# Geeta Jai Vatika Colony vs The Commissioner Commercial Taxes U.P. on 21 February, 2018

## Author: Ashwani Kumar Mishra

## Bench: Ashwani Kumar Mishra

HIGH COURT OF JUDICATURE AT ALLAHABAD

AFR

Court No. - 16

Case :- SALES/TRADE TAX REVISION No. - 37 of 2018

Applicant :- Geeta Jai Vatika Colony

Opposite Party :- The Commissioner Commercial Taxes U.P.

Counsel for Applicant :- Rahul Agarwal,Rajeev Ranjan Tripathi

Counsel for Opposite Party :- C.S.C.

Hon'ble Ashwani Kumar Mishra,J.

1. This commercial tax revision has been filed against the judgment/order dated 24.11.2017, passed by the Commercial Tax Tribunal Bench-2, Meerut, in Second Appeal No.25 of 2017 for the assessment year 2010-2011. The Tribunal has rejected the assessee's second appeal and has thereby confirmed the order passed by the first appellate authority dated 17.1.2017, as also the order of assessment dated 31st March, 2014.

2. Question posed for consideration in this revision is as to whether the Tribunal is justified in holding that notification dated 14th November, 2000 issued by the State of Uttar Pradesh is inconsistent with U.P. VAT Act, and therefore, not saved under Section 81 thereof?

3. Assessee had entered into a contract with U.P. State Road Transport Corporation (hereinafter referred to as 'corporation'), pursuant to which the assessee supplied Buses to the corporation for being used by Bhainsali Depot, Meerut, of the corporation. Authorities under the Act issued notices to the assessee treating the rent received from corporation as constituting transfer of right to use, which was liable to be taxed @ 5%. Despite notice, the assessee did not respond. The assessing authority relied upon an order passed by this Court in Trade Tax Revision No.468 of 2001, dated 7.4.2009, to hold that rental receipts secured from the corporation is taxable and accordingly raised a demand of Rs.5,69,720.50 paise, vide ex-parte order of assessment dated 31st March, 2014. An appeal was preferred by the assessee contending that payment of trade tax under the U.P. VAT Act continues to remain exempted in view of the notification dated 14.11.2000 by virtue of provisions contained under Section 81(2)(a) of the U.P. VAT Act and also on the ground that there was no transfer of right to use in favour of the corporation. The first appellate authority has rejected claim of assessee on both the counts, and the same is affirmed by the Tribunal.

4. Sri Rahul Agarwal, learned counsel appearing for the assessee contends that by the notification dated 14.11.2000, issued under Section 3-F(1) of the U.P. Trade Tax Act read with Section 21 of the U.P. General Clauses Act, 1904, the transaction itself stood exempted from payment of tax under the U.P. VAT Act and that the authorities, as also the Tribunal, have erred in taking a contrary view. Learned counsel submits that the notification dated 14.11.2000 is not inconsistent with the U.P. VAT Act and therefore would be deemed to have been issued under the U.P. VAT Act.

5. Sri A.C. Tripathi, learned Standing Counsel for the Revenue, submits that taxing scheme between the Act of 1948 and the Act of 2008 are distinct, and the Tribunal is justified in holding that the notification dated 14.11.2000 is inconsistent with the Act of 2008. Reliance is placed upon a Division Bench judgment of this Court in M/s Dharma Rice Mill Vs. State of U.P. and others, reported in 2010 U.P.T.C. 648. The ratio laid down in Dharma Rice Mill (supra) is contained in Para 17, which is reproduced:-

> "17. In view of aforesaid facts and circumstances, we are of the considered opinion that the U.P. Value Added Tax Act while repealing the U.P. Trade Tax Act in its entirety keeps alive the old rights, liabilities and the remedies under the repealed enactment and, as such, the impugned notice for revising the order of assessment is not without jurisdiction. However, it will be open for the petitioner to submit reply to the show cause notice and to contest the matter on merit before the authority concerned."

6. For the sake of convenience, U.P. Trade Tax Act, 1948 and U.P. VAT Act, 2008 would henceforth be referred as 'Act of 1948' and 'Act of 2008' in this judgment.

7. Act of 1948 has been repealed by the Act of 2008. Section 81 of the Act of 2008 provides for repeal and saving. Relevant parts of Section 81 are, therefore, reproduced:-

> "81. Repeal and saving. - (1) The Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No.XV of 1948) (hereinafter in this section referred to as the repealed enactment) is hereby

repealed.

(2) Notwithstanding such repeal, -

(a) any notification, rule, regulation, order or notice issued, or any appointment or declaration made, or confiscation made, or any penalty or fine imposed, any forfeiture, cancellation or any other thing done or any action taken under the repealed enactment, and in force immediately before such commencement shall, so far as it is not inconsistent with the provisions of this Act, be deemed to have been issued, made granted, done or taken under the corresponding provisions of this Act.

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the repealed Act, shall not be affected and manufacturing units enjoying benefit of exemption from payment of tax under Section 4-A of the repealed Act or the units enjoying facility of moratorium for payment of tax under Section 8(2-A) of the said Act shall be entitled to claim moratorium for payment of tax in accordance with provisions of Section 42.

(3) .....

(4) .....

(5) .....

(6) The mention of particular matters in this section shall not be held to prejudice or affect general application of Section 6 of the Uttar Pradesh General Clauses Act, 1904, with regard to the effect of repeals."

8. By virtue of Section 81(2)(a), a notification issued under the Act of 1948 would be deemed to have been issued under the Act of 2008, insofar as it is not inconsistent with the provisions of the Act of 2008. The question that arises for consideration in this revision, thus, is whether the notification dated 14.11.2000 is inconsistent with the Act of 2008.

9. Before proceeding further, it would be appropriate to reproduce the English translation of Government Notification No. KA. NI.-2-3736/XI-9 (28)/2000-U.P. Act-15-48-Order-(46)-2000, dated 14th November, 2000:-

U.P. TAX CASES, 2001 Volume I Acts, Rules, Ordinances, Notifications and Circulars [1] English Translation of Government Notification No. KA. NI.-2-3736/XI-9(28)/2000-U.P.Act-15-48-Order-(46)-2000, dated 14th November, 2000.

In exercise of the powers under sub-section (1) of Section 3-F of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No.15 of 1948) read with Section 21 of the Uttar

Pradesh General Clauses Act, 1904 (U.P. Act No.1 of 1904), and in supersession of Government Notification No. T.I.F.-2-2379/XI-9(251)/97-U.P. Act-15-48-Order-98, dated 23rd November, 1998 as amended from time to time, the Governor is pleased to declare that with effect from 15th November, 2000 every dealer to whom sub-section (3) of Section 3 applies, and every other dealer the aggregate of whose turnover in a year relating to the business of transfer of the right to use the goods, excluding the goods specified in the following Schedule, exceeds one lakh rupee, shall, in respect of such turnover, which shall be determined in the manner specified in Rule 44-C of the Uttar Pradesh Trade Tax Rules, 1948 be liable to tax at the rate of five per cent.

SCHEDULE

| SL.NO. | Description of goods |
|---|---|
| 1. | Transfer of film by film producer to film distributor and from film distributor to persons exhibiting film. |
| 2. | Transfer by a bus-owner to the Uttar Pradesh State Road Transport Corporation of the right to use a Bus under any contract. |

10. Section 3-F of the Act of 1948 provides for tax on the right to use any goods or goods involved in the execution of works contract. By virtue of Sub-section (1)(a), tax on net turnover becomes payable on the transfer of right to use. Section 3-F(1) is reproduced hereinafter:-

"3-F. Tax on the right to use any goods or goods involved in the execution of works contract.- 1. Notwithstanding anything contained in section 3-A or Section 3AAA or section 3-D but subject to the provisions of section 14 and 15 of the Central Sales Tax Act, 1956, every dealer shall, for each assessment year, pay a tax on the net turnover of--

(a) Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration; or

(b) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.

at such rate not exceeding twenty per centum, as the State Government may, by notification declare and different rates may be declared for different goods or different classes of dealers."

11. Sale is otherwise defined in the Act of 1948 under Section 2(h). Clause (iv) thereof is also

reproduced:-

> "2(h) 'Sale', with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration, and includes--
>
> (iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"

12. The statutory scheme under the Act of 1948 is clear, inasmuch as any transfer of right to use for cash or valuable consideration is included within the definition of sale and is taxable under Section 3-F(1) of the Act. Power of exemption from payment of tax is conferred upon the State under Sections 4 and 4-A of the Act of 1948, hedged by the use of phraseology therein. This Court is not required to dwell upon the limitations in exercise of such power in this case. On facts, the notification has been issued and admittedly continued to remain in operation till the Act of 1948 got repealed and substituted by the Act of 2008.

13. The scheme of 2008 Act, therefore, needs to be analyzed, so as to find out as to whether the notification dated 14.11.2000 is consistent with it. The definition of sale occurring in the Act of 2008 is similar, insofar as transfer of right to use is concerned. Section 2(ac)(iv) is reproduced hereinafter:-

> "2(ac) "sale" with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) by one person to another, for cash or for deferred payment or for any other valuable consideration and includes, -
>
> (iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;"

14. Section 3 thereafter provides for incidence and levy of tax. Liability to pay tax under the Act of 2008 arises, for each assessment year, on the taxable turnover of sale or purchase or both, as the case may be, of taxable goods, at such rates and at such point of sale or purchase, as is provided under Section 4 or Section 5. Section 2(an) defines "taxable turnover of sale" to mean the amount of turnover obtained from sale, after adjusting deductions permissible in law. Section 4 then provides for levy of tax on turnover of sale. Section 4(1)(a) of the Act of 2008 is relevant and is reproduced hereinafter:-

> "Section 4 - Levy of tax on turnover of sale.-
>
> (1) The tax, payable on sale of goods under this Act, shall be levied and paid on the taxable turnover of sale of -

(a) goods named or described in column 2 of the Schedule II, at every point of sale and at the rate of four percent;"

15. Item 3 in Part-A of Schedule-II provides that 4% tax would be leviable upon the transfer of right to use of goods. The relevant taxing entry reads as under:-

"S.No. 3 of Schedule-II Part-A:

Originally as per The Uttar Pradesh Value Added Tax Ordinance (U.P. Ordinance No.37 of 2007) S.No.3 of Schedule-II Part-A stood as under:

"3. All intangible goods like copyright, patent, rep. license etc."

W.r.e.f. 1.1.2008.

Entry substituted by the following entry w.r.e.f. 1.1.2008 by Noti. No. KA.NI.-2-67/XI-....., dt. 10.1.2008 (S.No.5):

"3. All intangible goods like copyright, patent, R.E.P., license etc.; transfer of right to use goods."

Entry has been incorporated in The U.P. Value Added Tax Act, 2008 published in the U.P. Gazette, dt. 27.2.2008."

16. Right to transfer of use therefore is taxable both under the Act of 1948 and the Act of 2008, and the only difference is that while tax under the Act of 1948 is payable @ 5%, where the turnover is above Rs.1 lac, it is 4% under the Act of 2008. The point of taxation remains the point of sale both under the Act of 1948 and the Act of 2008.

17. Similarly, under the Act of 2008, jurisdiction exists with the State to exempt a transaction from levy of tax, as is there in the Act of 1948. Section 7 of the Act of 2008 is relevant and is reproduced:-

"Section 7 - Tax not to be levied on certain sales and purchases.-

No tax under this Act shall be levied and paid on the turnover of-

(a) sale or purchase where such sale or purchase takes place -

(i) in the course of inter-state trade or commerce; or

(ii) outside the State; or

(iii) in the course of the export out of or in the course of the import into, the territory of India;

(b) sale or purchase of any goods named or described in column 2 of the Schedule-I of this Act or;

(c) such sale or purchase; or sale or purchase of such goods by such class of dealers, as may be specified in the notification issued by the State Government in this behalf:

Provided that while issuing notification under clause (c), the State Government may impose such conditions and restrictions as may be specified.

Explanation: For the purposes of this Act, sections 3, 4 and 5 of the Central Sales Tax Act, 1956, shall apply respectively for determining whether or not a particular sale or purchase of any goods falls under any of the sub-clauses (i), (ii) and (iii) of clause (a)."

(emphasis supplied)

18. While sale or purchase of goods named and described in Column 2 of Schedule-I of the Act of 2008 is exempted from payment of tax by the legislature itself, the Act permits the executive also to exempt sale or purchase, as may be specified in the notification issued by the State Government, in that behalf. The power to exempt levy of tax upon transfer of right to use is available to the State under the Act of 2008 also, and there is no inconsistency on such count between the two Acts.

19. The only reason to deny benefit of exemption notification is that rate of tax is different between the two Act, and therefore, the notification dated 14.11.2000 is inconsistent with the Act of 2008.

20. A taxing statute ordinarily provides for the transaction to be taxed, the rate of tax and the incidence of tax. In an exemption notification of the kind in hand i.e. notification dated 14.11.2000, the transaction itself is exempted from liability to pay tax. The rate of tax, which otherwise would be payable, is not a relevant factor when the Government decides to exempt a transaction itself from payment of tax. In the present case, the transfer by a Bus owner to the UPSRTC of the right to use a Bus under any contract, is the goods specified in the schedule, and thus to be exempted from the applicability of tax. Such a notification would not become inconsistent only because the right of tax payable for the transaction in the Act of 2008 is different from the rates specified in the Act of 1948.

21. Unless the notification dated 14.11.2000 is found to be inconsistent with the Act of 2008, the transaction would continue to be exempted under the Act of 2008, and the notification dated 14.11.2000 would be deemed to have been issued under the Act of 2008.

22. In Central Indian Machinery Manufacturing Co. Ltd. Vs. State of M.P. and another, reported in (1997) 9 SCC 475, a question arose regarding continuance of notification under a repealed Act on the ground that a deduction of 10% towards statutory allowance was contemplated in lieu of cost of repair etc. from the gross annual letting value. The High Court had observed that for such reasons, the notification issued under the repeal Act would not become wholly inconsistent with the new Act. The Apex Court agreed with the view of the High Court in Paras 2 to 4 of the judgment, which is

extracted hereinafter:-

> "2. Before the High Court it was submitted on behalf of the appellant that the notification issued in 1945 under the Gwalior Act was no longer applicable after the repeal of the said Act by the 1954 Act and that the said notification was not continued by the saving clause aforementioned on the ground that the provisions of the Gwalior Act were inconsistent with the provisions of the 1954 Act. While dealing with the said contention the High Court has held that Section 52(1) of the Gwalior Act authorised the imposition of house tax on buildings situate within the municipal limits and it also provided that the house tax shall not exceed 4% of the gross annual letting value of the building while under Section 69(1)(i) of the 1954 Act, municipalities have been authorised to impose a tax on houses and buildings or lands situate within the municipal limits and that under Section 73 of the 1954 Act the tax is to be assessed on the net annual letting value after deducting a statutory allowance of 10% in lieu of costs of repairs etc. from the gross annual letting value. The High Court has observed that the notification issued under the Gwalior Act cannot be said to be wholly inconsistent with the 1954 Act and that the inconsistency is only to the extent that the 1954 Act permits a statutory allowance of 10% of the gross annual letting value which was not allowed by the Gwalior Act and that to this extent alone the notification under the Gwalior Act will not have effect. The High Court has, therefore, directed that the municipality will have to permit a deduction of 10% from the gross annual letting value while assessing the tax. The High Court has further stated that there was no clear averment in the writ petition that tax was being assessed on the gross annual letting value and not on the net annual letting value after making a deduction of 10% and, therefore, it could not be said that action that was being taken against the appellant is contrary to the provisions of the 1954 Act.
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> 3. The other contention that was raised on behalf of the appellant before the High Court was that the notification imposing the tax did not apply to the area where the appellant's factory and buildings are situate. The said contention was rejected by the High Court on the view that the appellant's factory and buildings are situate in an area known as additional industrial area which was included within the Gwalior Municipal limits in October 1954. The High Court has referred to the provisions of Section 7(4)(a) of the 1954 Act wherein it is prescribed that "when any area is added to the municipality by a notification, the Act, rules, bye-laws, orders, notices and notifications of the Municipality concerned shall be applicable to that area". The High Court has held that in view of the said provision the 1945 notification passed under the Gwalior Act imposing house tax which was applicable after the 1954 Act, became applicable to the area wherein the properties of the appellant are situate. On that view the High Court has dismissed the writ petition filed by the appellant. Hence this appeal.
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> 4. The learned counsel for the appellant has urged the contentions aforementioned which have been rejected by the High Court. We do not find any reason to take a view

different from that taken by the High Court. In our view, the said contentions were rightly rejected by the High Court for the reasons mentioned above."

23. An Hon'ble Single Judge of the High Court of Andhra Pradesh in Andhra Pradesh State Road Transport Corporation rep. by its Executive Director (E and IT) and others Vs. Central Power Distribution Company of Andhra Pradesh Ltd. through its Managing Director and others, reported in 2008(5) ALD 787, had an occasion to examine a similar controversy in respect of banking of electricity. The term 'inconsistent' has been examined to hold that unless the new enactment manifested an intention to destroy the rights and liabilities created by the repealed Act, such rights are saved. The provisions of Section 6 of the General Clauses Act, 1904 have also been taken note of. Paras 14 to 23 of the judgment are reproduced:-

"14. From a plain reading of the above mentioned provision, it is clear that unless the document or instrument executed under the repealed Act is inconsistent with the provisions of the 2003 Act, the agreements entered into by the petitioners for banking and wheeling are saved.

15. Sri O. Manoher Reddy contended that under the 2003 Act there is a complete change with respect to making tariff regulation and determination of tariff. According to him, the fact that the Commission is vested with these powers under Part-VII, unlike such powers being vested in the SEBs and the Licensees which succeeded to the SEBs under the repealed Acts, shows that the agreements entered into by the erstwhile Board/Licensees with the petitioners are inconsistent with the provisions of the 2003 Act and, hence, Sub-sections (2) and (5) of Section 185 do not come to the rescue of the petitioners. He relied on Section 174 of the 2003 Act in this regard.

16. I have carefully considered this submission of the learned Standing Counsel and not felt persuaded to accept the same. On a careful analysis of the provisions of the 2003 Act, I have not found any inconsistency with regard to the activity of wheeling and banking. Indeed, while there was no specific provision of open access under the repealed laws, a right has now been conferred on every consumer/ generating company to make use of distribution network of the Licensees as of right, of course, subject to the Regulations made by the Commission. In respect of the banking, there is no specific statutory provision contained in the said Act. It is, therefore, not possible to accept the contention of the learned Standing Counsel that the provisions of the 2003 Act are incompatible with the banking and wheeling Agreements entered into by the erstwhile dispensation with the petitioners. That the Commission has been continuing with the policy of banking, even under the changed legal environment, is evident from Clause 12 of Regulation 2 of 2006, albeit with certain changes. The contention of the learned Standing Counsel is mainly based on the fact that the functions of tariff fixation and regulation are entrusted to the Commission. In my considered view, this change by itself cannot be treated as inconsistent between the provisions of the repealed Act and the present Act. More so, when the issue regarding Banking is not concerned with tariff fixation or tariff regulation.

17 . According to Black's Law Dictionary, the expression "inconsistent" means "lacking consistency" and "not compatible with". As noticed earlier, the present enactment far from being incompatible with Banking, the Commission continued the policy of Banking even under this Act. Hence, the contention of the learned Standing Counsel that the Agreements held by the petitioners were not saved by the provisions of Sub-section (2) of Section 185 of the 2003 Act, cannot be accepted.

18. In interpreting the provisions of the new enactments qua the rights vested under the repealed ones, the Courts have repeatedly held that unless the new enactment manifested an intention to destroy the rights and liabilities created by the repealed Act, such rights are saved notwithstanding the repeal of the earlier enactment.

19. In State of Punjab v. Mohar Singh AIR 1955 SC 84, the Supreme Court while disagreeing with the observations of Sulaiman, C.J, in Danmal Parshotamdas v. Baburam Chhote Lal MANU/UP/0139/1935 : AIR1936All3 - that where there is a new law which not only repeals the old law, but is substituted in place of the old law, Section 6(e) of the General Clauses Act is not applicable, observed as under:

These observations could not undoubtedly rank higher than mere 'obiter dictum' for they were not at all necessary for purposes of the case, though undoubtedly they are entitled to great respect. In agreement with this dictum of Sulaiman, C.J., the High Court of Punjab, in its judgment in the present case, has observed that where there is a simple repeal and the legislature has either not given its thought to the matter of prosecuting old offenders, or a provision dealing with that question has been inadvertently omitted, Section 6 of the General Clauses Act will undoubtedly be attracted. But no such inadvertence can be presumed where them has been a fresh legislation on the subject and if the new Act does not deal with the matter, it may be presumed that the legislature did not deem it fit to keep alive the liability incurred under the old Act. In our opinion the approach of the High Court to the question is not quite correct. Whenever there is a repeal of an enactment; the consequences laid down in Section 6 of the General Causes Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. THE line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is report of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to

examine the facts of the present case.

20. In Bansidhar v. State of Rajasthan MANU/SC/0057/1989: [1989]2SCR152 M.N. Venkatachalaiah, J, as he then was, speaking for the Constitution Bench, while expressing a similar view as in Mohar Singh AIR 1955 SC 84 held as under:

When there is a repeal of a statute accompanied by re-enactment of a law on the same subject, the provisions of the new enactment would have to be looked into not for the purpose of ascertaining whether the consequences envisaged by Section 6 of the General Clauses Act ensued or not - Section 6 would indeed be attracted unless the new legislation manifests a contrary intention but only for the purpose of determining whether the provisions in the new statute indicate a different intention. Referring to the way in which such incompatibility with the preservation of old rights and liabilities is to be ascertained this Court in State of Punjab v. Mohar Singh MANU/SC/0043/1954: 1955CriLJ254 said:

Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new Law and the mere absence of a saving clause is by itself not material. The provisions of Section 6 of the General Clauses Act will apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment. Of course,,...the consequences laid down in Section 6 of, the Act will apply only when a statute or regulation having the force of a statute is actually repealed.

21. In Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ET MANU/SC/2333/2007: AIR2007SC1984 , the Supreme Court while considering the effect of T.N. Tax on Consumption or Sale of Electricity Act, 2003, which repealed the Tamil Nadu Electricity Duty Act, 1939 and the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962, held that exemption from tax is a vested right and such a right having been accrued or vested, the same can be taken away only by reason of a Statute and not otherwise and that a notification which was issued under the repealed Acts would continue to govern unless the same is repealed.

22. The legal proposition that could be culled out from the above authoritative pronouncements of the Supreme Court is that unless the new enactment expressly or by necessary implication invalidates the acts done or takes away the rights vested, acquired or accrued under the repealed enactment, those acts done continue to be valid and such rights are saved notwithstanding the repeal of the earlier enactment. The 2003 Act, instead of taking away, expressly recognized such rights under Subsection (5) of Section 185 of the said Act by specific incorporation of Section 6 of the General Clauses Act, which reads as under:

6. Effect of repeal: Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be

made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or any thing duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

Banking and right to utilize the power so banked is a valuable right accrued to the petitioners. Such a right conferred on the petitioners and the obligation incurred by the respondents under the Agreements shall continue till the expiry of the period for which the Agreements were entered into.

23. On a careful consideration of the provisions of the 2003 Act and the settled legal position as discussed above, I am of the considered view that the Agreements held by the petitioners not being inconsistent with the provisions of the 2003 Act are saved by the provisions of Sub-sections (2) and (5) of Section 185 of the said Act. These contentions are answered accordingly."

24. Sri Rahul Agarwal has laid emphasis upon the expression of the natives in re R. reported in 1906 (1) Chancery Division p.730, reproduced hereinafter:-

"Where you have a repeal and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, Aye or No, is there incompatibility between the two? And in those cases the judges, in holding that there was a saving clause large enough to annul the repeal, said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that, if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as pro tanto wiped out."

25. The aforesaid observation has been followed by a Division Bench of Rajasthan High Court in Kamal Kishore Vs. State of Rajasthan, reported in 2008 (1) ILR (Raj) 478, while interpreting Section 6 of the General Clauses Act. A similar controversy was dealt with by a Division Bench of Punjab and Haryana High Court in Shanti Narain Vs. Jai Dayal and others, reported in (1981) ILR 2 Punjab and Haryana 365. A provision similar to Section 81 (2)(a) had fallen for consideration before the Division Bench, and the observations being relevant for the present purposes are extracted hereinafter:-

> "7. The Governor of Haryana gave his assent to the Haryana Urban (Control of Rent and Eviction) Act, 1973, on April 25, 1973 (hereinafter referred to as the "new Act"). The old Act was repealed by Section 24 of the Act. Sections 1, 3 and 24 of the Act read as under:
>
> Section 1--Short title and extent:
>
> 1. This Act may be called the Haryana Urban (Control of Rent and Eviction) Act, 1973.
>
> 2. It shall extend to all urban areas in Haryana but nothing herein contained shall apply to any cantonment area.
>
> 3. Nothing in this Act shall apply to--
>
> (i) any residential building the construction of which is completed on or after the commencement of this Act for a period of ten years from the date of its completion.
>
> (ii) any non-residential building construction of which is completed after the 31st March, 1962;
>
> (iii) any rented land let out on or after 31st March, 1962.
>
> Section 3--Exemptions:
>
> The State Government may direct that all or any of the provisions of this Act shall not apply to any particular building or rented land or to any class of buildings or rented lands.
>
> Section 24--Repeal and Savings:
>
> 1. The East Punjab Urban Rent Restriction Act, 1949 (East Punjab Act No. 3 of 1949), is hereby repealed:
>
> Provided that such repeal shall not affect any proceedings pending or order passed immediately before the commencement of this Act, which shall be continued and

disposed of or enforced as if the said Act had! not been repealed.

2. Notwithstanding such repeal, anything done or any action taken under the Act so repealed (including any rule notification or order made) which is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act as if this Act were in force at the time such thing was done or action was taken, and shall continue to be in force, unless and until superseded by anything done or any action taken under this Act.

8. A reference to Section 1(3)(ii) of the new Act would show that these provisions were not made applicable to the non-residential buildings completed after March 31, 1962. Thus the civil suit filed by the landlord-Respondent was properly entertained by the Sub-Judge 1st Class, Fatehabad, on August 2, 1973. The same was decreed by him on September 30, 1976. If the matters had rested here, no objection could have been raised against the jurisdiction exercised by the learned trial Court. However, the new Act was amended by the Haryana Urban (Control of Rent and Eviction) Amendment Act, 1978, which received the assent of the Governor of Haryana on April 25, 1978. By Section 2 of this Amendment Act, Sub-section (3) of Section 1 of the new Act was recast and all buildings completed after the coming into force of the new Act were exempted from its operation for a period of ten years.

On the basis of this provision, it has been argued on behalf of the Appellant that the earlier exemption granted either under the notification, dated October 22, 1971, or under Section 1(3)(ii) of the new Act has been taken away. According to Mr. Mohunta, this Court had to take notice of change of law even in second appeal and since the Legislature chose not to make any provision regarding the earlier exemptions, it should be presumed that the same had been unconditionally taken away.

9. The validity of this argument depends upon the extent to which effect can be given to the deeming provision contained in Section 2 of the Amendment Act, which reads as under:

Section 2.--Amendment of Section 1 of Haryana Act 11 of 1973:

For Sub-section (3) of Section 1 of the Haryana Urban (Control of Rent and Eviction) Act, 1973, the following sub-section shall be substituted and shall always be deemed to have been substituted, namely:

(3) Nothing in this Act shall apply to any building the construction of which is completed on or after the commencement of this Act for a period of ten years from the date of its completion.

10 . The words "shall be substituted and shall always be deemed to have been substituted" imply that the new provision would have to be read as if it had been enacted at the time when the new Act, i.e., Act No. 11 of 1973, was brought on the statute book. This matter admits of no doubt and has been finally set at rest by their Lordships of the Supreme Court in State of Bombay v. Pandurang Vinayak

and Ors. MANU/SC/0025/1953 : A.I.R. 1953 S.C. 244, wherein it was held--

When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. (Vide Lord Justice James in ex parte Walton) In re Levy 17 Ch. D. 748. If the purpose of the statutory fiction mentioned in Section 15 is kept in view, then it follows that the purpose of that fiction would be completely defeated if the notification was construed in the literal manner in which it has been construed by the High Court. In East and Dwellings Company Ltd. v. Finsbury Laraugh Council (1952) A.C. 109(B), Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, made reference to the same principle and observed as follows:

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

11. In other words, on April 25, 1973, the date on which Haryana Act No. 11 of 1973 was enacted, two important events occurred. Firstly, the old Act was repealed and secondly, the buildings constructed after the coming into force of Act were exempted from the provisions of the said Act for a period of ten years. We have to consider whether the notification issued by the Governor of Haryana on October 22, 1971, exempting the buildings constructed during the years 1968, 1969 and 1970 remained in force or not. The answer to this question is provided by Section 22 of the Punjab General Clauses Act, 1898. It reads as under:

> Where any Punjab Act is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme, rule, form or bye-law made or issued under the repealed Act, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted unless and until it is superseded by any appointment, notification, order, scheme, rule, form or bye-law made or issued under the provisions so re-enacted.

12. Since the old Act and the new Act were statutory measures concerning the same subject and Section 3 of the new Act also empowered the State Government to exempt rented lands or buildings of any class the said notification would be deemed to have been issued under the latter provision. Thus, in spite of the repeal of the old Act the notification would have to be deemed as a valid place of law.

13. Faced with this situation, the learned Counsel for the Appellant submitted that the notification was inconsistent with the provisions of the new Act inasmuch as the latter exempted only the

buildings constructed after it came into force and purposely did not make any mention about the buildings constructed earlier. We are not impressed with this argument either. A reading of Section 1 of the new Act shows that primarily the Act was made applicable to all urban areas excluding the cantonment areas, but special type of buildings were expressly excluded by the Legislature from the field of operation of the Act. At the same time, the Legislature authorised the Government by enacting Section 3 to exclude from the operation of the Act, any class of rented lands or buildings. Thus, the scheme of this section and that of Section 3 shows that the Legislature itself kept some buildings out of the control of the Act and also authorised the State Government to achieve the same result by issuing a notification. It cannot possibly be contended that there is some inconsistency in these two provisions. The Legislature thought that it would be advisable to clothe the Government with the power to exempt certain classes of buildings to remove hardship. In exercise of the powers under Section 3 of the new Act the Government could have exempted even the buildings which were constructed prior to the date on which this Act came into force. This position of law is not contested by the learned Counsel for the Appellant and indeed he could not have possibly done so because the buildings constructed before and after the coming into force of the Act formed two distinct classes and the provisions made for these two classes can stand side by side. We are accordingly of the view that the amendment of the new Act brought about in the year 1978 did not affect the validity of the notification, dated October 22, 1971, issued by the Governor of Haryana under the old Act and the same continues to be in force either under Section 22 of the Punjab General Clauses Act, 1898, or under Section 24(2) of the new Act. When looked at either way, there appears to be no merit in the claim of the Appellant that the Civil Courts had no jurisdiction to entertain the suit out of which the present appeal arises."

26. In Brihan Maharashtra Sugarsyndicate Ltd. Vs. Janardan Ramchandra Kulkarni and others, reported in AIR 1960 SC 794, the effect of Sections 6 and 24 of the General Clauses Act was examined to emphasize that what needs to be ascertained is the intention to destroy the rights created under the repealed Act, and if that is not inferred from the substituted Act, then the notification would continue. Para 9 of the judgment is reproduced:-

> "9. We are unable to accept these contentions. Section 10 of the Act of 1956 deals only with the jurisdiction of courts. It shows that the District Courts can no longer be empowered to deal with applications under the Act of 1956 in respect of matters contemplated by s. 153-C of the Act of 1913. This does not indicate that the rights created by s. 153-C of the Act of 1913 were intended to be destroyed. As we have earlier pointed out from State of Punjab v. Mohar Singh (1), the contrary intention in the repealing Act must show that the rights under the old Act were intended to be destroyed in order to prevent the application of s. 6 of the General Clauses Act. But it is said that s. 24 of the General Clauses Act puts an end to the notification giving power to the District Judge, Poona to hear the application under s. 153-C of the Act of 1913 as that notification is inconsistent with s. 10 of the Act of 1956 and the District Judge cannot, therefore, continue to deal with the applica- tion. Section 24 does not however purport to put an end to any notification. It is not intended to terminate any notification; all it does is to continue a notification in force in the stated circumstances after the Act under which it was issued, is repealed. Section 24

therefore does not cancel the notification empowering the District Judge of Poona to exercise jurisdiction under the Act of l9l3. It seems to us that since under s. 6 of the General Clauses Act the proceeding in respect of the application under s. 153-C (1) [1955] I S.C.R. 893 of the Act of 1913 may be continued after the repeal of that Act, it follows that the District Judge of Poona continues to have jurisdiction to entertain it. If it were not so, then s. 6 would become infructuous."

27. In Neel alias Niranjan Majumdar Vs. The State of West Bengal, reported in (1972) 2 SCC 668, a Division Bench of the Apex Court speaking through Hon'ble J.M. Shelat, J. expressed similar views in Paras 7 and 8, which are quoted hereinafter:-

"7. It, however, appears that no such notification as contemplated by section 4 of the 1959 act has been issued. But in 1923 such a notification bearing reference number Political (Police) Department Notification 787 PL, dated March 9, 1923 was issued under section 15 of the earlier indian arms act, 11 of 1878, which was in terms similar to section 4 of the present act. The question is, whether act 41 of 1878 having been repealed, the said notification issued under Section 15 thereof can still be said to be operative? Section 46(1) of the Arms Act, 1959 repealed the preceding Act of 1878. Its sub-section (2) provides that notwithstanding such repeal and without prejudice to sections 6 and 24 of the general clauses act 10 of 1897 a licence granted under the repealed Act and in force immediately before the commencement of the new Act shall continue, unless sooner revoked, for the unexpired period for which it had been granted or renewed. Section 46(2) thus saves only licences issued under the Arms Act.

8. Section 6(b) of General clauses Act, however, provides that where any Central Act or regulation made after the commencement of the Act repeals any earlier enactment, then, unless a different intention appears, such repeal shall not "affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder". Section 24 next provides that where any Central Act is repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any notification issued under such repealed Act shall, so far as it is inconsistent with the provisions re-enacted, continue in force and be deemed to have been made under the provisions so re-enacted unless it is superseded by any notification or order issued under the provisions so re-enacted. The new Act nowhere contains an intention to the contrary signifying that the operation of the repealed Act or of a notification issued thereunder was not to continue. Further, the new act re-enacts the provisions of the earlier act, and section 4 in particular, as already stated, has provisions practically identical to those of section 15 of the earlier act. The combined effect of sections 6 and 24 of the general clauses act is that the said notification of 1923 issued under Section 15 of the Act of 1878 not only continued to operate but has to be deemed to have been enacted under the new Act."

28. In a recent decision of the Apex Court in Harkesh Chand Vs. Krishan Gopal Mehta and others, reported in (2017) 4 SCC 547, the law has been extensively traced and the true import of Section 24 of the U.P. General Clauses Act has been examined in continuing a Government Notification under an enactment repealed and re-enacted. Paras 20 to 26 of the judgment are reproduced:-

> "20. The question whether the notification dated 31st March, 1949 continued to exist even after the Act was repealed upon the reenactment of the Act of 1972 may be considered.
>
> 21. Section 24 of the U.P. General Clauses Act, 1904:-
>
> "24. Continuation of appointments, notifications, orders, etc., issued under enactments repealed and re-enacted. - Where any enactment is repealed and re-enacted by an [Uttar Pradesh] Act, with or without modification, then, unless it is otherwise expressly provided, any appointment, [or statutory instrument or form], made or issued under the repealed enactment, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment, [or statutory instrument or form] made or issued under the provisions so re-enacted." (emphasis supplied) A plain reading of the above provision suggests that any statutory instrument (which a notification is) issued under the repealed enactment continues in force as if it were issued under the re-enacted provisions to the extent that it is not inconsistent with the re-enacted provisions. Such continuance exists till the statutory instrument is superseded by a statutory instrument issued under the re-enacted provisions.
>
> 22. It is, therefore, necessary to see whether the notification dated 31st March, 1949, issued under the Act of 1947 is inconsistent with the re-enacted provisions of the Act of 1972. Obviously, if the 1949 notification cannot stand along with the re-enacted provisions and is inconsistent with them, it cannot be said to have been continued in force by virtue of Section 24 of the U. P. General Clauses Act, 1904. The Governor of the erstwhile United Provinces, through the said notification, simply declared that the provisions of Sections 2, 3 (a), 4, 5, 6 etc. shall apply to Doiwala town in Dehradun district. The effect of this notification thus, was that the protection to the tenants offered by Section 3 (a) i.e. the restrictions on eviction, applied to Doiwala town.
>
> 23. We find nothing inconsistent between the protection accorded to the tenants under the Act of 1947 as applied to Doiwala town by the notification dated 31st March, 1949, and the protection accorded to the tenants in the re-enacted provision of the Act of 1972, both of which regulated the eviction of tenants in the whole of Uttar Pradesh. Section 21 of the later act provided the same restrictions on the eviction of tenants on specified grounds that Section 3 (a) of the 1947 Act did. Thus, there is no inconsistency whatsoever found between the two provisions. We also, do

not find any express provision to the contrary in the subsequent enactment.

24. The provisions of an Act, and a conditional legislation such as a notification, belong to a different order of things. A statutory instrument (i.e. the notification) itself does not enact the protection to the tenants. The Act of 1947 does that. The notification merely makes the enactment applicable to the Doiwala area. Apparently the purpose of the re- enacted provision is, inter alia, to protect the tenants from eviction, except on special grounds. Nothing in the Act shows that such a protection was intended to be removed from any area or for that matter, the Doiwala area. In fact, the contrary is clear from the fact that a notification expressly applying the re-enacted provisions to the Doiwala area was issued on the 21st of March, 1973. Thus, there can be no inconsistency between the notification applying the Act to the Doiwala area, and the re-enacted provisions of the Act unless the Act of 1972 clearly expresses an intention to remove the protection accorded to the tenants from an area.

25. Section 24 of the General Clauses Act, 1904 clearly provides that a statutory instrument issued under a repealed enactment shall continue in force and be deemed to have been made or issued under the re-enacted provisions unless:

(a) the re-enacted provision expressly provides otherwise or

(b) it is superseded by a statutory instrument made under the re-enacted provision.

The section further provides that the extent to which the statutory instrument under the repealed enactment shall continue is "so far as it is not inconsistent with the re-enacted provisions."

26. We find that none of the conditions which derogate from the continuation of the notification exist in the present case. There is no express provision to the contrary, there is no supersession by any statutory instrument under the re-enacted provisions and there is nothing inconsistent in the continuance of the notification with any of the re- enacted provisions."

29. So far as the Division Bench judgment of our Court in Dharma Rice Mill (supra) is concerned, the Division Bench was confronted with Section 81(2)(b) and not Section 81(2)(a) of the Act of 2008. The Division Bench judgment has been approved by a Full Bench of our Court in Ram Sewak Madan Mohan Vs. The Commissioner, Commercial Taxes, U.P. Lucknow, reported in (2016) 60 NTN DX 348, to hold that the power of revision under both the enactments continues to subsist. Para 35 of the Larger Bench Judgment in Ram Sewak Madan Mohan (supra) is reproduced:-

"35. Undoubtedly, there is a difference in the language of Section 6 of the General Clauses Act 1897 and Section 6 of the U P General Clauses Act 1904. However, we are of the view that this distinction in the language will have no practical meaning or consequence to the construction which has been placed by us on the provisions of the repealed and the repealing legislation.

> For these reasons, we come to the conclusion that the judgments of the two Division Benches of this Court in Dharma Rice Mill (supra) and Kumar Rice Mills (supra), insofar as they hold that the remedy of a revision against an order of assessment under the UP Trade Tax Act provided to the Commissioner under Section 10-B survives the repeal lay down the correct principle of law. The remedy is saved by virtue of the provisions of Section 81 of the Uttar Pradesh Value Added Tax Act 2008 read with Section 6 of the Uttar Pradesh General Clauses Act 1904."

The judgment in Dharma Rice Mill (supra) would not of any help for the cause of revenue.

30. Upon consideration of the relevant provisions occurring in the Act of 1948 and the Act of 2008, and on a conspectus of the judgments relied upon, I have no hesitation in coming to the conclusion that notification dated 14.11.2000, issued under the Act of 1948, is not inconsistent with the Act of 2008, and therefore, the notification would continue to subsist and would be deemed to have been issued under the Act of 2008, by virtue of Section 81(2)(a). The Tribunal, therefore, was not justified in taking a contrary view. The question framed for consideration in this revision is answered in favour of the assessee and against the revenue.

31. Revision is, accordingly, allowed.

Order Date :- 21.2.2018 Anil