SUPREME COURT OF INDIA

Somaiya Organics (India) Ltd.

Vs.

State of U.P.

(B.N. Kirpal, Syed Shah Mohammed Quadri, M.B. Shah and K.G. Balakrishnan JJ.)

17.04.2001

JUDGMENT

KIRPAL, J.

Civil Appeal No. 4093 of 1991 and C.A. No. 2853 of 2001 (Arising out of SLP (C) No. 20018 of 1991) Leave granted in SLP (C) No. 20018 of 1991.

These appeals are sequel to a judgment of this Court in Synthetics and Chemicals Ltd. and Others vs. State of U.P. and Others wherein it was held that in respect of industrial alcohol the States were not authorised to impose the impost they had purported to do. By that judgment delivered on 25th October, 1989 the Court overruled its earlier decision in State of U.P. and Others vs. Synthetics and Chemicals Ltd. and Others wherein the validity of such an impost had been upheld. By the second Synthetics case it was declared that the impugned provisions were illegal prospectively.

The question which arises for consideration in these appeals is whether the vend fee which had been levied by the appropriate State enactments, but not collected whether by reasons of the orders of the Court or otherwise, can be collected now when the said provisions by the said judgment dated 25th October, 1989 have been held to be invalid prospectively.

For the sake of convenience, we shall briefly refer to the facts in C.A. No. 4093 of 1991 Somaiya Organics (India) Ltd. vs. State of U.P. & Anr. The said company had established a plant at Barabanki for manufacture of intermediaries out of industrial alcohol. Its promoter company had sold and transferred to the appellant industry distillery located at Captainganj. The industrial alcohol manufactured by the distillery at Captainganj was captively consumed. On 8th October, 1970 the appellant had been exempted from paying vend fee which was leviable under the U.P. Excise Act, 1910. On 9th October, 1979, the State of U.P. withdrew the exemption from payment of vend fee/purchase tax on industrial alcohol. This was challenged by the appellant by filing writ petitions in the Allahabad High Court. During the pendency of the writ petitions interim orders were passed by the High Court whereby the petitioners before it were required to give a bank guarantee and/or pay to the State the amounts directed by the Court which, in an earlier order, the High Court had directed that it should be kept by the State in a separate account.

As noticed hereinabove, vide decision of a Division Bench of this Court in first Synthetics & Chemicals case rendered on 19th December, 1979 the validity of the impost was upheld. Subsequently, on the matter being referred to a Bench of Seven Judges, by the second Synthetics case decision in 1989, the validity of the provisions of the said Acts permitting levy of excise duty in the form of vend fee was struck down prospectively.

The High Court by the impugned judgment dated 29th August, 1990 in Somaiyas case interpreted the direction in the second Synthetics case relating to prospective declaration to mean that for the period prior to 25th October, 1989 the amount payable in respect thereto could be recovered. It held that once the levy for the period prior to 25th October, 1989 was saved further steps consequent upon such levy were equally saved and recovery in respect of the dues prior to 25th October, 1989 could be effected by the State. The State was held to be entitled to realise the vend fee for the period prior to 25th October, 1989.

When these appeals against the said decision came up for hearing in this Court a Division Bench vide its order dated 26th April, 1994 in Hindustan Sugar Mills Ltd. vs. State of U.P. & Others observed that the directions and observations made in the second Synthetics case had been differently construed by Benches of this Court. In view of this apparent conflict these appeals were referred to a larger Bench. It is in pursuance thereto that these appeals have been heard.

It was contended by Shri K.K. Venugopal, learned senior counsel for the appellants, that in respect of industrial alcohol the State Legislature had no legislative competence to levy excise duty or any tax in that nature. Drawing our attention to Entry 8 and 51 of List II, he submitted that the State can impose excise duty only on potable liquor.

Corresponding to that is Entry 84 in List I which enables the Parliament to levy excise duty except in regard to those items referred to in Entry 51 of List II. Furthermore under Entry 52 of List I the I.D.R. Act had been promulgated by the Parliament and in the First Schedule Item No. 26 related to fermentation industries. In respect of the industries referred to in the First Schedule to the I.D.R. Act it is only the Parliament which has jurisdiction to levy taxes in respect thereto. As such levy of vend fee on industrial alcohol by the States was not valid.

It is also submitted that Article 162 provides that the executive power of a State is co-extensive with its legislative power. Inasmuch as a State cannot levy excise duty on industrial alcohol being outside the ambit of Entry 51 of List II, the State Government cannot, in exercise of its executive power, recover the excise duty. After 25th October, 1989 law ceased to exist in respect of levy and collection of excise duty on industrial alcohol by reason of want of legislative competence. As such the State Government could not exercise executive power and collect excise duty on industrial alcohol.

It was contended that under Article 265 of the Constitution no tax can be levied or collected without the authority of law. The submission was that authority of law means that there should be a lawful enactment which authorised the levy and collection of tax. Tax cannot be levied and collected by virtue of a decision of a Court in the absence of any statutory provision. It was further submitted that in series of decisions of this Court, one of the examples being that of M.P.V. Sundararamier & Co. vs. The State of Andhra Pradesh & Another it had been held that the law which is declared ultra vires due to lack of legislative competence would be void ab initio and the same could not be made operative. The effect of the second judgment in Synthetics case was that after 25th October, 1989 no levy or collection could take place. In respect of the period prior to 25th October, 1989 even if tax had been levied and/or demand raised the contention of the learned counsel was that the same could not be collected.

On behalf of the respondents it was contended by Shri Rakesh Dwivedi that declaration of the provisions as being illegal prospectively meant that prior to 25th October, 1989 all the provisions were valid. He submitted that this meant that the said provisions were capable of being enforced for the period prior to the said date. He contended that liability to pay vend fee gets attracted the moment industrial alcohol is issued. Since this was issued during the period 31st May, 1979 and 25th October, 1989 the appellants had become liable to pay vend fee. Once this liability prior to 25th October, 1989 is held to be valid then the State was entitled to collect the same. He strongly relied on the reasoning of the High Court which had observed that it would be unreasonable if the observations in the second Synthetics case were understood as entitling the appellants to retain the vend fee despite prospective overruling because those who have paid the vend fee for the same period would stand in a disadvantageous position when compared to those who did not pay the vend fee in view of the interim orders although in both the cases liability to tax arises at the time of issuance of the alcohol. Such an interpretation, it was contended, would be arbitrary and violative of Article 14 of the Constitution.

The doctrine of prospective overruling was simply based on equity and full effect must be given thereto and the State should be permitted to recover the unpaid levy in respect of the period prior to 25th October, 1989. Shri Dwivedi further submitted that in any case payments which have been made under the interim orders of the High Court could be retained by the State and this clearly flows from the directions of this Court in paragraph 89 of the judgment in second Synthetics case. The learned counsel, of course, contended that even in respect of amounts secured by bank guarantee the State would be entitled to collect the same.

In the present case the State of Uttar Pradesh, like some other States, had levied vend fee in respect of industrial alcohol under the U.P. Excise Act, 1910. The validity of the same was challenged and a Division Bench of this Court in State of U.P. and Others (supra) had upheld its validity. Subsequently a review petition was filed in respect of the said judgment and another Writ Petition No. 182 of 1980 was also filed by Synthetics & Chemicals Ltd. challenging a notification dated 31st August, 1979 whereby a new rule was introduced, in place of existing one, providing for levy of vend fee. This was challenged and a Bench of Seven Judges in Synthetics and Chemicals Ltd. and Others (supra) in paragraph 82 recorded its conclusion that the relevant provisions of the U.P. Act and similar Acts of Andhra Pradesh, Tamil Nadu and Bombay were unconstitutional insofar as these purported to levy a tax or charge impost upon industrial alcohol, namely, alcohol used and usable for industrial purposes.

Having come to the conclusion that the levy was unconstitutional the Court, as far as the relief was concerned, observed as follows:

89. We must, however, observe, that these imposts and levies have been imposed by virtue of the decision of this Court in Synthetics & Chemicals Ltd. case. The States as well as the petitioners and manufacturers have adjusted their rights and their position on that basis except in the case of State of Tamil Nadu. In that view of the matter, it would be necessary to state that these provisions are declared to be illegal prospectively. In other words, the respondents States are restrained from enforcing the said levy any further but the respondents will not be liable for any refund and the tax already collected and paid will not be refunded. We prospectively declare these imposts to be illegal and invalid, but do not affect any realisations already made. The writ petitions and the appeals are disposed of accordingly. The review petitions, accordingly, succeed though strictly no grounds as such have been made out but in view we have taken, the decision in the Synthetics & Chemicals Ltd. case cannot be upheld. In the view we have taken also, it is not necessary to decide or to adjudicate if the levy is valid as to who would be liable, that is to say, the manufacturer or the producer or the dealer.

90. With regard to Writ Petition No. 4051 of 1978 (Chemicals & Plastics India Ltd. v. State of Tamil Nadu), certain orders were passed by this Court on November 1, 1978, September 1, 1986, October 1, 1986 and October 10, 1986. It is stated that the present demand of the Central Excise Department from March 1, 1986 on alcohol manufactured by the company in their captive distillery

is over Rs. 4 Crores. This Court by its order dated October 1, 1986 as confirmed on October 16, 1986 had permitted the State Government to collect the levy on alcohol manufactured in company's captive distillery subject to adjustment of equities and restrained the central excise authorities from collecting any excise duty on such alcohol. It is, therefore, necessary to declare that in future no further realisation will be made in respect of this by the State Government from the petitioners. So far as the past realisations made are concerned, we direct that this application for that part of the direction, should in accordance with our decision herein be placed before a Division Bench for disposal upon notice both to the State Government and the Central Government.

It is contended on behalf of the appellants that the declaration in paragraph 82 of the said judgment that the impugned provisions of the said Acts were unconstitutional was a declaration by this Court under Article 141 of the Constitution. The observations and the directions contained in paragraphs 89 and 90 supra indicated the exercise of the Courts jurisdiction under Article 142.

In the present case in respect of the period prior to 25th October, 1989, when the second Synthetics case was decided in respect of the appellants, demand had been raised under the impugned Acts and for some period payment had been made and in respect of other periods payment to the State Governments had not been made. The contention of the appellants is that in view of the observations of this Court in paragraph 89 the appellants may not be entitled to claim refund of the taxes already paid but, at the same time, the State Government is not entitled to collect the taxes in respect of the period prior to 25th October, 1989, i.e. the date on which the judgment was delivered. It was, however, submitted that in those cases where money was deposited with the State on the condition that the same will be kept in a separate account and would be subject to the outcome of the writ petition, the appellants would be entitled to refund thereof.

Shri R.F. Nariman, learned senior counsel for the appellants referred to Supreme Court Bar Association vs. Union of India and Another (at page 430) and contended that under Article 142 of the Constitution this Court cannot pass any order which is contrary to any constitutional or statutory provision. The effect of the decision in Synthetics case being that the impugned Acts were without legislative competence and those laws must be regarded as nonest as if they did not exist. The validity of the said laws which had earlier been upheld in the first Synthetics case got wiped out with a review petition against the first Synthetics case being allowed and the declaration of law in the Synthetics case. He contended that the directions given in paragraph 89 was to do complete justice in exercise of the power under Article 142 and the effect of prospective overruling was clearly specified in the said para where it is observed that in other words, the respondents States are restrained from enforcing the said levy any further but the respondents will not be liable for any refund and the tax already collected and paid will not be refunded.

It was also submitted by Shri Nariman that there is no jurisprudential basis for applying the doctrine of prospective overruling in India. He submitted that this doctrine was first invoked in I.C. Golak Nath & Ors. vs. State of Punjab & Anrs. where Chief Justice K. Subba Rao for himself and five

other judges invoked an American doctrine to that effect. Shri Nariman contended that the other six judges did not subscribe to this and in fact three of the judges through the judgment of Justice Wanchoo expressly came to the conclusion that the doctrine of prospective overruling was against the provisions of Article 13(2) of the Constitution. In our opinion it is not necessary nor appropriate for us to go into this question.

We are only concerned with the interpretation and effect of the Second judgment in Synthetics case and not with regard to the correctness of the same.

It was contended by Shri Nariman that the vend fee which was deposited in Court consequent on the interim order passed in respect thereto clearly stipulated that the same should be kept in a separate account. He, therefore, submitted that this cannot be regarded as a payment the refund of which the appellant was not entitled to by reason of the aforesaid observations in the second Synthetics & Chemicals judgment. He contended that the direction, that the amount received by the State should be kept in a separate account, entitled the appellants to get back the said amount once it was held that the State Legislature lacked legislative competence to impose such a levy. He further submitted that in any case the High Court was wrong in coming to the conclusion that there was any unjust enrichment and, therefore, there should be no refund of the levy in question.

Shri Sunil Gupta appearing on behalf of Hindustan Polymers Ltd. while reiterating the submissions of other counsel further contended that furnishing of a bank guarantee does not tantamount to payment of tax. He invited our attention to the decision of this Court in the case of Oswal Agro Mills Ltd. and Another vs. Asstt. Collector of Central Excise, Division Ludhiana and Others . In that case, pursuant to an interim order passed by this Court staying the recovery of excise duty a bank guarantee had been furnished. The assessees appeal was allowed and it claimed the refund of the bank guarantee which had already been encashed by the excise authorities. The Revenue contended that the bank guarantee should be deemed to have been an equivalent to money deposited in Court and as such Section 11-B of the Excise Act stood attracted and the appellants having failed to establish before the authorities concerned that they had not passed on the incidence thereof to the customers, the authorities were entitled to encash the bank guarantee and retain the amount thereof. Allowing the appeal and holding that the provisions of Section 11-B were not applicable in the case of furnishing of the bank guarantee, this Court observed as follows:

9. Section 11-B applies when an assessee claims refund of excise duty. A claim for refund is a claim for repayment. It presupposes that the amount of the excise duty has been paid over to the excise authorities. It is then that the excise authorities would be required to repay or refund the excise duty.

10. The question, therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duty pursuant to an order of the court is equivalent to payment of the amount of the excise duty.

In our view, the answer is in the negative. For the purposes of securing the revenue in the event of the revenue succeeding in proceedings before a court, the court, as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessee shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favour of the principal administrative officer of the court or in favour of the revenue authority concerned.

In the event that the revenue fails in the proceedings before the court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the revenue succeeds the amount of the tax or duty becomes payable by the assessee to the revenue and it is open to the revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the revenue, that in the event the revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however unlikely, of the bank refusing to honour its guarantee it would be necessary for the revenue or, where the bank guarantee is in favour of the principal administrative officer of the court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, therefore, be held to be paid to the revenue. There is no question of its refund and Section 11-B is not attracted.

When this Court decided in I.C. Golak Naths case that the power of amendment under Article 368 of the Constitution did not allow Parliament to abridge the fundamental rights in Part III of the Constitution, it made the decision operative with prospective effect. This was done in recognition of the fact that between the coming into force of the Constitution on 26th January 1950 and the date of the judgment, Parliament had in fact exercised the power of amendment in a way which, according to the decision in Golaknath was void. If retrospectivity were to be given to the decision, it would introduce chaos and unsettled conditions in our country. On the other hand it also recognised that such possibility of chaos might be preferable to the alternative of a totalitarian rule. The Court, therefore, sought to evolve some reasonable principle to meet this extraordinary situation. The reasonable principle which was evolved was the doctrine of prospective overruling.

Although the doctrine of prospective overruling, was drawn from American jurisprudence, it has/had, of necessity, to develop indigenous characteristics. The parameters of the power as far as this country is concerned were sought to be laid down in Golaknath itself when it was said:

As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions:

(1) The doctrine of prospective over-ruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it.

The parameters have not been adhered to in practice.

The word prospective overruling implies an earlier judicial decision on the same issue which was otherwise final. That is how it was understood in Golaknath.

However, this Court has used the power even when deciding on an issue for the first time. Thus in India Cement Ltd. and Others vs. State of Tamil Nadu and Others , when this Court held that the cess sought to be levied under Section 115 of the Madras Panchayats Act, 1958 as amended by Madras Act 18 of 1964, was unconstitutional, not only did it restrain the State of Tamil Nadu from enforcing the same any further, it also directed that the State would not be liable for any refund of cess already paid or collected.

This direction was considered in Orissa Cement Ltd. vs. State of Orissa and Others at page 498 where it was held that:

. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequent thereof are two different things and, in the latter sphere, the Court has, and must be held to have, a certain amount of discretion. It is a well settled proposition that it is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. It will be appreciated that it is not always possible in all situations to give a logical and complete effect to a finding..

Again in Union of India and Others vs. Mohd. Ramzan Khan , it was held that non-furnishing of a copy of the inquiry report to an employee amounted to violation of the principles of natural justice and any disciplinary action taken without furnishing such report was liable to be set aside. However, it was made clear that the decision would have prospective application so that no punishment already imposed would be open to challenge on this count. (See also Managing Director, ECIL, Hyderabad and Others vs. B. Karunakar and Others .

In the ultimate analysis, prospective overruling, despite the terminology, is only a recognition of the principle that the court moulds the reliefs claimed to meet the justice of the case justice not in its logical but in its equitable sense. As far as this country is concerned, the power has been expressly conferred by Article 142 of the Constitution which allows this Court to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. In exercise of this power, this Court has often denied the relief claimed despite holding in the claimants favour in order to do complete justice.

Given this constitutional discretion, it was perhaps unnecessary to resort to any principle of prospective over-ruling a view which was expressed in Narayanibai vs. State of Maharashtra & Others at page 470 and in Ashok Kumar Gupta and Another vs. State of U.P. and Others . In the latter case, while dealing with the doctrine of prospective overruling, this Court said that it was a method evolved by the Courts to adjust competing rights of parties so as to save transactions whether statutory or otherwise, that were effected by the earlier law. According to this Court, it was a rule of judicial craftsmanship with pragmatism and judicial statesmanship as a useful outline to bring about smooth transition of the operation of law without unduly affecting the rights of the people who acted upon the law operated prior to the date of the judgment overruling the previous law. Ultimately, it is a question of this Courts discretion and is, for this reason, relatable directly to the words of the Court granting the relief.

Reading the two paragraphs 89 and 90 together it does appear that this Court regarded the declaration of the provisions being illegal prospectively as only meaning that if the States had already collected the tax they would not be liable to pay back the same. It is the States which were protected as a result of the declaration for otherwise on the conclusion that the impugned Acts lacked legislative competence the result would have been that any tax collected would have become refundable as no State could retain the same because levy would be without the authority of law and contrary to Article 265 of the Constitution. At the same time, it was clearly stipulated that the States were restrained from enforcing the levy any further. The words used in Article 265 are levy and collect. In taxing statute the words levy and collect are not synonymous terms, (refer to Assistant Collector of Central Excise, Calcutta Division vs. National Tobacco Co. of India Ltd. at page 572, while levy would mean the assessment or charging or imposing tax, collect in Article 265 would mean the physical realisation of the tax which is levied or imposed. Collection of tax is normally a stage subsequent to the levy of the same. The enforcement of levy could only mean realisation of the tax imposed or demanded. That the States were prevented to recover the tax, if not already realised, in respect of the period prior to 25th October, 1989 is further evident from paragraph 90 of the judgment.

The said paragraph shows that as on the date of the judgment for the period subsequent to 1st March, 1986 the demand of the Central Excise Department on the alcohol manufactured was over Rs. 4 Crores. The Court referred to its orders dated 1st October, 1986 and 16th October, 1986 whereby the State Government was permitted to collect the levy on alcohol manufactured in the companys distilleries. With respect to the said amount of Rs. 4 Crores, it was observed that it is, therefore, necessary to declare that in future no further realisation will be made in respect of this by

the State Government from the petitioners. The implication clearly was that if out of Rs. 4 Crores the State Government had collected some levy the balance outstanding cannot be collected after 25th October, 1989.

After the decision in second Synthetics case Writ Petition Nos. 7452 of 1981 and 3571 of 1982 - Sachid Hussain & Anr. vs. The State of U.P. & Ors. - came up for hearing. A Bench of Three Judges presided over by Chief Justice Mukherji, who had delivered the judgment in second Synthetics case vide order dated 26th February, 1990 disposing of the said writ petitions observed as follows:

In view of the judgement of this Court in Synthetics and Chemicals Limited and Others vs. State of Uttar Pradesh 1990 (1) SCC 109, these writ petitions are allowed prospectively and the levy is declared to be bad prospectively. Since no refund is claimed, there will be an order in terms of prayers (1) and (2) of the writ petitions viz. the recovery order issued by the Excise Inspector dated 14th September, 1981 for a sum of Rs.68,200/- against the petitioners are quashed and the respondents are directed not to recover the amount of Rs.68,200/- from the petitioner towards vend fee for the period from 9.4.75 to 11.7.78.

To the same effect is another order dated 12th March, 1990 again by a Bench presided over by Chief Justice Mukherji in Writ Petition No. 8435 of 1981 - Yawar Ali vs. The State of U.P. & Ors. By these two orders the State of U.P. was directed not to recover the amounts outstanding despite recovery notices having been issued on a date prior to 25th October, 1989. These two orders are important inasmuch as the author of the judgment in second Synthetics case understood his own decision of prospective overruling to imply that if a levy in respect of the period earlier than 25th October, 1989 has not been recovered by the excise authorities then notwithstanding a recovery order having been issued the State was not entitled to recover the amount. It can be said that in 1990 Chief Justice Mukherji, along with two companion Judges interpreted his earlier decision in a manner which clearly showed that paragraph 89 of the judgment in the second Synthetics case could not entitle the State to physically receive any amount in respect of the levy for the period prior to 25th October, 1989 even though it could be said that the levy before that date was not invalid because of the doctrine of prospective overruling.

The doctrine of prospective overruling was applied in Belsund Sugar Co. Ltd. vs. State of Bihar and Others.

The question which arose for consideration there was whether market fee could be levied under the Bihar Agriculture Produce Markets Act, 1960 in respect to transactions of purchase of sugarcane, sugar and molasses by sugar mills.

In view of the provisions of the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 read with Sugar (Control) Order, 1966 issued under the Essential Commodities Act, it was held that the provisions of the Sugarcane Act and the Sugarcane Order, on the one hand, and the Bihar Market Act on the other could not operate harmoniously and, therefore, the Sugarcane Act and the Sugarcane Order prevailed over the Market Act. It was then contended that the appellants therein should be allowed to get refund of the market fee which they had paid under the Market Act subject to their showing that they had not passed on the burden on the principle of unjust enrichment. Dealing with the above contentions, it was observed as follows:

112. .Under these circumstances, keeping in view the peculiar facts and circumstances of these cases, we deem it fit to direct in exercise our powers under Article 142 of the Constitution of India that the present decision will have only a prospective effect. Meaning thereby that after the pronouncement of this judgment all future transactions of purchase of sugarcane by the sugar factories concerned in the market areas as well as the sale of manufactured sugar and molasses produced by therefrom by utilising this purchased sugarcane by these factories will not be subjected to the levy of market fee under Section 27 of the Market Act by the Market Committees concerned. All past transactions up to the date of this judgment which have suffered the levy of market fee will not be covered by this judgment and the collected market fees on these past transactions prior to the date of this judgment will not be required to be refunded to any of the sugar mills which might have paid these market fees.

113. However, one rider has to be added to this direction. If any of the Market Committees has been restrained from recovering market fee from the writ petitioners in the High Court or if any of the writ petitioners in the High Court has, as an appellant before this Court, obtained stay of the payment of market fee, then for the period during which such stay has operated and consequently market fee was not paid on the transactions covered by such stay orders, there will remain no occasion for the Market Committee concerned to recover such market fee from the sugar mill concerned after the date of this judgment even for such past transactions. In other words, market fees paid in the past shall not be refunded.

Similarly market fees not collected in the past also shall not be collected hereafter. The impugned judgments of the High Court in this group of sugar matters will stand set aside as aforesaid. The writ petition directly filed before this Court also will be required to be allowed in the aforesaid terms.

The aforesaid observations make clear what was implicit in paragraph 89 of the second Synthetics case, namely, that where payment has not actually been made to the Market Committee for a period prior to the announcement of the judgment, by reason of the assessee having obtained a stay, the Market Committee was not entitled to recover the market fee, payment of which had been stayed. It was pithily put in Belsund Sugar Co. Ltd.s case (supra) that "in other words market fees paid in the past was not to be refunded.

Similarly market fees not collected in the past was not to be collected hereafter. These observations are in consonance with the directions given in paragraph 89 of the judgment in second Synthetics case and applying the said principles to the present appeals the only conclusion which can be arrived at is that this Court intended the status quo as on 25th October, 1989 to be maintained as regards actual payment or levy was concerned. What had gone to the coffers to the Government with or without any string attached, was to remain with it and what was not received could not be realised by the Government.

It is, of course, true that in respect of the same period i.e. prior to 25th October, 1989 persons who had obtained stay orders or had otherwise not paid the levy would be better off than those who have deposited the sums with the Government and are not entitled to receive any refund. This situation, however, is unavoidable for the simple reason that Article 265 does not permit collection of tax without the authority of law. Even though levy prior to 25th October, 1989 may be valid but when in fact no collection was made pursuant to the said levy, then post judgment in the second Synthetics case collection is not permissible. After 25th October, 1989 there was no valid law in existence which permitted the collection of tax.

Shri Venugopal is right in contending that after 25th October, 1989 the provisions of Section 39 of the U.P. Excise Act, 1910 which provides for recovery of excise revenue would be inapplicable. The said section inter alia states that all excise revenue may be recovered from the person primarily liable to pay the same, as arrears of land revenue or in the manner provided for the recovery of public demands by any law for the time being in force. Section 3(1) defines excise revenue as meaning revenue derived or derivable from any duty if the taxes etc. imposed or ordered under the provisions of the Act or of any other law for the time being in force. Section 3(3a) defines excise duty and countervailing duty as meaning any such excise duty or countervailing duty, as may be mentioned in Entry 51 of List II of the Seventh Schedule of the Constitution.

There can be no excise duty under the U.P. Excise Act on industrial alcohol because that would be outside the ambit of Entry 51 of List II of the Seventh Schedule. Vend fee being regarded as excise duty on industrial alcohol which is not valid as not falling under Entry 51 of List II cannot be regarded as excise revenue and, therefore, at least after 25th October, 1989 it would be unrecoverable being outside the purview of the Section 39 of the U.P. Excise Act, 1910.

This would clearly be the position as a result of the Court having declared relevant provisions of the U.P. Act as being ultra vires insofar as it enables the imposition of excise duty on industrial alcohol.

Furthermore in view of the enunciation of the law by this Court in Oswal Agro Mills Ltd. case (supra), a bank guarantee which is furnished cannot be regarded as payment of excise levy which

the Government is entitled to retain.

The furnishing of a bank guarantee is ordered normally in order to ensure collection of dues. Where, however, the State, as in the present case, has been held not to be entitled to collect or realise vend fee after 25th October, 1989 it cannot be allowed to invoke the bank guarantee and realise the amount of vend fee. What cannot be done directly cannot be done indirectly either. Furnishing of bank guarantee is only a promise by the bank to pay to the beneficiary the amount under certain circumstances contained in the bank guarantee. Furnishing of bank guarantee cannot tantamount to making of payment as it was to avoid making payment of the vend fee that bank guarantees were issued.

The respondents, in other words, are not entitled to encash the bank guarantees and realise vend fee in respect of the period prior to 25th October, 1989.

It is true that the effect of a legislation without legislative competence is that it is nonest. [See: Behram Khurshed Pesikaka vs. The State of Bombay at 652, 653, R.M.D. Chamarbaugwalla vs. The Union of India at 940, M.P.V. Sundararamier & Co. vs. The State of Andhra Pradesh & Another (supra) at 1468 and Mahendra Lal Jaini vs. The State of Uttar Pradesh and Others at 937-941.] Nevertheless a law enacted without legislative competence remains on the statute book till a Court of competent jurisdiction adjudicates thereon and declares it to be void. When the Court declares it to be void it is only then that it can be said that it is nonest for all purposes. In Synthetics and Chemicals case the invalidity of the provisions was a declaration under Article 141 of the Constitution. It was for doing complete justice that the Court in exercise of its jurisdiction under Article 142 moulded the relief in such a way as to give effect to its declaration prospectively. It is not possible to accept that such an order of prospective overruling is contrary to law. An invalid law has not been held to be valid. All that has happened is that the declaration of invalidity of the legislation was directed to take effect from a future date.

The principle of prospective over-ruling is too well enshrined in our jurisprudence for it to be disturbed.

Therefore, by reason of the decision in second Synthetics case what has actually happened is collection and non-collection of vend fee prior to 25th October, 1989 is left untouched. However, the Court in the second Synthetics case did not specifically deal with the question of deposits made pursuant to interim orders of Courts. The word used there was realisation. It might have been arguable that the deposits were not realisations in the sense the word has been used in taxation statutes in general and the U.P.Excise Act, 1910 in particular. However, the interim orders passed by the High Court show that deposits were made of vend fee and the purchase tax. Although these deposits were to be kept in a separate account, nevertheless in the circumstances of this case, it would be mere sophistry to hold that the monies so deposited were not realisations for the purposes

of the U.P. Excise Act. Therefore, what was deposited by the appellants with the State would remain with it notwithstanding, the interim orders which required the State to keep it in a separate account but, at the same time, what has not been collected by the State cannot be realised by it, even in those cases where a bank guarantee had been furnished.

Lastly, while relying on Mafatlal Industries Ltd. and Others vs. Union of India and Others , Shri Dwivedi submitted that the appellants had realised the amount of vend fee payable by taking that figure into account while determining their sale price and, therefore, the State is entitled to recover the same as it would otherwise result in unjust enrichment to the appellants.

In Mafatlals case (supra) the principle of unjust enrichment was invoked as refund was claimed even though the amount of excise duty paid had already been recovered. This principle resulted in the court declining to order refund.

The principle of unjust enrichment does not apply in the present case, in view of the direction given in second Synthetics case (supra) that no refund be given. This is in line with the principle of unjust enrichment. But that principle cannot be extended to give a right to the State to recover or realise vend fee after the statute has been struck down and it has been categorically stated that the respondent States are restrained from enforcing the said levy any further.. The contention of the respondents in the teeth of the aforesaid direction cannot, therefore, be accepted. This is apart from the fact that there is no factual basis on which this Court can conclude that the appellants have in fact realised the amount of vend fee and allowing them to retain it will result in their getting enriched unjustly.

For the aforesaid reasons, C.A. No. 4093 of 1991 is allowed. Civil Appeal No. 2853 of 2001 is dismissed. It is declared that the vend fee realised by the States is not to be refunded to the appellants and, at the same time, the State cannot collect any vend fee for the period prior to 25th October, 1989 or thereafter notwithstanding that notices of demand may have been issued or recovery proceeding initiated. Parties to bear their own costs.

C.A. Nos. 324 of 1981, 455, 2795, 1604 of 1980, 624, 625, 125, 2049 of 1981, C.A. Nos. 1122, 181 of 1981, SLP (C) Nos. 4181, 4297-4298 of 1980, C.A. Nos. 215, 341 of 1981, T.C. Nos. 37-39 of 1989, C.A. Nos. 2777 of 1981 and 1607 of 1980 In these appeals apart from the points decided by the judgment in Somaiyas case (Civil Appeal No. 4093 of 1991), one of the issues which arises pertains to the validity of the export pass fee sought to be levied and realised by the State. Counsel for the parties agree that this and other issues, not covered by the judgment in Somaiyas case, can now be decided by an appropriate Bench.

I.A. Nos. 1 & 3 in W.P (C) No. 1892 of 1973 I.A. Nos. 1 and 3 in W.P (C) No. 1892 are dismissed.