SUPREME COURT OF INDIA

M.P. Cement Manufacturers' Association

Vs.

State of Madhya Pradesh

(Ruma Pal and P.Venkatarama Reddi JJ.)

09.12.2003

JUDGMENT

RUMA PAL, J.

Delay condoned.

Leave granted in special leave petitions.

The constitutional validity of the amendment to the Madhya Pradesh Upkar Adhiniyam 1981 (the 1981 Adhiniyam) is the subject matter of challenge in these matters. The amendment was initially made by an ordinance promulgated on 29th June 2001 by the State Government and entitled the "Madhya Pradesh Upkar (Sanshodhan) Adhyadesh, 2001" (hereafter referred to as the 'Ordinance'). By the amendment, a cess @ 20 paise per unit was imposed on the captive power producer on the total units of electrical energy produced. The Act which has subsequently replaced the Ordinance is known as the Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2001 (hereinafter referred to as 'the Amending Act). The provisions of the 2001 Ordinance and Act are identical.

The appellant in the first matter is an association representing the interest of its members who are cement manufacturers and owners of captive power plants. The connected appeals are by the captive power producers themselves. The amendment has been challenged broadly speaking on three grounds : first that by the amendment the Legislature sought to impose a cess on the production of electrical energy which it was legislatively incompetent to do because any tax legislation on the production of electricity is covered exclusively by Entry 84 of List-I to the Seventh Schedule of the Constitution; second that the Ordinance was passed without fulfilling the mandatory pre-condition of consultation with the Electricity Regulatory Commission as provided under Section 12 (3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000; third that the levy was violative of Article 14 of the Constitution. Virtually the same arguments were raised before the High Court.

The respondents are the State of Madhya Pradesh and the Madhya Pradesh State Electricity Board (MPSEB). They have submitted that the word 'production' in the impugned amendment had been used in conjuction with the phrase "whether for sale or supply to ." and was intended to relate only to sale and consumption of electricity. An Explanation was introduced by the Madhya Pradesh Upkar (Sansodhan) Adhiniyam, 2003 to clarify the ambiguity and to make it clear that the levy imposed by the 2001 amendment was on the electric energy sold or supplied by or from captive power units. It was submitted that the doubt, if any, should be resolved in favour of upholding the constitutional validity of the amendment. It was also contended that Entry 53 of List II was wide enough to cover the exercise of power of the State Legislature in introducing the impugned amendment. On the question of non-compliance with the provisions of Section 12 (3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000, it is stated that the Sudhar Adhiniyam was enacted on 3rd July 2001 whereas the impugned ordinance was promulgated on 29th June 2001 and as such, Section 12 (3) had no application. The further argument is that Section 12 (3) of the Sudhar Adhiniyam could not be construed as a restraint on the Legislature as no Legislature can bind any future legislative action of the Legislature. The third contention on this aspect is that the Courts could not review the legislative process. On the question of violation of Article 14, it is submitted that a cess is a tax which may constitutionally be levied on the capacity of a particular class of assessees to pay. It is submitted that the appellants cannot be equated with the MPSEB and that in any event there was no pleading to justify any finding on the issue of discrimination.

The High Court dismissed the writ petitions. According to the High Court the levy imposed by the impugned amendment was on sale and consumption of electricity and that "by mere use of word "production" in Section 3(2) it does not cease to be cess on the consumption of electrical energy". According to the High Court, "production is simply a measure of tax for the purpose of calculation of the amount of cess to be paid by the Captive Power Producer whose plant is located in the factory premises and whatever electrical energy is generated is consumed in the same premises and on the units so consumed". The High Court concluded that in substance, the impugned cess is on energy consumed and so falls under Entry 53, List II, and was not excise duty even if the measure of both is at the same stage.

On the argument alleging violation of Section 12(3) of the Sudhar Adhiniyam, it was held:

"We find that imposition of cess was under consideration of the State for some time past. It was discussed with the Industry and formed part of Captive Power Policy before Ordinance was promulgated. In case the Respondents wanted to rush through the measure, it could be done long back. It is not incumbent for the Government to discuss a matter with public before it is legislated.

Therefore, the Ordinance could be promulgated at any time, the Government deemed necessary to do so. Moreover, the Bill was presented before the Legislature, which had passed it".

The plea of violation of Article 14 was negatived because a valid distinction could be drawn between MPSEB and captive power generating concerns like the appellants. The cess of 20 paise per unit was held not to be confiscatory and as such not violative of Article 14.

LEGISLATIVE COMPETENCE The two competing entries in the Seventh Schedule to the Constitution are Entry 84 of List-I and Entry 53 of List-II. They respectively read:

"List-I "84. Duties of excise on tobacco and other goods manufactured or produced in India except (a) alcoholic liquors for human consumption.

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List-II "53. Taxes on the consumption or sale of electricity".

Electricity is goods [See Commissioner v. MPEB {(1969) 1 SCC 200, 204]. Thus, the levy of excise duty on the production of electricity which falls within the phrase "other goods manufactured" in Entry 84 of List-I" is within the exclusive jurisdiction of Parliament and the State has the competence to levy tax only on the sale and consumption of electricity1. This position is accepted by the respondents.

The Madhya Pradesh Electricity Duty Act , 1949 provides for the levy of a duty on the consumption or sale of electrical energy and under Section 3 of this Act , subject to certain statutory exceptions, every distributor and every producer of electrical energy is required to pay a monthly duty "on the electrical energy sold or supplied to a consumer or consumed by himself, for his own purpose or for

purposes of his township or colony". Under the Upkar Adhiniyam, 1981, an energy development cess is levied under Section 3 on every distributor of electrical energy at a rate of one paisa per unit "on the total energy sold or supplied to a consumer or consumed by himself or his employees during any month". The similarity in the phraseology used in both these statutes in describing the incidence of tax namely sale or supply of electricity is significant.

By the impugned amendment in 2001, Section 3 of the 1981 Adhiniyam was substituted to provide for payment of an Energy development cess by producers of electricity as well.

While setting out the substituted section, we have highlighted those portions of the section which were introduced by way of amendment.

"3. Levy of energy development cess (1) Every distributor of electricity energy shall pay to the State Government at the prescribed time and in the prescribed manner an energy development cess at the rate of one paise per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month:

Provided that no cess shall be payable in respect of electric energy, - (i) (a) sold or supplied to the Government of India for consumption by that Government;

or (b) sold or supplied to the Government of India or a railway company for consumption in the construction, maintenance or operation of any railway administered by the Government of India:

(ii) sold or supplied in bulk to a Rural Electric Co- operative Society registered under the Madhya Pradesh Co-operative Societies Act, 1960 (No. 17 of 1961).

Explanation: For the purpose of this sub- section 'month' means such period as may be prescribed.

2. Every producer producing electrical energy by his captive power unit or diesel generator set of capacity exceeding 10 Kilowatt in total shall pay to the State Government an energy development cess at the rate of 20 paise per unit on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month:

Provided that no cess shall be payable in respect of electrical energy produced by (i) the Government of India for consumption by that Government;

(ii) the Government of India or a railway company for consumption in the construction, maintenance or operation of any railway administered by the Government of India;

(iii) the State Government for consumption by that Government;

(iv) a Rural Electric Co-operative Society registered under the Madhya Pradesh Co- operative Societies Act, 1960 (No. 17 of 1961);

(v) the local bodies including Municipal bodies and Panchayats for consumption in public street lamp or lamps in any market place or water works or any other places of public resort maintained by such bodies:

Provided further that the amount of energy development cess shall be collected by the Madhya Pradesh State Electricity Board and the amount so collected shall be made available to the State Government.

(3) The proceeds of the cess under sub-section (1) and (2) shall first be credited to the Consolidated fund of the State and the State Government may at the commencement of each financial year, after due appropriations has been made by law, withdraw from the Consolidated Fund of the State an amount equivalent to the proceeds of cess realized by the State Government in the preceding financial year and shall place it to the credit of a separate fund to be called the Energy Development Fund and such credit to the said fund shall be an expenditure charged on the Consolidated Fund of the State Government of Madhya Pradesh.

(4) The amount in the credit of the funds shall, at the discretion of the State Government be utilised for:- (a) research and development in the field of energy including electrical energy as well as other conventional and non-conventional sources of energy;

(b) improving the efficiency of generation, transmission, distribution and utilisation of energy including reduction of losses in transmission and distribution;

(c) research in design, construction, maintenance, operation and materials of the equipment used in the field of energy with a view to achieve optimum efficiency, continuity and safety;

(d) survey of energy sources including non- perennial sources to alleviate energy shortage;

(e) Energy conservation programmes;

(f) Extending such facilities and services to the consumers as may be deemed necessary;

(g) Creation of a laboratory and testing facilities for testing of electrical appliances and equipments and other equipments used in the field of energy;

(h) Programmes of training conducive to achieve any of the above objectives;

(i) Transfer of Technology in the field of Energy;

(j) Any purpose connected with improvement of generation, transmission, distribution or utilisation of electrical and other forms of energy, as the State Government may, by notification, specify.

Explanation: In this sub-section 'energy' includes all conventional and non- conventional forms of energy.

(5) If any questions arises as to whether the purpose for which the fund is being utilised is a purpose falling under sub-section (4) or not, the decision of the State Government thereon shall be final and conclusive." The High Court's decision was given with reference to this amendment.

A plain reading of Sub-Section (2) of Sub-Section 3 introduced by the amendment to the 1981 Adhiniyam makes it clear that the levy of cess was "on the electrical energy produced". The phrase "whether for sale or supply" merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word "whether" after the phrase "energy produced" means that the cess would apply on units produced whichever of the

alternatives mentioned after the word "whether", namely, sale or supply or consumption is the case. There is no reason to assume that the words used did not reflect the intention of the Legislature. The imposition envisaged was on the production of electricity units. The charge was on generation and not on the sale or consumption of electricity. There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub-Section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under Section (1) and sub-section (2) were identical, the same language should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject matter of levy as far as producers were concerned.

Our interpretation of sub-section (2) of Section 3 is buttressed by and in keeping with the language and effect of the proviso to the said sub-section. It has been held that the normal function of the proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment2. The proviso to Section 3(2) excepts "electrical energy produced" from payment of the cess in five cases. This would show that the general application of Section 3(2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3(2), what would be subjected to tax would be electrical energy produced by the five categories mentioned under the proviso. Although in categories (i), (ii), (iii) and (v) the exemption is granted with reference to the utilisation of the electrical energy produced, under exception (iv) significantly, all electrical energy produced by a Rural Electrical Co-operative Society registered under the M.P. Co-operative Societies Act, 1960 is exempted. The difference of language between the proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 is also telling. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities.

That the intention of the Legislature was to levy cess on the production of electricity is also borne out from the Statement of Objects and Reasons which accompanied the Act which replaced the Ordinance. It says:

"With a view to impose cess on the electricity generated by the producers from their Captive Power Plants/Diesel Generating Sets for self consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (No. 1 of 1982) suitably." There can, in the circumstances, be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State admittedly was incompetent to impose3.

The interpretation of the amendment by the High Court and as canvassed by the respondents that the cess was actually on sale and consumption and that production was merely the measure of tax is

unacceptable. Such a construction is contrary to the express words of the statute.

Doubtless, while considering a challenge to the constitutionality of a statutory provision, the Court will lean in favour of upholding its validity. {See: State of Karnataka v. Ranganatha Reddy [(1977) 4 SCC 471]}. But this does not mean that in this process of leaning the Court must perform verbal gymnastics to overcome a patent lack of legislative competence. As said by the Constitution Bench of this Court in Madhuram Agrawal V. State of Madhya Pradesh [(1999) 8 SCC 667]:

"The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature." Although a dispute was sought to be raised by the appellants as to whether electricity can be stored or not, (this despite the decision to the contrary by the Constitution Bench of this Court in State of Andhra Pradesh v. National Thermal Power Corpn. Ltd. [(2002) 5 SCC 203], it is not necessary to enter into this controversy for the purpose of deciding this issue as it is the common case of the parties before us that between the generation and consumption of electricity there will be transmission loss and the amount of electricity generated need not necessarily be the amount of electricity consumed/sold. In any event, the practice which is actually followed in metering the generated electricity would not make the incidence of tax different. "The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act"4. Section 3(2) of the amendment speaks of cess on electrical energy generated and that must be taken as conclusive of the object and nature of the levy.

Had matters stood there, the appeals would have had to be allowed and the decision of the High Court reversed. But after the decision of the High Court, there was a further amendment effected to the 1981 Adhiniyam by the Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2003. The 2003 amendment introduced an Explanation at the end of Section 3 of sub-Section (2). The Explanation is as follows:- " Explanation For the purpose of this sub-section, the Cess shall be levied on units of electrical energy sold or supplied from captive power units or Diesel Generator sets to a consumer or consumed by the Producer or his employees.".

The issue now is can the 2003 Explanation cure the 2001 levy? The legislature has the power to validate an invalid levy and to do so retrospectively. The proscription provided in the context of judicially invalidated legislation would not apply as the 2001 amendment had not, till the

promulgation of the 2003 Act, been held to be invalid by any Court. The legislature can also change the character of the tax or duty from impermissible to permissible but the tax or levy should be within its legislative competence5. However, in our view, these principles would not apply to the 2003 Amendment since it is in the form of an Explanation to Section 3(2). The object of an Explanation to a statutory provision has been culled out from the earlier judicial decisions and succinctly restated in S. Sundaram Pillai & Ors. v.V.R. Pattabiraman & Ors. [(1985) 1 SCC 591 at 613].

" Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is a) to explain the meaning and intendment of the Act itself, b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve, c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful, d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same." According to the appellants, since Section 3(2) continued to remain the charging Section, the effect of the Explanation could be construed either as replacing the impost under Section 3(2) or as an alternative cess or as being an additional cess.

The first construction had not been argued by the respondents.

The second alternative would give the assessing officer an impermissible discretion and the third alternative would mean that the vice of constitutional incompetence would continue to attach to the impugned levy.

The respondents have argued that the decision of the High Court with regard to the interpretation put to Section 3(2) is correct. Indeed, they could hardly contend otherwise. We have not agreed with the interpretation of Section 3(2) put by the High Court judgment. Section 3(2) continues to be the charging Section. The Explanation, according to the respondents served the purpose of merely clearing up any ambiguity in Section 3(2) and reaffirmed the object of the cess levied thereunder.

The expression used by the Explanation is "for the purpose of sub-section (2) of Section 3, the cess shall be levied on units of electrical energy sold or supplied". Since the purpose of sub-section (2) of Section 3 continues to be a levy on production, the word 'levied' in the context would at the highest mean 'assessment' and not 'imposition'. It is not the respondents' case that any new or additional or alternative cess was sought to be introduced by the Explanation. Thus despite the Explanation, the charge in Section 3(2) continues to be on the production of the electrical energy units and nothing

else.

The proviso to sub-section (2) of Section 3 continues to except electrical energy produced from the cess in certain cases. The Explanation, if it is read with the main provision, introduces certain contradictions and vagueness. A charging provision should be explicit, certain and clear in order to bind the subject.

The outcome of the introduction of the Explanation to an otherwise unchanged Section 3(2) is a singularly ill drawn provision. The 2003 amendment was obviously introduced for the purpose of rectifying the obvious error in Section 3(2), an object which cannot be achieved by introducing an Explanation since an Explanation cannot be read as changing or as interfering with the incidence of the levy. It is not for us, particularly when legislative clarity is required since the statutory provision imposes a tax, to untangle the legislative confusion.

The legislature could have avoided the controversy, if it had wished to make the incidence of tax explicitly on sale or consumption, by the simple expedient of so providing. The Legislature in its wisdom did not choose to do so. To use the words voiced by Jessel M.R.6:

"I must say that whoever is responsible for drafting .. of this Act . has taken a great deal of trouble to raise a very difficult question, when he might with the greatest ease by using appropriate and well- known terms have avoided any question whatever." We are, therefore, of the opinion that the cess chargeable at all material times under Section 3(2) is only on the production of electrical energy units as far as producers of electricity for captive consumption are concerned and the Explanation does not serve to change the character of the tax from an impermissible to a permissible levy.

SECTION 12(3) OF THE SUDHAR ADHINIYAM The challenge to Section 3(2) of the 1981 Adhiniyam on the ground of violation of Section 12(3) of the Madhya Pradesh Vidyut Sudhar Adhiniyam, 2000 (hereinafter referred to as 'Sudhar Adhiniyam') is not necessary to be decided in view of our interpretation of the Section and the finding that it was an incompetent piece of legislation. However, since the scope of Section 12(3) of the Sudhar Adhiniyam has been argued in depth, we think it appropriate not to leave the dispute unanswered.

The Sudhar Adhiniyam was published in the Madhya Pradesh Gazette (Extra-Ordinary) on 20.2.2001 after receiving the assent of the President. It came into force on 3.7.2001. By the Sudhar Adhiniyam, the State Electricity Regulatory Commission has been set up and various provisions have been made for the following avowed objects:

"(i) restructuring of the Electricity Industry;

(ii) rationalisation of Generation, Transmission, Sub-Transmission, Distribution and Supply of Electricity in the State;

(iii) Regulating the licensing of transmission and supply of electricity;

(iv) regulating the purchase, Transmission, Sub- Transmission, Distribution, Supply and utilisation of electricity;

(v) providing quality of service and the tariff and other charges considering the interest of the consumers and utilities;

(vi) taking measures conducive to the development and management of the electricity industry in the State in an efficient, economic and competitive manner." Section 12(3), which is allegedly violated by the respondent State, reads as under:

"12 (3). The State Government shall consult the Commission in relation to any policy directive which it proposes to issue or any legislation is proposed to be enacted affecting the Electricity Industry it shall duly take into account the recommendation if any, given by the Commission within such reasonable time as the State Government may specify." There can be no doubt, in view of the authoritative pronouncement of the law in Maharaj Umeg Singh and Others v. The State of Bombay and Others [(1955 (2) SCR 164] that a State legislature cannot be fettered from exercising its plenary powers of legislation within the ambit of the legislative heads specified in the lists (II) & (III) of the 7th Schedule to the Constitution, unless the prohibition is contained in the Constitution itself. It had been argued in Maharaj Umeg Singh's case that agreements of merger entered into by the Rulers of the respective States with the Dominion of India and the collateral letters of guarantee passed by the Ministry of States precluded the State legislature from denying the rights under these two instruments. The argument was negatived saying:

"Once the topic of legislation was comprised within any of the entries in the Lists II & III of the Seventh Schedule to the Constitution the fetter or limitation on such legislative power had to be found within the Constitution itself and if there was no such fetter or limitation to be found there the State Legislature had full competence to enact the impugned Act no matter whether such enactment

was contrary to the guarantee given, or the obligation undertaken by the Dominion Government or the Province of Bombay or even the State of Bombay".

Unlike the decision in Maharaj Umeg Singh's case, the so-called legislative 'fetter' in the case before us is itself contained in valid legislation viz. the Sudhar Adhiniyam, 2000.

The State was competent to enact the Sudhar Adhiniyam, 2000. The respondents have not urged to the contrary. So now we have two pieces of legislation viz. the Sudhar Adhiniyam, 2000 and the Amendment Act of 2001, both enacted by the State which are both equally valid.

The first question, therefore, is whether Section 12(3) does in fact impose any fetter on the power of State to legislate? Sub-section (3) refers to "any policy directive which it proposes to issue" or "any legislation proposed to be enacted affecting the Electricity Industry ". It does not stop the State from enacting the legislation but merely states that prior to any legislation being proposed, the Government shall "duly take into account the recommendation, if any, given by the Commission".

It was and is open to the State Legislature to repeal this law.

As long it continues to be operative, it must be assumed that it was not a mere exercise in futility and some effect must be given to the words of the sub-section (3) of Section 12. As we read the sub-section, it is a mandate to the policy makers who, before proposing legislation, are required to consult the State Regulatory Commission.

Under the Sudhar Adhiniyam, the State Commission is a juristic entity [Section 3(1)]. The Members of the Commission, according to Section 5 of the Sudhar Adhiniyam, shall be persons of ability, integrity and standing who have adequate knowledge and experience of, or have shown capacity in dealing with problems relating to engineering, economics, commerce, finance, law, administration or management".

Under Section 9 of the Sudhar Adhiniyam, the Commission has been vested with the powers inter alia (a) to regulate the purchase, distribution, supply and utilization of electricity, the quality of service, the tariff and charges payable considering the interest of the consumer and the Electricity Industry both;

(c) to determine the tariff for electricity, wholesale, bulk, grid or retail in accordance with the provisions of this Act.

In particular the Commission has been given the power to determine the tariff under Section 26 of the Sudhar Adhiniyam, 2000. For discharging its functions, the Commission has been given wide ranging powers to carry out the objects for which it has been set up including the powers of a Civil Court in certain specified matters [Section 10].

It is true that the Sudhar Adhiniyam, 2000 although published in the Official Gazette prior to the promulgation of the impugned Ordinance, came into force after such promulgation.

Nevertheless, the Act which replaced the Ordinance was introduced as a Bill when the Sudhar Adhiniyam was operative and was certainly in place when the Explanation was added to Section 3(2) in 2003. There was admittedly no consultation by the State Government with the Commission at any stage though the levy of cess by the impugned legislation affects the electricity industry.

We are not concerned with why the legislature provided for this mandate of prior consultation but the importance of consultation at a pre-decisional stage has been recognised by Narayanan Sankaran Mooss v. The State of Kerala and another [(1974) 2 SCR 60, page 70]: " First impressions and provisional judgments have a tendency to become ultimate ideas and final judgments. They would settle unconsciously on the investigator's mind as the imperceptible dust- particles on an optical lens. They would dim his understanding and obfuscate his observation.

Facts which will dovetail with them would arrest his attention; facts which will conflict with them would flit his observation. If by any chance he happens to notice refractory facts, he would seek to reconcile them with his first impressions and provisional judgment. This understanding of human psychology seems to have persuaded Parliament to interpose the condition of the Board's consultation to the Government's action. The Board is an independent body. It consists of three members. One of them is a technical expert, the other is financial expert, and the third an administrative expert. While considering the facts presented to it by the Government and by the licensee in his explanation, the Board will undoubtedly act with an open and unconditioned mind and will be able to offer unbiased counsel to the Government." In our opinion, the consequence of non-consultation in terms of Section 12 (3) of the Sudhar Adhiniyam would not be an incompetent piece of legislation but a legislation introduced in breach of a salutary requirement to consult an expert statutory body. The statutory requirement for consultation with a body of experts before proposing legislation will serve as an in-built safeguard against a challenge under Article 14 of the Constitution apart from anything else.

Nevertheless, we do not propose to decide whether by reason only of such non-consultation, Section 3(2) of the 1981 Adhiniyam is violative of Article 14, nor do we propose to decide whether the cess of 20 paise is excessive, nor the other grounds urged by the appellants pertaining to Article 14. We have referred to the provisions of Sudhar Adhiniyam so that the State Government may in future act in consonance with Section 12(3).

An additional challenge has been raised to the constitutional validity of sub-sections (3), (4) and (5) of Section 3 in Civil Appeal No.2003 of 2002 alleging violation of Articles 202, 204, 207, 260 and 267 of the Constitution.

In order to appreciate the submission, we may recapitulate briefly the effect of these sub-sections. Under sub- section (3), the proceeds of the cess levied under sub-section (1) and (2) are required to be credited to the Consolidated Fund of the State. The State Government may then withdraw an amount equivalent to the proceeds of cess realised in the preceding financial year and place it to the credit of a separate fund called the Energy Development Fund. Such credit to the fund would be an expenditure charged on the Consolidated Fund. The State Government has also the discretion to use the amount in the credit for the various purposes specified in sub- section (4). A further discretion is given to the State Government under sub-section (5) to finally and conclusively decide whether the funds were in fact being utilised for a purpose falling under sub-section (4).

Apart from the submission that the respondents had not disclosed any information as to what had been done by the State after collecting the cess from its consumers and how the cess collected in fact been utilised since 1981 although called upon to do so, it is argued by the appellants that no fund could be earmarked or appropriated or expended from the Consolidated Fund of the State except in accordance with the provisions of Articles 196, 198, 199 and 200 of the Constitution which requires the expenditure to be passed by the State Legislature and it cannot be left to the State Executive to determine the expenditure at its discretion. This argument was raised before the High Court but not dealt with. Nor do we do so since we have upheld the appellants' contentions on the very imposition of the cess under Section 3(2).

In the circumstances, we allow the appeals. Section 3(2) of the Upkar Adhiniyam, 1981 as introduced by the Amendment Act, 2001 and amended in 2003 is declared ultra vires the Constitution as being outside the legislative competence of the State. As far the amounts collected by the respondents under Section 3(2) are concerned, the collection was in a sense protected by the decision of the High Court. The 'protection' became precarious when this Court while granting leave on the special leave petitions on Ist March, 2002 had refused interim relief stating that the question of refund with interest was an issue to be decided at the final hearing. In the circumstances, we direct that the respondents will be liable to refund the cess collected after Ist March, 2002 to the appellants together with interest at 9% p.a. There will however be no order as to costs.

In terms of our above judgment, the writ petitions stand disposed of accordingly.