

CENTRE STATE RELATIONS- DOCTRINE OF PITH AND SUBSTANCE

Written by *Yashi Mishra*

LL.M (II SEM) Gujarat National Law University

INTRODUCTION

There is the major contribution judiciary made, to the legislative relations between the Union and the States. Before we proceed further, let us distinguish between ‘legislative’ act and ‘judiciary’ act and sometimes it is difficult to draw a line of demarcation between them. The function of a legislature is to enact laws. The judiciary is to decide the rights of the parties according to the law and to submit to the mandate legislature. The courts interpret the mandate and decide the rights of the accordingly. On the other hand, the legislative process is for the legislature lay down the law which will govern parties and their transactions and to the court to give effect to the Law. But in spite of all the caution, some conflict and overlapping must arise in certain cases, owing to the nature of thing. For,

“No amount of care in phrasing the division of power in a federal Scheme will prevent difficulty when the division comes to be applied to the variety and complexity of social relationship. The different aspects of life in a society are not insulated from one another in such a way as to make possible a mechanical application of the division of powers. There is nothing in human affairs which corresponds to the neat logical division found in the Constitution.”¹

“It is not possible to make clean a cut between the powers of various legislatures; they are bound to overlap from time to time.”²

The court cannot issue any writ or process against legislature to prevent it from passing an unconstitutional law³, nor can the legislature, in India, decide while passing a law, whether it

¹ Laskin, Canadian Constitutional Law, 1951, p.4.

² Prafulla Kumar v. Bank of Commerce, AIR 1947 PC 28

³ AIR 1951 ALL 228(223)

is constitutional or otherwise. Of course the legislature is competent to put to the finality of a decision by a court by an enactment. Such an act legislature would not be a 'judicial'.⁴ It cannot declare any law as 'unconstitutional' because the 'unconstitutional law' is a misnomer in the context of 'parliamentary sovereignty'. It is only in the Federal and hence written constitutions that the judiciary decides upon, the constitutionality or otherwise of an act of legislature; because here the Constitution is the Supreme Law of the land and all bodies and individuals derives their powers from it. "The constitutional position in India approximates more closely to the American, model than to the 'British model'⁵. The Indian Parliament is as sovereign as the Congress of the United States and the legislatures of other independent countries having a federal constitution.⁶

Even in the Federal constitution of different countries, the courts have formulated certain principles in the interpretation of the legislative powers assigned both to the Centre and the State. The principles are determined by number of factors such as the nature of the constitution, the prevailing political climate in the country, the social and economic problems to be tackled by the country and finally the social and political background and outlook of the judge who are called upon to interpret the constitution.

This is essentially a Canadian Doctrine now firmly entrenched in the Indian Constitutional Jurisprudence. This doctrine found its place first in the case of **Cushing v. Dupey**⁷. In this case the Privy Council evolved the doctrine, that for deciding whether an impugned legislation was *intra vires*, regard must be had to its pith and substance. It was evolved by the Privy Council to ascertain the constitutionality of Canadian and Australian statute regarding the violation of the rules of the distribution of powers. The doctrine was adopted by the Federal Court of India and also by the Privy Council in determining the constitutionality under the Government of India Act, 1935.⁸

The framers of our Constitution established the Apex Court with the hope that the future evolution of the Constitution of India was to depend on the direction given to it by this Court

⁴ Mohanlal Chhaganlal Shah v Bissesarlal Chirawalla and Ors AIR 1947 Bom 268

⁵ Re The Delhi Laws Act, 1912, v. the Part C States (Laws) Act, 1950 AIR 1951 SC 332 (371, 372, & 401)

⁶ Re The Delhi Laws Act [n 5]

⁷ [1880] UPKC 22

⁸ Durga Das Basu [n 8]

and in fulfilling this expectation, “it has to keep poise between the seemingly contradictory forces. In this process of interpretation of the Constitution on certain occasion, it may appear to strengthen the union at the expense of the units, at another, it may champion the cause of provincial autonomy or regionalism... it is the great tribunal which has to draw the line between individual liberty and social control.”⁹

Thus the judiciary in India has been empowered to review the legislative acts, of both the Parliament and of the State Legislature. While interpreting the legislative power, the entries in the legislative list must prima facie be given broad and comprehensive interpretation.¹⁰ The provision must be given liberal and generous interpretation.

In case of dispute arising whether a particular piece of legislation is within the competence which passed it, the court must determine what pith and substance constitutes the subject-matter of legislation and see by comparing the language of the different entries that may be possibly cover the case, under which particular entries, it can be most appropriately fall.¹¹

DOCTRINE OF ‘PITH AND SUBSTANCE’ – MEANING

The doctrine means that if the substance of legislation falls within the legitimate power of a legislature, the legislation does not become invalid merely because it incidentally affects a matter outside its authorized sphere.¹² The phrase “pith and substance” means “true nature and character”. The doctrine relates to the violation of Constitutional delimitation of legislative power in a Federal State. Under it, the court ascertains whether the alleged encroachment is merely incidental or substantial. Thus, the doctrine of ‘pith and substance’ postulates for its application, that the impugned law is substantially within the legislative competence of the legislature that made it, but only incidentally encroached upon the legislative field of another

⁹ C.A Deb VIII P 224

¹⁰ Thakur Amar Singhji v State of Rajasthan AIR 1955 SC 5044(520); Ch. Tika Ramji & others, etc v The State of Uttar Pradesh & others AIR 1956 SC 676(691); Commissioner of Income tax, West Bengal v Raja Benoy Kumar Sahas Roy AIR 1957 SC 768

¹¹ A.S Krishna v State of Madras AIR 1957 297(301); Darshan Singh v State of Punjab AIR 1953 SC 83; D.N Banerji v P.R Mukherjee and Others AIR 1953 SC 58(59)

¹² Durga Das Basu, (8th Edition, first published in 1950, Reprint 2012, Vol 8) 8692

legislature. The doctrine saves this incidental encroachment if in reality the law is within the legislative field of the particular legislature which enacted it.¹³

The doctrine has been adopted in ascertaining whether a particular impugned statute substantially encroaches upon legislative power or is only an incidental encroachment not affecting materially the distribution of legislative power between the Union and the States.¹⁴ The doctrine means the true subject matter of the legislation. It was held that the expression “with respect to” in Article 246 brings in the doctrine of “Pith and Substance” in the understanding of the execution of the legislative power and whenever the question of legislative competence is raised, the test is whether the legislation, looked at as a whole, is substantially “with respect to” the particular topic of legislation. **If the legislation has substantial and not merely a remote connection with the Entry, the matter may well be taken to be legislation on the topic.**¹⁵

When legislation is not competent, for example, if it is in respect of an Entry within the Federal legislature List, but the legislation is by a provincial legislature, then the question of “occupied field” that is to say, that the federal legislature has not legislated on it, is irrelevant. Occupied or not, the provincial legislation will be incompetent. **The doctrine of ‘pith and substance’ is the rule of *ultra vires* and the difference between the operation of that rule and the effect of the doctrine of “occupied field” was brought out in the opinion of the Judicial Committee in *Attorney General for Alberta v Attorney General for Canada*¹⁶. After noticing that in respect of the subjects** specifically enumerated in S. 91 of the British North America Act, the Dominion Legislature alone had exclusive legislative authority, it was observed by court thus: - “It follows had the legislation coming in ‘pith and substance’ within one of the classes specifically enumerated in S.91 is beyond the legislative competence of provincial legislature under S.92. In such case, it is immaterial whether the Dominion has or not dealt with the subject of legislation or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament”

¹³ Durga Das Basu, (8th Edition, first published in 1950, Reprint in 2012 Vol 8) 8692

¹⁴ Judicial Review of Acts by Dr. C.D Jha-2 Edition 2009- P 517; also *Union of India v Shah Goverdhan L. Kabra teachers College*, AIR 2002 SC 3675 : (2002) 8 SCC 228

¹⁵ *Ujagar Prints M/s v Union of India*, AIR 1989 SC 516 : 1989 3 SCC 488

¹⁶ *Attorney General for Alberta v Attorney General for Canada*, AIR 1943 PC 76

The question of ‘pith and substance’ does not arise until unless the court is enquiring whether a particular legislation falls within one legislative list or another.¹⁷

The question whether the legislature has kept itself within the jurisdiction assigned to it or has encroached upon a forbidden field is determined by finding out the ‘true nature and character’ or ‘pith and substance’ of the legislation, which may be different from its consequential effects.¹⁸ If the pith and substance of legislation is covered by an Entry within the permitted jurisdiction of the legislature, any incidental encroachment in the rival field is to be disregarded.¹⁹

To ascertain the true nature and character of the legislation in question, one must have regard to it as a whole, to its objects and to the scope and effects of its provisions. If according to its ‘true nature and character’, the legislation substantially relates to a topic assigned to the legislature which has enacted it, then its not invalid ‘merely because its incidental’ trenches or encroaches on matters assigned to law even as regard the area of encroachment. To put it differently, incidental encroachment is not altogether forbidden.

The Supreme Court has enunciated the principle in **Premchand Jain v. R.K Chhabra**²⁰ as follows:

“as long as the legislation is within the permissible field in pith and substance, objection would not be entertained merely on the ground that while enacting legislation, provision has been made for a matter which though germane for the purpose for which competent legislation is made, it covers an aspect beyond it. In a series of decisions this court has opined that any enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature enacting it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature.”

¹⁷ United Provinces v Atiqua Begum, AIR 1941 PC

¹⁸ Asst. Commissioner of Urban Land Tax, Madras v Buckingham and Carnatic Co. Ltd, Air 1970 Sc 169: (1969) 2 SCC 55; Union of India v Shah Goverdhan L. Kabra Teachers College, AIR 2002 SC 3675 : (2002) 8 SCC 228; Welfare ASSN. A.R.P Maharashtra v Ranjit P Gohil, AIR 2003 SC 1266: (2003) 9 SCC 358

¹⁹ State of Bombay v F.N Balsara, AIR 1951 SC 318: (1951) SCR 682; Chaturbhai M. Patel v Union of India, AIR 1960 SC 424 : (1960) 2 SCR 362; Ishwari Ketan Sugar Mills (P) Ltd v State of U.P, AIR 1980 SC 1955: (1980) 4 SCC 136; Union of India v Shah Goverdhan L. Kabra Teachers College, AIR 2002 SC 3675 : (2002) 8 SCC 228

²⁰ AIR 1984 SC 981: (1984) 2 SCC 302

To ascertain the true character of a Law, it must be looked into as an organic whole. It would be wrong approach to view the statute as a mere collection of section, to disintegrate it into parts and then to examine under which entry each part would fall and then to determine which part of it is valid and which part is invalid. Instead, the Act should be taken in one piece and then its true character determined.

The doctrine of pith and substance saves the incidental encroachment if only the law in pith and substance falls within the entry within the legislative field of the particular legislature which has enacted it. The validity of legislation is not determined by the degree of invasion into the field assigned to the other legislature though it is a relevant factor to determine its 'pith and substance', as the legislation in question may advance so far into the other sphere as to show that its true nature and character is not concerned with a matter falling within the domain of the enacting legislature, in which case it will not be valid.

Once it is found that in pith and substance a law falls within the permitted field, any incidental encroachment by it on a forbidden field does not affect the competence of the concerned legislature to enact the law. "Effect is not the same thing as subject matter. If a State Act, otherwise valid, has effect on a matter in List I it does not cease to be legislation with respect to an entry in List II or III."²¹

ESSENTIALS FOR APPLYING THE DOCTRINE²²

For applying the principle of 'pith and substance' regard is to be had:

1. To the enactment as a whole;
2. To its main objects;
3. To the scope and effect of its provision.

Where the question for determination is, whether a particular law relates to a particular law relates to a particular subject mentioned in one list or the other, the court looks into the

²¹ State of Bombay v Narottamdas. AIR 1951 SC 69, 96 : 1951 SCR 51; Atiabari Tea Co. v State of Assam, AIR 1961 SC 232 : 1961 (1) SCR 809; Kannan D.H.P Co. v State of Kerala, AIR 1971 SC 2301.

²² Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra, (2010) 5 SCC 246; Bharat Hydro Power Corporation Ltd. V State of Assam, AIR 2004 SC 3173 : (2004) 2 SCC 553

substance of the enactment. If the substance of the enactment falls within the Union List, then the incidental encroachment by the enactment on the State List would not make it invalid.²³

NEED FOR THE DOCTRINE OF PITH AND SUBSTANCE IN THE INDIAN CONTEXT

The doctrine has been applied in India also to provide a degree of flexibility in the otherwise rigid scheme of distribution of powers. The reason for adoption of this doctrine is that if every legislation were to be declared invalid on the grounds that it encroached powers, the powers of the legislature would be drastically circumscribed.

“It is settled law of interpretation that entries in the Seventh Schedule are not powers but fields of legislation. The legislature derives its power from Article 246 and other related articles of the Constitution. Therefore, the power to make the Amendment Act is derived not from the respective entries but under Article 246 of the Constitution. The language of the respective entries should be given the widest scope of their meaning, fairly capable to meet the machinery of the Government settled by the Constitution. Each general word should extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. When the vires of an enactment is impugned, there is an initial presumption of its constitutionality and if there is any difficulty in ascertaining the limits of the legislative power, the difficulty must be resolved, as far as possible in favour of the legislature putting the most liberal construction upon the legislative entry so that it may have the widest amplitude.”²⁴

According to this doctrine, the legislation as a whole is examined to ascertain its “true nature and character” in order to determine in what list it falls. If according to its “true nature and character” the legislation substantially falls within the powers conferred on the legislature which has enacted it, then it is not deemed to be Invalid “merely because it incidentally trenches or encroaches on matters which have been assigned to another legislature.

²³ Zameer Ahmed Latifur Rehman Sheikh v State of Maharashtra, (2010) 5 SCC 246; Bharat Hydro Power Corporation Ltd. V State of Assam, AIR 2004 SC 3173 : (2004) 2 SCC 553

²⁴ Jijubhai Nanbhai Kachar v. State of Gujarat, 1995 Supp. (1) SCC 596.

The doctrine of “pith and substance” postulates for its application, that the law in question is substantially within legislative competence of the particular legislature which has made it but only incidentally encroaches upon the legislative field of another legislature. The doctrine saves the incidental encroachment, if only the law is in pith and substance within the legislative field of the particular legislature which has made it.

This doctrine is widely used when deciding whether a state is within its rights to create a statute that involves a subject mentioned in Union List of the Constitution. The basic idea behind this principle is that an act or a provision created by the State is valid if the true nature of the act or the provision is about a subject that falls in the State list.

LANDMARK SUPREME COURT JUDGMENTS ON THE DOCTRINE OF PITH AND SUBSTANCE

In India, it has already pointed out notwithstanding the adoption of three fold division of powers and notwithstanding the embodiment of the general rule of Federal supremacy (in Art. 246), it has been held that some overlapping between the entries in the several list was inevitable and that in cases of alleged encroachment, the doctrine of ‘pith and substance’ of the legislation in question was to be determined.²⁵ In ascertaining the substance of the impugned legislation, one must have regard to the enactment as a whole, to its object and to the scope and effect of its provision.

It has to be noted that the extent of invasion upon the field assigned to the other legislature is a relevant matter for determining the pith and substance of the Act. The provisions of the law may advance so far into the other sphere as to show that its true nature and character is not concerned with the matter falling within the jurisdiction of the enacting legislature.

The doctrine of pith and substance has been applied by the Privy Council in several appeals from Canada. The justification for the doctrine of pith and substance is that in a Federal Constitution, it is not possible to make a clear-cut distinction between the powers of the Union

²⁵ Durga Das Basu, *Commentary on the Constitution of India*, (first published in 1950(8th Edition)) P 8697

and the State Legislatures. There is bound to be over-lapping and in all such cases, it is but reasonable to ask what in whole is the true nature and character of the law. A strict verbal interpretation would result in a large number of statutes being declared invalid on the ground of overlapping. If the legislature is to have the full scope to exercise the powers granted to it, it is necessary to assume that the Constitution does not prevent a legislature from dealing with a matter which may incidentally affect any matter in the other List. The doctrine of pith and substance was first applied in India.²⁶ Gwyer CJ in **Subrahmanyam Chettiar v Muttuswami Goudan**²⁷ in explaining the validity of the doctrine of pith and substance said:

“It must be inevitably happened 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 number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in forbidden sphere. Hence the rule has been evolved... 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 on the List or in that.”

Prafulla Kumar Mukherjee v. The Bank of Commerce, Khulna²⁸

The Bengal Money Lenders Act, 1940 passed to scale down debts owed by the agriculturists, was challenged on the ground that being a provincial (State) law, it affected promissory notes, a Central subject (Entry 46, List I). The Act provided for limiting the amount and the rate of interest recoverable by a lender on any loan, was challenged on the ground that it was *ultra vires* the Bengal Legislature. The Calcutta High Court held that the Act was *intra vires* the Provincial Legislature but on appeal to the Federal Court the decision of the High court was reversed and the Act was held to be *ultra vires* the law making power of the Bengal Legislature.

²⁶ In Re. Central Province and Berar Act (known as Central Province’s case) (1939) FCR 18

²⁷ AIR 1941 FC 47, 51. This Statement of Law was cited with approval by the Privy Council in Prafulla Kumar Mukherjee v Bank of Commerce Ltd., (1946)-47) 74 IA 23. Also refer to A.S Krishna v State of Madras, AIR 1957 S 297, 301 : 1957 SCR 399.

²⁸ (1947) 49 Bom LR 568 : AIR 1947 PC 60

The Privy Council found that in its true nature and character, the legislation dealt with money-lenders and money-lending (Entry 30, List II) and not with promissory notes. The money-lenders commonly take a promissory note as security for a loan. A legislature would not, in any real sense be able to deal with money-lending if it cannot limit the liability of a borrower in respect of a promissory note given by him.

It was argued in the said case, though the doctrine of pith and substance may be applicable to Canada and Australia, in India the difficulty in dividing legislative powers had been foreseen. Accordingly, three and not two lists had been prepared in order to cover the whole field with a definite priority attributed to the Lists, so that anything contained in List I was reserved for the Federal Legislature and however incidentally it may be touched upon in an Act of the Provincial Legislature, that Act was *ultra vires* in whole or part as the case may be. The Privy Council rejected this argument observing that it was not possible to make so clean a cut between the powers of the various legislature that they are bound to overlap.

In short, this doctrine means that if an enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature which enacted it, it cannot be held to be invalid, merely because it incidentally encroaches on matters assigned to another Legislature.²⁹ In other words, when a law is impugned as *ultra vires*, what has to be ascertained is the true character of the Legislation. If on such examination it is found that the legislation is in substance one on a matter assigned to the Legislature, then it must held valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. In **State of Rajasthan v G. Chawla**³⁰ (**G. Chawla**), the state legislature made a law restricting the use of amplifiers. The respondent who had violated the provisions of the impugned Act was prosecuted. The Judicial Commissioner held the Act invalid and quashed the conviction. On appeal to the Supreme Court, the State contended that the law was within the legislative competence of the state legislature since it fell under the Entry 6, List II, “public health and sanitation”. The respondent on the other hand, contended that the impugned law fell under

²⁹ *Iswari Khetan Mills v State of UP*, AIR 1980 SC 1955; *State of Karnataka v Ranganatha*, AIR 1978 SC 215(para, 30); *K.S.E Board v Indian Aluminum Co.* AIR 1976 SC 1031; *Tansukh v Nilaratan* AIR 1966 SC 1780

³⁰ AIR 1959 SC 544: 1959 Supp (1) SCR 904

Entry 31, List I, “posts and telegraphs, telephone, wireless, broadcasting and other like forms of communication”. It was held by Supreme Court that the impugned legislation fell within Entry 6. The power to legislate in relation to public health includes the power to regulate the use of amplifier as producers of loud noises when the right of such users, by the disregard of the comfort and obligation to others, merges as a manifest nuisance to them it did not fall within the Entry 31 in the Union List, even though the amplifier is an apparatus for broadcasting and communication. The legislation in pith and substance being on a State matter, it is not invalid even if it incidentally encroached upon the subject of broadcasting or communication.

In **A.S Krishna v State of Madras**³¹ Constitutional Validity of Section 4(2), 28, 32 of the Madras Prohibition Act, 1937 was challenged. The appellants were charged before the Presidency Magistrate for offences under the Madras Prohibition Act, 1937 and when the cases were taken up for trial they raised the contentions that SS. 4(2) and 28 to 32 of the Act are void under S.107(I) of the Government of India Act,1935, because they are repugnant to the provisions of the Indian Evidence Act,1872, and the Code of Criminal Procedure, 1898, and also because they are repugnant to Art. 14 Of the Constitution of India. On their application, the Magistrate referred the questions for the opinion of the High Court under S. 432 of the Code of Criminal Procedure. The High Court having answered the questions against the appellants they preferred the present appeal under Art. 136.

Supreme Court held that the Madras Prohibition Act, 1937, is both in form and in substance a law relating to intoxicating liquors and that the presumptions in S. 4(2) and the provisions relating to search, seizure and arrest in SS. 28 to 32 of the Act have no operation apart from offences created by the Act and are wholly ancillary to the exercise of the legislative power under Entry 31 in List II, Sch. 7 of the Government of India Act, 1935. Accordingly the Act is in its entirety a law within the exclusive competence of the Provincial Legislature and the question of repugnancy under S.107 (1) of the Government of India Act, 1935, does not arise. When a law is impugned on the ground that it is *ultra vires* the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its

³¹ AIR 1957 SC 297: (1957) SCR 399

provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are *intra vires*.

In **State of Bombay v. F.N Balsara**³², the constitutional validity of the Bombay Prohibition Act, 1949 was in issue. The question was whether the Act fell under Entry 31 of the Government of India Act, 1935 (corresponding Entry 8 of the Constitution), namely, “intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase, and sale of intoxicating liquors”, or under Entry 19 of List I (corresponding Entry 41 of the Constitution), namely, “import and export of liquor across the customs frontier”, which is a Central subject. It was argued that the prohibition on purchase, use, transport, sale of liquor would affect the import. The court, rejecting the argument, held the Act valid because the pith and substance of the act fell under the Entry 31 of List II and not under Entry 19 of List I, even though the Act encroached upon the Central power of the Legislation.

In **D.N Banerji v. P.R Mukherjee**³³, the Industrial Dispute Act, 1947 of the Union Parliament, in so far as it applied to the municipalities, was challenged on the ground that it related to a state subject- the local government. The Supreme court held that having regard to the pith and substance of the impugned Act it dealt with the Union subject, Industrial and Labour disputes, Entry 22 List III, and not with local government, Entry 5 List II.

In **Shri Ramtanu Cooperation Housing Society Ltd. V State of Maharashtra**³⁴, question arose whether the Maharashtra Industrial Development Act was valid piece of legislation. The Supreme Court applied the doctrine of pith and substance and concluded that the pith and

³² State of Bombay v F.N Balsara, AIR 1951

³³ AIR 1953 SC 58 : 1953 SCR 302

³⁴ (1970) 3 SCC 323 : AIR 1970 SC 1971 See also, Indu Bhushan Bose v Ram Sundari Debi, (1969) 2 SCC 289; AIR 1970 SC 228; Bar Council of U.P v State of U.P, (1973) 1 SCC 261, 271; AIR 1973 SC 231; Kerala SEB v Indian Aluminum Co. Ltd, (1976) 1 SCC 466; AIR 1976 SC 1031

substance of the Act was establishment, growth and organization of industries, acquisition of land in that behalf and carrying out the purposes of the Act by setting up the Corporation as one of the limbs and agencies of the government. Thus the impugned Act did not fall within Entries 7 and 52 of List 1, but was within Entry 24 of List II. The rule that in delimiting the legislative power of the Union and the State legislative power of the Union and State Legislature resort is to be made to the principle of pith and substance, find support from the expression “with respect to” used in the clause (1) and (4) of Article 246.

To explain that in *G Chawla*³⁵ Supreme Court quoted the following statement of *Lanham CJ in Bank of New South Wales v Commonwealth*³⁶

“The power to make laws ‘with respect to’ a subject matter is a power to make laws which in reality and substance are laws upon the subject matter. It is not enough that a law should refer to the subject matter or apply to the subject matter: for example, income tax laws apply to clergymen and hotel-keepers. Building regulations apply to buildings erected for or by banks; but such regulations could not properly be described as laws with respect to banks and banking.”

In *Ishwari Khetan Sugar Mills v. State of U.P.*³⁷, the validity of the U.P. Sugar Undertakings (Acquisitions) Act, 1971, was challenged on the ground that the State Legislature had no competence to enact the impugned law on the ground that it fell within Parliament’s legislative power under Entry 52 of List I.

It was contended that in view of the declaration, the Parliament had made under Entry 52 of List I to take the sugar industry, State Legislature was divested of all legislative powers in respect of Sugar Industry under Entry 24 of List II.

³⁵ AIR 1959 SC 544 : 1959 Supp (1) SCR 904. Also see, *Delhi Cloth & General Mills Co. Ltd v Union of India*, (1983) 4 SCC 166; AIR 1983 SC 937; *Prem Chand Jain v R.K Chhabra* (1984) 2 SCC 302; AIR 1984 SC 981; *ITC Ltd. v State of Karnataka*, 1985 Supp SCC 476; *Ujagar Prints(2) v Union of India*, (1989) 3 SCC 488; AIR 1989 SC 516

³⁶ (1948) 76 CLR 1, 186

³⁷ AIR 1980 SC 1955

The Supreme Court rejected these contentions and held that there was no conflict between the State Act and the Central Act under Industries Act, 1951. The power of acquisition or requisition of property in Entry 42 List III is an independent power of the State Legislature which is preferable to Entry 42 of List III and its control was taken over by the Central Government.

All India Federation of Tax Practitioners & others v Union of India & others³⁸ an appeal was filed by All India Federation of Tax Practitioners against the Division Bench judgment of the Bombay High Court upholding the legislative competence of Parliament to levy service tax vide Finance Act, 1994 and Finance Act, 1998. The issue arising in this appeal questions the competence of Parliament to levy service tax on practicing chartered accountants and architects having regard to Entry 60 List II of the Seventh Schedule to the Constitution and Article 276 of the Constitution. The question which arises for determination in this civil appeal concerns the constitutional status of the levy of service tax and the legislative competence of Parliament to impose service tax under Article 246(1) read with Entry 97 of List I of the Seventh Schedule to the Constitution.

According to the impugned judgment, service tax falls in Entry 97, List I of the Seventh Schedule to the Constitution and held the legislation valid. Though the doctrine of pith and substance was not required to be applied in this case as the parliament possess the residuary power to bring any legislation into force not specifically mentioned under any List.

Special Reference Case 1 of 2001³⁹ The Gujarat State legislature passed an Act by name "Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001" which came into force w.e.f. 19th December. 2000. The object of the enactment is to provide for regulation of transmission, supply and distribution of gas, in the interests of general public and to promote gas industry in the State, and for that purpose, to establish Gujarat Gas Regulatory Authority and for matters connected therewith and incidental thereto. The State legislature passed the said enactment by tracing its legislative competence under Entry No. 25 of List II of the Seventh Schedule of the Constitution. The Parliament has passed various enactments

³⁸ Civil Appeal No. 7128 of 2001, All India Federation of Tax Practitioners and Ors. vs. Union of India (UOI) and Ors. (21.08.2007 - SC)

³⁹ (2001): 2004 (4) SCC 489

under Entry No. 53 of List I dealing with the matters of petroleum and petroleum products. When the State of Gujarat passed the Gujarat Act, the question arose whether the State Government can pass an enactment in respect of gas, including natural gas in all its forms by virtue of the legislative competence based on Entry 25 of List II of the Seventh Schedule. The Federal Legislature passed Petroleum Act, 1934. The Union of India, inter alia, enacted various legislations, namely, The Oil Fields (Regulation and Development) Act, 1948; Oil Industry (Development) Act, 1974; The Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962; the Oil Industry (Development) Act, 1974. All these legislations have been passed by the Union of India on the basis of the legislative competence under Entry 53 of List I of the Seventh Schedule. Oil and Natural Gas Commission increased the price of natural gas supplied by them. The Association of Natural Gas Consuming Industries of Gujarat and others filed Civil Writ Petition before the High Court of Gujarat wherein they challenged the legislative competence of the Union to make laws on "gas and gas works." Therefore, the question arose whether "Natural Gas" is a Union subject or State subject and whether the State of Gujarat and the other States have the legislative competence to make laws on the subject of "Natural Gas."

It was held by the Supreme Court that 'Natural Gas' including Liquefied Natural Gas (LNG) is a Union subject covered by Entry 53 of List I and the Union has exclusive legislative competence to enact laws on natural gas. The States have no legislative competence to make laws on the subject of natural gas and liquefied natural gas under Entry 25 of List II of the Seventh Schedule to the Constitution. The Gujarat Gas (Regulation of Transmission, Supply & Distribution) Act, 2001, so far as the provisions contained therein relating to the natural gas or liquefied natural gas (LNG) are concerned, is without any legislative competence and the Act is to that extent *ultra vires* of the Constitution.

K.K. Baskaran v. State rep. by its Secretary, Tamil Nadu & Others⁴⁰ the petitioner and others challenged the constitutional validity of the Tamil Nadu Protection of Interests of Depositors (in Financial Establishments) Act, 1997. The appellant in challenging the Tamil Nadu Act, which was also the main submission in challenging the Maharashtra Act, 1999, was that the said Act is beyond the legislative competence of the State Legislature as it falls within

⁴⁰ Civil Appeal no. 2341 of 2011 [arising out of S.L.P.(Civil) No. 7285/2011] CC No. 18900/2010

entries 43, 44 and 45 of List I of the Seventh Schedule to the Constitution. It was also submitted that the impugned Act is liable to be struck down as the field of legislation is already occupied by legislation of Parliament being The Reserve Bank of India Act, 1934, Banking Regulation Act, 1949, the Indian Companies Act, 1956 and the Criminal Law Amendment Ordinance, 1944 as made applicable by Criminal Law (Tamil Nadu Amendment) Act, 1977. It was also contended that the Tamil Nadu Act was arbitrary, unreasonable and violative of Articles 14, 19(1) (g) and 21 of the Constitution.

By the impugned judgment the Full Bench of the Madras High Court has held the aforesaid Act to be constitutional. The Tamil Nadu Act was enacted to ameliorate the conditions of thousands of depositors who had fallen into the clutches of fraudulent financial establishments who had raised hopes of high rate of interest and thus duped the depositors. Thus the Tamil Nadu Act is not focused on the transaction of banking or the acceptance of deposit, but is focused on remedying the situation of the depositors who were deceived by the fraudulent financial establishments. The impugned Tamil Nadu Act was intended to deal with neither the banks which do the business or banking and are governed by the Reserve Bank of India Act and Banking Regulation Act, nor the non-banking financial companies enacted under the Companies Act, 1956.

In **Vijay Kumar Sharma v State of Karnataka**⁴¹ the Supreme Court has held that the doctrine of pith and substance applies even when the Parliament and the State Legislature legislate on the same List, i.e. the Concurrent List but with respect to different Entries. The Court has said that the doctrine is relevant for the purpose of determining whether a law is of Parliament or an existing law and a law of the State Legislature are on the same matter in the Concurrent List or they pertain to different matters. If the pith and substance of the two laws is the same then Article 254(1) applies otherwise it does not.

The doctrine of pith and substance also applies to overlapping between states made laws in the State List and Central law on the Concurrent List. The State law may be justified even if

⁴¹ (1990) 2 SCC 562, 584 :AIR 1990 SCC 2072

it incorporates some of the features of Central law on Concurrent List so long the former is in pith and substance on State list.⁴²

Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and Ors.⁴³ Pith and Substance has been beautifully explained in this case:-

“This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme.”

Constitutional Bench of this Court while discussing the said doctrine in **Kartar Singh v. State of Punjab** observed as under:

This doctrine of ‘pith and substance’ is applied when the legislative competence of a legislature with regard to a particular enactment is challenged with reference to the entries in the various lists i.e. a law dealing with the subject in one list is also touching on a subject in another list. In such a case, what has to be ascertained is the pith and substance of the enactment. On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence i.e. on a matter included in the list belonging to the other legislature. To say differently, incidental encroachment is not altogether forbidden.”

⁴² Girmar Traders(3) v State of Maharashtra, (2011) 3 SCC 1; Offshore Holdings (P) Ltd. V Bangalore Development Authority, (2011) 3 SCC 139

⁴³ AIR 2010 SC 2633

CONCLUSION

This doctrine is an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List.

Entries in each of the lists must be given the most liberal and widest possible interpretation and no attempt should be made to narrow or whittle down the scope of the entries. The application of the doctrine of pith and substance really means that where legislation falls entirely within the scope of an entry and within the competence of the State Legislature then this doctrine will apply and the Act will not be struck down. The consideration of encroachment of one list in another and the extent thereof is also well-established. If the encroachment is minimum and does not affect the dominant part of some other entry, which is not within the competence of the State Legislature, then the Act may be upheld constitutionally valid. Where ever the Central and the State legislation cover the same field, then the Central legislation would prevail.

