

A

STATE OF WEST BENGAL AND ANR.

v.

E.I.T.A. INDIA LTD. AND ORS.

MARCH 5, 2003

B

[SYED SHAH MOHAMMED QUADRI AND ASHOK BHAN, JJ.]

C

West Bengal Sales Tax Act, 1994/West Bengal Sales Tax Rules, 1995—Sections 2(6), 11(1) Explanation thereto, (5), (7), (8), (10), (11) and (12), 14(4)/ Rules 173, 174, 188 and 189—Casual traders—Liability to pay tax on sale and purchase—Transporter and owner/lessee of warehouse deemed as casual trader—Disposal of goods by them deemed to be sale as per the Act, unless contra is proved—Constitutionality of the provisions challenged—Tax Tribunal held Section 2(6) as valid, but in view of lack of machinery provision suspended the same—All other provisions held unconstitutional—provisions

D

held to be beyond legislative competence of the State—Plea that no State Legislature can create a fiction to treat any other transaction as sale except to the extent as provided under Article 366(29A) of the Constitution—On appeal held—Suspension of Section 6(2) not justified—Provisions of Section 11 are enacted to prevent evasion of tax payable under the Act—State Legislature has power to provide for measures for prevention of evasion of tax—Hence the provisions intended to prevent the evasion of tax are within the legislative competence of the State and are intra vires Entry 54 of List II of the Seventh Schedule—It will be misconceived to treat the statutory presumption incorporated in the Explanation to sub-section (1) of Section 11 as extending the definition of 'sale' in clause (29-A) of Article 366 of the

E

F

Constitution—Constitution of India, 1950—Article 366(29A)—Seventh Schedule, List II, Entry 54—Evidence Act, 1872—Section 4—Bengal Finance (Sales Tax) Act, 1941.

G

Constitution of India, 1950—Article 14—Challenge to taxation statute on the ground of classification—Held: Legislature enjoys a greater latitude for classification in the field of taxation—No legislation can be declared to be illegal on the ground of being unreasonable or on the anvil of Article 14, except when it fails to clear the test of arbitrariness and discrimination.

H

Respondents challenged the constitutional validity of Section 2(6); explanation to sub-section (1), sub-sections (5), (7), (8), (10), (11) and (12) of

Section 11; Section 14(4) of West Bengal Sales Tax Act, 1994 and Rules 172, 173, 174, 188 and 189 of West Bengal Sales Tax Rules, 1995. Taxation Tribunal held Section 2(6) of the Act as valid and constitutional with a rider that until the manner of disclosure of name and address of the consigner or consignee was prescribed in terms of the judgment, the provision as to disclosure of those particulars shall remain suspended; that explanation to sub-section (1) of Section 11 was declared to be ultra vires the Constitution; that parts of sub-section (5) of Section 11 and sub-section (4) of Section 14 were declared as invalid and unconstitutional to the extent they applied to transporters; that sub-sections (7) and (8) of Section 11 and the words 'for the purpose of sub-section (7) and Sub-Section (8) in Clause (ii) of Section 11(5) were struck down as invalid and unconstitutional and beyond the legislative competence of the State; that sub-Sections (10), (11) and (12) of Section 11 were declared unconstitutional in so far as they were applicable to transporters; that Rules 172, 173 and 174 of the Rules were also struck down; Forms 28 and 31 prescribed under Rules were struck down in so far as they related to defence tax or security in lieu thereof with reference to a transporter; Form 32 prescribed under the Rules was declared valid; that rules 188 and 189 were declared valid subject to observations in the judgment in respect of transporters.

In appeal to this Court appellant-State contended that having upheld the constitutional validity of Section 2(6) which clearly provided the particulars to be declared by the transporters, there was no valid reason for the Tribunal to suspend the operation of the Section; that the Tribunal erred in striking down the impugned provisions of the Act on the ground of lack of legislative competence ignoring the fact that the legislature had ancillary power to enact provisions to prevent evasion of tax.

Respondents contended that except to the extent the provision of Article 366 (29A) of the Constitution of India provide for a deemed sale, no State Legislature can create a fiction to treat any other transaction as sale and, therefore, the disposal of the goods by a casual trader cannot per se be treated as sale of the goods and he cannot be put to onerous task of proving a negative fact that the disposal of the goods was not by way of sale.

Allowing the appeals, the Court

HELD: 1.1 A combined reading of the definitions of 'casual trader' and 'transporter' discloses that they are aimed at preventing any possible evasion of tax payable under West Bengal Sales tax Act, 1994 by spreading a very

A wide net. A comparison of the definition of 'casual trader' in the Act with the definition of the said expression in the Bengal Finance (Sales Tax) Act, 1941 shows that there is no material difference between the two. Two categories of persons are included within the meaning of 'casual trader'. Every prudent *bonafide* transporter is expected to know the particulars of the consignor of the goods for transportation and of the consignee to whom the goods have to be delivered in West Bengal. Similarly, every reasonable transporter is expected to have a copy of the challan, transport receipt or consignment note or document of like nature in respect of goods which are being transported. The requirement to furnish these particulars cannot, therefore, be treated as requiring the transporter to furnish information which is beyond his capacity or control. So also a prudent and reasonable owner or lessee of a warehouse where such goods are stored is expected to know the name and address of the owner of such goods and requiring him to furnish those particulars cannot be said to be either oppressive, irrelevant or arbitrary. In any event, after the Act came into force, such a person is expected to know and collect necessary particulars and information so there can be no legitimate excuse for non-compliance of the statutory requirements. It is only in the event of failure to furnish such information that the definition creates a fiction deeming such a transporter of goods or owner or lessee of a warehouse as a consignor or a consignee who, has brought the goods from any place outside West Bengal for sale in West Bengal, or has procured the goods, otherwise than by way of purchase, from any person, other than the registered dealer, for sale in West Bengal, or has purchased such goods in West Bengal from any person, other than the registered dealer, for purposes other than his personal use or consumption of such goods in West Bengal, as the case may be. For the purpose of furnishing the particulars, neither any special proforma is necessary nor any machinery is required to effectuate the section. Therefore, the reasoning of the Tribunal to justify suspension of Section 6(2) for want of machinery provisions cannot be upheld. [677-B-F; H; 678-A-C]

1.2. It cannot be said that except to the extent the provision of clause 29-A of Article 366 of the Constitution of India provides for a deemed sale, no State Legislature can create a fiction to treat any other transaction as sale and, therefore, the disposal of the goods by a casual trader cannot per se be treated as sale of the goods and he cannot be put to onerous task of proving a negative fact that the disposal of the goods was not by way of sale. In Section 4 of Evidence Act, 1872, the expression 'may presume' postulates whenever it is provided by the Evidence Act that the court may presume a fact, it will regard such fact as proved, unless and until it is disproved, or may call for

proof of it, but the expression 'shall presume' implies, whenever the Evidence Act says that the court 'shall presume' a fact, it shall regard such fact as proved, unless and until it is disproved. The statutory presumption incorporated in Explanation to sub-section (1) of Section 11 is in the nature of the second category of presumption. The deeming provisions embodied in the Explanation does not extend the meaning of sale to every disposal of goods. It is attracted when a transporter or an owner or a lessee of a warehouse is unable to account for the disposal of goods; the fact of disposal of the goods in question having been established, the statutory presumption which is a rebuttable presumption, would apply and the disposal of goods shall be deemed to be by way of sale; it will be open to such a person to rebut the presumption. Raising of such rebuttable presumption is normal legislative practice and no invalidity can be attributed to the same. It will be wholly misconceived to treat the statutory presumption incorporated in the Explanation as extending the definition of 'sale' in clause (29-A) of Article 366 of the Constitution. Indeed there can be no analogy between the definition of deemed sale incorporated in clause (29-A) of Article 366 of the Constitution and the statutory presumption incorporated in Explanation to sub-section (1) of Section 11. Explanation to Section 11(1) is valid in law and the challenge to its invalidity is misconceived and unsound. [682-B-H; 683-A]

Sodhi Transport Co. and Ors. v. State of Uttar Pradesh and Ors., [1986] 2 SCC 486, relied on.

1.3. Sub-sections (3), (4), (5), (6), (7) and (8) of Section 11 are part of the same scheme aimed at prevention of evasion of tax payable under the Act. Sub-sections (10) and (12) are consequential provisions. Imposition of penalty is authorized under sub-section (11). These sub-sections stand or fall along with sub-sections (5), (7) and (8). The impugned sub-sections of Section 11 are enacted to prevent evasion of tax payable under the Act. State Legislature, while providing for levy of impost, has power to provide for incidental matters, including measures for prevention of evasion of tax. Hence the impugned provisions which are intended to prevent the evasion of tax payable under the Act are within the legislative competence of the State and are *intra vires* Entry 54 of List II of the Seventh Schedule to the Constitution.

[684-G, H; 685-A; 687-F]

M/s. Nand Lal Raj Kishan v. Commissioner of Sales Tax, Delhi and Anr., [1962] 1 SCR 283; *Balaji v. Income-Tax Officer, Special Investigation Circle*, [1962] 2 SCR 983; *Khyerbari Tea Co. Ltd. and Anr. v. The State of Assam*, [1964]

A 5 SCR 975; *Tripura Goods Transport Association and Anr. v. Commissioner of Taxes and Ors.*, [1999] 2 SCC 253 and *State of Rajasthan and Anr. v. DP Metals*, [2002] 1 SCC 279, relied on.

B 1.4. Sub-section (4) of Section 14 is concerned with the detention of the vehicle for purposes of assessment and recovery of tax. This provision is also an anti-evasion of tax provision and over-rides Section 46. There is no illegality in sub-section (4) of Section 14 of the Act. [689-B, C]

C 1.5. The impugned provisions of sub-sections (5), (7), (8) of Section 11 and sub-section (4) of Section 14 are broadly akin to the provisions in the Bengal Finance (Sales Tax) Act, 1941, the validity of which was upheld by this Court. [689-D]

State of West Bengal and Anr. v. Road Transport Association, Sitaguri and Anr., [2003] 3 SCC 593 = JT [2003] 2 522, relied on.

D 1.6. In the view taken in upholding the provisions of the Act, the impugned Rules, namely Rules 172, 173, 174 and 188 of West Bengal Sales Tax Rules, 1995 and Forms 28 and 31 are also upheld. [689-E]

E 2. If a legislation is found to lack in legislative competence or is found to be in contravention of any provision of the Constitution, the impugned legislation cannot escape the vice of unconstitutionality. A challenge to any statutory provision on the ground of the classification being discriminatory and violative of Article 14 of the Constitution, can be successfully met on the principle of reasonable classification having nexus to the object of the Act sought to be achieved. However, the legislature enjoys a greater latitude for classification in the field of taxation. No legislation can be declared to be illegal, much less unconstitutional on the ground of being unreasonable or harsh on the anvil of Article 14 of the Constitution, except when it fails to clear the test of arbitrariness and discrimination which would render it violative of Article 14 of the Constitution. [674-F, G, H; 675-B]

G *Keshavananda Bharti v. State of Kerala*, AIR [1973] SC 1643; *State of Andhra Pradesh and Ors. v. Macdowell and Co.*, [1996] 3 SCC 709; *State of Bombay v. F.N. Balsara*, [1951] SCR 682; *Budhan Choudhary and Ors. v. State of Bihar*, [1955] 1 SCR 1045; *M/s. Steelworth Ltd. v. State of Assam*, [1962] Suppl. 2 SCR 589; *Gopal Narain v. State of Uttar Pradesh and Anr.*, AIR [1964] SC 370 and *Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh and Ors.*, AIR H [1980] SC 286, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8182 of A
1995.

From the Judgment and Order dated 7.4.1995 of the West Bengal
Taxation Tribunal in R. No. 152 of 1993.

WITH

C.A. Nos. 11649-50/95, 5863-64, 5865-66 and 5534 of 1997. B

B. Sen and Rakesh Dwivedi, Dayan Krishnan, S. Mishra for M/s. Sinha
and Das for the Appellants.

Yashank Adhyaru and Ms. V.D. Khanna, for the Respondents. C

The Judgment of the Court was delivered by

SYED SHAH MOHAMMED QUADRI, J.

Civil Appeal Nos. 5863-64/1997, 5865-66/1997 and 5534/1997 :

These appeals from various orders of the West Bengal Taxation Tribunal D
(for short, 'the Tribunal') raise a common question as to the constitutional
validity of provisions, mentioned hereunder, of the West Bengal Sales Tax
Act, 1994 [West Bengal Act XXIX of 1994] (for short, 'the Act') and the
Rules made thereunder. The Act came into force on March 23, 1995. It
repealed the Bengal Finance (Sales Tax) Act, 1941 which was then in force. E

The respondents challenged the constitutional validity of the following F
provisions of the Act: (i) Section 2(6); (ii) Explanation to sub-section (1),
sub-section (5), (7), (8), (10), (11) and (12) of Section 11; (iii) sub-section
(4) of Section 14; and (iv) Rules 172, 173, 174, 188 and 189 of the West
Bengal Sales Tax Rules, 1995 (for short, 'the Rules'). The Tribunal held:

"that section 2(6) of the 1994 Act is valid and constitutional with a
rider that until the manner of disclosure of name and address of the
consignor or consignee is prescribed in terms of this judgment, the
provision as to disclosure of those particulars shall remain suspended.
Observations have also been made in the body of the judgment G
regarding the extent of responsibility of a transporter in furnishing
the required documents and disclosing the required particulars. The
Explanation below sub-section (1) of Section 11 is declared to be
unreasonable and *ultra vires* the Constitution. The said Explanation
is, therefore, struck down. As per paragraphs 20 and 21 of this H

A judgment, parts of sub-section (5) of Section 11 and sub-section (4) of Section 14 are declared as invalid and unconstitutional to the extent they apply to a transporter. Sub-sections (7) and (8) of section 11 and the words 'for the purpose of sub-section (7) and sub-section (8)' in clause (ii) of section 11(5) are struck down as invalid and unconstitutional and beyond the competence of the State Legislature.

B Sub-sections (10), (11) and (12) of Section 11 are also declared unconstitutional insofar as they are applicable to transporters. Rules 172, 173 and 174 of the 1995 Rules are struck down for the reasons already stated. Forms 28 and 31 prescribed under the 1995 Rules are struck down in so far as they relate to advance tax or security in lieu thereof with reference to a transporter. Form 32 prescribed under those rules is valid. Rules 188 and 189 of the said Rules are valid subject to observations in this judgment in respect of transporters."

C

Mr. B. Sen, learned senior counsel appearing for the appellants-State, has contended that having upheld the constitutional validity of Section 2(6) which clearly provides the particulars to be declared by the transporter, there was no valid reason why the Tribunal should suspend the operation of the section so that portion of the order needs to be set aside. It is submitted that the Tribunal erred in striking down the impugned provisions of the Act on the ground of lack of legislative competence ignoring the fact that the legislature has ancillary power to enact provisions to prevent evasion of tax.

D The learned counsel has argued that the Tribunal is clearly wrong in declaring Explanation below Section 11(1) of the Act as arbitrary, unreasonable so unconstitutional.

E

In examining the constitutional validity of the impugned provisions of a statute, it will be useful to bear in mind the following well-settled propositions. If a legislation is found to lack in legislative competence or is found to be in contravention of any provision of Part III or any other provision of the Constitution, the impugned legislation cannot escape the vice of unconstitutionality [See: *Keshavananda Bharti v. State of Kerala*, AIR (1973) SC 1643 and also *State of Andhra Pradesh and Ors. v. Macdowell & Co.*, [1996] 3 SCC 709]. A challenge to any statutory provision on the ground of the classification being discriminatory and violative of Article 14 of the Constitution, can be successfully met on the principle of reasonable classification having nexus to the object of the Act sought to be achieved; [See: *State of Bombay v. F.N. Balsara*, [1951] SCR 682 and *Budhan Choudhary and Ors. v. State of Bihar*, [1955] 1 SCR 1045]. However, the legislature enjoys a greater latitude for classification in the field of

F

G

H

taxation [See: *M/s. Steelworth Ltd. v. State of Assam*, [1962] Supl. 2 SCR 589; *Gopal Narain v. State of Uttar Pradesh and Anr.*, AIR (1964) SC 370; and *Ganga Sugar Corporation Ltd. v. State of Uttar Pradesh and Ors.*, AIR (1980) SC 286]. No legislation can be declared to be illegal, much less unconstitutional on the ground of being unreasonable or harsh on the anvil of Article 14 of the Constitution, except, of course, when it fails to clear the test of arbitrariness and discrimination which would render it violative of Article 14 of the Constitution. [See : *M/s. Steelworth Ltd. and Macdowell & Co.* (supra)].

Inasmuch as the expression 'casual trader', defined in sub-section (6) of Section 2 of the Act is of great significance it will be apt to read it here :

"2. Definitions-- In this Act, unless the context otherwise requires,-

6. 'casual trader' means a person, other than a registered dealer, who has no fixed place of business in West Bengal and who,--

- (a) as a consignor or consignee, brings into West Bengal any goods, other than those specified in Schedule I or Schedule IV or those notified under sub-section (2) of section 10, from any place outside West Bengal for sale in West Bengal, or
- (b) procures goods, other than those specified in Schedule I or Schedule IV, otherwise than by way of purchase from a person other than a registered dealer, for sale in West Bengal, or
- (c) purchases any goods, other than those specified in Schedule I or Schedule IV, in West Bengal from any person, other than a registered dealer, for purposes other than his personal use or consumption of such goods in West Bengal, any includes, whether he has a fixed place of business in West Bengal or not,--
 - (i) a transporter as defined in clause (a) of the Explanation of Section 72, and who while carrying such goods in his goods vehicle fails to disclose the name and address on the consignor or consignee in West Bengal or fails to furnish copy of invoice, challan, transport receipt or consignment note or document of like nature in respect of such goods, or
 - (ii) an owner or lessee of a warehouse where such goods are stored and who fails to disclose the name and address of the owner of such goods or fails to satisfy the Commissioner that such goods are for his personal use or consumption,

A and who, for such failure, shall be deemed to have brought such goods as specified in sub-clause (a) or procured such goods as specified in sub-clause (b) or purchased such goods in sub-clause (c), as the case may be on his own account."

B A perusal of the definition of the expression "casual trader" shows that it has three parts. The first part defines the expression to mean a person, other than a registered dealer, not having a fixed place of business in West Bengal and who : (a) either as a consignor or as a consignee, *brings into West Bengal any goods* other than those specified in Schedule I or Schedule IV or those notified under sub-section (2) of Section 10 (hereinafter referred to as "the excluded goods") from any place outside West Bengal for sale in West Bengal, or (b) *procures goods*, other than the excluded goods, otherwise than by way of purchase from a person other than a registered dealer *for sale in West Bengal*, or (c) *purchases any goods*, other than the excluded goods, in West Bengal from any person, other than a registered dealer, for purposes other than *his personal use or consumption of such goods in West Bengal*. The second part takes in its fold a person, whether he has a fixed place of business in West Bengal or not, who is (i) a transporter, as defined in clause (a) of the Explanation to Section 72, and while carrying such goods in his goods vehicle, fails: (a) to disclose the name and address of the consignor or consignee in West Bengal, or (b) to furnish a copy of invoice, challan, transport receipt or consignment note or document of like nature in respect of such goods; or (ii) an owner or lessee of a warehouse where such goods are stored and fails (a) to disclose the name and address of the owner of such goods, or (b) to satisfy the Commissioner that such goods are for his personal use or consumption. And the third part contains a statutory presumption to the effect that such a transporter or an owner or lessee of a warehouse, who fails to fulfil the obligations mentioned above, is deemed to have brought such goods as specified in clauses (a) or (b) or (c), as the case may be, in the first part of the definition, on his own account.

A 'transporter' is defined in Explanation (a) to Section 72, which reads as follows:

G " 'transporter' means the owner, or any person having possession or control, of a goods vehicle who transports on account of any other person for hire or on his own account any goods from one place to another, and includes any person whose name is entered in the permit granted under the Motor Vehicles Act, 1988 (59 of 1988), as the holder thereof, the driver or any other person in charge of such

H

vehicle." A

It is seen that the explanation defined the terms 'transporter' to mean the owner or any person having possession or control of a goods vehicle who transports on account of any other person for hire or on his own account any goods from one place to another; it includes any person whose name is entered in the permit granted under the Motor Vehicles Act, 1988 and the holder thereof, the driver or any other person in charge of such vehicle. B

A combined reading of the definitions of 'casual trader' and 'transporter' discloses that they are aimed at preventing any possible evasion of tax payable under the Act by spreading a very wide net. A comparison of the definition of 'casual trader' in the Act with the definition of the said expression in the Bengal Finance (Sales Tax) Act, 1941 (for short, 'the 1941 Act') shows that there is no material difference between the two. Two categories of persons are included within the meaning of 'casual trader'; the first is the transporter who while carrying the goods fails to disclose the name and address of the consignor or the consignee in West Bengal or having so declared the names, fails to furnish a copy of the invoice, challan, transport receipt or consignment note or document of like nature in respect of such goods. Every prudent *bona fide* transporter is expected to know the particulars of the consignor of the goods for transportation and of the consignee to whom the goods have to be delivered in West Bengal. Similarly, every reasonable transporter is expected to have copy of the challan, transport receipt or consignment note or document of like nature in respect of goods which are being transported. The requirement to furnish these particulars cannot, therefore, be treated as requiring the transporter to furnish information which is beyond his capacity or control. So also a prudent and reasonable owner or lessee of a warehouse where such goods are stored is expected to know the name and address of the owner of such goods and requiring him to furnish those particulars cannot be said to be either oppressive, irrelevant or arbitrary. As an alternative to non-disclosure of the name and address of the owner of the goods stored in the warehouse, such an owner or lessee is required to satisfy the Commissioner that such goods are for his personal use or consumption. A person in possession of the goods must have stored them for and on behalf of the owner thereof or as his own goods for his personal use or consumption. The information required to be furnished by the owner or the lessee of a warehouse will normally be within his knowledge and, at any rate, ought to be within the knowledge of a reasonable owner or the lessee of a warehouse. In any event, after the Act came into force, such a person is expected to know and collect necessary particulars and information so there can be no legitimate excuse for non- C D E F G H

A compliance of the statutory requirements. It is only in the event of failure to furnish such information that the definition creates a fiction deeming such a transporter of goods or owner or lessee of a warehouse as a consignor or a consignee who, has brought the goods from any place outside West Bengal for sale in West Bengal, or has procured the goods, otherwise than by way of purchase, from any person, other than the registered dealer, for sale in the West Bengal, or has purchased such goods in West Bengal from any person, other than the registered dealer, for purposes other than his personal use of consumption of such goods in West Bengal, as the case may be. For the purpose of furnishing the particulars under the afore-mentioned provision, neither any special proforma is necessary nor any machinery is required to effectuate the section. It is, therefore, difficult to uphold the reasoning of the Tribunal to justify suspension of the said provision for want of machinery provisions. In this regard, the Tribunal referred to the Explanation to Section 2(1)(a)(i) of the 1941 Act, which had also been suspended by it in an earlier proceeding. In the appeal against the said order, in Civil Appeal No. 8180 of 1995, we have held that keeping that provision under suspension for want of a machinery was uncalled for and was illegal. We reiterate the same view in regard to Section 2(6) of the Act. We record the candid concession of Mr. Yashank Adhyaru, learned senior counsel for the respondents, that it will not be possible to support the reasoning and the conclusion of the Tribunal on this aspect.

E We shall now advert to various provisions of Section 11 which are brought under challenge. Inasmuch as almost entire Section 11 is under challenge, it is quoted here :

F "11. *Liability to pay tax on sales by casual trader* - (1) Notwithstanding anything contained elsewhere in this Act, a casual trader shall be liable to pay tax on all his sales in West Bengal of goods, other than those specified in Schedule I or Schedule IV or those notified under sub-section (2) of Section 10, brought by him into West Bengal from any place outside West Bengal, or on all his sales in West Bengal of goods, other than those specified in Schedule I or Schedule IV, G procured by him otherwise than by way of purchase from a person other than a registered dealer.

H Provided that no tax shall be levied on sales of goods which are effected on or after the date on which he becomes liable to pay tax under Section 9 or sub-section (3) of Section 27 and is registered under Section 26 or Section 27.

Explanation - Where a transporter, or an owner or a lessee of a warehouse, deemed to be a casual trader in respect of any goods referred to in sub-section (1), is found to have disposed of such goods the disposal of such goods shall be deemed to have been made by way of sale by him in West Bengal, unless he proves it otherwise with satisfactory evidence. A

(2) The tax payable under this section by a casual trader shall be levied at the rate referred to in clause (a), clause (b), clause (d), clause (e), clause (f), clause (g) or clause (h), as the case may be, of sub-section (1) of Section 17. B

(3) The tax payable under this section shall, notwithstanding anything contained in section 46, be determined, collected and recovered in such manner and by such authority as may be prescribed and shall be paid by such time as may be prescribed. C

(4) No person shall, except in accordance with the restrictions and conditions provided in sub-section (5), bring into West Bengal any goods, other than those specified in Schedule I or Schedule IV or those notified under sub-section (2) of Section 10. D

(5) Every person transporting in a road vehicle,--

(a) goods, other than those specified in Schedule I or Schedule IV or those notified under sub-section (2) of Section 10, brought by him into West Bengal, or E

(b) goods, other than those specified in Schedule I or Schedule IV, procured by him otherwise than by way of purchase from a person, other than a registered dealer,

shall, on interception by any person appointed under sub-section (1) of Section 3 and authorised by the Commissioner in this behalf (hereinafter referred to in this section as the authorised officer) stop the vehicle and produce, on demand, before such authorised officer invoice, challan, transport receipt, consignment note or document of like nature in respect of such goods and shall also furnish the name, address and number of the certificate of registration of the consignor or consignee, if registered, and thereafter,-- F G

(i) if it appears to the authorised officer that such goods are being transported by a person who is not a casual trader liable to pay tax under this section, he shall immediately allow movement of such vehicle, or H

A (ii) if it appears to the authorised officer that the goods are being transported by a casual trader or by some person on his behalf, he may detain such vehicle ordinarily for a period not exceeding twenty-four hours for the purposes of sub-section (7) and sub-section (8).

B (6) For the purposes of this section or section 14, the owner or lessee of a warehouse where goods are stored, shall furnish, on demand, before the Commissioner or the authorised officer.-

(a) if he is the owner of such goods, the invoice, challan or other documents in support of the manner of securing such goods, or

C (b) if he declares that the goods are being stored by another person, name and address of the person who has stored the goods and evidence in support of occupancy of the warehouse by that person.

and in the event of failure to furnish such particulars or evidence within a reasonable time, the authorised officer may seal such warehouse for a period ordinarily not exceeding twenty-four hours from the time of enquiry or search for the purposes of sub-section (7) and sub-section (8).

D (7) if the Commissioner or any person appointed under sub-section (1) of Section 3 to assist him is satisfied that a casual trader may become liable to pay tax under sub-section (1) in respect of any goods, he may, in order to secure payment of tax that may become due upon determination of tax under sub-section (3) and for reasons to be recorded in writing, demand from such casual trader an amount in advance equivalent to the amount of tax that may become due from him after determination, or security for an equivalent amount, after taking into consideration the saleable value of such goods.

E

F (8) The amount in advance equivalent to the amount of tax that may become due from a casual trader after determination after taking into consideration the saleable value of the goods as aforesaid shall, on demand under sub-section (4), be paid by him in advance and shall be adjusted with the amount of tax due from him; and the security, if any, for the equivalent amount shall, on demand, be furnished by him, and shall be refunded to him, in such manner and on such terms and conditions as may be prescribed.

G

(9) For the purposes of this section, if-

H (a) production and inspection of accounts, registers and documents,

and seizure thereof,

A

(b) entry, search and sealing of warehouse.

(c) interception, detention and search of any road vehicle, and

(d) seizure of any goods,

B

are required by the authorised officer, the provision of section 65, section 66, section 67, section 69 and section 70 shall apply mutatis mutandis.

(10) Where the Commissioner or the authorised officer has reason to believe that a person transporting goods has contravened the restrictions and conditions provided in sub-section (4) or section (5) or an owner or a lessee of a warehouse fails to comply with the conditions provided in sub-section (6), and if such person, owner or lessee, as the case may be, fails to comply with the provisions of sub-section (8), the Commissioner or the authorised officer, as the case may be, shall seize the goods with containers or other packing materials, if any.

C

D

(11) Where the goods are seized by the Commissioner or the authorised officer under sub-section (10), he may, by an order in writing impose upon the owner of such goods, where particulars of the owner of such goods are available and the owner is a casual trader, or upon the person from whom goods are seized after giving such owner or person, as the case may be, a reasonable opportunity of being heard, a penalty of a sum not exceeding twenty-five per cent of the value of goods so seized, and for the purposes of sub-section (1), sub-section (2) and sub-section (3) of section 71 shall apply mutatis mutandis.

E

F

(12) If the penalty is not paid, the seized goods may be sold in open auction and sale proceeds thereof shall be applied in the manner, and subject to the conditions, provided in sub-section (4), sub-section (5), sub-section (6), sub-section (7), and sub-section (8) of Section 71 as may be applicable for the purpose of this section."

G

Section 11 is a charging section in respect of all sales of a 'casual trader'. Sub-section (1) thereof opens with a non-obstante clause, gives it over-riding effect over other provisions of the Act and mandates that a casual trader shall be liable to pay tax on all his sales in West Bengal of goods, other than the excluded goods, brought by him into West Bengal from any

H

A place outside West Bengal or on all his sales in West Bengal of goods procured by him otherwise than by way of purchase from a person other than a registered dealer. The proviso is not relevant for our purpose.

The Explanation to sub-section (1) says that where a transporter or an owner or a lessee of a warehouse, deemed to be a casual trader in respect of any goods referred to in sub-section (1), is found to have disposed of such goods, the disposal of such goods shall be deemed to have been made by way of sale by him in West Bengal, unless he proves to the contra with satisfactory evidence. It is this Explanation which has been the subject-matter of a lengthy debate. It is contended by Mr. Yashank Adhyaru that except to the extent the provision of clause 29-A of Article 366 of the Constitution of India provides for a deemed sale, no State Legislature can create a fiction to treat any other transaction as sale and, therefore, the disposal of the goods by a casual trader cannot *per se* be treated as sale of the goods and he cannot be put to onerous task of proving a negative fact that the disposal of the goods was not by way of sale. This contention, though attractive, lacks substance. It will be apposite to notice here Section 4 of the Indian Evidence Act, 1872, which defines, *inter alia*, the expressions "may presume" and "shall presume". The expression 'may presume' postulates whenever it is provided by the Evidence Act that the court may presume a fact, it will regard such fact as proved, unless and until it is disproved, or may call for proof of it; but the expression 'shall presume' implies, whenever the Evidence Act says that the court 'shall presume' a fact, it shall regard such fact as proved, unless and until it is disproved. The statutory presumption incorporated in Explanation to sub-section (1) of Section 11 is in the nature of the second category of presumption. The deeming provision embodied in the Explanation does not extend the meaning of sale to every disposal of goods. It is attracted when a transporter or an owner or a lessee of a warehouse is unable to account for the disposal of goods; the fact of disposal of the goods in question having been established, the statutory presumption which is rebuttable presumption, would apply and the disposal of goods shall be deemed to be by way of sale; it will be open to such a person to rebut the presumption. Raising of such rebuttable presumption is a normal legislative practice and no invalidity can be attributed to the same. It will be wholly misconceived, in our view, to treat the statutory presumption incorporated in the Explanation as extending the definition of 'sale' in clause 29-A of Article 366 of the Constitution. Indeed there can be no analogy between the definition of deemed sale incorporated in clause 29-A of Article 366 of the Constitution and the statutory presumption incorporated in Explanation to sub-section (1) of Section

11. For these reasons, we cannot sustain the finding of the Tribunal. We hold that the said Explanation is valid in law and the challenge to its invalidity is misconceived and unsound. A

In *Sodhi Transport Co. and Ors v. State of Uttar Pradesh and Ors.*, [1986] 2 SCC 486, Section 28-B of the Uttar Pradesh Sales Tax Act, 1948 was assailed as unconstitutional. It enacts a rebuttable presumption on the failure of a driver or other person in charge of vehicle carrying the goods to deliver the pass to the officer in charge of the check post or barrier before his exit from the State. It says, "it shall be presumed" that the goods were sold within the State. Upholding the constitutional validity of the said provision, it was observed that as a rebuttable presumption, it had the effect of shifting the burden of proof. The Court has pointed out that the authority concerned before levying sales tax arrives at the conclusion by a judicial process that the goods have been sold inside the state and in so doing, relies upon the statutory rule of presumption contained in Section 28-B of the Act which may be rebutted by the persons against whom action is taken under Section 28-B. The person concerned has opportunity to displace the presumption by leading evidence, therefore, there is no unconstitutionality in it. B C D

It is provided in sub-section (2) that the levy of tax payable by a casual trader shall be at the rate referred to in clauses (a), (b), (d), (e), (f), (g) or (h), as the case may be, of sub-section (1) of Section 17. Sub-section (3) says that the tax payable under Section 11 shall be determined, collected and recovered in such manner and by such authority and as may be prescribed, notwithstanding anything contained in Section 46. The mandate contained in sub-section (4) is that no person shall bring into West Bengal any goods (other than the excluded goods), except in accordance with the restrictions and conditions provided in sub-section (5). E F

A plain reading of the impugned provisions of sub-section (5) of Section 11, quoted above, shows that it incorporates the restrictions and conditions, subject to which such goods can be brought into West Bengal. A detailed procedure outlining the obligations of the transporter or procurer of goods is laid down. The fiat contained therein is that every person transporting in a road vehicle goods, other than the excluded goods, brought by him into West Bengal or goods procured by him, other than the excluded goods, otherwise than by way of purchase, from a person other than a registered dealer, shall stop the vehicle, on interception by any person appointed under sub-section (1) of Section 3 and authorised by the Commissioner in that behalf (referred G H

- A to as the authorised person in this section) and produce, on demand before that officer, invoice, challan, transport receipt, consignment note or document of like nature in respect of such goods and also furnish the name, address and number of certificate of registration of the consignor or the consignee, *if registered*. If, however, the consignor or the consignee is not registered, the requirement to furnish any number of certificate of registration would be incapable of compliance. The authorised officer has to immediately allow movement of the vehicle on he being satisfied that such goods are being transported by a person who is not a casual trader liable to pay tax under that section; he is empowered to detain such vehicle for a period not exceeding twenty four hours for the purposes of sub-section (7) and (8) of that section,
- B
- C only if it appears to him that the goods are being transported by a casual trader or by some other person on his behalf.

A careful reading of sub-section (7) makes it clear that the Commissioner or any person appointed under sub-section (1) of Section 3 to assist him, on being satisfied that a casual trader may become liable to pay tax under sub-section(1) thereof in respect of any goods, may with a view to secure payment of tax that may become due upon determination under sub-section (3) and for reasons to be recorded in writing, demand from such casual trader an amount in advance equivalent to the amount of tax that may become due from him after determination, or security for an equivalent amount after taking into consideration the saleable value of such goods. It does not postulate payment of advance tax. What it aims is an amount in advance equivalent to the amount of tax that may become due from a casual trader or security for an equivalent amount depending upon the saleable value of the goods in question. There is thus a clear nexus between the amount in advance or security and the levy of impost on the casual trader. The provision is meant to ensure collection of tax. Sub-section (8) provides for payment of the amount in advance or the security, if any, referred to in sub-section (7) by a casual trader on demand under sub-section (4) at the time of bringing any goods, except those specified in Schedules I and IV or those notified under Section 10(2) of the Act, for being adjusted with the amount of tax due from him and for refund after due adjustment in the prescribed manner.

- D
- E
- F
- G
- H It is, thus, clear that sub-sections (3), (4), (5), (6), (7) and (8) are part of the same scheme aimed at prevention of evasion of tax payable under the Act. Sub-sections (10) and (12) are consequential provisions. Sub-section (10) empowers the Commissioner or the authorised officer to seize the goods with containers or other packing materials, if any, when he has reason to believe contravention of the restrictions and conditions provided in sub-sections

(4) and (5) or non-compliance of sub-section (6) and (8). In the case of seizure of goods under sub-section (10), imposition of penalty is authorised under sub-section (11). Sale of the seized goods in open auction on failure to pay the penalty is dealt with in sub-section (12). It is a common ground that these sub-sections stand or fall along with sub-section (5), (7) and (8). We have indicated above that the impugned sub-sections of Section 11 are enacted to prevent evasion of tax payable under the Act. The main challenge against those provisions is on the ground of legislative competence.

On the issue of legislative competence, we shall refer to Entry 54 of List II of the Seventh Schedule to the Constitution which is the field of State legislation for imposing taxes on the sale or purchases of goods, other than newspaper. This Entry is subject to the provisions of Entry 92-A of List I of the Seventh Schedule to the Constitution. It is well-settled that the State Legislature, while providing for levy of impost, has power to provide for incidental matters, including measures for prevention of evasion of tax.

In *M/s. Nand Lal Raj Kishan v. Commissioner of Sales Tax Delhi and Anr.*, [1962] 1 SCR 283, the validity of Section 8-A of the Bengal Finance (Sales Tax) (Delhi Amendment) Act, 1956 was assailed in a writ petition filed under Article 32 of the Constitution. That provision enables the Commissioner of Sales Tax to demand security from dealers for payment of tax. The contention of the petitioner was that the section conferred undefined, unlimited and unrestricted power to the Commissioner and that there was no limit fixed for the amount of security. It was also urged that no enquiry was contemplated before fixing the amount of security. The validity of Section 8-A was upheld on the view that it did not give any unlimited or unrestricted power to the Commissioner and that it was subject to the condition that it must appear to him to be necessary to demand security for the proper realisation of tax. It was observed that the power to levy tax included the power to impose reasonable safeguards for collecting it and, therefore, demanding security for the proper payment of tax was neither an arbitrary condition nor an unreasonable restriction. In our view, this judgment does not help the respondents for reasons more than one. Firstly, Section 8-A of that Act, as it stood at that time was upheld by the Constitution Bench as valid and secondly, in the instant case, the impugned provisions embody ample safeguards for a transporter of goods as also for an owner or lessee of a warehouse, enquiry is contemplated for determination of the amount in advance or security authorised to be demanded which, in any event, cannot be more than the amount of tax that could be levied in respect of the goods in question on such a person. It supports the case of the appellant.

A In *Balaji v. Income-tax Officer, Special Investigation Cricle*, [1962] 2
SCR 983, the petitioner challenged the provisions of Section 16(3)(a)(i) of
the Income Tax Act, 1922 in this Court under Article 32 of the Constitution
of India. The petitioner and his wife started a business in partnership and
admitted their minor sons to it. While computing the total income of the
petitioner for the purpose of assessment to income tax, the Income Tax Officer
B included the share of the income of the wife and the minor sons under the
said provision. It was held that Entries in the legislative lists were not powers
but fields of legislation and that the widest possible, import and significance
should be attached to them. So interpreting, it was observed that the relevant
Entry must cover such legislation as the impugned provision intended to
C prevent the evasion of tax; it is a settled proposition that in matters of taxation,
the power to legislate includes the incidental power to legislate for evasion
of tax for which the Entry provides.

In *Khyerbari Tea Co. Ltd and Anr. v. The State of Assam*, [1964] 5
SCR 975, the question before the Constitution Bench was, whether the Assam
D Taxation (on Goods carried by Road or on Inland Water-ways) Act [Assam
Act X of 1961] was constitutionally valid. It was held that the entries in the
three lists in the Seventh Schedule must be given the widest possible
interpretation and that the power conferred on the Legislature to levy tax
must be widely construed so as to include the power to select the taxable
articles to fix the rates, to prescribe the machinery for recovery, to prevent
E evasion and to prescribe the procedure for determining the amount payable
by any individual. It was added that Entry 56 of List II in giving the Legislature
the power to enact the impugned Act, required that the tax must be levied
only against the owner of the goods that were carried or against persons who
carried them. If the tax was really levied on goods carried, the Legislature
F was free to prescribe the machinery for its recovery. In that view of the
matter, it was held that sub-sections (1) and (2) of Section 3 of that impugned
Act, which imposed the tax and made the producer liable to pay the same
could not, therefore, be impugned on the ground of legislative incompetence.

In *Tripura Goods Transport Association and Anr. v. Commissioner of
G Taxes and Ors.*, [1999] 2 SCC 253, Sections 29, 30, 32, 36-A, 38-B and 2(b)
of the Tripura Sales Tax Act 1976 [98 of 1976] were assailed on the ground
of lack of legislative competence. Those provisions required the appellants
therein to obtain a certificate of registration and to comply with various other
formalities prescribed under the Act and the Rules made thereunder. A learned
Single Judge of the Gauhati High Court had dismissed the writ petition. That
H order was upheld by the Division Bench of the High Court in appeal. On

further appeal to this Court, it was contended that being transporters, they were not trading in sale or purchase of any goods and therefore they could not be held to be dealers within the meaning of the Act and as such the impugned provisions which laid certain obligation on them were beyond the legislative competence of the State Legislature under Entry 54 of List II of the Seventh Schedule to the Constitution. Negating the contention it was held that if the Legislature makes any ancillary or subsidiary provisions which incidentally transgresses over its jurisdiction for achieving the object of such legislation, it would be a valid piece of legislation. The entries in a legislative list should not be read in a narrow or pedantic sense but must be given their fullest meaning, the widest amplitude and be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended. Thus, the provision incorporating mechanism to seal all loopholes of escape and casting obligation on someone to perform certain acts to achieve this objective was held to be a valid provision.

In *State of Rajasthan and Anr. v. DP Metals*. [2002] 1 SCC 279, the provisions of the Rajasthan Sales Tax Act, 1994 [22 of 1995] for levy of penalty on person in charge of goods for non-compliance with certain statutory provisions or for submission of false or forged documents or declaration were questioned as being beyond the legislative competence of the State. Rejecting the contention, it was laid down that Entry 54 of List II of the Seventh Schedule to the Constitution has to be construed liberally. It has been observed that the settled position in law is that provisions to check evasion of tax are within the legislative competence of the States under Entry 54 of List II, therefore provisions which made the imposition of tax efficacious or to prevent evasion of tax are within the legislative competence of the State.

From the above discussion it follows that the afore-mentioned impugned provisions which are intended to prevent the evasion of tax payable under the Act are within the legislative competence of the State and are *intra vires* Entry 54 of List II of the Seventh Schedule to the Constitution.

Insofar as sub-sections (10) and (11) are concerned, it has already been noted above that they stand or fall along with sub-sections (7) and (8) of the said section. We have held above that sub-sections (7) and (8) are valid and therefore, consequentially, no illegality can be attributed to sub-sections (10) and (11). They have to be upheld as constitutionally valid provisions.

The provision of the Act which remains to be considered is sub-section

A (4) of Section 14. Whereas Section 11 deals with levy to tax on sales by casual trader, Section 14 is a charging section in respect of purchases made by a casual trader. It directs that, notwithstanding anything contained elsewhere in the Act, a casual trader shall be liable to pay tax on every purchase of goods, other than those specified in Schedule IV in West Bengal. This liability is subject to the provisions of sub-section (3) of Section 14. The purchases which are exempted are specified under the proviso to sub-section (1). Sub-section (2) speaks of rate of tax. Sub-section (3) deals with a situation where a casual trader makes regular purchases. Sub-section (4) which is impugned reads as under:

C "Every person transporting in a road vehicle goods, other than those specified in Scheduled I or Schedule IV, purchased by him in West Bengal on his own account or on behalf of any other person shall, on interception by any person appointed under sub-section (1) of Section 3 and authorized by the Commissioner in this behalf (hereinafter referred to in this section as the authorised officer), stop the road vehicle and produce on demand, before such authorized officer, invoice, challan, transport receipt or consignment note or document of like nature in respect of such goods and shall also furnish the name, address and number of certificate of registration of consignor or consignee, if registered, and thereafter,--

D

E (a) if the authorized officer is satisfied that the person transporting the goods is not liable to pay tax under sub-section (1), he shall immediately allow movement of the road vehicle, or

(b) if the authorized officer is satisfied that the goods are being transported by a casual trader or a person on behalf of a casual trader, he may detain the road vehicle for a period ordinarily not exceeding twenty four hours for the purposes of sub-section (6)."

F

A perusal of sub-section (4) shows that every person who is transporting in a road vehicle goods, other than the excluded goods, purchased by him in West Bengal on his own account or on behalf of any other person is required, on interception by any person appointed under sub-section (1) of Section 3 and authorised by the Commissioner in that behalf, (referred to as the authorised officer in this section) to stop the vehicle and produce, on demand, before such authorised officer invoice, challan, transport receipt or consignment note or document of like nature in respect of such goods; further, he is also obliged to furnish the name, address and number of certificate of registration of the consignor or the consignee, if registered. But if the consignor or the

G

H

consignee is not registered, the question of furnishing number of certificate of registration does not arise. In such an event, two courses are open to the authorised officer. The first is that if the authorised officer is satisfied that the person transporting the goods is not liable to pay tax under sub-section (1), he has to allow the movement of the vehicle immediately. And the second is that, if he is satisfied that the goods are being transported *by a casual trader or a person on behalf of a casual trader* he has the power to detain the vehicle for a period not exceeding twenty four hours for the purposes of sub-section (6) which provides for determination and collection of tax in the manner prescribed. It requires the casual trader to pay the tax in the prescribed form. Therefore, it follows that sub-section (4) is concerned with the detention of the vehicle for purposes of assessment and recovery of tax. This provision is also an anti-evasion of tax provision and over-rides Section 46. For the reasons above-mentioned, we do not find any illegality in sub-section (4) of Section 14 of the Act.

We may add that the impugned provisions of sub-section (5,) (7), (8) of Section 11 and sub-section (4) of Section 14 are broadly akin to the provisions in the Bengal Finance (Sales Tax) Act, 1941, the validity of which was upheld by us in Civil Appeal No. 8180 of 1995 by order dated February 25, 2003.

No separate arguments were addressed in regard to the invalidity of the Rules. In the view we have taken in upholding the provisions of the Act, the impugned Rules, namely Rules 172, 173, 174 and 188 and Forms 28 and 31 are also to be upheld and they are, accordingly, upheld. The orders under challenge in regard to the declaration of the Rules as invalid are, therefore, set aside.

For all these reasons, we are unable to sustain the orders of the Tribunal under challenge and they are, accordingly, set aside.

The Civil Appeals are, accordingly, allowed.

No order as to costs.

Civil Appeal Nos.8182/1995 and 11649-11650/1995 :

In view of the order passed by this Court in Civil Appeal No.8180 of 1995 on February 25, 2003, these appeals are also allowed.

No order as to costs.

K.K.T.

Appeals allowed.