M/S. KRISHNAMURTHI & CO. ETC.

v.

STATE OF MADRAS & ANR.

September 5, 1972

[K. S. HEGDE, P. JAGANMOHAN REDDY AND H. R. KHANNA, JJ.]

Madras General Sales Tax (Third Amendment) Act, 1967 Entry 47 and 47-A of the First Schedule—Whether invalid as they seek to impose Sales Tax with retrospective effect.

Under Entry 47 of the First Schedule of the Madras General Sales Tax Act, 1959, the sale of 'lubricating oil and greases' was liable to sales tax at the point of first sale in the State at 6 per cent. With effect from April 1, 1964, Entry 47 was amended and instead of the words "lubricating oils and greases," "lubricating oils, all kinds of mineral oils (not otherwise provided for in this Act) quencing oils and greases," were included.

Till September 30, 1965, the assessments were made on the assumption that the amendment of entry 47 had made no difference to sale of furnace oil. The dealers paid and collected the tax on that basis and the department accepted it. Thereafter, according to a resolution of the Board of Revenue, the dealers started charging tax on furnace oil from September 14, 1965 at the rate of 6 per cent although furnace oil was a non-lubricating mineral oil, and the assessment orders were made accordingly. The view expressed by the Board of Revenue that entry 47 as amended included furnace oil was challenged before the High Court by a writ and the High Court held that entry 47 as amended did not include furnace oil. Appeal against the said judgment is pending before the Supreme Court.

Thereafter, Madras General Sales Tax Act was again amended (Third Amendment) by which all kinds of mineral oils including furnace oil were included in entry 47 and Sales Tax would be payable during the period from April 1, 1964 to November 30, 1965 at the rate of 6% and the rate from December 1, 1965 to June 17, 1967, had been fixed at 6½% and with effect from June 18, 1967, the rate had been fixed at 7 per cent and Sec. 4 validated all taxes levied and collected before the passing of the amending Act and no suit lay for the refund of any tax paid or collected.

The appellants who are dealers in mineral oils including furnace oils filed writ petitions challenging the retrospective imposition of a single point tax on furnace oil and other non-lubricating oils for the period prior to January 5, 1968, as violative of Art. 14 and 19 of the Constitution. The High Court, however, dismissed the writ petitions. Dismissing the appeals,

HELD : (i) The legislative power conferred on the appropriate legislatures to enact laws in respect of topics covered by the several entries in the three lists can be exercised both prospectively and retrospectively. The legislative power, in addition, includes the subsidiary or auxiliary power to validate laws which have been found to be invalid. If a law passed by a legislature is struck down by the Court as being invalid for one infirmity or another, it would be competent to the appropriate legislature

A to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed. [59B]

Rai Ramkrishna & Ors. v. *The State of Bihar*, [1964]; S.C.R. 897, referred to.

(ii) In the present case, the amending Act was intended to cure an B infirmity as revealed by the judgment of the Madras High Court and to validate the past levy and collection of tax in respect of all kinds of non-lubricating mineral oils, including furnace oils, with effect from April 1, 1964. For this purpose, the legislature split the original entry 47 into two entries 47 and 47-A whereby, the sale of all kinds of mineral oils were made liable to tax. It is axiomatic that the Government needs revenue to carry on the administration and fulfil its obligation to the citizens. C Further amending and validating Act to make "small repairs" is a permissible mode of legislation and is frequently resorted to in fiscal enactments. [61B]

Therefore, the impugned provisions of the Amending Act are a valid piece of legislation and do not contravene Art. 19 of the Constitution.

Enari Chinna Krishana Moorthy v. *State of Orissa* [1964] 7 S.C.R. 185; *M/s. J. K. Jute Mills Co. Ltd.* v. *The State of U.P. and Anr.* [1962] D 2 S.C.R. 1; *The Union of India* v. *Madan Gopal Kabra*, [1954] S.C.R. 451; *Jaora Sugar Mills (P) Ltd.* v. *State of Madhya Pradesh & Ors.* [1966] 1 S.C.R. 523, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 471—474 of 1969.

Appeals by certificate from the judgment and order, dated E September 27, 1968 of the Madras High Court in Writ Petitions Nos. 283 to 286 of 1968.

M. C. Setalvad, Ravinder Narain, A. K. Verma, J. B. Dadakanji and *O. C. Mathur*, for the appellants.

S. T. Desai, A. V. Rangam and *A. Subhashini*, for the respon- F dents.

The Judgment of the Court was delivered by

KHANNA, J.—This judgment would dispose of four civil appeals No. 471 to 474 of 1969 which have been filed on certificate granted by the Madras High Court and are directed against the common judgment of that court, whereby petitions under G article 226 of the Constitution of India filed by the appellants were dismissed. The crucial question which arises for determination in these appeals is whether the provisions of Madras General Sales Tax (Third Amendment) Act, 1967 (Act No. 19 of 1967) are invalid on the ground that they seek to impose sales tax with retrospective effect in an unreasonable manner.

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According to entry 47 of First Schedule to the Madras General Sales Tax Act, 1959 (Madras Act 1 of 1959) (hereinafter referred to as the principal Act), the sale of "lubricating oils and

greases" was liable to sales tax at the point of first sale in the State at 6 per cent. With effect from April 1, 1964 entry 47 was amended by Madras Act 7 of 1964 and instead of the words "lubricating oils and greases" in that entry, the following words were substituted :

> "Lubricating oils, all kinds of mineral oils (not otherwise provided for in this Act) quenching oils and greases"

Till September 30, 1965, it is stated, the assessments were made on the assumption that the amendment of entry 47 had made no difference to sales of furnace oil and they were liable to multipoint tax at 2 per cent. The dealers paid and collected tax on that basis and the department accepted it. The Board of Revenue, on being moved by a dealer, passed a resolution on August 28, 1965 wherein it expressed the view that entry 47, as amended, included furnace oil and transformer oil. The dealers thereafter from September 14, 1965 started charging tax on furnace oils at the rate of 6 per cent on the first sale of those oils and the assessment orders were made accordingly. Furnace oil, it may be stated, is a non-lubricating mineral oil. The view expressed by the Board of Revenue that entry 47 as amended included furnace oil was challenged in a writ petition before the Madras High Court. The High Court gave its decision on August 2, 1967. The title of the case is *Burmah Shell Oil Storage and Distributing Company of India Limited, Madras* 1 *and Others* v. *The State of Madras,* and it is reported in (1968) 21 S.T.C. 227. The High Court held that having regard to the objects and reasons appended to Madras Act 7 of 1964 and the association of words which preceded and followed the words "all kinds of mineral oils", the words "all kinds of mineral oils" had only a limited meaning, namely, mineral oils which were lubricants. Entry 47 as amended was, therefore, held not to include furnace oil. Appeal against the said judgment, we have been told, is pending in this Court.

The above decision of the Madras High Court led to the enactment of the Madras General Sales Tax (Third Amendment) Act, 1947 (Act No. 19 of 1967) (hereinafter referred to as the amending Act). The amending Act received the assent of the Governor on December 29, 1967 and was published in the Fort St. George Gazette, Extraordinary on January 5, 1968. Section 2 of the amending Act has recast entry 47 in the First Schedule to the principal Act and has also inserted a new entry 47-A. Section 2 reads as under :

> "2. *Amendment of First Schedule to Madras Act* 1 *of* 1959.—In the First Schedule to the Madras General Sales Tax Act, 1959 (Madras Act 1 of 1959) (hereinafter referred to as the principal Act),—

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(a) during the period commencing on the 1st April 1964 and ending with the 30th November 1965, for item 47 and the entries relating thereto, the following shall be deemed to have been substituted, namely :—

"47	Lubricating oils (not otherwise provided for in this Act), quenching oils and greases.	Do	6
47-A	All kinds of mineral oils (other than those falling under item 47 and not otherwise provided for in this Act), including furnace oil.	Do	6";

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(b) during the period commencing on the 1st December 1965 and ending with the 17th June 1967, for item 47 and the entries relating thereto, the following shall be deemed to have been substituted, namely :—

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"47	Lubricating oils (not otherwise provided for in this Act), quenching oils and greases.	Do	6½
47-A	All kinds of mineral oils (other than those falling under item 47 and not otherwise provided for in this Act), including furance oil.	Do	6½";

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(c) with effect on and from the 18th June 1967, for item 47 and the entries relating thereto, the following shall be deemed to have been substituted, namely :—

"47	Lubricating oils (not otherwise provided for in this Act), quenching oils and greases.	Do	7
47-A	All kinds of mineral oils (other than those falling under item 47 and not otherwise provided for in this Act), including furnace oil.	Do	7".

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It would thus appear that according to the amendment the sales tax would be payable during the period from April 1, 1964 to November 30, 1965 on items mentioned in entries 47 and 47-A at the rate of 6 per cent. The rate for the period from December 1, 1965 to June 17, 1967 has been fixed at 6½ per cent and with effect from June 18, 1967 the rate has been fixed at 7 per cent. Section 4 of the amending Act is the validating section and reads as under :

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"4. *Validation.*—Notwithstanding anything contained in any judgment, decree or order of any court or other authority, all taxes levied or collected or purporting to have been levied or collected under the principal Act on the sale of the goods specified in item 47-A of the First Schedule to the principal Act as amended by this Act for the period commencing on the 1st April 1964 and ending with the date of the publication of this Act in the *Fort St. George Gazette* shall for all purposes be deemed to be, and to have always been validly levied or collected in accordance with law as if section 2 had

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been in force at all material times when such tax was levied or collected and accordingly,— A

(a) all acts, proceedings or things done or taken by any authority, officer or person in connection with the levy or collection of such tax shall, for all purposes, be deemed to be and to have always been done or taken in accordance with law; B

(b) no suit or other proceeding shall be maintained or continued in any court for the refund of any tax so paid;

(c) no court shall enforce any decree or order directing the refund of any tax so paid." C

The appellants, who are dealers in mineral oils including furnace oils, filed writ petitions in the High Court to challenge the validity of the amending Act. It was contended on their behalf that retrospective imposition of a single point tax on furnace oil and other non-lubricating oils for the period prior to January 5, 1968 was illegal inasmuch as it violated articles 14 and 19 of the D Constitution. This contention of the appellants was repelled by the High Court and their writ petitions, as mentioned earlier, were dismissed.

Mr. Setalvad in appeal before us has assailed the validity of the provisions of sections 2 and 4 of the amending Act on the ground that the retrospective operation of those provisions is E violative of article 19(1)(g) of the Constitution inasmuch as it constitutes unreasonable restriction on the right of the appellants to carry on their trade and business. As against that Mr. Desai on behalf of the respondents contends that there has been no unreasonable restriction on the exercise of the right of the appellants and the impugned provisions cannot be struck down on the ground F that the legislature has given retrospective operation to those provisions. In our opinion, the contention of Mr. Desai is well founded.

We may at the outset state that though the legislature can pass a law and make its provisions retrospective, it would be relevant to consider the effect of the said retrospective operation of the law G both in respect of the legislative competence of the legislature and the reasonableness of the restriction imposed by it. It would thus be open to a party affected by the provisions of an Act to contend that the retrospective operation of the Act so completely alters the character of the tax imposed by it as to take out outside the limits of the entry which gives the legislature competence to enact H the law or it may be open to the party to contend in the alternative that the restrictions imposed by the Act are so unreasonable

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that they should be struck down on the ground that they contravene the fundamental rights granted under articlt 19(1)(f) and (g) of the Constitution. At the same time, we have to bear in mind that the legislative power conferred on the appropriate legislatures to enact laws in respect of topics covered by the several entries in the three lists can be exercised both prospectively and retrospectively. Where the legislature can make a valid law, it may provide not only for the prospective operation of the material provisions of the said law, it can also provide for the retrospective operation of the said provisions. The legislative power, in addition, includes the subsidiary or auxiliary power to validate laws which have been found to be invalid. If a law passed by a legislature is struck down by the court as being invalid for one infirmity or another, it would be competent to the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed [*see Ramakrishna & Others* v. *The State of Bihar*(1)].

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In the light of what has been stated above, we can find no legal infirmity in the provisions of the amending Act. As a result of the amendment made by Madras Act 7 of 1964 in entry 47 of the First Schedule to the principal Act, sales tax, it appears, was intended to be levied on all kinds of mineral oils. The Madras High Court, however, took the view in the case of *Burmah Shell Oil Storage and Distributing Company of India Limited* (supra) that the words "al kinds of mineral oils" took colour from the words which preceded and followed them and, as such, the mineral oils mentioned in the entry had a limited meaning, namely, mineral oils which were lubricants. Entry 47 was, therefore, held not to include furnace oil which was a non-lubricant mineral oil. It was with a view to get over the effect of that decision and to prevent the refund of sales tax already realised on the assumption that the words "all kinds of mineral oils" also covered mineral oils of non-lubricating nature that the amending Act was passed. It would be pertinent in this context to reproduce the statement of Objects and Reasons appended to the Madras General Sales Tax (Third Amendment) Bill, 1967 as under :

> "In Tax Case Nos. 108 to 110 of 1967 the Madras High Court held that the expression "all kinds of mineral oils (not otherwise provided for in this Act)" occurring in entry 47 of the First Schedule to the Madras General Sales Tax Act, 1959 (Madras Act 1 of 1959) as amended by the Madras General Sales Tax (Amendment) Act, 1964 (Madras Act 7 of 1964) will cover only such of the mineral oils as are lubricants

(1) [1964] 1 S.C.R. 897.

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> and not furnace oil, etc., which are not lubricants. It is, therefore, proposed to make a separate entry in the First Schedule to the Act so as to cover all kinds of mineral oils (other than those falling under entry 47 and not otherwise provided for in the Act), including furnace oil the rate being the same as for entry 47 and to validate the past levy and collection of tax in respect of all kinds of mineral oils (other than lubricating oils, quenching oils and greases) including furnace oil with effect from the 1st April, 1964. Existing entry 47 is also proposed to be amended to cover only lubricating oils (not otherwise provided for in the Act), quenching oils and greases."

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It would thus appear that the amending Act was intended to cure an infirmity as revealed by the judgment of the High Court and to validate the past levy and collection of tax in respect of all kinds of non-lubricating mineral oils, including furnace oils, with effect from April 1, 1964. The legislature for this purpose split the original entry 47 into two entries, 47 and 47-A. The new entry 47 related to lubricating oils (not otherwise provided for in the Act), quenching oils and greases, while entry 47-A covered all kinds of mineral oils (other than those falling under item 47 and not otherwise provided for in the Act) including furnace oil. The tax levied by entry 47-A, in our opinion, was not a fresh tax. It seems, as mentioned earlier, that the legislature had intended as a result of the change made in entry 47 by Act 7 of 1964 to levy tax on sale of mineral oils of all kinds, includling non-lubricants, at the rate mentioned in that entry. As the language used by the legislature in that entry was found by the High Court to be not appropriate for levying tax on sale of non-lubricant mineral oils, the amending Act was passed by the legislature to rectify and remove the defect in the language found by the High Court, so that the tax on sale of non-lubricant mineral oils might be levied at the rate specified in entry 47 from April 1, 1964 when Act 7 of 1964 came into force. It is axiomatic that the Government needs revenue to carry on the administration and fulfil its obligation to the ctizens. For that purpose it resorts to taxation. The total amount needed is a apportioned under different heads. The fiscal enactments brought on the statute book in that connection are sometimes challenged by the tax payer in courts of law. The courts then scrutinise the legal provision to decide whether the levy of tax is legally valid or suffers from some infirmity. In case the court comes to the conclusion that the levy of tax is not valid as the legal provision enacted for this purpose does not warrant the levy of tax imposed because of some defect in phraseology or other infirmity, the

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A legislature quite often passes an amending and validating Act. The object of such an enactment is to remove and rectify the defect in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been found by the Court to be vitiated by an infirmity. Such an B amending and validating Act in the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending and validating Act to make "small repairs" is a permissible mode of legislation and is frequently resorted to in fiscal enactments. As observed in 73 *Harvard Law Review* 692 C at p. 705 :

> "It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called 'small repairs'. Moreover, the individual who claims that a vested right has arisen from the defect is seeking a wind- D fall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive during of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect..The Court has been ex- E tremely reluctant to override the legislative judgment as to the necessity for retrospective taxation not only because of the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it."

F The above passage was quoted with approval by the Constitution Bench of this Court in the case of *Assistant Commissioner of Urban Land Tax and Others* v..*The Buckingham & Carnatic Co. Ltd., etc.*(1)

G The period from April 1, 1964 to September 13, 1965 during which the sales tax authorities charged multipoint tax on sale of furnace oil at the rate of 2 per cent was, in our opinion, very short and did not give rise to some kind of vested right in favour of the appellants. It may well be that the matter had not till then been examined by the higher authorities. It was only when the Board of Revenue was moved that the opinion was expressed H by the Board as per resolution dated August 28, 1965 that entry 47 covered furnace oil.

(1) [1970] 1 S.C.R. 268.

In the case of *Rai Ramkrishna & Others* (supra) this Court dealt with the validity of Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961 in the following circumstances. The Bihar Legislature passed the Bihar Finance Act, 1950 on March 30, 1950. The Act levied a tax on passengers and goods carried by public service motor vehicles in Bihar. The appellants challenged the validity of the Act and its provisions were struck down by this Court. The respondent then issued the Bihar Ordinance on August 1, 1961. By that Ordinance, the provisions of the Act of 1950 which had been struck down by this Court were validated and brought into force retrospectively from the date when the earlier Act purported to come into force. Later on, the provisions of the said Ordinance were incorported in the Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) Act, 1961. As a result of the retrospective operation of the Act of 1961, its material provisions were deemed to have come into force from April 1, 1950. The validity of the Act of 1961 was challenged on the ground that the retrospective operation of the provisions of the Act changed its character and took it outside the legislative competence of the legislature. It was further argued that the retrospective operation was so unreasonable that it could not be saved under clauses (5) and (6) of article 19 of the Constitution. Both these contentions were repelled and it was held that the test of the length of time covered by the retrospective operation could not by itself be treated as a decisive test.

In the case of *Epari Chinna Krishna Moorthy* v. *State of Orissa*(1) this Court dealt with the validity of the Orissa Sales Tax Validation Act, 1961. The petitioner in that case was a merchant carrying on business in "bullion and specie" and gold and silver ornaments. He was a registered dealer under the Orissa Sales Tax Act, 1947. The petitioner claimed exemption from payment of sales tax in respect of certain gold ornaments on the basis of a notification issued on July 1, 1949 under section 6 of that Act. The sales tax authorities disallowed the petitioner's claim who thereupon filed writ petitions in the High Court. The High Court upheld the petitioner's claim and issued writs directing the sales tax officer to allow the petitioner's claim for exemption. After the judgment of the High Court, the impugned Act was passed by the legislature on August 1, 1961 and was published on September 18, 1961. Section 2 of the impugned Act sought to put a meaning on the notification of July 1, 1949 and stated that the notification shall always be deemed to have meant like that. One of the contentions raised in that case was that the retrospective operation of the impugned section should

(1) [1964] 7 S.C.R. 185.

A be struck down as unconstitutional because it imposed unreasonable restrictions on the petitioner's fundamental right under article 19(1)(g). This contention did not find favour with this Court and it was observed that a legislation could not be struck down although the retrospective operation might operate harshly in some cases.

B In the case of *M/s J. K. Jute Mills Co. Ltd.* v. *The State of Uttar Pradesh and Another*(1) this Court referred to the earlier case of *The Union of India* v. *Madan Gopal Kabra*(2) and held that the power to make retrospective legislation in cases relating to tax on sale of goods was the same as in the case of income C tax. It was observed :

> "The power of a legislature to enact a law with reference to a topic entrusted to it, is, as already stated, unqualified subject only to any limitation imposed by the Constitution. In the exercise of such a power, it will be competent for the legislature to enact a law, which D is either prospective or retrospective. In the *Union of India* v. *Madan Gopal* (supra) it was held by this Court that the power to impose tax on income under entry 82 of List I in Schedule VII to the Constitution, comprehended the power to impose income-tax with retrospective operation even for a period prior to the Constitution. The position will be the same as regards laws E imposing tax on sale of goods."

Mr. Setalvad has referred to the fact that the appellants did not realise the sales tax on the sale of furnace oil at the rate of 6 per cent during at least some part of the period for which retrospective operation had been given to the amending Act. It F is contended that this fact should weigh with this Court in striking down the provisions of the amending Act. There is, in our opinion, no force in this contention. The fact that a dealer is not in a position to pass on the sales tax to others does not affect the competence of the legislature to enact a law imposing sales tax retrospectively because that is a matter of legislative policy. A similar argument was advanced in the case of *M/s J. K. Jute* G *Mills Co. Ltd.* (supra) and was repelled in the following words :

> "And then it is argued that a sales tax being an indirect tax, the seller who pays that tax has the right to pass it on to the consumer, that a law which imposes a sales tax long after the sales had taken place deprives him of that right, that retrospective operation is, in con- H sequence, an incident inconsistent with the true character of a sales tax law, and that the Validation Act is,

(1) [1962] 2 S.C.R. 1. (2) [1954] S.C.R. 451.

therefore, not a law in respect of tax on the sale of goods, as recognized, and it is *ultra vires* entry 54. We see no force in this contention. It is no doubt true that a sales tax is, according to accepted notions, intended to be passed on to the buyer, and provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. But 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 sellers to collect the tax from the purchasers. Whether a law should be enacted, imposing a sales tax, or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not affect the competence of the legislature. This question is concluded by the decision of this Court in *The Tata Iron & Steel Co. Ltd.* v. *The State of Bihar*(1)."

In the case of *Jaora Sugar Mills (P) Ltd.* v. *State of Madhya Pradesh and Others*(2) this Court dealt with the validity of section 3 of the Sugar Cess (Validation) Act, 1961 (Central Act 38 of 1961). The said section concerned the levy of sugar-cane cess and provided that "all cesses imposed, assessed or collected or purported to have been imposed, assessed or collected under any State Act before the commencement of this Act, shall be deemed to have been validly imposed, assessed or collected in accordance with law as if the provisions of the said Act and of notifications, orders and rules issued or made thereunder in so far as such provisions relate to the imposition, assessment and collection of such cess had ben included in and have been part of the section and this section had been enforced at all material times when such cess was imposed, assessed or collected". Earlier the State Act under which the sugar-cane cess had been levied was found to be invalid on the ground of want of legislative competence to deal with topics covered by it. The attack on the validity of section 3 of that Act was repelled and it was held that the Parliament could, in exercise of its legislative competence, pass a law retrospectively validating the collections made under the State statutes. The present case is on a stronger footing from the point of view of the respondents because we are dealing in this case with retrospective legislation made by the same legislature which had enacted the eariler law. We are,

(1) [1958] S.C.R. 1355. (2) [1966] 1 S.C.R. 523.

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therefore, of the opinion that the impugned provisions are a valid piece of legislation and do not contravene article 19 of the Constitution.

The appeals consequently fail and are dismissed with costs. One hearing fee.

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S.C. *Appeals dismissed.*