SOUTHERN PETROCHEMICAL INDUSTRIES CO. LTD. A

v.

ELECTRICITY INSPECTOR AND E.T.I.O. AND ORS.

MAY 15, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003—Legislative competence and validity of—Held: State has not overstepped its limits of power—Legislative competence of the State and validity of the Act upheld—Also not repugnant to the Electricity (Supply) Act, 1948—Constitution of India, 1950—Articles 14, 248, 254, 288, 366—General Clauses Act, 1897, Section 6. C

Doctrines:

Doctrine of purposive construction—Doctrine of legitimate expectation—Doctrine of promissory estoppel—meaning and applicability of. D

Words & Phrases:

"Unless a different intention", "Corresponding", "not withstanding such repeal"—Meaning of in the context of Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 and General Clauses Act, 1897. E

"Permanence", "privilege", "goods"—Meaning of.

The validity of the provisions of Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 and/or application thereof in respect of the generating companies as also the consumers, were challenged before the Madras High Court in a large number of writ petitions. The Division Bench of the Madras High Court negatived the challenge. Hence the present appeals. F

On behalf of the appellants it was contended that the consumers of electrical energy form a homogenous class and, thus, could not have been discriminated in the matter of grant of exemption; that the equality clause contained in Article 14 of the Constitution of India being a basic structure of G

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A the Constitution must in a situation of this nature be enforced and in that view of the matter, it was obligatory on the part of the State to treat all the consumers on equal footing; that in view of the fact that Section 14 of the 2003 Act per se is arbitrary, the burden of proof was on the State to show that the classification is a valid classification, and that the validity of the 2003 Act can be read down for the purpose of upholding its constitutionality.

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It was also contended that the High Court committed a manifest error in interpreting Sub-sections (1) and (2) of Section 20 of the 2003 Act together; that they are independent of each other and operate in different fields; that whereas the proviso appended to Section 20(1) of the 2003 Act provides for savings that follow from the repeal of the 1962 Act and the 1939 Act; that Section 20(2) provides for a legal fiction for continuation of certain things as if the Acts of 1962 and 1939 had not been repealed; that Sub-section (1) of Section 20 does not contain any statement which occurs in Section 6 of the General Clauses Act being "unless a different intention appears", and in that view of the matter, all rights and privileges obtained by a consumer in terms of the provisions of the 1939 Act or the 1962 Act are safeguarded. Having regard to the new economic policy, the statute encourages more private participation in the private sector and thereby a literal or narrow interpretation will defeat the same; that in any event, Section 14 should be construed in such a manner so as to make it consistent with Article 14 of the Constitution of India; and that the 'privilege' is superior to the right and in that view of the matter even if the appellants have not acquired any right, they having enjoyed privilege, the same is saved under Clause (b) of Sub-section (1) of Section 20 of the 2003 Act.

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It was also submitted that the parties have set up their industries relying on the promises made by the State; that the sugar industries have spent about Rs. 745.64 crores in that behalf and that taking account of this substantial spin-off, doctrine of promissory estoppel should be attracted in this case and in that view of the matter, the State is estopped from demanding the electricity duty from the captive power plants including the appellants.

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G On behalf of the Respondent-State of Tamil Nadu, it was inter alia contended that the exclusive right of the State Legislature to legislate matters under entries enumerated in List II being exclusive, Entry 53 thereof would not be subservient to Entry 38 of List III of the Seventh Schedule of the Constitution of India; that no material has been placed on record to show that the State Legislature has transgressed its legislative power in covert or

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indirect manner or otherwise over-stepped its limits; that the functions of the State Electricity Regulatory Commission constituted under the 1998 Act refer to a non-taxing entry dealing with general aspects of electricity excluding taxation and, thus, the 1998 Act cannot prevail over Entry 53 of List II of the Seventh Schedule of the Constitution of India and, thus, in that view of the matter Article 254 of the Constitution of India cannot have any application; that an exemption, by its very nature, does not create a right and it is always defeasible and susceptible to be withdrawn; that the doctrine of promissory estoppel will have no application in the instant case as the State cannot be prevented from extending the exemption of electricity tax on consumption under the 2003 Act on the basis thereof or otherwise, inasmuch as there cannot be any estoppel against the exercise of legislative power to repeal any Act and to re-enact it. The exemption granted under Section 13(1) of the 1962 Act was otherwise subject to cancellation or variation under Section 13(2) thereof.

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Partly allowing the appeals, the Court

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HELD: 1.1. Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalized spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the Lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence vis-à-vis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifests the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. This Court does not mean to suggest that in regard to the validity of a taxation statute, the same, by itself, would be a determinative factor as in a case where the Parliament may legislate an enactment under several entries, one of them being a tax entry.

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[Para 55] [987-D-F]

1.2. A bare perusal of Entry 53 of List II and Entry 38 of List III, however, clearly suggests that they are meant to operate in different fields.

[Para 56] [987-G]

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A **1.3. Entry 53 does not contain any such restriction and, thus, Clause (3) of Article 254 of the Constitution of India will have no application in the instant case. [Para 58] [988-B]**

1.4. Legislative competence of the State of Tamil Nadu to legislate the impugned Act is beyond any dispute. It cannot, therefore, be said that the
B **State's action in enacting the Act suffers from colourable exercise of any power. Thus, it can be safely concluded that the State has not over-stepped its limits of power. [Para 59] [988-B-C]**

1.5. Entry 53 of List II provides for a taxation entry; whereas Entry 38 of List III provides for a non-taxation entry dealing with general aspects of
C **electricity excluding taxation. The 1998 Act empowers the Commission only to fix the electricity tariff or the charges for consumption of electricity. The legislation made by the State is independent of actual tariff of electricity charges. Tariff would mean a cartel of commerce and normally it is a book of rates. [Para 61] [988-G-H]**

D **1.6. The 2003 Act is, thus, not repugnant to the 1948 Act.**

[Para 64] [989-D]

K.C. Gajapati Narayan Deo and Ors. **v.** *The State of Orissa,* **[1954] SCR 1;** *R.S. Joshi, Sales Tax Officer, Gujarat and Ors.,* **v.** *Ajit Mills Limited and*
E *Anr.,* **[1977] 4 SCC 98;** *Raja Jagannath Baksh Singh* **v.** *State of Uttar Pradesh,* **AIR (1962) SC 1563 and** *M.P. Vidyut Karamchari Sangh* **v.** *M.P. Electricity Board,* **[2004] 9 SCC 755, relied on.**

M/s. Universal Imports Agency and Anr. **v.** *The Chief Controller of Imports and Exports and Ors.,* **[1961] 1 SCR 305;** *Shri Ram Prasad*
F *(Deceased) By His Legal Representative* **v.** *The State of Punjab,* **[1966] 3 SCR 486;** *State of Punjab* **v.** *Harnek Singh,* **[2002] 3 SCC 481;** *State of A.P.* **v.** *National Thermal Power Corpn. Ltd. and Ors.,* **[2002] 5 SCC 203;** *BSES Ltd.* **v.** *Tata Power Co. Ltd. and Ors.,* **[2004] 1 SCC 195;** *MRF Ltd., Kottayam* **v.** *Assistant Commissioner (Assessment) Sales Tax and Ors.,* **[2006] 8 SCC 702;** *State of Punjab* **v.** *Nestle India Ltd. and Anr.,* **[2004] 6 SCC 465;** *Madan Mohan*
G *Pathak and Anr.* **v.** *Union of India and Ors.,* **[1978] 2 SCC 50;** *Orissa State Electricity Board and Anr.* **v.** *IPI Steel Ltd. and Ors.,* **[1995] 4 SCC 320 and** *State of Mysore* **v.** *West Coast Papers Mills Ltd. and Anr.,* **[1975] 3 SCC 448, referred to.**

2.1. It is no doubt true that Section 18 of the 1962 Act as also Section
H **21 of the 2003 Act provided that they would be subject to the provisions of**

Article 288 of the Constitution of India. It deals with exemption from taxation by States in respect of water or electricity in certain cases. Clause (2) of the said Article mandates that when a State makes a law for imposition of tax and if any such law provides for fixation of the rates and other incidents of tax, the assent of the President would be required. [Para 65] [989-E-F] A

2.2. A plain reading of Clause (2) of Article 288 of the Constitution of India raises no doubt that the application thereof was meant to be only in respect of the river valley authorities like Damodar Valley Corporation constituted in the year 1948 by the Damodar Valley Corporation Act, 1948. [Para 66] [989-G-H] B

2.3. It may be true that in a case of this nature, it was not necessary to lay down a clear provision of applicability of Article 288 of the Constitution of India, but then it must have been done *ex maori cautela* (by way of abundant caution). Only because a provision of the Constitution has been mentioned in the Act, the same, would not necessarily mean that the same is required to be taken into consideration for the purpose of judging the constitutionality thereof. The provisions, it is trite, are to be read in their entirety. The same have to be read so as to give effect to the provisions contained in Article 287 of the Constitution of India. It is meant to be acted upon in the context of the heading of Part XII of the Constitution of India and not for dealing with a situation of the nature prevalent in the instant case. [Para 67] [990-D-F] C D E

2.4. The State Electricity Board has been given the exemption under the 2003 Act which by itself would not mean that those who purchase electrical energy from them would also be so exempted. Had that been so, the same could have been explicitly provided for. The principle of construction of statute, that the exemption provisions would be attracted only when requisite conditions precedent therefor are satisfied, would apply in a case of constitutional interpretation also. [Para 68] [990-G-H] F

2.5. The expression "subject to" stated that the same would imply that the provisions of Article 288 will have to be complied with. It is no doubt true that ordinarily the expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions subject to which it is made. But, keeping in view the nature of exemption granted, the subject matter and nature of the recipient of such exemption, in our opinion, Article 288 has no application in the instant case. [Para 70] [991-B-C] G

Damodar Valley Corporation v. *State of Bihar and Ors.*, [1976] 3 SCC H

A 710; *Surinder Singh* v. *Central Government and Ors.*, AIR (1986) SC 2166; *South India Corporation (P) Ltd.* v. *Secretary, Board of Revenue, Trivandrum and Anr.*, AIR (1964) SC 207; *Ashok Leyland Ltd.* v. *State of Tamil Nadu & Anr.*, [2004] 3 SCC 1 and *S.N. Chandrashekar and Anr.* v. *State of Karnataka and Ors.*, [2006] 3 SCC 208, relied on.

B 3.1. The issue that the 2003 Act was in violation of the equality clause contained in Article 14 of the Constitution of India was not raised before the High Court. Only in one of the civil appeals, prayer was made for urging additional ground and the same having been directed, additional ground has been taken to urge the said question. A ground taken, however, must be based C on a factual foundation. For attracting Article 14, necessary facts were required to be pleaded. The foundational facts as to how Section 14 of the 2003 Act would be discriminatory in nature have not been stated at all. The Government of Tamil Nadu has also not been given any opportunity to meet the said contention. [Para 71] [991-D-E]

D 3.2. It is now trite that such factual foundation, unless is apparent from the statute itself, cannot be permitted to be raised and that too for the first time before this Court. [Para 72] [991-F]

3.3. Furthermore, in the matter of taxation, the State is given wide discretion and is allowed to pick and choose objects for taxation and exemption. E [Para 74] [992-B]

3.4. This Court does not think that it is advisable to go into the said question. [Para 75] [992-B]

3.5. In absence of necessary pleadings and grounds taken before the F High Court, it cannot be said that only because Section 13 of the repealed Act is inconsistent with Section 14 of the 2003 Act, the same would be arbitrary by reason of being discriminatory in nature and *ultra vires* Article 14 of the Constitution of India on the premise that charging section provides for levy of tax on sale and consumption of electrical energy, while the G exemption provision purports to give power to exempt tax on "electricity sold for consumption" and makes no corresponding provision for exemption of tax on electrical energy self-generated and consumed. [Para 76] [992-C-D]

State of A.P. v. *National Thermal Power Corpn. Ltd. and Ors.*, [2002] 5 SCC 203; *BSES Ltd.* v. *Tata Power Co. Ltd. and Ors.*, [2004] 1 SCC 195 and H *Orient Weaving Mills (P) Ltd.* v. *The Union of India*, [1962] Supp 3 SCR 481,

relied on. A

4.1. The doctrine of purposive construction can be taken recourse to provided there exists any ambiguity. If this Court has to agree with the submission in this regard it has to not only ignore the words "for consumption" occurring immediately after the word "sold" but also ignore the word "by" occurring immediately after the word "consumption". This B Court has to give a new meaning which would amount to judicial legislation. There is no need therefor as thereby the taxation provision would be given a new dimension, by reason whereof not only exemption provisions will have to be understood in the context of sale of electricity but also consumption thereof. [Para 79] [993-B-C] C

4.2. It is one thing to say that where the words or expressions in a statute are plainly taken from an earlier statute in *pari materia,* which have received judicial interpretation, it must be presumed that the Parliament was aware thereof and intended to be followed in latter enactment. But, it is another thing to say that it is necessary or proper to resort to or consider the earlier D legislations on the subject only because the consolidating Act re-enacts in an orderly form the various statutes embodying the law on the subject. [Para 81] [993-F]

4.3. The words "consolidate and amend" furthermore often occur in a statute in repealing provision. Such a statute is not intended to alter the law. E [Para 82] [993-G]

4.4. There is no constitutional or statutory embargo that a consolidating Act must also be an amending Act. When different terms are used in the new Act, it would not be proper for the Court to refer to the provisions of a repealed statute. [Para 85] [995-A] F

4.5. The distinction between consolidating statute and other statutes is no longer valid. It is only in certain exceptional situations that the language used in the earlier Act can be resorted to. [Para 86] [995-B]

The Union of India v. *The Mohindra Supply Co.,* AIR (1962) SC 256, G relied on.

IRC v. *Hinchy,* [1960] 1 All ER 505, *Beswick* v. *Beswick,* [1967] 2 All ER 1197, *Dir. Of Public Prosecutions* v. *Schildkamp,* [1969] 3 All ER 1640, *Maunsell* v. *Olins,* [1975] 1 All ER 16; *Farrell* v. *Alexander,* [1976] 2 All ER H

A 721; *Williams* v. *Permanent Trustee Co. of New South Wales*, (1906) AC 249, p. 252 and *Grey* v. *IRC*, [1959] 3 All ER 603, referred to.

Jayantilal Amrathlal v. *Union of India*, [1972] 4 SCC 174; *India Tobacco Co. Ltd.* v. *The Commercial Tax Officer, Bhavanipore and Ors.*, [1975] 3 SCC 512; *T.S. Baliah* v. *T.S. Rangachari, Income Tax Officer, Central Circle* B *VI, Madras*, [1969] 3 SCR 65 and *Gajraj Singh and Ors.* v. *State Transport Appellate Tribunal and Ors.*, [1997] 1 SCC 650, referred to.

N.S. Bindra's Interpretation of Statutes, 10th edition, pages 1071-1072 and *G.P. Singh's 'Principles of Statutory Interpretation'*, Tenth Edition, pages 315-316, referred to.
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5.1. What, however, is the matter of moment would be that the expression "unless a different intention appears" occurring in Section 6 of the General Clauses Act, 1897 has not been inserted in Sub-section (1) of Section 20 of the 2003 Act. Sub-sections (1) and (2) of Section 20 of the 2003 Act, thus, D operate in different situations. Whereas the proviso appended to Sub-section (1) of Section 20 of the 2003 Act provides for the consequences flowing from the repeal of the 1939 Act and the 1962 Act; Section 20(2) provides for a legal fiction for continuation of certain things/ proceeding on the premise as if the said Acts had not been repealed. Repeal of the 1939 Act and the 1962 Act would lead to repeal of notifications issued thereunder also. Proviso E appended to Sub-section (1) of Section 20 of the 2003 Act, however, carves out an exception in regard to the consequences flowing therefrom.

[Para 95] [1000-F-G]

5.2. If Sub-sections (1) and (2) of Section 20 of the 2003 Act operate in different fields, the marginal note of Section 20, viz., repeal and savings, would F not be material. If both the Sub-sections of Section 20 of the 2003 Act are not dependant on each other and in particular having regard to the phraseology used therein, they need not be read together. One cannot proceed on the basis while reading the provisions of the statute that anomaly would be created and then urge that they should be read together. [Para 96] [1000-H; 1001-A-B]

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5.3. The submission that this Court must read the words "unless a different intention appears" in Sub-section (1) of Section 20 of the 2003 Act, is impermissible in law. Similar contention to read down and apply the purported rule of purposive construction while construing Section 14 of the 2003 Act has already been rejected. This Court does not intend to apply H different tests in the matter of construction of Section 20 of the 2003 Act.

Omission of words in a particular statute may play an important role. The intention of the legislature must be, as is well known, gathered from the words used in the statute at the first instance and only when such a rule would give rise to anomalous situation, the court may take recourse to purposive construction. It is also a well settled principles of law that causes omissus cannot be supplied. [Para 97] [1001-C-D]

5.4. Proviso appended to Sub-section (1) of Section 20 of the 2003 Act although for all intent and purport incorporates Section 6 of the General Clauses Act but a significant departure therefrom must be borne in mind. If the legislature has used different words, or has omitted certain words, the same cannot be read as containing the words "unless a different intention appears". It may be that the provisions of the 2003 Act are demonstrably different from the 1962 Act but it should be assumed that the legislature did so deliberately. The intention of the legislature by making a distinction between Sub-section (1) and Sub-section (2) of Section 20 of the 2003 Act, is obvious. The fact that the significant words "unless a different intention appears" or the Act does not contain a provision inconsistent therewith were known to the legislature. Whereas in Sub-section (1) of Section 20 of the 2003 Act they did not introduce any such thing, they did so while enacting Sub-section (2) thereof. [Para 98] [1001-E-G]

5.5. While construing the said words, one may require to construe Section 14 of the 2003 Act at the outset. The word "corresponding" may mean "to be in harmony with or to be similar or analogous to or to be identical with". [Para 99] [1001-H]

5.6. Whereas the 1939 Act did not contain any provision for exemption from payment of tax in respect of sale of electrical energy, Section 13 of the 1962 Act dealing with taxation on consumption of electrical energy expressly provided therefor. Section 14 of the 2003 Act, on the other hand, makes a provision for grant of exemption in respect of sale of energy as contra-distinguished from the provisions of the 1939 Act. It takes away the power of exemption on consumption of electrical energy which had been expressly provided under the 1962 Act. Once Section 14 of the 2003 Act is held to be not containing any provision corresponding to the relevant provisions of the 1939 Act and the 1962 Act, Sub-section (2) of Section 20 of the 2003 Act, will have no application. If Sub-section (2) of Section 20 of the 2003 Act would have no application, Sub-section (1) of Section 20 would apply. Once Sub-section (1) of Section 20 of the 2003 Act is found to have application, the

absence of the words "unless a different intention appears" will assume great significance. If that be so, then there is no conflict between the proviso appended to Sub-section (1) of Section 20 and Sub-section (2) thereof. In that view of the matter, Sub-section (2) of Section 20 of the 2003 Act would prevail.

[Para 101 and 102] [1002-B-F]

5.7. The High Court committed a manifest error in opining that both the provisions relate to the same scenario. Furthermore, Sub-section (2) of Section 20 of the 2003 Act uses the expression "notwithstanding such repeal" and, thus, the same cannot be construed to be notwithstanding anything contained in Sub-section (1) of Section 20 thereof. [Para 103] [1002-G]

5.8. Once the aforementioned conclusion is arrived at, it would not be necessary to construe the proviso appended to Sub-section (1) of Section 20 in its own language. [Para 104] [1002-H]

5.9. In a case of this nature, the proviso restricts the operation of the repeal clause. It seeks to protect the matter specified thereunder despite such repeal. Section 6 of the General Clauses Act seeks to achieve the same purpose, subject of course, to the repealing Act having no provision inconsistent with the repealed Acts. The 1962 Act provided for grant of exemption from payment of electricity tax levied on consumption of electricity. When a notification was issued by the appropriate authority, the same had to be given a purpose. A notification issued thereunder could be an act which would come within the purview of the words "anything duly done". It would not be correct to contend that only because Sub-section (2) of Section 20 of the 2003 Act refers to notification, the same would not mean that wherever the word notification has been issued, Sub-section (1) thereof will have no application.

[Paras 105, 106 and 107] [1003-D-F]

5.10. Right of exemption with a valid notification issued gives rise to an accrued right. It is a vested right. Such right had been granted to them permanently. 'Permanence' would mean unless altered by statute. When a right is accrued or vested, the same can be taken away only by reason of a statute and not otherwise. Thus, a notification which was duly issued would continue to govern unless the same is repealed.

[Paras 108 and 109] [1003-G; 1004-A]

5.11. Exemption from payment of tax in favour of the appellants herein would also constitute a right or privilege. The expression "privilege" has a wider meaning than right. A right may be a vested right or an accrued right

or an acquired right. Nature of such a right would depend upon and also vary from statute to statute. [Para 120] [1006-B, C] A

J. Srinivasa Rao v. *Govt. of A.P. and Anr.*, (2006) 13 SCALE 27; *H.V. Mathai* v. *Subordinate Judge, Kottayam and Ors.*, [1969] 2 SCC 194; *S. Sundaram Pillai* v. *V.R. Pattabiraman*, [1985] 1 SCC 591 and *Swedish Match AB* v. *Securities & Exchange Board, India*, [2004] 11 SCC 641, relied on. B

Stroud's Judicial Dictionary, 2nd Edition, Volume I, page 355; *"Statutory Interpretation - A Code"* by F.A.R. Bennion, Third Edition, page 229 and *Maxwell on the Interpretation of Statutes*, 12th edition, page 18, referred to.

6.1. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. Appellants had undoubtedly been enjoying the benefit of payment of tax in respect of sale/consumption of electrical energy in relation to the co-generating power plants. [Para 135] [1010-A, B] C D

6.2. Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its application against constitutional or statutory provisions is impermissible in law. [Para 136] [1010-C] E

6.3. Doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved. In view of the application of doctrine of promissory estoppel in the case of the appellants, their right is not destroyed and in that view of the matter although the Scheme under the impugned Act is different from the 1939 Act and the 1962 Act and furthermore in view of the phraseology used in Section 20(1) of the 2003 Act, right of the appellants cannot be said to have been destroyed. The legislature in fact has acknowledged that right to be existing in the appellants. [Paras 144 and 145] [1014-B, C] F G

M/s. A.P. Steel Re-Rolling Mill Ltd. v. *State of Kerala & Ors.*, (2006) 14 SCALE 162; *State of Bihar and Ors.* v. *Project Uchcha Vidya, Sikshak Sangh and Ors.*, [2006] 2 SCC 545; *Mahabir Vegetable Oils (P) Ltd. and Anr.* v. *State of Haryana and Ors.*, [2006] 3 SCC 620; *State of Punjab* v. *Nestle India* H

A *Ltd. and Anr.*, [2004] 6 SCC 465; *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.*, [1979] 2 SCC 409; *Kasinka Trading* v. *Union of India*, [1995] 1 SCC 274; *MRF Ltd., Kottayam* v. *Asst. Commissioner (Assessment) Sales Tax and Ors.*, [2006] 8 SCC 702 and *Madan Mohan Pathak and Anr.* v. *Union of India and Ors.*, [1978] 2 SCC 50, referred to.

B 7. Legitimate expectation is now considered to be a part of principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be applicable. The legislature, indisputably, has the power to legislate but where C the law itself recognizes existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable. [Para 147] [1014-F, G]

R v *North and East Devon Health Authority*, ex parte *Coughlan*, (2001) 1 QB 213, *Lord Woolf; R* v. *Home Secretary, ex parte Hindley*, (2001) 1 AC D 410; *R (on the application of Bibi)* v. *London Borough of Newham*, (2001) EWCA Civ 607 and *Barratt* v. *Howard*, (2000) FCA 190, referred to.

8. The maximum demand in a month means the highest value of the energy delivered at the point of supply of the consumer during any consecutive thirty minutes in a month. It is, therefore, incorrect to contend that there E does not exist any distinction between actual consumption and maximum demand. The High Court itself has noticed a distinction between Low Tension consumption and High Tension consumption. There indeed exists such a definition. Therefore, such a construction would not be correct.

[Para 158] [1020-B, C]

F 9.1. It may be that electricity has been considered to be 'goods' but the same has to be considered having regard to the definition of "goods" contained in Clause (12) of Article 366 of the Constitution of India. When this Court held electricity to be 'goods' for the purpose of application of sales tax laws and other tax laws, the same would have nothing to do with the construction G of Entry 53 of List II of the Seventh Schedule of the Constitution of India. Supply does not mean sale. A' fortiori it does not also mean consumption. A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. [Paras 164, 165 and 166] [1023-E, F, G]

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9.2. Keeping in view the fact that the maximum demand postulates something other than actual delivery of electricity, the question of imposition of any tax thereupon does not arise. [Para 169] [1025-F, G]

Manish Maheswari . Asstt. Commissioner of Income Tax and Anr., **(2007) 3 SCALE 627, relied on.**

State of Madras **v.** *Gannon Dunkerley & Co. (Madras) Ltd.*, **[1959] SCR 379;** *Bharat Sanchar Nigam Ltd. and Anr.* **v.** *Union of India and Ors.*, **[2006] 3 SCC 1 and** *M/s. Northern India Iron & Steel Co.* **v.** *State of Haryana and Anr.*, **[1976] 2 SCC 877, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2551 of 2007.

From the Judgment and Order dated 13.07.2006 of the High Court of Judicature at Madras in W.A. 384 of 2004.

WITH

C.A. Nos. 2552-2651 of 2007.

R.F. Nariman, A.R.L. Sundrasan, A.K. Ganguli, Vijay Narayan, Vijay Narayanan, K.K. Venugopal, Sr. Adv. P.H. Parekh, E.R. Kumar, Sanand Ramakrishnan, Nitin Thukral, Rukmini Bobde (for P.H. Parekh & Co.) Krishna Srinivasan, Sameer Parekh, Nitin Thukral, K.K. Mani, V.M. Shivkumar, Mayur R. Shah, Binu Tamta, Rohini Musa, V. Balaji, P.N. Ramalingam, Vijay K. Jain, K.K. Senthilvalan, Rakesh K. Sharma, K.V. Vishwanathan, B. Raghunath, V. Mohana, R. Nedumaran, Vijay Kumar, N.L. Rajah, Dayan Krishnan, Nikhil Nayyar, Gautam Narayan, P.B. Suresh, Vipin Nair, Amit Dhingra (for Temple Law Firm) Srikala Gurukrishna Kumar, Gauri Ghuman and Senthil Jagadeesan for the Appellant.

T.R. Andharujina, V. Krishnamurthy, Sr. Adv. T. Harish Kumar and Prasanth P. Advs. for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

INTRODUCTION

2. Validity and/or application of Tamil Nadu Tax on Consumption or Sale

A of Electricity Act, 2003 (for short "the 2003 Act") is in question in these appeals which arise out of a common judgment dated 13.07.2006 passed by a Division Bench of the High Court of Madras.

LEGISLATIVE BACKGROUND

B 3. Legislative competence in Central and Provincial Legislature in India was for the first time provided for by reason of the Government of India Act, 1935 (for short "the 1935 Act"). Item 48-B of List II of the Seventh Schedule of the 1935 Act provided for taxes on consumption or sale of electricity subject, however, to the provisions of Section 154-A of the 1935 Act which reads as under:

C

> "154-A. Save in so far as any Federal may otherwise provide, no Provincial law or law of a Federated State shall impose, or authorize the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is -
>
> D (a) consumed by the Federal Government, or sold to the Federal Government for consumption by that Government ; or
>
> (b) consumed in the construction, maintenance or operation of a Federal Railway by the Federal Railway Authority or a railway company operating that railway, or sold to that authority or any such railway E company for consumption in the construction, maintenance or operation of a Federal Railway ;
>
> and any such law imposing, or authorising the imposition of a tax on the sale of electricity shall secure that the price of electricity sold to the Federal Government for consumption by that Government, or to F the Federal Railway Authority or any such railway company as aforesaid for consumption in the construction, maintenance or operation of a Federal Railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity."

G 4. The 1935 Act did not contain any provision similar to Item No. 48-B of the Seventh Schedule of the 1935 Act. After coming into force of the Constitution of India, 'Electricity' was placed in List III of the Seventh Schedule of the Constitution of India. However, the matter relating to imposition of taxes on the consumption or sale of electricity was provided for under H Entry 53 of List II of the Seventh Schedule of the Constitution of India.

STATUTORY PROVISIONS

5. The then State of Madras in terms of Entry 48-B of the Seventh Schedule of the 1935 Act, enacted Tamil Nadu Electricity Duty Act, 1939 (for short "the 1939 Act") levying a duty on certain sales and consumption of electrical energy by the licensees in the State of Tamil Nadu. At the relevant time, licences used to be granted in terms of the Indian Electricity Act, 1910 (for short "the 1910 Act"). Section 3 of the 1910 Act reads as under:

> "3. Grant of licenses.(1) The State Government may, on application made in the prescribed form and on payment of the prescribed fee (if any), grant after consulting the State Electricity Board, a licence to any person to supply energy in any specified area, and also to lay down or place electric supply lines for the conveyance and transmission of energy,
>
> (a) where the energy to be supplied is to be generated outside such area, from a generating station situated outside such area to the boundary of such area, or
>
> (b) where energy is to be conveyed or transmitted from any place in such area to any other place therein, across an intervening area not included therein, across such area.
>
> (2) In respect of every such licence and the grant thereof the following provisions shall have effect, namely
>
> (a) any person applying for a license under this Part shall publish a notice of his application in the prescribed manner and with the prescribed particulars, and the license shall not be granted -
>
> (i) until all objections received by the State Government with reference thereto have been considered by it:
>
> Provided that no objection shall be so considered unless it is received before the expiration of three months from the date of the first publication of such notice as aforesaid; and
>
> (ii) until, in the case of an application for a license for an area including the whole or any part of any cantonment aerodrome, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Government for defence purposes, the State Government has ascertained that there is no objection to the grant of the license on

A the part of the Central Government;

(b) where an objection is received from any local authority concerned, the State Government shall, if in its opinion the objection is insufficient, record in writing and communicate to such local authority its reasons for such opinion;

B

(c) no application for a license under this Part shall be made by any local authority except in pursuance of a resolution passed at a meeting of such authority held after one month's previous notice of the same and of the purpose thereof has been given in the manner in which notices of meetings of such local authority are usually given;

C

(d) a license under this part -

(i) may prescribe such terms as to the limits within which, and the conditions under which, the supply of energy is to be compulsory or permissive, and generally as to such matters as the State Government

D may think fit; and

(ii) save in cases in which under section 10, clause (b), the provisions of sections 5 and 6, or either of them, have been declared not to apply, every such licensee shall declare whether any generating station to be used in connection with the undertaking shall or shall not form part

E of the undertaking for the purpose of purchase under section 5 or section 6;

(e) the grant of a licence under this Part for any purpose shall not in any way hinder or restrict the grant of a licence to another person within the same area of supply for a like purpose;

F

(f) the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every licence granted under this Part, save insofar as they are expressly added to, varied or excepted by the licence, and shall, subject to any such additions, variations or exceptions which the State Government is hereby

G empowered to make, apply to the undertaking authorised by the licence:

Provided that where a licence is granted in accordance with the provisions of clause IX of the Schedule for the supply of energy to other licensees for distribution by them, then, insofar as such licence

H relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and

XII of the Schedule shall not be deemed to be incorporated with the licence." A

6. It did not contain any provision for exemption. However, after coming into force of the Constitution of India, the Act was to have effect, subject to the provisions of Article 288 of the Constitution of India.

B

7. Article 288 of the Constitution of India reads as under:

"(1) Save insofar as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, C distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation - The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement D of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in Clause (1), but no such E law shall have any effect unless it has, after having been reserved for the consideration of the President received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President F being obtained to the making of any such rule or order."

8. A bare perusal of Section 3 of the 1939 Act would show that taxes were levied on sale of electrical energy by the licensee. There was, thus, no provision under the 1939 Act for levy of tax on consumption of electrical energy. G

9. In exercise of its power conferred upon it under Entry 38 of List III of the Seventh Schedule of the Constitution of India, the Parliament enacted the Electricity (Supply) Act, 1948 (for short "the 1948 Act"). In terms of Section 5 thereof, each State was enjoined with a duty to constitute State Electricity Board. Section 12 of the 1948 Act provides for incorporation of H

A such Boards constituted thereunder.

10. In the year 1962, the State of Tamil Nadu enacted Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 (Act No. IV of 1962) (for short "the 1962 Act") to provide for the levy of tax on the consumption of electrical energy in the State of Madras.

B

11. "Consumer" and "energy intensive industries" have been defined in Sections 2(1) and 2(3) respectively of the 1962 Act in the following terms:

> "(1) "consumer" with its grammatical variations and cognate expressions includes any person who consumes energy whether
> C generated by himself or supplied to him.
>
> (3) "energy intensive industries" means industries in which the price of energy used in the process of manufacturing or producing the principal product of the industry concerned exceeds 15 per centum of the total cost of the manufacture or production of that product and
> D includes the industries manufacturing or producing the following namely:-
>
> (i) aluminium ;
>
> (ii) bleaching powder ;
>
> E (iii) calcium carbide ;
>
> (iv) caustic soda ;
>
> (v) synthetic gem ;"

12. Section 3 of the 1962 Act provides for levy of tax on consumption
F of energy, referred to therein as electricity tax computed as percentage of the "price of energy consumed" by the consumer. Section 3-A provided for levy of additional tax on consumption of energy calculated at the rate of four per centum of the "price of energy consumed" by the consumer. The proviso appended thereto, however, *inter alia* provides for exemption from levy of
G some additional tax on the energy consumed by any person (other than a licensee) who consumes energy generated by himself.

13. Section 12 of the 1962 also provided for exemption of tax in the following terms:

> H "12. Exemption from tax. - (1) Where energy under High Tension

Supply is consumed in the process of manufacturing or producing the principal product in any industrial undertaking licensed under the Industries (Development and Regulation) Act, 1951 (Central Act LXV of 1951), no electricity tax shall be payable on the energy so consumed for a period of three years from the date of the commencement of the manufacture or production of the principal product in such undertaking. A B

(2) For the purposes of sub-section (1), if any question arises in regard to the date of the commencement of the manufacture or production of the principal product, the question shall be decided by the prescribed officer in accordance with such procedure as may be prescribed and his decision thereon shall be final." C

14. Section 13 of the 1962 Act, however, enabled the Government to make exemptions and impose restrictions by notification in the following terms:

13. *Power of Government to notify exemptions and reductions.* - (1) The Government may, by notification, make an exemption or reduction in rate, in respect of the electricity tax payable under this Act by any specified class of persons, having regard to all or any of the following matters, namely:- D

(a) the nature of the business or industry carried on by such class of persons ; E

(b) the price of energy consumed in relation to the total cost of the manufacture or production of the principal product in any industrial undertaking owned or controlled by such class of persons ;

(c) such other matters as may be prescribed. F

(2) Any exemption from electricity tax or reduction in the rate of electricity tax notified under sub-section (1) may be subject to such restrictions and conditions as may be specified in the notification.

(3) The Government may, by notification, cancel or vary any notification issued under sub-section (1). G

15. Section 14 of the 1962 Act provided that the said Act was in addition to and not in derogation of the 1939 Act. Section 18 of the 1962 Act also contained a provision that the same shall be subject to Article 288 of the Constitution of India.

A 16. The 1939 Act and the 1962 Act were repealed by the 2003 Act. Incidentally, the 2003 Act was not to consolidate and amend the levy of tax on consumption or sale of electricity but to consolidate and rationalize the same.

17. "Captive generating plant", "consumer", "generating company" and
B "tariff" were defined in Section 2 of the 2003 Act as under:

> "(2) "captive generating plant" means power plant set up by any person or association of persons or any Co-operative society to generate electricity primarily for his own use or for the use of members, and includes the power plants that are permitted to sell the surplus
C power so generated;
>
> (5) "consumer" with its grammatical variations and cognate expression means any person who is supplied with electricity on payment of charges, or free of cost or otherwise by a licensee or by the Government or by any other person engaged in the business of supplying electricity
D to the public under the Indian Electricity Act, 1910 or any other law for the time being in force and includes-
>
> (i) a licensee who consumes electricity whether generated by himself or supplied to him by any other licensee; and
>
E (ii) actual use of power or any other person who consumes electricity generated by himself;
>
> Explanation I.- Where a licensee consumes electricity, whether generated by himself or supplied to him, such licensee shall be deemed to be a consumer only in respect of the electricity so consumed,
>
F
> Explanation II - Where a licensee or other person consumes energy for purposes connected with the construction, maintenance and operation of the generating, transmitting and distributing system, such licensee or person shall not be deemed to be a consumer in respect of the energy so consumed;
>
G
> (9) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not or artificial juridical person, which owns or operates or maintains a generating station;
>
H (14) "tariff" means a rate of tariff leviable upon the consumption of

electricity in the State supplied by the licensee and as fixed by the Tamil Nadu Electricity Regulatory Commission;" A

18. Section 3 of the 2003 Act is the charging provision in terms whereof every licensee and every person other than a licensee is required to pay every month to the Government in the prescribed manner, a tax on the electricity sold or consumed during the previous month at the rate specified thereunder. B Section 4, however, contains a non-obstante clause stating that no electricity tax shall be payable under Section 3 on the sale of electricity by a licensee to the persons nominated thereunder. It contains almost an identical provision of the 1939 Act. The 2003 Act provides for a complete machinery for assessment of the electricity duty payable. It also provides for an appeal from C an order of assessment of electricity tax.

19. Section 14 of the 2003 Act provides for general exemption which is in the following terms:

"Exemption and reduction of tax.—The Government may, by D notification, make an exemption or reduction in rate in respect of the electricity tax payable under this Act on electricity sold for consumption by or in respect of any—

(i) institution or class of person;

(ii) place of public worship, public burial or burning ground or other E place for the disposal of the dead;

(iii) premises declared by the State Government to be used exclusively for purposes of public charity;

(iv) vessel whether seagoing or inland." F

20. The repeal and saving clause is contained in Section 20 thereof.

21. Section 20 and 21 of the 2003 Act read as under:

"20(1) :- The Tamil Nadu Electricity Duty Act, 1939 and the Tamil Nadu G Electricity (Taxation and Consumption) Act, 1962 is hereby repealed.

Provided that such repeal shall not affect:

(a) the previous operation of the said Acts or anything duly done or suffered thereunder;

H

A (b) any right, privilege, obligation or liability acquired, accrued or incurred under the said Acts;

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against the said Acts;

B (d) any investigation, legal proceeding (including assessment proceeding) or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act has not been passed;

C (2) Notwithstanding such repeal;

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection order or notice made or issued or any direction given under the repealed laws, shall so far as it is not inconsistent with the provisions of D this Act be deemed to have been done or taken under the corresponding provisions of this Act.

(b) Any duty levied under the repealed Tamil Nadu Electricity Duty Act, 1939 and the rules made thereunder during the period prior to the commencement of this Act, but not collected, may be E recovered in the manner provided under the repealed Act and rules made thereunder.

(c) Any tax levied under the repealed Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 and the rules made thereunder during the period prior to the commencement of this Act, but not F collected, may be recovered in the manner provided under the repealed Act and the rules made thereunder.

21. This Act shall have effect subject to the provisions of Article 288 of the Constitution"

G *WRIT PETITIONS*

22. Validity of the provisions of the 2003 Act and/ or application thereof in respect of the generating companies as also the consumers of electrical energy being purchasers from the Tamil Nadu Electricity Board came to be questioned before the Madras High Court in a large number of writ petitions. H The matter was heard by a Division Bench of the said High Court. By reason

of a judgment and order dated 13.07.2006, the Division Bench dismissed the writ petition. A

HIGH COURT JUDGMENT

23. The High Court noticed seven arguments raised before it. It decided all the issues against the writ petitioners. Before us, only argument Nos. 1, 3, 4, 5 and 7 have been pressed. B

24. We may notice the same at the outset:

"(1) The Tamil Nadu Act 12 of 2003 levying tax on consumption or sale of electricity is invalid for want of assent of the President of India, in view of Article 288(2) of the Constitution of India. C

(2) ***

(3) The impugned Act is repugnant to Section 29 of the Electricity Regulatory Commissions Act, 1998. The Central Act, 1996 provided for the fixation of tariff for electricity to vest with the Commission. The tariff so fixed should be held to include the entire price payable for the energy. Thus, the impugned State Act which imposes a tax on the sale or consumption of electricity is repugnant to the Central Law. Since the State Act had not received the assent of the President, it is not saved by Article 254(2) of the Constitution. Hence, it is invalid in law. D E

(4) Under the Tamil Nadu Electricity Taxation on Consumption Act, 1962, some of the appellants were exempted from payment of tax on consumption of self-generated energy. Even though this Act 1962 has been repealed by the present Act, in view of Section 20(2)(a) of the impugned Act, their rights are protected. Therefore, they are entitled to continue the exemption from payment of tax. F

(5) ***

(6) *** G

(7) The tax on consumption should be actual consumption. It cannot include the maximum/sanctioned demand charges. As such, the tax on consumption cannot be levied on such electricity which is lost in transmission. The tax on consumption of electricity should be based on the electricity consumed and not on the electricity lost in H

A transmission."

25. In regard to argument No. 1, the High Court opined that Article 288 of the Constitution of India being applicable in respect of those which are the authorities within the meaning of the provisions thereof, assent of the President was necessary only in their case and not in case of consumers like the B appellants.

26. It was furthermore held that in terms of Section 4 of the 2003 Act, the State of Tamil Nadu covered all persons except the Government, Railways and authorities dealing with the development of inter-state river and, thus, the constitutional obligation laid down under Article 288 of the Constitution of C India stands satisfied. It was held:

> "22. Thus, it is clear that this Article imposes a total ban against a State from imposing any tax on the purchase outside a State. This prohibition is absolute. Whereas under Article 288 of the Constitution, the State is not prevented from enacting a law, but it is made clear that D the law shall not have any effect against the authority mentioned in Article 288 of the Constitution of India unless it receives the assent of the President. Thus, the purpose of the article is to give protection only in respect of the authorities generated, consumed, etc. of the electricity as referred to under Article 288. Therefore, as correctly held E by the learned single Judge, the appellants, who are not such authorities described in the article, cannot take umbrage under the said article and consequently, they cannot resist the enforcement of Act 12 of 2003. Hence, the first submission would fail."

27. As regards argument No. 3, the High Court opined that as the tax F is levied on the tariff, the same being not a part of tariff, the provisions of the Electricity Regulatory Commissions Act, 1998 (for short "the 1998 Act") cannot be said to have any application whatsoever holding:

> "30. Similarly, the contention of repugnancy is also baseless. The question of repugnancy would arise only when both the laws are G enacted on the same entry. The question of repugnancy between one law and another would arise only if both the laws of the Parliament and the State Legislature are referable to an Entry in List III. As indicated above, the Central Law is referable to Entry 38 List III while the State Law falls under Entry 53 List II. In these circumstances, no H question of repugnancy would arise."

28. On argument No. 4, the High Court opined that as the exemption provision contained in Section 14 of the 2003 Act is inconsistent with the provisions of Sections 12 and 13 of the 1962 Act, Section 20(2)(a) of the 2003 Act will have no application stating: A

> "37. However, in this case, as indicated above, there is an exemption as provided in Section 14 only with reference to the tax on the sale of electricity and not on the tax on consumption of electricity. Thus, it is clear that there is clear inconsistency between the Acts that have been repealed and the repealing Act of 2003. In these circumstances, in view of Section 20(2)(a) of the impugned Act, the exemption orders would cease to be valid on the coming into force of the new Act. Hence, the appellants cannot take advantage of Section 20(1) of the Act." B C

29. In relation to argument No. 7, the High Court held that there being two types of consumers, *viz.*, Low Tension consumers and High Tension consumers, tax being payable only on High Tension consumers and as tariff is collected on the permitted demand, levy thereof on maximum demand is permissible in law stating: D

> "52. With regard to the High Tension connections, a twin tariff system is adopted, one rate as per KVA for each unit consumed, the other rate is on permitted demand as per KVA. It is pointed out that as per the definition of maximum demand, the same is determined on the energy delivered at a point of supply. Even though the tariff is collected on the permitted demand, the tax is levied only on the maximum demand, that is, on the energy consumed." E

30. A statement made by the learned Advocate General as to actually on what basis tax is collected was recorded in the following terms: F

> "53. Now, it is submitted by the learned Advocate General that the maximum demand is what is really consumed by them as against the permitted demand and therefore, the taxes are imposed only on the demand charges and it is based on actual consumption." G

ADDITIONAL GROUND

31. One of the appellants before us in Civil Appeal arising out of SLP (C) No. 21689 of 2006 filed an application for raising additional grounds. Permission to raise additional grounds was granted by an order dated 12.02.2007. H

A Pursuant thereto or in furtherance of such leave granted, the constitutionality of Section 14 of the 2003 Act was questioned.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

32. Mr. K.K. Venugopal, learned senior counsel appearing on behalf of
B the appellants, in support of the appellants pressing the aforementioned additional grounds, would contend that the consumers of electrical energy form a homogenous class and, thus, could not have been discriminated in the matter of grant of exemption. The learned counsel would contend that the equality clause contained in Article 14 of the Constitution of India being a
C basic structure of the Constitution must in a situation of this nature be enforced and in that view of the matter, it was obligatory on the part of the State to treat all the consumers on equal footing. In view of the fact that Section 14 of the 2003 Act per se is arbitrary, it was urged, the burden of proof was on the State to show that the classification is a valid classification. It was contended that in such an event, the validity of the 2003 Act can be read
D down for the purpose of upholding its constitutionality and according to the learned counsel the following words should be declared to be ultra vires "on electricity sold for consumption by".

33. Relying on the decision of a Constitution Bench of this Court in *D.S. Nakara and Ors* v. *Union of India,* [1983] 1 SCC 305, the learned counsel
E would contend that for the aforementioned purpose, the court may take into consideration the historical facts that the exemption which had all along been granted could not have been taken away all of a sudden particularly when the appellants altered their position relying on or on the basis of the representations made by the State that in the event, such captive generating
F plant or cogenerating units are set up, they would be granted perennial exemption from payment of electricity tax.

34. It was submitted that in view of the decision of this Court in *Manekagandhi* v. *Union of India,* [1978] 1 SCC 248, the Act can be struck down not only on the ground of being discriminatory in nature but also on
G the ground of being arbitrary.

35. Mr. R.F. Nariman, learned counsel appearing on behalf of the appellants in Civil Appeals arising out of SLP (C) Nos. 2100, 2844, 2099, 2097, 3108, 3109, 3111 and 3112 of 2007 would submit that the High Court committed a manifest error in interpreting Sub-sections (1) and (2) of Section 20 of the
H 2003 Act together. They are independent of each other and operate in different

fields. Whereas the proviso appended to Section 20(1) of the 2003 Act provides for savings that follow from the repeal of the 1962 Act and the 1939 Act; Section 20(2) thereof provides for a legal fiction for continuation of certain things as if the Acts of 1962 and 1939 had not been repealed. It was pointed out that Sub-section (1) of Section 20 does not contain any statement which occurs in Section 6 of the General Clauses Act being "unless a different intention appears". In that view of the matter, all rights and privileges obtained by a consumer in terms of the provisions of the 1939 Act or the 1962 Act are safeguarded.

36. It was urged that whereas Sub-section (1) of Section 20 of the 2003 Act contains a similar provision as Section 6 of the General Clauses Act, Clauses (a) and (b) of Sub-section (1) of Section 20 of the 2003 Act are clearly attracted. Reliance in this behalf has been placed on *M/s. Universal Imports Agency and Anr.* v. *The Chief Controller of Imports and Exports and Ors.*, [1961] 1 SCR 305, *Shri Ram Prasad (Deceased) By His Legal Representative* v. *The State of Punjab*, [1966] 3 SCR 486 and *State of Punjab* v. *Harnek Singh*, [2002] 3 SCC 481.

37. It was urged that the words "sold for consumption" would amount to 'tautology' as electrical energy can never be stored. Reliance in this behalf has been placed on *State of A.P.* v. *National Thermal Power Corpn. Ltd. and Ors.*, [2002] 5 SCC 203 and *BSES Ltd.* v. *Tata Power Co. Ltd. and Ors.*, [2004] 1 SCC 195. In that view of the matter, this is a fit case for applying purposive construction to provide meaningful context to the semantic interplay between the words "by" and the phrase "sold for consumption". If the aforementioned part of the provision, *viz.*, "sold for consumption by" is to be treated as superfluous, the same may as well be read down for the purpose of upholding the exemption granted in favour of the appellants, pursuant to the notifications issued under the 1939 Act and the 1962 Act, particularly when such exemptions were to be granted 'permanently'.

38. Such a construction is permissible having regard to the fact that the 2003 Act is not a consolidating and amending statute but one for consolidation and rationalization. Having regard to the new economic policy, the statute encourages more private participation in the private sector and thereby a literal or narrow interpretation will defeat the same. In any event, Section 14 should be construed in such a manner so as to make it consistent with Article 14 of the Constitution of India.

39. It was submitted that the 'privilege' is superior to the right and in

A that view of the matter even if the appellants have not acquired any right, they having enjoyed privilege, the same is saved under Clause (b) of Sub-section (1) of Section 20 of the 2003 Act.

40. The parties have set up their industries relying on the promises made by the State. In particular sugar industries have spent about Rs. 745.64 B crores in that behalf. Taking account of this substantial spin-off, doctrine of promissory estoppel should be attracted in this case and in that view of the matter, the State is estopped from demanding the electricity duty from the captive power plants including the appellants. Reliance in this behalf has been placed on *MRF Ltd., Kottayam* v. *Assistant Commissioner (Assessment) Sales Tax and Ors.*, [2006] 8 SCC 702 and *State of Punjab* v. *Nestle India Ltd. and Anr.*, [2004] 6 SCC 465.

41. Our attention in this behalf has also been drawn to the observations of Beg, J. in his concurrent judgment in *Madan Mohan Pathak and Anr.* v. *Union of India and Ors.*, [1978] 2 SCC 50 wherein the Life Insurance Corporation D (Modification of Settlement) Act, 1976 was struck down inter alia on the premise that the statute resiled from the earlier promise made by the Government.

42. Mr. A.K. Ganguli, learned senior counsel appearing on behalf of the appellants, had supplemented the submissions of Mr. K.K. Venugopal and Mr. E R.F. Nariman, urging that no previous sanction having been obtained from the President of India as is required under Article 288 of the Constitution of India, the 2003 Act is ultra vires particularly when Section 21 of the 2003 Act as also Section 18 of the 1962 Act specifically refer thereto.

43. The High Court, Mr. Ganguli would contend, has mis-interpreted the F provisions of Article 288 of the Constitution of India insofar as it failed to take into consideration that it is in two parts. Reference to inter-State river authority has nothing to do with the first part of the said provision. Also, as Tamil Nadu Electricity Board which was constituted by reason of the provisions of the 1948 Act, does not pay any tax, it cannot realize any tax from the G consumers to whom electricity is supplied.

44. It was further submitted that the maximum demand charges cannot be made a basis for demanding electricity tax as maximum demand charges have been levied for a different purpose which is penal in nature. Reliance in this behalf has been placed on *Orissa State Electricity Board and Anr.* v. H *IPI Steel Ltd. and Ors.*, [1995] 4 SCC 320.

45. The learned counsel would argue that as tax can be levied in terms of Article 265 of the Constitution of India, no taxable event occurred for levy of electricity duty on the quantum of electrical energy which has not been consumed or sold. Our attention in this behalf has been drawn to a decision of this Court in *State of Mysore* v. *West Coast Papers Mills Ltd. and Anr.*, [1975] 3 SCC 448 for the proposition that no electricity duty was payable at transmission loss.

46. Mr. A.R.L. Sundrasan, learned senior counsel appearing on behalf of the appellants in Civil Appeal arising out of SLP (C) No. 18220 of 2006 would submit that having regard to the Entry 38, List III of the Seventh Schedule of the Constitution of India, in terms whereof the Parliament had enacted the 1998 Act, the State could not have made any law in terms of Entry 58, List II of the Seventh Schedule of the Constitution of India as the entire filed of electricity is covered thereby and, thus, the impugned Act should he held to be repugnant to the 1998 Act.

47. The learned counsel appearing on behalf of the appellants in Civil Appeal arising out of SLP (C) No. 3600 of 2007, would submit that in terms of Article 288 of the Constitution of India, the focus is on the law which enables the State to impose tax and not the individual event of levy thereof and, thus, even if such actual levy might not have been levied, the Act authorizing imposition of such tax on river valley authorities, is bad in law.

48. The impugned Act suffers from callous exercise of power inasmuch as the State, by imposing tax, intended to give the State Electricity Board such amount which it could not get from the hands of the Electricity Regulatory Commission. A provision of the Act cannot be exercised in such a way to defeat the provisions of another Act. Burden of collection of tax from the consumer where it does not have any captive generation plant is on the licensee and, thus, it should be held to be the part of the tariff and in that view of the matter, the impugned legislation is *ultra vires* Article 246 of the Constitution of India.

49. Mr. K.V. Viswanathan, learned counsel would submit that tariff is not only a price but also all which is taken for sale or consumption of electrical energy.

50. In certain matters, including Civil Appeals arising out of SLP(C) Nos. 1746 to 1762 of 2007, the validity of provisions of the 1962 Act, as amended

A by Act 32 of 1991, have also been challenged on the ground that in view of insertion of Section 3-A, the Government of Tamil Nadu issued a notification bearing No. GOMs No. 787 dated 30.04.1979 so as to simplify the process of tariff and all taxes, thus, having been merged, fresh levy of additional tax would be prohibited.

B 51. In respect of certain factories involving products like cement, involving inter alia Grasim Industries Ltd. [Civil Appeal arising out of SLP (C) No. 2064 of 2007], we may notice that the Government of Tamil Nadu issued GOMs No. 2072 dated 19.11.1969 under Section 13(1) of the 1962 granting exemption for consumption of energy under High Tension Supply for a period C of two years in addition to the exemption specified in Sub-section (1) of Section 12, i.e., five years. By GOMs. No. 1201 dated 18.06.1970, the Government of Tamil Nadu again, in exercise of its power under Section 13(1) of the 1962 Act, granted exemption to those 'who consume energy generated by themselves' for a period of two years in addition to the exemption specified in the notification issued through GOMs. No. 2404, i.e., for a period of five D years. Some of the appellants established their cement plants and applied for High Tension Energy connection in the year 1998 and set up captive power plants in 2000 and started drawing energy from its captive power plant only from the year 2000 and, thus, the exemption notifications would remain valid despite enactment of the 2003 Act.

E *SUBMISSIONS ON BEHALF OF THE STATE*

52. Mr. T.R. Andhyarujina, learned senior counsel appearing on behalf of the State of Tamil Nadu, on the other hand, would submit:

(i) The exclusive right of the State Legislature to legislate matters F under entries enumerated in List II being exclusive, Entry 53 thereof would not be subservient to Entry 38 of List III of the Seventh Schedule of the Constitution of India.

(ii) No material has been placed on record to show that the State Legislature has transgressed its legislative power in covert or G indirect manner or otherwise over-stepped its limits.

(iii) The functions of the State Electricity Regulatory Commission constituted under the 1998 Act refer to a non-taxing entry dealing with general aspects of electricity excluding taxation and, thus, the 1998 Act cannot prevail over Entry 53 of List II of the H Seventh Schedule of the Constitution of India and, thus, in that

view of the matter Article 254 of the Constitution of India cannot have any application. A

(iv) Article 288 of the Constitution of India would be attracted only when the following things are established:

(a) Existence of an authority established by any law made by the Parliament; B

(b) The Authority must be established for regulating or developing any inter-state river or river valley and only in such case no State would make a law imposing or authorizing the imposition of tax in respect of any water or electricity stored, generated, consumed, distributed or sold by such authority; C

and in that view of the matter, only when a State makes a law on such an authority, the assent of the President would be required in terms of Clause (2) of Article 288 of the Constitution of India and not otherwise. D

(v) Whereas the 1939 Act having contained no provision for exemption and the 1962 Act providing for exemption only from consumption of electrical energy, the 2003 Act granted exemption only for sale; the provisions of the latter being inconsistent with the provisions of the earlier acts, the exemption notifications do not survive having regard to the fact that Section 20 of the 2003 Act repeals both the 1962 Act as well as the 1939 Act. E

(vi) Sub-sections (1) and (2) of Section 20 of the 2003 Act must be read together and having regard to the fact that the notifications are referred to under Sub-section (2) of Section 20 only, in view of the inconsistencies between the 2003 Act, on the one hand, and the 1939 Act and the 1962 Act, on the other, they do not survive. F

(vii) The words "corresponding provisions" contained in Section 20 of the 2003 Act need not mean exactly similar but "to be in harmony with or to be similar, analogous to or to be identical with" and in that view of the matter, Section 14 of the 2003 Act containing an exemption provision must be held to have covered the subject. G

(viii) As the notifications for exemption from payment of electricity H

duty under the 1962 Act are held to be saved under Sub-section (1) of Section 20 of the 2003 Act, the same would lead to anomalous situation.

(ix) (a) The words "unless a different intention appears" must necessarily be read in the context of Sub-section (1) of Section 20 of the 2003 Act and the proviso appended thereto being practically the incorporation of Section 6 of the General Clauses Act, the words "unless a different intention appears" must be read thereinto although not expressly contained therein.

(b) The words "anything duly done" contained in proviso (a) to Sub-section (1) of Section 20 of the 2003 Act cannot have the meaning of keeping alive a notification for exemption of electricity tax on consumption which is prohibited by Section 14 and negatived by Section 20(2)(a) and, thus, it must receive a restricted and contextual construction.

(c) An exemption, by its very nature, does not create a right and it is always defeasible and susceptible to be withdrawn.

(x) In absence of necessary pleadings, a challenge to the constitutionality of the Act on the purported ground of discrimination must fail. In matters of taxation including exemption, the State is given wide discretion and is allowed to pick and choose objects for taxation and exemption and in that view of the matter the notifications cannot be held to be *ultra vires.*

(xi) The doctrine of promissory estoppel will have no application in the instant case as the State cannot be prevented from extending the exemption of electricity tax on consumption under the 2003 Act on the basis thereof or otherwise, inasmuch as there cannot be any estoppel against the exercise of legislative power to repeal any Act and to re-enact it. The exemption granted under Section 13(1) of the 1962 Act was otherwise subject to cancellation or variation under Section 13(2) thereof.

(xii) Electricity tax is levied on a licensee under the 2003 Act in terms of Clauses (a) and (b) of Sub-section (1) of Section 3 thereof. In view of the definition of "net charge" contained in Section 2 (12) read with Explanation II of Section 2(7), the tax must be held to be levied on actual consumption and not on demand charges.

CONSTITUTIONAL SCHEME AND THE VIRES ISSUE

53. Article 245 of the Constitution of India vests the Parliament with power of legislation on all matters enumerated in List I and also the matters enumerated in List III of the Seventh Schedule of the Constitution of India. The State Legislature, however, has the exclusive right to legislate matters specified in the Entries contained in List II.

54. Federal supremacy no doubt recognizes that the State's power to legislate with regard to any matters in List III would be subject to any Act of the Parliament; however, Clause (3) of Article 246 of the Constitution of India gives the legislature of the State an exclusive power with respect to any matters in List II, subject to restriction imposed in the entry itself, as for example, Entries 1, 2, 12, 13, 17, 22, 23, 24, 32 and 33. Entry 53 of List II does not contain any such restriction and has not been made subject to any of the entry made in List I or List III.

55. Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the Lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence *vis-à-vis* the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifests the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. We, however, do not mean to suggest that in regard to the validity of a taxation statute, the same, by itself, would be a determinative factor as in a case where the Parliament may legislate an enactment under several entries, one of them being a tax entry.

56. A bare perusal of Entry 53 of List II and Entry 38 of List III, however, clearly suggests that they are meant to operate in different fields.

57. In *National Thermal Power Corpn. Ltd.* (supra), this Court has clearly held that "the power of the State Legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations: one,

A arising out of the entry itself, and the other, flowing from the restriction embodied in the Constitution."

58. Entry 53 does not contain any such restriction and, thus, Clause (3) of Article 254 of the Constitution of India will have no application in the instant case.

B

59. Legislative competence of the State of Tamil Nadu to legislate the impugned Act is beyond any dispute. It cannot, therefore, be said that the State's action in enacting the Act suffers from colourable exercise of any power. Thus, it can be safely concluded that the State has not over-stepped its limits of power. [See *K.C. Gajapati Narayan Deo and Ors.* v. *The State of Orissa,* [1954] SCR 1 and *R.S. Joshi, Sales Tax Officer, Gujarat and Ors.* v. *Ajit Mills Limited and Anr.*, [1977] 4 SCC 98].

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60. In the decision of this Court in *Raja Jagannath Baksh Singh* v. *State of Uttar Pradesh,* AIR (1962) SC 1563, it has been held:

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> "21... Though the validity of a taxing statute cannot be challenged merely on the ground that it imposes an unreasonably high burden, it does not follow that a taxing statute cannot be challenged on the ground that it is a colourable piece of legistation and as such, is a fraud on the legislative power conferred on the legislature in question. If, in fact, it is shown that the Act which purports to be a taxing Act is a colourable exercise of the legislative power of the legislature, then that would be an independent ground on which the Act can be struck down. Colourable exercise of legislative power is not a legitimate exercise of the said power and as such, it may be open to challenge. But such a challenge can succeed not merely by showing that the tax levied is unreasonably high or excessive, but by proving other relevant circumstances which justify the conclusion that the statute is colourable and as such, amounts to a fraud."

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61. Entry 53 of List II provides for a taxation entry; whereas Entry 38 of List III provides for a non-taxation entry dealing with general aspects of electricity excluding taxation. The 1998 Act empowers the Commission only to fix the electricity tariff or the charges for consumption of electricity. The legislation made by the State is independent of actual tariff of electricity charges. Tariff would mean a cartel of commerce and normally it is a book of rates. [*BSES Ltd* (supra) at page 208]

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62. Article 254 deals with methods of resolving conflict between the law made by the Parliament and law made by the State in respect of the matters enumerated in the concurrent list. A

63. In *M.P. Vidyut Karamchari Sangh* v. *M.P. Electricity Board,* [2004] 9 SCC 755, it was held: B

> "28. Recourse to the said principles, however, would be resorted to only when there exists direct conflict between two provisions and not otherwise. Once it is held that the law made by Parliament and the State Legislature occupy the same field, the subsequent legislation made by the State which had received the assent of the President of India indisputably would prevail over the parliamentary Act when there exists direct conflict between two enactments. Both the laws would ordinarily be allowed to have their play in their own respective fields. However, in the event there does not exist any conflict, the parliamentary Act or the State Act shall prevail over the other depending upon the fact as to whether the assent of the President has been obtained therefor or not. (See *Bharat Hydro Power Corpn. Ltd.* v. *State of Assam*)". C D

64. The 2003 Act is, thus, not repugnant to the 1948 Act.

ARTICLE 288 ISSUE E

65. It is no doubt true that Section 18 of the 1962 Act as also Section 21 of the 2003 Act provided that they would be subject to the provisions of Article 288 of the Constitution of India. It deals with exemption from taxation by States in respect of water or electricity in certain cases. Clause (2) of the said Article mandates that when a State makes a law for imposition of tax and if any such law provides for fixation of the rates and other incidents of tax, the assent of the President would be required. F

66. A plain reading of Clause (2) of Article 288 of the Constitution of India raises no doubt that the application thereof was meant to be only in respect of the river valley authorities like Damodar Valley Corporation constituted in the year 1948 by the Damodar Valley Corporation Act, 1948. The question came up for consideration before this Court in *Damodar Valley Corporation* v. *State of Bihar and Ors.,* [1976] 3 SCC 710 wherein it was stated: G

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A "9. What is required by clause (2) of Article 288 is that the law made by the State Legislature for imposing, or authorising the imposition of tax mentioned in clause (1) shall have effect only if after having been reserved for the consideration of the President it receives his assent. Another requirement of that clause is that if such law provides for the fixation of the rates and other incidents of such tax by means of Rules B or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such Rule or order. It is, however, not the effect of that clause that even if the abovementioned two requirements are satisfied, the provisions which merely deal with the mode and manner C of the payment of the aforesaid tax should also receive the assent of the President and that in the absence of such assent, the provisions dealing with the incidence of tax, which have received the assent of the President, would remain unenforceable."

67. It may be true that in a case of this nature, it was not necessary to D lay down a clear provision of applicability of Article 288 of the Constitution of India, but then it must have been done *ex maori cautela* (by way of abundant caution). Only because a provision of the Constitution has been mentioned in the Act, the same, in our opinion, would not necessarily mean that the same is required to be taken into consideration for the purpose of E judging the constitutionality thereof. Submission of Mr. Ganguli and other learned counsel appearing on behalf of the appellants, that the same was meant to give effect to the 1948 Act under which the State Electricity Boards are created, does not appeal to us. The provisions, it is trite, are to be read in their entirety. The same have to be read so as to give effect to the provisions contained in Article 287 of the Constitution of India. It is meant F to be acted upon in the context of the heading of Part XII of the Constitution of India and not for dealing with a situation of the nature prevalent in the instant case.

68. The State Electricity Board has been given the exemption under the 2003 Act which by itself would not mean that those who purchase electrical G energy from them would also be so exempted. Had that been so, the same could have been explicitly provided for. The principle of construction of statute, that the exemption provisions would be attracted only when requisite conditions precedent therefor are satisfied, would apply in a case of constitutional interpretation also.

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69. The learned counsel for the appellants would, however, submit that Article 265 of the Constitution read with Article 288 thereof would mandate compliance of the latter provision. A

70. The expression "subject to" stated that the same would imply that the provisions of Article 288 will have to be complied with. It is no doubt true that ordinarily the expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions subject to which it is made as has been held in *Surinder Singh* v. *Central Government and Ors.*, AIR (1986) SC 2166, para 6; *South India Corporation (P) Ltd.* v. *Secretary, Board of Revenue, Trivandrum and Anr.*, AIR (1964) SC 207, *Ashok Leyland Ltd.* v. *State of Tamil Nadu & Anr.*, [2004] 3 SCC 1 and *S.N. Chandrashekar and Anr.* v. *State of Karnataka and Ors.*, [2006] 3 SCC 208. But, keeping in view the nature of exemption granted, the subject matter and nature of the recipient of such exemption, in our opinion, Article 288 has no application in the instant case. B C

ARTICLE 14 ISSUE D

71. The issue that the 2003 Act in violation of the equality clause contained in Article 14 of the Constitution of India was not raised before the High Court. Only in one of the civil appeals, prayer was made for urging additional ground and the same having been directed, additional ground has been taken to urge the said question. A ground taken, however, must be based on a factual foundation. For attracting Article 14, necessary facts were required to be pleaded. The foundational facts as to how Section 14 of the 2003 Act would be discriminatory in nature have not been stated at all. The Government of Tamil Nadu has also not been given any opportunity to meet the said contention. E F

72. It is now trite that such factual foundation, unless is apparent from the statute, itself, cannot be permitted to be raised and that too for the first time before this Court.

73. In *Orient Weaving Mills (P) Ltd.* v. *The Union of India*, [1962] Supp 3 SCR 481, this Court has stated: G

> "...It is one thing to attack the constitutionality of the provisions of the Act authorising the levy of the excise duty on the petitioners; it is quite a different thing to complain of the exemption granted in respect of the goods produced by the 5th respondent. As the vires H

A of the Act itself has not been challenged, we need not say anything more on that aspect of a possible controversy which has not been actually raised in the petition."

74. Furthermore, in the matter of taxation, the State is given wide discretion and is allowed to pick and choose objects for taxation and exemption.

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75. We do not think that it is advisable for us to go into the said question.

76. In absence of necessary pleadings and grounds taken before the High Court, we are not in a position to agree with the learned counsel C appearing on behalf of the appellants that only because Section 13 of the repealed Act is inconsistent with Section 14 of the 2003 Act, the same would be arbitrary by reason of being discriminatory in nature and *ultra vires* Article 14 of the Constitution of India on the premise that charging section provides for levy of tax on sale and consumption of electrical energy, while the exemption D provision purports to give power to exempt tax on "electricity sold for consumption" and makes no corresponding provision for exemption of tax on electrical energy self-generated and consumed.

SHOULD WE READ IT DOWN

E 77. This leaves to the question as to whether the provisions of Section 14 of the 2003 Act should be read in such a manner so as to make it in consonance with Article 14 of the Constitution of India. The learned counsel would contend that Section 14 is loosely worded. We do not agree. The premise on which the said submission was made is that electricity cannot be stored. It has been held to be so in *National Thermal Power Corpn. Ltd* F (supra) in the following words:

> "...In this observation we agree with Grover, J. on all other characteristics of electric energy except that it can be stored and to the extent that electric energy can be stored, the observation must be held to be erroneous or by oversight. Science and technology till this G day have not been able to evolve any methodology by which electric energy can be preserved or stored."

[See also *BSES Ltd* (supra), para 16 and 18]

78. However, the editorial note in *National Thermal Power Corpn. Ltd* H (supra) itself suggests that now electricity, at least to some extent is possible

to be stored and that aspect of the matter had not been considered therein. Furthermore, the words "sold for consumption", only because the electricity cannot be stored, cannot be held to be mere tautology as urged or at all.

79. The doctrine of purposive construction can be taken recourse to provided there exists any ambiguity. If we have to agree with the submission of the learned counsel and in particular, Mr. Nariman, we will have to not only ignore the words "for consumption" occurring immediately after the word "sold" but also ignore the word "by" occurring immediately after the word "consumption". We have to give a new meaning which would amount to judicial legislation. We do not see any need therefor as thereby the taxation provision would be given a new dimension, by reason whereof not only exemption provisions will have to be understood in the context of sale of electricity but also consumption thereof.

80. We are not unmindful of the fact that the 2003 Act was enacted not only to consolidate but also to rationalize the Act. Mr. Nariman takes us to various authorities in regard to the construction of a consolidating statute including *IRC* v. *Hinchy,* (1960) 1 All ER 505, *Beswick* v. *Beswick,* (1967) 2 All ER 1197, *Dir. Of Public Prosecutions* v. *Schildkamp,* (1969) 3 All ER 1640, *Maunsell* v. *Olins,* (1975) 1 All ER 16 and *Farrell* v. *Alexander,* (1976) 2 All ER 721, to suggest that a consolidating statute is not meant to alter law. But, in these decisions, it has also been suggested that a consolidating statute may also be an amending act.

81. It is one thing to say that where the words or expressions in a statute are plainly taken from an earlier statute in pari materia, which have received judicial interpretation, it must be presumed that the Parliament was aware thereof and intended to be followed in latter enactment. But, it is another thing to say that it is necessary or proper to resort to or consider the earlier legislations on the subject only because the consolidating Act re-enacts in an orderly form the various statutes embodying the law on the subject. [See *Williams* v. *Permanent Trustee Co. of New South Wales,* (1906) AC 249, p. 252 and N.S. Bindra's Interpretation of Statutes, 10th edition, pages 1071-1072]

82. The words "consolidate and amend" furthermore often occur in a statute in repealing provision. Such a statute is not intended to alter the law.

83. In *The Union of India* v. *The Mohindra Supply Co.* AIR (1962) SC 256, this Court observed:

A "7...The Arbitration Act of 1940 is a consolidating and amending statute and is for all purposes a code relating to arbitration. In dealing with the interpretation of the Indian Succession Act, 1865, the Privy Council in *Norendra Nath Sircar* v. *Kamlabasini Desai* observed that a code must be construed according to the natural meaning of the language used and not on the presumption that it was intended to leave the existing law unaltered. The Judicial Committee approved of the observations of Lord Herschell in *Bank of England* v. *Vagliano Brothers* to the following effect:

I think ... the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions....

The court in interpreting a statute must therefore proceed without seeking to add words which are not to be found in the statute, nor is it permissible in interpreting a statute which codifies a branch of the law to start with the assumption that it was not intended to alter the pre-existing law; nor to add words which are not to be found in the statute, or for which authority is not found in the statute. But we do not propose to dispose of the argument merely on these general considerations. In our view, even the legislative history viewed in the light of the dictum of the Privy Council in Hurrish Chander case, does not afford any adequate justification for departing from the plain and apparent intendment of the statute."

84. Such construction is to be put only when it is a pure consolidating statute but there cannot be any doubt whatsoever that the same has to yield to plain words to the contrary. [See *Beswick* (supra) and *Grey* v. *IRC*, (1959)

3 All ER 603]. A

85. However, there is no constitutional or statutory embargo that a consolidating Act must also be an amending Act. When different terms are used in the new Act, it would not be proper for the Court to refer to the provisions of a repealed statute.

B

86. We may furthermore notice that the distinction between consolidating statute and other statutes is no longer valid. It is only in certain exceptional situations that the language used in the earlier Act can be resorted to.

87. In G.P. Singh's 'Principles of Statutory Interpretation', Tenth Edition, pages 315-316, it is stated: C

> "The distinction between consolidating statutes and other statutes for purposes of interpretation is being obliterated. Recent decisions have emphasised that a consolidation Act should be interpreted according to normal canons of construction and recourse to repealed enactments can be taken only to solve any ambiguity, for the process D of consolidation would lose much of its point if, whenever a question as to construction of a consolidating Act arose, reference had to be made to the statutes which it has consolidated and repealed. The primary rule of construction of a consolidation Act is to examine the language used in the Act itself without any reference to the repealed E statutes. It is only when the consolidation Act gives no guidance as to its proper interpretation that it is permissible to refer to the repealed enactments for guidance and it is never legitimate to have recourse to repealed enactments to make obscure or ambiguous that which is clear in the consolidation Act. It is only when there is a real or substantial difficulty or ambiguity that the court is to attempt to F resolve the difficulty or ambiguity by reference to the legislation which has been repealed and re-enacted in the consolidation Act. This rule applies to all types of consolidation Acts which are now three: (1) Pure consolidation. i.e. re-enactment, (2) Consolidation with correction and minor improvement, and (3) Consolidation with Law G Commission amendments. But when "the provisions of the Act itself invited reference to the earlier law and in some cases were unintelligible without them" recourse to the earlier law for construing the Act becomes inevitable."

H

A *REPEAL ISSUE*

88. Section 20 of the 2003 Act repeals the 1962 Act as well as the 1939 Act. The effect of 'repeal' is well known wherewith there does not appear to be any general controversy. Thus, before proceeding to advert to the rival contention of the parties, as noticed hereinbefore, we may notice certain B precedents of this Court operating in this behalf.

89. In *State of Punjab* v. *Mohar Singh,* [1955] 1 SCR 893], this Court has stated:

> "... Whenever there is a repeal of an enactment, the consequences laid C down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions D of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed E by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we F now proceed to examine the facts of the present case."

90. In *Jayantilal Amrathlal* v. *Union of India,* [1972] 4 SCC 174, this Court held:

> "8. The above contention is untenable. There are no provisions in the G Gold (Control) Act, 1968 which are inconsistent with Rule 126(I)(10) of the Rules. That being so, action taken under that rule must be deemed to be continuing in view of Section 6 of the General Clauses Act, 1897. It is true that Gold (Control) Act, 1968 does not purport to incorporate into that Act the provisions of Section 6 of the General H Clauses Act. But the provisions therein are not inconsistent with the

provisions in Section 6 of the General Clauses Act. Hence the provisions of Section 6 of the General Clauses Act are attracted in view of the repeal of the Gold (Control) Ordinance, 1968. As the Gold (Control) Act does not exhibit a different or contrary intention, proceedings initiated under the repealed law must be held to continue. We must also remember that by Gold (Control) Ordinance, the Rules were deemed as an act of Parliament. Hence on the repeal of the Rules and the Gold (Control) Ordinance, 1968 the consequences mentioned in Section 6 of the General Clauses Act, follow. For ascertaining whether there is a contrary intention, one has to look to the provisions of the Gold (Control) Act, 1968. In order to see whether the rights and liabilities under the repealed law have been put an end to by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question see *State of Punjab* v. *Mohar Singh and T.S. Baliah* v. *Income Tax Officer, Central Circle VI, Madras."*

91. In *India Tobacco Co. Ltd.* v. *The Commercial Tax Officer, Bhavanipore and Ors.,* [1975] 3 SCC 512, this Court held:

"15. The general rule of construction is that the repeal of a repealing Act does not revive anything repealed thereby. But the operation of this rule is not absolute. It is subject to the appearance of a different intention in the repealing statute. Again such intention may be explicit or implicit. The questions, therefore, that arise for determination are: Whether in relation to cigarettes, the 1941 Act was repealed by the 1954 Act and the latter by the 1958 Act? Whether the 1954 Act and 1958 Act were repealing enactments? Whether there is anything in the 1954 Act and the 1958 Act indicating a revival of the 1941 Act in relation to cigarettes?

16. It is now well-settled that repeal connotes abrogation or obliteration of one statute by another, from the statute book as completely as if it had never been passed; when an Act is repealed, it must be considered (except as to transactions past and closed) as if it had never existed. (Per Tindal, C.J., in *Kay* v. *Goodwin and Lord Tenterdon* in *Surtees* v. *Ellison* cited with approval in *State of Orissa* v. *M.A. Tulloch & Co.*).

A 17. Repeal is not a matter of mere form but one of substance, depending upon the intention of the legislature. If the intention indicated expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to a repeal (see Craies on Statute Law, 7th Edn. pp. 349, 353, 373, 374 and 375; Maxwells Interpretation of Statutes, 11th Edn. pp. 164, 390 based on *Mount* v. *Taylor*; Southerlands Statutory Construction 3rd Edn. Vol. I, para 2014 and 2022, pp. 468 and 490). Broadly speaking, the principal object of a repealing and amending Act is to excise dead matter, prune off superfluities and reject clearly inconsistent enactments see *Mohinder Singh* v. *Harbhajan Kaur*."

92. In *T.S. Baliah* v. *T.S. Rangachari, Income Tax Officer, Central Circle VI, Madras,* [1969] 3 SCR 65, this Court held:

"...The principle of this section is that unless a different intention appears in the repealing Act, any legal proceeding can be instituted and continued in respect of any matter pending under the repealed Act as if that Act was in force at the time of repeal. In other words, whenever there is a repeal of an enactment the consequences laid down in Section 6 of the General clauses Act will follow unless, as the section itself says, a different intention appears in the repealing statute. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject the Court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The question is not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. Section 6 of the General Clauses Act therefore will be applicable unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new statute and the mere absence of a saving clause is by itself not material. In other words, the provisions of Section 6 of the General Clauses Act will apply to a case of repeal even if there

is a simultaneous re-enactment unless a contrary intention can be gathered from the new statute..." A

93. In *Gajraj Singh and Ors.* v. *State Transport Appellate Tribunal and Ors.*, [1997]1 SCC 650, this Court held:

"24. When there is a repeal and simultaneous re-enactment, Section 6 of the GC Act would apply to such a case unless contrary intention can be gathered from the repealing Act. Section 6 would be applicable in such cases unless the new legislation manifests intention inconsistent with or contrary to the application of the section. Such incompatibility would have to be ascertained from all relevant provisions of the new Act. Therefore, when the repeal is followed by a fresh legislation on the same subject, the Court would undoubtedly have to look to the provisions of the new Act only for the purpose of determining whether the new Act indicates different intention. The object of repeal and re-enactment is to obliterate the Repealed Act and to get rid of certain obsolete matters." B C D

94. We may at this juncture also notice that whereas Section 6 of the General Clauses Act provides for effect of repeal, Section 24 thereof provides for continuation of orders issued under the enactments repealed and re-enacted. They read as under:

"6 Effect of repeal.—Where this Act, or any Central Act or Regulation made after the commencement of this Act, E

repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

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

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

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

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

(e) affect any investigation, legal proceeding or remedy in respect of H

A any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

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

24 Continuation of orders, etc., issued under enactments repealed and re-enacted.—Where any Central Act or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any
C appointment, notification, order, scheme, rule, form or bye-law, made or issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any appointment,
D notification, order, scheme, rule, form or bye-law, made or issued under the provisions so re-enacted and when any Central Act or Regulation, which, by notification under section 5 or 5A of the Scheduled Districts Act, 1874, (14 of 1874) or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn from and re-extended to such area or any part thereof, the
E provisions of such Act or Regulation shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this section."

95. What, however, is the matter of moment would be that the expression "unless a different intention appears" occurring in Section 6 of the General
F Clauses Act, 1897 has not been inserted in Sub-section (1) of Section 20 of the 2003 Act. Sub-sections (1) and (2) of Section 20 of the 2003 Act, thus, operate in different situations. Whereas the proviso appended to Sub-section (1) of Section 20 of the 2003 Act provides for the consequences flowing from the repeal of the 1939 Act and the 1962 Act; Section 20(2) provides for a legal
G fiction for continuation of certain things/ proceeding on the premise as if the said Acts had not been repealed. Repeal of the 1939 Act and the 1962 Act would lead to repeal of notifications issued thereunder also. Proviso appended to Sub-section (1) of Section 20 of the 2003 Act, however, carves out an exception in regard to the consequences flowing therefrom.

H 96. If Sub-sections (1) and (2) of Section 20 of the 2003 Act operate in

different fields, as we have held, the marginal note of Section 20, viz., repeal and savings, in our opinion, would not be material. If both the Sub-sections of Section 20 of the 2003 Act are not dependant on each other and in particular having regard to the phraseology used therein, they need not be read together. One cannot proceed on the basis while reading the provisions of the statute that anomaly would be created and then urge that they should be read together.

97. Submission of Mr. Andhyarujina that this Court must read the words "unless a different intention appears" in Sub-section (1) of Section 20 of the 2003 Act, in our opinion, is impermissible in law. We have rejected a similar contention of Mr. Nariman urging us to read down and apply the purported rule of purposive construction while construing Section 14 of the 2003 Act. We do not intend to apply different tests in the matter of construction of Section 20 of the 2003 Act. Omission of words in a particular statute may play an important role. The intention of the legislature must be, as is well known, gathered from the words used in the statute at the first instance and only when such a rule would give rise to anomalous situation, the court may take recourse to purposive construction. It is also a well settled principles of law that casus omissus cannot be supplied. [See *J. Srinivasa Rao* v. *Govt. of A.P. and Anr.*, [2006] 13 SCALE 27]

98. Proviso appended to Sub-section (1) of Section 20 of the 2003 Act although for all intent and purport incorporates Section 6 of the General Clauses Act but a significant departure therefrom must be borne in mind. If the legislature has used different words, or has omitted certain words, in our opinion, the same cannot be read as containing the words "unless a different intention appears". It may be that the provisions of the 2003 Act are demonstrably different from the 1962 Act but we must assume that the legislature did so deliberately. The intention of the legislature by making a distinction between Sub-section (1) and Sub-section (2) of Section 20 of the 2003 Act, in our opinion, is obvious. The fact that the significant words "unless a different intention appears" or the Act does not contain a provision inconsistent therewith were known to the legislature. Whereas in Sub-section (1) of Section 20 of the 2003 Act they did not introduce any such thing, they did so while enacting Sub-section (2) thereof.

99. While construing the said words, we may require to construe Section 14 of the 2003 Act at the outset. The word "corresponding" may mean "to be in harmony with or to be similar or analogous to or to be identical with"

A as has been held in *H.V. Mathai* v. *Subordinate Judge, Kottayam and Ors.*, [1969] 2 SCC 194.

100. The word "correspond" as contained in Stroud's Judicial Dictionary, 2nd Edition, Volume I, page 355, is to mean "to harmonize with" or "to be identical with".

B

101. But, we may notice that whereas the 1939 Act did not contain any provision for exemption from payment of tax in respect of sale of electrical energy, Section 13 of the 1962 Act dealing with taxation on consumption of electrical energy expressly provided therefor. Section 14 of the 2003 Act, on the other hand, makes a provision for grant of exemption in respect of sale C of energy as contra-distinguished from the provisions of the 1939 Act. It takes away the power of exemption on consumption of electrical energy which had been expressly provided under the 1962 Act. Can the 1939 Act and the 1962 Act, on the one hand, and the 2003 Act, on the other, be said to be containing similar or identical provisions? The answer thereto must be rendered D in the negative. Once Section 14 of the 2003 Act is held to be not containing any provision corresponding to the relevant provisions of the 1939 Act and the 1962 Act, Sub-section (2) of Section 20 of the 2003 Act, in our opinion, will have no application. If Sub-section (2) of Section 20 of the 2003 Act would have no application, Sub-section (1) of Section 20 would apply. Once Sub-section (1) of Section 20 of the 2003 Act is found to have application, E the absence of the words "unless a different intention appears" will assume great significance.

102. If that be so, then there is no conflict between the proviso appended to Sub-section (1) of Section 20 and Sub-section (2) thereof. In that view of F the matter, Sub-section (2) of Section 20 of the 2003 Act would prevail.

103. The High Court, therefore, in our opinion, committed a manifest error in opining that both the provisions relate to the same scenario. Furthermore, Sub-section (2) of Section 20 of the 2003 Act uses the expression "notwithstanding such repeal" and, thus, the same cannot be construed to G be notwithstanding anything contained in Sub-section (1) of Section 20 thereof.

104. Once the aforementioned conclusion is arrived at, it would not be necessary to construe the proviso appended to Sub-section (1) of Section 20 in its own language. Proviso, as is well known, has four functions, as has been noticed by this Court in *S. Sundaram Pillai* v. *V.R. Pattabiraman*, [1985] H 1 SCC 591 in the following terms:

"43. (1) qualifying or excepting certain provisions from the main enactment; A

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

B

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision." C

[See also *Swedish Match AB* v. *Securities & Exchange Board, India*, [2004] 11 SCC 641]

105. In a case of this nature, the proviso restricts the operation of the repeal clause. It seeks to protect the matter specified thereunder despite such repeal. Section 6 of the General Clauses Act seeks to achieve the same purpose, subject of course, to the repealing Act having no provision inconsistent with the repealed Acts. D

106. The 1962 Act provided for grant of exemption from payment of electricity tax levied on consumption of electricity. When a notification was issued by the appropriate authority, the same had to be given a purpose. A notification issued thereunder could be an act which would come within the purview of the words "anything duly done". E

107. In our opinion, it would not be correct to contend that only because Sub-section (2) of Section 20 of the 2003 Act refers to notification, the same would not mean that wherever the word notification has been issued, Sub-section (1) thereof will have no application. F

108. We are also unable to agree with Mr. Andhyarujina that exemption from tax is a mere concession defeasible by Government and does not confer any accrued right to the recipient. Right of exemption with a valid notification issued gives rise to an accrued right. It is a vested right. Such right had been granted to them permanently. 'Permanence' would mean unless altered by statute. G

H

A 109. Thus, when a right is accrued or vested, the same can be taken away only by reason of a statute and not otherwise. Thus, a notification which was duly issued would continue to govern unless the same is repealed.

110. Mr. Andhyarujina, however, would submit that reference to the words "anything duly done" should be given a restrictive meaning. He referred B to "Statutory Interpretation - A Code" by F.A.R. Bennion, Third Edition, page 229, wherein it was stated:

> "Paragraph (ii) This derives from Interpretation Act 1978 s16(1)(b). The reference to 'anything duly done' avoids the need for procedural matters, such as the giving of notices, to be done over again.
>
> C
>
> Example 89.3 The Interpretation Act 1978 s 16 preserved the effect of a noise nuisance notice served under the Control of Pollution Act 1974 s 58(1) before its repeal and replacement by the Environmental Protection Act 1990 ss 162 and 164(2) and Sch 16 Pt III."

D 111. The treatment of the law, in our opinion, is not exhaustive as different consequences are required to be taken into consideration and applied having regard to the nature of the statutory provision.

112. Mr. Andhyarujina also relied upon Maxwell on the Interpretation of Statutes, 12th edition, page 18, wherein it was stated:

E

> "When an Act is repealed, any delegated legislation made under the Act falls to the ground with the statute unless it is expressly preserved. Where the subordinate legislation is continued in force, however, the general rule is that its scope and construction are determined according to the repealed Act under which it was made."
>
> F

113. The statement of law therein does not militate against our findings aforementioned. Construction would vary from statute to statute.....

114. It is profitable to notice at this stage a decision of this Court in *M/s. Universal Imports Agency* (supra). In that case under the Indo-French G Agreement entered into by and between the two nations on 1st November, 1954, the entire Administration of French Settlement vested in the Government of India. The territory of Pondicherry, thus, became a free port without any restriction in case of most imports. However, by reason of a notification dated 30th October, 1954, the importers in Pondicherry were required to obtain H validation of licences held by them to import goods as petitioners thereof did

not have any merchandise imported by them stood confiscated. A

115. Clause 6 of the Agreement reads, thus:

> "Unless otherwise specifically provided in the Schedule, all laws in force in the French Establishments immediately before the commencement of the Order, which correspond to enactments specified B in the Schedule, shall cease to have effect, save as respect things done or omitted to be done before such commencement."

116. Analyzing the said provision, this Court held:

> "...The words things done in para 6 must be reasonably interpreted C and, if so interpreted, they can mean not only things done but also the legal consequences flowing therefrom. If the interpretation suggested by the learned counsel for the respondents be accepted, the saving clause would become unnecessary. If what it saves is only the executed contracts i.e. the contracts whereunder the goods have been imported and received by the buyer before the merger, no further D protection is necessary as ordinarily no question of enforcement of the contracts under the pre-existing law would arise. The phraseology used is not an innovation but is copied from other statutory clauses. Section 6 of the General Clauses Act (10 of 1897) says that unless a different intention appears, the repeal of an Act shall not affect E anything duly done or suffered thereunder..."

117. Thus, a liberal and extensive construction was given by this Court.

118. To the same effect is also a decision of this Court in *Shri Ram Prasad* (supra) wherein power to make rule was held to be a thing done within F the meaning of Article 357(2) of the Constitution of India.

119. In *Harnek Singh* (supra), this Court held:

> "16. The words anything duly done or suffered thereunder used in clause (b) of Section 6 are often used by the legislature in saving G clause which is intended to provide that unless a different intention appears, the repeal of an Act would not affect anything duly done or suffered thereunder. This Court in *Hasan Nurani Malak* v. *S.M. Ismail, Asstt. Charity Commr., Nagpur* has held that the object of such a saving clause is to save what has been previously done under the statute repealed. The result of such a saving clause is that the pre- H

A existing law continues to govern the things done before a particular date from which the repeal of such a pre-existing law takes effect. In *Universal Imports Agency* v. *Chief Controller of Imports and Exports,* this Court while construing the words things done held that a proper interpretation of the expression things done was comprehensive enough to take in not only the things done but also the effect of the legal consequence flowing therefrom."

B

120. Furthermore, exemption from payment of tax in favour of the appellants herein would also constitute a right or privilege. The expression "privilege" has a wider meaning than right. A right may be a vested right or an accured right or an acquired right. Nature of such a right would depend upon and also vary from statute to statute. It has been so held by this Court, while construing Section 6 of the General Clauses Act, in *M/s. Gurcharan Singh Baldev Singh* v. *Yashwant Singh and Ors.,* [1992] 1 SCC 428 in the following terms:

C

D "...The objective of the provision is to ensure protection of any right or privilege acquired under the repealed Act. The only exception to it is legislative intention to the contrary. That is, the repealing Act may expressly provide or it may impliedly provide against continuance of such right, obligation or liability..."

E 121. We are, however, in a case of this nature, not really concerned with the question as to whether even an inchoate right can be subject matter of a saving clause. Such a question, in our opinion, does not arise for consideration herein.

122. We have noticed the legislative history of the Act. Whereas the F 1939 Act did not contain any provision for grant of exemption from payment of electricity tax on sale of electrical energy, the 1962 Act contained two provisions in relation thereto. One, contained in Section 12 relating to High Tension Supply in the matter of principal production and another contained in Section 13 being a general power of exemption.

G 123. After the 1962 Act came into force, as noticed hereinbefore, the Government issued the notification bearing GOMs No. 787 dated 30.04.1979 merging the electricity tax with the basic tariff. In 1991, the 1962 Act was amended whereby additional tax was levied at 5%.

H 124. On or about 22.10.1991, the Union Ministry of Power, Government

of India published a policy for private participation in the power sector as a result whereof provisions were made in the 1948 Act allowing setting up of generating companies and captive power plants. Indisputably, the Government of Tamil Nadu constituted a committee to go into the issue of cogeneration of electricity in the sugar mills and other industries and to make recommendations therefor; the terms of reference being "to evolve a methodology for pricing of electricity purchased by Tamil Nadu Electricity Board from sugar Mills Cogenerating electricity", etc. as stated therein. It is not in dispute that a cogenerating sugar mill is not similar to other captive power plant insofar as a typical cogenerating sugar mill would consume only 30% of the power generated and balance 70% thereof is to be sold.

125. The Committee furnished a report recommending exemption from generation tax both from power consumption and as also the power supplied to the grid/ third parties. It was also recommended that the Tamil Nadu Electricity Board may pay a price equal to HT-I tariff charged for industrial consumers less 2% for transmission cost.

126. The State, however, did not accept the recommendations made by the said Committee in their entirety. By reason of a notification dated 16.06.1993, the State while accepting a part of the said report, directed that the Tamil Nadu Electricity Board shall pay a price equal to HT-I tariff charged for industrial consumers less 2% for transmission cost. However, an exemption provision was made from payment of Electricity General Tax therein stating:

> "Cogenerating sugar mills shall be exempted from the Electricity Generation Tax both for power consumed captively as well as power supplied to the Tamil Nadu Electricity Board and other third parties."

127. By reason of Act No. 43 of 1994, with a view to rationalize the rate of tax on consumption, rate of additional tax was increased from 4% to 5% without repealing GOMs. No. 230 dated 16.06.1993.

128. On 9.10.1995, the Ministry of Power, Union of India wrote to all State Electricity Boards and State Governments urging them to take steps to tap the potential in captive/ cogeneration power plants as energy shortage was visualized at 15% and peaking shortage at 30%. The State Governments, therefore, were urged to create an institutional mechanism to meet the said shortage.

129. On or about 23rd September, 1996, the Government of Tamil Nadu

A issued the following exemption notification bearing GOMs. No. 126:

> "In exercise of the powers conferred by sub-section (1) of Section 13 of the Tamil Nadu Electricity (Taxation on Consumption) Act 1962 (Tamil Nadu Act 4 of 1962), the Governor of Tamil Nadu hereby direct that the consumption of self-generated electrical energy for captive generators by the Paper, Textile, Chemical and Sugar Industries irrespective of the fuel they use be exempted permanently from the electricity tax payable under the said Act. The Governor also direct that the consumption of energy generated through Non-Conventional Energy Sources like Sun, Wind etc., be exempted from the Electricity Tax payable under the above Act."

130. Appellants contend that relying on or on the basis thereof, a huge sum was invested by them for installing power generation plants. Sugar industries, by way of example, alone are said to have invested about Rs. 745.64 crores in that behalf; the details whereof are as under:

Sl No	Name of the Sugar Mill	Project Cost Rs. in crores
1	EID Parry (India) Limited	265.00
2	Thiru Arooran Sugars Ltd/ Terra Energy Limited	104.00
3	Shree Ambika Sugars Limited	160.00
4	Rajshree Sugars & Chemicals Ltd	86.64
5	Sakthi Sugars Limited	96.00
6	Kothari Sugars & Chemicals Ltd.	33.00
	Total :	745.64

Grasim Industries alone is said to have invested about Rs. 37 crores.

131. Appellants contend that a lower rate of tariff was purposively fixed as the State intended to grant exemption from payment of electricity tax permanently which, according to them, would be evident from the following

chart:

"Date	TNEB Rate		HT-I Tariff	Assumed Tax on consumption	Net Rate
	Season	Off-season			
	(Rs. P)	(Rs. P)	(Rs. P)	(Rs. P)	(Rs. P)
01.04.1995	2.25		2.40	0.05	2.35
01.04.1996	2.36		2.80	0.05	2.75
01.04.1997	2.48		2.80	0.05	2.75
01.04.1998	2.60		2.80	0.06	2.74
20.07.1998	2.60		3.20	0.06	3.14
01.04.1999	2.73		3.20	0.07	3.13
01.04.2000	2.73	2.48	3.40	0.07	3.33
01.04.2001	2.87	2.60	3.40	0.07	3.33
01.04.2002	2.88	2.73	3.20	0.07	3.13
16.03.2003	3.01	2.73	3.50	0.08	3.42

Notes: 1. After 16.3.2003, the same rate continued as the TNEB rate is restricted to 90% of the HT-1 Tariff as per TNEB Board proceedings dated 11.1.2000.

2. In co-generation, out of the total power generated, 30% is used for captive consumption and 70% is exported to TNEB. Tax of 5% on consumption therefore approximates to 2.14% on the power exported to TNEB. The tax as above is calculated on that basis."

PROMISSORY ESTOPPEL ISSUE

132. It is in the aforementioned context, the doctrine of promissory estoppel is sought to be invoked. We will notice hereinafter that even a right can be preserved by reason of invocation of doctrine of promissory estoppel.

133. Submission of Mr. Andhyarujina, however, is that there cannot be an estoppel against a statute and, in any event, an exemption granted under Sub-section (1) of Section 13 of the 1962 Act was subject to cancellation or variation under Sub-section (2) of Section 13 thereof.

134. In regard to the evolution of the said doctrine, it may not be necessary for us to notice all the decisions cited at the bar as most of them have recently been taken into consideration by this Court in *M/s. A.P. Steel*

Re-Rolling Mill Ltd. v. *State of Kerala & Ors.*, (2006) 14 SCALE 162.

135. The doctrine of promissory estoppel would undoubtedly be applicable where an entrepreneur alters his position pursuant to or in furtherance of the promise made by a State to grant inter alia exemption from payment of taxes or charges on the basis of the current tariff. Such a policy decision on the part of the State shall not only be expressed by reason of notifications issued under the statutory provisions but also under the executive instructions. Appellants had undoubtedly been enjoying the benefit of payment of tax in respect of sale/ consumption of electrical energy in relation to the cogenerating power plants.

136. Unlike an ordinary estoppel, promissory estoppel gives rise to a cause of action. It indisputably creates a right. It also acts on equity. However, its application against constitutional or statutory provisions is impermissible in law. This aspect of the matter has been considered in *State of Bihar and Ors.* v. *Project Uchcha Vidya, Sikshak Sangh and Ors.*, [2006] 2 SCC 545 stating:

> "77. We do not find any merit in the contention raised by the learned counsel appearing on behalf of the respondents that the principle of equitable estoppel would apply against the State of Bihar. It is now well known, the rule of estoppel has no application where contention as regards a constitutional provision or a statute is raised. The right of the State to raise a question as regards its actions being invalid under the constitutional scheme of India is now well recognised. If by reason of a constitutional provision, its action cannot be supported or the State intends to withdraw or modify a policy decision, no exception thereto can be taken. It is, however, one thing to say that such an action is required to be judged having regard to the fundamental rights of a citizen but it is another thing to say that by applying the rule of estoppel, the State would not be permitted to raise the said question at all. So far as the impugned circular dated 18-2-1989 is concerned, the State has, in our opinion, a right to support the validity thereof in terms of the constitutional framework."

137. Yet again in *Mahabir Vegetable Oils (P) Ltd. and Anr.* v. *State of Haryana and Ors.*, [2006] 3 SCC 620, it was stated:

> "38. The promises/representations made by way of a statute, therefore, continued to operate in the field. It may be true that the appellants

altered their position only from August 1996 but it has neither been denied nor disputed that during the relevant period, namely, August 1996 to 16-12-1996 not only have they invested huge amounts but also the authorities of the State sanctioned benefits, granted permissions. Parties had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. An entrepreneur who sets up an industry in a backward area unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State. The State accepted that equity operated in favour of the entrepreneurs by issuing Note 2 to the notification dated 16-12-1996 whereby and whereunder solvent extraction plant was for the first time inserted in Schedule III i.e. in the negative list."

138. We may, however, notice that a survey of the earlier decisions has also been made by this Court in *State of Punjab* v. *Nestle India Ltd. and Anr.*, [2004] 6 SCC 465 wherein the law has been stated in the following terms:

"25. In other words, promissory estoppel long recognised as a legitimate defence in equity was held to found a cause of action against the Government, even when, and this needs to be emphasised, the representation sought to be enforced was legally invalid in the sense that it was made in a manner which was not in conformity with the procedure prescribed by statute."

139. Referring to *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of U.P.* [1979] 2 SCC 409, this Court observed:

"29. As for its strengths it was said: that the doctrine was not limited only to cases where there was some contractual relationship or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affect a legal relationship which would arise in future. The Government was held to be equally susceptible to the operation of the doctrine in whatever area or field the promise is made contractual, administrative or statutory. To put it in the words of the Court:

The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government

A would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. (SCC p. 442, para 24)

B ***

[E]quity will, in a given case where justice and fairness demand, prevent a person from insisting on strict legal rights, even where they arise, not under any contract, but on his own title deeds or under statute. (SCC p. 425, para 8)

C ***

Whatever be the nature of the function which the Government is discharging, the Government is subject to the rule of promissory estoppel and if the essential ingredients of this rule are satisfied, the D Government can be compelled to carry out the promise made by it. (SCC p. 453, para 33)"

140. This Court distinguished its earlier decision in *Kasinka Trading* v. *Union of India,* [1995] 1 SCC 274, whereupon Mr. Andhyarujina placed strong reliance, in the following terms:

E "40. The case of Kasinka Trading v. Union of India cited by the appellant is an authority for the proposition that the mere issuance of an exemption notification under a provision in a fiscal statute such as Section 25 of the Customs Act, 1962, could not create any promissory estoppel because such an exemption by its very nature is susceptible F to being revoked or modified or subjected to other conditions. In other words, there is no unequivocal representation. The seeds of equivocation are inherent in the power to grant exemption. Therefore, an exemption notification can be revoked without falling foul of the principle of promissory estoppel. It would not, in the circumstances, G be necessary for the Government to establish an overriding equity in its favour to defeat the petitioners plea of promissory estoppel. The Court also held that the Government of India had justified the withdrawal of exemption notification on relevant reasons in the public interest. Incidentally, the Court also noticed the lack of established prejudice to the promises when it said: (SCC p. 289, para 22)

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The burden of customs duty etc. is passed on to the consumer and therefore the question of the appellants being put to a huge loss is not understandable. A

(See also *Shrijee Sales Corpn.* v. *Union of India and STO* v. *Shree Durga Oil Mills.*) We do not see the relevance of this decision to the facts of this case. Here the representations are clear and unequivocal." B

141. In *MRF Ltd., Kottayam* v. *Asst. Commissioner (Assessment) Sales Tax and Ors.*, [2006] 8 SCC 702, wherein one of us (Katju, J.) was a member, *Kasinka Trading* (supra) has also been held to be inapplicable where a right has already accrued; for instance, in a case where the right to exemption of tax for a fixed period accrues and the conditions for that exemption have also been fulfilled, the withdrawal of that exemption cannot affect the already accrued right. C

142. In *MRF Ltd.* (supra), it was held that the doctrine of promissory estoppel will also apply to statutory notifications. D

143. We may also notice an interesting observation made by Beg, J. in *Madan Mohan Pathak and Anr.* v. *Union of India and Ors.*, [1978] 2 SCC 50 wherein the learned Judge in his concurrent judgment while striking down the Life Insurance Corporation (Modification of Settlement) Act, 1976, opined:

"Furthermore, I think that the principle laid down by this Court in Union of India v. Indo-Afghan Agencies Ltd. can also be taken into account in judging the reasonableness of the provision in this case. It was held there (at p. 385): E

Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen. F

In that case, equitable principles were invoked against the Government. It is true that, in the instant case, it is a provision of the Act of Parliament and not merely a governmental order whose validity is challenged before us. Nevertheless, we cannot forget that the Act is the result of a proposal made by the Government of the day which, instead of proceeding under Section 11(2) of the Life Insurance G H

A Corporation Act, chose to make an Act of Parliament protected by emergency provisions. I think that the prospects held out, the representations made, the conduct of the Government, and equities arising therefrom, may all be taken into consideration for judging whether a particular piece of legislation, initiated by the Government and enacted by Parliament, is reasonable."

B

144. We, therefore, are of the opinion that doctrine of promissory estoppel also preserves a right. A right would be preserved when it is not expressly taken away but in fact has expressly been preserved.

C 145. In view of the application of doctrine of promissory estoppel in the case of the appellants, their right is not destroyed and in that view of the matter although the Scheme under the impugned Act is different from the 1939 Act and the 1962 Act and furthermore in view of the phraseology used in Section 20(1) of the 2003 Act, right of the appellants cannot be said to have been destroyed. The legislature in fact has acknowledged that right to be D existing in the appellants.

LEGITIMATE EXPECTATION

146. We may also notice the emerging doctrine in this behalf, *viz.*, Legitimate Expectation of Substantive Benefit. Ordinarily, the said principle E would not have any application where the legislature has enacted a statute. As, according to us, the legislature in this case allowed the parties to take benefit of their existing rights having regard to the repeal and saving clause contained in Section 20(1) of the 2003 Act, the same would apply. If, thus, principle of promissory estoppel would apply, there may not be any reason as to why the doctrine of legitimate expectation would not.

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147. Legitimate expectation is now considered to be a part of principles of natural justice. If by reason of the existing state of affairs, a party is given to understand that the other party shall not take away the benefit without complying with the principles of natural justice, the said doctrine would be G applicable. The legislature, indisputably, has the power to legislate but where the law itself recognizes existing right and did not take away the same expressly or by necessary implication, the principles of legitimate expectation of a substantive benefit may be held to be applicable.

148. We may notice the applicability of the said doctrine in respect of H a substantive legislation, which is of some academic interest.

149. In *R* v. *North and East Devon Health Authority, ex parte Coughlan,* (2001) 1 QB 213, Lord Woolf identified three categories of legitimate expectations:

(i) "The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. Here the court is confined to reviewing the decision on Wednesbury grounds. This has been held to be the effect of changes of policy."

(ii) "On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. Here it is uncontentious that the court itself will require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it in which case the court will itself judge the adequacy of the reason advanced for the change of policy, taking into account what fairness requires."

(iii) "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

(See also para 57-59)

150. In *R* v. *Home Secretary, ex parte Hindley,* (2001) 1 AC 410 it is interesting to note the leading speech of Lord Steyn which is more reserved. Court of Appeal also considered the aforementioned concept in *R (on the application of Bibi)* v. *London Borough of Newham,* (2001) EWCA Civ 607. In *Bibi's* case (supra), the court accepted that it had jurisdiction to protect a substantive legitimate expectation but adopted a somewhat different approach from the approach taken in *Coughlan* (supra). In a joint judgment the court said:

"In all legitimate expectation cases, whether substantive or

A procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

B 151. In determining whether an authority has acted "unlawfully", the court expressed its discontent with the standard laid down in Coughlan. It will be in the fitness of the continuing theme, to refer to Coughlan on this point:

> The traditional view has been that the *Wednesbury* categories were exhaustive of what was an abuse of power. However in *Coughlan* the
> C court preferred "to regard the *Wednesbury* categories as the major instances (not necessarily the sole ones), of how public power may be misused" (para.81).
>
> In *Coughlan* the court followed *R* v. *Inland Revenue Commissioners ex parte Unilever,* (1996) S.T.C.681, in asking itself whether the reneging
> D by an authority on its promise was "so unfair as to amount to an abuse of power" (para.78). It concluded that it was. However, without refinement, the question whether the reneging on a promise would be so unfair as to amount to an abuse of power is an uncertain guide.

E After having established such an abuse the court may ask the decision taker to "take the legitimate expectation properly into account in the decision making process." It does not necessarily follow that a legitimate expectation of a substantive benefit will be satisfied. [See also *Barratt* v. *Howard* (2000) FCA 190].

F 152. We may, however, do not mean to lay down a law that the said principle is to be applied even on the face of the exercise of legislative power by the State in terms of the entries made in List II of the Seventh Schedule of the Constitution of India. Our observations must necessarily be understood in the context of the aforementioned decisions.

G *DEMAND CHARGE*

153. We have noticed hereinbefore that the legislative field carved out by reason of Entry 53 of List II and Entry 38 of List III of the Seventh Schedule of the Constitution of India operate in different fields. The 1948 Act was enacted to provide for the rationalization of the production and supply
H of electricity, and generally for taking measures conducive to electrical

development. A

154. Tariff is framed by the State Electricity Boards under Sections 46 and 49 of the 1948 Act. They may have different considerations for imposition of tariffs. We have noticed hereinbefore, the definition of 'tariff' in *BSES Ltd.* (supra), whereupon Mr. Andhyarujina himself relied upon. A tax on tariff and a tax on consumption or sale of electrical energy, thus, operate in different B fields. If it is to be held that the power of the Electricity Regulatory Commission to fix tariff does not include a power to impose tax, axiomatically, the same principle would apply also when a tax is sought to be levied on consumption or sale of electrical energy and not on tariff. Power of taxation, as noticed hereinbefore, operates differently from power to impose tariff. A tariff validly C framed by the licensee, in exercise of its statutory power, may lay down a higher rate on the sale of power to various types of consumers having regard to the necessity to maintain infrastructure. A maximum demand charge, when levied, does not contemplate a sale or consumption of electrical energy. Maximum tariff is provided for various reasons. It has been noticed by this Court in *IPI Steel Ltd.* (supra) in the following terms: D

> "From this circumstance, however, one cannot jump to the conclusion that it is an arbitrary way of levying consumption charges. Normally speaking, a factory utilises energy at a broadly constant level. May be, on certain occasions, whether on account of breakdowns, strikes or shutdowns or for other reasons, the factory may not utilise energy E at the requisite level over certain periods, but these are exceptions. Every factory expects to work normally. So does the Electricity Board expect and accordingly produces energy required by the factory and keeps it in readiness for that factory keeping it ready on tap, so to speak. As already emphasised, electricity once generated cannot be F stored for future use. This is the reason and the justification for the demand charges and the manner of charging for it. There is yet another justification for this type of levy and it is this: demand charges and consumption charges are intended to defray different items. Broadly speaking, while demand charges are meant to defray the capital costs, consumption charges are supposed to meet the G running charges. Every Electricity Board requires machinery, plant, equipment, sub-stations, transmission lines and so on, all of which require a huge capital outlay. The Board like any other corporation has to raise funds for the purpose which means it has to obtain loans. The loans have to be repaid, and with interest. Provision has to be H

made for depreciation of machinery, equipment and buildings. Plants, machines, stations and transmission lines have to be maintained, all of which require a huge staff. It is to meet the capital outlay that demand charges are levied and collected whereas the consumption charges are levied and collected to meet the running charges.

11. Pausing here for a moment, we may explain the importance and significance of maximum demand. The maximum demand of a given plant/factory determines the type of lines to be laid and the power of transformers and other equipment to be installed for the purpose. A factory having a maximum demand of say 1000 KVA and a factory having a maximum demand of 10,000 KVA require different type of lines and other equipment for providing supply to them. In the case of latter, lines have to be of a more load-bearing variety. Transformers have to be installed and of more capacity. Sometimes in the case of bulk consumers even a sub-station may have to be established exclusively for such factory/plant. Very often these industries are situated away from power stations and main transmission lines which means laying special power lines over considerable distances to give the supply connection. As a matter of fact, the significance of the maximum demand would be evident from the fact that the agreement between the Board and consumer (like the respondent) specifies only the maximum demand and not the total units allowed to be consumed. The agreement concerned herein prescribes the maximum demand at 7778 KVA but does not prescribe the total number of units of energy allowed to be consumed. This is for the reason, explains Shri Hegde, that the total number of units of energy consumed is determined by the load/level at which power is drawn. The formula, taking the case of the respondent is stated to be 100% unrestricted energy requirement of the respondent = contract demand in KVA x power factor x load factor x total number of hours in a year. In concrete terms, it means 7778 KVA x 0.90 x 0.611 x 8760 = 37,467,590 KWH (Units) = 37.467.59 MU (Million Units). This formula, as it states expressly, is premised on unrestricted supply. Problems arise only when restrictions are placed on consumption on account of fall in production of electricity by the Board, as would be explained hereinafter."

155. Thus, what is permissible for the purpose of framing a tariff need not necessarily be permissible for levy of tax. Tariff for supply of High Tension energy is in two parts, *viz.*, (a) units consumed and (b) maximum

demand. The High Court proceeded on a wrong premise to hold that the tax is levied only on the maximum demand, i.e., on the energy consumed. It is now accepted that the maximum demand indicator installed in a factory premises of a consumer of High Tension electrical energy shows the maximum amount of energy drawn during any consecutive thirty minutes in a total month of consumption of electrical energy. Maximum demand charge is fixed on that basis although the connected demand may be much more.

156. Mr. Andhyarujina himself has produced before us the terms and conditions of supply of Tamil Nadu Electricity Board wherein 'demand' has been defined in the following terms:

"(vii) "Demand" -

(a) "Average Demand" for the month means the ratio of the total kilowatt-hours consumed in the month to the total hours in the month.

(b) "Maximum Demand" in a month means the highest value of the average Kilowatt- amperes delivered at the point of supply of the consumer during any consecutive thirty minutes in the month.

(c) "Permitted Demand" means the demand permitted by the competent authority of the Board taking into account the constraints in the Board's transmission and distribution network. (This definition does not apply to the demand quota permitted under the "Restriction and Control" orders).

(d) "Sanctioned Demand or Contracted Demand" means the demand sanctioned by the competent authority of the Board and specified in the agreement"."

'Load' has been defined in clause 2(ix)(a) in the following terms:

"(ix) "Load" -

(a) "Connected Load" means the aggregate of the manufacturer's rating of all the equipment connected in the consumer's installation and of all the portable equipments;

This is expressed in KW or HP. If the rating is in KVA, it is converted to KW by multiplying it by a power factor of 0.9. If the rating is in HP, it is converted to KW by multiplying it by 0.746.

A (b) "Contracted Load" means the load which is specified in the agreement;"

157. Similar definition has been provided in Tamil Nadu Electricity Distribution Code.

B 158. From the definitions of aforementioned types of demand, it would appear that maximum demand in a month means the highest value of the energy delivered at the point of supply of the consumer during any consecutive thirty minutes in a month. It is, therefore, incorrect to contend that there does not exist any distinction between actual consumption and maximum demand. The High Court itself has noticed a distinction between C Low Tension consumption and High Tension consumption. There indeed exists such a definition. Therefore, in our opinion, such a construction would not be correct.

159. A taxing statute, as is well known, must receive strict interpretation. D [See *Manish Maheshwari* v. *Asstt. Commissioner of Income Tax and Anr.*, [2007] 3 SCALE 627].

160. A taxing statute, therefore, must be made in consonance with Article 265 of the Constitution of India. Mr. Andhyarujina draws our attention to Sub-clause (d) of Clause 29A of Article 366 of the Constitution of India E to submit that the Constitution itself has envisaged an expanded meaning of the term. Clause 29A is subject to the other provisions. It has been included for the purpose of defining the tax on the sale or purchase of goods as envisaged under Entry 54 of List II of the Seventh Schedule of the Constitution of India and not for the purpose of Entry 53.

F 161. The reason for insertion of such an explanation is to get over the decision of this Court in *State of Madras* v. *Gannon Dunkerley & Co. (Madras) Ltd.* [1959] SCR 379 wherein it has been held that tax cannot be imposed on sale of materials transferred in execution of a works contract stating:

G "In our opinion, that is not the inference to be drawn from the absence of words linking up the meaning of the word "sale" with what it might bear in the Sale of Goods Act. We think that the true legislative intent is that the expression "sale of goods" in Entry 48 should bear the precise and definite meaning it has in law, and that that meaning H should not be left to fluctuate with the definition of "sale" in laws

relating to sale of goods which might be in force for the time being. It was then said that in some of the Entries, for example, Entries 31 and 49, List II, the word "sale" was used in a wider sense than in the Sale of Goods Act, 1930. Entry 31 is intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs...". The argument is that "sale" in the Entry must be interpreted as including barter, as the policy of the law cannot be to prohibit transfers of liquor only when there is money consideration therefor. But this argument proceeds on a misapprehension of the principles on which the Entries are drafted. The scheme of the drafting is that there is in the beginning of the Entry words of general import, and they are followed by words having reference to particular aspects thereof. The operation of the general words, however, is not cut down by reason of the fact that there are sub-heads dealing with specific aspects..." A B C

162. *Gannon Dunkerley & Co. (Madras) Ltd.* (supra) has been noticed by a 3-Judge Bench of this Court in *Bharat Sanchar Nigam Ltd. and Anr.* v. *Union of India and Ors.*, [2006] 3 SCC 1 in the following terms: D

"43. Gannon Dunkerley survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of sale for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of deemed sales, the meaning of the word goods was not altered. Thus the definitions of the composite elements of a sale such as intention of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word goods has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to E F G H

A qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax."

While noticing the said case, it has been held:

"105. The amendment introduced fiction by which six instances of
B transactions were treated as deemed sale of goods and that the said definition as to deemed sales will have to be read in every provision of the Constitution wherever the phrase tax on sale or purchase of goods occurs. This definition changed the law declared in the ruling in Gannon Dunkerley & Co. only with regard to those transactions of deemed sales. In other respects, law declared by this Court is not
C neutralised. Each one of the sub-clauses of Article 366(29-A) introduced by the Forty-sixth Amendment was a result of ruling of this Court which was sought to be neutralised or modified. Sub-clause (a) is the outcome of *New India Sugar Mills Ltd.* v. *CST and Vishnu Agencies (P) Ltd.* v. *CTO.* Sub-clause (b) is the result of Gannon Dunkerley &
D Co. Sub-clause (c) is the result of *K.L. Johar and Co.* v. *CTO.* Sub-clause (d) is consequent to *A.V. Meiyappan* v. *CCT.* Sub-clause (e) is the result of *CTO* v. *Young Mens Indian Assn.* (Regd.). Sub-clause (f) is the result of *Northern India Caterers (India) Ltd.* v. *Lt. Governor of Delhi,* and *State of Punjab* v. *Associated Hotels of India Ltd.*

E 106. In the background of the above, the history prevailing at the time of the Forty-sixth Amendment and pre-enacting history as seen in the Statement of Objects and Reasons, Article 366(29-A) has to be interpreted. Each fiction by which those six transactions which are not otherwise sales are deemed to be sales independently operates only in that sub-clause.

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107. While the true scope of the amendment may be appreciated by overall reading of the entirety of Article 366(29-A), deemed sale under each particular sub-clause has to be determined only within the parameters of the provisions in that sub-clause. One sub-clause cannot be projected into another sub-clause and fiction upon fiction is not
G permissible. As to the interpretation of fiction, particularly in the sales tax legislation, the principle has been authoritatively laid down in *Bengal Immunity Co. Ltd.* v. *State of Bihar,* SCR at p. 647:

The operative provisions of the several parts of Article 286, namely, clause (1)(a), clause (1)(b), clause (2) and clause (3) are manifestly
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intended to deal with different topics and, therefore, one cannot be projected or read into another. (S.R. Das, Actg. C.J.)

We can also see pp. 720 and 721 (N.P. Bhagwati, J.)."

It was categorically held therein:

"75. In our opinion, the essence of the right under Article 366(29-A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise."

It was furthermore held that only because the Board keeps itself ready for supply of electrical energy, the same by itself would not mean that there had been deliverable goods and the goods have been delivered.

163. We are not concerned with the user of the goods and, therefore, deliverability of the goods is not in question.

164. It may be that electricity has been considered to be 'goods' but the same has to be considered having regard to the definition of "goods" contained in Clause (12) of Article 366 of the Constitution of India. When this Court held electricity to be 'goods' for the purpose of application of sales tax laws and other tax laws, in our opinion, the same would have nothing to do with the construction of Entry 53 of List II of the Seventh Schedule of the Constitution of India.

165. Supply does not mean sale. A' fortiori it does not also mean consumption.

166. A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed.

167. Strong reliance has been placed by Mr. Andhyarujina on a decision

A of this Court in *M/s. Northern India Iron & Steel Co.* v. *State of Haryana and Anr.*, [1976] 2 SCC 877 wherein it has been held:

> "10. Coming to the question of duty, we have no hesitation in an outright rejection of the extreme contention put forward on behalf of the appellants that no duty is liviable at all on the demand charge. But
B it is clear, and this was fairly conceded to by the Solicitor Generai appearing for the State of Haryana, that the amount of duty payable will be on the actual amount of demand charge realisable from the consumer after the proportionate reduction under clause 4(f) of the tariff.
>
C 11. Section 3 of the Duty Act says that there shall be levied and paid to the State Government on the energy supplied by the Board to a consumer a duty to be called the electricity duty, computed at the rates indicated in the various clauses of sub-section (1) of Section 3. The expression used in the various clauses is where the energy is
D supplied to a particular type of consumer, then the rate of duty will be as specified therein. On the basis of the said expression the argument put forward on behalf of the appellant was that the duty could be levied only on the energy charges for the actual amount of energy supplied. Such an argument is too obviously wrong to be accepted. Reading the clauses as a whole it would be seen that the
E duty is chargeable on the price of energy supplied in a month. The price of energy in a two-part tariff system would mean and include the energy charge as also the demand charge. This is made further clear by the manner of calculation provided in Rule 3 of the Punjab Electricity (Duty) Rules, 1958. Sub-rule (1) says:
>
F The duty under clauses (iii) and (iv) of sub-section (1) of Section 3 of the Act shall be calculated on the price of the energy recoverable at the net rate of the Board which will include the demand charge when the supply is governed by a two-part tariff."

In that case, no term like "net energy" existed.
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168. We may notice that this Court in *West Coast Papers Mills Ltd,* (supra), held that no tax can be invoked on transmission loss stating:

> "7. We have set out the relevant provisions of the Act, and it would appear therefrom that electricity tax is payable on the units of energy
H

consumed. The one question with which we are concerned in this appeal is whether electricity tax is payable in respect of the electrical energy which is lost in transmission as a result of transmission loss or transformer loss. So far as this question is concerned, we are of the view that no tax is payable on the electricity so lost. The entire scheme of the Act is to tax the consumption of electrical energy. Where some energy is not consumed but lost before it reaches the point of consumption, the question of levy of tax on consumption of such energy would not in the very nature of things arise. The place of consumption of electrical energy is normally at some distance from the place where electrical energy is generated. Electrical energy has consequently to be transmitted through metal conductors to the place where it is consumed. Such transmission admittedly entails loss of some electrical energy and what is lost can plainly be not available for consumption and as such would not be consumed. If a person, for example, generates 100 units of electrical energy and loses 10 units in the process of transmission from the point of generation to the point of consumption, he would in the very nature of things be able to supply only 90 units of electrical energy to the consumers. The tax which would be payable on the electrical energy consumed in such a case would be only for 90 units and not 100 units. To hold otherwise and to realise tax on 100 units of electrical energy would be tantamount to levying tax on the generation or production of electrical energy and not on its consumption. Such a tax on the generation or production of electrical energy is plainly not permissible under the Act. The fact that the consumer happens in the present case to be the same Company which generated the electrical energy would, in our opinion, make no material difference."

169. Our attention has been drawn to a simple bill, from a perusal whereof it appears that although permitted MD was 350 KVA, the recorded demand being 144 KVA, electricity tax was charged only on the basis of 144 KVA and not on the basis of 350 KVA. Keeping in view the fact that the maximum demand postulates something other than actual delivery of electricity, the question of imposition of any tax thereupon does not arise. The decision of this Court in *M/s. Northern India Iron & Steel Co.* (supra) did not assign any reason. The said decision did not take into consideration the provisions of Article 366 (12) of the Constitution of India or the effect of Entry 53 of List II of the Seventh Schedule of the Constitution of India. It has also not been taken into consideration that the State cannot impose tax only because the

A State Electricity Board would be entitled to levy tax on certain services. It would bear repetition to state that the concept of tariff and tax is different. Whereas tariff would include a list of charges, the tax must be on actual basis. It is also not the case nor can it be that imposition of tax on actual sale or consumption of electrical energy was impossible keeping in view of the particular fact situation. As noticed hereinbefore, two different meters are B installed; one, for the purpose of actual consumption of electrical energy and another being a trivector, the same merely records the maximum demand.

170. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. A decision is not an C authority on a point which has not been considered.

171. For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly. The appeals are allowed to the extent mentioned hereinbefore. No costs.

G.N. Appeal partly allowed.