' 11 cannot be computed as on the first day of the previous year, but it should be taken to be the average amount of 'capital employed' during the previous year. But the expression used by the Legislature in sub-section (1) of Section 80J being "capital employed.. computed in the prescribed manner in respect of the previous year", the computation has to be in respect of the previous year and it need not take into account the average amount of 'capital employed' during the previous year but it can legitimately take the first day of the previous year as the point of time at which the 'capital employed' must be computed. The 'capital employed' so computed would clearly fall within the expression "capital employed.. computed in the prescribed manner in respect of the previous year". Mr. Palkhivala relied on the description given in the parenthetical portion at the end of sub-section (1) of Section 80J which describes the amount calculated by applying the statutory rate of six per cent to the 'capital employed' computed in the prescribed manner in respect of the previous year as "the relevant amount of capital employed during the previous year", but that is merely a description given to the amount calculated as provided in the main part of sub-section (1) of Section 80J and in the main part, we find the words "in respect of the previous year" and not "during the previous year". It may be pointed out that the words "in respect of the previous year" were introduced for the first time when Section 80J came to be enacted as a result of the Report of Shri S. Boothalingam, where he recommended that the prevailing "base for the calculation of profits, nemely, average 'capital employed' in the business during each year" was complicated and difficult to establish and it was therefore desirable to adopt the basis of computation of the 'capital employed' as "at the beginning of the year but ignoring the fresh introduction of capital in the course of the year". It was following upon the introduction of the words 'in respect of the previous year" in subsection (1) of Section 80J that Rule l9A was made providing for computation of the 'capital employed' as on the first day of the computation period. Moreover, if we refer to the definition of 'statutory deduction' in sub-section (8) of Section ' and Rule I of the Second Schedule of the Companies (profits) Surtax Act 1964, it would be apparent that. according to the Legislature, the process of computation of the capital of the company includes also the specification of the point of time as on which the capital of the company shall be computed. Therefore" even if the words "in respect of the previous year" were absent, it would have been competent to the Central Board of Revenue as the rule making authority to provide for the computation of the 'capital employed as on the first day of the computation period, as was done by the Legislature in the case of the Companies (Profits) Surtax Act 1964. The words "in respect of the previous year" are facilitative of the computation of the 'capital employed' being prescribed as on the first day of the computation period. We cannot therefore accept the contention of Mr. Palkhivala that Rule l9A in so far as it provided for computation of the 'capital employed' as on the first day of the computation period was outside the rule making authority of the Central Board of Revenue under sub-section (1) of Section 80J.

We are therefore of the view that Rule 19A in so far as it excluded borrowed monies and debts in computation of the 'capital employed' and provided for computation of the 'capital employed' as on the first day of the computation period was not ultra vires Section 80J and was a perfectly valid rule within the rule making authority conferred upon the Central Board of Revenue. So also, for the same

reasons, Rule 9A in so far as it provided that the 'capital employed' in a ship shall be taken to be the written down value of the ship as reduced by the aggregate of the amounts owed by the assessee as on the computation date on account of monies borrowed or debts incurred in acquiring that ship must be held to be valid as being within the rule making authority of the Central Board of Revenue. Since, on the view taken by us, Rule 19A did not suffer from any infirmity and was valid in its entirety, Finance Act (No.2) of 1980 in so far as it amended Section 80J by incorporating Rule l9A in the Section with retrospective effect from 1st April 1972, was merely clarificatory in nature and must accordingly be held to be valid. F The writ petitions will therefore stand dismissed but having regard to the importance of the questions involved in the writ petitions, we think it would be fair and just to direct each party to bear its own costs of the writ petitions.

A.N. SEN, J. I have had the benefit of reading the judgment prepared by my learned brother Bhagwati, J. I regret I cannot pursuade myself to agree.

The material facts have been fully stated in the judgment of my learned brother. My learned brother in his judgment has set out all the relevant provisions of the Income Tax Act and the Income Tax Rules. He has also traced the legislative history of S.80J of the Income Tax Act, 1961 and has noted the various amendments effected to that section from time to time. It does not, therefore, become necessary to reproduce the same at any length in my judgment. The two questions which fall for determination are :

> (1) Whether rule 19A of the Income-Tax Act Rules insofar as the said rule excludes borrowed capital and fixes the first day of the year in the matter of computation of capital employed for the purpose of relief under section 80J is valid.
>
> (2) Whether the amendment introduced in S. 80J by the Finance (No.2) Act of 1980 incorporating in the section the provisions of the rule in relation to the exclusion of borrowed capital and the fixing of the first day of the year for the purpose of computation of the capital employed for granting relief under S. 80J with retrospective affect from 1st April, 1972 is valid ?
>
> The material provisions Of Rule 19A read as follows:- (1) For the purposes of S. 80J, the capital employed in an industrial undertaking or the business of a hotel shall be computed in accordance with sub- rules (2) to (4), and the capital employed in a ship shall be computed in accordance with sub-rule
>
> 5).
>
> (2) The aggregate of the amounts representing the values of the assets as on the first day of the computation period, of the undertaking or of the business of the hotel to which the said section 80J applies shall first be ascertained in the following manner:
>
> (i) in the case of assets entitled to depreciation, their written down value;

(ii) in the case of assets acquired by purchase and not entitled to depreciation, their actual cost to the assessee:

(iii) in the Case of assets acquired other-wise then by purchase and not entitled to depreciation, the value of the assets when they became assets of the business;

(iv) in the case of assets being debts due to the person carrying on the business the nominal amount of those debts;

(v) in the case of assets being cash in hand or bank, the amount thereof.

Explanation 1: In this rule, "Computation period" means the period for which profits and gains of the industrial undertaking or business of the hotel are computed under sections 28 to 43A.

Explanation 2: The value of any building, machinery or plant or any part there of as is referred to in cl. (a) or clause (b) of the explanation at the end of sub section (6) of section 80J shall not be taken into n account in computing the capital employed in the industrial undertaking or, as the case may be, the business of the hotel.

Explanation 3: Where the cost of asset has been satisfied other wise than in cash, the then value of the consideration actually given for the asset shall be treated as the actual cost of the asset.

(3) From the aggregate of the amount as ascertained under sub-rule (2) shall be deducted the aggregate of the amounts, as on the first day of the computation period, of borrowed moneys and debts due by the assessee (including amount due towards any liability in respect of tax ) Rule l9A forms a part of the Income-Tax Rules 1962 which have been framed by virtue of the authority conferred under section 295 of the Income-tax Act 1961. Section 295 lays down:

"(1) The Board may subject to the control of the Central Government, by notification in the Gazette of India, make rules for the whole or any part of India for carrying out the purposes of this Act;

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters:- xxx x It may be noted that the matters mentioned in sub-

section (2) do not refer to section 80J of the Act The relevant provisions of S. 80J as it stood prior to the impugned amendment by the Finance Act 2 of 1980 material for the purpose of the present proceedings may be set out:

"(1). Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction

from such profits and gains (reduced by the aggregate of the deductions, if any. admissible to the assessee under section - 80H and section 80HH) of so much of the amount thereof as does not exceed the amount calculated at the rate of six per cent per annum on the capital employed in the industrial undertaking or ship or business of the hotel as the case may be, computed in the prescribed manner in respect of the previous year relevant to the assessment year (the amount calculated as aforesaid being hereafter, in this section, referred to as the relevant amount of capital employed during the previous year) (2) The deduction specified in sub-section (1) shall be allowed in computing the total income in respect of the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning (such assessment year being hereafter, in this section, referred to as the initial assessment year) and each of the four assessment years immediately succeeding the initial assessment year. x x x (4) This section applies to any industrial undertaking which fulfills all the following conditions, namely:-

(i) it is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose; B

(iii) it manufactures or produced articles, or operates one or more cold storage plant or plants. in any part of India, and has begun or begins to manufacture or produce articles or to operate such plant or plants, at any time within the period of (thirty-three years) next following the 1st day of April, 1948, or such further period as the Central Government may, by notification in the official Gazette, specify with reference to any particular industrial undertaking; D

(iv) in a case where the industrial undertaking manufactures or produces articles, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power: E Provided that the condition in clause (i) shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in S. 33B, in the circumstances and within the period specified in that section; Provided further that, where any building or any part thereof previously used for any purpose is transferred to the business of the industrial undertaking, the value of the building or part so transferred shall not be taken in to account in computing the capital employed in the industrial undertaking:

Provided also that in the case of an industrial undertaking which manufactures or produces any articles specified in the list in the Eleventh Schedule, the provisions of clause (iii) shall have effect as if for the words 'thirty-three years', the word 'thirty-one years' had been substituted." 11 I propose to take up first the question of the validity of the Rule. I consider this will be the proper course to adopt lf the Rule is held to be valid, the question of the amendment with retrospective effect may not require any consideration at all. If, on the other hand, the Rule is held to be invalid, the question of the validity of the amendment assumes vital importance. The invalidity of the Rule, on the basis of the arguments advanced, may also have a bearing in deciding the validity or otherwise of the amendment.

The rule must be held to be valid, if the rule is found to be in conformity with and consistent with the section If, however, the rule is found to be inconsistent with and contrary to the provisions of the section, the rule has to be pronounced invalid.

Whether the rule is in conformity with and is consistent with the section or whether the rule is inconsistent with and contrary to the provisions of the section, must necessarily be determined on a proper interpretation of the section.

Principles of construction of any statute or any statutory provision are well-settled. The purpose of interpretation of any statute is to gather the true intention of the Legislature. It is well settled that "if the words of a statue are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament and there is no need to look elsewhere to discover their intention or their meaning". (See Halsbury's Laws of England, 4th Edn. Vol. 44 at P.

522). When the words of a statue are clear, plain or unambiguous, it becomes the duty of the Court to expound those words in their natural and ordinary sense, as the words used themselves best declare the intent of the Legislature If on a fair reading of a section, the words used appear to be plain and unambiguous and are reasonably susceptible to one meaning only, Courts must give effect to that meaning, unless such a meaning makes a non-sense of the section or leads to absurdity. The Court is not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language 0 used. In Emperor v. Banoari Lal Sarma,(l) Viscount Simon, L.C. Observed at P.55:-

"Again and again, this Board has insisted that in enacted words we are not concerned with the policy involved (1) A.I.R.. 1945 P.C.48.

construing or with the results, injurious or otherwise, which A may follow from giving effect to the language used".

In Kanti Lal Sur v. Paramnidhi Sadhukhan,(l) this Court at P. 910 held:-

> "lf the words used are capable of one construction only, then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the

Act".

If, however, the words of a statute are not clear and are ambiguous; different considerations may apply in interpreting the provisions for gathering the true intention of the law-giver. It is stated in Halsbury's Laws of England, 4th Edn. Vol. 44, in para 858 at P. 523, as follows:

"If the words of a statute are ambiguous, the intention of Parliament must be sought first in the statute itself, then in other legislation and contemperaneous circumstances and finally in the general rules laid down long ago, and often approved namely, by ascertaining (1)what was the common law before the making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy Parliament resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy".

As on a fair reading of S. 80J, I am satisfied that the section is sufficiently clear and the language used therein suffers from no ambiguity, it does not become necessary for me in the instant case to consider at length the principles of interpretation which are required to be observed in construing an ambiguous statute.

The material provisions of S. 80J of the Income-tax Act, prior to the impugned amendment by the Finance Act, 1980, have been earlier set out. The relevant provisions of the said section provide that where the gross total income of an assessee includes profits and gains derived from an industrial undertaking or ship or the business of a hotel to which the section applies, there shall, in accordance with and subject to the provisions of the section, be allowed in (1) A.l.R. 1957 S.C. 907. H computing total income of the assessee, a deduction from such profits and gains (reduced by the deduction, if any, admissible to the assessee under S. 80HH or S. 80HHA) of so much of the amount thereof as does not exceed an amount calculated @, 6 % per annum on the capital employed in the industrial undertaking or ship or business of the hotel as the case may be, computed in the manner prescribed in respect of the previous year relevant to the assessment year (the amount calculated aforesaid being hereinafter, in this connection referred to as the relevant amount of capital employed during the previous year) For qualifying for relief under this section, an assessee must derive profits and gains from an industrial undertaking or ship or the business of a hotel to which the section must be applicable. It is not in dispute that the assessees who have approached the Court have derived profits and gains from industrial undertaking set up by them and they qualify for relief under this section.

A plain reading of the section with reference to the language used therein clearly postulates that relief as contemplated in the section is to be allowed on the capital employed in the undertaking in the previous year, producing the profits and gains of the under taking in the previous year. An undertaking might have had capital which might not have been employed in the undertaking in previous year for earning profits and gains which were earned in the previous year. Such capital, though forming part of the capital of the undertaking, will not be entitled to the benefit of the relief under this section. Relief is contemplated only on the capital which was employed in the

undertaking in the previous year and which produced the previous year the profits and gains of the undertaking which were included in the total income of the assessee in the previous year. Relief under this section for the undertaking is clearly intended on the capital employed in the undertaking which produced the profits and gains of the undertaking in the previous year. This intention is made manifestly clear, as relief has to be granted on the basis of the profits and gains earned by the undertaking in the previous year by virtue of employment of capital in the undertaking in the previous year. The capital employed in the undertaking` which qualifies for relief under this Section clearly refers to and must necessarily be the capital employed in the undertaking in the previous year for the purpose of earning the profits. If the capital employed in the undertaking is own capital, such capital qualifies for relief. If capital employed is borrowed capita], such capital will equally qualify for relief. If capital employed consists of assessee's own capital and also his borrowed capital, the capital so employed, assessee's own and borrowed, will both qualify for the relief. The capital employed in the undertaking in the previous year which qualifies for relief under this section has to be computed in the manner prescribed. There is nothing in the section to suggest or indicate that in prescribing the manner of computation of the capital employed in the undertaking for the purpose of relief, any part of the capital which was employed in the undertaking for producing the profits and gains can be excluded. If the Legislature had any such intention for excluding any part of the capital employed in the undertaking producing profits and gains of the undertaking, the Legislature would have and could have easily made suitable provisions. The Legislature must be presumed to have known that the capital employed in an undertaking may consist of and, in fact, does consist of assessee's own capital and also capital borrowed by the assessee. It is common knowledge that most of the undertakings carry on their activities with borrowed capital in addition to own capital employed in the undertakings. Inspite of the knowledge of the Legislature that undertakings are carried on with borrowed capital, the Legislature in its wisdom has in this section mentioned capital employed in the undertaking for earning profits and gains of the undertaking without making any distinction between own capital and borrowed capital and has provided for relief in respect of the capital employed in the undertaking on the basis of profits and gains of the undertaking earned by virtue of employment of such capital. It is not disputed and cannot be disputed that profits and gains of the undertaking to be ultimately included in the total income of the assessee are produced by the capital, whether assessee's own or borrowed, employed in the undertaking in the relevant year and while computing profits and gains of the undertaking the borrowed capital is as important as the assessee's own capital and both play the same role in earning the profits and gains of the undertaking. It is the capital employed in the undertaking which qualifies for relief under this section. irrespective of the nature and source of the capital employed in the undertaking. It is, however, to be emphasised hat the capital to qualify for relief under this section, whether borrowed or own, must be employed in the undertaking in the previous year for earning profits and gains and any capital of the undertaking, borrowed or assessee's own which remains idle and is not employed in the undertaking for earning profits and gains dose not qualify for any relief under this section- ` H Sub-section 4 of S. 80J lays down the conditions which have to be fulfilled by an undertaking to qualify for the relief granted under this section. Even in this sub-section there is no indication that any undertaking set up with borrowed capital or with capital part of which may be borrowed will not be entitled to the benefits n of this section. An industrial undertaking which satisfies all the conditions laid down in sub-section 4 will undoubtedly be entitled to the benefits of S. 80J. An undertaking with borrowed capital can also very well satisfy the conditions of sub-section (4) and

qualify for the relief, as there is nothing in this sub-section which prevents an undertaking set up with wholly or partly borrowed capital from fulfilling the conditions laid down in the sub-section 4. An undertaking satisfying all the conditions in sub-section (4) and there by qualifying for relief if, however, set up with borrowed capital, will be denied the relief to which the undertaking in terms of the clear provisions of the section is justly entitled, merely on the ground that the rule prescribed for computing the relief excludes the borrowed ` capital in the computation of the capital employed for the purpose of granting the relief under this section. In other words, an industrial undertaking qualifying for the relief under S. 80J by virtue of the clear and unambiguous provisions made in the section will be denied the relief because of the rule, as on computation on the basis of the rule excluding borrowed capital, no relief will be available. As the sub-section in clear and unequivocal terms provides that S. 80J will apply to such an undertaking, the benefit intended to be given to the undertaking under this section cannot be denied to such an undertaking by any rule which will clearly have the effect of negativing the clear and unambiguous statutory provisions.

The argument of Mr. Palkhivala that the expression 'capital employed' is a term of art and is usually understood in business parlance and commercial circles and also in commercial accountancy in the sense that it includes not only owner's capital but also borrowed capital, particularly if the borrowing is on a long term basis, to my mind, has considerable force. It may be true that in different context and particularly in the context of return of capital, capital employed may not include borrowed capital. Unless the content otherwise requires and except in the case of return of capital, the expression 'capital employed' in its ordinary sense is understood to include borrowed capital. It refers to the capital, whatever may be the source, which is employed in any undertaking or venture for carrying on the business for the purpose of earning the profits and gains.

In the instant case, the words capital employed have to be A understood and interpreted in the context the said words have been used in S. 80J. It is quite clear from the text of the section that the words capital employed have been used in the context of the capital which has been employed in the under-taking for producing profits and gains of the undertaking in the relevant year. If borrowed capital is also employed in the undertaking, capital employed necessarily and clearly includes such borrowed capital which has teen employed in the undertaking and which has contributed to the profits and gains of the undertaking. To my mind, therefore, on a proper interpretation, section 80J is clear language postulates that capital employed in the undertaking includes own capital and also borrowed capital employed in the undertaking in the relevant year and the section plainly and unequivocally makes this intention of the Parliament manifestly clear.

As the Section is clear and unambiguous it is indeed not proper and necessary to refer to any other consideration for its construction. It may, however, be pointed out that this interpretation not only makes perfect sense but also clearly promotes the object for which this section was incorporated. To my mind, the object of S. 80J which indeed replaces the earlier section 84 which came in place of S. 15C of the earlier Income-Tax Act, is to give impetus and encouragement to the setting up of new industrial undertaking by offering tax incentives or tax reliefs. The object clearly is to encourage persons to set up new industrial undertakings for rapid industrialisation of the country by offering incentives in respect of undertakings covered by this section by way of grant of tax relief on the capital employed in such undertakings.

In the case of Textile Machinery Corporation v. Commissioner of Income-tax, West Bengal,(1) this Court while considering the object of a similar provision in S. 1 5C observed at page 202:

> The principal object of section 15C is to encourage setting up of new industrial undertaking by offering tax incentives within a period of 13 years from April 1, 1948. Section 1 5C provides for a fractional exemption from tax of profits of a newly established undertaking for five assessment years as specified there in. This section was inserted in the Act in 1949 by section 13 of the Taxation Laws (,Extension to (1) (1977) 107 I.T R. 195 Merged States and Amendment) Act 1949 (Act 67 of '919), extending the benefit to the actual manufacture or production of articles commencing from a prior date, namely, April 1, 1948. After the country had gained independence in 1947 it was most essential to give fillip to trade and industry from all quarters. That seems to be the background for insertion of section 15C.
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> It is also significant that the limit of the number of years for the purpose of claiming exemption has been progressively raised from the initial 3 years in 1949 to 6 years in 1953. 7 years in 1951, 13 years in 1956 and 18 years in 1968. The incentive introduced in 1949 has been thus stopped up ever since and the only object is that which we have already mentioned." In the case of Rajapopalayan Mills Ltd. v.

Commissioner of Income Tax Madras,(1) this Court had also held at page 783:

> "The law of income-tax in a modern society is intended to achieve various social and economic objectives. It is often used as an instrument for accelerating economic growth and development. S. 15C is a provision introduced in the . Indian I.T. Act, 192, with a view to carrying out this objective and it is calculated to encourage setting up of new industrial undertakings in the country."

The rapid industrialisation of the country for economic growth in the larger interests of the country is the main object of this section which seeks to afford an incentive or tax relief to new industrial undertakings which satisfy the requirements of the section.

To my mind, the argument of the learned Attorney General that the provision contained in the Section requiring 'the capital employed to be computed in the manner prescribed' authorises the rule making authority to include or to exclude borrowed capital at its discretion by making appropriate provision in the rules as to exclusion of a part of the capital employed for computation of capital employed for the purpose of granting relief under the section is clearly untenable. The section only enjoins that capital employed is to be computed in the manner to be prescribed and the (1) (1976) 115 ITR 777.

manner of computation of the capital employed only authorises A, the rule making authority to deal with the details regarding computation of capital employed for carrying out the provisions of the section and the provision regarding the manner of computation does not empower or authorise the rule making authority to lay down which part of the capital employed or how much of it will have to

be included or excluded and to what extent, if any: The question whether there should be any such exclusion or inclusion in the matter of consideration of the grant of relief, is essentially a matter of policy for the Legislature to decide and is not a matter for the rule making authority to prescribe. The power of the rule making authority in terms of the provision contained in section 295 of the Income-tax Act which confers such power is limited to the framing of rules for carrying out the purposes of the Act. The rule making authority is not competent to prescribe any rule which will be in the nature of a substantive provision of the Act itself and more particularly, which will be in conflict with the substantive provision of the section itself and which will in any way defeat or frustrate the purpose for which any provision in the Act has been enacted. In the instant case I am clearly of the opinion on a construction of S. 80J that the said section unequivocally and in clear terms provides that capital employed for earning the profits of the undertaking is the capital which is entitled to the benefit of the relief. The exclusion of borrowed capital by the rule making authority in the rules prescribed for computation of the relief under S. 80J is inconsistent with and derogatory to the provisions of the statute. The said rule not only fails to carry out the purpose of the said section but in fact tends to defeat the same and the rule runs clearly contrary to the provisions of the statute. The rule excluding borrowed capital must, therefore, be held to be bad and invalid.

The argument of Mr. Palkhivala that any such rule framed by the rule making authority including or excluding any part of the capital employed in the undertaking in the absence of any guideline will also be clearly beyond the power of the rule making authority, to my mind. is sound. In the section itself or in any other provision of the Act it does not appear that there is any provision laying down any guideline which may entitle the rule making authority to exclude any part of the capital employed, whether it is borrowed capital or own capital. No such provision or guideline is there in the Act. To my mind, there could not possibly be any such provision or guideline in the Act, as the section itself clearly provides that the entire amount of capital employed for earning the profits will qualify for the relief. If it be held that the rule making authority enjoys and such power of excluding any part of the capital employed in the undertaking because of the provision in the section regarding "computation of capital employed in the manner prescribed" it must necessarily be held that the rule making authority enjoys the power of framing a rule contrary to the provision of the section. It must further be held that the rule making authority at its discretion enjoys the power to exclude the whole or part of owner's capital and also the whole or part of the borrowed capital. this interpretation will mean that interpretation the power will be available with the rule making authority which at its discretion and in the absence of any guideline will be entitled to exclude any or every part of the capital employed even to an extent of rendering the section itself nugatory. This interpretation will have the effect of justifying a delegation of power to the rule making authority to an extent which cannot be permitted. l have no hesitation in coming to the conclusion that the rule making authority does not enjoy any such power or jurisdiction. No such power or jurisdiction in the absence of specific provision and clear guideline in the Act could be delegated to the rule making authority.

In the case of Sales Tax Officer v. KS. Abraham(l) this Court had the occasion to construe the meaning of the phrase "in the prescribed manner" occurring in S. 84 of the Central Sales-Tax Act, 1956. In dealing with the vires of rule 6 of the Central Sales Tax (Kerela) Rules, 1967 in so far as the said rule purported to prescribe a time limit within which' the declaration was to be filed by the registered dealer, this Court held,-

> "In our opinion, the phrase 'in the prescribed manner' occurring in S. 8 (4) of the Act only confers power on the rule making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form the nature and value of the goods sold, the parties to whom they are sold, and to which authority the form is to be furnished. But the phrase 'in the prescribed manner' in S. 8 (4) does not take in the time element. In other words, the section does not authorise the rule-making authority to prescribe a time-limit within which the declaration is to be filed by the registered dealer. The view that we have taken is supported by the language of S. 13 (4) (g) of the Act (1) [1967] 3 S.C.R. 518.

which states that the State Government may make rules for 'the time within which, the manner in which and the authorities to whom any change in the ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished.' This makes it clear that the Legislature was conscious of the fact that the expression 'in the manner' would denote only the mode in which an act was to be done, and if any time limit was to be prescribed for the doing of the act, specific words such as 'the time within which' were also necessary to be put in the statue.

The Privy Council in the case of Utah Construction & Engineering Pvt. Ltd. and Anr. v. Pataky,(l) observed at pages 653-654:

> "Their lordships now pass to S. 22 (2) (g) (iv) and
>
> (v). Sub-paragraph (iv) empowers the Governor to make regulations "relating to the manner of carrying out.. excavation work'. The relevant portion of reg. 9X provides 'Every drive and tunnel shall be securely protected and made safe for persons employed therein'.

The expression 'manner of carrying out' the work plainly envisages a system of working, and does not in their lordships view justify a regulation imposing an absolute duty of protecting the drive and tunnel or an absolute duty of ensuring the safety of persons employed in the drive or tunnal. The relevant portion of reg. 98 does not prescribe the manner of doing the work. Sub paragraph (iv) therefore cannot in their lordships opinion empower the making of the relevant portion of reg. 98. ' F The proposition that the rule making authority does not have any power to encroach upon any substantive provision in the statute appears to be beyond dispute. By virtue of S 295 (1) of the Income-tax Act, the rule making authority is empowered to make rules for carrying out the purposes of the Act and sub-section 2 which specifically refers that such rules may provide for all or any of the matters mentioned in the said subsection does not make any reference to S. 80J. In prescribing the manner of computation of capital employed, the rule making authority, in the absence of specific provision in the section itself or in the absence of any statutory provision, cannot exclude any (1) [196513 All. E.R. 650, part of capital employed in the undertaking at its discretion under the guise of the process of prescribing the manner of computation.

The argument of the learned Attornney General that as an undertaking which employs borrowed capital gets relief because in calculating the profits and gains the interest paid on the borrowed

capital is taken into account, the rule making authority in prescribing the manner of computation of capital employed is entitled to exclude borrowed capital to avoid grant of double relief to the undertaking, is without any merit. Interest paid on borrowed capital by any undertaking, whether it is an undertaking within the meaning of S.80J J or not, is taken into account as business expenditure in calculating the profits and gains of any undertaking. It is the prescribed mode of calculating the profits and gains of every undertaking and is no special benefit for any undertaking: and, undoubtedly it affords no incentive of special relief to a new undertaking which has necessarily to satisfy the required conditions laid down in S 80J for being entitled to the relief intended to be granted to an undertaking which comes within the purview of S.80J. In any event, such inclusion or exclusion on any consideration will be a matter of policy to be determined by the Legislature and not a matter for the rule making authority to lay down in prescribing the mode of computation.

The decision of the Calcutta High Court in the case of Century Enka Ltd. v. I.T.o.,(1) the decision of the Madras High Court in the case of Madras Industrial Linings Ltd. v. I.T.o.(2), the decision of the Allahabad High Court in Kota Box Manufacturing Co. v. I.T.o.(3) the decision of the Punjab and Haryana High Court in the case - of Ganesh Steel Industries v. I.T.o.(4), the decision of the Andhra Pradesh High Court in the case of Warner Hindustan Ltd. v. I.T.o.(5) holding the rule to the extent it excludes borrowed capital in the computation of capital employed for the purpose of granting relief under section 80J to be invalid, are correct and l have no hesitation in upholding these decisions 'The contrary view expressed . by the Madhya Pradesh High Court in the case of Commissioner of Income Tax, M.P. Il v. Anand Bahri Steel and Wire Products(n) must necessarily be held to be erroneous.

(1) [1977] 107 ITR 123.

(2) [1977] 110 ITR 256.

(3) [1980] 123 ITR 638.

(4) [1980] 126 ITR 258.

(5) [1982] 134 lTR .158.

(6) [l982] 133 ITR 365.

It may be noticed that the Madhya Pradesh High Court proceeded to hold the rule to be valid mainly on the ground that this rule has been in existence for a long time under S.15C of the earlier Act which subsequently came to be replaced by S.80J and the Parliament must have been aware at the time of enacting S.80J of the existence of the rule framed by the rule making authority which held the field for a long period without any challenge. The decision proceeds on the basis that the Parliament must have, therefore, accepted the interpretation put by the rule making authority at the time the Parliament enacted S 80J. This decision does not take into consideration the fact that the interpretation put by the rule making authority has not been the same all throughout and has undergone changes from time to time and the rule making authority has in certain years also

permitted certain classes of borrowed capital to be taken into account in computation of capital employed for the purpose of relief. The decision of the Madhya Pradesh High Court does not also take into consideration the question whether the rule seeking to include or exclude borrowed capital at the discretion of the rule making authority in the absence of any statutory provision or guideline, becomes bad on account of unjustified excessive delegation of authority. The decision of the Madhya Pradesh High Court has not proceeded to construe S.80J correctly to gather the true intention of the Parliament before deciding the question as to whether the rule excluding borrowed capital is consistent with the intention of Parliament clearly expressed in S.80J.

In my opinion, the mere existence of an invalid rule without any challenge for any length of time does not affect the question of validity of the rule and cannot render a rule otherwise invalid to be valid only on the ground that the rule had remained in existence without any challenge for a number of years. In the case of Proprietary Articles Trade Association v. Attorney General for Canada(l), the Judicial Committee while considering the vires of a statute namely, Combines Investigation Act R.S. Can. 1927, c. 26 passed by the Parliament of Canada observed at p. 317:-

> "Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment." In the case of Campbell College Belfast (Governors) v.

Commis-

(1) [1931] A.C. 310.

sioner of Valuation for Northern Ireland(l), the House of Lords while considering the validity of payment of rates by fee paying public school in Northern Ireland which has continued for over 132 year.. despite the terms of s. 2 of the Valuation (Ireland) Act Amendment Act, 1954, held at p. 941 to 942 :

> " my Lords, for my part I am quite unable to apply that principle to a statute although it was passed` over 100 years ago, but its language is plain and unambiguous and it was not misconstrued until the decision in the Alexandra College case 60 years later. True it is that fee paying schools did always pay rates in accordance with section 2, but until 1914 that was not because it was assumed that section 2 was con trolled by the proviso, and that charitable purposes bore a limited meaning. It may have been that it was thought that if some of the pupils were free paying, section 16 of the Act of 1852 was not satisfied. That argument is now untenable n and, as Black L.J. point out at an early part of his judgment, Campbell College is clearly for this purpose a charitable institute. My Lords, in these circumstances I can attach no weight whatever to this long unquestioned payment when construing section 2. To my mind, this doctrine can have no application to the circumstances of this case.

It is also well-settled that even if the rules have been laid before the Parliament and there is a resolution of the Parliament approving the rules, the validity of the rules has to be declared by the Court and the Court can declare any rule placed before the Parliament and approved by the Parliament to be ultra vires the Act and invalid. In the case of Kerala State Electricity Board. v. Indian Aluminium(2)., this Court held at p.576:-

> "In India many statutes both of Parliament and of State Legislatures provide for subordinate legislation made under the provisions of those statutes to be placed on the table of either the Parliament or the State Legislature and to be subject to such modification, amendment or annulment, as the case may be, as may be made by the Parliament or the State Legislature. Even so, we do not think that where an executive authority is given power to frame subordinate legislation within stated limits, rules made by such authority (1) [1964] I W.L.R. 912.

(2) [1976] I S.C.R.552.

if outside the scope of the rule making power should be deemed to be valid merely because such rules have been placed before the legislature and are subject to such modification, amendment or annulment, as the case may be as the legislature may think fit. The process of such amendment, modification or annulment is not the same as the process of legislation and in particular it lacks the assent either of the President or the Governor of the State, as the case may be. We are, therefore, of opinion that the correct view is that notwithstanding the subordinate legislation being laid on the table of the House of Parliament or the State Legislature and being subject to such modification, annulment or amendment as they may make, the subordinate legislation cannot be said to be valid unless it is within the scope of the rule making power provided in the statute."

The other impugned provision of the rule, prescribing that capital employed should be computed on the basis of the capital employed on the first day of the year, must on a proper construction of the section be also held to be invalid. The section clearly provides that the deduction to be allowed is to be computed in the prescribed manner in respect of the previous year relevant to the assessment year. The deduction to be allowed is on the profits and gains of the undertaking earned in the relevant year in respect of the previous year relevant to the assessment year. Profits and gains which are to be taken into account are the profits and gains earned in the relevant year and the year must necessarily mean and include the whole of the year and not some days or months of the year. The capital employed for earning the posts and gains - dring the whole year must necessarily be the capital which is entitled to the benefit of the section. Capital employed on the 1st day of the year does not produce the profits of the entire relevant year, unless the very same amount of capital remains employed throughout the year. It does not usually happen and in any event it may not happen. Therefore, by prescribing the 1st day of the year to be the date of . computation of the capital employed, the capital employed during the whole year is sought to be denied by the rule the benefit to which it is entitled under the section. This provision, therefore, is clearly contrary to and inconsistent with the specific provision of the statute, as by fixing the 1st day of the year to be the date of computation of the capital employed for the year, the rule making authority is seeking to deny the benefit conferred by the statute.

Andhra Pradesh High Court in the case of Warner Hindustan H Ltd. and Anr. v. Income-tax Officer and Ors. (supra) in dealing with this question has referred to the decision of the Calcutta High Court in Century Enka Ltd. v. Income-tax Officer (supra) on this very point and in agreement with the decisions of the Calcutta High Court, the Andhra Pradesh High Court held at p. 195:-

> "As observed by a learned Judge of the Calcutta High Court in Century Enka Ltd. v. Income tax Officer(l),the main consideration upon which this question has to be resolved is (p. 132), 'whether having regard to the purpose for which provisions of S. 80J of the Act was introduced, it was the legislative intent to restrict the capital employed in any manner so as to limit it to the first day of the computation period'. So far as S. 80 J is concerned, it does not give any such indication. That apart, such computation of capital employed in an industrial undertaking would defeat the very purpose of the undertaking and would lead to incongruous and anomalous results. While an assessee who has employed the capital in an industrial undertaking on the very first day but has withdrawn it for the major part of the year would be entitled to the full benefit, an assesses who has not employed the capital on the first day but has employed it during the major part of the previous year would be deprived of the benefit. If the intendment of the Act is to give tax holiday for the new industrial undertaking with a view to help them find their roots and encourage entrepreneur to establish new industrial undertakings and pave the way for rapid industrial growth in the country then the purpose would be not served. In fact, it would be defeated if the capital employed is computed with reference to the first day of the computation period and not in respect of the previous year relevant to the assessment year".

The Calcutta High Court and Andhra Pradesh High Court have both held this part of the rule fixing the first day of the year for computing the capital employed for the purpose of granting relief under S. 80J to be invalid. I find no difficulty in upholding the decision of the Calcutta High Court and of the Andhra Pradesh High Court on this question.

I know proceed to consider the other question about the validity of the amendment of section 80J introduced by the Finance (1) [1977] 107 I.T.R. 123.

Act 2 of 1980. By the amendment the provisions contained in the - A rule excluding borrowed capital and fixing the first day of the year for computation of capital employed for the purpose of relief under S. 80J have been incorporated in the section itself with retrospective effect from 1.4.72.

On behalf of some of the assessees the amendment both with; regard to its prospective and retrospective operation has been challenged. Dr. D. Pal, supported by other learned counsel, addressed us mainly on the aspect of prospective operation, while supplementing and supporting the submissions of Mr. Palkhivala on the aspect of retrospective operation. Mr. Palkhivala who has been the principal spokesman for the assessees, confined his challenge to the validity of the amendment mainly to the retrospective part, although he made it clear that he was not conceding the validity of the prospective operation.

I propose to consider the submission of Dr. Pal in the first instance. If the submission of Dr. Pal that the entire amendment is invalid is accepted, the submission of Mr. Palkhivala that the amendment in so far as it is made retrospective is also bad must necessarily succeed.

Dr. Pal has argued that the amendment seeks to make an invidious distinction between own capital and borrowed capital in the matter of granting relief under this section. It is the argument of Dr. Pal that having regard to the object of the section which is to promote new industries and to give relief on the basis of the capital employed in such new industries by way of incentive, distinction between own capital and borrowed capital is wholly irrelevant -, and does not have any nexus with the object sought to be achieved and this distinction between own capital and borrowed capital in the matter of computation of capital employed in the undertaking for the purpose of granting relief results in justified discrimination and is therefore violative of Art. 14 of the constitution. To my mind, there is no merit in the submission of Dr. Pal. It is entirely a matter for the Parliament to decide whether any relief by way of incentive should be allowed and if so to what extent and in what manner. There is no obligation on the part of the Parliament to make any provision for granting relief to promote new industries. The Legislature in its wisdom may decide to grant relief and may equally decide not to grant any relief. It is essentially for the Legislature to decide as to whether any incentive for promoting industrial growth of the country is called for and if the Legislature feels that in the situation prevailing in the country such incentive should be provided it will be again for the Legislature to decide what kind of incentive and in what form and to what extent the same should be provided and to pass appropriate legislation in this regard. The Parliament would have been legally competent to withdraw the entire relief under section 80J and to abrogate the said section in its entirety, if the Parliament had considered such withdrawal to be necessary. The Parliament is equally competent to increase or reduce the quantum of relief intended to be given under this section. In providing that relief intended under S. 80J would be allowed only to owner's own capital and not to any borrowed capital, there can be no infringement of Art. 14. No entrepreneur or businessman can claim as a matter of right that relief by way of incentive should be provided to new undertakings to be set up by him. The Parliament provides for such relief in pursuance of a policy and policy may change from time to time in view of the situation prevailing from time to time. The Parliament may legitimately feel that borrowing by businessman may not be encouraged and persons should be encouraged to bring their own money for setting up new undertakings and Parliament may provide for appropriate relief by way of incentive to the owner's capital employed to the exclusion of borrowed capital in the setting up of any new industrial undertaking. Whether it is prudent to do so is essentially a matter for the Parliament in its wisdom to decide. It is not for this Court to sit in judgment over the wisdom of the Parliament in the framing of its policy. The discrimination in the matter of granting relief to own capital to the exclusion of borrowed capital in pursuance of a policy cannot be said to be violative of Art 14, as the two classes of capital, though forming a part of the total capital of the undertaking, are distinct p and they stand on a different footing. A classification between these two classes of capital for encouraging investment of own capital in setting up new industrial undertakings, cannot be held to be unreasonable and unjustified. The contention of Dr. Pal that the amendment in discriminating between borrowed capital and owner's own capital in the enjoyment of relief under section 80J infringes Art. 14, must therefore, be rejected. Very properly in challenging the validity of the amendment in so far as it operates prospectively, no grievance in regard to violation of Art. 19 of the Constitution has been made.

I now pass on to the question of the validity of the amendment with retrospective effect from 1.4 1972.

It has been contended by the learned counsel for the assessees that the retrospective operation of the provision is unreasonable arbitrary and violative of Arts. 14 and 19 of the Constitution. The main argument is that the withdrawal of relief granted by the statute A before the present amendment and lawfully enjoyed by the assessee during all these years and thereby imposing on the assessee an unjust, unmerited and accumulated huge financial liability, cannot be considered to be reasonable; and such imposition of accumulated liability will seriously affect the financial stability of the undertakings and will further create various other difficulties which may be almost impossible for the assessees to overcome. It has been argued that the present amendment has not been necessitated as a result of any provision of the statute being declared ultra vires for any lacuna in the statutory provision and there is no question of any liability being foisted on the Government of refunding any large sun of money collected as tax from the assessees on account of any statutory provision imposing any levy being declared invalid or unconstitutional. It is submitted that in view of the unequivocal provision of the statute granting relief to borrowed capital which was sought to be negated and denied by an invalid rule which has been struck down, the assessees are legitimately entitled to the relief and they have rightly and justifiably arranged their affairs on the basis of the law as it stood. The existence of an invalid rule and the tendency of appeals in this Court against the judgment of the various High Courts declaring the rule to be invalid cannot be considered to be relevant factors, particularly when the statutory provision is clear, for guiding the assessee who has to carry on its normal trading activities, in arranging its affairs. The submission is that the withdrawal or relief lawfully granted and properly enjoyed by the assessees after this long lapse of time, when no serious prejudice is caused or is likely to be caused to the public exchequer and on the other hand a heavy unwarranted financial burden along with other difficulties and problems are created for the assessee, cannot be said to be in public interest and must be held to be unreasonable, arbitrary and violative of Art. 14 and 19 of the Constitution.

The learned Attorney General has submitted that retrospective operation of the provision does not suffer from any infirmity and is not arbitrary or unreasonable nor is it violative of Art. 14 and 19 of the Constitution. He argues that prior to rule 19-A being considered by some of the tribunals and by various High Courts, the said rule excluding borrowed capital in the matter of computation of relief and fixing the 1st day of the year as the relevant date for the computation of relief has remained in force for a number of years. It is his argument that after the said rule had been struck down, the validity of the decisions has been challenged and was pending appeal in this Court; and the appeal was pending at the time when the present amendment came to b enacted in 1980. The Learned Attorney General contends that as rule 19-A excluding borrowed capital and fixing the first day of the year as the date for computation of relief had remained in force for a number of years and as the decision striking down the rule is now pending appeal, the assessees were not justified in arranging their affairs on the basis of the said rule being invalid and as prudent men of business they should have so arranged their affairs as to cover every contingency and particularly the contingency of the validity of the rule being upheld by this Court. The Learned Attorney General has submitted that the amendment has been introduced before the decision of this Court in the pending appeals, as the Parliament wanted to clarify the position in the interest of all concerned and more so in the interest

of the assessees to enable the undertakings which qualified for relief under S. 80J to enjoy the benefit intended to be conferred by the Section. It is the submission of the Learned Attorney General that in the absence of any valid rule prescribing the manner of computation of relief to which the assessee may be entitled under S. 80J, the benefit cannot be computed and, therefore, no benefit contemplated under S. 80J may be at all available to the assessees. He submits that if the rule is held to be valid by this Court in these appeals, the arguments of the assessee that the assessee has arranged its affairs on the basis of invalidity of the rule will be of no avail; and he further submits that if the invalidity is upheld by this Court in these appeals, the assessee in the absence of any valid rule prescribing the manner of computation of the relief will not be entitled to the benefit of any relief under the section. It is his submission that in these circumstances the Parliament with the object of seeing that the assessee who is entitled to any relief under S. 80J is not denied such relief over these years for lack of provision of a suitable rule prescribing the manner p of computation of such relief, has amended the section itself with retrospective effect from 1972 in the interest of the assessees them selves. It is the submission of the Attorney General that as the amendment with retrospective effect has been made essentially in the interest of the assessees to enable them to enjoy the relief intended to be given under S. 80J, the retrospective effect of the amendment cannot be said to be unreasonable or arbitrary and the retrospective amendment dose not violate either Art. 14 or 19 of the Constitution, even if the retrospective effect may operate harshly on some assessees.

Before considering the arguments advanced on behalf of the parties, I propose at this stage to refer to some of the decisions cited from the Bar on this aspect.

In the case of Epari Chinna Krishna Moorthy, Proprietor Epari A Chinna Moorty and Sons, Berhampur Orissa v. State of Orissa,(l) it was observed at p. 191:-

> "Mr. Sastri also argued that the retrospective operation of the impugned section should be struck down as unconstitutional, because it imposes an unreasonable restriction on the petitioners' fundamental right under Art. 19 (1) (g). It is true that in considering the question as to whether legislative power to pass an Act retrospectively has been reasonably exercised or not, it is relevant to enquire how the retrospective operation operates. But it would be difficult to accept the argument that because the retrospective operation may operate harshly in some cases., therefore, the legislation itself is invalid. Besides, in the present case, the retrospective operation dose not spread over a very long period either. Incidentally, it is not clear from the record that the petitioners did not recover sales tax from their customers when they sold the gold ornaments to them". D In the case of Rai Ram Krishna & Ors. v. State of Bihar(2). this Court observed at pp. 914-917:-
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> "Mr. Setalvad contends that since it is not disputed that the retrospective operation of a taxing statute is a relevant fact to consider in determining its reasonableness, it may not be unfair to suggest that if the retrospective operation covers a long period like ten years, it should be held to impose a restriction which is unreasonable and as such, must be struck down as being unconstitutional. In support of this plea, Mr. Setalvad has referred us to the observations made by Sutherland. 'Tax Statute,' says

> Sutherland, "nay be retrospective if the legislature clearly so intends. If the retrospective feature of a law is arbitrary and burdensome, the statute will not be sustained. The reasonableness of each retrospective tax statute will depend on the circumstances of each case. A statute retroactively imposing a tax on income earned between the adoption of an amendment making income taxestes legal and the passage of the income tax Act is not unreasonable Likewise an Income tax not retroactive beyond the year of its passage is clearly valid. The longest (1) [1964 7] S.C.R. 185.
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> (2) [1964] I S.C.R.897 period of retroactivity yet sustained has been three years.

In general, income taxes are valid although retroactive, if they affect prior but recent transaction.' Basing himself on these observations Mr. Setalvad contends that since the period covered by the retroactive operation of the Act is between April 1, 1950 and September 25, 1961, it should be held that the restrictions imposed by such retroactive operation are unreasonable, and so, the Act should be struck down in regard to its retrospective operation. We do not think that such a mechanical test can be applied in deter mining the validity of the retrospective operation of the Act. It is conceivable that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the restrictions imposed by it may be open to serious challenge as unconstitutional, but the test of the length of time covered by the retrospective operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively short period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the retrospective operation. On the other hand we may get cases where the period covered by the retrospective operation of the statute, though long, will not introduce any such infirmity. Take the case of a Validating Act. If a statute passed by the legislature is challenged in proceedings before a Court, and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long period and the legislature may well decide to await the final decision in the said proceedings before it p uses its legislative power to cure the alleged infirmity in the earlier Act. In such a case, if after the final judicial verdict is pronounced in the matter the legislature passes a validating Act, it may well cover a long period taken by the judicial proceedings in Court and yet it would be in appropriate to hold that because the retrospective operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test".

It the case of Jawaharlal v. State of Rajasthan & Ors.(l) this Court held at p. 905:-

(1) [l966] 1 S.C.R.890.

> "We have already stated that the power to make laws A involves the power to make them effective prospectively as well as retrospectively, and tax laws are no exception to this rule. So it would be idle to contend that merely because a taxing statute purports to operate retrospectively, the retrospective operation per se involves

> contravention of the fundamental right of the citizen taxed under Art. 19(1)(f) or (g). It is true that cases may conceivably occur where the Court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the Court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation".

In the case of Assistant Commissioner of Urban Land Tax v. The Buckingham & Carnatic Co. Ltd.l etc. it was observed at P.287:-

> "It is contended on behalf of the petitioners that the
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> - retrospective operation of the law from 1st July, 1963 would make it unreasonable. We are unable to accept the argument of the petitioners as correct. It is not right to say as a general proposition that the imposition of tax with retrospective effect per se renders the law unconstitutional. In E: applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itself".

In the case of M/s. Krishnamurthi & Co. Etc. v. State of p Madras & Anr.(2j this Court observed at P. 61:-

> "The object of such an enactment is to remove and rectify the defeat in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been found by the Court to be vitiated by an infirmity. Such an amending and validating Act in - the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending (1) [1970] I S.C.R. 268.

(2) 1197312 S.C.R. 54, i 11 and validating Act to make small repairs' is a permissible mode of legislation and is frequently resorted to in fiscal enactments."

Similar observations have been made by this Court in the case of Hira Lal Rattan Lal etc. etc. v. State of U.P. & Anr. etc(l) at P. 511:-

> "A feable attempt was made to show that the retrospective levy made under the Act is violative of Art. 19(t) (f) and (g). But we see no substance in that contention. As seen earlier, the amendment of the Act was necessitated because of the legislature's failure to bring out clearly in the principal Act its intention to separate the processed or split pulses from the unsplit or unprocessed pulses. Further the retrospective amendment became necessary as otherwise the State would have to refund large sum of money".

In the case of State of Gujarat v. Ramanalal Keshave Lal Soni(2), this Court observed at p. 62:-

> "The Legislature is undoubtedly competent to legislate y with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to do's and don'ts of the Constitution; neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights an-i not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history".

The power and competence of the Parliament to amend any (1) [1973] 2 S.C.R. 502.

(2) [1983] 2 S.C.C. 33.

statutory provision with retrospective effect cannot be doubted. Any A retrospective amendment to be valid must, however, be reasonable and not arbitrary and must not be violative of any of the fundamental rights guaranteed under the Constitution. The mere fact that any statutory provision has been amended with retrospective effect does not by itself make the amendment unreasonable. Unreasonableness or arbitrariness of any such amendment with retrospective effect has necessarily to be judged on the merits of the amendment in the light of the facts and circumstances under which such amendment is made. In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not, it becomes relevant to enquire as to how the retrospective effect of the amendment operates. C In the large interest of administration and for promotion of public interest and welfare of the country power has been conferred by the Constitution on the Parliament to mobilize resources and to levy tax. In view of the complexity of fiscal adjustment of diverse elements the Parliament necessarily enjoys a very wide discretion in the matter of fiscal legislation. To meet various expenses for proper administration, maintenance of defense and security, for promoting peace and prosperity and for development of social, economic and all round growth of the country, the Government must have resource and sufficient funds at its disposal. Suitable provisions have necessarily to be made for raising the revenue and for proper realisation of funds to be collected to meet such expenses. Appropriate legislations including various fiscal laws are enacted for this purpose. Imposition of any tax by the Parliament is therefore considered to be made in public interest. It may so happen that any provision of any enactment imposing a particular levy may be challenged in Court and may be challenged successfully; and the particular levy may, for some reason or other, be held to be constitutionally invalid. If any particular provision of any statute imposing any tax which has been or is being collected, is struck down as unconstitutional, the financial arrangement of the State may become upset and the Government which might have already collected and even utilised the tax, may be called upon to refund taxes so collected. If such a situation arises the economy of the State may get unbalanced and difficulties may arise for meeting the various commitments and obligations. Under such circumstances a Validating Act may be passed and is often enacted to

remove the infirmities which might have led to the invalidation of the provision imposing the levy. Validating Acts for meeting such situations have necessarily to be passed with retrospective operation so that the fiscal arrangement of the State and its financial commitments may not in any way be in jeopardy and the State may be relieved of the liability of refunding any tax already collected. A validating Act validating any fiscal provision with retrospective operation is usually held not to be unreasonable or arbitrary. In the case of any Validating Act, the intention of the legislature is generally made sufficiently clear in the section or in the Act which is declared invalid on account of some flaw or defect which is within the competence of the Parliament to rectify. Such Validating Acts, it may be observed, do not in fact have the effect of imposing a fresh tax with retrospective effect and they only legalese the levy already imposed. There is in effect and substance no imposition of any new tax for the earlier years by virtue of the retrospective operation and the retrospective operation merely validates the levy already imposed and possibly collected. The present amendment, has been necessitated not as a result of any part of S. 80J being declared invalid. There was no lacuna or defect in section 80J prior to the impugned amendment and the section which was perfectly valid granted relief in clear and unambiguous language to the assessee in respect of capital employed, whether assesses' own or borrowed, in an undertaking which qualified for relief under the section. The rule making authority by framing an invalid rule sought to deny the asks the benefit of the relief lawfully and validly granted by the section. The rule was contrary to the clear provisions of the statute and the invalid rule has been rightly struck down. By the present amendment the Parliament is seeking to validate not any provision of the State declared invalid because of any flaw or defect, as there was none, but is seeking to validate an invalid rule which had sought to deprive the assessee of the benefit which the Parliament had clearly bestowed on the assessee by the section. The effect of the present amendment by seeking to incorporate the provisions of the rule declared invalid in the section itself is to withdraw with retrospective effect the relief which had been earlier granted by the Parliament in so far as the relief extends to borrowed capital employed in the undertaking and thereby to impose on the assessee a burden of tax which was not there for all these years. As a matter of policy it may be open to the Parliament to withdraw the relief granted to borrowed capital by an amendment with prospective effect consequent on any such amendment. To withdraw with retrospective effect the benefit of relief unequivocally granted by the section to an assessee who qualified for such relief and was lawfully entitled to enjoy the benefit of such relief and has in fact in many cases enjoyed the benefit for all these years, prior to the present amendment with retrospective effect, cannot, in my opinion, be said to on any just and valid grounds and cannot be considered to be reasonable. If any fiscal statute grants relief to any assessee and the assessee enjoys the benefit of that relief, as the assessee is legally entitled under the statute, the withdrawal of the relief validly and unequivocally granted and enjoyed by any A assessee must necessarily in the absence of proper grounds be held to be unreasonable and arbitrary. The relief granted under section 80J before the present amendment was not merely a promise on the part of the Government relying on which the assessee might have set up new undertakings, but it was in the nature of a statutory right confer- red on any assessee might have set up new undertakings, but it was in the nature of a statutory right conferred on any assessee who qualified for such relief under the section. The withdrawal with retrospective effect of any relief granted by a valid statutory provision to an assessee, depriving the assessee of the benefit of the relief vested in the assessee, stands on a footing entirely different from the footing which may necessitate the passing of a Validating Act seeking to validate any statutory provision declared unconstitutional. When Parliament passes an amendment

validating any provision which might have been declared invalid for some defect or lacuna, the Parliament seeks to enforce its intention which was already there by removing the defect or lacuna. The Parliament indeed seems to remedy the situation created as a result of the statutory provision being declared invalid. As I have earlier observed, this is done in public interest for properly regulating the fiscal structure and to relieve the Government of any financial burden by way of refund of taxes collected for enabling the State to implement its budget by proper collection of revenue expected to be realised. When the Parliament in any fiscal statute proposes to grant any relief to any assessee the Parliament must be presumed to do so in public interest. In the instant case section 80J granted relief for the purpose of promoting the industrial growth of the country by affording incentive for the setting up of new undertakings. As a matter of policy again the Parliament may withdraw such relief or any part thereof or modify the nature, extent and kind of relief, if Parliament may withdraw such relief or any part thereof or modify the nature, extent and kind of relief, if Parliament in its wisdom may consider any such action necessary and proper and any such act done by the Parliament must also be regarded to have been done in public interest. However, the withdrawal or modification with retrospective effect of the relief properly granted by the statute to an assessee which the assessee has lawfully enjoyed or is entitled to enjoy as his vested statutory right depriving the assessee of the vested statutory right, has the effect of imposing a levy with retrospective effect for the years for which there was no such levy and cannot, unless there be strong and exceptional circumstances justifying such withdrawal or modification, be held to be reasonable or in public interest. This kind of retrospective amendment, seeking to defeat an accrued statutory right is likely to affect the sanctity of any statuory provision and may A create a state of confusion. The only circumstance which appears to have led to the present retrospective amendment is the existence of the invalid rule. The existence of any invalid rule seeking to deny an assessee a benefit clearly and unequivocally granted to an assessee by the Legislature, lawfully and properly enjoyed or to be impugned amendment in 1980 the relief granted by S. 80J had been in force and had been legitimately available to the assessee. In view of the clear provision made in the statute by Parliament itself the Parliament must be presumed to have been aware that the relief as contemplated under S. 80J was available to the assessee and the assessee had been enjoying and were entitled to enjoy the benefit of the said relief. The Parliament must have and in any event must be presumed to have arranged the financial affairs of the State on the footing that the relief allowed to an assessee under S. 80J was being enjoyed and would be enjoyed by the assessee In view of the clear provision of the statute which must be held to manifest the true intention of the Parliament it will be idle to contend that Parliament could have intended that the relief so granted would not be available to the assessees who would be liable to pay a larger amount of tax. The years for which relief had remained in force had already passed out. It does not appear that as a result of the relief enjoyed by the assessee, the financial position of the state for all these years, had been or could be in any way affected. The facts and circumstances also do not indicate that there will be any heavy burden on the State to sound taxes collected which may upset the economy of the State. It appears that in the majority of the cases, the assessees have succeeded and they have been assessed after being allowed the relief and under S. 80J in respect of the borrowed capital also.

On the other hand it is quite clear that if the relief granted is to be withdrawn with retrospective operation from 1972 the assessees who have enjoyed the relief for all those years will have to face a very grave situation. The effect of the withdrawal of the relief with retrospective operation will be to

impose on the assessee a huge accumulated financial burden for no fault of the assessee and this is bound to create a serious financial problem for the assessee. Apart from the heavy financial burden which is likely to upset the economy of the undertaking, the assessee will have to face other serious problems. On the basis that the relief was legitimately and legally available to the assessee, the assessee had proceeded to act and to arrange its affairs. If the relief granted is now permitted to be withdrawn with retrospective operation, the assessee may be found guilty of violation provision of other state and may be visited with panel consequen-

ces. This position cannot be and is not disputed by the learned A Attorney General who has, however, argued that taking into consideration the peculiar facts and circumstances, penal provisions may not be enforced. This argument does not impress me. The assessee has, in any event, to run the risk and for no fault on his part has to place itself at the mercy of the authorities for facing consequences of violation of statutory provisions, which but for the introduction of retrospective amendment, would not have been violated by the assessee.

To establish arbitrariness or unreasonableness it does not become necessary to prove that the undertaking of the assessee will be completely crippled and will have to be closed down in consequence of the withdrawal of the relief with retrospective effect. There cannot be any doubt about the real possibility of very serious prejudice being caused to the assessee for no fault of the assessee. In my opinion, the possibility of very grave prejudice to the assessee by the withdrawal of the relief with retrospective effect, in the absence of any justifiable ground and any serious prejudice to the interest of revenue, establishes unreasonableness and arbitrariness of the retrospective amendment is bound to have very serious effect on the assessee and there is reasonable possibility of the business of the assessee being adversely affected and seriously prejudiced. The retrospective amendment, therefore, is also violative of Art- 19 (1) (g) of the Constitution.

The argument of the Attorney General that the amendment had to be made with retrospective effect in the interest of the assessee, as otherwise, the assessee would not be entitled to the benefit of there- lief intended to be given under the section because there will be no valid rule for computing the relief, to my mind, is clearly untenable. I see no reason as to why there should be any difficulty in the computation of relief if the invalid part of the rule is struck down. It may be noted that the rule in so far it excludes borrowed capital and fixes the first day of the year for computation of the relief had been struck down by various High Courts years ago and the assessing authorities have found no difficulty in computing the relief and in proceeding to complete the assessment by granting the relief legally available to assessee under S. 80J even after the invalid part of the rule had been struck down. It may also be noted that the Parliament had also not considered it necessary to effect this amendment earlier inspite of the decisions of the High Courts, although the Parliament had introduced other amendments into this section.

Before concluding I wish to emphasise that the withdrawal with retrospective effect by amendment of any financial benefit or relief granted by a fiscal statute must ordinarily be held to be unreasonable and arbitrary. Such withdrawal makes a mockery of beneficial statutory provision and leads to chaos and confusion Such withdrawal in effect results in the imposition of a levy at a future date for past years for which there was no such levy in the relevant years. The imposition of any

fresh tax with retrospective effect for years for which there was no such levy is entitled to arrange and normally arranges his financial affairs on the basis of the law as it exists. Such retrospective taxation imposes an unjust and unwarranted accumulated burden on the assessee for no fault on his part and the assessee has to face unnecessarily without any just reason very serious financial and other problems. Imposition of any tax with retrospective effect for years for which no such tax was there, cannot also be considered to be just and reasonable from the point of view of revenue. The years for which levy is sought to be imposed with retrospective effect had already passed and there cannot be any proper justification for imposition of any fresh tax for those years. Such retrospective taxation is likely to disturb and unsettle the settled position; and because of such imposition of retrospective levy for the years for which there was no such levy, assessments for those years which might already have been completed and concluded will get upset. If the State is in need of more funds, the State instead of seeking to levy any tax with retrospective effect can always take appropriate steps to collect any larger amount so required by imposition of higher taxes or by other appropriate methods. I have already observed that Validating Acts which seek to validate the levy of any tax with retrospective effect do not in effect impose any fresh tax with retrospective effect and Validating Acts stand on an entirely different footing. T, therefore, hold that the impugned amendment in so far as it is sought to be made retrospective with effect from the 1st day of April 1972 is invalid and unconstitutional, though the amendment in so far as it operates prospectively is valid.

In the result I dismiss the appeals filed by the Union of India against the decisions of the High Courts declaring Rule 19-A to be invalid in so far as the said rule excludes borrowed capital and fixes the first day of the year for computation of the relief to be granted to an assessee under S.80J. I set aside the judgment of the Madhya Pradesh High Court which upholds the validity of the Rule and I allow the appeal of the assessee against the judgment of the Madhya Pradesh High Court. I hold and declare that Rule 19-A is so far as it seeks to exclude the borrowed capital and fixes the first day of the year for the computation of relief under S. 80J is invalid and unconstitutional and the same has to be struck down and has been struck down by the various High Courts. I hold and declare that the impugned amendment of 1980 incorporating the provision of the invalid rule l9-A in the section itself, excluding the borrowed capital and fixing the first day of the year for computation of the relief under S. 80J is valid in its prospective operation from the date of the amendment and is unconstitutional and invalid insofar as the said amendment is sought to brought into operation retrospectively with effect from 1st B April 1972. Accordingly, I allow the writ petitions challenging the validity of the amendment only to the extent of its retrospective operation and I dismiss the writ petitions in so far as the amendment in its entirety is sought to be challenged. I propose to make no order as to costs.

In view of the majority decision, all the writ petitions are dismissed and both the parties to bear their own costs. C A.P.J. Petitions dismissed