DISTRIBUTION OF LEGISLATIVE POWERS

[Doctrine of Territorial Nexus – Extra-territorial operation of a state legislation]

State of Bihar v. *Charusila Dasi*

AIR 1959 SC 1002

(S.R. Das, C.J. and S.K.Das, P.B. Gajendragadkar, K.N.Wanchoo and M. Hidayatullah,JJ.)

S.K. DAS, J. – 1. This appeal relates to a trust known as the Srimati Charusila Trust and the properties appertaining thereto. By its judgment and order dated October 5, 1953 the High Court of Patna has held that the trust in question is a private trust created for the worship of a family idol in which the public are not interested and, therefore, the provisions of the Bihar Hindu Religious Trusts Act, 1950 (Bihar 1 of 1951), hereinafter referred to as the Act, do not apply to it. Accordingly, it allowed an application made to it under Article 226 of the Constitution and quashed the proceedings taken against the respondent herein under Sections 59 and 70 of the Act. The State of Bihar, the President of the Bihar State Board of Religious Trusts and the Superintendent of the said Board who were respondents to the petition under Article 226 are the appellants before us.

2. The trust in question was created by a trust deed executed on March 11, 1938. Srimati Charusila Dasi is the widow of one Akshaya Kumar Ghose of No. 3, Jorabagan Street in Calcutta. She resided at the relevant time in a house known as Charu Niwas at Deoghar in the district of Santhal Perganas in the State of Bihar. In the trust deed she described herself as the settlor who was entitled to and in possession of certain properties described in Schedules B, C and D. Schedule B property consisted of three bighas and odd of land situate in Mohalla Karanibad of Deoghar town together with buildings and structures thereon; Schedule C property was Charu Niwas, also situate in Karanibad of Deoghar; and Schedule D properties consisted of several houses and some land in Calcutta the aggregate value of which was in the neighbourhood of Rs 8,50,000. In a subsequent letter to the Superintendent, Bihar State Board of Religious Trusts, it was stated on behalf of Srimati Charusila Dasi that the total annual income from all the properties was about Rs 87,839. In the trust deed it was recited that the settlor had installed a deity named Iswar Srigopal in her house and had since been regularly worshipping and performing the "puja" of the said deity; that she had been erecting and constructing a twin temple (jugal mandir) and a Nat Mandir (entrance hall) to be named in memory of her deceased son Dwijendra Nath on the plot of land described in Schedule B and was further desirous of installing in one of the two temples the deity Srigopal and such other deity or deities as she might wish to establish during her lifetime and also of installing in the other temple a marble image of Sri Sri Balanand Brahmachari, who was her religious preceptor and who was regarded by his disciples as a divine person. It was further recited in the trust deed that the settlor was also desirous of establishing and founding a hospital at Karanibad for Hindu females to be called Akshaya Kumar Female Hospital in memory of her deceased husband.

By the trust deed the settlor transferred to the trustees the properties described in Schedules B, C and D and the trustees were five in number including Srimati Charusila Dasi

and her deceased husband's adopted son Debi Prasanna Ghosh; the other three trustees were Amarendra Kumar Bose, Tara Shanker Chatterjee and Surendra Nath Burman, but they were not members of the family of the settlor. Amarendra Kumar Bose resigned from the office of trusteeship and was later replaced by Dr Shailendra Nath Dutt. The trusts imposed under the trust deed were - (1) to complete the construction of the two temples and the Nat Mandir at a cost not exceeding three lakhs to be met out of the trust estate and donations, if any; (2) after the completion of the two temples, to instal or cause to be installed the deity Iswar Srigopal in one of the temples and the marble image of Sri Balanand Brahmachari in the other and to hold a consecration ceremony and a festival in connection therewith; (3) after the installation ceremonies and festivals mentioned above, to provide for the payment and expenditure of the daily "sheba puja" and periodical festivals each year of the deity Srigopal and such other deities as might be installed at an amount not exceeding the sum of Rs 13,600 per annum and also to provide for the daily "sheba" of the marble image of Sri Balanand Brahmachari and to celebrate each year in his memory festivals on the occasion of (a) the "Janma-tithi"(the anniversary of the installation of the marble image); (b) "Guru-purnima" (full moon in the Bengali month of Ashar); and (c) "Tirodhan" (anniversary of the day on which Sri Balanand Brahmachari gave up his body) at a cost not exceeding Rs 4500 per annum; and (4) to establish or cause to be established and run and manage in Deoghar a hospital for Hindu females only to be called Akshaya Kumar Female Hospital and an attached outdoor charitable dispensary for all outpatients of any religion or creed whatsoever and pay out of the income for the hospital and the outdoor dispensary an annual sum of Rs 12,000 or such other sum as might be available and sufficient after meeting the charges and expenditure of the two temples and after paying the allowance of the "shebait" and trustees and members of the temple committee. It was further stated that the work of the establishment of the hospital and the out-door charitable dispensary should not be taken in hand until the construction of the temples and the installation of the deities mentioned above.

3. It may be here stated that it is the case of both parties before us that the temples and the Nat Mandir have been constructed and the deity and the marble image installed therein; but neither the hospital nor the charitable dispensary has yet been constructed. The powers, functions and duties of the trustees were also mentioned in the deed and, in Schedule A, detailed rules were laid down for the holding of annual general meetings, special meetings, and ordinary meetings of the trustees. To these details we shall advert later.

4. On October 27, 1952 the Superintendent, Bihar State Board of Religious Trusts, Patna, sent a notice to Srimati Charusila Dasi under Section 59 of the Act asking her to furnish a return in respect of the trust in question. Srimati Charusila Dasi said in reply that the trust in question was a private endowment created for the worship of a family idol in which the public were not interested and therefore the Act did not apply to it. On January 5, 1953 the Superintendent wrote again to Srimati Charusila Dasi informing her that the Board did not consider that the trust was a private trust and so the Act applied to it. There was further correspondence between the solicitor of Srimati Charusila Dasi and the President of the Bihar State Board of Religious Trusts. The correspondence did not, however, carry the matter any further and on February 5, 1953 the President of the State Board of Religious Trusts said in a notice that he had been authorised to assess a fee under Section 70 of the Act in respect of the

trust. Ultimately, on April 6, 1953, Srimati Charusila Dasi made an application to the High Court under Article 226 of the Constitution in which she prayed that a writ or order be issued quashing the proceedings taken against her by the Bihar State Board of Religious Trusts on the grounds (a) that the trust in question was a private trust to which the Act did not apply and (b) that the Act was ultra vires the Constitution by reason of the circumstance that its several provisions interfered with her rights as a citizen guaranteed under Article 19 of the Constitution.

5. This application was contested by the State of Bihar and the Bihar State Board of Religious Trusts, though no affidavit was filed by either of them. On a construction of the trust deed the High Court came to the conclusion that the trust in question was wholly of a private character created for the worship of a family idol in which the public were not interested and in that view of the matter held that the Act and its provisions did not apply to it. Accordingly, the High Court allowed the application and issued a writ in the nature of a writ of certiorari quashing the proceedings under Sections 59 and 70 of the Act and a writ in the nature of a writ of prohibition restraining the Bihar State Board of Religious Trusts from taking further proceedings against Srimati Charusila Dasi in respect of the trust in question. The appellants then applied for and obtained a certificate from the High Court that the case fulfilled the requirements of Article 133 of the Constitution. The present appeal has been filed in pursuance of that certificate.

6. In connected Civil Appeals numbered 225, 226, 228, 229 and 248 of 1955 judgment has been pronounced today, and we have given therein a conspectus of the provisions of the Act and have further dealt with the question of the constitutional validity of those provisions in the context of fundamental rights guaranteed by Part III of the Constitution. We have held therein that the provisions of the Act do not take away or abridge any of the rights conferred by that Part. In Civil Appeal No. 343 of 1955 in which also judgment has been pronounced today, we have considered the definition clause in Section 2(1) of the Act and come to the conclusion that the Act does not apply to private endowments, and have further explained therein the essential distinction in Hindu law between private and public religious trusts. We do not wish to repeat what we have said in those two decisions; but in the light of the observations made therein, the two questions which fall for decision in this appeal are— (1) if on a true construction of the trust deed dated March 11, 1938 the Charusila Trust is a private endowment created for the worship of a family idol in which the public are not interested, as found by the High Court and (2) if the answer to the first question is in the negative, does the Act apply by reason of Section 3 thereof to trust properties which are situate outside the State of Bihar.

13. Now, we proceed to a consideration of the second point. Section 3 of the Act says—

> "This Act shall apply to all religious trusts, whether created before or after the commencement of this Act, any part of the property of which is situated in the State of Bihar."

The argument before us on behalf of the respondent is this. Under Article 245 of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. clause (2) of

the said Article further states that no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Article 246 gives the distribution of legislative power; Parliament has exclusive power to make laws with respect to any of the matters enumerated in what has been called the Union List; Parliament as also the legislature of a State have power to make laws with respect to any of the matters enumerated in the Concurrent List; the legislature of a State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in the State List. Item 28 of the Concurrent List is - "Charities and charitable institutions, charitable and religious endowments and religious institutions." Learned counsel for the respondent contends that by reason of the provisions in Articles 245 and 246 of the Constitution read with Item 28 of the Concurrent List, the Bihar legislature which passed the Act had no power to make a law which has operation outside the State of Bihar; he further contends that under Section 3 the Act is made applicable to all religious trusts, whether created before or after the commencement of the Act, any part of the property of which is situated in the State of Bihar; therefore, the Act will apply to a religious institution which is outside Bihar even though a small part of its property may lie in that State. It is contended that such a provision is ultra vires the power of the Bihar Legislature, and Parliament alone can make a law which will apply to religious institutions having properties in different States. Alternatively, it is contended that even if the Act applies to a religious institution in Bihar a small part of the property of which is in Bihar, the provisions of the Act can have no application to such property of the institution as is outside Bihar, such as the Calcutta properties in the present case.

14. It is necessary first to determine the extent of the application of the Act with reference to Sections 1(2) and 3 of the Act read with the preamble. The preamble states:

> "Whereas it is expedient to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection and preservation of properties appertaining to such trusts."

It is clear from the preamble that the Act is intended to provide for the better administration of Hindu religious trusts in the State of Bihar. Section 1(2) states that the Act extends to the whole of the State of Bihar, and Section 3 we have quoted earlier. If these two provisions are read in the context of the preamble, they can only mean that the Act applies in cases in which (a) the religious trust or institution is in Bihar and (b) any part of the property of which institution is situated in the State of Bihar. In other words, the aforesaid two conditions must be fulfilled for the application of the Act. It is now well settled that there is a general presumption that the legislature does not intend to exceed its jurisdiction, and it is a sound principle of construction that the Act of a sovereign legislature should, if possible, receive such an interpretation as will make it operative and not inoperative; see the cases referred to ***In re the Hindu Women's Right to Property Act, 1937 and The Hindu Women's Rights to Property (Amendment) Act, 1936*** **and** ***In re a Special Reference under Section 213 of the Government of India Act, 1935*** [(1941) FCR 12, 27-30], and the decision of this Court in ***R.M.D. Chamarbauguwala*** **v.** ***Union of India*** [(1957) SCR 930]. We accordingly hold that Section 3 makes the Act applicable to all public religious trusts, that is to say, all public religious and charitable institutions within the meaning of the definition clause in

Section 2(1) of the Act, which are situate in the State of Bihar and any part of the property of which is in that State. In other words, both conditions must be fulfilled before the Act can apply. If this be the true meaning of Section 3 of the Act, we do not think that any of the provisions of the Act have extra-territorial application or are beyond the competence and power of the Bihar Legislature. Undoubtedly, the Bihar Legislature has power to legislate in respect of, to use the phraseology of Item 28 of the Concurrent List, "charities, charitable institutions, charitable and religious endowments and religious institutions" situate in the State of Bihar. The question, therefore, narrows down to this: in so legislating, has it power to affect trust property which may be outside Bihar but which appertains to the trust situate in Bihar? In our opinion, the answer to the question must be in the affirmative. It is to be remembered that with regard to an interest under a trust the beneficiaries' only right is to have the trust duly administered according to its terms and this right can normally be enforced only at the place where the trust or religious institution is situate or at the trustees' place of residence; see *Dicey's Conflict of Laws, 7th Edn., p. 506*.

The Act purports to do nothing more. Its aim, as recited in the preamble, is to provide for the better administration of Hindu religious trusts in the State of Bihar and for the protection of properties appertaining thereto. This aim is sought to be achieved by exercising control over the trustees *in personam*. The trust being situate in Bihar the State has legislative power over it and also over its trustees or their servants and agents who must be in Bihar to administer the trust. Therefore, there is really no question of the Act having extra-territorial operation. In any case, the circumstance that the temples where the deities are installed are situate in Bihar, that the hospital and charitable dispensary are to be established in Bihar for the benefit of the Hindu public in Bihar gives enough territorial connection to enable the legislature of Bihar to make a law with respect to such a trust. This Court has applied the doctrine of territorial connection or nexus to income tax legislation, sales tax legislation and also to legislation imposing a tax on gambling. In ***Tata Iron & Steel Co. Ltd.*** **v.** ***State of Bihar*** [AIR 1958 SC 452] the earlier cases were reviewed and it was pointed out that sufficiency of the territorial connection involved a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It cannot be disputed that if the religious endowment is itself situated in Bihar and the trustees function there, the connection between the religious institution and the property appertaining thereto is real and not illusory; indeed, the religious institution and the property appertaining thereto form one integrated whole and one cannot be dissociated from the other. If, therefore, any liability is imposed on the trustees, such liability must affect the trust property. It is true that in the ***Tata Iron & Steel Co.*** case this Court observed:

> "It is not necessary for us on this occasion to lay down any broad proposition as to whether the theory of nexus, as a principle of legislation is applicable to all kinds of legislation. It will be enough for disposing of the point now under consideration, to say that this Court has found no apparent reason to confine its application to income tax legislation but has extended it to sales tax and to tax on gambling."

We do not see any reason why the principles which were followed in ***State of Bombay*** **v.** ***R.M.D. Chamarbaugwala*** [(1957) SCR 874] should not be followed in the present case. In

R.M.D. Calmarbaugwala *case* it was found that the respondent who was the organiser of a prize competition was outside the State of Bombay; the paper through which the prize competition was conducted was printed and published outside the State of Bombay, but it had a wide circulation in the State of Bombay and it was found that "all the activities which the gambler is ordinarily expected to undertake" took place mostly, if not entirely, in the State of Bombay. These circumstances, it was held, constituted a sufficient territorial nexus which entitled the State of Bombay to impose a tax on the gambling that took place within its boundaries and the law could not be struck down on the ground of extra-territoriality. We are of the opinion that the same principles apply in the present case and the religious endowment itself being in Bihar and the trustees functioning there, the Act applies and the provisions of the Act cannot be struck down on the ground of extra-territoriality.

16. There is a decision of this Court to which our attention has been drawn Petition No. 234 of 1953 decided on March 18, 1953). A similar problem arose in that case where the head of a math situate in Banaras made an application under Article 32 of the Constitution for a writ in the nature of mandamus against the State of Bombay and the Charity Commissioner of that State directing them to forbear from enforcing against the petitioner the provisions of the Bombay Public Trusts Act, 1950 on the ground inter alia that the Bombay Act could have no application to the math situate in Banaras or to any of the properties or places of worship appurtenant to that math. In the course of the hearing of the petition the learned Attorney-General who appeared for the State of Bombay made it clear that there was no intention on the part of the Government of Bombay or the Charity Commissioner to apply the provisions of the Bombay Act to any math or religious institution situated outside the State territory. The learned Attorney-General submitted that the Bombay Act could be made applicable, if at all, to any place of religious instruction or worship which is appurtenant to the math and is actually within the State territory. In view of these submissions no decision was given on the point urged. The case cannot, therefore, be taken as final decision of the question in issue before us.

17. For the reasons which we have already given the Act applies to the Charusila Trust which is in Bihar and its provisions cannot be struck down on the ground of extra-territoriality.

18. The result is that the appeal succeeds and is allowed with costs, the judgment and order of the High Court dated October 5, 1953 are set aside and the petition of Srimati Charusila Dasi must stand dismissed with costs.

* * * * *

G. V. K. Industries Ltd. & Anr. V. *Income Tax Officer & Anr.*

(2011) 4 SCC 36

(S.H. Kapadia, C.J. and B. Sudershan Reddy, K.S.P. Radhakrishnan, S.S. Nijjar and Swatantra Kumar, JJ.)

Factual Background:

The Appellant by way of a writ petition filed in Andhra Pradesh High Court, had challenged an order of the Respondents which decided that the Appellant was liable to withhold a certain portion of monies being paid to a foreign company, under either one of Sections 9(1)(i) or 9(1)(vii)(b) of the Income Tax Act (1961). The Appellant had also challenged the vires of Section 9(1)(vii)(b) of the Income Tax Act (1961) for want of legislative competence and violation of Article 14 of the Constitution. The High Court having upheld that Section 9(1)(i) did not apply in the circumstances of the facts of the case, nevertheless upheld the applicability of Section 9(1)(vii)(b) on the facts and also upheld the constitutional validity of the said provision. The High Court mainly relied on the ratio of the judgment by a three judge bench of this court in *ECIL*[1989 Supp(2) SCC 642]. Hence, the appeal.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. In any federal or quasi federal nation-State, legislative powers are distributed territorially, and legislative competence is often delineated in terms of matters or fields. The latter may be thought of as comprising of aspects or causes that exist independently in the world, such as events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres. While the purpose of legislation could be seen narrowly or purely in terms of intended effects on such aspects or causes, obviously the powers have to be exercised in order to enhance or protect the interests of, the welfare of, the well-being of, or the security of the territory, and the inhabitants therein, for which the legislature has been charged with the responsibility of making laws.

2. Paraphrasing President Abraham Lincoln, we can say that the State and its Government, though of the people, and constituted by the people, has to always function "for" the people, indicating that the mere fact that the State is organized as a democracy does not necessarily mean that its government would always act "for" the people. Many instances of, and vast potentialities for, the flouting of that norm can be easily visualized. In Constitutions that establish nation-States as sovereign democratic republics, those expectations are also transformed into limitations as to how, in what manner, and for what purposes the collective powers of the people are to be used.

3. The central constitutional themes before us relate to whether the Parliament's powers to legislate, pursuant to Article 245, include legislative competence with respect to aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India. It is obvious that legislative powers of the Parliament incorporate legislative competence to enact laws with

respect to aspects or causes that occur, arise or exist, or may be expected to do so, within India, subject to the division of legislative powers as set forth in the Constitution. It is also equally obvious and accepted that only Parliament may have the legislative competence, and not the State Legislatures, to enact laws with respect to matters that implicate the use of State power to effectuate some impact or effect on aspects or causes that occur, arise or exist or may be expected to do so, outside the territory of India.

4.. Two divergent, and dichotomous, views present themselves before us. The first one arises from a rigid reading of the ratio in ***Electronics Corporation of India Ltd.,*** **v.** ***Commissioner of Income Tax & Anr.***, [(1989) (2) SCC 642-646] **(*ECIL*)** and suggests that Parliament's powers to legislate incorporate only a competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India. A slightly weaker form of the foregoing strict territorial nexus restriction would be that the Parliament's competence to legislate with respect to extra- territorial aspects or causes would be constitutionally permissible if and only if they have or are expected to have significant or sufficient impact on or effect in or consequence for India. An even weaker form of the territorial nexus restriction would be that as long as some impact or nexus with India is established or expected, then the Parliament would be empowered to enact legislation with respect to such extra-territorial aspects or causes.

5. The polar opposite of the territorial nexus theory, which emerges also as a logical consequence of the propositions of the learned Attorney General, specifies that the Parliament has inherent powers to legislate "for" any territory, including territories beyond India, and that no court in India may question or invalidate such laws on the ground that they are extra- territorial laws. Such a position incorporates the views that Parliament may enact legislation even with respect to extra- territorial aspects or causes that have no impact on, effect in or consequence for India, any part of it, its inhabitants or Indians, their interests, welfare, or security, and further that the purpose of such legislation need not in any manner or form be intended to benefit India.

6.. Juxtaposing the two divergent views outlined above, we have framed the following questions:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on, or effect(s) in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians?

(2) Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it?

7. It is necessary to note the text of Article 245 and Article 1 at this stage itself:

"Article 245. Extent of laws made by Parliament and by the Legislatures of States – (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra- territorial operation."

"Article 1. Name and territory of the Union – (1) India, that is Bharat, shall be a Union of States. (2) The States and the territories thereof shall be as specified in the First Schedule. (3) The territory of India shall comprise – (a) the territories of the States; (b) the Union territories

specified in the First Schedule; and (c) such other territories as may be acquired."

II

Meanings of some phrases and expressions used hereinafter:

6. Many expressions and phrases, that are used contextually in the flow of language, involving words such as "interest", "benefit", "welfare", "security" and the like in order to specify the purposes of laws, and their consequences can, have a range of meanings. In as much as some of those expressions will be used in this judgment, we are setting forth below a range of meanings that may be ascribable to such expressions and phrases:

"Aspects or causes" "aspects and causes":

events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, in the social, political, economic, cultural, biological, environmental or physical spheres, that occur, arise, exist or may be expected to do so, naturally or on account of some human agency.

"Extra-territorial aspects or causes":

aspects or causes that occur, arise, or exist, or may be expected to do so, outside the territory of India.

"Nexus with India", "impact on India", "effect in India", "effect on India", "consequence for India" or "impact on or nexus with India":

> *any impact(s)on, or effect(s) in, or consequences for, or expected impact(s) on, or effect(s) in, or consequence(s) for: (a) the territory of India, or any part of India; or (b)the interests of, welfare of, wellbeing of or security of inhabitants of India, and Indians in general*, that arise on account of *aspects or causes.*

"Benefit to India" or "for the benefit of India":

"to the benefit of India", "in the benefit of India" or " to benefit India" or "the interests of India", "welfare of India", "well-being of India" etc.:

> *protection of and/or enhancement of the interests of, welfare of, well-being of, or the security of India (i.e., the whole territory of India), or any part of it, its inhabitants and Indians*.

IV

The ratio in *ECIL*

20. It was concluded in ECIL that the Parliament does not have the powers to make laws that bear no relationship to or nexus with India. The obvious question that springs to mind is: "what kind of nexus?" Chief Justice Pathak's words in ECIL are instructive in this regard, both as to the principle and also the reasoning: (SCC p, 646, para 9)

> "*But the question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no competence to make the law. It will be noted that Article 245(1) empowers Parliament to enact laws for the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra-territorial operation in order to subserve the object, and that object must be related to something in India. It is inconceivable that a law should be made by parliament which has no relationship with anything in India."*

(emphasis added).

21.. We are of the opinion that the distinction drawn in ECIL between "make laws" and "operation" of law is a valid one, and leads to a correct assessment of the relationship between clauses (1) and (2) of Article 245. We will have more to say about this, when we turn our attention to the propositions of the learned Attorney General.

V

The propositions of the learned Attorney General

27.. The main propositions are that the Parliament is a "sovereign legislature", and that such a "sovereign legislature has full power to make extra-territorial laws." …

28.. The further proposition of the learned Attorney General, is that courts in India do not have the powers to declare the "extra- territorial laws" enacted by the Parliament invalid, on the ground that they have an "extra-territorial effect", notwithstanding the fact: (a) that such extra-territorial laws are with respect to extra- territorial aspects or causes that have no impact on or nexus with India; (b) that such extra-territorial laws do not in any manner or form work to, or intended to be or be to the benefit of India; and (c) that such extra-territorial laws might even be detrimental to India. The word "extra-territorial-effect" is of a much wider purport than "extra-territorial operation", and would also be expected to include within itself all the meanings of "extra-territorial law" as explained above.

29. The implication of the proposed disability is not merely that the judiciary, under our Constitution, is limited from exercising the powers of judicial review, on specific grounds, over a clearly defined set of laws, with a limited number of enactments; rather, it would be that the judiciary would be so disabled with regard to an entire universe of laws, that are undefined, and unspecified. Further, the implication would also be that the judiciary has been stripped of its essential role even where such extra-territorial laws may be damaging to the interests of India.

30.. In addition the learned Attorney General has also placed reliance on the fact that the Clause 179 of the Draft Constitution, was split up into two separate clauses, Clause 179(1) and Clause 179(2), by the Constitution Drafting Committee, and adopted as Clauses (1) and (2) of Article 245 in the Constitution. It seemed to us that the learned Attorney General was seeking to draw two inferences from this. The first one seemed to be that the Drafting Committee intended Clause 179(2), and hence Clause (2) of Article 245, to be an independent, and a separate, source of legislative powers to the Parliament to make "extra-territorial laws". The second inference that we have been asked to make is that in as much as Parliament has been explicitly permitted to make laws having "extra-territorial operation", Parliament should be deemed to possess powers to make "extra-territorial laws", the implications of which have been more particularly explicated above.

31. The learned Attorney General relied on the following case law in support his propositions and arguments: *..., British Columbia Electric Railway Company Ltd.* v. *The King,* [1946] A.C. 527; *Governor General in Council v. Raleigh Investment Co. Ltd.,* [1944] 12 ITR 265 *Wallace Brothers and Co.* v. *Commissioner of Income Tax, Bombay,* [1948] 16 ITR 240; *A.H. Wadia* v. *Commissioner of Income Tax, Bombay,* [1949] 17 ITR 63; … *Shrikant Karulkar Bhalchandra* v. *State of Gujarat,* (1994) 5 SCC 459; and *State of A.P.* v. *N.T.P.C.,* (2002) 5 SCC 203.

VI

Constitutional Interpretation:

32.. We are acutely aware that what we are interpreting is a provision of the Constitution.[…] Hence clarity is necessary with respect to the extent of powers granted and the limits on them, so that the organs of the State charged with the working of the mandate of the Constitution can proceed with some degree of certitude.

33.. In such exercises we are of the opinion that a liberal and more extensive interpretative analysis be undertaken to ensure that the court does not, inadvertently and as a consequence of not considering as many relevant issues as possible, unnecessarily restrict the powers of another coordinate organ of the State. Moreover, the essential features of such arrangements, that give the Constitution its identity, cannot be changed by the amending powers of the very organs that are constituted by it.

34. Under our Constitution, while some features are capable of being amended by Parliament, pursuant to the amending power granted by Article 368, the essential features – the basic structure – of the Constitution is beyond such powers of Parliament. The power to make changes to the basic structure of the Constitution vests only in the people sitting, as a nation, through its representatives in a Constituent Assembly. (See Keshavanadna *Bharati* v. *State of Kerala,* (1973) 4 SCC 225 and *I.R. Coelho* v. *State of Tamil Nadu,* (2007) 2 SCC 1). One of the foundational elements of the concept of basic structure is it would give the stability of purpose, and machinery of government to be able to pursue the constitutional vision into the indeterminate and unforeseeable future.

VII

Textual Analysis of Article 245

42.. Prior to embarking upon a textual analysis of Clauses (1) and (2) of Article 245, it is also imperative that we bear in mind that a construction of provisions in a manner that renders words or phrases therein to the status of mere surplussage ought to be avoided.

43.. The subject in focus in the first part of Clause (1) of Article 245 is "the whole or any part of the territory of India", and the object is to specify that it is the Parliament which is empowered to make laws in respect of the same. The second part of Clause (1) of Article 245 deals with the legislative powers of State legislatures.

44.. The word that links the subject, "the whole or any part of the territory of India" with the phrase that grants legislative powers to the Parliament, is "for". It is used as a preposition. The word "for", when ordinarily used as a preposition, can signify a range of meanings between the subject, that it is a preposition for, and that which preceded it:

> *"-prep 1 in the interest or to the benefit of; intended to go to; 2 in defence, support or favour of 3 suitable or appropriate to 4 in respect of or with reference to 5 representing or in place of..... 14. conducive or conducively to; in order to achieve..."* (See*Concise Oxford English Dictionary*, 8th Edn.OUP (Oxford, 1990))

46.. Consequently, the range of senses in which the word "for" is ordinarily used would suggest that, pursuant to Clause (1) of Article 245, the Parliament is empowered to enact those laws that are in the interest of, to the benefit of, in defence of, in support or favour of, suitable or appropriate to, in respect of or with reference to "the whole or any part of the territory of India".

47.. The above understanding comports with the contemporary understanding, that emerged in

the 20th Century, after hundreds of years of struggle of humanity in general, and nearly a century long struggle for freedom in India, that the State is charged with the responsibility to always act in the interest of the people at large. In as much as many extra-territorial aspects or causes may have an impact on or nexus with the nation-state, they would legitimately, and indeed necessarily, be within the domain of legislative competence of the national parliament, so long as the purpose or object of such legislation is to benefit the people of that nation-State.

51.. The notion that a nation-state, including its organs of governance such as the national legislature, must be concerned only with respect to persons, property, things, phenomenon, acts or events within its own territory emerged in the context of development of nation-states in an era when external aspects and causes were thought to be only of marginal significance, if at all. This also relates to early versions of sovereignty that emerged along with early forms of nation-states, in which internal sovereignty was conceived of as being absolute and vested in one or some organs of governance, and external sovereignty was conceived of in terms of co-equal status and absolute non-interference with respect to aspects or causes that occur, arise or exist, or may be expected to do so, in other territories.

52. Oppenheim's International Law (9th edn.) states as follows:

> *"The concept of sovereignty was introduced and developed in political theory in the context of the power of the ruler of the state over everything within the state. Sovereignty was, in other words, primarily a matter of internal constitutional power…. The 20th century has seen the attempt, particularly through the emergence in some instances of extreme nationalism, to transpose this essentially internal concept of sovereignty on to the international plane. In its extreme forms such a transposition is inimical to the normal functioning and development of international law and organization. It is also inappropriate….. no state has supreme legal power and authority over other states in general, nor are states generally subservient to the legal power and authority of other states. Thus the relationship of states on the international plane is characterized by their equality, independence, and in fact, by their interdependence."*

55. Within international law, the principles of strict territorial jurisdiction have been relaxed, in light of greater interdependencies, and acknowledgement of the necessity of taking cognizance and acting upon extra-territorial aspects or causes, by principles such as subjective territorial principle, objective territorial principle, the effects doctrine that the United States uses, active personality principle, protective principle etc. However, one singular aspect of territoriality remains, and it was best stated by Justice H.V. Evatt: "The extent of extra-territorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. But certainly no State attempts to exercise jurisdiction over matters, persons, or things with which it has absolutely no concern." (*See Trustees Executors & Agency Co Ltd* v. *Federal Commissioner of Taxation* (1933) 49 CLR. 220 at 239). The reasons are not too far to grasp.

56. To claim the power to legislate with respect to extra-territorial aspects or causes, that have no nexus with the territory for which the national legislature is responsible for, would be to claim dominion over such a foreign territory, and negation of the principle of self- determination of the people who are nationals of such foreign territory, peaceful co-existence of nations, and co-equal sovereignty of nation-states. Such claims have, and invariably lead to, shattering of

international peace, and consequently detrimental to the interests, welfare and security of the very nation-state, and its people, that the national legislature is charged with the responsibility for.

57.. Because of interdependencies and the fact that many extra- territorial aspects or causes have an impact on or nexus with the territory of the nation-state, it would be impossible to conceive legislative powers and competence of national parliaments as being limited only to aspects or causes that arise, occur or exist or may be expected to do so, within the territory of its own nation-state. Our Constitution has to be necessarily understood as imposing affirmative obligations on all the organs of the State to protect the interests, welfare and security of India. Consequently, we have to understand that the Parliament has been constituted, and empowered to, and that its core role would be to, enact laws that serve such purposes. Hence even those extra-territorial aspects or causes, provided they have a nexus with India, should be deemed to be within the domain of legislative competence of the Parliament, except to the extent the Constitution itself specifies otherwise.

58.. A question still remains, in light of the extreme conclusions that may arise on account of the propositions made by the learned Attorney General. Is the Parliament empowered to enact laws in respect of extra-territorial aspects or causes that have no nexus with India, and furthermore could such laws be bereft of any benefit to India? The answer would have to be no.

59.. The word "for" again provides the clue. To legislate for a territory implies being responsible for the welfare of the people inhabiting that territory, deriving the powers to legislate from the same people, and acting in a capacity of trust. In that sense the Parliament belongs only to India; and its chief and sole responsibility is to act as the Parliament of India and of no other territory, nation or people. There are two related limitations that flow from this.

60. The first one is with regard to the necessity, and the absolute base line condition, that all powers vested in any organ of the State, including Parliament, may only be exercised for the benefit of India. All of its energies and focus ought to only be directed to that end. It may be the case that an external aspect or cause, or welfare of the people elsewhere may also benefit the people of India. The laws enacted by Parliament may enhance the welfare of people in other territories too; nevertheless, the fundamental condition remains: that the benefit to or of India remain the central and primary purpose. That being the case, the logical corollary, and hence the second limitation that flows thereof, would be that an exercise of legislative powers by Parliament with regard to extra-territorial aspects or causes that do not have any, or may be expected to not have nexus with India, transgress the first condition. Consequently, we must hold that the Parliament's powers to enact legislation, pursuant to Clause (1) of Article 245 may not extend to those extra-territorial aspects or causes that have no impact on or nexus with India.

61. For a legislature to make laws for some other territory would be to act in a representative capacity of the people of such a territory. That would be an immediate transgression of the condition that the Parliament be a parliament for India. The word "for", that connects the territory of India to the legislative powers of the Parliament in Clause (1) of Article 245, when viewed from the perspective of the people of India, implies that it is "our" Parliament, a jealously possessive construct that may not be tinkered with in any manner or form. The formation of the State, and its organs, implies the vesting of the powers of the people in trust; and that trust demands, and its continued existence is predicated upon the belief, that the institutions of the State shall always act completely, and only, on behalf of the people of India.

62. While the people of India may repose, and continue to maintain their trust in the State,

notwithstanding the abysmal conditions that many live in, and notwithstanding the differences the people may have with respect to socio-political choices being made within the country, the notion of the collective powers of the people of India being used for the benefit of some other people, including situations in which the interests of those other people may conflict with India's interests, is of an entirely different order. It is destructive of the very essence of the reason for which Parliament has been constituted: to act as the Parliament for, and only of, India.

63. The grant of the power to legislate, to the Parliament, in Clause (1) of Article 245 comes with a limitation that arises out of the very purpose for which it has been constituted. That purpose is to continuously, and forever be acting in the interests of the people of India. It is a primordial condition and limitation. Whatever else may be the merits or demerits of the Hobbesian notion of absolute sovereignty, even the Leviathan, within the scope of Hobbesian logic itself, sooner rather than later, has to realize that the legitimacy of his or her powers, and its actual continuance, is premised on such powers only being used for the welfare of the people.

64. No organ of the Indian State can be the repository of the collective powers of the people of India, unless that power is being used exclusively for the welfare of India. Incidentally, the said power may be used to protect, or enhance, the welfare of some other people, also; however, even that goal has to relate to, and be justified by, the fact that such an exercise of power ultimately results in a benefit – either moral, material, spiritual or in some other tangible or intangible manner – to the people who constitute India.

65. We also derive interpretational support for our conclusion that Parliament may not legislate for territories beyond India from Article 51, a Directive Principle of State Policy, though not enforceable, nevertheless fundamental in the governance of the country. …

66.. To enact legislation with respect to extra-territorial aspects or causes, without any nexus to India, would in many measures be an abdication of the responsibility that has been cast upon Parliament as above. International peace and security has been recognised as being vital for the interests of India. This is to be achieved by India maintaining just and honourable relations, by fostering respect for international and treaty obligations etc., as recognized in Article 51.

67. It is one matter to say that because certain extra-territorial aspects or causes have an impact on or nexus with India, Parliament may enact laws with respect to such aspects or causes. That is clearly a role that has been set forth in the Constitution, and a power that the people of India can claim. How those laws are to be effectuated, and with what degree of force or diplomacy, may very well lie in the domain of pragmatic, and indeed ethical, statecraft that may, though not necessarily always, be left to the discretion of the Executive by Parliament. …

69.For the aforesaid reasons we are unable to agree that Parliament, on account of an alleged absolute legislative sovereignty being vested in it, should be deemed to have the powers to enact any and all legislation, de hors the requirement that the purpose of such legislation be for the benefit of India. The absolute requirement is that all legislation of the Parliament has to be imbued with, and at the core only be filled with, the purpose of effectuating benefits to India. This is not just a matter of the structure of our Constitution; but the very foundation.

70.. The arguments that India inherited the claimed absolute or illimitable powers of the British parliament are unacceptable. …

72.. We now turn our attention to other arguments put forward by the learned Attorney General with regard to the implications of permissibility of making laws that may operate extra-

territorially, pursuant to Clause (2) of Article 245. In the first measure, the learned Attorney General seems to be arguing that the act and function of making laws is the same as the act and function of "operating" the law. From that position, he also seems to be arguing that Clause (2) of Article 245 be seen as an independent source of power. Finally, the thread of that logic then seeks to draw the inference that in as much as Clause (2) prohibits the invalidation of laws on account of their extra- territorial operation, it should be deemed that the courts do not have the power to invalidate, - i.e., strike down as ultra vires -, those laws enacted by Parliament that relate to any extra- territorial aspects or causes, notwithstanding the fact that many of such aspects or causes have no impact on or nexus with India.

73.. It is important to draw a clear distinction between the acts & functions of making laws and the acts & functions of operating the laws. Making laws implies the acts of changing and enacting laws. The phrase operation of law, in its ordinary sense, means the effectuation or implementation of the laws. The acts and functions of implementing the laws, made by the legislature, fall within the domain of the executive. Moreover, the essential nature of the act of invalidating a law is different from both the act of making a law, and the act of operating a law.

74. Invalidation of laws falls exclusively within the functions of the judiciary, and occurs after examination of the vires of a particular law. While there may be some overlap of functions, the essential cores of the functions delineated by the meanings of the phrases "make laws" "operation of laws" and "invalidate laws" are ordinarily and essentially associated with separate organs of the state – the legislature, the executive and the judiciary respectively, unless the context or specific text, in the Constitution, unambiguously points to some other association.

75.. In Article 245 we find that the words and phrases "make laws" "extra-territorial operation", and "invalidate" have been used in a manner that clearly suggests that the addressees implicated are the legislature, the executive and the judiciary respectively. While Clause (1) uses the verb "make" with respect to laws, thereby signifying the grant of powers, Clause (2) uses the past tense of make, "made", signifying laws that have already been enacted by the Parliament. The subject of Clause (2) of Article 245 is the law made by the Parliament, pursuant to Clause (1) of Article 245, and the object, or purpose, of Clause (2) of Article 245 is to specify that a law so made by the Parliament, for the whole or any part of territory of India, should not be held to be invalid solely on the ground that such laws require extra-territorial operation. The only organ of the state which may invalidate laws is the judiciary.

76. Consequently, the text of Clause (2) of Article 245 should be read to mean that it reduces the general and inherent powers of the judiciary to declare a law ultra-vires only to the extent of that one ground of invalidation. One thing must be noted here. In as much as the judiciary's jurisdiction is in question here, an a-priori, and a strained, inference that is unsupported by the plain meaning of the text may not be made that the powers of the legislature to make laws beyond the pale of judicial scrutiny have been expanded over and above that which has been specified.

77. The learned Attorney General is not only seeking an interpretation of Article 245 wherein the Parliament is empowered to make laws "for" a foreign territory, which we have seen above is impermissible, but also an interpretation that places those vaguely defined laws, which by definition and implication can range over an indefinite, and possibly even an infinite number, of fields beyond judicial scrutiny, even in terms of the examination of their vires. That would be contrary to the basic structure of the Constitution.

78.Clause (2) of Article 245 acts as an exception, of a particular and a limited kind, to

the inherent power of the judiciary to invalidate, if ultra-vires, any of the laws made by any organ of the State. Generally, an exception can logically be read as only operating within the ambit of the clause to which it is an exception. It acts upon the main limb of the Article – the more general clause - but the more general clause in turn acts upon it. The relationship is mutually synergistic in engendering the meaning. In this case, Clause (2) of Article 245 carves out a specific exception that a law made by Parliament, pursuant to Clause (1) of Article 245, for the whole or any part of the territory of India may not be invalidated on the ground that such a law may need to be operated extraterritorially. Nothing more.

79. The power of the judiciary to invalidate laws that are ultra-vires flows from its essential functions, Constitutional structure, values and scheme, and indeed to ensure that the powers vested in the organs of the State are not being transgressed, and that they are being used to realise a public purpose that subserves the general welfare of the people. It is one of the essential defences of the people in a constitutional democracy.

80.. If one were to read Clause (2) of Article 245 as an independent source of legislative power of the Parliament to enact laws for territories beyond India wherein, neither the aspects or causes of such laws have a nexus with India, nor the purposes of such laws are for the benefit of India, it would immediately call into question as to why Clause (1) of Article 245 specifies that it is the territory of India or a part thereof "for" which the Parliament may make laws. If the power to enact laws for any territory, including a foreign territory, were to be read into Clause (2) of Article 245, the phrase "for the whole or any part of the territory of India" in Clause (1) of Article 245 would become a mere surplassage. When something is specified in an Article of the Constitution it is to be taken, as a matter of initial assessment, as nothing more was intended.

81. In this case it is the territory of India that is specified by the phrase "for the whole or any part of the territory of India." "*Expressio unius est exclusio alterius"*- the express mention of one thing implies the exclusion of another. In this case Parliament has been granted powers to make laws "for" a specific territory – and that is India or any part thereof; by implication, one may not read that the Parliament has been granted powers to make laws "for" territories beyond India.

82.The reliance placed by the learned Attorney General on the history of changes to the pre-cursors of Article 245, in the Draft Constitution, in support of his propositions is also inapposite. In fact one can clearly discern that the history of changes, to Clause 179 of the Draft Constitution (which became Article 245 in our Constitution), supports the conclusions we have arrived at as to the meaning, purport and ambit of Article 245. …

VIII

Analysis of Constitutional Topological Space: Chapter 1, Part XI:

86. We now turn to Chapter 1 Part XI, in which Article 245 is located, to examine other provisions that may be expected to transform or be transformed by the meaning of Article 245 that we have discerned and explained above. In particular, the search is also for any support that may exist for the propositions of the learned Attorney General that the Parliament may make laws for any territory outside India.

87.. As is well known, Article 246 provides for the division of legislative competence, as between the Parliament and the State legislatures, in terms of subjects or topics of legislation. Clauses (1), (2) and (3) of Article 246 do not mention the word territory. However, Clause (4) of Article 246 specifies that Parliament has the power to "make laws for any part of the territory of

India not included in a State" with respect to any matter, notwithstanding that a particular matter is included in the State List. In as much as Clause (1) of Article 245 specifies that it is for "the whole or any part of the territory of India" with respect of which Parliament has been empowered to make laws, it is obvious that in Article 246 legislative powers, whether of Parliament or of State legislatures, are visualized as being "for" the territory of India or some part of it.

IX

Wider Structural Analysis:

94.. Article 260, in Chapter II of Part XI is arguably the only provision in the Constitution that explicitly deals with the jurisdiction of the Union in relation to territories outside India […]

95.. It is clear from the above text of Article 260 that it is the Government of India which may exercise legislative, executive, and judicial functions with respect of certain specified foreign territories, the Governments of which, and in whom such powers have been vested, have entered into an agreement with Government of India asking it do the same. Indeed, from Article 260, it is clear that Parliament may enact laws, whereby it specifies the conditions under which the Government of India may enter into such agreements, and how such agreements are actually implemented.

98.. The text of Articles 1 and 2 leads us to an irresistible conclusion that the meaning, purport and ambit of Article 245 is as we have gathered above. Sub-clause (c) of Clause (3) of Article 1 provides that territories not a part of India may be acquired. The purport of said Sub-Clause (c) of Clause 3 of Article 1, pace ***Berubari Union and Exchange of Enclaves, In re*** (AIR 1960 SC 845) is that such acquired territory, automatically becomes a part of India.

99. It was held in *Berubari*, that the mode of acquisition of such territory, and the specific time when such acquired territory becomes a part of the territory of India, are determined in accordance with international law. It is only upon such acquired territory becoming a part of the territory of India would the Parliament have the power, under Article 2, to admit such acquired territory in the Union or establish a new state. The crucial aspect is that it is only when the foreign territory becomes a part of the territory of India, by acquisition in terms of relevant international laws, is the Parliament empowered to make laws for such a hitherto foreign territory.

100. Consequently, the positive affirmation, in the phrase in Clause (1) of Article 245, that the Parliament "may make laws for the whole or any part of the territory of India" has to be understood as meaning that unless a territory is a part of the territory of India, Parliament may not exercise its legislative powers in respect of such a territory. In the constitutional schema it is clear that the Parliament may not make laws for a territory, as a first order condition, unless that territory is a part of India.

XI

Conclusion:

124.. We now turn to answering the two questions that we set out with:

(1) Is the Parliament constitutionally restricted from enacting legislation with respect to extra-territorial aspects or causes that do not have, nor expected to have any, direct or indirect, tangible or intangible impact(s) on or effect(s) in or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of

India, and Indians?

The answer to the above would be yes. However, the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, – events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like -, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, *only when* such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians.

125. It is important for us to state and hold here that the powers of legislation of the Parliament with regard to all aspects or causes that are within the purview of its competence, including with respect to extra-territorial aspects or causes as delineated above, and as specified by the Constitution, or implied by its essential role in the constitutional scheme, ought not to be subjected to some a-priori quantitative tests, such as "sufficiency" or "significance" or in any other manner requiring a pre-determined degree of strength. All that would be required would be that the connection to India be real or expected to be real, and not illusory or fanciful.

126. Whether a particular law enacted by Parliament does show such a real connection, or expected real connection, between the extra-territorial aspect or cause and something in India or related to India and Indians, in terms of impact, effect or consequence, would be a mixed matter of facts and of law. Obviously, where the Parliament itself posits a degree of such relationship, beyond the constitutional requirement that it be real and not fanciful, then the courts would have to enforce such a requirement in the operation of the law as a matter of that law itself, and not of the Constitution.

127. (2)Does the Parliament have the powers to legislate "for" any territory, other than the territory of India or any part of it? The answer to the above would be no. It is obvious that Parliament is empowered to make laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, within the territory of India, and also with respect to extra-territorial aspects or causes that have an impact on or nexus with India as explained above in the answer to Question 1 above. Such laws would fall within the meaning, purport and ambit of the grant of powers to Parliament to make laws "for the whole or any part of the territory of India", and they may not be invalidated on the ground that they may require extra-territorial operation. Any laws enacted by Parliament with respect to extra- territorial aspects or causes that have no impact on or nexus with India would be ultra-vires, as answered in response to Question 1 above, and would be laws made "for" a foreign territory.

128. Let the appeal be listed before an appropriate bench for disposal. Ordered accordingly.

* * * * *

In Re CP & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938

AIR 1939 F.C. 1

[*Doctrine of Harmonious Construction*]

[Sir Maurice Gwyer, C.J., Sir Shah Sulaiman and M.R. JAyakar, JJ.]

This was the opinion rendered by the Federal Court in a Special Reference made by the Governor-General to the Court under S. 213 of the Government of India Act, 1935. The Reference was in the following terms:

> "Is the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars, or to what extent, ultra vires the Legislature of the Central Provinces and Berar"?

GWYER C.J. – Notwithstanding the very wide terms in which the Special Reference is framed, the question to be determined lies essentially in a small compass. It has arisen in the following way. S. 3 (1), Provincial Act, to which it will be convenient to refer hereafter as the impugned Act, is in these terms:

> There shall be levied and collected from every retail dealer a tax on the retail sales of motor spirit and lubricants at the rate of five per cent on the value of such sales.

"Retail dealer" is defined by S. 2 as any person who, on commission or otherwise, sells or keeps for sale motor spirit or lubricant for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased, and "retail sale" is given a corresponding meaning.

Both motor spirit and lubricants are manufactured or produced (though not to any great extent) in India. Motor spirit is subject to an excise duty imposed by the Motor Spirit (Duties) Act, 1917, an Act of the Central Legislature; no excise duty at present has been imposed on lubricants.

By Sec. 100 (1), Constitution Act the Federal Legislature (which up to the date of the Federation contemplated by the Act, means the present Indian Legislature) has, notwithstanding anything in sub-ss. (2) and (3) of the same Section, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in the Federal Legislative List, that of List I in Sch. 7 to the Act. Entry (45) in that List is as follows: "Duties of excise on tobacco and other goods manufactured or produced in India", with certain exceptions not here material and it is said on behalf of the Government of India that the tax imposed by S. 3 (1) of the impugned Act, in so far as it may fall on motor spirit and lubricants of Indian origin, is a duty of excise within Entry (45) and therefore an intrusion upon the field of taxation reserved by the Act exclusively for the Federal Legislature.

By Sec. 100 (3) of the Act, a Provincial Legislature has, subject to the two Preceding sub-sections of that Section, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial

Legislative List, that is List II of Sch. 7. Entry (48) in this List is as follows: II "Taxes on the sale of goods and on advertisements"; and it is said on behalf of the Provincial Government that the tax imposed by the impugned Act is within the taxing power conferred by that entry, and therefore within the exclusive competence of the Provincial Legislature.

It will be observed that by Sec, 100 (1) the Federal Legislature are given the exclusive powers enumerated in the Federal Legislative List, "notwithstanding" anything in the two next succeeding sub sections" of that Section. Sub-sec. (2) is not relevant to the Present case but sub-s. (3) is as I have stated, the enactment which gives to the Provincial Legislature the exclusive powers enumerated in the Provincial Legislative List. Similarly Provincial Legislature are given by Sec. 100 (3) the exclusive powers in the Provincial Legislative List "subject to the two preceding sub-sections", that is sub-sections (1) and (2). Accordingly, the Government of India further contend that, even if the impugned Act were otherwise within the competence of the Provincial Legislature, it is nevertheless invalid, because the effect of the *non obstante* clauses in S. 100 (1), and a *fortiori* of that clause read with the opening words of Sec. 100 (3), is to make the federal power prevail if federal and provincial legislature powers overlap. The Provincial Government, on the other hand, deny that the two entries overlap and say that they are mutually exclusive. The Government of India raise a further point under S. 297, Constitution Act, but it will be more convenient to deal with this separately and at a later stage. I should add that it is common ground between the parties that if S. 3 (1) of the impugned Act is held to be invalid, the rest of the Act must be invalid also, since it only provides the machinery for giving practical effect to the charging Section.

The first case of importance that has come before the Federal Court; and it is desirable, more particularly in view of some of the arguments addressed to us during the hearing, to refer briefly to certain Principles which the Court will take for its guidance. It will adhere to canons of interpretation and construction which are now well known and established. It will seek to ascertain the meaning and intention of Parliament from the language of the statute itself: but with the motives of Parliament it has no concern. It is not for the Court to express, or indeed to entertain, any opinion on the expediency of a particular piece of legislation, if it is satisfied that it was within the competence of the Legislature which enacted it: nor, will it allow itself to be influenced by any considerations of policy, which lie wholly outside its sphere.

The Judicial Committee have observed that a Constitution is not be construed in any narrow and pendantic sense: per Lord Wright in [***James* v. *Commonwealth of Australia***, (1936) A C 578, 614]. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:

> Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting to remember that it is a Constitution, a mechanism under which laws are to be made and not a mere Act which declares what the law is to be: [**Attorney-General for *New South Wales*** v. ***Brewery Employees Union*** (1908) 6 Commonwealth LR 469], per Higgins J. at p. 611.

Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret; but I do not imply but this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis-valeat quam pereat.*

Dispute with regard to central and provincial legislative spheres are inevitable under every federal Constitution, and have been the subject-matter of a long series of cases in Canada, Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument. The decisions of the Canadian and Australian Courts are not bindings upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend on the words of the Constitution which the Court is interpreting; and since no two Constitution are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.

The attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists. Whether this elaboration will be productive of more or less litigation than in Canada, where there is also a distribution, by enumeration time alone will show; at least this court will not be confronted with the additional problems created by the interlacing provisions of Ss. 91 and 92. British North America Act and the distribution of powers not only by the enumeration of specified subjects, but also by reference to the general or local nature of the subject matter of legislation. But the interpretation of the British North America Act has given rise to questions analogous to that which is now before this Court and there are two decisions of the Judicial Committee which lay down most clearly the principles which should be applied by Courts before which questions may come.

The question before the Court admits of three possible solutions: (1) that the provincial entry covers the tax now challenged and that the federal entry does not; (2) that the federal entry covers it, but that the provincial entry does not; and (3) that the tax falls within both entries, so that there is a real overlapping of jurisdiction between the two. In the first case, the validity of the tax could not be questioned; in the second, the tax would be invalid as the invasion of an exclusively federal sphere, in the third, it would, because falling within both spheres be invalid by reason of the *non obstante* clause. It is necessary therefore to scrutinize

more closely the two entries, first separately and then in relation to each other and to the context and scheme of the Act.

The provincial legislative power extends to making laws with respect to taxes on the sale of goods. The words which this power is given, taken by themselves and in their ordinary and natural sense seem apt to cover such a tax as is imposed by the impugned Act; and it might indeed be difficult to had a more exact or appropriate formula for the purpose.

The federal legislative power extends to making laws with respect to duties of excise on goods manufactured or produced in India. "Excise" is stated in the Oxford Dictionary to have been originally "accise", a word derived through the Dutch from the late Latin *accensare,* to tax; the modern form, which ousted "accise" at an early date, being apparently due to a mistaken derivation from the Latin *excidere,* to cut out. It was at first a general word for a toll or tax, but since the 17th century it has acquired in the United Kingdom particular, though not always precise, signification. The primary meaning of 'excise duty' or'duty of excise' has come to be that of a tax on certain articles of luxury (such as spirits, beer to tobacco) produced or manufactured in the United Kingdom, and it is used in contradistinction to customs duties on articles imported into the country from elsewhere. At a later date the licence fees payable by persons who produced or sold excisable articles also became known as duties of excise; and the expression was still later extended to licence fees imposed for revenue, administrative, or regulative purposes on persons engaged in a number of other trades or callings. Even the duty payable on payments for admission to places of entertainment in the United Kingdom is called a duty of excise; and, generally speaking, the expression is used to cover all duties and taxes which together with customs duties are collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry (45).

It was then contended on behalf of the Government of India that an excise duty is a duty which may be imposed upon home produced goods at any stage from production to consumption and that therefore the federal legislative power extended to imposing excise duties at any stage. This is to confuse two things, the nature of excise duty and the extent of the federal legislative power to impose them. Authorities were cited to us, from Blackstone onwards, to prove that excise duties may be imposed at any stage; and if this means no more than that, instances are to be found where they have been so imposed, authority seems scarcely needed. It would perhaps not be easy without considerable research to ascertain how far Blackstone was justified at the time he wrote in saying that excise duties were an inland imposition, paid sometimes on the consumption of the commodity, and frequently on the retail sale. Blackstone's statement however is repeated, almost verbatim, in the latest edition of Stephen's commentaries, and as a description of excise duty now in force in the United Kingdom it is demonstrably wrong; for, a brief examination of those duties shows that in practically all cases it is the producer or manufacturer from whom the duty is collected. But there can be no reason in theory why an excise duty should not be imposed even on the retail sale of an article, if the taxing Act so provides. Subject always to the legislative competence

of the taxing authority; a duty on home-produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, wherever it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty; that is a duty on home-produced or home manufactured goods, no matter at what stage it is collected. The definition of excise duties is therefore of little assistance in determining the extent of the legislative power to impose them: for a duty imposed by a restricted legislative power does not differ in essence from the duty imposed by an extended one.

It was argued on behalf of the Provincial Government that an excise duty was a tax on production or manufacture only and that it could not therefore be levied at any later stage. Whether or not there be any difference between a tax on production and a tax on the thing produced, this contention, no less than that of the Government of India, confuses the nature of the duty with the extent of the legislative power to impose it. Nor for the reasons already given, is it possible to agree that in no circumstances could an excise duty be levied at a stage subsequent to production or manufacture.

If therefore a Legislature is given power to make laws "with respect to" duties of excise it is a matter to be determined in each case whether on the true construction of the enactment conferring the power, the power itself extends to imposing duties on home-produced or home manufactured goods at any stage up to consumption, or whether it is restricted to imposing duties, let us say, at the production or manufacture only. A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense, but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act.

The question must next be asked whether such a tax as is imposed by the impugned Act, though described as a tax on the sale of goods could in any circumstances be held to be a duty of excise, for it is common ground that the Courts are entitled to look at the real substance of the Act imposing it, at what it does and not merely at what it says in order to ascertain the true nature of the tax. Since writers on political economy are agreed that taxes on the sale of commodities are simply taxes on the commodities themselves, it is possible to regard a tax on the retail sale of motor spirit and lubricants as a tax on those commodities, and I will assume for the moment in favour of the Government of India that it is on that ground capable of being regarded as a duty of excise.

It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province.

But the question before the Court is not how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now in the Constitution

Act. This is a very different problem and one on which case decided under other Constitutions can never be conclusive. In the United Kingdom there are no competing jurisdictions at all: and though in Canada, Australia and United States there is a division or distribution of powers between the Centre and the Provinces or States, there is nowhere to be found set in opposition to one another the power of levying duties of excise and an express power of levying a tax on the sale of goods. In Canada there is, it is true, a double enumeration of legislative powers; but so far as taxation is concerned, the conflict is between direct and indirect taxation, the first being the prerogative of the Provinces, the second of the Dominion; and though duties of excise (as well as those of customs) are mentioned in the British North America Act, it is nearly always as indirect taxes that constitutional questions arise with regard to them. In Australia all taxing powers belong to the States except those which are specifically reserved to the Commonwealth. Among the latter are duties of customs and excise; and the question in Australia always is whether a particular tax falls within the field of taxation reserved to the Commonwealth or not; there can be no overlapping of particular legislative spheres. In the United States the Central Legislature has power to levy "taxes, duties, imposts and excises", provided that they are uniform throughout the States. This is not an exclusive power, and the States can levy what taxes they like (other than imposts or duties on imports or exports), subject to the provisions of the Constitution, though certain of those provisions, such as the commerce clause, operate in practice as a very effective restriction upon State powers. Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and where necessary, modifying the language of the one by the that of the other. If indeed such a reconciliation should prove impossible then, and only then, will the *non obstante* clause operate and the federal power prevail: for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

It has been shown that if each legislative power is given its widest meaning, there is a common territory shared between them and an overlapping of jurisdictions is the inevitable result; and this can only be avoided if it is reasonably possible to adopt such an interpretation it would assign what would otherwise be common territory to one or the other. To do this it is necessary to construe this legislative power defined or described by one entry or the other in a more restricted sense than, as already pointed out, it can theoretically possess. I mention, only to dismiss, the argument that the new autonomy of the provinces and the expenditure necessary to administer and maintain the vital services committed to their charge require that every intendment should be made in favour of the provincial taxing power. I should never deny the high importance of the provincial functions; but the Centre has also great responsibilities, though of another kind, and it is not for this Court to weigh one against the other. The issue must be decided on other grounds than these.

The provincial legislative power defined in Entry (48) may be first considered. The Advocate-General of India, when asked what was left to the legislative power of the Provinces under this entry if the view of the Government of India prevailed, said that it was

clearly within their power to levy the taxes commonly known as turnover taxes, which under that name or under the name of sales taxes have since the War proved so successful a fiscal expedient in many countries. Strictly, a turnover tax appears to be the correct description of a tax usually calculated in the form of a percentage, on the gross receipts of wholesalers or retailers or of both, and in some countries also on receipts in respect of services. It is however sometimes included under the more general name of sales tax, and it is evident from the various modern writers who have dealt with the subject and to whose works we were referred that the latter expression is often used a convenient name for a number of taxes ranging from turnover taxes to taxes on the retail sale of specified classes of goods; the so-called sales taxes which have been imposed by a large number of the State Legislatures in the United States seem to be often of the latter variety. Two citations from these writers will be sufficient to show that neither "turnover tax" nor "sales tax" has yet achieved a recognized and certain meaning:

> The scope of sales and turnover taxes has varied greatly. Some extended to all transactions, both wholesale and retail, and others to wholesale transactions only. The first of these are usually called turnover taxes. Certain taxes include both goods and services, while others include only goods. The German turnover tax is an example of a tax which includes nearly every type of transaction in the line of goods and services.

And again:

> The tax (i.e. the sales or turnover tax) may be general, as in France or Germany, or retail transactions may be excluded, as in Belgium. It may be as is common in the States of the American Union, confined to retail transactions. It may be imposed, as in Canada and Australia, as a producers' or manufactures' tax, and it may be on classified industries or trades only. It may be levied on nearly all goods and services, as in Germany. It may exempt certain sales, as in France, where the sales of farmers are exempt unless carrying on manufacture as well as agriculture.

Thus the expression "sales tax" may comprehend a good deal more than would be understood by "tax on the sale of goods" in the ordinary and natural meaning of those words, and the expression "turnover tax" seems to be in some directions wider and in others narrower. "Tax on the sale of goods" at any rate seems to include some varieties of turnover tax but it seems also to include more than a turnover tax in the stricter sense could reasonably be held to cover. In these circumstances it may be thought hazardous to impute to Parliament any particular intentions with regard to turnover taxes. Parliament may have had them in mind. The Proposals for Indian Constitutional Reform, commonly known as the White Paper (Cmd. 4268, 1933) and the Report of the Joint Select Committee thereon (H. L. 6 and H. C. 5, 1934) are historical facts and their relation to the Constitution Act is matter of common knowledge to which this court is entitled to refer and it may be observed that "taxes on the sale of commodities and on turnover" appeared in the White Paper as a suggestion for possible sources of provincial revenue, and that the suggestion was approved without comment by the Joint Select Committee. I do not know, and it would be idle to speculate why a different formula was ultimately inserted in the Act, the Court is only concerned with what Parliament has in fact said, and if the Government of India are right and "taxes on the sale of goods" was intended to refer to taxes on turnover alone, I find it difficult to understand why Parliament used so inappropriate and indeed misleading a formula. "Taxes on turnover"

may not be yet a term of art, but some of its meanings are tolerably plain. "Taxes on the sale of goods" appears to me to be plainer still, and though there may be general agreement that it includes some forms of turnover the exclusion of everything else. Certainly that would not be its ordinary meaning, and I cannot persuade myself, even for the purpose of avoiding a conflict between the two entries, that Parliament deliberately used words which cloaked its real intention when it would have been so simple a matter to make that intention clear beyond any possibility of doubt. I therefore proceed to inquire if it is reasonably possible to avoid the conflict by construing the power to make laws "with respect to" duties of excise as not extending to the imposition of a tax or duty on the retail sale of goods. This is the crucial issue in the case.

In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature is to be construed as a power to impose duties of excise upon the manufacture or producer of the excisable articles, or at least at the stage of or in connection with, manufacture or production, and that it extends no further. I think that this is an interpretation reasonable in itself; more consonant than any other with the context and general scheme of the Act, and supported by other considerations to which I shall refer.

I have said that it seems to me impossible, without straining the language of the Act, to construe a power to impose taxes on the sale of goods as a power to impose only turnover taxes. To construe the power to impose duties of excise, as I think it ought to be construed, involves no straining of language at all. The expression "duties of excise", taken by itself, conveys no suggestion with regard to the time or place of their collection. Only the context in which the expression is used can tell us whether any reference to the time or manner of collection is to be implied. It is not denied that laws are to be found which impose duties of excise at stages subsequent to manufacture or production; but, so far as I am aware, in none of the cases in which any question with regard to such a law has arisen was it necessary to consider the existence of a competing legislative power, such as appears in entry (48).

Much stress was laid upon two cases which were cited to us. In [***Patoon* v. *Brady*** (1901) 184 US 608], a case before the United States Supreme Court, tobacco, which had already paid excise duty had been sold to the plaintiff. While it was still in his hands, an Act was passed doubling the current rate of duty and (no doubt lest persons in possession at the moment of duty paid tobacco should get an unearned increment on its sale) imposing a special duty on all tobacco which had paid the excise duty in force at the date of the Act and was at that date held and intended for sale. The Act was challenged as unconstitutional on the ground (inter alia) that the legislature having once excised an article could not excise it a second time. The Court; upholding the Act on this particular point, referred to the account of excise duties given in Blackstone and Story and to definitions in various standard dictionaries, and then said:

> Within the scope of the various definitions we have quoted, there can be no doubt that the power to excise continues while the consumable articles are in the hands of the manufacture or any intermediate dealer, and until they reach the consumer. Our conclusion then is that it is within the power of Congress to increase an excise, as well as a property tax, and that such an increase may be made at least while the property is held for sale and before it has passed into the hands of the consumer.

The case is thus a decision on the scope and extent of the power to impose excise duties given to the Central Legislature by the Constitution of the United States. No question was involved of a competing legislative power. It is to be observed however that the imposition of an excise duty at a stage later than production or manufacture was obviously regarded as an unusual thing and that the duty about which the litigation arose was not intended as a permanent duty but was imposed once for all. The other case was [***Commonwealth Oil Refineries Co.*** **v.** ***South Australia,*** 38 Commonwealth LR 408]. There a State law had (inter alia) purported to impose an additional income tax (for so the duty was described) at the rate of 3 for every gallon of motor spirit sold by any person who sold and delivered it within the State to persons within the State for the first time after its production or manufacture, but not including any purchaser who subsequently sold it. It was argued that this was in substance a duty of excise which under the Constitution only the Commonwealth had the right to impose, and that contention prevailed. It might at first sight appear that this decision supported the Government of India's case; for, as already pointed out, the taxing power of the Australian States is unlimited, save in so far as the Constitution reserves the right for imposing certain specified taxes to the Commonwealth and indirectly limits the power of the States by giving the Commonwealth power to regulate inter-State trade and commerce. But closer examination of the judgment delivered shows that the majority of the Judges took the view that the duty on first sale of the commodity in fact is a tax on the producer and for that a reason a duty of excise without doubt. The case is no authority at all for the proposition that a tax on retail sales must necessarily be a duty of excise.

It cannot be strongly emphasized that the question now before the Court is one of possible limitations on a legislative power, and not possible limitations on the meaning of the expression duties of excise"; for, "duties of excise" will bear the same meaning whether the power of the Central Legislature to impose them is restricted or extended. It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by language of the other. Here are two separate enactments, each in one aspect conferring the power to impose a tax upon goods; and would accord with sound principles of construction to take the more general power; that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the Province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for, the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense, effect given to the latter in its ordinary and natural meaning. So in ***Bank of Toronto*** **v.** ***Lambe*** [(1887) 12 AC 575, 587], where a Provincial Legislature in Canada had imposed a tax upon banks carrying on business in the Province, varying in amount with the paid up capital and with the number of the offices of the bank, whether or not the bank's principal place of business was within the Province, it was argued that even if the tax imposed by the Act was direct taxation and therefore within the power of the Provincial Legislature under Sec. 92, British North America Act, it was nevertheless invalid because it was legislation relating to banking and the incorporation of banks, the making of laws on

which was by S. 91 of the Act vested solely in the Dominion Parliament. The Judicial Committee rejected this argument. They pointed out that in (1882) 7 A C 96, to which reference has already been made, it was found absolutely necessary that the literal meaning of the words defining the powers vested in the Dominion Parliament should sometimes be restricted, "in order to afford scope for powers which are given exclusively to the Provincial Legislatures"; and they summed up the matter thus:

The question they (the Committee) have to answer is whether the one body or the other has power to make a given law. If they find that on the due constitution of the Act the legislative power falls within S. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.

This is not to ignore the *non obstante* clause, still less to bring into existence, as it were a *non obstante* clause in favour of the Provinces; for if the two legislative powers are read together in the manner suggested above, there will be a separation into two mutually exclusive spheres, and there will be no overlapping between them. Thus, the Central Legislature will have the power to impose duties of excisable articles before they become part of the general stock of the Province that is not say, at the stage of manufacture or the production and the Provincial Legislature an exclusive power to impose a tax on sales thereafter.

In discussing the possible overlapping of the federal and provincial jurisdictions I assumed for the moment that a tax on retail sales might be a duty of excise. Whether it is so or not must depend upon circumstances: certainly I cannot agree that it must always be so regarded, even where the power to impose duties of excise extends to imposing them at stages subsequent to production or manufacture. There are some significant observations on this point in the judgment of Isaacs J. (afterwards Isaacs C.J.) in the ***Commonwealth Refineries*** case to which reference has already been made. After stating his conclusion that the words "excise duties" were not used in the constitution in the extended sense which had been suggested, the learned Judge proceeded as follows:

> I arrive at that conclusion notwithstanding the expression was in South Australia before Federation, as in Victoria, sometimes used in a sense large enough to include breweries' and wine licences. Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of goods as existing articles of trade and commerce, independently of the fact of their local production, a license or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words "excise duties as used in the constitution... Therefore, if the taxation by the State Act under S. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter State operation of trade or commerce it would not be open to the challenge here made. [***Commonwealth Oil Refineries Co.*** case]

There appears to be a sound basis for the above distinction and the case which the Court is now considering is indeed stronger than the Australian one, for in the latter the power of the State to levy taxes on sale other than duties of excise was implied in its general powers of taxation and was not conferred expressly as in Entry (48). No doubt there will be border line cases in which it may be difficult to say on which side a particular tax or duty falls; but that is one of the inevitable consequences of a division of legislative powers. If however the facts in (1901) 184 U S 608 had been such as to make the decision turn upon the distinction between the two kinds of tax mentioned above, it seems probable that the special duty there imposed would still have been held to be a duty of excise, because it was an attempt, as it were, to relate duty back to the stage of production, even though the person may be liable for payment was not (and indeed could seldom have been) the original producer himself. In the present case it could not be suggested that the tax on retail sales has any connection with production; it is also imposed indifferently on all motor spirit and lubricants, whether produced or manufactured in India or not. I do not say that this is conclusive, but it is to be taken into consideration. And I think that the distinction drawn by the learned Judge corresponds in substance with the distinction which it seems to me ought to be drawn in the case of the federal and provincial spheres in India, that is, between the taxation of goods at the stage of manufacture or production and their taxation by the provincial taxing authority (as in Australia by the State) after they have become part of what I have called the common stock of the Province. The learned Judge's observations, it is true, were obiter, and in any case are not binding upon us; but I am strengthened in my own view by what he has said.

I am impressed also by another argument. The claim of the Government of India must be that any provincial Act imposing a tax on the sale of any goods (other than a turnover tax) is an invasion of Entry (45) in the Federal Legislative List, whether the goods are at the time the subject of a central excise or not, and no matter how improbable it is that any excise will ever be imposed upon them. Duties of excise in the nature of things will always be confined to a comparatively small number of articles; but it is a necessary corollary of the argument of the Government of India that the power to impose excise duties though only exercised with respect to this small group, is an absolute bar to the exercise by the Provinces of any jurisdiction by way of a tax on sales over every other material, commodity and article manufactured or produced in India and to be found in the Province. Nay, more; for though excise duties can only be imposed in respect of goods manufactured or produced in India, it is part of the Government of India's case that to impose a tax on the sale of goods manufactured or produced elsewhere will infringe the provisions of Sec. 297 (1) (b), Constitution Act, against discrimination. It is not necessary for me here to say whether I agree with the latter argument or not; it is sufficient to point out how on one ground or the other this interpretation of the federal entry would exclude the Province from an immense field of taxation in which the Government of India does not now and probably would never in the future seek to compete. I should find it exceedingly difficult to adopt an interpretation of the two entries which would have consequences such as these.

Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties, for Parliament must surely be presumed to have had Indian legislative practice in mind and unless

the context otherwise clearly requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply. There were several central excise duties in force in India at the date of the passing of the Constitution Act, imposed respectively upon motor spirit, kerosene, silver, sugar, matches, mechanical lighters, and iron and steel. In all the Acts by which these duties were imposed it is provided (and substantially by the same words) that the duty is to be paid by the manufacturer or producer, and on the issue of the excisable article from the place of manufacture or production. The Acts which imposed the cotton excise now repealed, were in the same form.

The only provincial excise duty in force was that on alcoholic liquor and intoxicating drugs. The Devolution Rules, 1920, which were made under S. 45-A of the then Government of India Act, for the purpose of distinguishing the functions of the Local Governments and local Legislatures of Governors' Provinces.

Classified a variety of subjects, in relation to the functions of Government, as central and provincial subjects, respectively. Among the provincial subjects appears the following:

> 16. Excise that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating drugs, and the levying of excise duties and licence fees on or in relation to such articles...

The earlier part of this entry obviously describes an administrative and legislative sphere only, the taxing power being given in the last words quoted, which I take to mean excise duties on the articles mentioned and licence fees in relation to them. But here again, after examining various Provincial Acts relating to the control of alcohol, I have been unable to find any case of excise duties payable otherwise than by the producers or manufacturers or persons corresponding to them; I am speaking, of course, only of alcohol manufactured or produced in the Province itself. The Advocate General of India referred us to an Act of the Central Provinces (Central Provinces Excise Act (No. 2 of 1915)] which was said to make provision for the imposition of an excise duty on retail sales. I have been unable to find any such provision in the Act; it provides, it is true, as do other provincial Acts, for lump sum payments in certain cases by manufacturers and retailers, which may be described as payments either for the privilege of selling alcohol, or as consideration for the temporary grant of a monopoly, but these are clearly not excise duties or anything like them. Provision was also made in most Provincial Acts for the payment of licence fees in connection with the production or sale of alcohol in the Province: but these fees are mentioned in the Devolution Rules Entry in addition to excise duties and are therefore something different from them.

Thus, at the date of the Constitution Act, though it seems that the word "excise" was not infrequently used as a general label for the system of internal indirect taxation or for the administration of a particular indirect tax (as salt excise or opium excise), the only kind of excise duties which were known in India by that name were duties collected from manufacturers or producers, and usually payable on the issue of the excisable articles from the place of manufacture or production. This also may not be conclusive in itself, but it seems a not unreasonable inference that Parliament intended the expression "duties of excise" in the Constitution Act to be understood in the sense in which up to that time it had always in fact been used in India, where indeed excise duties of any other kind were unknown. Nor indeed are excise duties properly so called often to be found at the present day which are not

collected at the stage of production or manufacture, whatever may have been the case in Blackstone's time, and whatever may have been the reasons for Johnson's definition of "Excise" in the first edition of his Dictionary (1755) as a hateful tax levied on commodities and adjudged not by the common Judges of property but wretches hired by those whom the excise is paid.

The conclusion at which I have arrived seems to me to be in harmony with what I conceive to be the general scheme of the Act and its method of differentiation between the functions and powers of the Centre and of the Provinces. It introduces no novel principle. It reconciles the conflict between the two entries without doing violence to the language of either, and it maps out their respective territories on a reasonable and logical basis. It would be strange indeed if the Central Government had the exclusive power to tax retail sales, even if the tax were confined to goods produced or manufactured in India, when the Province has an exclusive power to make laws with respect to trade and commerce, and with respect to the production, supply and distribution of goods, within the provincial boundaries. In the view which I take none of these inconsistencies will arise. Nor will the effect of this interpretation be to deprive the Centre of any source of revenue which it enjoys at present, nor of any which it is reasonable to anticipate that it might have enjoyed in the future. If I may be permitted to hazard a guess, the anxiety of the Government of India arises from the probability that a general adoption by Provinces of this method of taxation will tend to reduce the consumption of the taxed commodities and thus indirectly diminish the Central excise revenue. This however is a circumstance which this Court cannot allow to weigh with it if, as I believe, the interpretation of the Act is clear though it might be an element to take into consideration if there were real ambiguity or doubt. But I do not think there is either ambiguity or doubt, if the two entries are read together and interpreted in the light of one another. The difficulty with which the Government of India may be faced is of a kind which must inevitably arise from time to time in the working of a Federal Constitution, where a number of taxing authorities compete for the privilege of taxing the same taxpayer. In the present case, the result may well be that the Central Government will find itself unable to make such a distribution of the proceeds of central excise duties under S. 140 of the Act as it might otherwise desire to do; but these are not matters for this Court, and they must be left for adjustment by the interest concerned in a spirit of reasonableness and commonsense, qualities which I do not doubt are to be found in India as in other Federations.

I am of opinion that for the reasons which I have given the answer to the question referred to us is that the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not ultra vires the Legislature of the Central Provinces and Berar, and since that is also the opinion of the whole Court we shall report to His Excellency accordingly.

* * * * *

Gujarat University v. *Krishna Ranganath Mudholkar*

AIR 1963 SC 703

[Bhuvaneshwar Prasad Sinha, C.J. and S.J. Imam, K. Subba Rao, K.N. Wanchoo, J.C. Shah and N. Rajagopala Ayyangar, JJ.]

[Entry 11, List II referred to in this case is presently entry 25 of List III.]

Shrikant, son of Shri Krishna Mudholkar, appeared for the Secondary School Certificate Examination held by the State of Bombay in March 1960 and was declared successful. He took instruction in the various subjects prescribed for the examination through the medium of Marathi, which was his mother tongue and answered the questions at the examination also in Marathi. Shrikant joined the St. Xavier's College affiliated to the University of Gujarat, in the First Year Arts class and was admitted in the section in which instructions were imparted through the medium of English. After successfully completing the First Year Arts course in March 1961, Shrikant applied for admission to the classes preparing for the Intermediate Arts examination of the University through the medium of English. The Principal of the College informed Shrikant that in view of the provisions of the Gujarat University Act, 1949 and Statutes 207, 208 and 209 framed by the Senate of the University, as amended in 1961, he could not permit him to attend classes in which instructions were imparted through the medium of English without the sanction of the University. Shri Krishna, father of Shrikant then moved the Vice Chancellor of the University for sanction to permit Shrikant to attend the "English medium classes" in the St. Xavier's College. The Registrar of the University declined to grant the request. By another letter, Shrikant was "allowed to keep English as a medium of examination" but not for instruction.

A petition was then filed by Shrikrishna Madholkar on behalf of himself and his minor son Shrikant in the High Court of Gujarat for a writ or order in the nature of mandamus or other writ, direction or order requiring the University of Gujarat to treat Sections 4(27), 18(i)(xiv) and 38-A of the Gujarat University Act, 1949, and Statutes 207, 208 and 209 as void and inoperative and to forbear from acting upon or enforcing those provisions and requiring the Vice Chancellor to treat the letters or circulars issued by him in connection with the medium of instruction as illegal and to forbear from acting upon or enforcing the same, and also requiring the University to forbear from objecting to or from prohibiting the admission of Shrikant to "the English medium Intermediate Arts class", and requiring the Principal of the College to admit Shrikant to the "English medium Intermediate Arts class" on the footing that the impugned provisions of the Act, Statutes and letters and circulars were void and inoperative.

The High Court of Gujarat issued the writs prayed for. The University and the State of Gujarat separately appealed to the Supreme Court with certificates of fitness granted by the High Court.

Two substantial questions, which came up before the Supreme Court for determination:

(*1*) whether under the Gujarat University Act, 1949 it is open to the University to prescribe Gujarati or Hindi or both as an exclusive medium of media of instruction and examination in the affiliated colleges, and

(*2*) whether legislation authorising the University to impose such media would infringe Entry 66 of List I**,** Seventh Schedule to the Constitution.

J.C. SHAH, J. - 7. St. Xavier's College was affiliated to the University of Bombay under Bombay Act 4 of 1928. The legislature of the Province of Bombay enacted the Gujarat University Act, 1949 to establish and incorporate a teaching and affiliating University "as a measure of decentralisation and re-organisation" of University education in the Province. By Section 5(3) of the Act, from the prescribed date all educational institutions admitted to the privileges of the University of Bombay and situate within the University area of Gujarat were deemed to be admitted to the privileges of the University of Gujarat. Section 3 incorporated the University with perpetual succession and a common seal. Section 4 of the Act enacted a provision which is not normally found in similar Acts constituting Universities. By that section various powers of the University were enumerated. These powers were made exercisable by diverse authorities of the University set out in Section 15. We are concerned in these appeals with the Senate, the Syndicate and the Academic Council. Some of the powers conferred by Section 4 were made exercisable by Section 18 by the Senate. The Senate was by that section authorised, subject to conditions as may be prescribed by or under the provisions of the Act, to exercise the powers and to perform the duties as set out in sub-section (1). By Section 20 certain powers of the University were made exercisable by the Syndicate, and by Section 22, the Academic Council was invested with the control and general regulation of, and was made responsible for, the maintenance of standards of teaching and examinations of the University and was authorised to exercise certain powers of the University. The powers and the duties of the Senate are to be exercised and performed by the promulgation of Statutes of the Syndicate by Ordinances and of the Academic Council by Regulations. In 1954, the Gujarat University framed certain Regulations dealing with the media of instruction. They are Statutes 207, 208 and 209. Statute 207 provided:

> (1) Gujarati shall be medium of Instruction and Examination.
>
> (2) Notwithstanding anything in clause (1) above, English shall continue to be the medium of instruction and examination for a period not exceeding ten years from the date on which Section 3 of the Gujarat University Act comes into force, except as prescribed from time to time by Statutes.
>
> (3) Notwithstanding anything in clause (1) above, it is hereby provided that non-Gujarati students and teachers will have the option, the former for their examination and the latter for their teaching work, to use Hindi as the medium, if they so desire. The Syndicate will regulate this by making suitable Ordinances in this behalf, if, as and when necessary.
>
> (4) Notwithstanding anything in (1), (2), (3) above, the medium of examination and instruction for modern indian languages and English may be the respective languages.

8. Statute 208 provided that the medium of instruction and examination in all subjects from June 1955 in First Year Arts, First Year Science and First Year Commerce in all subjects and from June 1956 in Inter Arts, Inter Science Inter Commerce and First Year Science (Agri.) shall cease to be English and shall be as laid down in Statute 207(1). This Statute further provided that a student or a teacher who feels that he cannot "use Gujarati or Hindi tolerably well", would be permitted the use of English in examination and instruction respectively upto November, 1960 (which according to the academic year would mean June 1961) in one or more subjects. Statute 209 is to the same effect enumerating therein the permitted use of English for the BA, BSc, and other examinations. After the constitution of a separate State of Gujarat, Act 4 of 1961 was enacted by the Gujarat State Legislature. By that

Act the proviso to Section 4(27) was amended so as to extend the use of English as the medium of instruction beyond the period originally contemplated and Section 38-A which imposed an obligation upon all affiliated colleges and recognised institutions to comply with the provisions relating to the media of instruction was enacted. It was provided by Section 38-A(2) that if an affiliated college or recognised institution contravenes the provisions of the Act, Rules, Ordinance and Regulations in respect of media of instruction the rights conferred on such institution or college shall stand withdrawn from the date of the contravention and that the college or institution shall cease to be affiliated college or recognised institution for the purpose of the Act. The Senate of the University thereafter amended Statutes 207 and 209. Material part of Statute 207 as amended is as follows:

> (1) Gujarati shall be the medium of instruction and examination:
> Notwithstanding anything contained in sub-item (*1*) above, Hindi will be permitted as an alternative medium of instruction and examination in the following faculties:
> (*i*) Faculty of Medicine, (*ii*) Faculty of Technology including Engineering, and (*iii*) Faculty of Law; and (*iv*) in all faculties for post graduate studies;
> (2) Notwithstanding anything contained in clause (1) above, English may continue to be the medium of instruction and examination for such period and in respect of such subjects and courses of studies as may, from time to time, be prescribed by the Statutes under Section 4(27) of the Gujarat University Act for the time being in force.
> (3) Notwithstanding anything contained in clause (1) above, it is hereby provided that students and teachers, whose mother tongue is not Gujarati will have the option, the former for their examination and the latter for their instruction to use Hindi as the medium, if they so desire.
> (4) Notwithstanding anything contained in clauses (1) and (3) above, it is hereby provided that the affiliated colleges, recognised Institutions and University Departments, as the case may be, will have the option to use, for one or more subjects, Hindi as a medium of instruction and examination for students whose mother tongue is not Gujarati.
> (5) Notwithstanding anything in clauses (1), (2), (3) and (4) above, the medium of examination and instruction for modern Indian languages and English may be the respective languages.

9. Statute 209 as amended provides that the medium of instruction and examination in all subjects in the examinations enumerated therein shall cease to be English and shall be as laid down in Statute 207 as amended with effect from the years mentioned against the respective examinations.

10. The Registrar of the University thereafter issued a circular on June 22, 1961 addressed to Principals of affiliated Colleges stating that the Vice Chancellor in exercise of the powers vested in him under Section 11(4)(*a*) of the Act was pleased to direct that:

> (*i*) Only those students who have done their secondary education through the medium of English and who have further continued their studies in First Year (Pre-University) Arts class in the year 1960-61 through English, shall be permitted to continue to use English as the medium of their examination in the Intermediate Arts class for one year i.e. in the year 1961-62, and
> (*ii*) the colleges be permitted to make arrangements for giving instructions to students mentioned in (i) above through the medium of English for only one year i.e. during the academic year 1961-62, and

(*iii*) that the Principals shall satisfy themselves that only such students as mentioned in (i) above are permitted to avail themselves of the concession mentioned therein.

11. Shrikant had not appeared at the SSC Examination in the medium of English and under the first clause of the circular he could not be permitted by the Principal of the St. Xavier's College to continue to use English as the medium of instruction in the Intermediate Arts class: if the Principal permitted Shrikant to do so the College would be exposed to the penalties prescribed by Section 38-A.

12. The petitioner challenged the authority of the University to impose Gujarati or Hindi as the exclusive medium of instruction under the powers conferred by the Gujarat University Act, 1949 as amended by Act 4 of 1961. The University contended that authority in that behalf was expressly conferred under diverse clauses of Section 4, and it being the duty of the Senate to exercise that power under Section 18(XIV), Statutes 207 and 209 were lawfully promulgated. In any event, it was submitted the University being a Corporation invested with control over higher education for the area in which it functions such a power must be deemed to be necessarily implied.

18. The Government of India may have in the year 1948 intended that English should be replaced in gradual stages as the medium of instruction by the language of the State or the Province, or region, but that will not be a ground for interpreting the provisions of the Act in a manner contrary to the intention of the legislature plainly expressed. This recommendation of the Government of India has been ignored if not by all, by a large majority of Universities. It is also true that in the Statement of Objects and Reasons of the Gujarat University Act, it was stated "... As recommended by the Committee, it is proposed to empower the University to adopt Gujarati or the national language as the medium of instruction except that for the first ten years English may be allowed as the medium of instruction in subjects in which this medium is considered necessary." But if the legislature has made no provision in that behalf a mere proposal by the Government, which is incorporated in the Statement of Objects and Reasons will not justify the court in assuming that the proposal was carried out. Statements of Objects and Reasons of a Statute may and do often furnish valuable historical material in ascertaining the reasons which induced the legislature to enact a Statute, but in interpreting the Statute they must be ignored. We accordingly agree with the High Court that power to impose Gujarati or Hindi or both as an exclusive medium or media has not been conferred under clause (27) or any other clauses of Section 4.

20. [N]either under the Act as originally framed nor under the Act as amended by Act 4 of 1961 was there any power conferred on the University to impose Gujarati or Hindi or both as exclusive medium or media of instruction and examination and if no such power was conferred upon the University, the Senate could not exercise such a power. The Senate is body acting on behalf of the University and its powers to enact Statutes must lie within the contour of the powers of the University conferred by the Act.

22. Power of the Bombay Provincial Legislature to enact the Gujarat University Act was derived from Entry 17 of the Government of India Act, 1935, List II of the Seventh Schedule - "Education including Universities other than those specified in para 13 of List I." In List I Item 13 were included the Banaras Hindu University and the Aligarh Muslim University.

Therefore, except to the extent expressly limited by Item 17 of List II read with Item 13 of List I, a Provincial Legislature was invested with plenary power to enact legislation in respect of all matters pertaining to education including education at University level. The expression "education" is of wide import and includes all matters relating to imparting and controlling education; it may therefore have been open to the Provincial Legislature to enact legislation prescribing either a federal or a regional language as an exclusive medium for subjects selected by the University. If by Section 4(27) the power to select the federal or regional language as an exclusive medium of instruction had been entrusted by the legislature to the University, the validity of the impugned statutes 207, 208 and 209 could not be open to question. But the legislature did not entrust any power to the University to select Gujarati or Hindi as an exclusive medium of instruction under Section 4(27). By the Constitution a vital change has been made in the pattern of distribution of legislative power relating to education between the Union Parliament and the State Legislatures. By Item 11 of List II of the Seventh Schedule to the Constitution, the State Legislature has power to legislate in respect of "education including Universities subject to the provisions of Items 63, 64, 65 and 66 of List I and 25 of List III". Item 63 of List I replaces with modification Item 13 of List I to the Seventh Schedule of the Government of India Act, 1935. Power to enact legislation with respect to the institutions known at the commencement of the Constitution as the Benaras Hindu University, the Aligarh Muslim University and the Delhi University, and other institutions declared by Parliament by laws to be an institution of national importance is thereby granted exclusively to Parliament. Item 64 invests the Parliament with power to legislate in respect of "institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament, by law, to be institutions of national importance". Item 65 vests in the Parliament power to legislate for "Union agencies and institutions for - (*a*) professional, vocational or technical training, including the training of police officers; or *(b)* the promotion of special studies or research; or (*c*) scientific or technical assistance in the investigation or detection of crime." By Item 66 power is entrusted to Parliament to legislate on "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Item 25 of the Concurrent List confers power upon the Union Parliament and the State Legislatures to enact legislation with respect to "vocational and technical training of labour". It is manifest that the extensive power vested in the Provincial Legislatures to legislate with respect to higher, scientific and technical education and vocational and technical training of labour, under the Government of India Act is under the Constitution controlled by the five items in List I and List III mentioned in Item 11 of List II. Items 63 to 66 of List I are carved out of the subject of education and in respect of these items the power to legislate is vested exclusively in the Parliament. Use of the expression "subject to" in Item 11 of List 11 of the Seventh Schedule clearly indicates that legislation in respect of excluded matters cannot be undertaken by the State Legislatures. In ***Hingir Rampur Coal Company*** **v.** ***State of Orissa*** [(1961) 2 SCR 537] this Court in considering the import of the expression "subject to" used in an entry in List II, in relation to an entry in List I observed that to the extent of the restriction imposed by the use of the expression "subject to" in an entry in List II, the power is taken away from the State Legislature. Power of the State to legislate in respect of education including Universities must to the extent to which it is entrusted to the Union Parliament, whether such power is

exercised or not, be deemed to be restricted. If a subject of legislation is covered by Items 63 to 66 even if it otherwise falls within the larger field of "education including Universities" power to legislate on that subject must lie with the Parliament. The plea raised by counsel for the University and for the State of Gujarat that legislation prescribing the medium or media in which instruction should be imparted in institutions of higher education and in other institutions always falls within Item 11 of List II has no force. If it be assumed from the terms of Item 11 of List II that power to legislate in respect of medium of instruction falls only within the competence of the State Legislature and never in the excluded field, even in respect of institutions mentioned in Items 63 to 65, power to legislate on medium of instruction would rest with the State, whereas legislation in other respects for excluded subjects would fall within the competence of the Union Parliament. Such an interpretation would lead to the somewhat startling result that even in respect of national institutions or Universities of national importance, power to legislate on the medium of instruction would vest in the legislature of the States within which they are situate, even though the State Legislature would have no other power in respect of those institutions. Item 11 of List II and Item 66 of List I must be harmoniously construed. The two entries undoubtedly overlap: but to the extent of overlapping, the power conferred by Item 66 List I must prevail over the power of the State under Item 11 of List II. It is manifest that the excluded heads deal primarily with education in institutions of national or special importance and institutions of higher education including research, sciences, technology and vocational training of labour. The power to legislate in respect of primary or secondary education is exclusively vested in the States by Item 11 of List II, and power to legislate on medium of instruction in institutions of primary or secondary education must therefore rest with the State Legislatures. Power to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary. Under Items 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items, must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, insofar it has a direct bearing and impact upon the legislative head of coordination and determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by Item 66 List I to be vested in the Union.

23. The State has the power to prescribe the syllabi and courses of study in the institutions named in Entry 66 (but not falling within Entries 63 to 65) and as an incident thereof it has the power to indicate the medium in which instruction should be imparted. But the Union Parliament has an overriding legislative power to ensure that the syllabi and courses of study prescribed and the medium selected do not impair standards of education or render the coordination of such standards either on an all-India or other basis impossible or even difficult. Thus, though the powers of the Union and of the State are in the Exclusive Lists, a degree of overlapping is inevitable. It is not possible to lay down any general test which would afford a solution for every question which might arise on this head. On the one hand, it is certainly within the province of the State Legislature to prescribe syllabi and courses of study and, of course, to indicate the medium or media of instruction. On the other hand, it is also within the power of the Union to legislate in respect of media of instruction so as to ensure coordination and determination of standards, that is, to ensure maintenance or

improvement of standards. The fact that the Union has not legislated, or refrained from legislating to the full extent of its powers does not invest the State with the power to legislate in respect of a matter assigned by the Constitution to the Union. It does not, however, follow that even within the permitted relative fields there might not be legislative provisions in enactments made each in pursuance of separate exclusive and distinct powers which may conflict. Then would arise the question of repugnancy and paramountcy which may have to be resolved on the application of the "doctrine of pith and substance" of the impugned enactment. The validity of the State legislation on University education and as regards the education in technical and scientific institutions not falling within Entry 64 of List I would have to be judged having regard to whether it impinges on the field reserved for the Union under Entry 66. In other words, the validity of State legislation would depend upon whether it prejudicially affects coordination and determination of standards, but not upon the existence of some definite Union legislation directed to achieve that purpose. If there be Union legislation in respect of coordination and determination of standards, that would have paramountcy over the State law by virtue of the first part of Article 254(1); even if that power be not exercised by the Union Parliament the relevant legislative entries being in the exclusive lists, a State law trenching upon the Union field would still be invalid.

24. Counsel for the University submitted that the power conferred by Item 66 of List I is merely a power to coordinate and to determine standards i.e. it is a power merely to evaluate and fix standards of education, because, the expression "coordination" merely means evaluation, and "determination" means fixation. Parliament has therefore power to legislate only for the purpose of evaluation and fixation of standards in institutions referred to in Item 66. In the course of the argument, however, it was somewhat reluctantly admitted that steps to remove disparities which have actually resulted from adoption of a regional medium and the falling of standards, may be undertaken and legislation for equalising standards in higher education may be enacted by the Union Parliament. We are unable to agree with this contention for several reasons. Item 66 is a legislative head and in interpreting it, unless it is expressly or of necessity found conditioned by the words used therein, a narrow or restricted interpretation will not be put upon the generality of the words. Power to legislate on a subject should normally be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that subject. Again there is nothing either in Item 66 or elsewhere in the Constitution which supports the submission that the expression "coordination" must mean in the context in which it is used merely evaluation, coordination in its normal connotation means harmonising or bringing into proper relation in which all the things coordinated participate in a common pattern of action. The power to coordinate, therefore, is not merely power to evaluate, it is a power to harmonise or secure relationship for concerted action. The power conferred by Item 66 List I is not conditioned by the existence of a state of emergency or unequal standards calling for the exercise of the power.

25. There is nothing in the entry which indicates that the power to legislate on coordination of standards in institutions of higher education does not include the power to legislate for preventing the occurrence of or for removal of disparities in standards. This power is not conditioned to be exercised merely upon the existence of a condition of disparity nor is it a power merely to evaluate standards but not to take steps to rectify or to prevent

disparity. By express pronouncement of the Constitution makers, it is a power to coordinate, and of necessity, implied therein is the power to prevent what would make coordination impossible or difficult. The power is absolute and unconditional, and in the absence of any controlling reasons it must be given full effect according to its plain and expressed intention. It is true that "medium of instruction" is not an item in the Legislative List. It falls within Item 11 as a necessary incident of the power to legislate on education : it also falls within Items 63 to 66. Insofar as it is a necessary incident of the powers under Item 66 List I it must be deemed to be included in that item and therefore excluded from Item 11 List II. How far State legislation relating to medium of instruction in institutions has impact upon coordination of higher education is a matter which is not susceptible, in the absence of any concrete challenge to a specific statute, of a categorical answer. Manifestly, in imparting instructions in certain subjects, medium may have subordinate importance and little bearing on standards of education while in certain others its importance will be vital. Normally, in imparting scientific or technical instructions or in training students for professional courses like law, engineering, medicine and the like existence of adequate text books at a given time, the existence of journals and other literature availability of competent instructors and the capacity of students to understand instructions imparted through the medium in which it is imparted are matters which have an important bearing on the effectiveness of instruction and resultant standards achieved thereby. If adequate textbooks are not available or competent instructors in the medium, through which instruction is directed to be imparted are not available, or the students are not able to receive or imbibe instructions through the medium in which it is imparted, standards must of necessity fall, and legislation for coordination of standards in such matters would include legislation relating to medium of instruction.

26. If legislation relating to imposition of an exclusive medium of instruction in a regional language or in Hindi, having regard to the absence of text books and journals, competent teachers and incapacity of the students to understand the subjects, is likely to result in the lowering of standards, that legislation would, in our judgment, necessarily fall within Item 66 of List I and would be deemed to be excluded to that extent from the amplitude of the power conferred by Item 11 of List II.

29. We are unable, however, to agree with the High Court that Act 4 of 1961 insofar as it amended the proviso to Section 4(27) is invalid, because it is beyond the competence of the State Legislature. By the amendment of the proviso to Section 4(27), the legislature purported to continue the use of English as the medium of instruction in subjects selected by the Senate beyond a period of ten years prescribed by the Gujarat University Act 1949. Before the date on which the parent act was enacted, English was the traditional medium of instruction in respect of all subjects at the University level. By enacting the proviso as it originally stood, the university was authorised to continue the use of English as an exclusive medium of instruction in respect of certain subjects to be selected by the Senate. By the amendment it is common ground that no power to provide an exclusive medium other than the pre-existing medium is granted. Manifestly, imparting instruction through a common medium, which was before the Act the only medium of instruction all over the country, cannot by itself result in lowering standards and coordination and determination of standards cannot be affected

thereby. By extending the provisions relating to imparting of instruction for a period longer than ten years through the medium of English in the subjects selected by the University, no attempt was made to encroach upon the powers of the Union under Item No. 66 List I.

30. The order of the High Court relating to the invalidity of the Statutes 207 and 209 of the University insofar as they purport to impose "Gujarati or Hindi or both as exclusive medium" of instruction, and the circulars enforcing those Statutes must therefore be confirmed.

*****

Prafulla Kumar Mukherjee v. *Bank of Commerce, Limited, Khulna*

AIR 1947 PC 60

[Lord Wright, Lord Porter, Lord Uthwatt, Sir Madhavan Nair and Sir John Beaumont]

[*Doctrine of Pith and Substance*]

In this case, the validity of the Bengal Money Lenders Act, 1940 was challenged. The impugned section 30 of the Act provided:

> "Notwithstanding anything contained in any law for the time being in force, or in any agreement (1) No borrower shall be liable to pay after the commencement of this Act" –

more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest. Moreover, it is retrospective in its effect, and its limitations can be relied upon by a borrower by way of defence to an action by the moneylender or the borrower can himself institute a suit in respect of a loan to which the provisions of the Act apply.

Section 100, Government of India Act, 1935, is in the following terms:

"100. (1) Notwithstanding anything in the two next succeeding subsections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. 7 to this Act (hereinafter ca1led the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding subsection, the Federal Legislature, and, subject to the preceding subsection a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding subsections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincia1 Legislative List'}.

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

The Federal Legislative List referred to in this section assigned to the Federal Legislature jurisdiction to make laws with respect to

> "(28) Cheques, bills of exchange, promissory notes and other like instruments."
> "(33) Corporations, that is to say, the incorporation regulation and winding up of trading corporations including banking. ..."
> "(38) Banking, that is to say, the conduct of banking business …."
>
> and denies that jurisdiction to Provincial Legislatures.

The Provincial Legislative List, however, empowered the Provincial Legislature in Item (27) to make laws with respect to "Trade and Commerce within the Province; ... money lending and money lenders," and therefore no objection could be taken to the provisions of the Bengal Money-lenders Act, if they were concerned only with the limitation of capital and interest recoverable.

[Entries 28, 33 and 38 are entries 46, 43 and 45 of List I and entry 27 is entry 30 of List II of the VII Schedule to the Constitution of India.]

LORD PORTER – 11. Having regard to these provisions the respondents say that whilst it is true that they are money-lenders, yet they are engaged in banking and are holders of promissory notes, matters which are solely within the Federal jurisdiction and that a Provincial Act such as the Bengal Money-lenders Act is ultra vires in that it deals with Federal matters. These matters, they say, are so intertwined with the rest of the Act that they cannot be disassociated and therefore the Act is wholly void. But whether this be so or not the particular loans, the subject matter of the actions under review, are secured by promissory notes and in addition are matters of banking; accordingly they say that the Act is void at any rate so far as concerns promissory notes or banking.

14. In the present cases the Judges of the High Court found in favour of the appellants on the ground that though the Federal List prevails over the Provincial List where the two lists come in conflict, yet the Act being a Money-lenders Act, deals with what is in one aspect at least a Provincial matter and is not rendered void in whole or in part by reason of its effect upon promissory notes. In their view the jurisdiction of the Provincial Legislature is not ousted by the inclusion of provisions dealing with promissory notes though that subject-matter is to be found in Item 28 of the Federal List. The reference to Bills of Exchange and promissory notes in that item, they held, only applies to those matters in their aspect of negotiability and not in their contractual aspect. In their contractual aspect the appropriate item, as they considered, was entry (10) of List 111 "contract". "Interest on promissory notes," they say,

> (I)s a matter with respect to contracts, a subject to be found in the Concurrent Legislative List. The Bengal Act has received the assent of the Governor-General and in view of the provisions of S 107 (2), Constitution Act, Ss. 29 (2) and 30, Bengal Money-lenders Act, 1940 must prevail.

I5. Section 107, Constitution Act (identical with Article 254 of the Constitution of India), is in the following terms:

> 107. (1) If any provision of a Provincial law is repugnant to any provision of a Federal Law which the Federal Legislature is competent to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or, as the case may be, the existing Indian law, shall prevail and the provincial law shall, to the extent of the repugnancy, be void.
>
> (2) Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Federal law or an existing Indian law with respect to that matter, then, if the Provincial law, having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall in that Province prevail, but nevertheless the Federal Legislature may at any time enact further legislation with respect to the same matter:
>
> Provided that no Bill or amendment for making any provision repugnant to any Provincial law, which, having been so reserved, has received the assent of the Governor-General or of His Majesty, shall be introduced or moved in either Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion.

(3) If any provision of a law of a Federated State is repugnant to a Federal law which extends to that State, the Federal law, whether passed before or after the law of the State, shall prevail and the law of the State shall, to the extent of the repugnancy, be void.

I6. The High Court's conclusion would no doubt be true, if they are right in saying that interest on promissory notes is a matter with respect to contracts and therefore an item contained in the Concurrent List. The Act to which it was said to be repugnant was the Negotiable Instruments Act, 1881, which no doubt applied to the whole of India, but, as the High Court points out this Act is not a Federal but an existing Indian Act, and under the provisions of S. 107 (2) would give place to the Bengal Money-lenders Act (which had received the assent of the Governor-General) provided that Act does not deal with matters over which the Federal Legislature alone has jurisdiction. This opinion, however, was reversed in the Federal Court which thought the Act a clear interference with the subjects set out in Item 28 in the Federal List and declared the Bengal Act to be *ultra vires* in so far as it dealt with those subjects. It was not, however, in their opinion totally void.

17. The Federal Court had in fact already given the matter some consideration in two previous cases, viz: (1) 1940 FCR 188 (1) a case in which the Madras Agriculturists' Relief Act of 1938 was impugned. That Act did not specifically mention promissory notes but it did contain provisions limiting the liability and diminishing the debts of agriculturists in terms wide enough to include debts due on promissory notes. In that case, however, judgment had been obtained upon the promissory note and the Court held that inasmuch as the debt had passed into a claim Under a decree, before the Agriculturists' Relief Act had been enacted, there was nothing to preclude it from being scaled down under the terms of that Act. Accordingly the Court found it unnecessary to deal with a matter in which a claim on promissory notes as such was involved. (2) A similar result was reached in 1944 FCR 126 (2) a case upon which their Lordships have to pronounce at a later stage.

18. All the courts in India have considered the Bengal Money-lenders Act, to deal in pith and substance with money-lenders and money lending and with this view their Lordships agree. But such a view is not necessarily conclusive of the question in India and indeed, as the respondents contend, is not decisive of the matter even in Canada or Australia. With these and the other questions arising in the case their Lordships must now grapple.

19. The appellants set out their contentions under four heads. Firstly, they said that power to make laws with respect to money-lending necessarily imports the power to affect the lender's rights against the borrower upon a promissory note given in the course of a money-lending transaction. The Constitution Act they said must be read as a whole so as to reconcile item 28 of List I with Item 27 of List II, and so read Item 27 is a particular exception from the general provisions of Item 28.

20. Secondly, they argued that the impugned Act is in pith and substance an Act with respect to money-lenders and money-lending and is not rendered void in whole or in part because it incidentally touches upon matters outside the authorized field.

21. Thirdly, they maintained that upon its true construction, item 28 is confined to that part of the law relating to negotiable instruments which has reference to their negotiability and does not extend to that part which governs the contractual relationship existing between

the immediate parties to a bill of exchange or promissory note. That part, they said, lay in the field of contract.

22. If then the subject matter of the Act lay in contract, which is one of the items within the concurrent List, it was, it was true, in conflict with an existing Indian Law viz : the Negotiable Instruments Act, 1881 within the meaning of S.31 (1), Constitution Act, but inasmuch as the impugned Act had received the assent of the Governor-General, it must prevail over the Negotiable Instruments Act as a result of the provision of S. 107 (2), Constitution Act.

23. The Respondents on the other hand pointed out in the first place that the Constitution Act differs in form from the British North America Act and the Australian Commonwealth Act. Those Acts, they said, contain no concurrent list and therefore recognize, as the Constitution Act does not, that there must be some overlapping of powers. Moreover, the Indian Act contains a strict hierarchy of powers since under the terms of S. 100, Federal List prevails over both the Concurrent and the Provincial List, and the Concurrent List in its turn prevails over the Provincial List. “The Provincial Legislature", as it enacts, “has not power to make laws with respect to any of the matters enumerated in List 1", and this prohibition, they contend, extends to any matter whatsoever set out in the Federal List, however incidental to a matter contained in the Provincial List. No question could arise, they maintained, as to pith and substance, The Constitution Act directly prohibits any interference by a Province with any matter set out in List I.

24. For the same reasons they said that there could be no question of an exception out of the generality of expressions used in List I on the ground that a matter dealt with in List II was particularly described whereas it was only referred to generally in List I under a wider heading.

25. In any case they said the expression "Money Lending" was no more particular than the expression "Bills of Exchange, promissory notes, and other instruments of the like kind”. Finally, they contended that if money-lending was to be regarded as an incidence of contract, then the Negotiable Instruments Act being an Act of the Government of India had precedence over the' impugned Act, in those subjects with which they both dealt.

27. For instance it is no doubt true, as has been pointed out above, and has been accepted in the Courts in India that in the case of a matter contained in the Concurrent List, the Act of a Provincial Legislature which has been approved by the Governor-General prevails over an existing Indian Law (See S. 107 (2), Government of India Act, 1935). If then the impugned Act is to be considered as a matter of contract, it would prevail over the Negotiable Instruments Act if that Act or the part of it in respect of which repugnancy is alleged is also to be regarded as contractual and therefore coming within List III.

28. But this result depends upon two assumptions viz.: (1) that the impugned Act in dealing with promissory notes, or for that matter with banking, is concerned with contract and (2) that the reference to negotiable instruments, promissory notes and the like instruments in List I Item 28 is a reference to them in their capacity of negotiability only.

29. The point was raised in the Federal Court in 1940 FCR 188 but that Court did not find it necessary finally to decide it, though Sulaiman J. in his dissenting judgment inferentially

rejected it. Like the Federal Court, their Lordships in the present case do not find it necessary to express a final opinion upon these points, but it is, they think, essential to determine to what extent under the Indian Constitution Act of 1935 the jurisdiction of the several legislatures is affected by ascertaining what is the pith and substance of an impugned Act.

30. The two remaining points taken on behalf of the appellant can in their Lordships' opinion and indeed must be considered together since to say that power to make laws in respect to money-lending necessarily imparts power to affect the lender's rights in respect of promissory notes given as security in money-lending transactions is in their view to maintain that if the pith and substance of the Act, the validity of which is challenged, is money-lending, it comes within the Provincial jurisdiction. Three questions therefore arise, viz:

(1) Does the Act in question deal in pith and substance with money-lending ?
(2) If it does is it valid though it incidentally trenches upon matters reserved for the Federal Legislature?
(3) Once it is determined whether the pith and substance is money-lending, is the extent to which the Federal field is invaded a material matter?

31. (1) All the Courts in India have held that the transactions in question are in pith and substance money-lending transactions and their Lordships are of the same opinion. To take promissory note as security for a loan is the common practice of money-lenders and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in any real sense deal with money-lending. All the lender would have to do in order to oust its jurisdiction would be to continue his normal practice of taking the security of a promissory note and he would then be free from any restrictions imposed by the Provincial Legislature. In truth, however, the substance is money-lending and the promissory note is but the instrument for securing the loan.

32. (2) The second is a more difficult question and was put with great force by Counsel for the respondents. The principles, it was said, which obtain in Canada and Australia have no application to India. In the former instance either the Dominions and Provinces or the Commonwealth and States divide the jurisdiction between them, the ominion or as the case may be the States retaining the power not specifically given to the Provinces or the Commonwealth. In such cases it is recognized that there must be a considerable overlapping of powers. But in India, it is asserted, the difficulty in dividing the powers has been foreseen. Accordingly three, not two lists, have been prepared in order to cover the whole field and these lists have a definite order of priority attributed to them so that anything contained in List I is reserved solely for the Federal Legislature, and however incidentally it may be touched upon in an Act of the Provincial Legislature, that Act is ultra vires in whole or at any rate where in any place it affects an entry in the Federal List.

33. Similarly, any item in the Concurrent List if dealt with by the Federal Legislature is outside the power of the Provinces and it is only the matters specifically mentioned in List II over which the Province has complete jurisdiction, although so long as any item in the Concurrent List has not been dealt with by the Federal Legislature the Provincial Legislature is binding.

34. In their Lordships' opinion this argument should not prevail. To take such a view is to simplify unduly the task of distinguishing between the powers of divided jurisdictions. It is not possible to make so clean a cut between the Powers of the various legislatures: they are bound to overlap from time to time.

35. Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap. As Sir Maurice Gwyer C. J. said in 1940 FCR 188, 201:

> It must inevitably happen from time to time that legislation though purporting to deal with a subject in one list, touches also upon a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the .Judicial Committee, whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character-for the purpose of determining whether it is legislation with respect to matters in this list or in that.

36. Their Lordships agree that this passage correctly describes the grounds upon which the rule is founded, and that it applies to Indian as well as to Dominion legislation. No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provisions should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two or even by arranging for a hierarchy of jurisdictions.

37. Subjects must still overlap and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to Provincial Legislation could never effectively be dealt with.

38. (3) Thirdly, the extent of the invasion by the Provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

39. This view places the precedence accorded to the three lists in its proper perspective. No doubt where they come in conflict List I has priority over Lists III and II and List III has priority over List II, but, the question still remains, priority in what respect ? Does the priority

of the Federal Legislature prevent the Provincial Legislature from dealing with any matter which may incidentally affect any item in its list or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view.

40. If this be correct it is unnecessary to determine whether the jurisdiction as to promissory notes given to the Federal Legislature is or is not confined to negotiability. The Bengal Money-lenders Act is valid because it deals in pith and substance with money-lending, not because legislation in respect of promissory notes by the Federal Legislature is confined to legislation affecting their negotiability– a matter as to which their Lordships express no opinion.

41. It will be observed that in considering the principles involved their Lordships have dealt mainly with the alleged invalidity of the Act, based upon its invasion of the Federal entry, "promissory notes" Item (25) in List I. They have taken this course, because the case was so argued in the Courts in India.

42. But the same considerations apply in the case of banking, Whether it be urged that the Act trenches upon the Federal List by making regulations for banking or promissory notes, it is still an answer that neither of those matters is its substance and this view is supported by its provisions exempting scheduled and notified banks from compliance with its requirements.

43. In the result their Lordships are of opinion that the Act is not void either in whole or in part as being ultra vires the Provincial Legislature. This opinion renders it unnecessary to pronounce upon the effect of the Ordinance No.11 of 1945, purporting to validate, inter alia, the impugned Act and their Lordships express no opinion upon it. But having regard to their views expressed in this judgment they will humbly advise His Majesty that the appeal be allowed.

* * * * *

State of Rajasthan v. *G. Chawla*

AIR 1959 SC 544

[S.R. Das, C.J. and S.K. Das, P.B. Gajendragadkar, K.N. Wanchoo and M. Hidayatullah, JJ.]

M. HIDAYATULLAH, J. - This appeal was preferred by the State of Ajmer, bat after the reorganisation of States, the State of Rajasthan stands substituted for the former State. It was filed against the decision of the Judicial Commissioner of Ajmer, who certified the case as fit for appeal to this Court under Article 132 of the Constitution.

2. The Ajmer Legislative Assembly enacted the Ajmer (Sound Amplifiers Control) Act, 1952 (Ajmer III of 1953), (hereinafter called the Act) which received the assent of the President on 9-3-1953. This Act was successfully impugned by the respondents before the learned Judicial Commissioner, who held that it was in excess of the powers conferred on the State Legislature under Section 21 of the Government of Part C States Act, 1951 (49 of 1951), and therefore, ultra vires the State Legislature.

3. The respondents (who were absent at the hearing) were prosecuted under Section 3 of the Act for breach of the first two conditions of the permit granted to the first respondent, to use sound amplifiers on May 15 and 16, 1954. These amplifiers, it was alleged against them, were so tuned as to be audible beyond 30 yards (Condition 1) and were placed at a height of more than 6 feet from the ground (Condition 2). The second respondent was at the time of the breach, operating the sound amplifiers for the *Sammelan,* for which permission was obtained.

4. On a reference under Section 432 of the Code of Criminal Procedure, the Judicial Commissioner of Ajmer held that the pith and substance of the Act fell within entry No. 31 of the Union list and not within entry No. 6 of the State List, as was claimed by the State.

5. Under Article 246(4) of the Constitution, Parliament had power to make laws for any part of the territory of India not included in Part A or B of the First Schedule, notwithstanding that such matter was a matter enumerated in the State List. Section 21 of the Government of Part C States Act (49 of 1951) enacted:

> "(1) Subject to the provisions of this Act, the Legislative Assembly of a State, may undertake laws for the whole or any part of the State with respect to any of the matters enumerated in the State List or in the Concurrent list, * * * * *
>
> (2) Nothing in sub-section (1) shall derogate from the power conferred on Parliament by the Constitution to make laws with respect to any matter for a State or any part thereof."

6. Under these provisions, the legislative competence of the State Legislature was confined to the two lists other than the Union list. If, therefore, the subject-matter of the Act falls substantially within an Entry in the Union list, the Act must be declared to be unconstitutional, but it is otherwise, if it falls substantially within the other two lists, since prima facie there is no question of repugnancy to a Central statute or of an "occupied field".

7. The rival entries considered by the Judicial Commissioner read as follows:

Entry No. 31 of the Union List – Post and Telegraphs; Telephones, wireless, broadcasting and other like forms of communication.

Entry No. 6 of the State List – Public health and sanitation, hospitals and dispensaries.

The attention of the learned Judicial Commissioner was apparently not drawn to entry No. 1 of the State List, which is to the following effect:

Entry No. 1 of the State List – Public order (but not including the use of naval, military or air forces of the Union in aid of civil power.

Shri H.J. Umrigar relied upon the last Entry either alone, or in combination with entry No. 6 of the State List, and we are of opinion that he was entitled to do so.

8. After the dictum of Lord Selborne in ***Queen* v. *Burah*** [(1878) 3 App Cas 889], oft-quoted and applied, it must be held as settled that the legislatures in our Country possess plenary powers of legislation. This is so even after the division of legislative powers, subject to this that the supremacy of the legislatures is confined to the topics mentioned as Entries in the lists conferring respectively powers on them. These Entries, it has been ruled on many an occasion, though meant to be mutually exclusive are sometimes not really so. They occasionally overlap, and are to be regarded as *enumeratio simplex* of broad categories. Where in an organic instrument such enumerated powers of legislation exist and there is a conflict between rival lists, it is necessary to examine the impugned legislation in its pith and substance, and only if that pith and substance falls substantially within an entry or entries conferring legislative power, is the legislation valid, a slight transgression upon a rival list, notwithstanding. This was laid down by Gwyer C.J. in ***Subramanyam Chettiar* v. *Muthuswamy Goundan*** [(1940) FCR 188, 201] in the following words:

> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance', or its 'true nature and character', for the purpose of determining whether it is legislation with respect to matters in this list or in that."

This dictum was expressly approved and applied by the Judicial Committee in ***Prafulla Kumar Mukherjee* v. *Bank of Commerce, Ltd., Khulna*** [(1947) LR 74 IA 23] and the same view has been expressed by this Court on more than one occasion. It is equally well settled that the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given.

9. It becomes, therefore, necessary to examine closely how the Act is constructed and what it provides. The Act in its preamble expresses the intent as the control of the 'use' of sound amplifiers. The first section deals with the title, the extent, the commencement and the interpretation of the Act. It does not unfold its pith and substance. The last two sections provide for penalty for unauthorised use of sound amplifiers and the power of police officers to arrest without warrant. They stand or fall with the constitutionality or otherwise of the second section, which contains the essence of the legislation.

10. That section prohibits the use in any place, whether public or otherwise, of any sound amplifier except at times and places and subject to such conditions as may be allowed, by order in writing either generally or in any case or class of cases by a police officer not below the rank of an inspector, but it excludes the use in a place other than a public place, of a sound amplifier which is a component part of a wireless apparatus duly licensed under any law for the time being in force. In the explanation which is added, "public place" is defined as a place (including a road, street or way, whether a thoroughfare or not or a landing place) to which the public are granted access or have a right to resort or over which they have a right to pass.

11. The gist of the prohibition is the "use" of an external sound amplifier not a component part of a wireless apparatus, whether in a public place or otherwise, without the sanction in writing of the designated authority and in disregard of the conditions imposed on the use thereof. It does not prohibit the use in a place other than a public place of a sound amplifier which is a component part of a wireless apparatus.

12. There can be little doubt that the growing nuisance of blaring loudspeakers powered by amplifiers of great output needed control, and the short question is whether this salutary measure can be said to fall within one or more of the entries in the State List. It must be admitted that amplifiers are instruments of broadcasting and even of communication, and in that view of the matter, they fall within Entry 31 of the Union list. The manufacture, or the licensing of amplifiers or the control of their ownership or possession, including the regulating of the trade in such apparatus is one matter, but the control of the '*use*' of such apparatus though legitimately owned and possessed, to the detriment of tranquillity, health and comfort of others is quite another. It cannot be said that public health does not demand control of the use of such apparatus by day or by night, or in the vicinity of hospitals or schools, or offices or habited localities. The power to legislate in relation to public health includes the power to regulate the use of amplifiers as producers of loud noises when the right of such user, by the disregard of the comfort of and obligation to others, emerges as a manifest nuisance to them. Nor is it any valid argument to say that the pith and substance of the Act falls within Entry 31 of the Union list, because other loud noises, the result of some other instruments etc., are not equally controlled and prohibited.

13. The pith and substance of the impugned Act is the control of the use of amplifiers in the interests of health and also tranquillity, and thus falls substantially (if not wholly) within the powers conferred to preserve, regulate and promote them and does not so fall within the entry in the Union list, even though the amplifier, the use of which is regulated and controlled is an apparatus for broadcasting or communication.

14. On a view of the Act as a whole, we think that the substance of the legislation is within the powers conferred by entry No. 6 and conceivably entry No. 1 of the State List, and it does not purport to encroach upon the field of entry No. 31, though it incidentally touches upon a matter provided there. The end and purpose of the legislation furnishes the key to connect it with the State List. Our attention was not drawn to any enactment under entry No. 31 of the Union list by which the ownership and possession of amplifiers was burdened with any such regulation or control, and there being thus no question of repugnancy or of an occupied field, we have no hesitation in holding that the Act is fully covered by the first cited entry and conceivably the other in the State List.

15. The Judicial Commissioner's order, with respect, cannot be upheld, and it must be set aside. We allow the appeal and reverse the decision, and we declare the Act in all its parts to be intra vires the State Legislature. As the matter is four years old we do not order a retrial and we record that the State does not, as a result of the reversal of the decision under appeal, propose to prosecute the respondents, and that a statement to this effect was made before us at the hearing.

****

State of Karnataka v. *Drive-in Enterprises*

(2001) 4 SCC 60

[VN Khare and Ruma Pal, JJ.]

V.N. KHARE, J. - This appeal is directed against the judgment of the Karnataka High Court passed in the writ petition filed by the respondent herein whereby sub-clause (*v*) of clause (*i*) of Section 2 of the Karnataka Entertainments Tax Act, 1958 ("the Act") was struck down as being beyond the legislative competence of the State Legislature.

2. The respondent herein, is the owner and proprietor of a drive-in-theatre in the outskirts of Bangalore city wherein cinema films are exhibited. It is alleged that the drive-in-theatre is distinct and separate in its character from other cinema houses or theatres. The drive-in-cinema is defined under Rule 111-A of the Karnataka Cinemas (Regulation) Rules, 1971 (hereinafter referred to as "the Rules") framed in exercise of the powers conferred on the State Government under Section 19 of the Karnataka Cinemas (Regulation) Act, 1964. The definition of drive-in-cinema runs as under:

> "111-A. (1) 'Drive-in-cinema' means a cinema with an open-air theatre premises into which admission may be given normally to persons desiring to view the cinema while sitting in motor cars. However, where an auditorium is also provided in a 'drive-in-cinema' premises, persons other than those desiring to view the cinema while sitting in motor cars can also be admitted. Such drive-in-cinemas may have a capacity to accommodate not more than one thousand cars;"

The drive-in-theatre of the respondent with which we are concerned here is a cinema with an open-air theatre into which admissions are given to persons desiring to see cinema while sitting in their motor cars taken inside the theatre. The drive-in-theatre has also an auditorium wherein other persons who are without cars, view the film exhibited therein either standing or sitting. The persons who are admitted to view the film exhibited in the auditorium are required to pay Rs 3 for admission therein. It is not disputed that the State Government has levied entertainment tax on such admission and the same is being realised. However, if any person desires to take his car inside the theatre with a view to see the exhibition of the films while sitting in his car in the auditorium, he is further required to pay a sum of Rs. 2 to the proprietor of the drive-in-theatre. The appellant State in addition to charging entertainment tax on the persons being entertained, levied entertainment tax on admission of cars inside the theatre. This levy was challenged by the proprietors of the drive-in-theatres by means of writ petitions before the Karnataka High Court which were allowed and levy was struck down by a Single Judge of the High Court. The said judgment was affirmed by a Division Bench of that Court. It was held, that the levy being not on a person entertained (i.e. car/motor vehicle), the same was ultra vires. After the aforesaid decision, the Karnataka Legislature amended the Act by Act 3 of 1985. By the said amendment, sub-clause (*v*) was added to clause (*i*) of Section 2 of the said Act. Simultaneously, Sections 4-A and 6 of the Act were also amended. After the aforesaid amendments, the appellant herein, again levied entertainment tax on admission of cars into the drive-in-theatre. This levy was again challenged by means of a petition under Article 226 of the Constitution and the said writ petition was allowed, and as stated above, the High Court struck down sub-clause (*v*) to clause (*i*) of Section 2 of the Act.

3. Learned counsel appearing for the appellant urged that insertion of sub-clause (*v*) of clause (*i*) of Section 2 of the Act is a valid piece of legislation and after its insertion and amendment of Section 6 and Section 4-A of the Act, the appellant State was competent to levy and realise the entertainment tax on the admission of cars/motor vehicles inside the drive-in-theatre. Learned counsel urged that in pith and substance, the levy is on the person entertained and not on the admission of cars/motor vehicles inside the drive-in-theatre. It was also urged that the State Legislature is fully competent to impose such a levy.

4. Learned counsel for the respondent, inter alia, urged that the drive-in-theatre is a different category of cinema unlike cinema houses or theatres, that the special feature of the drive-in-theatre is that a person can view the film exhibited therein while sitting in his car, that the admission of cars/motor vehicles into the drive-in-theatre is incidental and part of the concept of drive-in-theatre, that the film that is shown in drive-in-theatre is like any other film shown in cinema houses, and that the State Legislature is not competent to levy entertainment tax on admission of motor vehicles inside the drive-in-theatre. Learned counsel further argued that the incidence of tax being on the entertainment, the State Legislature is competent to enact law imposing tax only on persons entertained. In a nutshell, the argument is that the State Legislature can levy entertainment tax on human beings and not on any inanimate object. According to learned counsel, since the vehicle is not a person entertained, the State Legislature is not competent to enact law to levy entertainment tax on the admission of cars/motor vehicles inside the drive-in-theatre.

5. On the arguments of learned counsel of parties, the question arises as to whether the State Legislature is competent to enact law to levy tax under Entry 62 List II of the Seventh Schedule on admission of cars/motor vehicles inside the drive-in-theatre.

6. Whereas in the present case, the vires of an enactment is impugned on the ground that the State Legislature lacks power to enact such an enactment, what the court is required to ascertain is the true nature and character of such an enactment with reference to the power of the State Legislature to enact such a law. While adjudging the vires of such an enactment, the court must examine the whole enactment, its object, scope and effect of its provision. If on such adjudication it is found that the enactment falls substantially on a matter assigned to the State Legislature, in that event such an enactment must be held to be valid even though nomenclature of such an enactment shows that it is beyond the competence of the State Legislature. In other words, when a levy is challenged, its validity has to be adjudged with reference to the competency of the State Legislature to enact such a law, and while adjudging the matter what is required to be found out is the real character and nature of levy. In sum and substance, what is to be found out is the real nature of levy, its pith and substance and it is in this light the competency of the State Legislature is to be adjudged. The doctrine of pith and substance means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature, it cannot be held to be ultra vires merely because its nomenclature shows that it encroaches upon matters assigned to another heading of legislation. The nomenclature of a levy is not conclusive for determining its true character and nature. It is no longer res integra that the nomenclature of a levy is not a true test of nature of a levy. In ***Goodyear India Ltd.*** **v.** ***State of Haryana*** [(1990) 2 SCC 71], it was held that the nomenclature of an Act is not conclusive and for determining the true character and nature of

a particular levy with reference to the legislative competence of the legislature, the court will look into the pith and substance of the legislation. In ***R.R. Engineering Co.* v. *Zila Parishad, Bareilly*** [(1980) 3 SCC 330], the question arose as to whether the Zila Parishad can levy tax on calling or property. The argument was that the levy is tax on income, therefore, it is ultra vires. However this Court held thus: (SCC Headnote)

> "The fact that the tax on circumstances and property is often levied on calling or property is not conclusive of the nature of the tax; it is only as a matter of convenience *that income is adopted as a yardstick or measure for assessing the tax*. The measure of the tax is not a true test of the nature of the tax. Considering the pith and substance of the tax, it falls in the category of a tax on '*a man's financial position, his status taken as a whole* and includes what may not be properly comprised under the term "property" and at the same time ought not to escape assessment'. " (emphasis supplied)

7. In ***Kerala SEB* v. *Indian Aluminium Co. Ltd.*** [(1976) 1 SCC 466], it was held thus:

> "For deciding under which entry a particular legislation falls the theory of 'pith and substance' has been evolved by the courts. If in pith and substance a legislation falls within one list or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another list, the Act as a whole would be valid notwithstanding such incidental trenching."

8. In ***Governor-General-in-Council* v. *Province of Madras*** [AIR 1945 PC 98], the question arose as to whether the levy was sales tax or excise duty. In that connection the Privy Council held:

> "Its real nature, its 'pith and substance' is that it imposes a tax on the sale of goods. No other succinct description could be given of it except that it is a 'tax on the sale of goods'. It is in fact a tax which according to the ordinary canons of interpretation appears to fall precisely within Entry 48 of the Provincial Legislative List."

9. In ***(Morris) Leventhal* v. *David Jones Ltd.*** [AIR 1930 PC 129], the question arose as to whether the legislature can impose bridge tax when the power to legislate was really in respect of "tax on land". The levy of bridge tax was held valid under legislative power of tax on land. It was held as thus: (AIR p. 133)

> "The appellants' contention that though directly imposed by the legislature, the bridge tax is not a land tax, was supported by argument founded in particular on two manifest facts. The bridge tax does not extend to land generally throughout New South Wales, but to a limited area comprising the City of Sydney and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is *not within the true significance of the term a tax*. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation." (emphasis supplied)

10. In ***Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*** [AIR 1962 All 83] which was subsequently approved in ***Raza Buland Sugar Co. Ltd.* v. *Municipal Board, Rampur*** [AIR 1965 SC 895], the question arose as to whether the Municipal Board can levy

water tax when the power to legislate was in respect of the land and building. The High Court held that in pith and substance *water tax is not on water but it is a levy on land and building*.

11. We are in full agreement with the aforestated statement of law and are of the view that it is not the nomenclature of the levy which is decisive of the matter, but its real nature and character for determining the competency or power of the State Legislature to enact law imposing the levy. It is in the light of the aforesaid statement of law, we would examine the validity of levy challenged in the present case. Before we deal with the question in hand, we would first examine the provisions of the Act. Section 2(*a*) of the Act defines "admission". "Admission" includes admission as a spectator or as one of the audiences, and admission for the purpose of amusement by taking part in an entertainment. Clause (*b*) of Section 2 defines "admission to an entertainment" which includes admission to any place in which an entertainment is held. Clause (*ca*) of Section 2 defines "cinema theatre" as any place of entertainment in which cinematography shows are held to which persons are admitted for payment. Clause (*e*) of Section 2 of the Act defines "entertainment", which means a horse race or cinematography shows including exhibition of video films to which persons are admitted on payment.

12. Section 2(*i*) defines "payment for admission" which runs as under:

> "2. (*i*)(*i*) any payment made by a person who having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof for admission to which a payment involving a tax or a higher tax is required; * * *
>
> (*v*) *any payment for admission of a motor vehicle into the auditorium of a cinema known as drive-in-theatre*." (emphasis supplied)

Section 3 is a charging section. The relevant provisions run as under:

> "3. *Tax on payment for admission to entertainments*.- (1) There shall be levied and paid to the State Government on each payment for admission (excluding the amount of tax) to an entertainment, other than the entertainment referred to in sub-clause (*iii*) of clause (*e*) of Section 2, entertainment tax at 70 per cent of such payment.
>
> (2) Notwithstanding anything contained in sub-section (1) there shall be levied and paid to the State Government (except as otherwise expressly provided in this Act) on every complimentary ticket issued by the proprietor of an entertainment, the entertainment tax at the appropriate rate specified in sub-section (1) in respect of such entertainment, as if full payment had been made for admission to the entertainment according to the class of seat or accommodation which the holder of such ticket is entitled to occupy or use; and for the purpose of this Act, the holder of such ticket shall be deemed to have been admitted on payment."

Sub-section (1) of Section 6 runs as under:

> "6. *Manner of payment of tax*.- (1) Save as otherwise provided in Section 4-A or 4-B, the entertainment tax shall be levied in respect of each payment for admission or each admission on a complimentary ticket and shall be calculated and paid on the number of admissions."

13. Entry 62 List II of the Seventh Schedule empowers the State Legislature to levy tax on luxuries, entertainment, amusements, betting and gambling. Under Entry 62, the State

Legislature is competent to enact law to levy tax on luxuries and entertainment. The incidence of tax is on entertainment. Since entertainment necessarily implies the persons entertained, therefore, the incidence of tax is on the persons entertained. Coming to the question whether the State Legislature is competent to levy tax on admission of cars/motor vehicles inside the drive-in-theatre especially when it is argued that cars/motor vehicles are not the persons entertained. Section 3 which is the charging provision, provides for levy of tax on each payment of admission. Thus, under the Act, the State is competent to levy tax on each admission inside the drive-in-theatre. The challenge to the levy is on the ground that the vehicle is not a person entertained and, therefore, the levy is ultra vires. It cannot be disputed that the car or motor vehicle does not go inside the drive-in-theatre of its own. It is driven inside the theatre by the person entertained. In other words the person entertained is admitted inside the drive-in-theatre along with the car/motor vehicle. Thereafter the person entertained while sitting in his car inside the auditorium views the film exhibited therein. This shows that the person entertained is admitted inside the drive-in-theatre along with the car/motor vehicle. This further shows that the person entertained carries his car inside the drive-in-theatre in order to have better quality of entertainment. The quality of entertainment also depends on with what comfort the person entertained has viewed the cinema films. Thus, the quality of entertainment obtained by a person sitting in his car would be different from a squatter viewing the film show. The levy on entertainment varies with the quality of comfort with which a person enjoys the entertainment inside the drive-in-theatre. In the present case, a person sitting in his car or motor vehicle has the luxury of viewing cinema films in the auditorium. It is the variation in the comfort offered to the person entertained for which the State Government has levied entertainment tax on the person entertained. The real nature and character of the impugned levy is not on the admission of cars or motor vehicles, but the levy is on the person entertained who takes the car inside the theatre and watches the film while sitting in his car. We are, therefore, of the view that in pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading "admission of vehicle" is a levy on entertainment and not on admission of vehicle inside the drive-in-theatre. As long as in pith and substance the levy satisfies the character of levy, i.e. "entertainment", it is wholly immaterial in what name and form it is imposed. The word "entertainment" is wide enough to comprehend in it, the luxury or comfort with which a person entertains himself. Once it is found there is a nexus between the legislative competence and subject of taxation, the levy is justified and valid. We, therefore, find that the State Legislature was competent to enact sub-clause (*v*) of clause (*i*) of Section 2 of the Act. We accordingly hold that the impugned levy is valid.

14. For the aforesaid reasons, we are of the view that the High Court fell in serious error in holding that sub-clause (*v*) of clause (*i*) of Section 2 of the Act is ultra vires Entry 62 List II of the Seventh Schedule.

15. Consequently, this appeal deserves to be allowed. The judgment under appeal is set aside. The writ petition shall stand dismissed. The appeal is allowed.

* * * * *

K.C. Gajapati Narayan Deo v. *State of Orissa*

AIR 1953 SC 375

[M. Patanjali Sastri, C.J. and B.K.Mukherjea, S.R, Das, Ghulam Hasan and N.H. Bhagwati, JJ.]

B.K. MUKHERJEA, J. - These six appeals arise out of as many applications, presented to the High Court of Orissa, under Article 226 of the Constitution, by the proprietors of certain permanently settled estates within the State of Orissa, challenging the constitutional validity of the legislation known as the Orissa Estates Abolition Act, 1952 (hereinafter called "the Act") and praying for mandatory writs against the State Government restraining them from enforcing the provisions of the Act so far as the estates owned by the petitioners are concerned.

2. The impugned Act was introduced in the Orissa State Legislature on the 17th of January, 1950, and was passed by it on 28th September, 1951. It was reserved by the State Governor for consideration of the President and the President gave his assent on 23rd January, 1952. The Act thus receives the protection of Articles 31(4) and 31(A)of the Constitution though it was not and could not be included in the list of statutes enumerated in the Ninth schedule to the Constitution, as referred to in Article 31(B).

3. The Act, so far as its main features are concerned, follows the pattern of similar statutes passed by the Bihar, Uttar Pradesh and Madhya Pradesh Legislative Assemblies. The primary purpose of the Act is to abolish all zemindary and other proprietary estates and interests in the State of Orissa and after eliminating all the intermediaries, to bring the ryots or the actual occupants of the lands in direct contact with the State Government. It may be convenient here to refer briefly to some of the provisions of the Act which are material for our present purpose. The object of the legislation is fully set out in the Preamble to the Act which discloses the public purpose underlying it. Section 2(*g*) defines an "estate" as meaning any land held by an intermediary and included under one entry in any of the general registers of revenue-paying lands and revenue-free lands prepared and maintained under the law for the time being in force by the Collector of a district. The expression "intermediary" with reference to any estate is then defined, and it means a proprietor, sub-proprietor, landlord, landholder ... thikadar, tenure-holder, under-tenure-holder and includes the holder of inam estate, jagir and maufi tenures and all other interests of similar nature between the ryot and the State. Section 3 of the Act empowers the State Government to declare, by notification, that the estate described in the notification has vested in the State free from all incumbrances. Under Section 4 it is open to the State Government, at any time before issuing such notification, to invite proposals from "intermediaries" for surrender of their estates and if such proposals are accepted, the surrendered estate shall vest in the Government as soon as the agreement embodying the terms of surrender is executed. The consequences of vesting either by issue of notification or as a result of surrender are described in detail in Section 5 of the Act. It would be sufficient for our present purpose to state that the primary consequence is that all lands comprised in the estate including communal lands, non-ryoti lands, waste lands, trees, orchards, pasture lands, forests, mines and minerals, quarries, rivers and streams, tanks,

water channels, fisheries, ferries, hats and bazars, and buildings or structures together with the land on which they stand shall, subject to the other provisions of the Act, vest absolutely in the State Government free from all incumbrances and the intermediary shall cease to have any interest in them. Under Section 6, the intermediary is allowed to keep for himself his homestead and buildings and structures used for residential or trading purposes such as golas, factories, mills etc. but buildings used for office or estate purposes would vest in the Government. Section 7 provides that an intermediary will be entitled to retain all lands used for agricultural or horticultural purposes which are in his khas possession at the date of vesting. Private lands of the intermediary, which were held by temporary tenants under him, would however vest in the Government and the temporary tenants would be deemed to be tenants under the Government, except where the intermediary himself holds less than 33 acres of land in any capacity. As regards the compensation to be paid for the compulsory acquisition of the estates, the principle adopted is that the amount of compensation would be calculated at a certain number of years' purchase of the net annual income of the estate during the previous agricultural year, that is to say, the year immediately preceding that in which the date of vesting falls. First of all, the gross asset is to be ascertained and by gross asset is meant the aggregate of the rents including all cesses payable in respect of the estate. From the gross asset certain deductions are made in order to arrive at the net income. These deductions include land revenue or rent including cesses payable to the State Government, the agricultural income tax payable in the previous year, any sum payable as chowkidary or municipal tax in respect of the buildings taken over as office or estate buildings and also costs of management fixed in accordance with a sliding percentage scale with reference to the gross income. Any other sum payable as income tax in respect of any other kind of income derived from the estate would also be included in the deductions. The amount of compensation thus determined is payable in 30 annual equated instalments commencing from the date of vesting and an option is given to the State Government to make full payment at any time. These in brief are the main features of the Act.

4. There was a fairly large number of grounds put forward on behalf of the appellants before the High Court in assailing the validity of the Act. It is to be remembered that the question of the constitutional validity of three other similar legislative measures passed, respectively, by the Bihar, Uttar Pradesh and Madhya Pradesh Legislative Assemblies had already come for consideration before this Court and this Court had pronounced all of them to be valid with the exception of two very minor provisions in the Bihar Act. In spite of all the previous pronouncements there appears to have been no lack of legal ingenuity to support the present attack upon the Orissa legislation, and as a matter of fact, much of the arguments put forward on behalf of the appellants purported to have been based on the majority judgment of this Court in the Bihar appeals, where two small provisions of the Bihar Act were held to be unconstitutional.

5. The arguments advanced on behalf of the appellants before the High Court have been classified by the learned Chief Justice in his judgment under three separate heads. In the first place, there were contentions raised, attacking the validity of the Act as a whole. In the second place, the validity of the Act was challenged as far as it related to certain specified items of property included in an estate e.g. private lands, buildings, waste lands etc. Thirdly,

the challenge was as to the validity of certain provisions in the Act relating to determination of compensation payable to the intermediary, with reference either to the calculation of the gross assets or the deductions to be made therefrom for the purpose of arriving at the net income.

6. The learned Chief Justice in a most elaborate judgment discussed all the points raised by the appellants and negatived them all except that the objections with regard to some of the matters were kept open. Mr Justice Narasimham, the other learned Judge in the Bench, while agreeing with the Chief Justice as to other points, expressed, in a separate judgment of his own, his suspicion about the bona fides of the Orissa Agricultural Income Tax (Second Amendment) Act, 1950, and he was inclined to hold that though ostensibly it was a taxation measure, it was in substance nothing else but a colourable device to cut down drastically the income of the intermediaries so as to facilitate further reduction of their net income as provided in clause (*b*) of Section 27(1) of the Act. He, however, did not dissent from the final decision arrived at by the Chief Justice, the ground assigned being that whenever there is any doubt regarding the constitutionality of an enactment, the doubt should always go in favour of the legislature. The result was that with the exception of the few matters that were kept open, all the petitions were dismissed. The proprietors have now come before us on appeal on the strength of certificates granted by the High Court under Articles 132 and 133 of the Constitution as well as under Section 110 of the Code of Civil Procedure.

7. No contention has been pressed before us on behalf of the appellants attacking the constitutional validity of the Act as a whole. The arguments that have been advanced by the learned counsel for the appellants can be conveniently divided under three heads: In the first place, there has been an attack on the validity of the provisions of two other statutes, namely, the Orissa Agricultural Income Tax (Amendment) Act, 1950, and the Madras Estates Land (Amendment) Act, 1947, insofar as they affect the calculation of the net income of an estate for the purpose of determining the compensation payable under the Act. In the second place, the provisions of the Act have been challenged as unconstitutional to the extent that they are applicable to private lands and buildings of the proprietors, both of which vest as parts of the estate, under Section 5 of the Act. Lastly, the manner of payment of compensation money, as laid down in Section 37 of the Act, has been challenged as invalid and unconstitutional.

8. Under the first head the appellants' main contention relates to the validity of the Orissa Agricultural Income Tax (Amendment) Act, 1950. This Act, it is said, is not a bona fide taxation statute at all, but is a colourable piece of legislation, the real object of which is to reduce, by artificial means, the net income of the intermediaries, so that the compensation payable to them under the Act might be kept down to as low a figure as possible. To appreciate this contention of the appellants, it would be necessary to narrate a few relevant facts. Under Section 27(1)(*b*) of the Act, any sum payable in respect of an estate as agricultural income tax, for the previous agricultural year, constitutes an item of deduction which has to be deducted from the gross asset of an estate for the purpose of arriving at its net income, on the basis of which the amount of compensation is to be determined. The Estates Abolition Bill was published in the local gazette on 3rd January, 1950. As has been said already, it was introduced in the Orissa Legislative Assembly on the 17th of January following and it was passed on 28th September, 1951. There was an Agricultural Income Tax

Act in force in the State of Orissa from the year 1947 which provided a progressive scale of taxation on agricultural income, the highest rate of tax being 3 annas in the rupee on a slab of over Rs 30,000 received as agricultural income. On 8th January, 1950, that is to say, five days after the publication of the Abolition Bill, an amended agricultural income tax bill was published in the Official Gazette. At that time Mr H.K. Mahtab was the Chief Minister of Orissa and this bill was sponsored by him. The changes proposed by this Amendment Act were not very material. The highest rate was enhanced from 3 annas to 4 annas in the rupee and the highest slab was reduced from Rs 30,000 to Rs 20,000. For some reason or other, however, this bill was dropped and a revised bill was published in the local gazette on 22nd July, 1950, and it passed into law on 10th of August following. This new Act admittedly made changes of a very drastic character regarding agricultural income tax. The rate of taxation was greatly enhanced for slabs of agricultural income above Rs 15,000 and for the highest slab the rate prescribed was as much as 12 annas 6 pies in the rupee. It was stated in the statement of objects and reasons that the enhanced agricultural income was necessary for financing various development schemes in the State. This, it is said, was wholly untrue for it could not be disputed that almost all the persons who came within the higher income group and were primarily affected by the enhanced rates were intermediaries under the Estates Abolition Bill which was at that time before the Select Committee and was expected to become law very soon, and as the legislature had already definitely decided to extinguish this class of intermediaries, it was absurd to say that an increased taxation upon them was necessary for the development schemes. The object of this amended legislation, according to the appellants, was totally different from what it ostensibly purported to be and the object was nothing else but to use it as a means of effecting a drastic reduction in the income of the intermediaries, so that the compensation payable to them may be reduced almost to nothing. This change in the provisions of the Agricultural Income Tax Bill, it is further pointed out, synchronized with a change in the Ministry of the Orissa State. The original amended bill was introduced by the then Chief Minister, Mr H.K. Mahtab, who was in favour of allowing suitable compensation to expropriated zemindars; but his successor, who introduced the revised bill, was said to be a champion of the abolition of zemindary rights with little or no compensation to the proprietors. In these circumstances, the argument of the learned counsel is that the agricultural income tax legislation being really not a taxation statute but a mere device for serving another collateral purpose constitutes a fraud on the Constitution and as such is invalid, either in its entirety, or at any rate to the extent that it affects the estate abolition scheme. We have been referred to a number of decisions on this point where the doctrine of colourable legislation came up for discussion before courts of law; and stress is laid primarily upon the pronouncement of the majority of this Court in the case of *State of* ***Bihar*** **v.** ***Maharaja Kameshwar Singh*** [1952 SCR 889] which held two provisions of the Bihar Land Reforms Act, namely, Sections 4(*b*) and 23(*f*) to be unconstitutional on the ground, among others, that these provisions constituted a fraud on the Constitution. The fact that the provisions in the amended Agricultural Income Tax Act were embodied in a separate statute and not expressly made a part of the Abolition Act itself should not, it is argued, make any difference in principle. As the question is of some importance and is likely to be debated in similar cases in future, it would be necessary to examine the precise scope and meaning of what is known ordinarily as the doctrine of "colourable legislation".

9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power [Vide *Cooley's Constitutional Limitations*, Vol 1 p 379]. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in ***Attorney-General for Ontario* v. *Reciprocal Insurers*** [1924 AC 328 at 337]:

> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avows on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction; yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires [See *Lefroy on Canadian Constitution*, page 75].

10. In support of his contention that the Orissa Agricultural Income Tax (Amendment) Act, 1950 is a colourable piece of legislation and hence ultra vires the Constitution, the learned counsel for the appellants, as said above, placed considerable reliance upon the majority decision of this Court in the case of ***State of Bihar*** **v.** ***Sir Kameshwar Singh*** [1952 SCR 889] where two clauses of the Bihar Land Reform Act were held to be unconstitutional as being colourable exercise of legislative power under Entry 42 of List III of Schedule VII of the Constitution. The learned counsel has also referred us, in this connection, to a number of cases, mostly of the Judicial Committee of the Privy Council, where the doctrine of colourable legislation came up for consideration in relation to certain enactments of the Canadian and Australian Legislatures. The principles laid down in these decisions do appear to us to be fairly well settled, but we do not think that the appellants in these appeals could derive much assistance from them.

11. In the cases from Canada, the question invariably has been whether the Dominion Parliament has, under colour of general legislation, attempted to deal with what are merely provincial matters, or conversely whether the Provincial Legislatures under the pretence of legislating on say of the matters enumerated in Section 92 of the British North America Act really legislated on a matter assigned to the Dominion Parliament. In the case of ***Union Colliery Company of British Columbia Ltd.*** **v.** ***Bryden*** [1899 AC 580] the question raised was whether Section 4 of the British Columbian Coal Mines Regulation Act, 1890, which prohibited Chinamen of full age from employment in underground coal working, was, in that respect, ultra vires of the Provincial Legislature. The question was answered in the affirmative. It was held that if it was regarded merely as a coal working regulation, it could certainly come within Section 92, sub-section (10) or (13), of the British North America Act; but its exclusive application to Chinamen, who were aliens or naturalised subjects, would be a statutory prohibition which was within the exclusive authority of the Dominion Parliament, conferred by Section 91 sub-section (25) of the Act. As the Judicial Committee themselves explained in a later case [Vide ***Cunningham*** **v.** ***Tomeyhomma***, 1903 AC 151, 157] the regulations in the British Columbian Act "were not really aimed at the regulation of coal mines at all, but were in truth a device to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and in effect to prohibit their continued residence in that province since it prohibited their earning their living in that province".

12. On the other hand, in ***Re Insurance Act of Canada*** [1932 AC 41] the Privy Council had to deal with the constitutionality of Sections 11 and 12 of the Insurance Act of Canada passed by the Dominion Parliament under which it was declared to be unlawful for any Canadian company or an alien, whether a natural person or a foreign company to carry on insurance business except under a licence from the Minister, granted pursuant to the provisions of the Act. The question was whether a foreign or British insurer licensed under the Quebec Insurance Act was entitled to carry on business within that Province without taking out a licence under the Dominion Act? It was held that Sections 11 and 12 of the Canadian Insurance Act, which required the foreign insurers to be licensed, were ultra vires, since in the guise of legislation as to aliens and immigration — matters admittedly within the Dominion authority - the Dominion legislature was seeking to intermeddle with the conduct of insurance business which was a subject exclusively within the provincial authority. The

whole law on this point was thus summed up by Lord Maugham in ***Attorney-General for Alberta* v. *Attorney-General for Canada*** [1939 AC 117]:

> "It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive power of the other."

13. The same principle has been applied where the question was not of one legislature encroaching upon the exclusive field of another but of itself violating any constitutional guarantee or prohibition. As an illustration of this type of cases we may refer to the Australian case of ***Moran* v. *Deputy Commissioner of Taxation for New South Wales*** [1940 AC 838]. What happened in that case was that in pursuance of a joint Commonwealth and States scheme to ensure to wheat growers in all the Australian States "a payable price for their produce" a number of Acts were passed by the Commonwealth Parliament imposing taxes on flour sold in Australia for home consumption, so as to provide a fund available for payment of moneys to wheat growers. Besides a number of taxing statutes, which imposed tax on flour, the Wheat Industry Assistance Act 53 of 1938 provided for a fund into which the taxes were to be paid and of which certain payments were to be made to the wheat growers in accordance with State legislation. In the case of Tasmania where the quantity of wheat grown was relatively small but the taxes were imposed as in the other States, it was agreed as a part of the scheme and was provided by Section 14 of the Wheat Industry Assistance Act that a special grant should be made to Tasmania, not subject to any federal statutory conditions but intended to be applied by the Government of Tasmania, in paying back to Tasmanian millers, nearly the whole of the flour tax paid by them and provision to give effect to that purpose was made by the Flour Tax Relief Act 40 of 1938 of the State of Tasmania. The contention raised was that these Acts were a part of a scheme of taxation operating and intended to operate by way of discriminating between States or parts of States and as such were contrary to the provisions of Section 51(*ii*) of the Commonwealth Australian Constitution Act. The matter came up for consideration before a full Court of the High Court of Australia and the majority of the Judges came to the conclusion that such legislation was protected by Section 96 of the Constitution, which empowered the Parliament of the Commonwealth to grant financial assistance to any State on such terms and conditions as the Parliament thought fit. Evatt, J. in a separate judgment dissented from the view and held that under the guise of executing the powers under Section 96 of the Constitution, the legislature had really violated the constitutional prohibition laid down in Section 51(*ii*) of the Constitution. There was an appeal taken to the Privy Council. The Privy Council affirmed the judgment of the majority but pointed out that "cases may be imagined in which a purported exercise of the power to grant financial assistance under Section 96 would be merely colourable. Under the guise and pretence of assisting a State with money, the real substance and purpose of the Act might simply be to effect discrimination in regard to taxation. Such an Act might well be ultra vires the Commonwealth Parliament".

14. We will now come to the decision of the majority of this Court regarding two clauses in the Bihar Land Reforms Act which seems to be the sheet anchor of the appellants' case[vide *State of Bihar* v. *Kameshwar Singh*, 1952 SCR 889]. In that case the provisions of Sections 23(*f*) and 4(*b*) of the Bihar Land Reforms Act were held to be invalid by the majority

of this Court not on the ground that, in legislating on these topics, the State Legislature had encroached upon the exclusive field of the Central Legislature, but that the subject-matter of legislation did not at all come within the ambit of Item 42 of List III, Schedule VII of the Constitution under which it purported to have been enacted. As these sections did not come within Entry 42, the consequence was that half of the arrears of rent as well as 12½% of the gross assets of an estate were taken away, otherwise than by authority of law and therefore there was a violation of fundamental rights guaranteed by Article 31(1) of the Constitution. This was a form of colourable legislation which made these provisions ultra vires the Constitution.

15. It may be stated here that Section 23 of the Bihar Land Reforms Act lays down the method of computing the net income of an estate or a tenure which is the subject-matter of acquisition under the Act. In arriving at the net income certain deductions are to be made from the gross asset and the deductions include, among others, revenue, cess and agricultural income tax payable in respect of the properties and also the costs of management. Section 23(*f*) provided another item of deduction under which a sum representing 4 to 12½% of the gross asset of an estate was to be deducted as "costs of works for benefit to the raiyat". The other provision contained in Section 4(*b*) provides that all arrears of rent which had already accrued due to the landlord prior to the date of vesting, shall vest in the State and the latter would pay only 50% of these arrears to the landlord. Both these provisions purported to have been enacted under Entry 42 of List III Schedule VII of the Constitution and that entry speaks of "principles on which compensation for property acquired is to be determined and the form and manner in which that compensation is to be given". It was held in the ***Bihar*** case [Vide ***State of Bihar* v. *Kameshwar Singh***, 1952 SCR 889] by the majority of this Court that the item of deduction provided for in Section 23(*f*) was a fictitious item wholly unrelated to facts. There was no definable pre-existing liability on the part of the landlord to execute works of any kind for the benefit of the raiyat. What was attempted to be done, therefore, was to bring within the scope of the legislation something which not being existent at all could not have conceivable relation to any principle of compensation. This was, therefore, held to be a colourable piece of legislation which though purporting to have been made under Entry 42 could not factually come within its scope.

16. The same principle was held applicable in regard to acquisition of arrears of rent which had become due to the landlord prior to the date of vesting. The net result of this provision was that the State Government was given the power to appropriate to itself half of the arrears of rent due to the landlord without giving him any compensation whatsoever. Taking the whole and returning the half meant nothing more or less than taking the half without any return and this, it was held, could not be regarded as a principle of compensation in any sense of the word. It was held definitely by one of the learned Judges, who constituted the majority, that Item 42 of List III was nothing but the description of a legislative head and in deciding the competency of the legislation under this entry, the court is not concerned with the justice or propriety of the principles upon which the assessment of compensation is directed to be made; but it must be a principle of compensation, no matter whether it was just or unjust and there could be no principle of compensation based upon something which was unrelated to facts. It may be mentioned here that two of the three learned Judges who formed the majority did base their decision regarding the invalidity of the provision, relating to

arrears of rent, mainly on the ground that there was no public purpose behind such acquisition. It was held by these Judges that the scope of Article 31(4) is limited to the express provisions of Article 31(2) and although the court could not examine the adequacy of the provision for compensation contained in any law which came within the purview of Article 31(4), yet that clause did not in any way debar the court from considering whether the acquisition was for any public purpose. This view was not taken by the majority of the court and Mr Narasaraju, who argued the appeals before us, did not very properly pursue that line of reasoning. This being the position, the question now arises whether the majority decision of this Court with regard to the two provisions of the Bihar Act is really of any assistance to the appellants in the cases before us. In our opinion, the question has got to be answered in the negative.

17. In the first place, the line of reasoning underlying the majority decision in the ***Bihar*** case cannot possibly have any application to the facts of the present case. The Orissa Agricultural Income Tax (Amendment) Act, 1950 is certainly a legislation on "taxing of agricultural income" as described in Entry 46 of List II of the Seventh Schedule. The State Legislature had undoubted competency to legislate on agricultural income tax and the substance of the amended legislation of 1950 is that it purports to increase the existing rates of agricultural income tax, the highest rate being fixed at 12 annas 6 pies in the rupee. This may be unjust or inequitable, but that does not affect the competency of the legislature. It cannot be said, as was said in the Bihar case, that the legislation purported to be based on something which was unrelated to facts and did not exist at all. Both in form and in substance the Act was an agricultural income tax legislation and agricultural income tax is certainly a relevant item of deduction in the computation of the net income of an estate and is not unrelated to it as Item 23(*f*) of the Bihar Act was held to be. If under the existing law the agricultural income tax was payable at a certain rate and without any amendment or change in the law, it was provided in the Estates Abolition Act that agricultural income tax should be deducted from the gross asset at a higher rate than what was payable under law, it might have been possible to argue that there being no pre-existing liability of this character it was really a non-existing thing and could not be an ingredient in the assessment of compensation. But here the Agricultural Income Tax (Amendment) Act was passed in August 1950. It came into force immediately thereafter and agricultural income tax was realised on the basis of the amended Act in the following year. It was, therefore, an existing liability in 1952, when the Estates Abolition Act came into force. It may be that many of the people belonging to the higher income group did disappear as a result of the Estates Abolition Act, but even then there were people still existing upon whom the Act could operate.

18. The contention of Mr Narasaraju really is that though apparently it purported to be a taxation statute coming under Entry 46 of List II, really and in substance it was not so. It was introduced under the guise of a taxation statute with a view to accomplish an ulterior purpose, namely, to inflate the deductions for the purpose of valuing an estate so that the compensation payable in respect of it might be as small as possible. Assuming that it is so, still it cannot be regarded as a colourable legislation in accordance with the principles indicated above, unless the ulterior purpose which it is intended to serve is something which lies beyond the powers of the legislature to legislate upon. The whole doctrine of colourable legislation is based upon

the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid. Under Entry 42 of List III which is a mere head of legislative power the legislature can adopt any principle of compensation in respect to properties compulsorily acquired. Whether the deductions are large or small, inflated or deflated they do not affect the constitutionality of a legislation under this entry. The only restrictions on this power, as has been explained by this Court in the earlier cases, are those mentioned in Article 31(2) of the Constitution and if in the circumstances of a particular case the provision of Article 31(4) is attracted to a legislation, no objection as to the amount or adequacy of the compensation can at all be raised. The fact that the deductions are unjust, exorbitant or improper does not make the legislation invalid, unless it is shown to be based on something which is unrelated to facts. As we have already stated, the question of motive does not really arise in such cases and one of the learned Judges of the High Court in our opinion pursued a wrong line of enquiry in trying to find out what actually the motives were which impelled the legislature to act in this manner. It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation or that it lies within the exclusive field of another legislature. The result is that in our opinion the Orissa Agricultural Income Tax (Amendment) Act, 1950 could not be held to be a piece of colourable legislation, and as such invalid. The first point raised on behalf of the appellants must therefore fail.

19. The other point raised by the learned counsel for the appellants under the first head of his arguments relates to the validity of certain provisions of the Madras Estates Land (Orissa Amendment) Act, 1947. This argument is applicable only to those estates which are situated in what is known as ex-Madras area, that is to say which formerly belonged to the State of Madras but became a part of Orissa from 1st April, 1936. The law regulating the relation of landlord and tenant in these areas is contained in the Madras Estates Land Act, 1908 and this Act was amended with reference to the areas situated in the State of Orissa by the amending Act 19 of 1947. The provisions in the amended Act, to which objections have been taken by the learned counsel for the appellants, relate to settlement and reduction of rents payable by raiyats. Under Section 168 of the Madras Estates Land Act, settlement of rents in any village or area for which a record of rights has been published can be made either on the application of the landholder or the raiyats. On such application being made, the Provincial Government may at any time direct the Collector to settle fair and equitable rents in respect of the lands situated therein. Sub-section (2) of Section 168 expressly provides that in settling rents under this section, the Collector shall presume, until the contrary is proved, that the existing rate of rent is fair and equitable and he would further have regard to the provisions of this Act for determining the rates of rent payable by raiyats. Section 177 provides that when any rent is settled under this chapter, it can neither be enhanced nor reduced for a period of 20 years, except on grounds specified in Sections 30 and 38 of the Act respectively. The amending Act of 1947 introduced certain changes in this law. A new section, namely, Section 168-A was introduced and a further provision was added to Section 177 as sub-section (2) of that section, the original section being renumbered as sub-section (1). Section 168-A of the amended Act runs as follows:

"(1) Notwithstanding anything contained in this Act the Provincial Government may, on being satisfied that the exercise of the powers hereinafter mentioned is necessary in the interests of public order or of the local welfare or that the rates of rent payable in money or in kind whether commuted, settled or otherwise fixed are unfair or inequitable invest the Collector with the following powers:

(*a*) Power to settle fair and equitable rents in cash;

(*b*) Power, when settling rents to reduce rents if in the opinion of the Collector the continuance of the existing rents would on any ground, whether specified in this Act or not, be unfair and inequitable.

(2)The power given under this section may be made exercisable within specified areas either generally or with reference to specified cases or class of cases."

Sub-section (2) which has been added to Section 177 stands thus:

"2. (*a*)Notwithstanding anything in sub-section (1) where rent is settled under the provisions of Section 168-A, the Provincial Government may either retrospectively or prospectively prescribe the date on which such settlement shall take effect. In giving retrospective effect the Provincial Government may, at their discretion, direct that the rent so settled shall take effect from a date prior to the commencement of the Madras Estates Land (Orissa Amendment) Act, 1947."

20. The appellants' contention is that by these amended provisions the Provincial Government was authorised to invest the Collector with power to settle and reduce rents, in any way he liked, unfettered by any of the Rules and principles laid down in the Act and the Provincial Government was also at liberty to direct that the reduction of rents should take effect retrospectively, even with reference to a period for which rents had already been paid by the tenant. Under Section 26 of the Orissa Estates Abolition Act, the gross asset of an estate is to be calculated on the basis of rents payable by raiyats for the previous agricultural year. According to the appellants, the State Government made use of the provisions of the amended Madras Estates Land (Orissa Amendment) Act to reduce arbitrarily the rents payable by raiyats and further to make the reduction take effect retrospectively, so that the diminished rents could be reckoned as rents for the previous year in accordance with the provision of Section 26 of the Estates Abolition Act and thus deflate the basis upon which the gross asset of an estate was to be computed.

21. It is conceded by the learned counsel for the appellants that the amendments in the Madras Estates Land Act are no part of the Estates Abolition Act of Orissa and there is no question of any colourable exercise of legislative powers in regard to the enactment of these provisions. The legislation, however, has been challenged, as unconstitutional, on two grounds. First of all, it is urged that by the amended sections mentioned above, there has been an improper delegation of legislative powers by the legislature to the Provincial Government, the latter being virtually empowered to repeal existing laws which govern the relations between landlord and tenant in those areas. The other ground put forward is that these provisions offend against the equal protection clause embodied in Article 14 of the Constitution. It is pointed out that the Provincial Government is given unfettered discretion to choose the particular areas where the settlement of rent is to be made. The Government has also absolute power to direct that the reduced rents should take effect either prospectively or retrospectively in particular cases as they deem proper. It is argued that there being no

principle of classification indicated in these legislative provisions and the discretion vested in the Government being an uncontrolled and unfettered discretion guided by no legislative policy, the provisions are void as repugnant to Article 14 of the Constitution.

22. In reply to these arguments it has been contended by the learned Attorney-General that, apart from the fact as to whether the contentions are well-founded or not, they are not relevant for purposes of the present case. The arguments put forward by the appellants are not grounds of attack on the validity of the Estates Abolition Act, which is the subject-matter of dispute in the present case, and it is not suggested that the provisions of the Estates Abolition Act relating to the computation of gross asset on the basis of rents payable by raiyats is in any way illegal. The grievance of the appellants in substance is that the machinery of the amended Act is being utilised by the Government for the purpose of deflating the gross asset of an estate. We agree with the learned Attorney-General that if the appellants are right in their contention, they can raise these objections if and when the gross assets are sought to be computed on the basis of the rents settled under the above provisions. If the provisions are void, the rents settled in pursuance thereof could not legitimately form the basis of the valuation of the estate under the Estates Abolition Act and it might be open to the appellants then to say that for purposes of Section 26 of the Estates Abolition Act, the rents payable for the previous year would be the rents settled under the Madras Estates Land Act, as it stood unamended before 1947. The learned counsel for the appellants eventually agreed with the views of the Attorney-General on this point and with the consent of both sides we decided to leave these questions open. They should not be deemed to have been decided in these cases.

23. The appellants' second head of arguments relates to two items of property, namely, buildings and private lands of the intermediary, which, along with other interests, vest in the State under Section 5 of the Act.

24. There are different provisions in the Act in regard to different classes of buildings. Firstly, dwelling houses used by an intermediary for purposes of residence or for commercial or trading purposes remain with him on the footing of his being a tenant under the State in respect to the sites thereof and paying such fair and equitable rent as might be determined in accordance with the provisions of the Act. In the second place, buildings used primarily as office or kutchery for management of the estates or for collection of rents or as rest houses for estate servants or as golas for storing of rents in kind vest in the State and the owner is allowed compensation in respect thereof. In addition to these, there are certain special provisions in the Act relating to buildings constructed after 1st January, 1946, and used for residential or trading purposes, in respect to which the question of bona fides as to its construction and use might be raised and investigated by the Collector. There are separate provisions also in respect to buildings constructed before 1st January, 1946, which were not in possession of the intermediary at the date of coming into force of the Act. The questions arising in regard to this class of cases have been left open by the High Court and we are not concerned with them in the present appeals. No objection has been taken by the appellants in respect to the provisions of the Act relating to buildings used for residential or trade purposes. Their objections relate only to the building used for estate or office purposes which vest in the State Government under the provisions of the Act.

25. In regard to these provisions, it is urged primarily that the buildings raised on lands do not necessarily become parts of the land under Indian law and the legislature, therefore, was wrong in treating them as parts of the estate for purposes of acquisition. This contention, we are afraid, raises an unnecessary issue with which we are not at all concerned in the present cases. Assuming that in India there is no absolute rule of law that whatever is affixed to or built on the soil becomes a part of it and is subject to the same rights of property as the soil itself, there is nothing in law which prevents the State Legislature from providing as a part of the estates abolition scheme that buildings, lying within the ambit of an estate and used primarily for management or administration of the estate, would vest in the Government as appurtenances to the estate itself. This is merely ancillary to the acquisition of an estate and forms an integral part of the abolition scheme. Such acquisition would come within Article 31(2) of the Constitution and if the conditions laid down in clause (4) of that article are complied with, it would certainly attract the protection afforded by that clause. Compensation has been provided for these buildings in Section 26(2)(*iii*) of the Act and the annual rent of these buildings determined in the prescribed manner constitutes one of the elements for computation of the gross asset of an estate. The contention of the appellants eventually narrows down to this that the effect of treating the annual valuation of the buildings as part of the gross asset of the estate in its entirety, leads to unjust results, for if these buildings were treated as separate properties, the intermediaries could have got compensation on a much higher scale in accordance with slab system adopted in the Act. To this objection, two answers can be given. In the first place, if these buildings are really appurtenant to the estate, they can certainly be valued as parts of the estate itself. In the second place, even if the compensation provided for the acquisitions of the buildings is not just and proper, the provision of Article 31(4) of the Constitution would be a complete answer to such acquisition.

26. As regards the private lands of the proprietor, the appellants have taken strong exception to the provisions of the Act so far as they relate to private lands in possession of temporary tenants. In law these lands are in possession of the proprietor and the temporary tenants cannot acquire occupancy rights therein, yet they vest, under the Act, in the State Government on the acquisition of an estate, the only exception being made in cases of small landholders who do not hold more than 33 acres of land in any capacity. Section 8(1) of the Act gives the temporary tenants the right to hold the lands in their occupation under the State Government on the same terms as they held them under the proprietor. Under the Orissa Tenants Protection Act, which is a temporary Act, the landholder is not entitled to get contractual or competitive rents from these temporary tenants in possession of his private lands and the rent is fixed at two-fifths of the gross produce. It is on the basis of this produce rent which is included in the computation of the gross asset of an estate under Section 26 of the Act, that the landholder gets compensation in respect to the private lands in occupation of temporary tenants. The appellants' main contention is that although in these lands both the *malevaram* and *kudivaram* rights, that is to say, both the proprietor's as well as the raiyat's interests are united in the landholder, the provisions of the Act indicated above, have given no compensation whatsoever for the *kudivaram* or the tenant's right and in substance this interest has been confiscated without any return. This, in our opinion, is a wrong way of looking at the provisions for compensation made in the Act. The Orissa Act, like similar Acts passed by the legislatures of other States, provides for payment of compensation on the basis of the net

income of the whole estate. One result of the adoption of this principle, undoubtedly is, that no compensation is allowed in respect of potential values of properties; and those parts of an estate which do not fetch any income have practically been ignored. There is no doubt that the Act does not give anything like a fair or market price of the properties acquired and the appellants may be right in their contention that the compensation allowed is inadequate and improper but that does not affect the constitutionality of the provisions. In the first place, no question of inadequacy of compensation can be raised in view of the provision of Article 31(4) of the Constitution and it cannot also be suggested that the rule for payment of compensation on rental basis is outside the ambit of Entry 42 of List III. This point is concluded by the earlier decision of this Court in ***Raja Suriya Pal Singh*** **v.** ***State of U.P.*** [1952 SCR 1056] and is not open to further discussion. Mr Narasaraju is not right in saying that the compensation for the private lands in possession of temporary tenants has been given only for the landlord's interest in these properties and nothing has been given in lieu of the tenant's interest. The entire interest of the proprietor in these lands has been acquired and the compensation payable for the whole interest has been assessed on the basis of the net income of the property as represented by the share of the produce payable by the temporary tenants to the landlord. It is true that the Orissa Tenants Protection Act is a temporary statute, but whether or not it is renewed in future, the rent fixed by it has been taken only as the measure of the income derivable from these properties at the date of acquisition.

27. Mr Narasaraju further argues that his clients are not precluded from raising any objection on the ground of inadequacy of compensation in regard to these private lands by reason of Article 31(4) of the Constitution as the provision of that article is not attracted to the facts of the present case. What is said is that the original Estates Abolition Bill, which was pending before the Orissa Legislature at the time when the Constitution came into force, did not contain any provision that the private lands of the proprietor in occupation of temporary tenants would also vest in the State. This provision was subsequently introduced by way of amendment during the progress of the bill and after the Constitution came into force. It is argued, therefore, that this provision is not protected by Article 31(4). The contention seems to us to be manifestly untenable. Article 31(4) is worded as follows:

> "If any bill pending at the commencement of this Constitution in the Legislature of a State has, after it has been passed by such legislature, been reserved for the consideration of the President and has received his assent, then, notwithstanding anything in this Constitution, the law so assented to shall not be called in question in any court on the ground that it contravenes the provisions of clause (2)."

Thus it is necessary first of all that the bill, which ultimately becomes law, should be pending before the State Legislature at the time of the coming into force of the Constitution. That Bill must be passed by the Legislature and then receive the assent of the President. It is the law to which the assent of the President is given that is protected from any attack on the ground of non-compliance with the provisions of clause (2) of Article 31. The fallacy in the reasoning of the learned counsel lies in the assumption that the Bill has got to be passed in its original shape without any change whatsoever, before the provision of clause (4) of Article 31 could be attracted. There is no warrant for such assumption in the language of the clause. The expression "passed by such Legislature" must mean "passed with or without amendments" in

accordance with the normal procedure contemplated by Article 107 of the Constitution. There can be no doubt that all the requirements of Article 31(4) have been complied with in the present case and consequently there is no room for any objection to the legislation on the ground that the compensation provided by it is inadequate.

28. The last contention of the appellants is directed against the provision of the Act laying down the manner of payment of the compensation money. The relevant section is Section 37 and it provides for the payment of compensation together with interest in 30 annual equated installments leaving it open to the State to make the payment in full at any time prior to the expiration of the period. The validity of this provision has been challenged on the ground that it is a piece of colourable legislation which comes within the principle enunciated by the majority of this Court in the *Bihar case* referred to above. It is difficult to appreciate this argument of the learned counsel. Section 37 of the Act contains the legislative provision regarding the form and the manner in which the compensation for acquired properties is to be given and as such it comes within the clear language of Entry 42 of List III, Schedule VII of the Constitution. It is not a legislation on something which is non-existent or unrelated to facts. It cannot also be seriously contended that what Section 37 provides for, is not the giving of compensation but of negativing the right to compensation as the learned counsel seems to suggest. There is no substance in this contention and we have no hesitation in overruling it. The result is that all the points raised by the learned counsel for the appellants fail and the appeals are dismissed.

* * * * *

Union of India v. *H.S. Dhillon*

1971(2) SCC 779

[S.M.Sikri, C.J., J.M. Shelat, G.K. Mitter, A.N.Ray, I.D. Dua, S.C.Roy and D.G. Palekar, JJ.]

[*Residuary Power of Legislation*]

S. M. SIKRI, C.J. - This appeal is from the judgment of the High Court of Punjab and Haryana in Civil Writ No. 2291 of 1970, which was heard by a Bench of five Judges. Four Judges held that Section 24 of the Finance Act, 1969, in so far as it amended the relevant provisions of the Wealth Tax Act, 1957, was beyond the legislative competence of Parliament. Pandit, J., however, held that the impugned Act was intra vires the legislative powers of Parliament. The High Court accordingly issued a direction to the effect that the Wealth Tax Act, as amended by Finance Act, 1969, in so far as it includes the capital value of the agricultural land for the purposes of computing net wealth, was ultra vires the Constitution of India.

2. We may mention that the majority also held that the impugned Act was not a law with respect to Entry 49, List II of the Seventh Schedule to the Constitution; in other words, it held that this tax was not covered by Entry 49, List II of the Seventh Schedule.

3. The Wealth Tax Act, 1957, was amended by Finance Act, 1969, to include the capital value of agricultural land for the purposes of computing net wealth. "Assets" is defined in Section 2(*c*) to include property of every description, movable or immovable. The exclusions need not be mentioned here as they relate to earlier assessment years. "Net Wealth" is defined in Section 2(*m*) to mean "the amount by which the aggregate value computed in accordance with the provisions of this Act of all the assets, wherever located, belonging to the assessee on the valuation date, includes assets required to be included in his net wealth as on that date under this Act, is in excess of the aggregate value of all the debts owned by the assessee on the valuation date". Other than certain debts which are set out in the definition. "Valuation date" in relation to any year for which the assessment is to be made under this Act is defined in Section *2*(*q*) to mean the last day of the previous year as defined in Section 3 of the Income Tax Act, if an assessment were to be made under this Act for that year. We need not set out the proviso here. Section 3 is the charging section which reads:

> 3. Subject to the other provisions contained in this Act there shall be charged for every assessment year commencing on and from the first day of April, 1957, a tax hereinafter referred to as the "wealth-lax" in respect of the net wealth on the correspondent valuation date of every individual, Hindu Undivided Family and company at the rate or rates specified in the Schedule.

8. The submissions of Mr Setalvad, appearing on behalf of the Union in brief were these: That the impugned Act is not a law with respect to any entry (including Entry 49) in List II, if this is so, it must necessarily fall within the legislative competence of Parliament under Entry 86, read with Entry 97 or Entry 97 by itself read with Art 248 of the Constitution; the words "exclusive of agricultural land" in Entry 86 could not cut down the scope of either Entry 97, List I or Article 248 of the Constitution.

9. The submissions of Mr Palkiwala, who appeared on behalf of the respondent in the appeal, and the other counsel for the interveners, in brief, were these: It was the scheme of the Constitution to give States exclusive powers to legislate in respect of agricultural land, income on agricultural land and taxes thereon; in this context the object and effect of specifically excluding agricultural land from the scope of Entry 86 was also take it out of the ambit of Entry 97 List I and Article 248; the High Court was wrong in holding that the impugned Act was not a law in respect of Entry 49, List II.

10. It was further urged by Mr Setalvad that the proper way of testing the validity of a parliamentary statute under our Constitution was first to see whether the parliamentary legislation was with respect to a matter or tax mentioned in List II, if it was not, no other question would arise. The learned counsel for the respondent contended that this manner of enquiry had not been even hinted in any of the decisions of the Court during the last 20 years of its existence and there must accordingly be something wrong with this test. He urged that in so far as this test is derived from the Canadian decisions, the Canadian Constitution is very different and those decisions ought not to be followed here and applied to our Constitution.

11. It seems to us that the best way of dealing with the question of the validity of the impugned Act with the contentions of the parties is to ask ourselves two questions:

first is the impugned Act legislation with respect to Entry 49, List II and
secondly if it is not, is it beyond the legislative competence of Parliament.

13. It seems to us unthinkable that the Constitution-makers, while creating a sovereign democratic republic, withheld certain matters or taxes beyond the legislative competency of the Legislatures in this country either legislating singly or jointly. The language of the relevant articles on the contrary is quite clear that this was not the intention of the Constituent Assembly. Chapter I of Part XI of the Constitution deals with "Distribution of Legislative powers".

14. Reading Article 246 with the three lists in the Seventh Schedule, it is quite clear that Parliament has exclusive power to make laws with respect to all the matters enumerated in List I and this notwithstanding anything in clauses (2) and (3) of Article 246. The State Legislatures have exclusive powers to make laws with respect to any of the matters enumerated in List'11, but this is subject to clauses (1) and (2) of Article 246. The object of this subjection is to make Parliamentary legislation on matters in Lists I and III paramount. Under clause (4) of Article 246 Parliament is competent also to legislate on a matter enumerated in State List for any part of the territory of India not included in a State. Article 248 gives the residuary powers of legislation to the Union Parliament.

15. This scheme of distribution of legislative power has been derived from the Government of India Act, 1935, but in one respect there is a great deal of difference, and it seems to us that this makes the scheme different in so far as the present controversy is concerned. Under the Government of India Act, the residuary powers were not given either to the Central Legislature or to the Provincial Legislatures. The reason for this was given in the Report of the Joint Committee on Indian Constitutional Reform, Volume I, Para 56. The reason was that there was profound cleavage of opinion existing in India with regard to

allocation of residuary legislative powers. The result was the enactment of Section 104 of the Government of India Act[…]

17. There does not seem to be any dispute that the Constitution-makers wanted to give residuary powers of legislation to the Union Parliament. Indeed, this is obvious from Article 248 and Entry 97, List I. But there is a serious dispute about the extent of the residuary power. It is urged on behalf of the respondent that the words "exclusive of agricultural land" in Entry 86, List I, were words of prohibition, prohibiting Parliament from including capital value of agricultural land in any law levying tax on capital value of assets. Regarding Entry 97, List I, it is said that if a matter is specifically excluded from an entry in List I, it is apparent that it was not the intention to include it under Entry 97, List I; the words "exclusive of agricultural land" in Entry 86 by themselves constituted a matter and therefore they could not fall within the words "any other matter" in Entry 97, List I. Our attention was drawn to a number of entries in List I where certain items have been excluded from List I. For example, in Entry 82, taxes on agricultural income have been excluded from the ambit of "taxes on income", in Entry 84 there is exclusion of duties of excise on alcoholic liquors for human consumption and on opium, Indian hemp and other narcotic drugs and narcotics; in Entry 86, agricultural land has been excluded from the field of taxes on the capital value of the assets; in Entry 87, agricultural land has again been excluded from the Union Estate duty in respect of property; and in Entry 88, agricultural land has been further excluded from the incidence of duties in respect of succession to property. It was urged that the object of these exclusions was to completely deny Parliament competence to legislate on these excluded matters.

18. It will be noticed that all the matters and taxes which have been excluded, except taxes on the capital value of agricultural land under Entry 86, List I, fall specifically within one of the entries in List II. While taxes on agricultural income have been excluded from Entry 82, List I, they form Entry 46, List II, duties of excise excluded in Entry 84, List I, have been included in Entry 51, List II; agricultural land exempt in Entry 87 has been incorporated as Entry 48, List II; and similarly, agricultural land exempted from the incidence of duties in respect of succession to property has been made the subject-matter of duties in respect of succession in Entry 47, List II.

19. It seems to us that from this scheme of distribution it cannot be legitimately inferred that taxes on the capital value of agricultural land were designedly excluded from Entry 97, List I.

[…] If the residuary subject had ultimately been assigned to the States could it have been seriously argued that vis-a-vis the states the matter of taxes on "Capital value of agricultural land" would have been outside the powers of States? Obviously not, if so, there can be no reason for excluding it from the residuary powers ultimately conferred on Parliament. The content of the residuary power, does not change with its conferment on Parliament.

20. It may be that it was thought that a tax on capital value of agricultural land was included in Entry 49, List II. This contention will be examined a little later. But if on a proper interpretation of Entry 49, List II, read in the light of Entry 86, List I, it is held that tax on the capital value of agricultural land is not included within Entry 49, List II or that the tax imposed by the impugned statute does not fall either in Entry 49, List II or Entry 86, List I, it

would be arbitrary to say that it does not fall within Entry 97, List I. We find it impossible to limit the width of Article 248, and Entry 97, List I by the words "exclusive of agricultural land" in Entry 86, List I. We do not read the words "any other matter" in Entry 97 to mean that it has any reference to topics excluded in Entries 1-96; List I. It is quite clear that the words "any other matter" have reference to matters on which the Parliament has been given power to legislate by the enumerated Entries 1-96, List I and not to matters on which it has not been given power to legislate. The matter in Entry 86, List I, is the whole entry and not the Entry without the words "exclusive of agricultural land". The matter in Entry 86, List I, again is not tax on capital value of assets but the whole entry. We may illustrate this point with reference to some other entries. In Entry 9, List I "Preventive Detention for reasons connected with defence, foreign affairs or the security of India" the matter is not Preventive Detention but the whole entry. Similarly, in Entry 3, List III "Preventive Detention for reasons connected with the security of the State, the maintenance of public order or the maintenance of supplies and services essential to the community" the matter is not Preventive Detention but the whole entry. It would be erroneous to say that Entry 9, List I and Entry 3, List III deal with the same matter. Similarly, it would, we think, be erroneous to treat Entry 82, List I (taxes on income other than agricultural income) as containing two matters, one, tax on income, and the other, as "other than agricultural income". It would serve no useful purpose to multiply illustrations.

21**.** It seems to us that the function of Article 246(1), read with Entries 1-96, List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly we do not interpret the words "any other matter" occurring in Entry 97, List I, to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words "any other matter" had to be used because Entry 97, List I follows Entries 1-96, List I. It is true that the field of legislation is demarcated by Entries 1-96, List I, but demarcation does not mean that if Entry 97, List I confers additional powers, we should refuse to give effect to it. At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms On its terms the only question to be asked is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.

22**.** It must be remembered that the function of the lists is not to confer powers; they merely demarcate the legislative field.

24**.** We are compelled to give full effect to Article 248 because we know of no principle of construction by which we can cut down the wide words of a substantive article like Article 248 by the wording of entry in Schedule VII. If the argument of the respondent is accepted Article 248 would have to be re-drafted as follows:

> Parliament has exclusive power to make any law with respect to any matter not mentioned in the Concurrent List or State List, provided it has not been mentioned by way of exclusion in any entry in List I.

We simply have not the power to add a proviso like this to Article 248.

25. We must also mention that no material has been placed before us to show that it was ever in the mind of anybody, who had to deal with the making of the Constitution, that it was the intention to prohibit all the Legislatures in this country from legislating on a particular topic.

31. Two points emerge from this. The Constituent Assembly knew how to prohibit Parliament from levying a tax (see proposed Article 198-A set out above). Secondly, they knew of certain taxes as taxes on the use or consumption of goods. The proposal to include them in the Provincial List was not accepted. Indeed, Shri T.T. Krishnamachari said this about this proposals:

> "Sir, one other recommendation of the Expert Committee is, I am afraid, rather mischievous. That is, they have suggested in regard to Sales Tax—which is Item 58 in List 2—that the definition should be enlarged so as to include Use Tax as well, going undoubtedly on the experience of the American State Use Tax which, I think, is a pernicious recommendation. I think, it finds a reflection in the mention of Sales Tax in Item 58 which ought not to be there."

32. If Parliament were to levy a Use Tax, it could hardly be thrown out on the ground that it cannot be included in the residuary powers because the tax was known at the time of the framing of the Constitution. Indeed it does not seem to be a sound principle of interpretation to adopt to first ascertain whether a tax was known to the framers of the Constitution and include it in the residuary powers only if it was not known. This would be an impossible test to apply. Is the Court to ask members of the Constituent Assembly to give evidence or is the Court to presume that they knew of all the possible taxes which were being levied throughout the world? In our view the only safe guide for the interpretation of an article or articles of an organic instrument like our Constitution is the language employed, interpreted not narrowly but fairly in the light of the broad and high purposes of the Constitution, but without doing violence to the language. To interpret Article 248 in the way suggested by the respondent would in our opinion be to do violence to the language.

33. We are, however, glad to find from the following extracts from the debates that our interpretation accords with what was intended.

34. Entry 91 in the draft Constitution corresponds to the present Entry 97, List I. Article 217 of the draft Constitution corresponds to Article 246 of the Constitution. Article 223 of the draft Constitution corresponds to Article 248 of the Constitution.

35. While dealing with Entry 91, List I of the draft Constitution, Sardar Hukam Singh moved the following amendments:

"That in Entry 91 of List I, the word 'other' be deleted."

36. Extracts from the debates on the proposed amendment are reproduced below:

Sardar Hukam Singh (***Constituent Assembly Debates***, Volume 9, page 854):

> "The object of this Entry 91 is, whatever is not included in Lists II and III must be deemed to have been included in this list, I feel that it would be said in very simple words, if the word 'other' were omitted, and then there would be no need for this list absolutely. Ultimately, it comes to this that whatever is not covered by Lists II and III is all embraced in the Union

List. This could be said in very simple words and we need not have taken all this trouble which we have taken."

37. Mr Naziruddin Ahmad (***Constituent Assembly Debates***, Volume 9, page 855):

"Mr President, Sir, I do not wish to oppose Entry 91. It is too late to do it, but I should submit that the moment we adopted Entry 91, it would involve serious redrafting of certain articles and entries. Under Article 217 we have stated in substance that entries in List I will belong to Union, List II to States and List III common to both. That was the original arrangement under which we started. We took the scheme from the Government of India Act. When an entry like 91 was considered at an earlier stage we agreed that the residuary power should be with the Centre. This was an innovation, as there was nothing like it in the Government of India Act. As soon as we accept Entry No. 91, Article 217 and a few other articles would require redrafting and Entries 1 to 90 would be redundant. In fact all the previous entries—from 1 to 90 would be rendered absolutely unnecessary. I fail to see the point now retaining Entries 1 to 90. If every subject which is not mentioned in Lists II and III is to go to the Centre what is the point in enumerating Entries 1 to 90 of List I? That would amount to absolutely needless, cumbersome detail. All complications would be avoided and matters simplified by redrafting Article 217 to say that all matters enumerated in List II must belong to the States, and all makers enumerated in List III are assigned to the Centre and the States concurrently and that every other conceivable subject must come within the purview of the Centre. There was nothing more simple or logical than that. Instead, a long elaborate List has been needlessly incorporated. This was because List I was prepared in advance and Entry No. 91 was inserted by way of afterthought. As soon as Entry 91 was accepted, the drafting should have been altered accordingly. Article 217 should have been re-written on the above lines and matters would have been simplified. May I suggest even at this late stage that these needless entries be scrapped and Article 217 be re written and things made simple? I had an amendment to that effect but I did not move it because I know that any reasons behind an amendment would not be deemed fit for consideration by the House."

38. Prof. Shibban Lal Saksena (***Constituent Assembly Debates***, Vol. 9 pages 855-56):

"Sir, today is a great day that we are passing this entry almost without discussion. This matter has been the subject of discussion in this country for several years for about two decades. Today it is being allowed to be passed without any discussion. The point of view of Mr Naziruddin Ahmad is not correct. In fact Dr Ambedkar has said that if there is anything left, it will be included in this Item 91. I, therefore, think that it is a very important entry. There should not be any deletion of Items 1 to 90. I know this entry will include everything that is already contained in the first 90 entries as well as whatever is left. This entry will strengthen the Centre and weld our nation into one single nation behind a strong Centre. Throughout the last decade the fight was that provincial autonomy should be so complete that the Centre should not be able to interfere with the provinces, but now the times are changed. We are now for a strong Centre. In fact some friends would like to do away with provincial autonomy and would like a unitary Government. This entry gives powers to the Centre to have legislation on any subject which has escaped the scrutiny of the House. I support this entry."

39-40. The Honourable Dr B.R. Ambedkar (***Constituent Assembly Debates***, Vol. 9, pages 856-857):

"My President, I propose to deal with the objection raised by my friend Sardar Hukam Singh. I do not think he has realised what is the purpose of Entry 91 and I should therefore like to

state very clearly what the purpose of Entry 91 in List I is. It is really to define a limit or scope of List I and I think we could have dealt with this matter, viz., of the definition of and scope of Lists II and III by adding an entry such as 67 which would read:

'Anything not included in List II or III shall be deemed to fall in List I.'

That is really the purpose of it. It could have been served in two different ways, either having an entry such as the one 91 included in List I or to have any entry such as the one which I have suggested ....'that anything not included in List II or III shall fall in List I'. That is the purpose of it. But such an entry is necessary and there can be no question about it. Now I come to the other objection which has been repeated if not openly at least whispered as to why we are having these 91 entries in List I when as a matter of fact we have an article such as 223 which is called residuary article which is 'Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List'. Theoretically I quite accept the proposition that when anything which is not included in List II or List III is by a specific article of the Constitution handed over to the Centre, it is unnecessary to enumerate these categories which we have specified in List I. The reason why this is done is this. Many States people, and particularly the Indian States at the beginning of the labours of the Constituent Assembly, were very particular to know what are the legislative powers of the Centre. They wanted to know categorically and particularly; they were not going to be satisfied by saying that the Centre will have only residuary powers. Just to allay the fears of the Provinces and the fears of the Indian States, we had to particularise what is included in the symbolic phrase 'residuary powers'. That is the reason why we had to undergo this labour notwithstanding the fact that we had Article 223.

I may also say that there is nothing very ridiculous about this, so far as our Constitution is concerned, for the simple reason that it has been the practice of all federal constitutions to enumerate the powers of the Centre, even those federations which have got residuary powers given to the Centre. Take for instance the Canadian Constitution. Like the Indian Constitution, the Canadian Constitution also gives what are called residuary powers to the Canadian Parliament. Certain specified and enumerated powers are given to the Provinces. Notwithstanding this fact, the Canadian Constitution, I think in Article 99, proceeds to enumerate certain categories and certain entries on which the Parliament of Canada can legislate. That again was done in order to allay the fears of the French Provinces which were going to be part and parcel of the Canadian Federation. Similarly also in the Government of India Act, the same scheme has been laid down there and Section 104 of the Government of India Act, 1935, is similar to Article 223 here. It also lays down the proposition that the Central Government will have residuary powers. Notwithstanding that, it had its List I. Therefore, there is no reason, no ground to be over critical about this matter. In doing this we have only followed as I said, the requirements of the various Provinces to know specifically what these residuary powers are, and also we have followed well-known conventions which have been followed in any other federal constitutions. I hope the House will not accept either the amendment of my friend Sardar Hukam Singh nor take very seriously the utterings of my friend Mr Naziruddin Ahmad."

41. It seems to us that this discussion clearly shows that it was realised that the old Entry 91 would cover every matter which is not included in Lists II and III, and that entries were enumerated in List I following the precedent of the Canadian Constitution and also to inform the provinces and particularly the Indian States as to the legislative powers the Union was going to have.

42. The same conclusion is also arrived at if we look at some of the speeches made when the third reading of the Constitution was taken up. Extracts from those speeches are reproduced below.

43. Shri Alladi Krishnaswami Ayyar (***Constituent Assembly Debates***, Vol. 11, p. 838):

> " In regard to the distribution and allocation of legislative power, this Assembly has taken into account the political and economic conditions obtaining in the country at present and has not proceeded on any a priori theories as to the principles of distribution in the Constitution of a Federal Government. In regard to distribution, the Centre is invested with residuary power, specific subjects of national and all India importance being expressly mentioned."

44. Shri T.T. Krishnamacharl (***Constituent Assembly Debates***, Vol. 11, pp. 952-954):

> "I would in this connection deal with a point raised regarding the vesting of the residuary powers. I think more than one honourable member mentioned that the fact that the residuary power is vested in the Centre in our Constitution, makes it a unitary Constitution. It was, I think, further emphasised by my honourable friend Mr Gupta in the course of his speech. He said: 'The test is there. The residuary power is vested in the Centre'. I am taking my friend Mr Gupta quite seriously, because he appears to be a careful student who has called out this particular point from some text book on federalism. I would like to tell honourable members that it is not a very important matter in assessing whether a particular Constitution is based on a federal system from the point of view whether the residuary power is vested in the States or in the Central Government. Mr K.C. Wheare who has written recently a book on Federalism has dealt with this point.
>
> Now if you ask me why we have really kept the residuary power with the Centre and whether it means anything at all, I will say that it is because we have gone to such absolute length to enumerate the powers of the Centre and of the States and also the powers that are to be exercised by both of them in the concurrent field. In fact, to quote Professor Wheare again, who has made a superficial survey of the Government of India Act, the best point in the Government of India Act is the complete and exhaustive enumeration of powers of Schedule VII. *To my mind there seems to be the possibility of only one power that has not been enumerated, which might be exercised in the future by means of the use of the residuary power, namely the capital levy on agricultural land. This power has not been assigned either to the Centre or to the Units. It may be that that/allowing the scheme of Estate Duty and succession duty on urban and agricultural property, even if the Centre has to take over this power under the residuary power after some time. It would assign the proceeds of this levy to the provinces, because all things that are supposed to be associated with agriculture are assigned to the provinces. I* think the vesting of the residuary power is only a matter of a academic significance today. To say that because residuary power is vested in the Centre and not in the provinces this is not a Federation would not be correct."

45. The above speech of Mr T.T. Krishnamachari shows that the members were aware that certain known taxes had not been included specifically in the three lists.

46. It is, therefore, difficult to escape from the conclusion that in India there is no field of legislation which has not been allotted either to Parliament or to the State Legislatures.

47. The last sentence applies much more to the Constitution of a sovereign democratic republic. It is true that there are some limitations in Part III of the Constitution on the Legislatures in India but they are of a different character. They have nothing to do with legislative competence. If this is the true scope of residuary powers of Parliament, then we are

unable to see why we should not, when dealing with a Central Act, enquire whether it is legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament. If a Central Act does not enter or invade these prohibited fields there is no point in trying to decide as to under which entry or entries of List I or List III a Central Act would rightly fit in.

48**.** It was accepted that this test had been applied in Canada, but it was argued that the Canadian Constitution is completely different from the Indian Constitution. It is true that the wording of Sections 91 and 92 of the Canadian Constitution is different and the Judicial Committee has interpreted these sections differently at different periods, but whatever the interpretation, it has always held that the lists are exhaustive. The scheme of distribution of legislative powers between the Dominion and the Provinces is essentially the same as under our Constitution. In this matter it is best to quote the words of the Judicial Committee or some learned authors rather than interpret Sections 91 and 92 ourselves.

66. Be that as it may, we are unable to see how the adoption of this mode of enquiry will destroy the federal structure of our Constitution. The State Legislatures have full legislative authority to pass laws in respect of entries in List II, and subject to legislation by Parliament on matters in List III.

67. It was also said that if this was the intention of the Constitution-makers they need not have formulated List I at all. This is the point which was taken by Sardar Hukam Singh and other in the debates referred to above and was answered by Dr Ambedkar. But apart from what has been stated by Dr Ambedkar in his speech extracted above there is some merits and legal affect in having included specific items in List I for when there are three lists it is easier to construe List II in the light of Lists I and II. If there had been no List I, many items in List II would perhaps have been given much wider interpretation than can be given under the present scheme. Be that as it may, we have the three lists and a residuary power and therefore it seems to us that in this context if a Central Act is challenged as being beyond the legislative competence of Parliament, it is enough to enquire if it is a law with respect to matters or taxes enumerated in List II. If it is not, no further question arises.

68. In view of this conclusion, we now come to the question, i.e. whether the impugned Act is a law with respect to Entry 49, List II, or whether it imposes a tax mentioned in Entry 49 in List II? On this matter we have three decisions of this Court and although these decisions were challenged we are of the opinion that they interpreted Entry 49, List II correctly.

69. In ***Sudhir Chand Nawa* v. *Wealth Tax Officer*** [AIR 1969 SC 59] this Court was concerned with the validity of the Wealth Tax Act, 1957, as it originally stood. This Court proceeded on the assumption that the Wealth Tax Act was enacted in exercise of the powers under Entry 86, List I. It was argued before this Court that since the expression 'net wealth' includes non-agricultural lands and buildings of an assessee, and power to levy tax on lands and buildings is reserved to the State Legislatures by Entry 49, List II of the Seventh Schedule, Parliament is incompetent to legislate for the levy of wealth-tax on the capital value of assets which include non-agricultural lands and buildings.

70. In rejecting this argument the Court observed:

> "The tax which is imposed by Entry 86, List I of the Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the assessee; it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of assets, but the general liability of the assessee to pay his debts and to discharge his lawful obligations, have to be taken into account....Again Entry 49 List II of the Seventh Schedule contemplates the levy of tax on lands and buildings, or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of powers under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not, in our Judgment, make the fields of legislation under the two entries overlapping."

71. It was urged on behalf of the respondent that in ***Assistant Commissioner of Urban Land Tax*** **v.** ***The Buckingham and Carnatic Co. Ltd.*** [(1970)1 SCR 268], this Court held that a tax on the capital value of lands and buildings could be imposed under Entry 49, List II, but it seems to us that this is not a correct readings of that decision. Reliance is placed on the following sentence at page 277:

> We see no reason, therefore, for holding that the Entries 86 and 87 of List I preclude the State Legislature from taxing capital value of lands and buildings under Entry 49 of List II.

72. The above observations have to be understood in the context of what was stated later. Ramaswami, J., later observed in that Judgment as follows:

> "The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals, and companies on the valuation date. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account..... But Entry 49 of List II, contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings, is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of powers under Entry 86, List I, tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II, the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the fields of legislation under the two

entries overlapping. The *two taxes are entirely different in their basic concept and fell on different* subject-matters."(Emphasis supplied).

74. The requisites of a tax under Entry 49, List II, may be summarised thus:

(1) It must be a tax on units, that is lands and buildings separately as units.

(2) The tax cannot be a tax on totality, i. e., it is not a composite tax on the value of all lands and buildings.

(3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns **or** occupies it or two or more persons own or occupy it.

75. In short, the tax under Entry 49, List II, is not a personal tax but a tax on property.

76. It seems to us that this Court definitely held and we agree with the conclusion that the nature of the wealth tax imposed under the Wealth Tax Act, as originally stood, was different from that of a tax under Entry 49, List II, and it did not fall under this entry.

82. In our view the High Court was right in holding that the impugned Act was not a law with respect to Entry 49, List II, or did not impose a tax mentioned in Entry 49, List II. If that is so, then the legislation is valid either under Entry 86, List I, read with Entry 97, List I or Entry 97, List I standing by itself.

83. Although we have held that the impugned Act does not impose a tax mentioned in Entry 49, List II, we would like to caution that in case the real effect of a Central Act, whether called a Wealth Tax Act or not, is to impose a tax mentioned in Entry 49, List I, the tax may be bad as encroaching upon the domain of State Legislatures.

86. Although it is not necessary to decide the question whether the impugned Act falls within Entry 86, List I, read with Entry 97, List I, or Entry 97, List I alone, as some of our breathren are of the view that the original Wealth Tax Act fell under Entry 86, List I, we might express our opinion on that point. It seems to us that there is a distinction between a true net wealth tax and a tax which can be levied under Entry 86, List I. While legislating in respect of Entry 86, List I, it is not incumbent on Parliament to provide for deduction of debits in ascertaining the capital value of assets. Similarly, it is not incumbent on State Legislatures to provide for deduction of debits while legislating in respect of Entry 49, List II. For example the State Legislature need not, while levying tax under Entry 49, List II, provide for deduction of debits owed by the owner of the property. It seems to us that the other part of entry, i. e. "tax on the capital of companies". In Entry 86, List I, also seems to indicate that this entry is not strictly concerned with taxation of net wealth because capital of a company is in one sense a liability of the company and not its asset. Even if it is regarded as an asset, there is nothing in the entry to compel Parliament to provide for deduction of debits. It would also be noticed that Entry 86, List I, deals only with individuals and companies but net wealth tax can be levied not only on individuals but on other entities and associations also. It is true that under Entry 86, List I, aggregation is necessary because it is a tax on the capital value of assets of an individual but it does not follow from this that Parliament is obliged to provide for deduction of debits in order to determine the capital value of assets of an individual or a company. Therefore, it seems to us that the whole of the impugned Act clearly falls within Entry 97, List I. We may mention that this Court has never held that the original Wealth Tax Act fell

under Entry 86, List I. It was only assumed that the original Wealth Tax Act fell within Entry 86, List I, and on that assumption this entry was analysed and contrasted with Entry 49, List II. Be that as it may, we are clearly of the opinion that no part of the impugned legislation falls within Entry 86, List I.

87. However, assuming that the Wealth Tax Act, as originally enacted, is held to be legislation under Entry 86, List I, there is nothing in the Constitution to prevent Parliament from combining its powers under Entry 86, List I with its powers under Entry 97, List I. There is no principle that we know of which debars Parliament from relying on the powers under specified Entries 1 to 96, List I and supplement them with the powers under Entry 97, List I and Article 248, and for that matter powers under entries in the Concurrent List.

90. It was contended that the case of residuary powers was different but we are unable to see any difference in principle. Residuary power is as much power as the power conferred under Article 246 of the Constitution in respect of a specified item.

91. *In* ***In re: The Regulation and Control of Aeronautics in Canada*** [1932 AC 54, 77], the Privy Council upheld the validity of a Parliamentary statute after supplementing the powers under the specified items in Section 91 with the residuary powers. It observed:

> "To sum up, having regard (*a*) to the terms of Section 132; (b) to the terms of the convention which covers almost every conceivable matter relating to aerial navigation; and (*c*) to the fact that further legislative powers in relation to aerial navigation reside in the Parliament of Canada by virtue of Section 91, Items 2, 5, and 7, it would appear that substantially the whole field of legislation in regard to aerial navigation belongs to the Dominion. There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by a specific words in the Provinces. *As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good Government of Canada.* Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under Section 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion." (emphasis supplied).

92. In conclusion we hold that the impugned Act is valid. The appeal is accordingly allowed and the Judgment and order of the High Court set aside and Civil Writ No. 2291 of 1970 in the High Court dismissed. There will be no order as to costs, either here or in the High Court.

* * * * *

Zaverbhai Amaidas v. *State of Bombay*

AIR 1954 SC 752

[M.C.Mahajan, C.J. and B.J. Mukherjea, V.Bose, B. Jagannadhadas and T.L. Venkatarama Ayyar, JJ.]

T.L. VENKATARAMA AYYAR, J. - This is an appeal against the judgment of the High Court of Bombay dismissing a revision petition filed by the appellant against his conviction under Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946.

2. The charge against the appellant was that on 6th April, 1951, he had transported 15 maunds of juwar from his village of Khanjroli to Mandvi without a permit, and had thereby contravened Section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949. The Resident First Class Magistrate of Bardoli who tried the case, found him guilty, and sentenced him to imprisonment till the rising of the Court and a fine of Rs 500. The conviction and sentence were both affirmed by the Sessions Judge, Surat, on appeal. The appellant thereafter took up the matter in revision to the High Court of Bombay, and there for the first time, took the objection that the Resident First Class Magistrate had no jurisdiction to try the case, because under Section 2 of the Bombay Act 36 of 1947 the offence was punishable with imprisonment, which might extend to seven years, and under the Second Schedule to the Criminal Procedure Code, it was only the Sessions Court that had jurisdiction to try such offence. The answer of the State to this contention was that subsequent to the enactment of the Bombay Act 36 of 1947, the Essential Supplies (Temporary Powers) Act had undergone substantial alterations, and was finally recast by the Central Act 52 of 1950; that the effect of these amendments was that Act 36 of 1947 had become inoperative, that the governing Act was Act 52 of 1950, and that as under that Act the maximum sentence for the offence in question was three years, the Resident First Class Magistrate had jurisdiction over the offence.

3. The revision petition was heard by a Bench consisting of Bavdekar and Chainani, JJ. Bavdekar, J. was of the opinion that the amendments to the Essential Supplies (Temporary Powers) Act including the re-enactment of Section 7 in Act 52 of 1950 did not trench on the field covered by the Bombay Act 36 of 1947, which accordingly remained unaffected by them. Chainani, J., on the other hand, held that both Act 36 of 1947 and Act 52 of 1950 related to the same subject-matter, and that as Act 52 of 1950 was a Central legislation of a later date, it prevailed over the Bombay Act 36 of 1947. On this difference of opinion, the matter came up under Section 429, Criminal Procedure Code for hearing before Chagla, C.J., who agreed with Chainani, J. that there was repugnancy between Section 7 of Act 52 of 1950 and Section 2 of the Bombay Act 36 of 1947, and that under Article 254(2), the former prevailed; and the revision petition was accordingly dismissed. Against this judgment, the present appeal has been preferred on a certificate under Article 132(1), and the point for determination is whether contravention of Section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949 is punishable under Section 2 of the Bombay Act 36 of 1947, in which case the trial by the Resident First Class Magistrate would be without jurisdiction; or whether it is punishable under Section 7 of the Essential Supplies

(Temporary Powers) Act, as amended by Act 52 of 1950, in which case, the trial and conviction of the appellant by that Magistrate would be perfectly legal.

4. It is now necessary to refer in chronological sequence to the statutes bearing on the question. We start with the Essential Supplies (Temporary Powers) Act 24 of 1946 enacted by the Central Legislature by virtue of the powers conferred on it by 9 and 10, George VI, Chapter 39. It applied to the whole of British India. Section 3 of the Act conferred power on the Central Government to issue orders for regulating the production, supply and distribution of essential commodities, and under Section 4, this power could be delegated to the Provincial Government. Section 7(1) provided for punishment for contravention of orders issued under the Act, and ran as follows:

> "If any person contravenes any order made under Section 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty;
>
> Provided that where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall make such direction, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole or as the case may be, a part of the property."

The State of Bombay considered that the maximum punishment of three years' imprisonment provided in the above section was not adequate for offences under the Act, and with the object of enhancing the punishment provided therein, enacted Act 36 of 1947. Section 2 of the said Act provided (omitting what is not material for the present purpose) that "Notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act, 1946, whoever contravenes an order made or deemed to be made under Section 3 of the said Act, shall be punished with imprisonment which may extend to seven years, but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine." This section is avowedly repugnant to Section 7(1) of the Essential Supplies (Temporary Powers) Act. Section 107(2) of the Government of India Act, which was the Constitution Act then in force, enacted that,

> "Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General has received the assent of the Governor-General, the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

On the footing that the subject-matter of Act 36 of 1947 fell within the Concurrent List, the Bombay Government obtained the assent of the Governor-General therefor, and thereafter, it came into force on 25th November, 1947. The position therefore was that by reason of Section 107(2) of the Government of India Act, Act 36 of 1947 prevailed in Bombay over Section 7 of the Essential Supplies (Temporary Powers) Act; but at the same

time, it was subject under that section to all and any "further legislation with respect to the same matter", that might be enacted by the Central Legislature.

5. The contention of the State is that there was such further legislation by the Central Legislature in 1948, in 1949 and again in 1950, and that as a result of such legislation, Section 2 of the Bombay Act 36 of 1947 had become inoperative. In 1948 there was an amendment of the Essential Supplies (Temporary Powers) Act, whereby the proviso to Section 7(1) was repealed and a new proviso substituted, which provided inter alia that,

> "Where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall direct that any property in respect of which the order has been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in writing it is of opinion that the direction should be made not in respect of the whole, or as the case may be, a part of the property."

The Essential Supplies (Temporary Powers) Act was again amended in 1949. Under this amendment, the proviso to Section 7(*i*) was repealed, and a new clause substituted in the following terms:

> "(*b*) Where the contravention is of an order relating to foodstuffs, the Court shall
>
> (*i*) sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may, in addition, impose a sentence of fine, unless for reasons to be recorded, it is of opinion that a sentence of fine only will meet the ends of justice; And
>
> (*ii*) direct that any property in respect of which the order has been contravened or a part thereof shall be forfeited to His Majesty, unless for reasons to be recorded it is of opinion that such direction is not necessary to be made in respect of the whole, or, as the case may be, a part of the property."

Then came Central Act 52 of 1950, under which the old Section 7 was repealed and a new section enacted in the following terms:

> "(1) If any person contravenes any order under Section 3 relating to cotton textiles he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine; and any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government.
>
> (2)If any person contravenes any order under Section 3 relating to foodstuffs,—
>
> (*a*) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice; and
>
> (*b*) any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government, unless for reasons to be recorded the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property:
>
> Provided that where the contravention is of an order prescribing the maximum quantity of any foodgrain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrains exceeding twice the maximum quantity so prescribed, the Court shall—

(*a*)sentence him to imprisonment for a term which may extend to seven years and to a fine not less than twenty times the value of the foodgrain found in his possession, and

(*b*)direct that the whole of such foodgrain in excess of the prescribed quantity shall be forfeited to the Government.

Explanation.— A person in possession of foodgrain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this sub-section.

(3) If any person contravenes any order under Section 3 relating to any essential commodity other than cotton textiles and food-stuffs, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both, and if the order so provides, any property in respect of which the Court is satisfied that the order has been contravened may be forfeited to the Government.

(4) If any person to whom a direction is given under sub- section (4) of Section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

6. It must be mentioned that while the amendments of 1948 and 1949 were made when Section 107(2) of the Government of India Act was in force, the Constitution of India Act had come into operation, when Act 52 of 1950 was enacted. Article 254(2) of the Constitution is as follows:

"Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

7. This is, in substance, a reproduction of Section 107(2) of the Government of India Act, the concluding portion thereof being incorporated in a proviso with further additions. Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under Section 107(2) of the Government of India Act, it was observed by Lord Waston in ***Attorney-General for Ontario* v. *Attorney-General for the Dominion*** [(1896) AC 348] that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute. That would appear to have been the position under Section 107(2) of the Government of India Act with reference to the subjects mentioned in the Concurrent List. Now, by the proviso to Article 254(2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under Section 107(2) of the Government of India Act, and enact a law adding to, amending, varying or repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can, acting under the proviso to Article 254(2), repeal a State law. But where it

does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later "law with respect to the same matter" that may be enacted by Parliament.

8. In the present case, there was no express repeal of the Bombay Act by Act 52 of 1950 in terms of the proviso to Article 254(2). Then the only question to be decided is whether the amendments made to the Essential Supplies (Temporary Powers) Act by the Central Legislature in 1948, 1949 and 1950 are "furthers legislation" falling within Section 107(2) of the Government of India Act or "law with respect to the same matter" falling within Article 254(2). The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter". If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then Article 254(2) will have no application. The principle embodied in Section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

9. Considering the matter from this standpoint, the first question to be asked is, what is the subject-matter of the Bombay Act 36 of 1947? The preamble recites that it was "to provide for the enhancement of penalties for contravention of orders made under the Essential Supplies (Temporary Powers) Act, 1946". Then the next question is, what is the scope of the subsequent legislation in 1948, 1949 and 1950? As the offence for which the appellant has been convicted was committed on 6th April, 1951, it would be sufficient for the purpose of the present appeal to consider the effect of Act 52 of 1950, which was in force on that date. By that Act, Section 7(1) of the Essential Supplies (Temporary Powers) Act as passed in 1946 and as amended in 1948 and 1949 was repealed, and in its place, a new section was substituted. The scheme of that section is that for purposes of punishment, offences under the Act are grouped under three categories - those relating to cotton textiles, those relating to foodstuffs, and those relating to essential commodities other than textiles or foodstuffs. The punishments to be imposed in the several categories are separately specified. With reference to foodstuffs, the punishment that could be awarded when the offence consists in possession of foodgrains exceeding twice the maximum prescribed, is imprisonment for a term which may extend to seven years, with further provisions for fine and forfeiture of the commodities. In other cases, there is the lesser punishment of imprisonment, which may extend to three years. Section 7 is thus a comprehensive code covering the entire field of punishment for offences under the Act, graded according to the commodities and to the character of the offence. The subject of enhanced punishment that is dealt with in Act 36 of 1947 is also comprised in Act 52 of 1950, the same being limited to the case of hoarding of foodgrains. We are, therefore, entirely in agreement with the opinion of Chagla, C.J. and Chainani, J. that Act 52 of 1950 is a legislation in respect of the same matter as Act 36 of 1947.

10. Bavdekar, J. who came to the contrary conclusion observed, and quite correctly, that to establish repugnancy under Section 107(2) of the Government of India Act, it was not necessary that one legislation should say "do" what the other legislation says "don't", and that repugnancy might result when both the legislations covered the same field. But he took the view that the question of enhanced penalty under Act 36 of 1947 was a matter different from

that of punishment under the Essential Supplies (Temporary Powers) Act, and as there was legislation in respect of enhanced penalty only when the offence was possession of foodstuffs in excess of twice the prescribed quantity, the subject-matter of Act 36 of 1947 remained untouched by Act 52 of 1950 in respect of other matters. In other words, he considered that the question of enhanced punishment under Act 36 of 1947 was a matter different from that of mere punishment under the Essential Supplies (Temporary Powers) Act and its amendments; and in this, with respect, he fell into an error. The question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under Act 36 of 1947 and under Act 52 of 1950 constitutes a single subject-matter and cannot be split up in the manner suggested by the learned Judge. On this principle rests the rule of construction relating to statutes that "when the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one". (Maxwell on Interpretation of Statutes, 10th Edition, pages 187 and 188). "It is a well settled rule of construction", observed Goddard, J. in ***Smith* v. *Benabo*** [(1937) 1 KB 518] "that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute: see ***Michell* v. *Brown*** [1 El & El 267, 274] per Lord Campbell".

11. It is true, as already pointed out, that on a question under Article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. We must accordingly hold that Section 2 of Bombay Act 36 of 1947 cannot prevail as against Section 7 of the Essential Supplies (Temporary Powers) Act 24 of 1946 as amended by Act 52 of 1950.

12. The appellant also sought to argue that the subject-matter of the legislation in Act 36 of 1947 was exclusively in the Provincial List, and that Section 107(2) of the Government of India Act and Article 254(2) of the Constitution which apply only with reference to legislation on subjects which are in the Concurrent List, have no application. The very legislation on which the appellant relies viz. Act 36 of 1947, proceeds, as already stated, on the basis that the subject-matter is in the Concurrent List. The appellant raised this question before the learned Judges of the Bombay High Court, and they rejected it. In the application for, leave to appeal to this Court which was presented under Article 132(1), the only ground that was put forward as involving a substantial question as to the interpretation of the Constitution was, whether the Bombay Act 36 of 1947 was repugnant and void under Article 254 of the Constitution. No other question having been raised in the petition, we must decline to permit the appellant to raise this point.

13. In the result, the appeal fails and is dismissed.

* * * * *

Hoechst Pharmaceuticals Ltd. v. *State of Bihar*

(1983) 4 SCC 45;

[A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ.]

[*Doctrine of Repugnancy – Article 254*]

The Bihar Finance Act, 1981, ('Act' for short) under Section 5 provided for the imposition of a surcharge at 10 per cent of the total amount of the tax payable by a dealer whose gross turnover during a year exceeded Rs. 5 lakhs, in addition to the tax payable by him.

The facts in Civil Appeal No. 2567 / 1982 as gathered from the judgment are as follows.

Messrs Hoechst Pharmaceuticals Limited and Messrs Glaxo Laboratories (India) Limited are companies incorporated under the Companies Act, 1956 engaged in the manufacture and sale of various medicines and life-saving drugs throughout India including the State of Bihar. They have their branch or sales depot at Patna registered as a dealer under Section 14 of the Act and effect sales of their products through wholesale distributors or stockists appointed in Bihar who, in their turn, sell them to retailers through whom the medicines and drugs reach the consumers. Almost 94 per cent of the medicines and drugs sold by them are at the controlled price exclusive of local taxes under the *Drugs (Prices Control) Order, 1979 issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act* and they are expressly prohibited from selling these medicines and drugs in excess of the controlled price so fixed by the Central Government from time to time which allows the manufacturer or producer to pass on the tax liability to the consumer. The appellants have their printed price-lists of their medicines and drugs showing the price at which they sell to the retailers as also the retail price, both inclusive of excise duty. One of the terms of their contract is that sales tax and local taxes will be charged wherever applicable.

The appellants produced in the Court the orders of assessment together with notices of demand, for the assessment years 1980-81 and 1981-82. These figures showed the magnitude of the business carried on by these appellants in the State of Bihar alone and their capacity to bear the additional burden of surcharge levied under sub-section (1) of Section 5 of the Bihar Finance Act, 1981.

The High Court referred to the decision in ***S. Kodar*** v. ***State of Kerala*** [AIR 1974 SC 2272] where this court upheld the constitutional validity of sub-section (2) of Section 2 of the Tamil Nadu Additional Sales Tax Act, 1970 which is in pari materia with sub-section (3) of Section 5 of the Act and which interdicts that no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable by him. It held that the surcharge levied under sub-section (1) of Section 5 is in reality an additional tax on the aggregate of sales effected by a dealer during a year and that it was not necessary that the dealer should be enabled to pass on the incidence of tax on sale to the purchaser in order that it might be a tax on the sale of goods. Merely because the dealer is prevented by sub-section (3) of Section 5 of the Act from collecting the surcharge, it does not cease to be a surcharge on sales tax. Relying on ***Kodar*** case, the Court held that:

- the charge under sub-section (1) of Section 5 of the Act falls at a uniform rate of 10 percent of the tax on all dealers falling within the class specified therein i.e. whose gross turnover during a year exceeds Rs. 5 lakhs, and is therefore not discriminatory and violative of Article 14 of the Constitution,

- nor is it possible to say that because a dealer is disabled from passing on the incidence of surcharge to the purchaser, sub-section (3) of Section 5 imposes an unreasonable restriction on the fundamental right guaranteed under Article 19(1) (*g*).

As regards the manufacturers and producers of medicines and drugs, the High Court held

- that there was no irreconcilable conflict between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order, 1979 and both the laws are capable of being obeyed.

In spite of the decision of the Supreme Court in ***Kodar*** case, the appellants challenged the constitutional validity of sub-section (3) of Section 5 of the Act on the ground that the court in that case did not consider the effect of price fixation of essential commodities by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which, by reason of Section 6 of that Act, has an overriding effect notwithstanding any other law inconsistent therewith.

A. P. SEN, J. - 3. The principal contention advanced by the appellants in these appeals is that the field of price fixation of essential commodities in general, and drugs and formulations in particular, is an occupied field by virtue of various control orders issued by the Central Government from time to time under sub-section (1) of Section 3 of the Essential Commodities Act, 1955 which allows the manufacturer or producer of goods to pass on the tax liability to the consumer and therefore the State legislature of Bihar had no legislative competence to enact sub-section (3) of Section 5 of the Act which interdicts that no dealer liable to pay a surcharge, in addition to the tax payable by him, shall be entitled to collect the amount of surcharge, and thereby trenches upon a field occupied by a law made by Parliament. Alternatively, the submission is that if sub-section (3) of Section 5 of the Act were to cover all sales including sales of essential commodities whose prices are fixed by the Central Government by various control orders issued under the Essential Commodities Act, then there will be repugnancy between the State law and the various control orders which according to Section 6 of the Essential Commodities Act must prevail. There is also a subsidiary contention put forward on behalf of the appellants that sub-section (1) of Section 5 of the Act is ultra vires the State legislature inasmuch as the liability to pay surcharge is on a dealer whose gross turnover during a year exceeds Rs. 5 lakhs or more i.e. inclusive of transactions relating to sale or purchase of goods which have taken place in the course of inter-State trade or commerce or outside the State or in the course of import into, or export of goods outside the territory of India. The submission is that such transactions are covered by Article 286 of the Constitution and therefore are outside the purview of the Act and thus they cannot be taken into consideration for computation of the gross turnover as defined in Section *2*(*j*) of the Act for the purpose of bearing the incidence of surcharge under sub-section (1) of Section 5 of the Act.

10. In ***Kodar*** case [***S. Kodar*** **v.** ***State of Kerala,*** AIR 1974 SC 2272], this court upheld the constitutional validity of the Tamil Nadu Additional Sales Tax Act, 1970 which imposes additional sales tax at 5 per cent on a dealer whose annual gross turnover exceeds Rs. 10 lakhs. The charging provision in subsection (1) of Section 2 of that Act is in terms similar to sub-section (1) of Section 5 of the Act, and provides that the tax payable by a dealer whose turnover for a year exceeds Rs. 10 lakhs shall be increased by an additional tax at the rate of 5

per cent of the tax payable by him. Sub-section (2) of that Act is in pari materia with sub-section (3) of Section 5 of the Act and provides that no dealer referred to in sub-section (1) shall be entitled to collect the additional tax payable by him. The court laid down that:

> (1) The additional tax levied under sub-section (1) of Section 2 of that Act was in reality a tax on the aggregate of sales effected by a dealer during a year and therefore the additional tax was really a tax on the sale of goods and not a tax on the income of a dealer and therefore falls within the scope of Entry 54 of List II of the Seventh Schedule.
>
> (2) Generally speaking, the amount or rate of tax is a matter exclusively within the legislative judgment and so long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness cannot be questioned by the court. The imposition of additional tax on a dealer whose annual turnover exceeds Rs. 10 lakhs is not an unreasonable restriction on the fundamental rights guaranteed under Article 19(1) (*g*) or (*f*) as the tax is upon the sale of goods and was not shown to be confiscatory.
>
> (3) It is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for seller to collect the tax from the purchasers. Merely because sub-section (2) of Section 2 of that Act prevented a dealer from passing on the incidence of additional tax to the purchaser, it cannot be said that the Act imposes an unreasonable restriction upon the fundamental rights under Article 19(l)(*g*) or (*f*). The Act was not violative of Article 14 of the Constitution as classification of dealers on the basis of their turnover for the purpose of levy of additional tax was based on the capacity of dealers who occupy a position of economic superiority by reason of their greater volume of business i.e. on capacity to pay and such classification for purposes of the levy was not unreasonable.

12. Sub-section (1) of Section 5 of the Act provides for the levy of surcharge on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs and the material provisions of which are in the following terms:

> **5. Surcharge.** (1) Every dealer whose grosss turn over during a year exceeds rupees five lakhs shall, in addition to the tax payable by him under this Part, also pay a surcharge at such rate not exceeding 10 per cent of the total amount of the tax payable by him, as may be fixed by the State Government by a notification published in the Official Gazette….

Sub-section (3) of section 5 of the Act, the constitutional validity of which is challenged provides:

> Notwithstanding anything to the contrary contained in this Part, no dealer mentioned in sub-section (1), who is liable to pay surcharge, shall be entitled to collect the amount of this surcharge.

13. It is fairly conceded that not only sub-section (1) of Section 5 of the Act which provides for the levy of surcharge on dealers whose gross turnover during a year exceeds Rs. 5 lakhs, but also sub-section (3) of Section 5 of the Act which enjoins that no dealer who is liable to pay a surcharge under sub-section (1) shall be entitled to collect the amount of surcharge payable by him, are both relatable to Entry 54 of List II of the Seventh Schedule which reads:

> 54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I.

14. There can be no doubt that the Central and the State legislations operate in two different and distinct fields. The Essential Commodities Act provides for the regulation, production, supply, distribution and pricing of essential commodities and is relatable to Entry 33 of List III of the Seventh Schedule which reads:

> 33. Trade and commerce in, and the production, supply and distribution of,—
>
> (*a*) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

17. We are here concerned with the impact of sub-section (3) of Section 5 of the Act on the price structure of formulations, but nonetheless much stress was laid on fixation of price of bulk drugs under Paragraph 3(2) which allows a reasonable return to the manufacturer under sub-paragraph (3) thereof. A manufacturer or producer of such bulk drugs is entitled to sell it at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

22. […] The amount credited to the Drugs Prices Equalisation Account is meant to compensate a manufacturer, importer or distributor the shortfall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, or securing the equitable distribution and availability at fair prices, of drugs after meeting the expenses incurred by the Government in connection therewith. Every manufacturer, importer or distributor is entitled to make a claim for being compensated for the shortfall.

25. Much emphasis was laid on fixation of price of bulk drugs under Paragraph 3 which provides by sub-paragraph (1) that the Government may, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price and subject to the provisions of sub-paragraph (2) and after making such enquiry as it deems fit, fix from time to time, by notification in the official Gazette, the maximum price at which such bulk drug shall be sold. Sub-paragraph (2) enjoins that while fixing the price of a bulk drug under sub-paragraph (1), the Government may take into account the average cost of production of each bulk drug manufactured by efficient manufacturer and allow a reasonable return on net worth. Explanation thereto defines the expression "efficient manufacturer" to mean a manufacturer (i) whose production of such bulk drug in relation to the total production of such bulk drug in the country is large, or (ii) who employs efficient technology in the production of such bulk drug. Sub-paragraph (3) provides that no person shall sell a bulk drug at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

28. It cannot be doubted that a surcharge partakes of the nature of sales tax and therefore it was within the competence of the State legislature to enact sub-section (1) of Section 5 of the Act for the purpose of levying surcharge on certain class of dealers in addition to the tax payable by them. When the State legislature had competence to levy tax on sale or purchase of goods under Entry 54, it was equally competent to select the class of dealers on whom the charge will fall. If that be so, the State legislature could undoubtedly have enacted sub-section (3) of Section 5 of the Act prohibiting the dealers liable to pay a surcharge under sub-section

(1) thereof from recovering the same from the purchaser. It is fairly conceded that sub-section (3) of Section 5 of the Act is also relatable to Entry 54. The contention however is that there is conflict between Paragraph 21 of the Control Order which allows a manufacturer or producer of drugs to pass on the liability to pay sales tax and sub-section (3) of Section 5 of the Act which prohibits such manufacturers or producers from recovering the surcharge and therefore it is constitutionally void. It is said that the courts should try to adopt the rule of harmonious construction and give effect to Paragraph 21 of the Control Order as the impact of sub-section (3) of Section 5 of the Act is on fixation of price of drugs under the Drugs (Prices Control) Order and therefore by reason of Section 6 of the Essential Commodities Act, Paragraph 21 of the Control Order which provides for the passing on of tax liability must prevail. The submission rests on a construction of Article 246(3) of the Constitution and it is said that the power of the State legislature to enact a law with respect to any subject in List II is subject to the power of Parliament to legislate with respect to matters enumerated in Lists I and III.

29. It is convenient at this stage to deal with the contention of the appellants that if sub-section (3) of Section 5 of the Act were to cover all sales including sales of essential commodities whose prices are controlled by the Central Government under the various control orders issued under sub-section (1) of Section 3 of the Essential Commodities Act, then there will be repugnancy between the State law and such control orders which according to Section 6 of the Essential Commodities Act must prevail. In such a case, the State law must yield to the extent of the repugnancy. In ***Harishankar Bagla* v. *State of M.P.*** [AIR 1954 SC 465], the court had occasion to deal with the non obstante clause in Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 which was in pari materia with Section 6 of the Essential Commodities Act and it was observed:

> The effect of Section 6 certainly is not to repeal any one of those laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, or the orders made thereunder. In other words, the orders made under Section 3 would be operative in regard to the essential commodity covered by the Textile Control Order wherever there is repugnancy in this Order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the order made under Section 3 it does not operate in that field for the time being.

The court added that after an order is made under Section 3 of that Act, Section 6 then steps in wherein Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than that Act.

30. Placing reliance on the observations in ***Harishankar Bagla*** case, it is urged that the effect of the non obstante clause in Section 6 of the Essential Commodities Act is to give an overriding effect to the provisions of Paragraph 21. It is further urged that Paragraph 21 of the Control Order having been issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which permits the manufacturer or producer to pass on the liability to pay sales tax must prevail and sub-section (3) of Section 5 of the Act which is inconsistent therewith is by-passed. The contention appears to be misconceived. The

appellants being manufacturers or producers of formulations are not governed by Paragraph 21 of the Control Order but by Paragraph 24 thereof and therefore the price chargeable by them to a wholesaler or distributor is inclusive of sales tax. There being no conflict between sub-section (3) of Section 5 of the Act and Paragraph 24 of the Control Order, the question of non obstante clause to Section 6 of the Essential Commodities Act coming into play does not arise.

31. Even otherwise i.e. if some of the appellants were governed by Paragraph 21 of the Control Order that would hardly make any difference. Under the scheme of the Act, a dealer is free to pass on the liability to pay sales tax payable under Section 3 and additional sales tax payable under Section 6 to the purchasers. Sub-section (3) of Section 5 of the Act however imposes a limitation on dealers liable to pay surcharge under sub-section (1) thereof from collecting the amount of surcharge payable by them from the purchasers which only means that surcharge payable by such dealers under sub-section (1) of Section 5 of the Act will cut into the profits earned by such dealers. The controlled price or retail price of medicines and drugs under Paragraph 21 remains the same, and the consumer interest is taken care of inasmuch as the liability to pay surcharge under subsection (3) of Section 5 cannot be passed on. That being so, there is no conflict between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order. The entire submission advanced by learned counsel for the appellants proceeds on the hypothesis that the various control orders issued under sub-section (1) of Section 3 of the Essential Commodities Act are for the protection of the manufacturer or producer. There is an obvious fallacy in the argument which fails to take into account the purpose of the legislation.

32. Where the fixation of price of an essential commodity is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middleman for whom it would be unprofitable to carry on business at fixed rate or that it does not ensure a reasonable return to the manufacturer or producer on the capital employed in the business of manufacturing or producing such an essential commodity.

33. The contention that in the field of fixation of price by a control order issued under sub-section (1) of Section 3 of the Essential Commodities Act, the Central Government must have due regard to the securing of a reasonable return on the capital employed in the business of manufacturing or producing an essential commodity is entirely misconceived. The predominant object of issuing a control order under sub-section (1) of Section 3 of the Act is to secure the equitable distribution and availability of essential commodities at fair prices to the consumers, and the mere circumstance that some of those engaged in the field of industry, trade and commerce may suffer a loss is no ground for treating such a regulatory law to be unreasonable, unless the basis adopted for price fixation is so unreasonable as to be in excess of the power to fix the price, or there is a statutory obligation to ensure a fair return to the industry. In ***Shree Meenakshi Mills Ltd.*** **v.** ***Union of India*** [A1R 1974 SC 366] Ray, C. J. speaking for the court rejected the contention that the controlled price must ensure a reasonable return on the capital employed in the business of manufacturing or producing essential commodities…

36. The principal point in controversy is: Whether there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order and therefore sub-section (3) of Section 5 must yield to that extent. The submission is that if Parliament chooses to occupy the field and there is price fixation of an essential commodity with liberty to pass on the burden of tax to the consumer by a law made by Parliament under Entry 33 of List III of the Seventh Schedule, then it is not competent for the State legislature to enact a provision like sub-section (3) of Section 5 of the Act while enacting a law under Entry 54 of List II prohibiting the passing on of liability of tax to the purchaser.

37. The true principle applicable in judging the constitutional validity of sub-section (3) of Section 5 of the Act is to determine whether in its pith and substance it is a law relatable to Entry 54 of List II of the Seventh Schedule and not, whether there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order made under sub-section (1) of Section 3 of the Essential Commodities Act, is therefore void. In dealing with the question, we must set out Article 246 of the Constitution which is based on Section 100 of the Government of India Act, 1935….

38. It is obvious that Article 246 imposes limitations on the legislative powers of the Union and State legislatures and its ultimate analysis would reveal the following essentials:

1. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I notwithstanding anything contained in clauses (2) and (3). The non obstante clause in Article 246(1) provides for predominance or supremacy of Union legislature. This power is not encumbered by anything contained in clauses (2) and (3) for these clauses themselves are expressly limited and made subject to the non obstante clause in Article 246 (1). The combined effect of the different clauses contained in Article 246 is no more and no less than this : that in respect of any matter falling within List I, Parliament has exclusive power of legislation.
2. The State legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III. The exclusive power of the State legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to clause (1) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a consequence, if there is a conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List II must supersede pro tanto the exercise of power of the State legislature.
3. Both Parliament and the State legislature have concurrent powers of legislation with respect to any of the matters enumerated in List III.

39. Article 254 provides for the method of resolving conflicts between a law made by Parliament and a law made by the legislature of a State with respect to a matter falling in the Concurrent List[…]

40. We find it difficult to subscribe to the proposition advanced on behalf of the appellants that merely because of the opening words of Article 246(3) of the Constitution "subject to clauses (1) and (2)" and the non-obstante clause in Article 246(1) "notwithstanding anything in clauses (2) and (3)", sub-section (3) of Section 5 of the Act which provides that no dealer shall be entitled to collect the amount of surcharge must be

struck down as ultra vires the State legislature inasmuch as it is inconsistent with Paragraph 21 of the Drugs (Prices Control) Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which enables the manufacturer or producer of drugs to pass on the liability to pay sales tax to the consumer. The submission is that sub-section (3) of Section 5 of the Act enacted by the State legislature while making a law under Entry 54 of List II of the Seventh Schedule which interdicts that a dealer liable to pay surcharge under sub-section (1) of Section 5 of the Act shall not be entitled to collect it from the purchaser, directly trenches upon Union power to legislate with respect to fixation of price of essential commodities under Entry 33 of List III. It is said that if both are valid, then ex hypothesi the law made by Parliament must prevail and the State law pro tanto must yield. We are afraid, the contention cannot prevail in view of the well accepted principles.

41. The words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the entries in the Union and State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non-obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

42. Union and State legislatures have concurrent power with respect to subjects enumerated in List III, subject only to the provision contained in clause (2) of Article 254 i.e. provided the provisions of the State Act do not conflict with those of any Central Act on the subject. However, in case of repugnancy between a State Act and a Union law on a subject enumerated in List III, the State law must yield to the Central law unless it has been reserved for the assent of the President and has received his assent under Article 254(2).

43. As regards the distribution of legislative powers between the Union and the States, Article 246 adopts with immaterial alterations the scheme for the distribution of legislative powers contained in Section 100 of the Government of India Act, 1935. Our Constitution was not written on a clean slate because a Federal Constitution had been established by the Government of India Act, 1935 and it still remains the framework on which the present Constitution is built. The provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act, 1935 and the principles laid down in connection with the nature and interpretation of legislative power contained in the

Government of India Act, 1935 are applicable, and have in fact been applied, to the interpretation of the Constitution.

45. With regard to the interpretation of non obstante clause in Section 100(1) of the Government of India Act, 1935 Gwyer, C.J. observed:

> It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other.
>
> In all cases of this kind the question before the Court", according to the learned Chief Justice is not "how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now".

47. Earl Loreburn, L.C. delivering the judgment of the Judicial Committee in ***Attorney General for Ontario*** case [1912 AC 571] observed that in the interpretation of Sections 91 and 92 of the British North America Act:

> If the text is explicit, the text is conclusive alike for what it directs and what it forbids.When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

48. In ***A.L.S.P.P.L. Subrahmanyan Chettiar*** **v.** ***Muttuswami Goundan*** [AIR 1941 FC 47], Gwyer, C.J. reiterated that the principles laid down by the Privy Council in a long line of decisions in the interpretation of Sections 91 and 92 of the British North America Act, 1867 must be accepted as a guide for the interpretation of Section 100 of the Government of India Act, 1935 :

> It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character", for the purpose of determining whether it is legislation with respect of matters in this list or in that.

49. It has already been stated that where the two lists appear to conflict with each other, an endeavour, should be made to reconcile them by reading them together and applying the doctrine of pith and substance. It is only when such attempt to reconcile fails that the non obstante clause in Article 246(1) should be applied as a matter of last resort. For, in the words of Gwyer, C. J. in ***C.P. and Berar Taxation Act*** case[AIR 1939 FC 1]:

> For the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

50. The observations made by the Privy Council in the ***Citizens Insurance Company*** case [(1881) 7 AC 96,108], were quoted with approval by Gwyer, C.J. in ***C.P. and Berar Taxation Act*** case, and he observed that an endeavour should be made to reconcile apparently conflicting provisions and that the general power ought not to be construed as to make a nullity of a particular power operating in the same field. The same duty of reconciling

apparently conflicting provisions was reiterated by Lord Simonds in delivering the judgment of the Privy Council in ***Governor-General in Council* v. *Province of Madras*** [AIR 1945 PC 98]:

> For in a Federal constitution, in which there is a division of legislative powers between Central and Provincial legislatures, it appears to be inevitable that controversy should arise whether one or other legislature is not exceeding its own, and encroaching on the other's, constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls.

Their Lordships approved of the decision of the Federal Court in ***Province of Madras* v. *Boddu Paidanna & Sons*** [AIR 1942 FC 33] where it was held that when there were apparently conflicting entries the correct approach to the question was to see whether it was possible to effect a reconciliation between the two entries so as to avoid a conflict and overlapping.

51. In ***Prafulla Kumar Mukherjee* v. *Bank of Commerce Ltd., Khulna*** [AIR 1947 PC 60], Lord Porter delivering the judgment of the Board laid down that in distinguishing between the powers of the divided jurisdictions under Lists I, II and III of the Seventh Schedule to the Government of India Act, 1935, it is not possible to make a clean cut between the powers of the various legislatures. They are bound to overlap from time to time, and the rule which has been evolved by the Judicial Committee whereby an impugned statute is examined to ascertain its pith and substance or its true character for the purpose of determining in which particular list the legislation falls, applies to Indian as well as to Dominion legislation. In laying down that principle, the Privy Council observed:

> Moreover, the British Parliament when enacting the Indian Constitution Act had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers entrusted to the several legislatures will never overlap.

The Privy Council quoted with approval the observations of Gwyer, C. J. in ***Subrahmanyan Chettiar*** case[1940 FCR 188]quoted above, and observed :

> No doubt experience of past difficulties has made the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial Legislation could never effectively be dealt with.

52. It would therefore appear that apparent conflict with the federal power had to be resolved by application of the doctrine of pith and substance and incidental encroachment. Once it is found that a law made by the Provincial legislature was with respect to one of the matters enumerated in the Provincial List, the degree or extent of the invasion into the

forbidden field was immaterial. "The invasion of the provinces into subjects in the Federal List," in the words of Lord Porter, "was important":

> […] N]ot, … because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking ? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content.

The passage quoted above places the precedence accorded to the three Lists in its proper perspective. In answering the objection that that view does not give sufficient effect to the non obstante clause in Section 100(1) of the Government of India Act, 1935, as between the three Lists, the Privy Council observed:

> Where they come in conflict List I has priority over Lists III and II and List III has priority over List II.

But added:

> The priority of the Federal legislature would not prevent the Provincial Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.

It would therefore appear that the constitutionality of the law is to be judged by its real subject-matter and not by its incidental effect on any topic of legislation in another field.

53. The decision of the Privy Council in ***Prafulla Kumar Mukherjee*** case, has been repeatedly approved by the Federal Court and this court as laying down the correct rule to be applied in resolving conflicts which arise from overlapping powers in mutually exclusive lists.. It may be added as a corollary of the pith and substance rule that once it is found that in pith and substance an impugned Act is a law on a permitted field any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act.

57. It is well settled that the validity of an Act is not affected if it incidentally trenches upon matters outside the authorized field and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature.

62. […]The question is whether the field is not clear and the two legislations meet and therefore on the doctrine of federal supremacy sub-section (3) of Section 5 of the Act must be struck down as ultra vires. The principle deducible from the dictum of Lord Dunedin as applied to the distribution of legislative powers under Article 246 of the Constitution is that when the validity of an Act is challenged as ultra vires, the answer lies to the question, what is the pith and substance of the impugned Act ? No doubt, in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in List II, then it is under the terms of Article 246(3) not to be

deemed to come within the classes of subjects assigned exclusively to Parliament under Article 246(1) even though the classes of subjects looked at singly overlap in many respects. The whole distribution of powers must be looked at as Gwyer, C.J. observed in ***C.P. and Berar Taxation Act*** case, in determining the question of validity of the Act in question. Moreover, as Gwyer, C.J. laid down in ***Subrahmanyan Chettiar*** case, and affirmed by Their Lordships of the Privy Council in ***Prafulla Kumar Mukherjee*** case, it is within the competence of the State legislature under Article 246(3) to provide for matters which, though within the competence of Parliament, are necessarily incidental to effective legislation by the State legislature on the subject of legislation expressly enumerated in List II.

63. We must then pass on to the contention advanced by learned counsel for the appellants that there is repugnancy between sub-section (3) of Section 5 of the Act and Paragraph 21 of the Drugs (Prices Control) Order and therefore sub-section (3) of Section 5 of the Act is void to that extent. Ordinarily, the laws could be said to be repugnant when they involve impossibility of obedience to them simultaneously but there may be cases in which enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. The question of "repugnancy" arises only with reference to a legislation falling in the Concurrent List but it can be cured by resort to Article 254(2).

64. As we have endeavoured so far, the question raised as to the constitutional validity of sub-section (3) of Section 5 of the Act has to be determined by application of the rule of pith and substance whether or not the subject-matter of the impugned legislation was competently enacted under Article 246, and therefore the question of repugnancy under Article 254 was not a matter in issue. The submission put forward on behalf of the appellants however is that there is direct collision and/or irreconcilable conflict between sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act which is relatable to Entry 33 of List III. It is sought to be argued that the words "a law made by Parliament which Parliament is competent to enact" must be construed to mean not only a law made by Parliament with respect to one of the matters enumerated in the Concurrent List but they are wide enough to include a law made by Parliament with respect to any of the matters enumerated in the Union List. The argument was put in this form. In considering whether a State law is repugnant to a law made by Parliament, two questions arise: First, is the law made by Parliament viz. the Essential Commodities Act, a valid law ? For, if it is not, no question of repugnancy to a State law can arise. If however it is a valid law, the question as to what constitutes repugnancy directly arises. The second question turns on a construction of the words "a law made by Parliament which Parliament is competent to enact" in Article 254(1).

66. Nicholas in his ***Australian Constitution,*** 2nd Edition, p. 303, refers to three tests of inconsistency or repugnancy :

1. There may be inconsistency in the actual terms of the competing statutes;
2. Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive code; and

3. Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject matter.

In ***Ch. Tika Ramji*** **v.** ***State of U.P.*** [AIR 1956 SC 676], the court accepted the above three rules evolved by Nicholas, among others, as useful guides to test the question of repugnancy.

67. Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an exception, viz. that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together.

69. We fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-section (3) of Section 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore sub-section (3) of Section 5 of the Act which is a law made by the State legislature is void under Article 254(1). The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy, become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and Lists I and III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non obstante clause in Article 246(1) read with the opening words "subject to" in Article 246(3). In such a case, the State law will fail not because of repugnance

to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Article 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as "List I". But if Article 254(1) is read as a whole, it will be seen that it is expressly made subject to clause (2) which makes reference to repugnancy in the field of Concurrent List - in other words, if clause (2) is to be the guide in the determination of scope of clause (1), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Article 254(1) speaks of a State law being repugnant to (*a*) a law made by Parliament or (*b*) an existing law. There was a controversy at one time as to whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (*a*) and (*b*) or (*b*) alone. It is now settled that the words "with respect to" qualify both the clauses in Article 254(1) viz, a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The underlying principle is that the question of repugnancy arises only when both the legislatures are competent to legislate in the same field i.e. with respect to one of the matters enumerated in the Concurrent List. Hence, Article 254(1) cannot apply unless both the Union and the State laws relate to a subject specified in the Concurrent List, and they occupy the same field.

70. This construction of ours is supported by the observations of Venkatarama Ayyar, J. speaking for the court in ***A.S. Krishna*** case [***A.S. Krishna* v. *State of Madras***, AIR 1957 SC 297] while dealing with Section 107(1) of the Government of India Act, 1935 to the effect:

For this section to apply, two conditions must be fulfilled : (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void.

72. We are unable to appreciate the contention that sub-section (3) of Section 5 of the Act being a State law must be struck down as ultra vires as the field of fixation of price of essential commodities is an occupied field covered by a Central legislation. It is axiomatic that the power of the State legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for projecting the power of Parliament to make a law under Entry 33 of List III into the State's power of taxation under Entry 54 of List II. Otherwise, Entry 54 will have to be read as : 'Taxes on the sale or purchase of goods *other than essential commodities et cetera'*. When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92A of List I and there can be no further curtailment of the State's power of taxation. It is a well established rule of construction that the entries in the three lists must be read in a broad

and liberal sense and must be given the widest scope which their meaning is fairly capable of because they set up a machinery of Government.

73. The controversy which is now raised is of serious moment to the States, and a matter apparently of deep interest to the Union. But in its legal aspect, the question lies within a very narrow compass. The duty of the court is simply to determine as a matter of law, according to the true construction of Article 246(3) of the Constitution, whether the State's power of taxation of sale of goods under Entry 54 of List II and to make ancillary provisions in regard thereto, is capable of being encroached upon by a law made by Parliament with respect to one of the matters enumerated in the Concurrent List. The contention fails to take into account that the Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246.

74. It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control.

76. It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. In ***M.P.V. Sundararamier & Co.*** **v.** ***State of A.P.*** [AIR 1958 SC 468] this court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92-A deal with taxes. In List II, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State's exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-section (3) of Section 5 of the Act and Paragraph 21 of the Control Order issued by the Central Government under sub-section (1) of Section 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.

* * * * *