[2023] 15 S.C.R. 141 : 2023 INSC 942

CASE DETAILS

THE STATE OF TELANGANA & ORS.

v.

M/S TIRUMALA CONSTRUCTIONS

(Civil Appeal No(s). 1628 of 2023)

OCTOBER 20, 2023

[S. RAVINDRA BHAT AND ARAVIND KUMAR, JJ.]

HEADNOTES

Issue for consideration: The Constitution (101st Amendment) Act, 2016, introduces a fundamental re-ordering of the constitutional premise of taxation by the Union and State Governments in India. It is the framework to enable the introduction of the Goods and Services Tax (GST). These batch of appeals arise from judgments delivered by the Telangana, Gujarat and Bombay High Court. The concerned States (Telangana and Gujarat) have appealed aggrieved by the judgments. The assessee petitioners are appellants, and are aggrieved by the judgments of Bombay High Court.

Constitution of India – Constitution (101st Amendment) Act, 2016 – Effect of:

Held: The coming into force of the GST regime, and the passage of the amendment demonstrates a rare unanimity, a resolve across the political spectrum, to ensure that there is a single indirect taxation regime – The effect of the Amendment is to subsume all state and union taxes, on goods and services – Both the Union and the States will ostensibly have the power to tax the supply of goods and services – The 101st Amendment Act takes away neither the Union's nor the States' taxing power but instead gives them the power to impose taxes on supply of goods and supply of services respectively – Through Article 246-A the Amendment creates: (a) a new legislative field, conferring; (b) legislative authority outside the three Lists of the Seventh Schedule; (c) concurrent powers to both Parliament and the State Legislatures to enact legislations on the same subject-matter and at the same time. [Para 8]

Constitution of India – Constitution (101st Amendment) Act, 2016 – s.19 – Interpretation of:

Held: S.19 seeks to achieve three aims – The first is to preserve the existing status quo with regard to the state and central indirect tax regime, for a period of one year from the date of commencement of the Amendment or till a new law is enacted whichever is earlier – The second is authorizing the competent legislatures i.e. the State Legislatures and Parliament to amend existing laws which were in force in states and other parts of the country (both Central and State laws) – The third was the repeal of such laws – S.19 was meant to be transitional – In its absence, the several hundreds of state enactments and central laws which were in force, would have been jeopardized – Other than s.19 there is no saving provision which is part of the Amendment – So, s.19 of the Constitution (101st Amendment) Act, 2016 and Article 246A enacted in exercise of constituent power, formed part of the transitional arrangement for the limited duration of its operation, and had the effect of continuing the operation of inconsistent laws for the period(s) specified by it and, by virtue of its operation, allowed state legislatures and Parliament to amend or repeal such existing laws. [Paras 73, 116]

Constitution of India – Ordinary law and Constitutional law:

Held: An ordinary law such as an Act of Parliament, is a product of a legislative exercise – The source of that power is traced to the Constitution in some specific provisions or through fields of legislation enumerated in one or the other lists – Constitutional law on the other hand is that it arises out of the Constitution and creates different organs of the State, defines their power and imposes limitations on the functioning of the Executive and legislative wings through the fundamental rights and other limitations – An ordinary law can be made or changed by the same body, the legislating body in exercising legislative power – Since constitutional amendments relates to the fundamental law of the land which is a source of authority for other laws, it can be achieved only through fulfilling the special procedure. [Para 77]

Constitution of India – Constitution (101st Amendment) Act, 2016 – s.19 – Whether the power of amendment or repeal is subject to limitations u/s. 19:

Held: There were no limitations u/s. 19 (read together with Art. 246A), of the Amendment – That provision constituted the expression of the sovereign legislative power, available to both Parliament and state legislatures, to make necessary changes through amendment to the existing laws – As held in Rama Krishna Ramanath case the transitional power (in that case, Section 143 (3)) "the provision by its implication confers a limited legislative power to desire or not to desire the continuance of the levy" – This limited legislative power was not constricted or limited, in the manner alleged by the states; it is circumscribed by the time limit, indicated (i.e. one year, or till the new GST law was enacted) – It could, therefore, enact provisions other than those bringing the existing provisions in conformity with the amended Constitution – Since other provisions of the said Amendment Act, had the effect of deleting heads of legislation, from List I and List II (of the Seventh Schedule to the Constitution of India), both s.19 and Art.246A reflected the constituent expression that existing laws would continue and could be amended – The source or fields of legislation, to the extent they were deleted from the two lists, for a brief while, were contained in s.19 – As a result, there were no limitations on the power to amend. [Paras 97 and 116]

Constitution of India – Constitution (101st Amendment) Act, 2016 – Validity of Telangana Act tested from the touch stone of its originating as an ordinance:

Held: The Telangana ordinance was promulgated on 17.6.2016 – The Telangana State GST Act was enacted and received the assent of the Governor on 25.05.2017; it was brought into force on 01.07.2017 – The state GST Act contained a savings and repeal law, which sought to save acts done, privileges and rights accrued under the repealed enactment, i.e. the State VAT Act – It was sought to be argued that once the State Legislature approved the ordinance and enacted the amendment, in conformity with it, the provisions of the Ordinance became part of the act – The question of legislative competence would not arise, because the mere confirmation of an ordinance is within the competence of the State legislature – Since the law was introduced through a different procedure, i.e. ordinance, the effect of that law, empowering the VAT officials to reopen or complete assessments, was no different – The state of Telangana had argued to the contrary, and

explained that when the ordinance was issued, there was no doubt about the state possessing legislative competence – As of that date (17.06.2017) the power to amend existing laws, was permissible u/s. 19 of the Amendment – However, that argument is not tenable, because the ordinance's validity and effect might not have been suspect on the date of its promulgation; yet, the issue is that on the date when it was in fact, approved and given shape as an amendment, the State legislature had ceased to possess the power – By that time, the State GST and the Central GST Acts had come into force (on 01.07.2017) – Therefore, Section 19 ceased to be effective – The original entry (Entry 54 of the State List) ceased to exist – In the circumstances, the state legislature had no legislative competence to enact the amendment, which approved the ordinance, which consequently was rendered void. [Paras 102, 105]

Constitution of India – Constitution (101st Amendment) Act, 2016 – Gujarat Act:

Held: In the Gujarat batch of cases, s.84A was introduced in the Gujarat Value Added Tax Act, 2003 by the Gujarat Value Added Tax (Amendment) Act, 2018, gazetted on 06.04.2018 but with retrospective effect from 1.4.2006 – It *inter-alia* provided that if for a particular issue in "some other proceedings" a lower forum, gave a decision which is prejudicial to the interest of the revenue and an appeal against such decision is pending before the higher forum then the period spent in such litigation will be excluded while computing period of limitation for revision – By giving such provision retrospective effect the State legislature thus sought to enable reopening of assessments which had already attained finality – The Gujarat High Court struck down the amendment on the ground of lack of legislative competence, on the part of the legislature, after 01.07.2017, and also that it was manifestly arbitrary – In the instant case, the retrospective effect, given to the amendment, which was brought into force, with effect from 2006, cannot in any way save it, after the coming into force of the GST laws, on 01.07.2017 – Nor can there can be any argument that the amendment made in February, 2018, is traceable to Article 246A – The amendments in question, made to the Gujarat VAT Act after 01.07.2017 were correctly held void, for want of legislative competence, by the High Court of Gujarat. [Paras 16,113,116]

Constitution of India – Constitution (101st Amendment) Act, 2016 – Maharashtra Act:

Held: As far as the Maharashtra appeals are concerned, the assessees' grievance is that the retrospective amendments, made to the Maharashtra VAT Act, were void – There is no quarrel with the proposition that a legislative body is competent to enact a curative legislation with retrospective effect – Yet, the same vice that attaches itself to the Gujarat amendment, i.e. lack of competence on the date the amendment was enacted i.e. in this case, 09.07.2019, the Maharashtra legislature ceased to have any authority over the subject matter, because the original entry 54 had undergone a substantial change, and the power to change the VAT Act, ceased, on 01.07.2017, when the GST regime came into effect – Therefore, for the same reasons, as in the other cases, the amendments to the Maharashtra VAT Act cannot survive. [Paras 15, 115]

LIST OF CITATIONS AND OTHER REFERENCES

Ramkrishna Ramanath v. Janpad Sabha [1962] Suppl. (3) SCR 70; *Kesavananda Bharati v State of Kerala* [1973] Supp 1 SCR 1; *Krishna Kumar Singh v. State of Bihar* [2017] 5 SCR 160 – followed.

Synthetics and Chemicals Ltd. and Ors. v. State of U.P. & Ors [1989] Supp (1) SCR 623; *Vipulbhai M Chaudhary v Gujarat Milk Mktg Federation Ltd.* [2015] (3) SCR 997; *Bondu Ramaswamy v. Bangalore Development Authority* [2010] 6 SCR 29; *Bimolangshu Roy (Dead) through L.Rs. v. State of Assam & Ors* [2017] 13 SCR 301; *A. Hajee Abdul Shakoor & Co v. State of Madras* [1964] 8 SCR 217; *Jaya Thakur v Union of India & Ors* 2023 SCC OnLine SC 813; *Kerala State Electricity Board v. Indian Aluminium Co. Ltd* [1976] 1 SCR 552; *Union of India v Mohit Mineral Pvt. Ltd* [2018] 13 SCR 139 – relied on.

T.N. Kalyana Mandapam Assn. v. Union of India [2004] Supp 1 SCR 169; *Godfrey Phillips India Ltd. v. State of U.P.* [2005] 1 SCR 732; *A.K. Roy v. UOI* [1982] 2 SCR 272; *R.K. Garg v. Union of India* [1982] 1 SCR 947; *Fuerst Day Lawson Ltd v Jindal Exports Ltd* [2001] 3 SCR 479; *UOI & Anr. v. Mohit Minerals Private Limited* [2022] 9 SCR 300; *Anant Mills Company Limited v. State of Maharashtra* [1975] 3 SCR 220;

Vijay Prakash D. Mehta v. Collector of Customs (Preventive), Bombay [1988] Supp (2) SCR 434; *State of Haryana v. Maruti Udyog Limited & Ors.* [2000] Supp 3 SCR 185; *Thirumali Chemicals Limited v. Union of India* [2011] 4 SCR 739; *Neena Aneja & Anr. v. Jai Prakash Associated Limited* [2021] 15 SCR 96; *M/s West Ramnad Electric Distribution Co. Ltd. v. State of Madras* [1963] 2 SCR 747; *State of Rajasthan v. Mangilal Pindwal* [1996] Supp (3) SCR 98; *Mafatlal Industries Ltd. v. Union of India* [1996] Suppl. (10) SCR 585; *State of Gujarat v. Reliance Industries Ltd* [2017] 13 SCR 25; *Sundergarh Zilla Adivasi Advocates Association and Ors. v State of Odisha and Ors* [2013] 6 SCR 420; *Union of India v. VKC Footsteps India (P)Ltd* [2021] 15 SCR 169; *R. Abdul Quader v. Sales Tax Officer* [1964] 6 SCR 867; *State of Madhya Pradesh v. M.V. Narasimhan* [1976] 1 SCR 6; *R.K. Garg Etc. Etc v. Union Of India & Ors.* [1982] 1 SCR 947; *State of Gujarat v. Reliance Industries Ltd* [2017] 16 SCC 28; *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality* [1970] 1 SCR 388; *Government of Andhra Pradesh v. Hindustan Machine Tools Ltd* [1975] Supp (1) SCR 394; *Ujagar Prints v. Union of India* [1988] Supp 3 SCR 770; *Anshul Impex Private Ltd. v. State of Maharashtra* STA No. 2/2018; *United Projects v State of Maharashtra* (Writ Petition (ST.) No. 11589 of 2021, and Writ Petition No. 13754 of 2018; *State of Gujarat v. Welspun Gujarat Stahl Rohren Ltd.* [2014] 71 VST 550 (Guj); *Reliance Industries Ltd. v. State of Gujarat* [2018] 58 GSTR 366 (Guj); *Sree Rayalaseema Alkalies and Allied Chemicals Limited v. State of Andhra Pradesh and Ors.* 2007 SCC OnLine AP 1158 – referred to.

Constitutional Law of India 4th Edition Volume 3 page 3119; P. Ramanatha Aiyar's Advance Law Lexicon Volume I at Page 271 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1628 of 2023.

From the Judgment and Order dated 03.08.2022 of the High Court for the State of Telangana at Hyderabad in WP No.5010 of 2021.

With

C.A. Nos. 2502-2513, 2644-2686, 2732, 2733, 1654, 1683, 1662, 1663, 1629, 1658, 1630, 1653, 1655, 1657, 1672, 1676, 1656, 1661, 1664, 1660, 1682, 1665, 1666, 1667, 1668, 1669, 1659, 2690, 1670, 1673, 1671, 1674, 1675, 1677, 2687, 2688, 2689 of 2023 SLP(C) Nos. 7776, 13543-13545, 13529-13530, 13523-13526, 13547-13559, 13562-13574, 13561, 13539-13540, 13527-13528, 13560, 13534-13537 of 2023, C.A. Nos. 2433, 2436, 2437-2443, 2730, 2731, 1645, 1649, 1643, 1636, 1652, 1679, 1637, 1632, 1651, 1633, 1648, 1634, 1647, 1644, 1638, 1678, 1631, 1681, 1641, 1640, 1680, 1639, 1646, 1635, 1642 and 1650 of 2023.

Appearances:

Vikram Nankani, Arvind P. Datar, Sr. Advs., B.S. Prasad A.G./Sr. Adv., Ms. Kavita Jha, Arnab Roy, Prithwiraj Choudhuri, Ms. Archana Pathak Dave, Kumar Prashant, Ms. Deepanwita Priyanka, Ms. Manju Jetley, Varun Mishra, Ankur Jain, Prablin Singh Abrol, Sanchit Jain, Aniruddha Singh, Rajavat, Ajay Sharma, Awadhesh Kumar, Manju Jetley, Digant Mishra, Somanadri Goud Katam, Rahul Unnikrishnan, Sirajuddin, Advs. for the Appellants.

Balbir Singh, A.S.G., S. Dwarakanath, Saurabh Soparkar, Kapil Sibbal, S. Ganesh, Jay Savla, Dama Seshadari Naidu, Sr. Advs., Sameer Jain, Ms. Anu Sura, Soayib Qureshi, K. K. Mani, Ms. T. Archana, Rajeev Gupta, Vinay Rajput, K. R. Sasiprabhu, Uchit Sheth, Santosh Krishnan, Vishnu Sharma A S, Prakhar Agarwal, Robin Ratnakar David, R Jawaharlal, Siddharth Bawa, Anuj Garg, Mohit Sharma, Mayank Kshirsagar, Sridhar Potaraju, Ms. Aditi Anil Dani, Rajat Srivastava, Aayush, Ms. Simran Gupta, Ashutosh Jha, Dr. M. V. K. Moorthy, M. V. J. K. Kumar, M. Kumar, Hitendra Nath Rath, Mohan Raj A, Hariharan, Ms. Charulata Chaudhary, Ravinder Kumar Yadav, D. Srinivas, A.V.S. Raju, R. Ravi, Sadam Satyanarayana Raja Yadav, Srinivas Rao Ambaji, Somanatha Padhan, Sujit Ghosh, Mridul Gupta, Shubh Dixit, Ms. Mannat Waraich, Aniruddha Joshi, Shrirang B. Varma, Siddharth Dharmadhikari, Naman Tandon, Samarvir Singh, Prasanjeet Mohpatra, Aditya Rathore, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ranjeet Singh, Mrs. Bela Maheshwari, V Seshagiri, Bikram Bhattacharya, R. Krishnan, Rupesh Kumar, Ms. Pankhuri Shrivastava, Ms. Neelam Sharma, Rajeev Sharma, Kumar Visalaksh, Udit Jain, Arihant Tater,

Abhishek Vikas, Ms. Tatini Basu, Ms. Nitipriya Kar, Kumar Shashank, Byrapaneni Suyodhan, Krishan Kumar, Mrs. Neetu Sharma, Nitin Pal, Shivam Pandey, Yelamanchili Shiva Santosh Kumar, Rudrajit Ghosh, Tushar Arora, Tarun Gupta, Ishaan George, Ms. Shiwani Tushir, M/s. Shree Chakra Chambers, Venkatram Reddy Mantur, G.N. Reddy, Ravi Shankar, Vedrumudi Vishnoo C. Kashyap, Uchit Seth, Malak Manish Bhatt, Jasdeep Singh Dhillon, Prabhat Kumar Chaurasia, Yugantar Singh Chauhan, Ms. Pinky Behera, Rizwan Ahmad, Shakeel Ahmed, Amir Kaleem, Paras Nath Singh, Jatin Anand Diwedi, Soumik Ghosal, Ramesh Allanki, Ms. Aruna Gupta, Syed Ahmad Naqvi, B Krishna Reddy, K. Aroah, K. K. Tyagi, Iftekhar Ahmad, Ms. Garima Tyagi, Sarvam Ritam Khare, Vikash Chandra Shukla, V. C. Shukla, Sidharth Relan, Naga Deepak, Aishvary Vikram, Ajay Awasthi, Anantha Narayana M. G., Siddhartha Relan, Prakash Gautam, Puspraj Singh Parihar, Pushpraj Singh Parihar, Akshya Kumar Panda, Prabhsimar Singh, Amritesh Raj, Nitesh Ranjan, Tarun Gulia, Manish Dutt Sharma, Piyush Singh, Anshuman Sinha, Vijay Kumar Pandey, Vinay Prakash, Ajay Vikram Singh, Mrs. Pragya Sharma, Udayan Sinha, Karan Talwar, Krishna Sumanth, Siddhant Buxy, Sumanth Nookala, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

S. RAVINDRA BHAT, J.

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1. This batch of appeals arise from judgments delivered by the Telangana, Gujarat and Bombay High Court. The concerned states (Telangana and Gujarat) have appealed aggrieved by the judgments. The assessee petitioners are appellants, and are aggrieved by the judgments of Bombay High Court.

I. Background and relevant provisions

2. The Constitution (101st Amendment) Act, 2016, (hereafter referred to as "the Amendment") introduces a fundamental re-ordering of the constitutional premise of taxation by the Union and State Governments in India. It is the framework to enable the introduction of the Goods and Services Tax (GST). It confers new powers upon the Union Parliament and State Legislative Assemblies, and also creates institutions that have a significant bearing on the federal character of the Constitution.

3. The pre-Amendment constitutional scheme had a vision of taxation of goods and services supplied within India. Excise and customs duty and excise on manufacture were within the scope of the legislative powers of the Union Parliament[1], under the Seventh Schedule. No separate entry for Service Tax existed in the Constitution at the time it was enacted. In *T.N.Kalyana Mandapam Assn.* v. *Union of India*[2], this court held that service tax as a subject matter was within the "residuary power" of the Union; nevertheless, Entry 92C was introduced into the Union List by the Constitution (88th Amendment) Act, 2004 clarifying that the Union had exclusive authority to impose a service tax. Taxation of sale and movement of goods was within the exclusive purview of the States,by Entries 52 and 54 of the State List (List II of the VIIth Schedule to the Constitution). The delineation of Union and State taxation powers through the Union and State Lists of the Seventh Schedule was precise and clear, leaving little room for

1 Entries 83 and 84, List I, Seventh Schedule of the Constitution of India.
2 2004 Supp (1) SCR 169; (2004) 5 SCC 632

any overlap in the kind of taxes that the Union could impose and those that a State could levy. The "Concurrent List" (or List III of the VIIth Schedule) contained no taxing entries, signifying that the constitutional scheme for taxation was to apportion two distinct, exclusive spheres of taxation for the Union and the States.

4. The initial move to introduce GST was through the Fiscal Responsibility and Budget Management Report and the first official announcement for a transition to GST, was made by the Government of India in 2006-07 by the Budget Speech of the then Finance Minister; this was reiterated in the Budget Speech of 2008-09 and followed up in 2009-10 when certain policy changes were announced in the Budget for that year. The "First Discussion Paper on Goods and Services Tax in India" released by the Empowered Committee in November 2009 was the first official document publicly delineating the contours of the proposed reform and nuances of the GST Model.

5. The First Discussion Paper, in fact, explained the *rationale* for a constitutional amendment to introduce GST. It noted that while the Centre is empowered to tax services and goods up to the production stage, the States have the power to tax the sale of goods. The States do not have the power to levy a tax on the supply of services while the Centre does not have the power to levy a tax on the sale. It suggested for a constitutional amendment that would contain a mechanism for a harmonious structure of GST that would not affect the federal fabric.

6. Then, with the deliberations between the Centre and States, aided by the Empowered Committee, the constitutional amendment process to usher in GST began. It resulted in the "Constitution (One Hundred and Fifteenth Amendment) Bill, 2011" After that failed attempt, the 2014 Amendment Bill was adopted and passed on 8 September 2016. The Bill became "the Constitution (One Hundred and First Amendment) Act, 2016".

7. The GST Council was constituted in September 2016. It is a constitutional institution comprising as its members the Finance Ministers of the Union and the States including Union Territories with members of the legislatures. It has the authority

"to recommend to the Union and the States on various facets of GST, including Model GST laws, principles to determine the place of supply, levy of the tax, design of GST, dispute settlement, special provisions for a special category of States, and so forth".

GST Council's recommendations led Parliament to enacted legislation.[3]

8. The coming into force of the GST regime, and the passage of the amendment demonstrates a rare unanimity, a resolve across the political spectrum, to ensure that there is a single *indirect taxation* regime. The effect of the Amendment is to subsume all state and union taxes, on goods and services. Both the Union and the States will ostensibly have the power to tax the supply of goods and services. The 101st Amendment Act takes away neither the Union's nor the States' taxing power but instead gives them the power to impose taxes on supply of goods and supply of services respectively.Through Article 246-A the Amendment creates:

a. a new legislative field, conferring

b. legislative authority outside the three Lists of the Seventh Schedule;

c. concurrent powers to both Parliament and the State Legislatures to enact legislations on the same subject-matter and at the same time.

9. There consequently is a fundamental change to the scheme of legislative relations between the Union and the States by departing from the underlying theory of exclusivity of legislative fields between Parliament and the State legislatures,in terms of the distribution of legislative powers carried out by Chapter I of Part XI of the Constitution[4].

10. To exemplify this:whilst Article 246-A changes the legislative distribution of powers, however, it does not upset the balance between

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3 The Central Goods and Services Tax Act, 2017: it levies a tax on intra-State supplies of goods and services in all supplies within a State; the Integrated Goods and Goods and Services Tax Act, 2017: it levies a tax on inter-State supplies of goods and services; and (3) the Union Territory Goods and Services Tax Act, 2017: it levies a tax on intra-State supplies of goods and service.

4 *Godfrey Phillips India Ltd. v. State of U.P.* (2005) 1 SCR732,

the Union and the States. Instead, it carries out the function of *cross-empowerment.* On the one hand, it enables the Union to legislative and collect taxes on certain subjects which were hitherto within the exclusive fold of the States (such as the taxes on sale and purchase of goods, luxury taxes, advertisement taxes, etc.), while retaining the legislative rights it hitherto possessed (such as taxes on manufacture, taxes on services, etc.) except that these taxes are subsumed in a larger legislative field - i.e., GST - and would be levied thereunder. On the other hand, Article 246-A also expands the legislative reach of the States to bring within their fold the subjects which were hitherto beyond their competence-such as tax on the supply of services, etc. As in the case of the Union, the States also continue to enact and impose taxes on the legislative fields they hitherto possessed (such as taxes on sale and purchase, taxes on betting and gambling, and taxes on advertisements), albeit as a partof GST which subsumes these legislative fields.

11. Article 279-A provides for the Goods and Services Tax Council (hereafter "GST Council"). This provision also changes the underlying constitutional philosophy to a certain extent. Sub-clause (1) of Article 279-A creates a new constitutional institution; (2) confers upon it the power to make recommendations to the Union and the States; (3) provides that certain functions of other constitutional institutions shall be carried out on the basis of the recommendations of the GST Council[5]; (4) has overarching jurisdiction and carries extensive functions in relation to the design and structure of the goods and services tax; (5) has substantial role in resolution of disputes amongst the executive governments relating to GST, etc.[6] In fact, the GST Council is empowered to even recommend on the model legislations and rates of tax on supply of goods and services.

12. The relevant parts of the Amending Act, read as follows:

In terms of Section 2 of the aforesaid Constitution Amendment Act, after Article 246, a new Article 246-A came to be inserted which reads as under:

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5 *For illustration, see Art. 246-A Explanation, Art. 269-A(1), Constitution of India.*

6 *Article 279-A, infra, for a detailed discussion.*

"246A. Special Provision with respect to goods and services tax---

(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.---The provisions of this article, in respect of goods and services tax referred to in clause (5) of the article 279A, take effect from the date recommended by the Goods and Services Tax Council."

By Section 7, Article 268-A was omitted. After Article 269, Article 269-A has been inserted, which reads as under:

"269A. Levy and collection of goods and services tax in course of inter-state trade or commerce---

(1) Goods and Services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation---For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce."

Section 12 of the Amendment inserted Article 279-A, which reads as follows:

"279A. Goods and Services Tax Council ---

(1) The President shall, within sixty days from the date of commencement of the Constitution (One Hundred and First Amendment) Act, 2016, by order, constitute a Council to be called the Goods and Services Tax Council.

(2) The Goods and Services Tax Council shall consist of the following members, namely:-

(a) the Union Finance Minister.....Chairperson;

(b) the Union Minister of State in charge of Revenue or Finance..... Member;

(c) The Minister in charge of Finance or Taxation or any other Minister nominated by each State Government .....Members.

(3) The Members of the Goods and Services Tax Council referred to in sub-clause (c) of the clause (2) shall, as soon as may be, choose one amongst themselves to be the Vice-Chairperson of the Council for such period as they may decide.

(4) The Goods and Services Tax Council shall make recommendations to the Union and the State on---

(a) the taxes, cesses and surcharges levied by the Union, the States and the local bodies which may be subsumed in the goods and services tax;

(b) the goods and services that may be subjected to, or exempted from the goods and services tax;

(c) model Goods and Services Tax Laws, principles of levy, apportionment of Goods and Services Tax levied on supplies in the course of inter-state trade or commerce under article 269-A and the principles that govern the place of supply;

(d) the threshold limit of turnover below which goods and services may be exempted from goods and services tax;

(e) the rates including floor rates with bands of goods and services tax;

(f) any special rate or rates for a specified period, to raise additional resources during any natural calamity or disaster;

(g) special provision with respect to the States of Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand; and

(h) any other matter relating to the goods and services tax, as the Council may decide.

(5) The Goods and Services Tax Council shall recommend the date on which the goods and services tax be levied on petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel.

(6) While discharging the functions conferred by this article, the Goods and Services Tax Council shall be guided by the need for a harmonized structure of goods and services tax and for the development of a harmonised national market for goods and services.

(7) One-half of the total number of Members of the Goods and Services Tax Council shall constitute the quorum at its meetings.

(8) The Goods and Services Tax Council shall determine the procedure in the performance of its functions.

(9) Every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely:---

(a) the vote of the Central Government shall be a weightage of one-third of the total votes cast, and

(b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.

(10) No act or proceedings of the Goods and Services Tax Council shall be invalid merely by reason of---

(a) any vacancy in, or any defect in, the constitution of the Council; or

(b) any defect in the appointment of a person as a Member of the Council; or

(c) any procedural irregularity of the Council not affecting the merits of the case.

(11) The Goods and Services Tax Council shall establish a mechanism to adjudicate any dispute---

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other side; or

(c) between two or more States,

arising out of the recommendations of the Council or implementation thereof."

13. Section 14 (of the Amendment)had the effect of introducing Article 366 (12A), (26-A) and (26-B). A crucial amendment was in the VIIth Schedule to the Constitution. In List I (Union List) for Entry 84, the following entry was substituted:

"84. Duties of excise on the following goods manufactured or produced in India, namely:---

(a) Petroleum crude;

(b) High speed diesel;

(c) Motor spirit (commonly known as petrol);

(d) Natural gas;

(e) Aviation turbine fuel; and

(f) Tobacco and tobacco products.";

Entries 92 and 92 C (Union List)were omitted. Similarly, Entry 52 was omitted and Entry 54 was substituted. The new Entry 54, reads as follows:

"54. Taxes on the sale of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel and alcoholic liquor for human consumption, but not including sale in the course of inter-State trade or commerce or sale in the course of international trade or commerce of such goods."

Section 19 read as follows:

"19. Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier."

Section 20 read as follows:

"20. (1) If any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act (including any difficulty in relation to the transition from the provisions of the Constitution as they stood immediately before the date of assent of the President to this Act to the provisions of the Constitution as amended by this Act), the President may, by order, make such provisions, including any adaptation or modification of any provision of the Constitution as amended by this Act or law, as appear to the President to be necessary or expedient for the purpose of removing the difficulty:

Provided that no such order shall be made after the expiry of three years from the date of such assent.

(2) Every order made under sub-section (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

II. Facts

14. There are three batches of appeals, arising from separate special leave petitions filed in this case. One batch relates to the State of Telangana. The facts in relation to that State are that the local VAT Act was amended – after the Amendment was introduced. The VAT amendment was through an Ordinance, and was brought into force on 17.06.2017, i.e. 13 days before

the time granted by the 101st Amendment Act, i.e. one year. The Amendment came into force on 16.09.2016. The ordinance sought to extend the period of limitation, and permitted to re-open assessments. This ordinance, continued till the State Legislature enacted it. The Governor then assented to the law, and it came into force on 02.12.2017. Feeling aggrieved many traders and VAT payers approached the Telangana High Court, challenging the amendments to the local VAT Act. By the impugned judgment, the High Court accepted the challenge and struck it down, on various counts, including that the State had limited scope to amend its VAT Act, which in terms of Section 19 of the Amendment could have done it only to bring it in conformity with the amended Constitution. Other reasons included that the ordinance, could not have been confirmed, as the state was denuded of legislative competence after 01.07.2017.

15. In the batch of appeals arising from the judgment of the Bombay High Court, the parties were aggrieved by the fact that the Maharashtra VAT Amendment Act, which was initially made on 15.04.2017, was read down by a Division Bench judgment, of the Bombay High Court. That position was sought to be reversed, through an amendment which was brought into force, on 15.04.2017 and later in an effort to reverse the effect of a judgment, given retrospective effect. The writ petitions filed by such aggrieved parties, were dismissed. Consequently, they are in appeal.

16. In the Gujarat batch of cases, Section 84A was introduced in the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the Gujarat VAT Act") by the Gujarat Value Added Tax (Amendment) Act, 2018, gazetted on 06.04.2018 but with retrospective effect from 1.4.2006. It *inter-alia* provided that if for a particular issue in *"some other proceedings"* a lower forum, gave a decision which is prejudicial to the interest of the revenue and an appeal against such decision is pending before the higher forum then the period spent in such litigation will be excluded while computing period of limitation for revision. By giving such provision retrospective effect the State legislature thus sought to enable reopening of assessments which had already attained finality. The Gujarat High Court struck down the amendment on the ground of lack of legislative competence, on the part of the legislature, after 01.07.2017, and also that it was manifestly arbitrary.

III. Arguments of the appellant-states

17. It was argued on behalf of the State of Telangana, by Mr. Arvind Datar, Senior Advocate, Mr. Balbir Singh, learned Additional Solicitor General (ASG), on behalf of Maharashtra, that the Constitutional Amendment was introduced on 16.09.2016. It was highlighted that by its provisions various entries in the State and Union list were amended drastically to limit the powers of the two legislatures. The object of the amendment was to re-organize the powers of indirect taxation that the original Constitution makers had envisioned. Indirect taxes: more specifically, sales tax, service tax, central excise and value added tax were the subject matter of this amendment. The original intent of the Constitution and powers in relation to levy of customs duty were retained as it were. For the first time, the amendments denuded the States and Parliament of exclusive fields of legislation and introduced the concept of *shared* or *pooled* sovereign powers in relation to value added tax, central excise and service tax. These were brought into one compendious term "goods and services tax", ensuring that all aspects in this field of taxation were covered. For the first time, the power of taxation could be traced to a substantive provision of the Constitution, introduced by the Amendment. Furthermore, the issue of evolving principles division of *pooled* field of taxation was left to a new entity, the Goods and Service Tax Council (hereafter "GST Council"), created as a constitutional entity. This design was to ensure that the federal balance of power was retained and in fact furthered.

18. Learned counsel relied upon the provisions of the Amendment to emphasize that the GST Council is comprised of Finance Ministers of all States and that the Union has only 1/3rd weightage in its decision making. The balance is with the States collectively. Furthermore, any decision in the council becomes effective when it is voted for by a 3/4 ths majority.

19. It was contended, that the almost the revolutionary change brought about by redistribution of indirect taxation power and the giving effect to it through the Amendment meant that both Parliamentary and state legislative powers were denuded in respect of fields of taxation as far as they covered central excise, service tax, sales tax and other taxes which the states could hitherto levy and collect. As an effect of the Amendment, the fields of taxation in Entries 84 of the Union List (List I) of the Seventh Schedule to

the Constitution of India and Entries 54 and 62 of the State List, too were amended. The revamping of these fields of taxation resulted in such powers getting pooled or collected as a sovereign taxation power, shared by the state and the centre. This became the subject matter of a separate entry, i.e. Article 246A. Article 246A is expressed in overriding terms and begins with a *non-obstante* clause and overrides Article 246 which deals with the distribution of legislative powers *vis-à-vis* the Union and the States in terms of Lists 1 and 2, and of Article 254 which deals with the subject matter of Concurrent List, i.e. List III and the resolution of any conflict (in terms of repugnancy) between laws enacted by the States and the Parliament.

20. The effect of Article 246A is that both the Parliament and the State legislatures have the power to enact laws with respect to goods and service imposed by the Union or such State. Article 246A (2) states that Parliament has the overriding power to enact laws with respect to goods and services taxes *qua* supply of goods and services and both of them in the course of *inter-state trade and commerce*. Another substantial provision is Article 269A which authorizes the Union to collect GST on supplies in the course of inter-State trade or commerce which *"shall be apportioned between the Union and the States in the manner as may be provided by the Parliament on the recommendations of the GST Council"*. The other provisions of Article 269A clarify the nature of the collections which are not to form the Consolidated Fund of India. Article 279A provides for the GST Council and elaborately deals with its structure to ensure balanced decision making, ensure democratic participation of the Union and the States.

21. It was also submitted that consequent to these amendments, Article 366 [12(A)]was introduced, which defined GST, *astax on supply of goods and Services or both,* excluding *alcoholic liquor for human consumption* It was urged on behalf of the States that with the coming into force of the amendment, Parliament and the states realized that any changes in the law or the practical application of the existing law would become impossible. As a consequence, to cater to these eventualities, certain constitutional provisions were made, i.e. Section 19 which provided firstly that laws relating to tax on goods or services or both *"in force in any state immediately before the commencement of the amendment Act shall continue to be in force until amended or repealed by a competent legislature or other*

competent authority." The other eventuality was that with or without such amendments such laws were to be in force only for a period of one year from the commencement of the amendment. Section 20 authorized the President to, by order, make provisions, including modification and adoption of *"any provision of the Constitution as amended by the amendment Act in case of any defect, including defect in relation to transition from the provisions of the State as they stood immediately before the commencement of the amendment Act, for a period of three years."*

22. In view of Section 19 of the Amendment, the Telangana legislature amended the existing state statute – Value Added Tax Act (hereafter "the Telangana VAT Act")[7]. The amended provisions empowered the Assessing Officer to reassess the returns which had been assessed previously – additionally for a period of two years. In other words, originally the power to reassess was limited to four years. The lengthening of the period by two more years meant that dealers whose assessments had either escaped notice and who had mis-declared or withheld information could now be exposed to the possibility of reassessment for a further period of two years.

23. It was submitted that this amendment was made through an ordinance issued by the Governor of Telangana on 17.06.2017. The State VAT Act was to cease to have any effect, on 30.06.2017. However, before that, its provisions were amended through the ordinance which was later transformed into law through an Act of the State legislature and brought into force on 02.12.2017. The Telangana GST Act was enacted and came into force before 30.06.2017. It repealed the existing law, i.e. the State VAT Act, but by virtue of Section 174, the existing provisions of the State VAT Act were continued and all pending proceedings so far as they related to ongoing assessment proceedings and matters which had not become final.

24. The learned counsel submitted that the impugned judgments of the Telangana and Gujarat High Courts are erroneous. It was submitted that the Telangana High Court's interpretation that the expression "amend" had limited import is without basis. Learned counsel highlighted that the

7 Sections 20(4), 21(3), 21(4), 21(6), 21(7), 21(8), 31(1), 32(3), 32(6), 32(7) and 57(5).

ordinance in terms of the several judgments of this Court, especially *A.K. Roy v. UOI*[8] (hereafter, *"AK Roy"*) and the seven judge decision in *Krishna Kumar Singh v. State of Bihar*[9] *(hereafter, "Krishna Kumar Singh")* have declared that there is no difference between the effect of an ordinance and that of a law enacted by the State legislature. Being in the nature of special power to cater to unforeseen eventualities, the executive was empowered to enact laws for a limited duration as far as the conditions spelt out in Article 213. The Union executive in a like manner was authorized by Article 123 to promulgate ordinances.

25. Learned counsel also relied upon the decision of this Court in *Ramkrishna Ramanath v. Janpad Sabha*[10] *(hereafter, "Rama Krishna Ramanath")* and relied upon the principle that so long as the power to amend existed, both the Parliament and the State legislatures could not be limited in the exercise of that power which was plenary and sovereign. The interpretation placed by the Telangana and the Gujarat high Courts that the expression amend only conferred a constricted power which is to bring the existing enactments in line with the amendments of the Constitution, was erroneous. In fact, it amounted to unduly restricting – without any warning – the purport and amplitude of the saving and Presidential power expressed through Section 19.

26. Learned counsel submitted that if one takes into account the fact that the effect of an ordinance and the effect of law are identical which is that they bind the space or subject matter to the extent they provide for it, the difference lies only in the manner of their creation. Learned counsel emphasized that the distinction lies in the procedure adopted rather than the content or the effect of the law. Whereas the origin of an ordinance is through a different entity which is the executive (clothed with limited legislative power), the Act, on the other hand, is an expression of a State legislative or Parliament. This distinction cannot obliterate the effect of the law which is the same and would continue to bind the parties for which express provision is made.

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8 (1982) 2 SCR 272
9 (2017) 5 SCR160
10 1962 Suppl. (3) SCR 70

27. In support of the proposition that there is no difference between the legislative power of the State and that of the executive, learned counsel relied upon the decision of the Constitution Bench of this Court in *R.K. Garg v. Union of India*[11]. It was argued further that the provision requiring placing or tabling the ordinance before the house, either the State legislature or the Parliament was entirely different from the exercise of tabling an enacted legislation. The former amounted to a part of the legislative activity itself. In the event the legislature, i.e. the State legislature or the Parliament approves the ordinance in its own terms, it becomes a parliamentary or State enactment. Learned counsel stressed upon the issue or point that a separate embodiment of the terms of the ordinance is not essentially a requirement under the Constitution. A mere approval of the ordinance results in its enactment and acceptance by the State legislature which in turn assimilates the terms of the ordinance through the body of law enacted by it. In other words, if the State legislature or the Parliament disapproves the ordinance or does not approve any part of the ordinance and embodies the ordinance in the form of an enactment, that enactment would then be decisive from the date the ordinance itself was brought into force. However, in the case of disapproval, in terms of the disapproval, the limited life of the ordinance would cease. It was thus argued that upon the State legislature approving the terms of the ordinance in Telangana and embodying it in terms of the second amendment which was brought into force on 02.12.2017, its terms related back. Therefore, the State power to legislate has to be viewed in continuum or as continuing from the date it was brought into force which is 17.06.2017 and formed from the State enactment. Consequentially, even the power to enact the law on the part of the state was preserved. Learned counsel also relied upon the decision of this Court in *Fuerst Day Lawson Ltd v Jindal Exports Ltd*[12] in support of the submission. In the case of Maharashtra VAT Act, it was highlighted that the amendment Act was brought into force on 15.04.2017. The Central Goods and Services Tax Act (hereafter "CGST Act") came into force on 01.07.2017. In terms of the amendment to the State VAT Act, the pre-deposit of 10% became the condition for hearing the appeal.

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11 (1982) 1 SCR947

12 2001 (3) SCR 479

28. It was argued on behalf of the State of Maharashtra that what is material is the existence of a power to legislate and not the manner of exercise of that power. Therefore, the existence of a power to legislate was preserved by Section 19; its purpose was to preserve both the portion of existing laws and also to permit the State legislature and the Parliament to amend or repeal the existing law. Being a constitutional amendment, no expression or term ought to be interpreted in a limited manner. The reasoning of the Telangana and Gujarat High Courts that the power of amendment was limited to bringing the existing enactments, i.e. State VAT Acts in conformity with the express terms of the 101st amendment, was erroneous. It was submitted that till the date specified in the 101st amendment, i.e. the expiration of one year which was effectively 30th June, 2017, the power of the competent legislatures, i.e. the State and the Union was untrammeled. Learned counsel also pointed to amendments made to the Central Excise Act, much in the same terms as in the case of the Telangana and Gujarat amendments which enlarged the period of limitation in certain respects. It is fallacious to contend that the State legislatures were denuded the power to legislate. The power was traceable to the amended provisions of the Constitution notwithstanding that relevant entries in the State List 54 and 62 had been altered. It was submitted that such a view was taken notice of and discussed in *UOI & Anr. v. Mohit Minerals Private Limited*[13].

29. It is urged that the power to amend the Constitution is a constituent power of the Parliament in accordance with Article 368. Under Article 368(2), the amendment to the Constitution is initiated by introduction of a bill and after assent to the bill by the President, the Constitution stands amended in accordance with the terms of the Bill. In other words, every single provision in the Constitutional Amendment Bill becomes a part of the amended Constitution.

30. It is further submitted that absence of specifically inserting Section 19 in the Constitution makes no difference. It is still a part of the Constitution as amended. The reference in this regard is made to the seventh constitutional amendment which conferred power upon the President to frame regulations for administering Part D States. After the said Amendment,

13 2022 (9) SCR300

the Regulations were continued for a limited period. The constitutional amendment completely became part of the Constitution. This Court in the matter of *A.K. Roy (supra)* has considered the issue.

31. It was urged, on behalf of the Maharashtra state that the amendment to Section 26 of Maharashtra Value Added Tax Act, 2002 (hereafter as "MVAT Act") requiring a pre-deposit is not inconsistent with the Amendment. It is procedural in nature and no vested right of the assessee was taken away. It is also not in dispute that the same is in respect of past levies prior to the introduction of GST w.e.f. 1st July, 2017 and therefore, even otherwise are saved by Section 174 of the Maharashtra GST Act.

32. It is submitted that the plain language of Section 26(6A) and 26(6B) of the MVAT Act clarifies that it applies in all cases where the order is passed after 15th April, 2017 and an appeal is preferred. That provision only requires a pre-deposit of 10% and takes away the discretion of the Appellate Authority/Tribunal. It does not take away the statutory right of appeal and only regulates the same by removing the discretion of the Tribunal. The condition of pre-deposit is also not even an onerous condition to make it arbitrary. The only question, therefore, is whether there is any vested right of filing an appeal without a pre-deposit. The plain language of the amendment has taken away the discretion of the Appellate Authority and not the right of appeal in case where the order is passed by the original authority after 15th April, 2017. The state relies on the decisions, to say that the right to appeal remains unaltered, only its conditions are controlled, or regulated, with pre-deposit requirements, at the appellate stage, i.e. *Anant Mills Company Limited v. State of Maharashtra*[14]*; Vijay Prakash D. Mehta v. Collector of Customs (Preventive), Bombay*[15] *State of Haryana v. Maruti Udyog Limited &Ors*[16]*Thirumali Chemicals Limited v. Union of India*[17]*; Neena Aneja & Anr. v. Jai Prakash Associated Limited*[18].

33. The State of Gujarat urges that the High Court fell into error in not recognizing that in somewhat similar situations, this court in *A. Hajee*

14 (1975) 3 SCR220
15 (1988) Supp (2) SCR 434
16 (2000) Supp 3 SCR 185
17 (2011) 4 SCR739
18 (2021) 15 SCR96

Abdul Shakoor& Co v. State of Madras[19] (hereafter, *"Hajee Abdul Shukoor"*) recognized the power of states to even retrospectively validate assessments under the Act of 1939 even though the earlier Act had failed for want of Presidential assent. It was also pointed out that this court in *M/s West Ramnad Electric Distribution Co. Ltd. v. State of Madras*[20] validated the power of states to retrospectively validate actions taken under notifications of enactments which had been declared unconstitutional and non-est. Reliance is also placed on this court's decision in *State of Rajasthan v. Mangilal Pindwal*[21] upheld the power of the legislature to amend repealed provisions for a period when these provisions were in operation till the date of repeal. The repealing of Section 166 of the Gujarat GST Act clearly shows that the VAT Act has not been repealed at all and hence, the consequences of repeal cannot follow.

34. It is submitted that Section 84 A is neither arbitrary nor unreasonable but aims at equity and restitution by allowing the tax authorities to collect the tax from those dealers who have passed on the burden of tax on the ultimate consumer but not paid it into the government treasury thus avoiding unjust enrichment of money as held by a special larger Constitution bench in *Mafatlal Industries Ltd. v. Union of India*[22] *(*hereafter*, "Mafatlal Industries").* It is urged that restitution and prevention of unjust enrichment is a principle of equity applicable irrespective of any statutory provisions. Further, it is argued that Section 84 A does not impose new tax or liability, but merely facilitates the collection of tax whose burden was passed on to the ultimate consumer and that collected tax, being public money and its incidence and burden is always presumed in indirect taxes, it will be most inequitable and improper to allow some dealers to retain the benefit of tax which has been passed on.

35. It was next urged that Section 84 A is a validating Act which increases the time limit thereby enabling the collection of public funds in the hands of the dealers of tax. The revision notices were sent after the judgment delivered by this court in the *State of Gujarat v. Reliance Industries*

19 1964 (8) SCR 217; AIR 1964 SC 1729
20 1963 (2) SCR 747
21 (1996) Supp (3) SCR 98
22 1996 Suppl.(10) SCR 585

Ltd[23]. Counsel submitted that the time limit prescribed under Section 84 A is not too long if Articles 61(b), 62, 63(b), 64, 65, 66, 67, 92, 94, 96, 106, 107, 108, 109, 110 and 136 of the Limitation Act, 1963 are viewed which provide for time limits of 12 or even 30 years from the occurrence of any event which may also take many years to occur.

IV. Arguments of the respondent-assessees

36. It was argued on behalf of the assessee-respondents by Mr. Kapil Sibal, Mr. S. Ganesh, Mr Nankani and Mr Soparkar, learned Senior counsel and Mr. Sujit Ghosh, Advocate (hereafter "the assesses") that continuance of inconsistent existing law is solely for the purposes of making them consistent (through amendments) with the amended architecture of the Constitution. It was submitted that to elucidate the ambit of powers under Section 19 of the Amendment, an inference can be drawn from Article 243ZF of the Constitution, which has been couched in a manner identical to Section 19. There are however, two distinctive features *inter se* between them, first, being, that unlike Section 19 Article 243ZF was incorporated into the body of the Constitution, and the second is while Article 243ZF has a *non-obstante* clause seeking to override all Articles contained in Part IXA of the Constitution, Section 19 of the Constitutional Amendment Act, 2017 ("CAA") only overrides the provision of the Amendment and not the Constitution of India. In other words, *ex facie* Article 243ZF of the Constitution can be said to be at a pedestal higher than that of CAA. It is argued that this court had interpreted Article 243ZF in *Sundergarh Zilla Adivasi Advocates Association and Ors v State of Odisha and Ors*[24] *(hereafter, Sundergarh Zilla").*, wherein this court, at para held as follows:

> *"....Clearly, the purpose of continuing an existing law (even though it may be inconsistent with Part IX-A) was to enable necessary amendments to be made to the existing law to make it in consonance with Part IX-A."*

37. It is submitted that considering that the language of Article 243ZF of the Constitution and Section 19 are near *pari materia,* placing reliance on

23 (2017) 13 SCR25.
24 (2013) 6 SCR420

Sundergarh Zilla (supra), it is clear that the amending power under Section 19 is limited to making the existing inconsistent legislations consistent with the Amendment. In other words, the purpose is to cure the inconsistencies and iron out the creases. Further, in view of the fact that, unlike Article 243ZF which is a part of the Constitution and also overrides part IXA of the Constitution, Section 19 is not part of the Constitution and also not overriding any provision of the Constitution, the power to amend under Section 19 of the CAA would be even narrower as compared to the power to amend available under Article 243ZF as interpreted in *Sundergarh Zilla (Supra).*

38. Counsel urged that a similar transitional provision was introduced in the form of Section 143(2) of the Government of India Act 1935, with the introduction of Part III introducing the concept of 'provisional legislation' in *Rama Krishna Ramanath* (supra).

39. It is submitted that even where express power to continue the levy was granted through incorporation into the Government of India Act, 1935, the Constitution Bench of this Court proceeded to hold that even in such cases, the power of the Provincial Legislature is extremely limited and certainly cannot be used to 'alter the incidence'. In the present case, such powers to continue the levy are wholly absent and accordingly powers under Section 19 of the CAA would be construed in an extremely narrow framework, i.e. limited to bring the legislation in consonance with the Constitution.

40. It was submitted that the term 'amend' ought not to be interpreted textually, instead contextual interpretation ought to be adopted. By applying contextual interpretation, it would appear that Section 19 of the Amendment Act is couched in a manner which contemplates ultimate repeal and obliteration from the statute books. This suggests that the legislature contemplated a diminishing life of the legislation concerned and the state could not have used the power to amend to breathe any more life into the statute concerned. Further, the usage of the word 'inconsistent' followed later with the word 'until amended', clearly suggests that the intention was to let the inconsistent provisions survive for a limited time, until it is amended to make it consistent. Had the intention been to confer plenary power to amend, then section 19 would have been couched in a manner such that it provided for 'subject to amendment', which would have then suggested

that the existing inconsistent law 'as is' or 'as amended', could continue to be in force until the lapse of one year or its repeal, whichever was earlier. However, such is not the case for the nonce.

41. Further, by applying purposive construction, Section 19 of the CAA admits to the exercise of *'curative legislative action'*. This is so because with the advent of GST, as per Article 279-A(6) of the Constitution, the need for a harmonized structure of goods and services tax and for the development of a harmonized national market for goods and services was specifically provided within the Constitution. This harmony has been interpreted by the Supreme Court in *Union of India v. VKC Footsteps India (P)Ltd*[25], to mean legislative harmony between the State and the Centre with a view to achieve co-operative federalism. Therefore, this avowed purpose of harmony between the Centre and the State or *inter se* between the States cannot be achieved if using the power of amendment under Section 19 of the Amendment, a given State enlarges the operation and sweep of an existing tax law even after the introduction of

42. It is argued that to interpret Section 19 as conferring legislative power which is non- curative and breathing more life into it than what existed earlier, would be in the teeth of constitutional morality and contrary to the principle of the 'Pure Theory of Law' propounded by Kelsen. This is so because plenary legislation stands at a pedestal lower than the Constitution of India and can never clash with the *Grundnorm*. Accordingly, whatever legislative power may be couched in Section 19 of the Amendment, will have to be subservient to Articles 245 and 246 of the Constitution. If under the latter two Articles, there is no power available with the State to legislate on a subject which has been deleted or truncated from List II of the Seventh Schedule, then Section 19 of the Amendment cannot be pressed into services to override such a Constitutional restriction. Counsel urges that the entire Amendment was enacted by following the procedure under Article368 of the Constitution. While the said Article confers constituent power to the Parliament to amend the Constitution, *stricto senso* the enactment of Section 19 of the Amendment not being made a part of the Constitution may be viewed as not having been enacted in exercise of powers under Article 368

25 2021 (15) SCR 169

of the Constitution. However, considering that along with the remaining provisions of the Amendment, Section 19 of the Amendment also went through the entire drill prescribed under the Amendment, a possible view emerges that Section 19 of the Amendment is perhaps an adjunct to exercise the powers under Article 368 of the Constitution which have been enacted using the 'incidental and ancillary' powers available to the Legislature. It is well known and well settled that incidental and ancillary powers are exercised in aid of the main Legislation (Reliance is placed on the decision of this court in *R. Abdul Quader v. Sales Tax Officer*[26]). Therefore, to interpret the word "amend" in Section 19 of the Amendment to mean conferment of a parallel power wider than making curative legislation, which runs contrary to the revised Constitutional architecture of simultaneous levy through the introduction of GST, cannot be said to be in aid of the main subject of Amendment.

43. It is alternatively argued that assuming *arguendo*, Section 19 has been legislated by the Parliament in exercise of power under Entry 97 of List I of the Seventh Schedule (being a residuary entry for matters not enumerated in List II or List III including any tax not mentioned in List II or III), even then in such cases, such power can only be exercised by the Parliament and can in no manner be said to be transferred to the State Legislatures thereby enabling them to amend the plenary legislations. Neither Article 258 nor Article 258A of the Constitution admits of any transfer of legislative power by the Parliament to the State Legislatures. It cannot, therefore, be said that Parliament entrusted the legislative functions to the State Legislature.

44. Counsel argued that the amendment to the VAT legislation cannot also find its source of power in Article 246A. This is for two reasons, firstly, under Article 246A, there must be a simultaneous levy by the state as well as by the centre, the scope of which does not arise in the present case. Secondly, Article 246A contemplates, the power to legislate on Goods and Service Tax, which is a defined term, entirely different as also wider than a tax on sales. GST cannot be equated with tax on sales by any stretch.

45. It is argued that Section 19 contemplates that *'any provision of any law relating to tax on goods or services or both in force in any State*

26 (1964) 6 SCR 867

immediately before the commencement of this Act' shall continue to be in force until amended or repealed or until the expiration of one year which is earlier. Hence, the edifice of Section 19 is based on the *law being in force* before the Commencement of the Amendment i.e. on 15.09.2016.

46. In one of the cases, pursuant to the order dated 31.12.2007 of the AP High Court in *Sree Rayalaseema Alkalies and Allied Chemicals Limited v. State of Andhra Pradesh and Ors*[27]., the levy of entry tax under AP Tax on Entry of Goods into Local Areas Act of 2001, was declared unconstitutional. The said decision of the A.P High Court was set aside by this court on 29.03.2017 by Order dated 29.03.2017 which is much after the Amendment which came into effect on 16.09.2016. In the meanwhile, the AP Tax on Entry of Goods into Local Areas Act, 2001whichwasdeclared unconstitutional, was also adopted by the State of Telangana vide G.0.M No.45 dated 01.06.2016.

47. It is submitted that where the law was declared as unconstitutional and thereby obliterated from the statute book, such law cannot be treated as 'a law in force' as contemplated under the Amendment. Accordingly, where the AP Tax on Entry of Goods into Local Area Act of 2001 was not in force on the date immediately before the commencement of the Amendment, such legislation in any case, cannot continue to be in force in the manner as contemplated under the Amendment.

48. It is further submitted that even the adoption of the AP Tax on Entry of Goods into Local Area Act, 2001 by the State of Telangana was also unconstitutional in as much as the AP Tax on Entry of Goods into Local Area Act, 2001 was already declared as unconstitutional as on 31.12.2007. Accordingly, being a dead law, the same could not have been adopted by the State of Telangana on 01.06.2016. Further, the subsequent decision of this court which set aside the order of the Hon'ble AP High Court cannot breathe life and validate the adoption as it was well settled that *the validity of a statute is to be tested at the time of enactment by the legislature. An After-acquired power cannot ex proprio vigore validate a statute void when enacted.*

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27 2007 SCC OnLine AP 1158 : (2008) 13 VST 15

49. Section 6 of the Telangana Tax on Entry of Goods into Local Area Act, 2001 incorporates the provisions of the Telangana VAT Act in relation to assessment, returns etc. Accordingly, the present is a case of 'legislation by incorporation'.On this basis, it is submitted that the amendments in the Telangana VAT Act will have no impact and bearing on the Telangana Tax on Entry of Goods into Local Area Act, 2001 and as such the extension in the period of limitation from 4 to 6 years would not be applicable to the assessment made in respect of entry tax. This is based on a well settled principle of law as laid down by this Court in the case of *State of Madhya Pradesh v. M.V. Narasimhan (hereafter, "M.V. Narasimhan")*[28]**,** which held that where a subsequent enactment incorporates the provisions of a previous act, then the borrowed provisions become an integral and independent part of the subsequent act and are totally unaffected by any repeal or amendment in the previous act. The exception to this principle is:

> *(i) Where the subsequent Act and previous Act are supplemental to each other;*
>
> *(ii) Where the two Acts are pari materia;*
>
> *(iii)Where the amendment in the previous Act if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual;*
>
> *(iv)Where the amendment of the previous Act, either expressly or by necessary intendment applies the said provisions to the subsequent Act.*

50. In the present case, since none of the exceptions as laid down by this court in *M.V. Narasimhan* (supra)stand satisfied, the amendment in the Telangana VAT Act would not be applicable to the Telangana Tax on Entry of Goods into Local Area Act, 2001 and as such the entire demand is in any case barred by limitation.

51. The intention behind Section 19 was to stipulate a time frame for subsuming of erstwhile indirect taxes and for States to amend or repeal to pave the way for imposition of SGST. It was not for permitting States to freely amend their legislation till GST laws were enforced. Post 16.09.2016

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28 (1976) 1 SCR6

the States had no competence to freely legislate on goods other than those mentioned in Entry 54List II of Constitution as amended by the 101st CAA. Section 19 was intended only to allow the States to bring their laws into compliance with the Constitution as amended by the 101stCAA. Section19 is *pari materia* with Article 243ZT. In *Vipulbhai M Chaudhary v Gujarat Milk Mktg Federation Ltdṅ*[29] *(hereafter, "Vipulbhai"),* it was observed, in the context of Article 243ZT, which required laws relating to co-operative societies in force in States prior to the Amendment Act to be in tune with and in terms of the constitutional concept and set up of cooperative societies and provided a period of one year, it was held that *"the Constitution enables the competent legislature or authority to suitably amend the existing provisions in their laws in tune with the constitutional mandate."*

52. The Telangana Amendment Act to the extent it seeks to legislate on the basis of erstwhile Entry 54 of List Il of the 7th Schedule is bereft of legislative competence.Section19 contemplates amendment by a "competent legislature". Post amendment the competence has to be determined with reference to post amendment provisions. It is submitted that States had legislative competence only as an incidental power to amend or repeal the provisions dealing with State indirect taxes so as to bring them in line with the amended Constitution. An example of a valid amendment would have been to amend the definition of "goods" in the Telangana VAT Act. The same was however achieved by S.174(1)(i) of the Telangana Goods and Services Tax Act, 2017 ("TGST Act") by confining the repeal of the Telangana VAT Act to all goods except those covered by Entry 54 of List II of the 7th Schedule. Section 19 of the101stAmendment is *pari materia* with Clause 20 of the Constitution 122nd Amendment Bill, 2014. The said Bill was considered by the Select Committee of Rajya Sabha in its report dated 22.07.2015.

53. The assessees also argue that the extension of limitation is done so with a view to secure revenue of the state by enlarging the duration. It is submitted that this argument is not tenable and cannot be sustained. The further argument that provisions of limitation on assessments etc., are only procedural and aspects of levy and assessment are not substantial, is also untenable.

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29 2015 (3) SCR997

54. It was argued that the Telangana Ordinance was issued with effect from 17.6.2017. However, Section 7 of the Telangana Amendment Act clearly repealed the Ordinance without any savings clause. Further, under Section 1(2) the Telangana Amendment Act was deemed to retrospectively come into effect from 17.6.2017. Thus, the Telangana Amendment clearly intended to obliterate the Ordinance altogether and not merely continue the law. Thus, all submissions to the effect that the issuance of the Ordinance and its incorporation into an enactment constitutes a single law making power being exercised akin to a principal ratifying an agent's actions are belied by the very provisions of the State Amendment.

55. Thus, the lack of legislative competence is immediate. That is not the subject matter of Section 19. Instead, what is kept in suspension under Section 19, is the effect of such incompetence on enactments that had already been passed prior to the Amendment, i.e., enactments in force. Section 19 is *pari materia* to Article 243 ZF and must be given the above interpretation in accordance with *Bondu Ramaswamy v. Bangalore Development Authority*[30] (hereafter, *"Bondu Ramaswamy")* Further, the words "shall come into force" in Section 1(2) will have no meaning if Section 19 is interpreted to mean that the operation of the Amendment itself is to be stayed for a period of one year.

56. Counsel stated that a transitional provision cannot be used for oblique purposes. The scope of a power to 'amend' a statute is co-terminus with the scope of legislative competence and cannot travel beyond such Competence as on the date of such amendment. With effect from 16.09.2016, and therefore, as on o 17.06.2017, the competence of the State Legislature to make law with respect to Article 246(3) read with unamended Entry 54 did not exist. The word 'amend' in Section 9 therefore cannot be read to be wider than the competence of the State Legislature on 17.06.2017. Instead, the word 'amend' is limited to the power to make law only with respect to the new contours of Entry 54.The term 'until' indicates that the lifetime of an inconsistent law is immediately decided by Section 19. An inconsistent law continues to be in force until:

30 (2010) 6 SCR29

a. The State legislature amends the inconsistent law to bring it in conformity with the Constitution as amended by the 101st Amendment OR

b. The State Legislature repeals the inconsistent law OR

c. The period of one year from the commencement of the Act expires i.e., 15.09.2017.

57. The purpose of using the word 'amend' is to allow the State Legislature to bring existing laws in conformity with the 101st Constitution Amendment so that they can continue to operate. If the legislatures chooses to take such a route, the inconsistent provisions of the Act cease to exist upon amendment. In the language of Section 19 - until it was amended. Therefore, the State Legislature did not possess any legislative competence with respect to goods other than those included in the new and limited Entry 54 either on the date of the Ordinance i.e., 17.06.2017, or on the date of the Amendment Act, i.e., 02.12.2017.

58. The Telangana VAT Act 2005, was effectively repealed from 01.07.2017 by Section 174(1)(i) of the TGST Act 2017 except in respect of goods included in Entry 54 of List II. Section 174(1) operates as an express acknowledgment and acceptance of the 101st Amendment. Therefore, the TVAT Amendment of 02.12.2017 applicable to all goods cannot be made after such repeal.

59. Article 246A embodies the principle of simultaneous levy by both Parliament and the State Legislature and is distinct from the principle of concurrence. Article 246A creates *both* the power and the subject matter of legislation. This makes it distinct from a concurrent power of legislation u/a 246(2) which requires one to travel to List III, Schedule VII to find the subject matters with respect to which the power may be exercised. When concurrence as a principle already exists in such a manner, the decision of the Parliament to house both the power and the subject matter in a single article of the Constitution, i.e., Article 246A, leads to the conclusion that such power is to be exercised simultaneously by the Parliament and the State and cannot be exercised independently as they do under the provisions of Article 246(3).

60. Therefore, the State Legislature can only exercise its taxing powers with respect to goods and services either under Article 246A, which is to be exercised along with the Parliament, or under Article 246(3) r/w amended Entry 54 only with respect to the six items mentioned therein.

61. It is argued on behalf of the assesses of Maharashtra that the High Court proceeded erroneously to uphold the state's power to legislate with respect to its extant sales tax laws, in this case,the Maharashtra VAT Act, 2002. The High Court failed to appreciate that Article 246-A has no relation whatsoever to the earlier sales tax laws as it specifically deals with GST, which was specifically defined under the Constitution to mean a tax on the "supply of goods and services". Applying the pith and substance test, the phrase "goods and services tax" referred to in Article246-A is totally different and distinct from the earlier tax levied on the sale of goods by the State Legislature.

62. Further, it is submitted that GST is a tax on "supply". Supply is the new taxable event, as opposed to as opposed to the taxable events existing prior to the 101st Constitution Amendment Act. The mere fact that the word "supply" has been defined under the GST Acts to cover the manufacture, service and sale, for the purpose of levy and assessment of GST, does not mean that the legislative competence of the State Legislature should also be construed widely relying on the definitions meant for the purposes of the GST Acts and not the Constitution of India.

63. Further, the High Court failed to appreciate that Article 367 of the Constitution of India incorporates the provision of the General Clauses Act, 1897 and makes them applicable to the Constitution. It is in this context, that the effect of the General Clauses Act, needs to be examined at two levels. One with reference to the101st Constitutional Amendment Act, 2016 and the other with reference to amendment to MVAT Act. As regards to 101st Constitutional Amendment, the power under the old Article 246 has been abridged by simultaneously a mending the fields of legislation in Entry-54 of List-II, which is referred to therein. In this case, there is no question of any power to legislate in respect of rest of the goods, other than the 6 presently covered by Entry-54, which survives post-amendment, even by applying the provisions of the General Clauses Act, 1897.

64. It is submitted that Section 19 of CAA does not confer unabridged or wide powers on the state legislatures/ Parliament to make any and every amendment in the laws existing in force at the time of enacting the Amendment Act. The power referred to in Section 19 is a limited power granted to the State Legislature for a limited period to make such amendments as may be necessary to remove inconsistencies, if any, and bring the existing laws in consonance with the GST legislations. Accordingly, it is submitted that only the power to enact the aligning act enacted in Maharashtra to align its existing laws with the GST provisions, will be saved interms of Section 19. Consequently,the State of Maharashtra lacked the power to make the impugned amendments which were enacted not for removing any inconsistency but as a regular amendment under the Maharashtra Act.

65. Counsel appearing in the Gujarat batch of appeals argued that the impugned Section 84A was introduced in the Gujarat Value Added Tax Act, 2003 (hereinafter referred to as "the Gujarat VAT Act") by the Gujarat Value Added Tax (Amendment) Act, 2018 gazetted on 06.04.2018 but with retrospective effect from 1.4.2006 whereby it is *inter-alia* provided that if for a particular issue in "some other proceedings" a lower forum, has given a decision which is prejudicial to the interest of revenue and appeal against such decision is pending before higher forum then the period spent in such litigation will be excluded while computing period of limitation for revision. By giving such provision retrospective effect the State legislature thus sought to enable reopening of assessments which had already attained finality before such amendment was brought into force.

66. Section 19 cannot be applied to save the impugned Section 84A of the Gujarat VAT Act since Section 19 of the CAA had a limited shelf life for 1 year from 16.9.2016 or till the date of implementation or the GST regime i.e. 1.7.2017 whichever is earlier and the impugned Section 84A of the Gujarat Act was enacted on 06.04.2018 i.e. much after expiry of Section 19.

67. It was argued that in any case section 84A of the Gujarat VAT Act is manifestly arbitrary and violates Article 14 and 19(1) (g) of the Constitution of India. When assessment for a particular year attains finality the same creates a vested right in favour of the dealer. The dealer arranges his affairs considering the fact that his liability has crystalized for periods where

assessments have attained finality. Alteration of such position without any definite time limit only on the ground that judgement in favour of the revenue has been pronounced by a Court in another case is manifestly arbitrary and illegal. Moreover, the impugned provision has been retrospectively introduced w.e.f. 1.4.2006. Therefore High Court has rightly struck it down as being manifestly arbitrary and illegal.

68. It is argued that if an unlimited time period is available to the revenue for assessment/reassessment/revision in any case based on decisions in the case of other dealers will lead to unimaginable chaos and therefore it is rightly struck down as being manifestly arbitrary and illegal. The Respondent is supported on all fours by the judgement of Hon. 9 judge bench of this Court in the case of *Mafatlal Industries* (supra).In that case, this court was faced with a situation converse to the present case in as much as assesses used to claim a refund after number of years on the basis of judgements rendered in the case of other assesses. This court observed that allowing refund claims beyond the stipulated period of limitation based on decisions rendered in other cases would do violence to several well-accepted principles of law. It was further observed that one of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding." Denouncing the legality of the practice of claiming a refund after a number of years based on subsequent decisions it was observed that an order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken and that if this theory is applied universally. It will lead to unimaginable chaos.

69. Section 64 of the Gujarat VAT Act requires the dealer to preserve books of accounts only for a period of 6 years from the end of the relevant accounting year. The proviso thereto requires further preservation of books of accounts only to the extent a matter is pending in appeal or revision. However, the impugned provision exposes the dealer to assessment/ reassessment/revision for an indefinite period which is excessive and disproportionate. In fact, retrospective operation of the provision w.e.f. 1.4.2006 allows the reopening of assessments of years in respect of which a dealer was not required to preserve books of accounts and therefore retrospective operation is all the more onerous and manifestly arbitrary.

V. Analysis and reasoning

70. In the Telangana batch of cases, the facts are that the amendment to the State VAT Act was confined to two provisions which are Sections 21 and 32. Their effect was to prolong or extend the period of limitation to issue notice of reassessment and reopen cases as well as extend the period of limitation for deciding pending revisions and proceedings. These were subjected to a time limit of four years in the existing law. By virtue of the amendment, these were enlarged by a further period of two years (i.e., to six years). This became the subject matter of challenge before the Telangana High Court which culminated in the impugned judgment.

71. So far as the Gujarat set of cases is concerned, the facts are that the Gujarat VAT Act came into force on 01.07.2017. After that date, the Gujarat legislature repealed the State VAT Act. The High Court had set aside an assessment, based on an interpretation of the existing VAT Act, much before 16.9.2016. The Gujarat Legislature amended the VAT Act (after its repeal) by introducing a new provision, Section 84A, which was given retrospective effect. The effect of this amendment was to exclude the period spent during the pendency of any appeal or revision before the appellate authority or High Court, for the purpose of revision or reopening which in the interest of the revenue, was necessary to reopen. These became the subject matter of challenge on diverse grounds before the High Court. The High Court, by its elaborate and reasoned judgment, held the amendment to be unconstitutional on the ground that the legislature lacked competence to enact the provision having regard to Section 19 of the 101st amendment and furthermore that the amended provision was manifestly arbitrary.

In the Maharashtra batch of matters, subject matter of the proceedings was MVAT and amendments made to it. MVAT came into force on 01.03.2005 to consolidate laws regarding the collection of tax in sales and purchase of goods. 101st CAA came into effect in 16.09.2016 and by the CAA, the power of the state government to levy tax on sales and purchase of goods under Entry 54 of List II was sought to be restricted only with respect to the 6 goods mentioned therein. The state government amended Section 26 of the MVAT Act and inserted sections 6A, 6B and 6C requiring assessee to deposit 10% of the disputed tax amount, failing which the appeal of the concerned assessee will be dismissed. HC upheld the amendment made to

the MVAT Act requiring assessee's to deposit 10% of the disputed amount before filing the appeal

A. Interpretation of Section 19

72. The petitioners contended that the language of Section 19 of the Amendment Act does not attach itself to the body of the Constitution unlike the other provisions. The further argument was that the power to amend is to be seen in the context. The other provisions of the amendment inserted new provisions of the Constitution itself. They also altered substantially entries of taxation particularly Entry 54 of the State List beyond recognition, denuding states of power to levy VAT on most items. Those provisions become effective immediately upon the bringing into force of the Amendment i.e. 16.09.2016. A contextual interpretation of Section 19 therefore would mean that it preserved the operation of existing laws till they were repealed or such laws were brought in line with the other provisions of the amendment which became part of the Constitution. It was submitted in this context, that Section 19 cannot be considered as a part of the Constitution, but merely as an incidental provision with limited operation.

73. Section 19 seeks to achieve three aims. The first is to preserve the existing *status quo* with regard to the state and central indirect tax *regime,* for a period of one year from the date of commencement of the Amendment or till a new law is enacted whichever is earlier. The second is authorizing the competent legislatures i.e. the State Legislatures and Parliament to amend existing laws which were in force in states and other parts of the country (obviously both Central and State laws. The third was the repeal of such laws. Now, that Section 19 was meant to be transitional cannot be doubted. In its absence, the several hundreds of state enactments and central laws which were in force, would have been jeopardized. Other than Section 19 there is no saving provision which is part of the Amendment. It is questionable whether Section 6 of the General Clauses Act, 1897, would have applied on its own force. Consequently, Parliament, acting in a constituent capacity, amended the substantive parts of the Constitution, and also, at the same time ensured through Section 19 that limited operation of existing laws continued till the legal *regime* was changed in accordance with the amended parts of the Constitution. Keeping in mind that the Amendment, denuded the States – and even Parliament of legislative authority in regard to the pre-existing

(i.e. pre-amendment) powers and fields of taxation, the absence of such a transitional provision might have been catastrophic. It was in this context that Section 19 also clarified that not only were the laws to be continued, in force but also that the States – and Parliament, could amend, or repeal them.

74. The petitioners have relied upon the Judgments of this court in *Bondu Ramaswamy* (supra) and *Vipulbhai* (supra).In the present case, there is no dispute with respect to the fact that Section 19 also seeks to achieve the same objects i.e. the preservation of existing fiscal and taxation laws prevailing in various statutes and in other parts of the country for a limited duration of one year or till they were amended or repealed. The distinction pointed out by the petitioners is that transitional provisions as they were involved in those cases become the part of the Constitution, as they continued and still continue in force long after the amendment. Whereas in the present case, Section 19 has a limited life and would not ever become part of the Constitution.

75. The question is – Is that really so? It is undisputed that the amendment was enacted pursuant to what is now recognized as constituent power, which is sourced from Article 368. The present frame of Article 368 underwent a change after the Constitutional 25th Amendment Act of 1971. Before that amendment, the title of the provision was *"procedure for amendment of the Constitution".* By virtue of the amendment, Article 368 is described as *"power of Parliament to amend the Constitution and the procedure therefor".* Article 368 (2) outlines the manner of initiation of the amendment i.e. through a Bill and thereafter outlines the procedure of that as such majority of not less than two thirds of the members present and voting in both the Houses of Parliament. After the passage of the Bill, it is to be presented to the President for assent. Unlike in the case of recommendations of the cabinet, or when any other bill is presented, the President has no choice, but "shall" assent to the Amendment. The proviso to Article 368 requires that wherever enumerated provisions or parts of the Constitution are sought to be amended in addition there is a category of amendments which have to be ratified by the legislature of not less than one half of the States by the resolutions of their state legislatures.

76. It is unnecessary to recount the well documented path that led to the amendment of Article 368 and the subsequent amendments or the fate they

met with. What needs to be underlined is that unlike ordinary legislation, which is traced to the power of Parliament or any other legislative body, the amendment power is distinct inasmuch as it is expressly a constituent power. In *Kesavananda Bharati v State of Kerala*[31] case, the largest bench formed, this court ever sat in (13 Judges) declared that the power under Article 368 though constituent and though seemingly unbounded and does not expressly constrict, yet has impliedly limited by the "essential features" or"basic structure" doctrine.

77. An ordinary law such as an Act of Parliament, is a product of a legislative exercise. The source of that power is traced to the Constitution in some specific provisions or through fields of legislation enumerated in one or the other lists. Constitutional law on the other hand is that it arises out of the Constitution and creates different organs of the State, defines their power and imposes limitations on the functioning of the Executive and legislative wings through the fundamental rights and other limitations. An ordinary law can be made or changed by the same body, the legislating body in exercising legislative power. Since constitutional amendments relates to the fundamental law of the land which is a source of authority for other laws, it can be achieved only through fulfilling the special procedure.

78. The distinction between constituent power and legislative power was commented upon by the late H.M. Seervai in the *Constitutional Law of India*[32] :

> *"the constituent power therefore a juristic entity or category separate from legislative power. In the case of India there are three different modes of amending the Constitution – the first is the easiest or the simplest where states reorganization or names of States are sought to be changed, in that event a Parliamentary enactment would suffice. In other cases, an amendment to the Constitution requires the special procedure of two thirds majority in both houses by members sitting and voting and assent by the President. In the special category carved out is proviso to Article 368, not only the special procedure to be resorted to but also super added to it is the requirement of amendment*

31 1973 Supp 1 SCR 1
32 4th Edition Volume 3 page 3119

having to secure the ratification and the proviso of one half of the State Legislature by the Resolutions. Thus the nature of the amendment and structure of Article 368 distinctly brings home the point that it encapsulates both the power and also contains the procedure for amendment."

79. This Court had in the judgment reported as *AK Roy (supra)* dealt with some aspects of this issue. The challenge there essentially, was to provisions of the then National Security Act. One of the grounds of challenge is that it violated Article 22. Since Article 22 was amended by the 44th Amendment to the Constitution and provisions of those amendments were not brought into force, Section 1(2) of that Constitution Amendment was challenged. This Court, held as follows:

"It is well settled that the power conferred upon the Parliament by Article 245 to make laws is plenary within the field of legislation upon which that power can operate. That power, by the terms of Article 245, is subject only to the provisions of the Constitution. The constituent power, subject to the limitation aforesaid, cannot be any the less plenary that the legislative power, especially when the power to amend the Constitution and the power to legislate are conferred on one and the same organ of the State, namely, the Parliament. The Parliament may have to follow a different procedure while exercising its constituent power under Article 368 than the procedure which it has to follow while exercising its legislative power under Article 245. But the obligation to follow different procedures while exercising the two different kinds of power cannot make any difference to the width of the power. In either event, it is plenary, subject in one case to the constraints of the basic structure of the Constitution and in the other, to the provisions of the Constitution.

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It is true that the constituent power, that is to say, the power to amend any provision of the Constitution by way of an addition, variation or repeal must be exercised by the Parliament itself and cannot be delegated to an outside agency. That is clear from Article 368 (1) which defines at once the scope of the constituent power of the Parliament and limits that power to the Parliament. The power to issue a notification

for bringing into force the provisions of a Constitutional amendment is not a constituent power because, it does not carry with it the power to amend the Constitution in any manner. It is, therefore, permissible to the Parliament to vest in an outside agency the power to bring a Constitutional amendment into force. In the instant case, that power is conferred by the Parliament on another organ of the State, namely, the executive, which is responsible to the Parliament for all its actions. The Parliament does not irretrievably lose its power to bring the Amendment into force by reason of the empowerment in favour of the Central Government to bring it into force. If the Central Government fails to do what, according to the Parliament, it ought to have done, it would be open to the Parliament to delete Section (2) of the 44th Amendment Act by following the due procedure and to bring into force that Act or any of its provisions."

80. In the opinion of this Court, the mere circumstance that Section 19 does not get added to the Constitution, would not make any difference. If one looks closely at Articles 243 ZF which this Court interpreted in *Bondu Ramaswamy* (supra) and Article 243 ZT which was interpreted in *Vipulbhai (supra)* the effects of those provisions are the same as Section 19. Although those provisions continued to be part of the Constitution, they have no meaning and were merely historical. The reason is that they were operative, for a limited duration – like Section 19. However, the fact remains that those provisions as well as Section 19 were enacted in exercise of the constituent power. Section 19 is not, in this court's opinion comparable to a mere Parliamentary enactment. There cannot be any gain in saying that Section 19 is not a mere legislative device. It was adopted as part of the 101st Constitutional Amendment Act. Undoubtedly, it was not inserted into the Constitution. Whatever reasons impelled Parliament to keep it outside the body of the Constitution, the fact remains that it was introduced as part of the same Amendment Act which entirely revamped the Constitution.

81. Furthermore, it is clear that apart from Section 19 there is another proviso to Section 20 (which is also part of the 101st Amendment Act) that proviso reads as follows:

"20. (1) If any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act (including any difficulty in relation

to the transition from the provisions of the Constitution as they stood immediately before the date of assent of the President to this Act to the provisions of the Constitution as amended by this Act), the President may, by order, make such provisions, including any adaptation or modification of any provision of the Constitution as amended by this Act or law, as appear to the President to be necessary or expedient for the purpose of removing the difficulty:

Provided that no such order shall be made after the expiry of three years from the date of such assent.

(2) Every order made under sub-section (1) shall, as soon as may be after it is made, be laid before each House of Parliament."

82. It cannot be in dispute that Section 20 existed for a period of two years and enabled the President to issue orders for the removal of difficulties experienced in the course of implementing the amendments to the Constitution. If indeed those parts of the amendments were not enacted in the exercise of constituent power but mere legislative power, there would be no legitimacy of the power conferred upon the President under Section 20.

83. On an overall interpretation of the provisions of the Amendment, it is held that Sections 19 and 20 constitute incidental and transitory provisions which have limited life, so to speak. Whether they became part of the Constitution or not is really academic. What really matters is the effect of those provisions.

B. Whether the power of amendment or repeal is subject to limitations under Section 19

84. In this context, Section 143(2) of the Government of India Act, 1935 was considered by a Constitution Bench of this court in *Rama Krishna Ramanath (supra)*. That provision reads as follows:

"143(2) Any taxes duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, municipality or other local authority or body for the purposes of the Province, municipality, district or other local area under a law in force on the first day of January, nineteen hundred and thirty-five, may, notwithstanding that those taxes, duties,

cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature."

85. In *Rama Krishna Ramanath* (supra) it was held that considering the use of the phrase "continue to be levied" found in Section 143(2) of the Government of India Act, until provisions to the contrary are made by the Federal Legislature, the provision posits a limited legislative power in the province to indicate or express a desire to continue or not to continue the levy, which would include the power to repeal the statute in its entirety. Such limited legislative power would also include reducing the rate of tax, though continuing the levy. Having said so, this court observed how this limited legislative authority could be exercised:

"the effect of the provision of the Constitution would be to enable the continuance of the power to levy the taxbut this does not alter the fact that the provision by its implication confers a limited legislative power to desire or not to desire the continuance of the levy subject to the overriding power of the Central Legislature to put an end to its continuance and it is on the basis of the existence of this limited legislative power that the right of the Provincial Legislature to repeal the taxation provision under the Act of 1920 could be rested. Suppose for instance, a Provincial Legislature desires the continuance of the tax by considers the rate too High and wishes it to be reduced and passes an enactment for that purpose, it cannot be that the legislation is incompetent and that the State Government must permit the local authority to levy tax at the same rate as prevailed on April 1, 1937 if the latter desired the continuance of the tax. If such a legislation were enacted to achieve a reduction of the rate of the duty, its legislative competence must obviously be traceable to the power contained in words "may continue to be levied" in s. 143(2) of the Government of India Act. If we are right so far it would follow that in the exercise of this limited legislative power the Provincial Legislature would also have a right to legislate for the continuance of the tax provided, if of course, the other conditions of s. 143(2) are satisfied, viz., (1) that the tax was one which was lawfully levied by a local authority for the purposes of a local area at the commencement of Part III of the Government

of India Act., (2) that the identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purposes for which the utilisation is to take place continue to be the same and (3) the rate of the tax is not enhanced nor its incidence in any manner altered, so that it continues to be same tax. If as we have held earlier there is a limited legislative power in the Province to enact a law with reference to the tax levy so as to continue it, the validity of the Act of 1949 which manifested the legislative intent of Continue the tax without any break, the legal continuity being established by the retrospective operation of the provision, has to be upheld."

86. It would be worthwhile to recollect that in *Synthetics and Chemicals Ltd. and Ors. v. State of U.P. & Ors.*[33] this court observed that:

"[..] The power to legislate is given by Article 246 and other Articles of the Constitution. The three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which the appropriate legislatures can operate. It is well settled that widest amplitude should be given to the language of the entries in three Lists but some of these entries in different lists or in the same list may override and sometimes may appear to be in direct conflict with each other, then and then only comes the duty of the court to find the true intent and purpose and to examine the particular legislation in question. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. ..."

87. Recently, *Bimolangshu Roy (Dead) through L.Rs. v. State of Assam & Ors*[34] this court had held that:

"23. Article 246 is one of the sources of authority to legislate under the Constitution of India. It declares that Parliament and the legislatures of the various states have the "power to make laws with respect to any of the matters enumerated" in each of the three lists contained in the Seventh Schedule. It also makes clear that the power of the Parliament

33 1989 Supp (1)SCR 623
34 [2017] 13 SCR301

is exclusive with respect to List I and that of the State Legislature with respect to List II. List III indicates various fields over which both the Parliament as well as the State legislatures would have authority to legislate concurrently subject of course to the discipline of Article 254.

24. Apart from declaration contained in Article 246, there are various other Articles of the Constitution which confer authority to legislate either on the Parliament or on a State legislature, as the case may be in various circumstances. For example, Article 3 authorises the Parliament to make a law either creating a new State or extinguishing an existing State. Such a power is exclusively conferred on the Parliament.

25. Article 326 while declaring a right of every citizen who is not less than 18 years of age to register as a voter at any election to the House of the People or to the legislative assembly of a State, authorises the appropriate legislature to disqualify any such citizen to be a voter on any one of the grounds specified Under Article 326 by making a law. The authority to make such a law obviously flows directly from the text of Article 326 but not from Article 246. See also Articles 2, 3, 11, 15(5), 22(7), 32(3), 33, 34, 59(3), 70, 71(3), 98(2). The Articles mentioned above are only illustrative but not exhaustive of the category.

26. It must be remembered that this Court repeatedly held that the entries in the various lists of the Seventh Schedule are not sources of the legislative power but are only indicative of the fields w.r.t. which the appropriate legislature is competent to legislate.

27. The task of this Court in identifying the scope of an entry in the Lists contained in the Seventh Schedule is not easy. While examining the scope of the entries this Court must necessarily keep in mind the scheme of the Constitution relevant in the context of the Entry in question.

28. A broad pattern can be identified from the scheme of the three lists, the salient features of which are (i) Fields of legislation perceived to be of importance for sustaining the federation, are exclusively assigned to the Parliament, (ii) State legislatures are assigned only specified fields of legislation unlike the US Constitution, (iii) Residuary legislative

power is conferred in the Parliament; (iv) taxing entries are distinct from the general entries24, and (v) List III does not contain a taxing entry,

29. At the same time, it can also be noticed that there is no logical uniformity in the scheme of the three lists contained in the Seventh Schedule."

88. In *Bondu Ramaswamy* (supra) the provision in question was Article 243 ZE. This was inserted, by way of amendment, in the 73rd and 74th amendments of the Constitution of India which came into force on 24.04.1993 and 01.06.1993. The object of the amendments - as indeed their enacted provisions was to strengthen the democratic political government and grass root level in urban and semi-urban areas by providing constitutional status to municipalities and panchayats. Article 243ZF's wording is identical to Section 19 in the present case. This court discussed the effect of Article 243ZF and stated as follows:

*"**40.** Any statute or provision thereof which is inconsistent with any constitutional provision will be struck down by the courts. Consequently, if the BDA Act or any provision of the BDA Act is found to be inconsistent with any provision of Part IX-A of the Constitution, it will be struck down by the courts as violative of the Constitution. In regard to any provision of any law relating to municipalities, Article 243-ZF suspends such invalidity or postpones the invalidity for a period of one year from 1-6-1993 to enable the competent legislature to remove the inconsistency by amending or repealing such law relating to municipalities to bring it in consonance with the provisions of Part IX-A of the Constitution.*

***41.** Article 243-ZF is a provision enabling continuance of any provision of a law relating to municipalities in spite of such provision being inconsistent with the provisions of Part IX-A of the Constitution for a specified period of one year. It does not extend the benefit of continuance to any law other than laws relating to municipalities; it also does not provide for continuance of a law for one year, if the violation is in respect of any constitutional provision other than Part IX-A; and it does not declare any provision of a statute to be inconsistent with it nor declare any statute to be invalid. The invalidity*

of a statute is declared by a court when it finds a statute or its provision to be inconsistent with a constitutional provision.

42. The benefit of Article 243-ZF is available only in regard to laws relating to "municipalities". The term "municipality" has a specific meaning assigned to it under Part IX-A. Article 243-P(e) defines the word as meaning an institution of self-government constituted under Article 243-Q. Article 243-Q refers specifically to three types of municipalities, that is, a Nagar Panchayat for a transitional area, a Municipal Council for a smaller urban area and a Municipal Corporation for a larger urban area. Thus, neither any city improvement trust nor any Development Authority is a municipality, referred to in Article 243-ZF. Thus Article 243-ZF has no relevance to test the validity of the BDA Act or any provision thereof. If the BDA Act or any provision thereof is found to be inconsistent with the provisions of Part IX-A, such inconsistent provision will be invalid even from 1-6-1993, and the benefit of continuance for a period of one year permitted under Article 243-ZF will not be available to such a provision of law, as the BDA Act is not a law relating to municipalities.

***45.** Part IX-A seeks to strengthen the democratic political governance at grass root level in urban areas by providing constitutional status to municipalities, and by laying down minimum uniform norms and by ensuring regular and fair conduct of elections. When Part IX-A came into force, the provisions of the existing laws relating to municipalities which were inconsistent with or contrary to the provisions of Part IX-A would have ceased to apply. To provide continuity for some time and an opportunity to the State Governments concerned to bring the respective enactments relating to municipalities in consonance with the provisions of Part IX-A in the meanwhile, Article 243-ZF was inserted. The object was not to invalidate any law relating to city improvement trusts or Development Authorities which operate with reference to specific and specialised field of planned development of cities by forming layouts and making available plots/houses/apartments to the members of the public."*

89. The effect of the 97th amendment to the Constitution which came into force on 12.01.2012 was to introduce provisions, to strengthen the

functioning of the cooperative societies in a democratic, autonomous and economically sound manner. Various new provisions granted constitutional status to cooperative societies and inserted Part IX-B in the Constitution which specified several conditions for state laws relating to cooperative societies. Article 243 ZT which is worded similarly to Section 19 of the present case sought to continue in force existing laws, for a limited duration until amended or repealed or until the expiration of one year from the commencement of the amendment act. This court held in *Vipulbhai (supra)* on an interpretation of 243 ZT that the competent legislature could suitably amend the existing provisions in their laws in tune with the constitutional mandate.

90. Once it is conceded that Section 19 was enacted as part of the constituent power and has the same force as the rest of the constitutional amendment and is not a mere Parliamentary enactment, one has to consider the consequence of this sequitur to such a finding. The previous rulings in *Bondu Ramaswamy (supra) and Vipulbhai (supra),* indicate that even in the case of transitional provisions of the kind that they dealt with – which were enacted as part of the Constitution – the states' power to amend is limited to bring the existing law inconformity with the new provisions of the Constitution brought into force by the concerned amendment. In those cases, the court was not confronted with the complex situation of the nature that one has to deal with today. The 101st amendment as noted earlier uniquely transformed the indirect taxation regime and revamped the constitutional compact itself in one sense. Gone were the traditional delineations of distribution of legislative power including taxation fields which traced their origins to Articles 245 and 246 and also the rules for handling repugnancy which Article 254 had enacted. Instead,what was brought in was an entirely new concept of sourcing common or concurrent power of both the state legislatures and the Union through the newly added provision Article 246A.

91. As held earlier, the change was dramatic and revolutionary and wisely the constitutional amending body which is the Parliament and the ratifying States felt it expedient to ensure that during the transitional period of one year or till the new GST regime was ushered through an enactment, there ought to be flexibility with the States and Parliament to

make such changes as the times demanded. In the previous two judgments, *Bondu Ramaswamy (supra) and Vipulbhai (supra),* however, there was no question of denuding the powers, the State or conferring new powers on the Parliament and the State but rather creation of new bodies as in the case of Panchayats and Zila Parishads in *Bondu Ramaswamy(supra)* and imposing new standards in *Vipulbhai (supra),* in relation to cooperative societies. Then, the existing legal regime was preserved for a limited duration. Yet the court felt that the amendments should not have a lasting impact going beyond the period provided by the savings or transitional provisions as that would have inevitably met with challenges as not being inconformity with the new regime.

92. In the present case, however, Section 19 is seen as a plenary constituent power, subject to other limitations in the Constitution, and also given that by the amendment the legislative entries in the fields which are Entry 54 of the State List and Entry 84 of the Central List were substantially changed, this court has to take into account the reality that State's powers or even Parliament's power had to be sourced directly from the amendment.

93. There is merit in the argument that although Article 246A in a sense itself comprehends the power to impose tax on goods and services, yet its operationalization could take place only through the recommendations of the GST council. The GST council appears to have been formed in the wake of the 101st amendment, nevertheless, the process of making recommendations had only begun. Therefore, the power to make laws could not have been sourced only to Article 246A. The power to make laws in the opinion of this court (which is to amend or repeal existing laws), could then by sourced to some other provision as well. In the present case, Section 19 itself is held to be the source which enables Parliament and the State Legislatures (along with Article 246A) to amend the existing laws. The analogy of Entry 97 of the Union List, would be tempting. In the case of Parliament, it could be said that once the power to enact laws relating to service tax stood deleted, Entry 92C also stood in a sense, devoid of its essence. Entry 97 could still *arguendo,* be a source of power to amend the existing Central laws. That interpretation is not feasible, because the expression used in Section 19 is the competent legislature, and not Parliament; the latter alone can enact in

the exercise of the power conferred by Entry 97 of the Union List. However, that conclusion would not be consistent with the coming into force of the Amendment on 16.09.2016. The only harmonious manner of sourcing the power to amend or repeal could be to Section 19 and Article 246Awhich are to be seen as both the power enabling the existing state of affairs to continue and also enabling both the centre and the states to make necessary changes in the existing laws through amendment or repeal.

94. There is no doubt that the authority to legislate flows from the Constitution. In the context of our Constitution, this authority has been traditionally located primarily in Articles 245 and 246. The courts have consistently recognized that the Lists in the Seventh Schedule to the Constitution merely delineates the fields of legislation; they are not considered as sources of power. The authority or the power stems from Articles 245 and 246. The reorganization of those legislative fields particularly Entry 84 of the First List and Entry 54 of the Second List and the conformant of larger powers, upon both the legislative entities i.e. Parliament and the State Legislatures meant that both authorities to legislate upon all subject matters which are comprehended within the description of "goods and services" for the purpose of indirect taxation under Article 246 A. Yet the operationalization of this provision required the formulation of the principles by the GST Council which occurred later. The *hiatus* between the coming into force of the constitutional amendment and the enactment of a comprehensive legislation, [based upon the recommendations of the GST Council] provided for by Section 19. As held in the previous segment of this judgment Section 19 is to be construed as part of the Constitution for the limited duration it operated and was effective.

95. Such being the case the sequitur would have to be that the authority to legislate is expressed through Section 19, read with Article 246A. In other words, in the absence of principles formulated by the GST Council, the authority so to say reserved by Section 19 and Article 246A to amend or repeal the law the subject matter as originally understood itself stood obliterated from the Constitution. This would have resulted in a conundrum. Therefore, Section 19 and Article 246Aareto be understood as expressing a field of legislation available to both the Parliament and the

State Legislatures to in furtherance of the *status quo*, cater to unforeseen or other eventualities in the administration of existing tax laws. An example can be that a heavy financial burden, being cast as a consequence of holding that the machinery for collection of an existing levy, was defective, the High Court invalidating a rule or statutory provision. In that event, were it to be held, that the state lacked competence altogether to legislate, and cure the defects through a validating enactment, during the period till 01.07.2017, the results could have been catastrophic. The phrase "amend" or "repeal" denotes a *legislative activity.* That it is spoken of in a provision, introduced through a constituent process, means that it has to be given meaning, because no words or provisions can be considered as surplusage.

96. The meaning of the term 'amend' is well-known it takes within its sweep the idea of correcting something, adding something, deleting, or substituting something or doing something to an existing document, enactment, or rule to make it better. P. Ramanatha Aiyar's *Advance Law Lexicon*[35], has this to say:

> ***"Amendment/Repeal.*** *Amendment is, in fact, a wider term and it includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it. There is no real distinction between repeal and an amendment. Bhagwat Ram Sharma v UOI, AIR 1988 SC 740, 746.9*
>
> ***Amend.*** *A word derived from the French word signifying 'to make better'; 'to change for the better.'*
>
> *To alter formally by some addition, omission or substitution [Preamble, T.P. Act (4 of 1882)].*
>
> *The power to 'amend' Constitution conferred by Article 368 of the Constitution is wide enough to include the power to take away fundamental rights. [Shankri Prasad Singh v. UOI, AIR 1951 SC 458]*
>
> *The dictionary meaning of the word 'amend' is to correct a fault or reform; but in the context of Article 368 reliance on the dictionary*

35 P. Ramanatha Iyer, Advance Law Lexicon, Volume I at Page 271

meaning of the word is singularly inappropriate, because what Article 368 authorises to be done is the amendment of the provisions of the Constitution. An amendment of a law may in a proper case include the deletion of any one or more of the provisions of the law and substitution in their place of new provisions. Similarly an amendment of the Constitution which is the subject matter of the power conferred by Article 368, may include modification or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases. The power to amend in the context is a very wide power and it cannot be controlled by the literal dictionary meaning of the word 'amend'. Sajjan Sing v State of Rajasthan Mad LJ: QD (1961-1965) Vol II C 1204-1205: (1965) 1 SCJ 377 : (1965)1 Mad LJ (SC) 57 : AIR 1965 SC 845

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Amend; emend; Correct; Rectify; Reform. *All these words convey the idea of making a things into a more perfect state. We correct when we conform things to some standard or rule; as to correct proof sheets. We amend by removing faults or errors as to amend a decree or a law. Emend is another form of amend and is mostly applied to editions of books. To reform is to put into a new and better form, as to reform one's life. Rectify is to make right, as, to rectify a mistake, to rectify an abuse.*

The amendment of a law may in a proper case include the deletion of any one or more of the provisions of the law and substitution in their place of new provisions. An amendment of the constitution which is the subject-matter of the power conferred by Article 368, may include modifications or change of the provisions or even an amendment which makes the said provisions inapplicable in certain cases. Sajjan Singh v State of Rajasthan AIR 1965 SC 845, 854. [Constitution of India, Article 368]

The term 'amended in Section 1(2) of the Calcutta Trika Tenancy Amendment Act must be construed in its natural meaning 'as altered by addition, substitutions and omissions'. Deorajin Debi v Satyadhyan, AIR 1954 Cal 119."

97. It is, therefore, held that there were no limitations under Section 19 (read together with Article 246A), of the Amendment. That provision constituted the expression of the sovereign legislative power, available to both Parliament and state legislatures, to make necessary changes through amendment to the existing laws. As held in *Rama Krishna Ramanath* (supra) the transitional power (in that case, Section 143 (3)) *"the provision by its implication confers a limited legislative power to desire or not to desire the continuance of the levy."* This limited legislative power was not constricted or limited, in the manner alleged by the states; it is circumscribed by the time limit, indicated (i.e. one year, or till the new GST law was enacted). It could, therefore, enact provisions other than those bringing the existing provisions in conformity with the amended Constitution.

C. Validity of Telangana Act tested from the touch stone of its originating as an ordinance

98. Telangana had argued that although with effect from 1st July 2017, due to the enactment of the CGST Act, its state legislature could not *per se* enact a new law on a subject matter contained within the original entry 54 of the State list, nevertheless, the approval of the ordinance which amended the existing State -law on 02.07.2017 had the effect of relating back to the original date when in fact it was validly amended. This is sought to be supported by the theory of the relating back of the law to a date when the power to enact existed. The argument in support was that in terms of its effect there is no difference between an ordinance [which is merely a product of a different procedure i.e., or executive law making] as compared to enactment of law by the legislature. An ordinance may have a limited life but once confirmed, or enacted,it acquires permanence. Even during the time it is in force, it is as effective and as binding on the subject matter and the State as an enacted law. The effect of an ordinance was explained in *A.K. Roy (supra),* in the following terms:

> *"[..] the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power".*

99. In *R.K. Garg Etc. Etc v. Union Of India & Ors*[36] this court held similarly, that ordinance making power is *"co-extensive with the power of the Parliament to make laws, it is difficult to see how any limitation can be read into this legislative power of the President so as to make it ineffective to alter or amend tax laws. If Parliament can by enacting legislation alter or amend tax laws, equally can the President do so by issuing an Ordinance under Article 123."*

100. This court is of the view that the submissions of the Telangana State are not substantial. There can be no doubt that an ordinance promulgated by the Government is as much a law as much as is any binding law enacted by State legislature. The difference is that contrary to the traditional role of the executive, law making does not fall within its primary domain. Yet the Constitution clothes the executive with the emergency power of promulgating ordinances which can operate for a limited duration to be mandatorily raised before the House of the State legislature for its approval or disapproval. In the event of approval, the ordinance is given the shape that the legislature accrues it in. In India, practice has been largely to enact the provisions or incorporate the provision ordinance in the form of the Bill which is then approved by the House or Houses of the State legislature and then it results in an Act. Although, the State is correct in characterizing that law making in both cases only is shaped or the products of two different procedures, nevertheless, to stop at that would be an oversimplification.

101. This court had on previous occasions, dealt with the effect of the power of issuing ordinances and their effect. There were few conflicting judgments on the issue, especially on whether the effect of anything done during the time when the ordinance is in force can continue to bind and be effective even after it ceases to be or is inoperable, or in other words, has lapsed. Since conflicting decisions existed, a larger seven judge bench combination examined the matter in detail in *Krishna Kumar Singh (supra).* A majority judgment of 5 Judges is of the opinion that the theory of lasting effect of an ordinance cannot be supported. *Krishna Kumar Singh (supra)* first explained the effect of an ordinance:

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36 1982 (1) SCR 947

"Is the requirement of laying an Ordinance before the state legislature mandatory? There can be no manner of doubt that it is. The expression "shall be laid" is a positive mandate which brooks no exceptions. That the word 'shall' in Sub-clause (a) of Clause 2 of Article 213 is mandatory, emerges from reading the provision in its entirety. As we have noted earlier, an Ordinance can be promulgated only when the legislature is not in session. Upon the completion of six weeks of the reassembling of the legislature, an Ordinance "shall cease to operate". In other words, when the session of the legislature reconvenes, the Ordinance promulgated has a shelf life which expires six weeks after the legislature has assembled. Thereupon, it ceases to operate."

The larger Bench then proceeded to examine the need to lay the ordinance before the State Legislature:

"31. Laying of an Ordinance before the state legislature subserves the purpose of legislative control over the Ordinance making power. Legislation by Ordinances is not an ordinary source of law making but is intended to meet extra-ordinary situations of an emergent nature, during the recess of the legislature. The Governor while promulgating an Ordinance does not constitute an independent legislature, but acts on the aid and advice of the Council of Ministers Under Article 163. The Council of Ministers is collectively responsible to the elected legislative body to whom the government is accountable. The Constitution reposes the power of enacting law in Parliament and the state legislatures under Articles 245 and 246, between whom fields of legislation are distributed in the Seventh Schedule. Constitutional control of Parliament and the state legislatures over the Ordinance making power of the President (under Article 123) and the Governors (under Article 213) is a necessary concomitant to the supremacy of a democratically elected legislature. The reassembling of the legislature defines the outer limit for the validity of the Ordinance promulgated during its absence in session. Within that period, a legislature has authority to disapprove the Ordinance. The requirement of laying an Ordinance before the legislative body subserves the constitutional purpose of ensuring that the provisions of the Ordinance are debated upon and discussed in the legislature. The legislature has before it a

full panoply of legislative powers and as an incident of those powers, the express constitutional authority to disapprove an Ordinance. If an Ordinance has to continue beyond the tenure which is prescribed by Article 213(2)(a), a law has to be enacted by the legislature incorporating its provisions. Significantly, our Constitution does not provide that an Ordinance shall assume the character of a law enacted by the state legislature merely upon the passing of a resolution approving it. In order to assume the character of enacted law beyond the tenure prescribed by Article 213(2)(a), a law has to be enacted. The placement of an Ordinance before the legislature is a constitutional necessity; the underlying object and rationale being to enable the legislature to determine (i) the need for and expediency of an ordinance; (ii) whether a law should be enacted; or (iii) whether the Ordinance should be disapproved.

32. The failure to lay an Ordinance before the state legislature constitutes a serious infraction of the constitutional obligation imposed by Article 213(2). It is upon an Ordinance being laid before the House that it is formally brought to the notice of the legislature. Failure to lay the Ordinance is a serious infraction because it may impact upon the ability of the legislature to deal with the Ordinance. We are not for a moment suggesting that the legislature cannot deal with a situation where the government of the day has breached its constitutional obligation to lay the Ordinance before the legislature. The legislature can undoubtedly even in that situation exercise its powers Under Article 213(2)(a). However, the requirement of laying an Ordinance before the state legislature is a mandatory obligation and is not merely of a directory nature. We shall see how in the present case a pattern was followed by the Governor of Bihar of promulgating and re-promulgating Ordinances, none of which was laid before the state legislature. Such a course of conduct would amount to a colorable exercise of power and an abuse of constitutional authority. Now it is in this background, and having thus far interpreted the provisions of Article 213, that it becomes necessary to refer to the precedents on the subject and to the nuances in the interpretation of the constitutional provisions."

This court then examined the legal effects of an ordinance, in case, it ceased to operate:

> *"58. What then is the effect upon rights, privileges, obligations or liabilities which arise under an ordinance which ceases to operate? There are two critical expressions in Article 213(2) which bear a close analysis. The first is that an ordinance "shall have the same force and effect" as an act of the legislature while the second is that it "shall cease to operate" on the period of six weeks of the reassembling of the legislature or upon a resolution of disapproval. The expression "shall have the same force and effect" is prefaced by the words "an ordinance promulgated under this article". In referring to an ordinance which is promulgated Under Article 213, the Constitution evidently conveys the meaning that in order to have the same force and effect as a legislative enactment, the ordinance must satisfy the requirements of Article 213. Moreover the expression "shall have the same force and effect" is succeeded by the expression "but every such ordinance.." shall be subject to what is stated in sub-clauses(a) and (b). The pre-conditions for a valid exercise of the power to promulgate as well as the conditions subsequent to promulgation are both part of a composite scheme. Both sets of conditions have to be fulfilled for an ordinance to have the protection of the 'same force and effect' clause. Once the deeming fiction operates, its consequence is that during its tenure, an ordinance shall operate in the same manner as an act of the legislature. What is the consequence of an ordinance ceasing to operate by virtue of the provisions of Article 213(2)(a)? There are two competing constructions which fall for consideration. The expression "shall cease to operate" can on the one hand to be construed to mean that with effect from the date on which six weeks have expired after the reassembling of the legislature or upon the disapproval of the ordinance, it would cease to operate from that date. 'Cease' to operate in this sense would mean that with effect from that date, the ordinance would prospectively have no operation. The ordinance is not void at its inception. The second meaning which can be considered for interpretation is that the expression "shall cease to operate" will mean that all legal consequences that*

arose during the tenure of the ordinance would stand obliterated. According to the second construction, which is wider than the first, the consequence of an ordinance having ceased to operate would relate back to the validity of an ordinance.

59. Now, one of the considerations that must be borne in mind is that Article 213 has not made a specific provision for the saving of rights, privileges, obligations or liabilities that have arisen under an ordinance which has since ceased to operate either upon the expiry of its term or upon a resolution of disapproval. Significantly, there are other provisions of the Constitution where, when it so intended, the Constitution has made express provisions for the saving of rights or liabilities which arise under a law."

The court then overruled previous judgments, which had relied on and applied the "enduring rights" theory, to hold that rights and privileges, acquired, or created, and obligations cast or assumed would continue, even if the ordinance were to lapse, or become void. It was held that:

"68. [..] The enduring rights theory which was accepted in the judgment in Bhupendra Kumar Bose was extrapolated from the consequences emanating from the expiry of a temporary act. That theory cannot be applied to the power to frame ordinances. Acceptance of the doctrine of enduring rights in the context of an ordinance would lead to a situation where the exercise of power by the Governor would survive in terms of the creation of rights and privileges, obligations and liabilities on the hypothesis that these are of an enduring character. The legislature may not have had an opportunity to even discuss or debate the ordinance (where, as in the present case, none of the ordinances was laid before the legislature); an ordinance may have been specifically disapproved or may have ceased to operate upon the expiry of the prescribed period. The enduring rights theory attributes a degree of permanence to the power to promulgate ordinances in derogation of parliamentary control and supremacy. Any such assumption in regard to the conferment of power would run contrary to the principles which have been laid down in S.R. Bommai….

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The Constitution has not made a specific provision with regard to a situation where an ordinance is not placed before a legislature at all. Such an eventuality cannot be equated to a situation where an ordinance lapses after the prescribed period or is disapproved. The mandate that the ordinance will cease to operate applies to those two situations. Not placing an ordinance at all before the legislature is an abuse of constitutional process, a failure to comply with a constitutional obligation. A government which has failed to comply with its constitutional duty and overreached the legislature cannot legitimately assert that the ordinance which it has failed to place at all is valid till it ceases to operate. An edifice of rights and obligations cannot be built in a constitutional order on acts which amount to a fraud on power. This will be destructive of the Rule of law. Once an ordinance has been placed before the legislature, the constitutional fiction by which it has the same force and effect as a law enacted would come into being and relate back to the promulgation of the ordinance. In the absence of compliance with the mandatory constitutional requirement of laying before the legislature, the constitutional fiction would not come into existence. In the present case, none of the ordinances promulgated by the Governor of Bihar were placed before the state legislature. This constituted a fraud on the constitutional power. Constitutionally, none of the ordinances had any force and effect. The noticeable pattern was to avoid the legislature and to obviate legislative control. This is a serious abuse of the constitutional process. It will not give rise to any legally binding consequences."

102. In the present case, the Telangana ordinance was promulgated on 17.6.2016. The Telangana State GST Act was enacted and received the assent of the Governor on 25.05.2017; it was brought into force on 01.07.2017. The state GST Act contained a savings and repeal law, which sought to save acts done, privileges and rights accrued under the repealed enactment, i.e. the State VAT Act. It was sought to be argued that once the State Legislature approved the ordinance and enacted the amendment, in conformity with it, the provisions of the Ordinance became part of the act. The question of legislative competence would not arise, because the mere confirmation of an ordinance is within the competence of the State legislature. Since the law was introduced through a different procedure, i.e. ordinance, the effect of

that law, empowering the VAT officials to reopen or complete assessments, was no different.

103. This court held in *Hajee Abdul Shukoor*(supra) that:

"The State legislature is free to enact laws which would have retrospective operation. Its competence to make law for a certain past period, depends on its present legislative power and not on what it possessed at the period of time when its enactment is to have operation. We therefore do not agree with this contention.

The matter can be looked at in a different way. The 1939 Act required no assent of the President. The State Legislature was doing in 1963 what the legislature enacting the 1939 Act was supposed to have enacted and therefore its enactment was not governed by the Constitutional requirement for an Act to be enacted during the period Act LII of 1952 was in force. Lastly, it has been urged for the petitioner that hides and skins have been declared to be of special importance in inter-State trade or commerce by s.14 of the Central Sales Tax of 1956. The tax imposed by sub-section (1) of s. 2 of the Act is a tax on the sale of hides and skins in the course of inter-State trade or commerce and therefore fen within entry No. 92A of list 1 of Seventh Schedule and that therefore the State legislature was not competent to impose it. It could impose by virtue of entry No. 54 in List II of Seventh Schedule tax on the sale or purchase of goods subject to the provisions of entry No. 92A of List 1. There is no force in this contention. The tax is imposed on the sale which took place within the State. The State legis- lature is competent to impose such a tax. The mere fact that the article sold in the State had been brought from outside the State does not make the sale of that article a sale in the course of inter-State trade or commerce. It is only when A, in State X, purchased through a commission agent in a State Y and receives the articles purchased through the commercial agency that the sale comes within the expression 'in the course of inter-State trade': See State of Travancore Cochin v Shanmugha Vilas Cashew Nut Factory . (supra at p. 70).

It has been argued for the State that the Act is not affected by the provisions of Arts. 301 to 304 of the Constitution as they affect the legislative power with respect to Acts to operate in the future and not

the power to enact Acts which would operate in the past. We do not consider the contention sound. The Act makes provision for a period subsequent to the commencement of the Constitution and therefore is to be subject to the provisions of the Constitution.

We therefore hold that sub-section (1) of S. 2 of the Act discriminates against imported hides and skins which were sold up to the 1st of August 1957 upto which date the tax on sale of raw hides and skins was at the rate of 3 pies per rupee or 19/16th percent. This however does not mean that the sub-section is valid with respect to the sales which took place subsequent to August 1, 1957. The subsection being void in its provisions with respect to a certain initial period, we cannot change the provision with respect to the period as enacted to the period for which it could be valid as that would be re-writing the enactment. We have therefore to hold that sub-s.(1) of Section 2 void accordingly hold so."

104. It was held by this court, in Jaya *Thakur v Union of India & Ors*[37]that:

"the challenge to the legislative Act would be sustainable only if it is established that the legislature concerned had no legislative competence to enact on the subject it has enacted."

105. The state of Telangana had argued to the contrary, and explained that when the ordinance was issued, there was no doubt about the state possessing legislative competence. As of that date (17.06.2017) the power to *amend* existing laws, was permissible under Section 19 of the Amendment. However, that argument is not tenable, because the ordinance's validity and effect might not have been suspect on the date of its promulgation; yet, the issue is that on the date when it was in fact, approved and given shape as an amendment, the State legislature had ceased to possess the power. By that time, the State GST and the Central GST Acts had come into force (on 01.07.2017). Therefore, Section 19 ceased to be effective. The original entry (Entry 54 of the State List) ceased to exist. In the circumstances, the state legislature had no legislative

37 2023 SCC OnLine SC 813

competence to enact the amendment, which approved the ordinance, which consequently was rendered void.

106. A subsidiary argument was that acts done in pursuance of the ordinance cannot lapse, because they are saved, by virtue of the repeal and savings clause (Section 174[38]) of the State GST Act, all action taken pursuant to the ordinance, when it was in force, would be saved. In the opinion of this court, there is no merit in that argument. The invalidity of the amendment by the state legislature (which conformed to the ordinance, on 02.12.2017) went to its root of the jurisdiction of those acting under the amended provisions of the State GST, rendering them (as indeed, the substantive provisions) void and unenforceable. Furthermore, even if for some reason, there were any doubts regarding validity and continuance of any notice, or proceedings, initiated pursuant to the provisions of the ordinance, their invalidity is such that they cannot be sustained. Furthermore, as held in *Krishna Kumar Singh* (supra) unless the consequences are "irreversible" there is ordinarily no question of any action- taken under an ordinance that is rendered void, due to operation of the provisions of the Constitution, being continued. Though the observations of this court were in the context of ordinances lapsing due to their not being presented before the House of the legislatures, the same principle would, in this court's considered view, apply to cases, where the legislature ceases to have competence over the subject matter.

107. It is therefore, held that the provisions of the ordinance, as approved by the later state act, which amended the local VAT Act's, are valid.

D. Gujarat and Maharashtra Acts

108. In the case of the Gujarat VAT Act, the brief facts are that the Deputy Commissioner of Commercial Tax, passed an assessment order on

38 The relevant part of Section 174 (2) *inter alia,* is as follows:
"(2) The repeal of the said Acts and the amendment of the Acts specified in section 173 (hereafter referred to as ―such amendment‖ or ―amended Act‖, as the case may be) to the extent mentioned in sub-section (1) or section 173 shall not— (a) revive anything not in force or existing at the time of such amendment or repeal; or (b) affect the previous operation of the amended Acts or repealed Acts and orders or anything duly done or suffered thereunder; or (c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Acts or repealed Acts or orders under such repealed or amended Acts:"

December 23, 2009, for the financial year 2006-07 against the assessee and reversed the input tax credit to the extent of eight per cent., i.e., four per cent, under each of the provisions of sections 11(3)(b)(ii) and 11(3)(b)(iii) of the Gujarat VAT Act. The appellate authority dismissed the assessee. On April 26, 2012, the Gujarat VAT Tribunal allowed the assesses second appeal by quashing and setting aside both the orders of the sales tax authorities by holding that reduction of the input tax credit to the extent of eight per cent, for purchases was not applicable to consignment of branch transfer transactions. The High Court, by judgment[39] dated January 18, 2013, dismissed the State Government's appeal against the aforesaid order of the VAT Tribunal, while holding, inter alia, that the reduction of input tax credit under section 11(3) (b) would, in no case, exceed four per cent. It was held that the limitation of availing of the tax credit as provided under section 11(3)((b) could be applied only once irrespective of the fact as to whether particular commodity purchased falls in more than one sub-clauses of section 11(3)(b) of the VAT Act. An assessment order was made by the concerned officer, for two separate issues. The judgment of the High Court was given effect to by tax authorities. In a decision of the VAT Tribunal, rendered in another case wherein it was observed that tax paid by the assessee on purchases of goods used in manufacture of taxable goods exported outside the country was not to be included. In other words, according to the Tribunal, the said incentive limit cannot be curtailed by the said tax paid by the assessee. These findings were set aside by the High Court[40]. In view of that judgment, the commissioner issued a revision notice, in March, 2018 under Section 75 of the VAT Act, why the benefit given to them should not be revised to give effect to the judgment of the High Court.

109. As noted earlier, provisions of the Constitution (One Hundred and First Amendment) Act, 2016, were enacted. They came into force with effect from July 1, 2017.On September 20, 2016, the Additional Commissioner of Commercial Tax passed an order and reduced the sales tax incentive, in case of the petitioner-company, while considering the tax paid on the purchase of

39 *State of Gujarat v. Reliance Industries Ltd.* [2013] 58 VST 376 (Guj); 2013 SCC OnLine Guj 8788

40 *State of Gujarat v. Welspun Gujarat Stahl Rohren Ltd.* [2014] 71 VST 550 (Guj); 2014 SCC OnLine Guj 15909

taxable goods used in the manufacture of taxable goods, exported outside the country. On July 1, 2017, two legislations, i.e., the Gujarat Goods and Services Tax Act, 2017 and the Central Goods and Services Tax Act, 2017 came into force to levy tax on all the intra-State supplies of goods or services or both. The Gujarat Value Added Tax Act, 2003 was substantially amended by way of substitution and deletion of many provisions thereof by virtue of the Gujarat Value Added Tax (Amendment) Act, 2017, which. came into force with effect from July 1, 2017.Meanwhile, the High Court passed an order dated September 22, 2017 in an appeal filed by the State, setting aside the judgment[41] dated January 18, 2013 in respect of the assessee who had succeeded.

110. In view of the aforesaid judgment of this court, the Additional Commissioner of Commercial Tax issued a revision notice dated November 3/6, 2017 in Form 503 under section 75 of the Act to revise the assessment order for the financial year 2008-09 made vide order dated March 30, 2013 (Sr. No. 5 above), for reducing the input tax credit to the extent of eight per cent under the provisions of section 11(3)(b)(ii) and 11(3)(b)(iii) of the VAT Act in the light of the judgment dated September 22, 2017, of this court. The revision notice was quashed[42] by the High Court.

111. By virtue of the VAT (Amendment) Act, 2018, section 84A was added in the VAT Act to be operative retrospectively with effect from April 1, 2006, *inter alia,* providing for the exclusion of the period spent between the date of the decision of the Appellate Tribunal and that of the High Court as well as the Supreme Court in computing the period of limitation, referred to in section 75 of the Gujarat VAT Act. In the present case, the period commencing from the date of the decision of high court dated January 18, 2013[43] rendered against the revenue up to the date of the decision of this court, i.e., September 22, 2017[44]. As a consequence, on September 1, 2018, fresh notice for revision was issued by the Additional Commissioner of

41 *State of Gujarat v. Reliance Industries Ltd* [2017] 16 SCC 28.

42 In the judgment in *Reliance Industries Ltd. v. State of Gujarat* [2018] 58 GSTR 366 (Guj))

43 HC judgment dated 18.01.2013 in Tax Appeal No 934 & 935 of 2012

44 Order of this court in State of Gujarat v Reliance Industries. Civil Appeal No 13047-13048 of 2017.

Commercial Tax to the assessee on the basis of the above referred newly added section 84A, for revising the assessment for the financial year 2008-09 made by order dated March 30, 2013. The original period of limitation as provided under Section 75 of the Gujarat VAT Act for issuing notice was of three years from the date of the assessment order, i.e., March 30, 2013, which had lapsed on March 30, 2016. However, by virtue of the newly enacted section 84A, the period spent from the date of the decision of the High Court up to the date of the decision of this court was to be excluded in computing the aforesaid period of three years, referred to under Section 75 of the Gujarat VAT Act. This development resulted in a challenge to the validity of the amendment. The state had sought to urge that being a validating enactment, which sought to cure the defect found earlier, and given that it operated retrospectively, there is no question of the amendment being invalid.

112. There are undoubtedly several judgments of this court such as *Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*[45] *Government of Andhra Pradesh v. Hindustan Machine Tools Ltd*[46]*; Ujagar Prints v. Union of India*[47] and several others, which hold that a purely curative and validating enactment, if made retrospective, is unexceptionable. However, it has been held by this court, in *Kerala State Electricity Board v. Indian Aluminium Co. Ltd.*[48]*:*

> *"... Both the 1910 Act as well as the 1948-Act are existing law as contemplated under article 372 of the Constitution. An existing law continues to be valid even though the legislative power with respect to the subject-matter of the existing law might be in a different list under the Constitution from the list under which it would have fallen under the Government of India Act, 1935. But after the Constitution came into force an existing law could be amended or repealed only by the Legislature which would be competent to enact that law if it were to be newly enacted..."*

45 1970 (1) SCR 388
46 [1975] Supp (1) SCR 394
47 [1988] Supp 3 SCR770
48 [1976] 1 SCR 552

As noted earlier, *Ramakrishna Ram Nath* (supra) held that the power to repeal is co-extensive with the power to amend, or make a law. It was also held that *"(T)he power has to be seen at the time when the repealing legislation is being enacted. […] However, the Legislature should have the competence at the time when such a repealing law is being enacted."*

113. In the present case, the retrospective effect, given to the amendment, which was brought into force, with effect from 2006, cannot in any way save it, after the coming into force of the GST laws, on 01.07.2017. Nor can there can be any argument that the amendment made in February, 2018, is traceable to Article 246A. On this aspect, this court held in *Union of India v Mohit Mineral Pvt. Ltd*[49]. that:

> *" The expression used in article 246A is 'power to make laws with respect to goods and service tax'. The power to make law, thus, is not general power related to a general entry rather it specifically relates to goods and services tax. When express power is there to make law regarding goods and services tax, we fail to comprehend that how such power shall not include power to levy cess on goods and services tax. True, that the Constitution (One Hundred and First Amendment) Act, 2016 was passed to subsume various taxes, surcharges and cesses into one tax but the constitutional provision does not indicate that henceforth no surcharge or cess shall be levied."*

114. As far as the Maharashtra appeals are concerned, the assessees' grievance is that the retrospective amendments, made to the Maharashtra VAT Act, were void. On 15.04.2017, the State published Maharashtra Tax Laws (Levy, Amendment and Validation) Act 2017 in the Government Gazette thereby amending various provisions of various Acts. In paragraph No. 26 of the MVAT Act, 2002, Sections 6(A), 6(B) and 6(C) were inserted. The effect of these was to require a mandatory pre-deposit of 10% of the disputed tax liability. This was challenged, and the Nagpur Bench of the Bombay High Court in *Anshul Impex Private Ltd. v. State of Maharashtra*[50] *(hereinafter, "Anshul Impex Private Ltd"*) held the amendment inapplicable to a *lis* which had started in 2011. The state again

49 2018 (13) SCR 139

50 STA No. 2/2018 in a Judgment delivered on 28th September, 2018

amended the enactment, through ordinance i.e. Maharashtra Ordinance No. VI of 2019, published in the Government Gazette on 6th March, 2019. By the Ordinance the State of Maharashtra inserted an explanation w.e.f. 15th April 2017. According to the state, the explanation was inserted for the purpose of removal of doubts, in view of the Judgment of Nagpur Bench of the court in *Anshul Impex Private Ltd.* (supra). On 9th July 2019, the Maharashtra Tax Laws (Levy, Amendment and Validation) Act 2019 was enacted. It was published in the Government Gazette on 9th July 2019. The Ordinance was replaced by the enactment of the State Legislature inserting various provisions including the said explanation to Section 26 (6C) of the MVAT Act, 2002. The explanation had the effect of clarifying that the pre-deposit requirements applied to pre-2017 appeals and revisions. This was challenged. The High Court, by a Full Bench ruling[51] upheld the amendment. It was held that

> *"The State Government has legislative competence to remove the substratum of foundation of a Judgment retrospectively. The State Government is empowered to carry out amendment suitably to amend the law by use of appropriate phraseology removing the defects pointed out by the Court in any judgment and by amending the law inconsistent with the law declared by the Court so that the defects which were pointed out were never on the statute for effective enforcement of law. There is no judicial encroachment directly or indirectly by the State Government by inserting amendment which are the subject matter of these petitions as sought to be canvassed by the learned senior counsel for the petitioner.*
>
> *. In our view curing the defect pointed out by any Court through a judgment or simplicitor removing such defects does not amount to encroachment directly or indirectly or overruling the view taken by the Court or overreaching the powers of the State Government by nullifying the effect of the law laid down by the Court."*

115. In the opinion of this court, there is no quarrel with the proposition that a legislative body is competent to enact a curative legislation with

51 United Projects v State of Maharashtra (Writ Petition (ST.) No. 11589 of 2021, and Writ Petition No. 13754 of 2018, decided on 12.07.2022

retrospective effect. Yet, the same vice that attaches itself to the Gujarat amendment, i.e. lack of competence on the date the amendment was enacted i.e. in this case, 09.07.2019, the Maharashtra legislature ceased to have any authority over the subject matter, because the original entry 54 had undergone a substantial change, and the power to change the VAT Act, ceased, on 01.07.2017, when the GST regime came into effect. Therefore, for the same reasons, as in the other cases, the amendments to the Maharashtra VAT Act cannot survive.

VI. Conclusions

116. In view of the foregoing discussion and conclusions, the findings of the court in these cases are:

(i) Section 19 of the Constitution (101st Amendment) Act, 2016 and Article 246A enacted in exercise of constituent power, formed part of the transitional arrangement for the limited duration of its operation, and had the effect of continuing the operation of inconsistent laws for the period(s) specified by it and, by virtue of its operation, allowed state legislatures and Parliament to amend or repeal such existing laws.

(ii) Since other provisions of the said Amendment Act, had the effect of deleting heads of legislation, from List I and List II (of the Seventh Schedule to the Constitution of India),both Section 19 and Article 246A reflected the constituent expression that existing laws would continue and could be amended. The source or fields of legislation, to the extent they were deleted from the two lists, for a brief while, were contained in Section 19. As a result, there were no limitations on the power to amend.

(iii) The above finding is in view of the vacuum created by the coming into force of the 101st Amendment, which resulted in deletion of the heads of legislation in the two lists aforesaid.

(iv) The amendments in question, made to the Telangana VAT Act, and the Gujarat VAT Act, after 01.07.2017 were correctly held void, for want of legislative competence, by the two High Courts (Telangana and Gujarat High Court). The judgment of

the Bombay High Court is, for the above reasons, held to be in error; it is set aside; the amendment to the Maharashtra Act, to the extent it required pre-deposit is held void.

117. The appeals (and any other special leave petitions) filed by the States of Telangana and Gujarat are hereby dismissed in the above terms; the appeals of the assessees against the judgment of the Bombay High Court (i.e., Civil Appeal No. 2730-2733/2023 & SLP (C) No. 7776/2023), succeed and are allowed. There shall be no order on costs.

Headnotes prepared by:
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Appeals disposed of.