

# MYSORE HIGH COURT

P. Bhuvaneshwariah

Vs

State of Mysore

Writ Petns. Nos. 318 of 1964

(K.S. Hegde and G.K. Govinda Bhat, JJ.)

28.09.1964

## JUDGMENT

### **K.S. Hegde, J.**

1. The petitioners, in these 54 petitions, who are building owners in this State, seek a Writ of Mandamus directing the State of Mysore to refrain from enforcing on them the provisions of the Mysore Buildings Tax Act, 1962 (Mysore Act No. 4 of 1963) (to be hereinafter referred to as the "Act"), after declaring the same as void and inoperative.

2. The "Act" received the assent of the Governor on the 8th of January 1963 and it came into Force on the 1st January 1964. Under Section 4 of the "Act" all buildings as defined in the "Act", in the towns mentioned in Schedule I to the "Act", stand charged with 'Building Tax' in accordance with the provisions contained in Schedule II to the "Act". The "Act" provides a machinery for quantification of the charge and for the collection of the tax assessed. In the "Act" there are provisions for appeal, second appeal and revision. The "Act" confers on the Government power to make rules to carry out the purposes of the "Act". Accordingly rule have been made and published.

3. The validity of the "Act" was assailed on various grounds. It was contended that in pith and substance, though not in form, the "Act" imposed tax on the assessee's income or in the alternative on the capital value of his assets in the form of buildings, and, therefore, the "Act" is beyond the legislative competence of the State Legislature. It was next contended that the "Act" is a colourable piece of legislation as the motive in enacting the same was not to tax buildings but to take away a portion of the fabulous unearned income made by speculators and tax doggers. It was said that Section 4 of the "Act", the charging Section, is vague and unenforceable and consequently it is inoperative and if that Section is struck down as being vague and unenforceable, as it should be, the other provisions in the "Act" being machinery provisions will have no independent existence and, therefore, the entire "Act" has to be held to be inoperative. The power granted to the Government to alter the first schedule was assailed on the ground that it is a delegation of essential legislative function and hence void. Section 3(2) of the "Act" is said to be hit by Article 14 of the Constitution. The validity of the levy under the "Act" was challenged on

the ground that it amounted to double taxation which we were told is not permissible under law. The strongest attack on the "Act" was on the ground that the levy under it is violative of Article 14 of the Constitution. Some of the petitioners contended that the levy in question in so far as it places restrictions on freedom of trade, commerce or intercourse with or within the State is opposed to Article 304(b) of the Constitution as no previous sanction of the President was obtained for introducing the Bill leading up to the "Act".

4. In the counter-affidavit filed by Sri N.S. Bharath, Budget Officer and Deputy Secretary to Government, Finance Department, he has denied the various contentions taken by the petitioners in the affidavits filed in support of their petitions. He has asserted that the impugned "Act" was enacted by the Legislature in pursuance of the legislative powers available to it under Entry 49 of the State List. According to him, the tax in question is not and was not intended to be a tax on income or capital assets of the assessee falling under either Entry 82 or Entry 86 of the Union List. He has denied that the legislation in question is a colourable piece of legislation. According to him the scheme of the "Act" is to levy tax on buildings on the aggregate floorage of all buildings owned by a person in any "rating area". He has denied that all or any of the provisions contained in the "Act" are opposed to the equality clause in the Constitution. According to him, the "rating area" was decided on the basis of the population as found in the latest census. He has denied that the power conferred on the State under Section 32 amounts to a delegation of essential legislative function.

5. From the arguments advanced at the hearing, following questions emerge for decision :

I. Is the "Act" beyond the legislative competence of the State Legislature ?

II. Is it a colourable piece of legislation ?

III. Is Section 4-the charging Section-vague and unenforceable and consequently the "Act" inoperative ?

IV. Is the power of exemption conferred on the State by Section 32 amounts to delegation of essential legislative function ?

V. Is the impost under the "Act" amounts to double taxation and if so, is the same opposed to law ?

VI. Is Section 3(2) hit by Article 14 of the Constitution and if that provision is void is the "Act" liable to be struck down ?

VII. Whether the provisions contained in Section 4 are violative of Article 14 of the Constitution; and, therefore, the "Act" is liable to be struck down ?

And

VIII. Whether the provisions contained in the "Act" to the extent they place restrictions on freedom of trade, commerce or intercourse with or within the State are invalid as no previous sanction of the President had been obtained for the introduction of the Bill which culminated in the "Act" ?

6. When the validity of an enactment is challenged on the ground that the Legislature has no competence to enact the same or that one or more of the provisions contained therein are opposed to one or the other of the fundamental rights guaranteed by the Constitution, it is the duty of the Court to first interpret the relevant provisions so that the challenge to their validity may be examined to its proper perspective. To pronounce on the question of validity, it is necessary to know the pith and substance or the true scope and effect of the Statute impugned. As

observed in Concordia.

*Fire Insurance Co. v. People of the State of Illinois*<sup>1</sup>, the validity of a statute often depends on how it is construed and applied. Therefore, I shall first take up the interpretation of the relevant provisions in the "Act".

7. The title given to the "Act" is "the Mysore Buildings Tax Act" It is claimed to be an act to provide for the levy of a tax on buildings. Its preamble: says that it was enacted because it was found expedient to provide for the levy of a tax on buildings. Therefore, prima facie, it is a statute providing for the levy of tax on buildings. Admittedly the State Legislature, in view of Entry 49 in the State List, has power to tax buildings. But it was said that the Legislature in the guise of taxing buildings has in reality taxed either the income or the assets of the owners of the buildings. In support in this contention reliance was placed on some of the provisions in the "Act."

8. It was urged that by defining "building" in an artificial manner the "Act" has not only purported to tax buildings as such but has also brought within its net some other assets, which are not really buildings and, therefore, the tax levied in truth is not a tax on buildings. There is no substance in this contention.

9. "Building" is defined in the "Act" as meaning a house, out-house, garage or any other structure, or part thereof, whether of masonry, bricks, wood, metal or other material, but does not include any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure. The term "buildings" is not a term of art. That expression is not a nomen juris. Hence the rule laid down by the Supreme Court in the *State of Madras v. Cannon Dunkerley and Co. (Madras) Ltd*<sup>2</sup>, has no application to the facts of these cases. I am unable to agree with the petitioners that the definition of "buildings" is an artificial definition or that definition has brought within its fold things other than buildings. The fact that "any portable shelter or any shed constructed principally of mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure" are excluded from the definition of "building" does not make the definition in any manner an artificial definition. To tax one thing, the State need not tax everything. The State has extensive power of classification in the exercise of its taxation power. Hence no arguments can be properly advanced on the basis of the definition in question to support the plea that the impugned fact is a tax on income or a tax on capital assets.

10. It was next said that in view of the definition of the word "owner" and the provisions contained in Sections 3, 4, 6 and 8 read with the Schedules it would be seen that the levy in question is a levy on Income or in the alternative it is a levy on the capital value of the assets of the assesseees. The expression "owner" as defined in Section 2(7) includes

"a person who for the time being is receiving or is entitled to receive, the rent

<sup>1</sup>(1933) 78 Law Ed. 1411: 292 US 535

<sup>2</sup> AIR 1958 SC 560

of any building whether on his own account or on account of himself and others or as an agent, trustee, guardian or receiver for any other person or who receive the

rent or be entitled to receive it if the building or part thereof were let to a tenant."

The "owner" is liable to pay the tax assessed in view of Sections 4, 8 and 9, though he may not really own the "building". Hence it was said that in truth the levy is on the "owner" and not on the "building" and, therefore, it is a levy on income or on assets of the "owner". This contention has no merit in it. All taxes whether levied on income, or on assets or any other object, have to be ultimately paid by some human being. The power to tax a "thing" includes within its ambit the ancillary power to determine as to who should pay the same. That is obvious. Merely because a tax levied on an object is made payable by some individual, the tax does not cease to be a tax on the object concerned. A Legislature which has power to tax a thing has also power to say as to who shall pay that tax, unless, probably, it can be said that there is no nexus whatsoever between the object taxed and the person asked to pay the same. That is certainly not the case here. The fact that the tax paid by the assessee cannot be taken into consideration in fixing fair rent under Section 14 of the Mysore Rent Control Act, 1961 (see Section 29 of the "Act") does not make it any the less a "building tax".

11. It was next urged that a "building tax" presupposes a levy on each building separably. The unit of taxation must be necessarily and invariably a building and not several buildings put together, in which event it will be either a tax on income or assets and not a tax on "buildings". As the "Act" provides for taxing on a graduated scale, the floorage of all the buildings owned by an assessee in one "rating area" the levy in question cannot be considered as a "building tax". From these submissions two questions arise for decision, viz. (i) can it be said that the "Act" has provided for cumulatively taxing all the buildings owned by a person in one "rating area", and (ii) if the true effect of the "Act" is to deem all buildings owned by a person in one "rating area" as one building for the purpose of levying tax does the levy cease to be "building tax". Section 4(1) without the provisos, but read with the Schedules provides for a graduate tax on each building. It also provides for some exemption. It was said that because of clause (c) to Section 3(1) and the first proviso to Section 4(1) the several buildings owned by a single person have to be considered as one unit of taxation, the resulting position being, the assessee will not only lose the benefit of the exemption provided, but he will also have to pay tax at a higher rate on a larger area of floorage. Is this contention correct ?

12. Clause (o) to Sub-Section (1) of Section 3 provides; "save in respect of buildings to which proviso (1) to Sub-Section (1) of Section 4 is applicable, residential buildings having a floorage of not more than one thousand square feet and non-residential buildings having a floorage of not more than two hundred and fifty square feet" are exempt from tax. This provision undoubtedly indicates that the Legislature did not intend to give the benefit of that provision to cases falling under the first proviso to Sub-Section (1) of Section 4. But has it effectuated that intention ? For our purpose what is important is the charging Section, i.e. 4(1), The main Section 4(1)

"There shall be charged, levied and paid tax (hereinafter referred to as 'building tax') in respect of total floorage of every building-

(a) at the rate or rates specified in Sections A and B of Part I of Schedule II on residential buildings and non-residential buildings, as the case may be, situated in every rating area specified in Part I of Schedule I;

(b) at the rate or rates specified in Sections A and B of Part II of Schedule II on residential buildings and non-residential buildings, as the case may be, situated in every rating area

specified in Part II of Schedule I;

(c) at the rate or rates specified in Sections A and B of Part III of Schedule II on residential and non-residential buildings, as the case may be, situated in every rating area specified in Part III of Schedule I:"

Now when we come to Schedule II, it proceeds on the basis that such building has to be separately taxed. Neither the main Section 4(1) nor Schedule II provides for treating two or more buildings in one "Voting area" as one unit of taxation. That position is made further clear when we come to R. 3 which deals with determination of the floorage of buildings. That rule requires an assessee to submit his return in such form and containing such details relating to each building as may be necessary for the purposes of assessment under the "Act". The return has to be submitted in Form No. 1. That form provides for a return in respect of a single building. But then we were told that in view of the first proviso to Section 4(1), the Government has a right to make a consolidated levy on more than one building in the same "rating area", owned by the same person. The said proviso says :

"Where more than one building in the same rating area is owned by the same person the building tax shall be levied on the aggregate floorage of all such buildings."

The learned Advocate-General told us that the word "owned" found in that proviso should not be read in the Sight of the definition of "owner". That appears to be obvious enough. If that is not so, it is clear that there will be considerable incongruity. The words "owned by the same person" found in the first proviso to Section 4(1) should be understood as referring to a person who has title to the buildings in question. According to the learned Advocate-General that though in the main Section 4(1) every building stands charged separately to "buildings tax", in view of the first proviso thereto the charge in question gets itself enlarged into a consolidated charge on all the buildings owned by the same person in the same "rating area" The proper function of a proviso was considered by the Supreme Court in *Commissioner of Income-tax, Mysore v. Indo Mercantile Bank Ltd*<sup>3</sup>., It was observed therein that a proviso qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso, would fall within the main enactment; ordinarily, it is foreign to the proper function of a proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment; "It is a fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso"; therefore, it is to be construed harmoniously with the main enactment; it has to operate in the same field and if the language of the main

<sup>3</sup>1959 36 ITR 1 : AIR 1959 SC 713

enactment is clear it cannot be used for the purpose of interpreting the main enactment or to exclude by implication what the enactment clearly says unless the words of the proviso are such that that is its necessary effect. While this is the true rule of construction the Legislature by employing clear and unambiguous language may assign to a proviso a field larger than that occupied by the main Section. After all what is of the essence in the ultimate analysis is the intention of the Legislature. If that intention is made clear, no rule of construction arises for consideration. Did the Legislature intend to levy a progressive rate of taxation on all buildings owned by the same person in the same "rating area" as one suit, as contended by the learned Advocate-general ? We must remember that we are construing a taxation measure. As observed

by a Bench of this Court, of which I was a Member in *G. Mallarappa and Sons v. State of Mysore*<sup>4</sup>,

"In the case of fiscal statutes Courts re extremely reluctant to hold the subject liable to tax by either extending the ordinary meaning of the words found in the statute or by supplying alleged omissions. In Craies on Statute Law, 5th Edition, it is said that express and unambiguous language appears to be absolutely indispensable, in statutes passed for imposing a tax or charge. Sir Lancelot Sanderson speaking for the Judicial Committee in *Bank of Chettinad Ltd. v. Commissioner of Income-tax, Madras*<sup>5</sup> quoted with approval a passage from the opinion of Lord Russel of Killouen at page 24 found in *Inland Revenue Commissioners v. Duke of Westminster*<sup>6</sup>, which reads :

"I confess that I view with disfavor the doctrine that in tax-cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a Statute applicable to the facts and circumstances of his case."

As Lord Cairns said many years ago in *Partington v. Attorney General*<sup>7</sup>, at page 122 :

"As I understand the principle of al! fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appeal to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be."

"The Supreme Court in *Empress Mills, Nagpur v. Municipal Committee, Wardha*<sup>8</sup>, held that if in construing a taxing statute, there are two interpretations possible, then effect is to be given to the one that favors the citizen and not that imposes a burden on him."

13. In the instant case, if the effect of the proviso is as contended by the learned Advocate-General surely the tax liability of several of the assesses becomes heavier and no assessee will be benefited. Hence the construction placed by the learned

<sup>4</sup>1962-40 Mys LJ 768

<sup>6</sup>1930 AC 1

<sup>8</sup> AIR 1958 SC 341

<sup>5</sup> AIR 1940 PC 183

<sup>7</sup>(1869) 4 HL 100

Advocate-General is not beneficial to the assessees. Therefore, we must adopt the rule of strict construction.

14. Bearing in mind the rules of construction set out above let us now examine the true scope of the proviso in question. While the main Section 4(1) says :

"There shall be charged, levied and paid tax," the proviso merely refers to a "levy" or' tax. In the main Section the word "charged" refers to imposition of the tax, "levied" to quantification and "paid" to collection. The word "levy" has several meanings. It is sometimes used in the sense of imposition of tax, sometimes to indicate quantification

and sometimes even to steps taken for collection. See: *Byramjee Jeejeebhoy v. Province of Bombay*<sup>9</sup>, Hence the meaning of the word "levy" has to be gathered from the context in which it is used. As mentioned earlier, the main Section has used the word "levied" to indicate quantification. Again in Section 27, the word "levy" is used to connote quantification. In the very nature of things the local authorities cannot impose tax. They can only quantify the existing charge and not create a charge.

Hence the word "levy" in the "Act" appears to have been used as meaning quantification of the tax imposed by the main Section 4(1). If so understood the proviso merely means that the tax charged on the several buildings owned by the same person in the same "rating area" shall be quantified together, It may be noted that there is no provision in the "Act" modifying the rates mentioned in Schedule II. The rates mentioned therein provide for exemption in respect of certain floor age both as regards the residential and non-residential buildings. These exemptions are available even without any assistance from Section 3(1)(c). Further, there is no provision in the "Act" specifically providing for a higher rate of tax, if two or more buildings are owned by the same person in the same "rating area". An examination of the entire scheme of the "Act" shows that the unit of taxation is a building. See Sections 4, 5, 6 and 8.

15. The "Act" is based on Kerala Buildings Tax Act. Under that Act, each building is the unit of taxation. The Bill introduced in the Legislature faithfully followed the pattern adopted in the Kerala Act. But as the Bill emerged from the select committee, we find several changes, the most important new additions being Section 3(1)(c) and the first proviso to Section 4(1). It may be that the Legislature had a vague intention to club together two or more buildings owned by the same assessee in the same "rating area" and treat them as one unit for the purpose of taxation. But it clearly failed to effectuate that intention. That anomaly must be due to tinkering with the original text.

16. Even if we consider that the word "levied" found in the first proviso to Section 4(1) means imposition of tax, the imposition in question can only be as provided in Schedule II, which means that each building should be treated as a unit and each unit assessed to tax in accordance with the rules contained therein. The proviso in question does not prescribe any rate of its own nor any basis of taxation. Hence when it says

<sup>9</sup> AIR 1940 Bom 65 (FB)

that the "building tax shall be levied on the aggregate footage of all such buildings", it must be held to mean that the levy in question is in accordance with the rules contained in Schedule II.

17. Much thought does not appear to have been bestowed in drafting the provisos to Section 4(1). There is no doubt that the Legislature wanted to levy more tax on non-residential buildings than on residential buildings. But the intention is not fully carried out as will be clear from the illustration given hereinbelow.

18. Let us take the case of a building having a floorage of 10,000 sq. ft if that building is a residential building, the tax payable is ₹ 2,350; if it is a non-residential building, the tax payable is ₹ 2,475; if 5,000 sq. ft out of that is residential and the remaining 5,000 sq.ft. non-residential, the tax payable on the residential portion is ₹ 750 and the tax payable on the non-residential

portion is ₹ 850, the total being ₹ 1,625. There is no reason to think that the Legislature intended to levy less tax on a building which is partly residential and partly non-residential, than on a residential building. Numerous other incongruities were pointed out at the hearing. It is not necessary to refer to them. All that I need say is that the "Act" is an ill drafted piece of legislation.

19. It was next urged that what is taxed under Section 4(1), read with Schedule II, is the floorage of a building and not that building as such and, therefore, the tax levied is not a "building tax". That contention is not correct. Under the "Act", tax is levied on buildings. The floorage of building is adopted as a measure to fix the tax liability. Floorage is but a mode to find out the proper tax to be imposed on a building. Whether the measure adopted has introduced substantial inequality, as to amount to denial of equality before law will be considered later. But, it cannot be said that the Legislature has no competence to adopt such a measure or the same would convert the tax into a tax on income or on capital assets.

20. The question whether a tax purported to have been levied by means of an Act passed by the Provincial Legislature under Entry 42 of the Provincial List in the Government of India Act, 1935 (same as Entry 49 of the State List in the Constitution) was in reality a tax on income or a tax on capital assets came up for consideration in Sir Byramjee's case, AIR 1940 Bombay 65 (FB). Therein the validity of the Urban immovable Property Tax levied by Section 22 forming part of Part 6 of the Bombay Finance Act (Act 2 of 1932) came up for consideration. It was urged on behalf of the assessee that the tax in question being a tax on income or in the alternative a tax on capital value of lands and buildings was ultra vires of the powers of the Bombay Legislature. This contention was rejected by the Full Bench. Beaumont, C.J., who delivered the leading judgment in the case, rejected the several contentions advanced in support of the plea that the tax in question is a tax on income.

In the course of his judgment, the learned Chief Justice observed that prima facie, a tax on the annual value of the land is not a tax on income, and recognition of that fact seems implicit in the decision of the House of Lords in *London County Council v. Attorney General*<sup>10</sup>, His Lordship then referred to the legislative practises that

<sup>10</sup>1901 AC 26

prevailed in England and in India to find out the true import of the Act. He observed :

"The question to be determined comes back to the short one, whether the impugned tax is a tax on income, I am of opinion that it is not.

The charging Section 22 imposes the tax on lands and buildings, and not on income, and the basis of the tax is annual value. This is an arbitrary basis which might be applied as well for ascertaining capital value, as for ascertaining income. The fact that some concession is allowed to the small owner a concession which may be based as much on political, as on economic considerations and that an allowance may be made where the property is shown to produce no income, a fact which may be taken to show that the estimated value was found to be erroneous, cannot alter the nature of the tax." Dealing with the contention that the tax in question is a tax on the capital value of the assets of the assessee, the learned Judge observed :

"...it is impossible to say that this tax although it is a tax on lands and buildings, is a tax

on the capital value of the lands and buildings. It is imposed without any relation to the capital value except so far as such value can be ascertained by reference to rateable value." In the course of his concurring judgment, Kania, J. (as he then was) observed :

"It must be conceded that every tax, because it is a direct tax, does not necessarily become "income-tax". Also because there is a graduated tax it is not necessarily income-tax." In another portion of his judgment His Lordship observed :

"The attempt to classify taxes on property under heads like capital, income and occupation is not profitable, as the list is not exhaustive. On the other hand, as pointed out by the learned Advocate General taxes on lands and buildings have been known to Indian Legislatures for over 50 years, and find place as such in the Municipal Acts passed by different provinces."

The Federal Court in *Ralla Ram v. Province of East Punjab*<sup>11</sup>, held that where the annual rental value is the basis of a tax, that tax does not necessarily become a tax on income. There are other factors to be taken into consideration. It is the essential nature of the tax charged and not the nature of the machinery which is to be looked at. This question, if I may say so with respect, has been very lucidly dealt with by Sarkar, J. in his dissenting judgment (on this point there is no difference of opinion) in *Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*<sup>12</sup>, This is what His Lordship observed in paragraph 53 of the judgment :

"The Provincial Legislature had been given the power to tax units of lands and buildings irrespective of their value and the Central Legislature the power to tax the value of assets. As was said in *the Provincial Treasurer of Alberta v. Kerr*<sup>13</sup>:

"The identification of the subject-matter of the tax is naturally to be found in the charging Section of the statute, and it will only be in the case of some ambiguity in the terms of the charging Section that recourse to other Sections

<sup>11</sup> AIR 1949 FC 81

<sup>13</sup>1933 AC 710 at p. 720

<sup>12</sup> AIR 1963 SC 1742 at spl. page 1755

is proper or necessary.'

Proceeding further in paragraph 55 of the judgment, the learned Judge observed :

"In 1948 FCR 207; AIR 1949 FC 81, the Federal Court upheld a Provincial statute which imposed a property tax assessed on the annual value of the property and rejected the contention that such a tax was really a tax on income which only the Centre could impose under item 54 of List I (Govt. of India Act, 1935). I think it may be legitimately said that if a tax expressly levied on land and made assessable on its annual value, that is, its income, is not by reason of such method of assessment a tax on income, a tax on land cannot become a tax on capital value of assets because it is made assessable on the basis of the capital value of the land."

A Full Bench of the Allahabad High Court in *Oudh Sugar Mills Ltd., Hargaon v. State of U.P.*<sup>14</sup>.,) construing U.P. Large Land Holdings Tax Act (31 of 1957) observed that looking to the whole of

the Act the tax under the Act "a clearly a tax on the holding and not on the annual value or the capitalised value of the land but the annual value is only the measure of the tax. It went further and held that even if it be assumed that the income is the capitalised value of the land, the capitalised value is only the basis and not the object of taxation. Therefore the State Legislature was fully competent to enact the impugned Act under Entry 49 of the State List. It further held that the mere fact that the tax is on a progressive scale does not make the tax any the less a tax on land; so also the mere fact that the landholder pays the tax would not change the nature of the tax. I am in respectful agreement with these observations. Hence I hold that tax levied under the "Act" is tax on buildings. The State Legislature had full competence to enact the same. In view of this conclusion, I refrain from going to the question whether the State Legislature had legislative competence to club together more buildings than one belonging to the same assessee and tax them as one unit,

21. It was strenuously urged on behalf of the petitioners that the "Act" is a colourable piece of legislation; the motive in enacting the same is not to levy tax on buildings but to reach the unearned income of speculators and the income that has escaped taxes. In support of this contention reliance was placed on the Statement of Objects and Reasons. In that Statement it was stated;

"A considerable amount of "shy" money, and sums saved by escapement of taxes, is at present going into property deals in the cities and larger towns in the State. The value of buildings and sites in cities like Bangalore and even in places like Mangalore Hubli, Belgaum and Davangere has risen to unprecedented levels out of all proportion to their real worth. Speculative business. In urban properties has developed into a regular trade. If not a racket, and those who make easy money out of it are also successfully escaping all taxes. Instead of profiteering middlemen being allowed to enrich themselves at the cost of society and make fabulous incomes by speculation, the State should try and take a part of the caboodle through taxes. While there can be no

<sup>14</sup> AIR 1960 All 136CFB

disagreement as to the desirability of taking this kind of unearned increment, the only question for consideration is how it may be tapped. All the States have Betterment Levy Acts on their Statute Books for the reconvey of a part of the due to irrigation facilities. If a levy of contribution from agriculturists owning irrigable lands is justified, there la greater justification to take away a share of speculative rises in the values of urban properties of social origin."

The first question that presents itself for decisions is whether the Statement of Objects and Reasons-can be looked into for finding out whether a statute is a colorable piece of legislation. Relying on the decision of the Supreme Court in *Hamdard Dawakhana v. Union of India*<sup>15</sup>, it was urged that when the constitutionality of an enactment is challenged on the ground of violation of any articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary and in that event the Court ought to take into consideration the subject-matter of the Act, the area in which it is intended to operate and its purport and intent. In order to do so, it is legitimate to take into consideration all factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief

which it intended to suppress, the remedy for the disease-which the legislature resolved to cure and the true reason for the remedy. I fail to see how this decision bears on the question whether the "Act" is a colourable piece of legislation or not. Next reliance was placed on the decision of the Supreme Court in *S.C. Prashar v. Vssantsera Dwarkadas*<sup>16</sup>, wherein S.K. Das, I observed (in paragraph 23 of the judgment) :

".,...,... .It is indeed true that the Statement of Objects and Reasons for introducing and Particular piece of legislation cannot be used for interpreting the legislation if the words used therein are clear enough. But the Statement of Objects and Reasons can be referred to for the purpose of ascertaining the circumstances which led to the legislation in order to find out what was the mischief which the legislation aimed at."

The rule laid down above has no application to the point in controversy before us. I have already interpreted the charging Section. For its interpretation there is no need to fall back on the Statement of Objects and Reasons. Assuming that the said Statement is admissible in law, assuming further that the definition of "owner", the floorage basis and the graduated tax scale, all, go to indicate that the real motive of legislature was to get a share in the speculative earnings of the assessee or/and from the "black" money which has escaped tax, even then the impugned "Act" cannot be considered as a colourable piece of legislation.

22. The question what exactly is a colorable legislation has come up for decision in a number of cases before the Supreme Court. I shall refer only to two of them. In *K.G. Gajapati Narayan Rao v. State of Orissa*<sup>17</sup>, dealing with the question what exactly is meant by "colorable legislation" this is what Mukherjea, J., (as he then was) observed : (Paragraph 9 at page 379);

"It may be made clear at the outset that the doctrine of colorable legislation

<sup>15</sup> AIR 1960 SC 554

<sup>17</sup> AIR 1953 SC 375

<sup>16</sup> AIR 1963 SC 1356

does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power vide Cooley's Constitutional Limitations, Vol. 1, p. 379. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction.

If the Constitution of a State distributes the legislative powers amongst different bodies, which, have to act within their respective spheres legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, In respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression

may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in *Attorney General for Ontario v. Reciprocal Insurers*<sup>18</sup>,

"Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

The substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority - Vide 1024 AC 328 at p, 337. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. Vide *Attorney General for Alberta v. Attorney General for Canada*<sup>19</sup>, But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it, really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy in his well-known work on

<sup>18</sup>1924 AC 328 at p. 337

<sup>19</sup>1939 AC 117 at p. 130 : (AIR 1939 PC 53 at p. 57)

Canadian Constitution that even if the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered 'ultra vires'. See Lefroy on Canadian Constitution, page 75."

In *Gullapalli Nageswara Rao v. A. P. S. R. P. Corpn*<sup>20</sup>., Subba Rao, J., speaking for the Court observed :

"The legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The legislature cannot overstep the field of its competency, directly or indirectly. The Court will scrutinize the law to ascertain whether the legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it. If, in fact, it has power to make the law, its motives in making the law are irrelevant."

From these decisions it follows that as long as a Legislature has competence to enact a law, it is immaterial with what motive it enacted the same. The true question for decision always is, whether the Statute enacted, taking its pith and substance into consideration, is one within the

legislative competence of the Legislature. If it is, it is a valid statute. If it is not, it is ultra vires of the Legislature. Hence no question of *bona fides* or mala fides on the part of the Legislature arises for consideration. I have earlier come to the conclusion that the Legislature had legislative competence to enact the "Act". Hence it cannot be considered as a colourable piece of legislation.

23. Now coming to the contention that the charging Section is vague and therefore we should hold the "Act" to be inoperative, that question really does not arise for decision in view of the findings reached by me earlier. It is true, as seen, earlier, that the charging Section (Section 4) is not happily worded. But then, it cannot be said that the same is incapable of judicial interpretation. If a Section in a statute is capable of "being judicially interpreted then the same cannot be held to be vague and unenforceable.

24. It was urged on behalf of some of the petitioners that Section 32 which gives power to the State Government to add to, omit, or vary any of the entries contained in Schedule I from time to time by means of Notification in the Official Gazette is an unguided and uncontrolled delegation of essential legislative power and therefore we should strike down the same. It was said that the power conferred on the Government under Section 32 is not a power to execute the law but a power to make law, because it is a matter of policy whether buildings situate in a particular town should be taxed or not and a decision on that question must be taken only by the Legislature. It was also contended that the grant of power to an outside authority to repeal or modify a provision in a statute passed by a Legislature was unconstitutional and as such not merely Section 32 is invalid. Its invalidity vitiates the entire "Act" as it is not separable from the rest of the "Act". According to the counter affidavit filed on behalf of the State, that in selecting towns for inclusion in Parts, I, II and III of Schedule I the Legislature had proceeded on certain fixed population basis. This submission was

<sup>20</sup> AIR 1950 SC 308

not challenged before us. Hence I have to hold that Schedule I was prepared on the basis of a definite legislative policy. The population in any town cannot be expected to be stationary. There is bound to be change in the population composition of the towns in the State. The Legislature in the very nature of things, cannot go on altering the Schedule as and when the population composition changes. Once having laid down the legislative policy, the Legislature can leave it to the Government to implement that policy by altering the Schedule when any alteration becomes necessary. Hence the power conferred on the State Government under Section 32 cannot be considered as a delegation of an essential legislative function. But, that power will have to be exercised by the State Government in accordance with the policy laid down by the Legislature. If it fails to carry out the legislative policy then what has to be struck down is the action of the Government and not the power conferred. This conclusion of mine finds support from the decision of the Supreme Court in *Banarsi Das v. State of Madhya Pradesh*<sup>21</sup>,

25. It was strenuously contended that the tax levied under the "Act" amounts to double taxation on buildings as the Legislature has already empowered the local bodies in the State to levy house tax and in exercise of that power those bodies have in fact levied house tax in most of the towns in the State and therefore, the levy should be struck down. I know no principle of law which interdicts double taxation. The power of the State to tax persons and things is one of the most extensive power known to law. That power "Is one so unlimited in force and so searching in extent, that the Courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it.." The only limitation on

that power is the wisdom of the legislature or the fear of popular resentment. Taxes as defined by Cooley in his *Constitutional Limitations* "are burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes". The power to tax rests upon public necessity, and it is inherent in every sovereignty. "However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the interest, wisdom, and Justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally." As observed by one eminent Judge that "it is unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." If a legislature can by a single measure tax a property till it is destroyed there is no doubt that it has power to do so long as the intention is not to confiscate there is no reason to hold that that power cannot be exercised by two or more installments. No decision taking the view that double taxation is impermissible under law was brought to our notice. There is no legal basis for the contention that a levy which results in taxing the same property more than once is invalid in law.

26. There is force in the contention that Section 3 (2) is an invalid provision. Under that Section unguided and uncontrolled power is given to the Government to exempt from payment of buildings tax any class of buildings. This, it can do, if, in its opinion, it is necessary in the public interest so to do. Power to exempt a person or a thing

<sup>21</sup> AIR 1958 SC 909

from payment of tax is essentially a legislative power. Ordinarily, that power should be exercised by the Legislature. Even the Legislature should exercise it so as not to offend Article 14. But, under Section 3 (2) blanket power is given to the Government to exempt from payment of buildings tax any class of buildings, on its subjective satisfaction that it is in public interest so to do. Conferment of such a power on the Government without any guidance for its exercise also attracts the mischief of Article 14 of the Constitution. The very power to exempt from taxation properties similar to those that are subject to tax under the "Act" introduce an element of inequality before law. What is bad is not the exercise of that power but the very existence of that power. A law which, creates conditions under which similar things can be differently treated is itself opposed to the equality clause. The provisions in the "Act" do not lay down the principles which should govern, the exercise of that power. Therefore, Section 3 (2) should be held to be void not only because the power conferred under. It amounts to a delegation of essential legislative function but also because the very existence of such a power is a threat to the equality clause. My view in this regard finds support from the decision of the Supreme Court *Kunnathath Thathunni Moopil Nair v. State of Kerala*<sup>22</sup>. The rule laid down in *P.J. Irani v. State of Madras*<sup>23</sup>, relied on by the learned Advocate-General is inapplicable to the point in controversy before us. After examining the provisions of the Statute impugned therein the Supreme Court came to the conclusion that enough guidance is afforded by the preamble and operative provisions in that Act for the exercise of the power of exemption given to the Government. That is not the case here. The learned Advocate General did not point out to us any provision in the "Act" from which the policy underlying the exercise of the power conferred, can be gathered.

27. But, because Section 3 (2) is invalid, it is not correct to say that the entire "Act" is void. That Section is clearly separable. Its separation from the other provisions in the "Act" does not in any manner affect the legislative policy, nor its removal interferes with the efficacy of the other

provisions in the "Act". It is an independent a provision and is not in any manner interwoven into the structure of the "Act". Therefore, while I agree with the contention that Section 3 (2) is an invalid provision and therefore it has to be struck down, I do not agree with the contention that as a sequel to striking down Section 3 (2) it is necessary to strike down the "Act".

28. By far the most important challenge directed against the "Act" is the one based on the equality clause in the Constitution. It was said that the mode and method of taxation adopted in the "Act" has brought about substantial inequality as regards the incidence of taxation. It was complained that classification of buildings on the basis of floorage taking into consideration the object of the "Act", is an irrational classification and the failure of the Legislature to make a rational classification has resulted in placing unequal burdens on the assesseees similarly placed. What was said is that the purpose of the "Act" is to levy tax with a view to augment public revenue and not to limit the floorage of the buildings in towns; therefore the basis of taxation ought to have been the annual letting value or the capital value of the building charged to tax and not its floorage. The floorage basis is an innovation of recent origin in the matter of levying tax on buildings. It defies well known and time-worn

<sup>22</sup> AIR 1961 SC 552

<sup>23</sup> AIR 1961 SC 1731

methods of taxation. But for that reason it need not be invalid. What we have to see is whether that basis results in the infringement of any of the constitutional guarantees. As mentioned earlier, the taxation power of the State is one of the most comprehensive powers. But that power like all other legislative, powers is subject to the equality clause in the Constitution. If the taxation power is used in such a manner as to impose unequal burdens on things or persons similar, then its validity is open to challenge under Article 14. It is of the very essence of taxation that it be levied with, equality and uniformity, and to this end, there should be some reasonable system of apportionment. When taxes are levied on property there must be an apportionment with reference to a uniform standard, or they degenerate into mere arbitrary exactions. Absolute equality of taxation can never be attained. That system is the best which cornea the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. The object should be to place the burden 'so that it will bear as nearly as possible equally upon all. For this purpose different systems adjusted with reference to the valuation of different kinds of property may be adopted, the essence of the matter being that there should be equality of taxation or something very near to it. Classification is an unavoidable concomitant of an exercise of its taxing powers by the State. The general limitation imposed by the constitutional provisions is that classification for tax purposes must be reasonable if it is to be held valid. A prohibited degree of inequality may result from ignoring differences relevant to taxation. Similar treatment of dissimilar tax subjects may be as invalid as the dissimilar treatment of similar tax subjects.

29. In adjudging reasonableness of classification, the Supreme Court observed in Civil Appeal No. 491 of 1963, that the Courts recognize greater freedom in the Legislature and if the statute discloses a permissible policy of taxation, the Courts will uphold it. The Courts undoubtedly lean more readily in favor of the presumption of constitutionality of a taxing statute but that is not to say that they will not strike down a statute unless it appears that the tax was imposed deliberately with the object of differentiating between persons similarly circumstanced. It must be evident to any one that the power to declare a legislative enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. As often

observed that one of the principles which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the Legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience and that elected representatives assembled in a Legislature enact laws which they consider reasonable for the purpose for which they are enacted. This initial presumption has a larger sway, as observed by Gajendragadkar, J. (as he then was) in *Khyerbari Tea Co, Ltd. v. State of Assam*<sup>24</sup>, when a statute is challenged on the ground of inequality before the law, inasmuch as it may place the burden on the petitioner to show that the impugned law denied equality before the law or equal protection of the law. But as observed by Justice Brewer, in *Gulf of Colorado and S. F R. Co. v. W. H. Ellis*<sup>25</sup>, in his inimitable language while good faith and knowledge of existing conditions on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of

<sup>24</sup> AIR 1864 SC 925

<sup>25</sup>(1897) 165 US 150

always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or Corporations to hostile discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining State action". It was laid down in *Kenchappa v. Sales Tax Officer, Bangalore*<sup>26</sup>, that fiscal enactments are not exempt from the ban against discrimination. The classification is not meant to be a mechanical formality devised in a haphazard manner as cover for raising money but must disclose differentiation pertinent to the burden being heavy in some cases and light in others. The principle of equality may be offended on account of dissimilarity of treatment in like instances or same treatment in cases between which resemblance is lacking. In AIR 1961 SC 552, the Supreme Court laid down that a taxing statute is not wholly immune from attack on the ground that it infringes the equality clause in Article 14, though the courts are not concerned with the policy underlying a taxing statute or whether a particular tax could not have been imposed in a different way or in a way that the Court might think more just and equitable; if the legislature has classified persons or properties into different categories which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal; similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification. Article 14 will not be in the way of such classification resulting in unequal burdens on different classes of properties; but if the same class of property similarly situated is subjected to an incidence of taxation, which results in inequality, the law may be struck down as creating an inequality amongst holders of the same kind of property.

30. I shall now proceed to examine the validity of Section 4, the charging Section read with the Schedules, in the light of the principles noticed above.

31. Section 4 charges all buildings in the towns listed in the First Schedule, in accordance with the rates provided in Schedule II. The First Schedule lists 121 towns. These towns are classified into three categories. Eleven towns, including Bangalore Metropolitan Area, are included in Part I, 17 towns are included in Part II and 93 towns are included in Part III. As mentioned earlier, we were told that this classification was made on the basis of population as ascertained at the last Census. Buildings situate in these towns are first classified into residential and non-residential buildings. All residential buildings in Part I are taxed at the same rate. Similarly, all non-

residential buildings in that Part are taxed at the same rate. A slightly lower rate of tax is adopted in the case of buildings listed in Part II and still lower rate of tax is levied on buildings in Part III. As between residential and non-residential buildings, some concession is shown to the residential buildings. Bangalore Metropolitan Area includes the City of Bangalore which is the heart of the area and the surrounding places like Kethamaranahalli', Yelahanka etc. The basis of taxation, as mentioned earlier, is the floorage of a building. The value of the building, its location and its utility does not enter into the picture. As observed by Buehler in his "Public Finance" (3rd edition) at page 378 :

<sup>26</sup> AIR 1957 Mys 45

"Because property taxation concentrates on real estate, it is essential that real estate should be assessed as accurately and as equitably as possible." Again at page 379 he observes :  
"Especial difficulties arise in the assessment of urban real estate because of its great variety, the complications of building construction, the high value of some plots of ground, and the numerous factors affecting the value of real estate." It is obvious and we can take judicial notice of it, that ground value in the City of Bangalore varies sharply from place to place. While building sites are available for a few rupees per sq. yard in Kethamaranahalli, Jodikempapura and Yelahanka, every yard of building site will cost somewhere between ₹ 150/- to 200/- in important business localities like Gandhinagar. B.G. Madiman Manager of Sri Shivayogeshwar Ginning and Pressing Factory, Hubli, petitioner in W. P. No. 688/1964 has sworn to the fact that ground value in places like Rajajinagar, Jayanagar and Jayamahall is about ₹ 40/- per sq. yard, while house sites in Gandhinagar, Kempegowcia Road and Narasimharaja Road cost more than ₹ 150/- per sq. yard. He has mentioned two instances of purchase of lands in Gandhinagar at the rate of ₹ 283/- per sq. yard respectively.

In support of that averment, he has produced copies of sale deeds executed on the 28th day of December 1962. He has also mentioned in his affidavit that one Sundatta Fabrics has rented on hire two shops in the Canara Bank Buildings near the Town Hall at Bangalore, about 40 ft x 21 ft. each, that is measuring in all about 1,683 sq. ft. at a monthly rental of ₹ 1885/-. That rent works out at ₹ 1.12 paise per sq. ft. per month. In the same building the Handloom House has taken on lease 2 shops at the rate of ₹ 0.45 per month per sq. ft. According to Madiman, while the site value at Bangalore ranges from ₹ 40/-per sq. yard to ₹ 283/- per sq. yard, the market value of land in the best or most sought after locality in Hubli is not more than ₹ 20/- per sq. yard. It may be noted that both Hubli and Bangalore are listed in Part I of Schedule I. The State has not chosen to deny these averments. Therefore, we have to proceed on the basis that they are true.

32. Value of sites differ from place to place in every town. They also vary" from town to town. These variations are not nominal variations - differences are very appreciable. That is so far as

the ground value is concerned. Now coming to the value of buildings, they must necessarily vary from building to building. Buildings charged with tax range from cow-sheds to palaces. Under the "Act" both a cow-shed situate in a slum area and an ultra modern cinema house in the best locality are charged with the same amount of tax, if the extent of the floorage of both is the same. The market value of the two is bound to widely differ. Therefore, there can be hardly any doubt that inequality is writ large on the "Act" and is inherent in the very provisions of the taxing Section. The classification of the buildings on the basis of the towns in which they are situate is not a rational classification for levying "building tax".

To me that position appears to be obvious. I have not come across any treatise on Public Finance wherein taxing buildings, for raising public revenue, on the basis of floorage is even contemplated. The floorage basis is not only unscientific, it is something arbitrary and mechanical. It does not conform to any of the known principles of taxation. In the very nature of things, under that basis the incidence of tax must fall unevenly on things similar. The classification adopted appears to be a mere mechanical formality devised in a haphazard manner as cover for raising money. It does not disclose differentiation pertinent to the burden being heavy in some cases and light in others. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause. In such matters there should be not only a classification but the same should be based upon reasonable ground of some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection. As mentioned earlier, the object of the "Act" is not to limit the floorage of the buildings in towns taut to raise public revenue. Therefore, the classification on the basis of floorage has no just relationship with the object of the "Act". Hence the "Act" suffers from lack of rational classification.

33. The basis of taxation adopted in the "Act" has a close resemblance to the basis adopted in the Travencore-Cochin Land Tax Act (15 of 1955, as amended by Act 10 of 1957), Under that Act a tax called land tax, at a flat rate of ₹ 2/- per acre, was levied on all lands irrespective of their productivity or to the use to which they' can be put to. The validity of that levy came up for consideration before the Supreme Court in Moopil Nair's Case, AIR 1961 SC 552. The Supreme Court struck down that Act on the ground that it was violative of Article 14 of the Constitution. The learned Chief Justice speaking for the Court observed thus (paragraph 8 at page 658) :

"..... .Ordinarily a tax on land or land revenue is assessed on the actual or the potential productivity of the land sought to be taxed. In other words, the tax has reference to the income actually made, or which could have been made, with due diligence, and, therefore, is levied with due regard to the incidence of the taxation. Under the Act in question we shall take a hypothetical case of a number of persons owning and possessing the same area of land. One makes nothing out of the land, because it is and desert. The second one does not make any income but could raise some crop after a disproportionately large investment, of labour and capital, A third one, in due course of husbandry, is making the land yield just enough to pay for the incidental expenses and labour charges besides land tax or revenue. The fourth is making large profits, because the land is very fertile and capable of yielding good crops. Under the Act, it is manifest that the fourth category, in our illustration, would easily be able to bear the burden of the tax. The third one may be able to bear the tax. The first and the second one will have to pay

from their own pockets, if they could afford the tax. If they cannot afford the tax, the property is liable to be sold, in due process of law, for realization of the public demand. It is clear, therefore, that inequality is writ large in the Act and is inherent in the very provisions of the taxing Section. It is also clear that there is no attempt at classification in the provisions of the Act. Hence, no more need be said as to what could have been the basis for a valid classification. It is one of those cases where the lack of classification creates inequality. It is, therefore, clearly hit by the prohibition to deny equality before the law contained in Article 'it of the Constitution."

These observations apply with equal force to the issue under consideration.

34. After the Supreme Court struck down the Travencore-Cochin Land -Tax Act, in Moopil Nair's case, AIR 1961 SC 552 the Kerala Legislature amended the same by classifying lands on the basis of their annual gross income. The amended Act classified lands into two classes, (1) lands getting an annual gross income of ₹ 10/- and more per acre, and (2) lands getting an annual gross income of less than ₹ 10/-. The validity of the amended Act came for consideration before the Kerala High Court in *Padmanabha Ravi Varma Raja v. Deputy Tahsildar, Chittur*<sup>27</sup>, The High Court struck down the Act as being violative of Article 14 of the Constitution. The same view was again taken by the Kerala High Court in *Padmanabha Ravi Varma Rajah v. State of Kerala*<sup>28</sup>,

35. Similar is the view taken by the Supreme Court of America in *Cumberland Coal Co. v. Board of Revision*<sup>29</sup>, wherein assessment on all coal fields in a township at the same sum per acre, notwithstanding differences in actual or market value due to distances from transportation facilities and other factors, was struck down as violating the equal protection clause of the 14th Amendment.

36. For the reasons already mentioned, I hold that the "Act" is void as it does not conform to the constitutional requirements embodied in Article 14.

37. The only contention remaining to be examined is that raised by Kri N.T. Raghunathan, the learned Counsel for the petitioner in W. P. No. 1095/64, namely that the "Act" to the extent it taxes garages, workshop and offices of the petitioner who carries on inter-State transport business is a restriction on freedom of trade, commerce or intercourse and hence invalid; even if the provisions concerned are considered as being regularly in character, as the Bill introduced into the Legislature had not received the previous sanction of the President as required by Article 304(b) of the constitution.

38. It was urged by Sri Raghunathan, the learned counsel for the petitioner that his client's garage, workshops and offices are instrumentalities of trade and to charge them with "building tax" is to affect his trade. Hence the levy under the "Act" being not compensatory in character and the Bill not having received the previous sanction of the President before its introduction in the Legislature, those buildings cannot be held to have been validly charged with "building tax."

39. Let us now examine how far this contention is correct ? Article 301 of the Constitution says

that subject to the other provisions of this Part, trade, commerce and inter-course throughout the territory of India shall be free'. Article 302 deals with power of Parliament to impose restrictions on trade, commerce and intercourse. For

<sup>27</sup> ILR (1963) 1 Ker 84 : AIR 1963 Ker 155      <sup>29</sup>(1931) 76 Law Ed 116

<sup>28</sup> AIR 1963 Ker 31

our present purpose that Article is not relevant. Article 303 has nothing to do with the present controversy. Article 30-1(b) the Article with which we are concerned reads;

"Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law -

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"(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest; Provided that no bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

We have to decide whether the impugned levy is a restraint on the freedom of trade, commerce or intercourse. If that question is answered in the affirmative, then there can be no doubt that the levy in question is not saved by Article 304(b) for the simple reason that the Bill before its introduction in the Legislature had not received the previous sanction of the President.

40. Admittedly the restraint complained of operates to restrict trade, commerce and intercourse, not directly and immediately but indirectly and remotely. What is complained of is that tax levied on buildings used for the purpose of carrying on trade, commerce and intercourse adversely affects trade or commerce, no doubt in an indirect and remote manner but even an indirect or remote restraint is within the mischief of Article 301. But, according to the learned Advocate-General, such indirect restraints are not within the scope of Article 301. In support of his contention that even indirect restraints come within the prohibition of Article 301, Sri Raghunathan, relied on the decisions of the Australian High Court, interpreting Section 92 of the Australian Constitution Act, 1900, which according to him is in part materia with Article 301. I do not think that it is necessary to refer to any of the decisions rendered by the Australian High Court interpreting Section 92 of the Australian Constitution Act, 1900, in view of the decision of the Privy Council in *Commonwealth of Australia v. Bank of New South Wales*<sup>29</sup>, Delivering the judgment of the Board, in that case, Lord Porter observed thus (at page 771) :

"Through all the subsequent cases in which Section 92 has been discussed, the problem has been to define the qualification of that which is the Constitution is left unqualified, to this labyrinth there is no golden thread. But it seems that two general propositions may be accepted. (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that Section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote."

On the point in controversy, it is not profitable to go in search of decisions rendered by Court

outside India, as in my opinion, that point is no more *res Integra*, in view of the decisions of our Supreme Court. The question whether even indirect restraints are

<sup>29</sup>(1849) 2 All ER 753

within the contemplation of Article 301 came up for consideration by the Supreme Court in *Atiabari Tea Co. Ltd. v. State of Assam*<sup>30</sup>, Dealing with that question, this is what Gajendragadkar, J. (as he then was) speaking for the majority observed (at page 254) :

"Thus considered we think it would be reasonable and proper to hold that restriction freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fail within the purview of Article 301. The argument that a tax should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be :

'Does the impugned restriction operate directly or immediately on trade or its movement ? It is in the light of this test that we propose to examine the validity of the Act under scrutiny to the present proceedings.'

But, according to Sri Raghunathan, the Supreme Court did not adhere to this view in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan*<sup>31</sup>, In support of that contention of his, he read to us certain passages from the majority judgment in that case. On the other hand, the learned Advocate-General arguing *contra* referred us to other passages in that Judgment. I do not think, the question that we are considering now pointedly came up for decision in that case. In that case, the Supreme Court proceeded on the basis that the impact of the tax levied under Rajasthan Motor Vehicles Taxation Act (II of 1951) was direct and immediate, but the majority of the learned Judges justified that levy on the ground that it is compensatory and consequently not hindering the freedom of trade, commerce and intercourse. In view of the decision of the Supreme Court in *Firm A.T.B. Mehtab Majid and Co. v. State of Madras*<sup>32</sup>, there is no need to pronounce as to the scope of the decision in Rajasthan Transport case, AIR 1962 SC 1406 as regards the point in controversy before us. In *Firm Mehtab Majid and Co.'s* case, AIR 1969 SC 928, the Supreme Court after examining its decisions in *Atiabari Tea Co.'s* case, AIR 1961 SC 232 and Rajasthan Transport case, AIR 1962 SC 1406 observed : In paragraphs 8 and 9 of the judgment (at page 930) :

"Article 301 of the Constitution which provides for trade, commerce and intercourse throughout the territory of India to be free subject to the other provisions of Part XIII, has been construed by this Court in 1961-1 SCR 809 : AIR 1961 SC 232 and in AIR 1962 SC 1406.

The majority view in the Atiabari Tea Co. case, 1961-1 SCR 809 : AIR 1961 SC 232 which has been accepted in the Automobile Transport Case, AIR 1962 SC 1406, is as expressed by Gajendragadkar, J. at page 860 :

"Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301 . . . ."

In my opinion, this decision concludes the matter and there is no further room, at any rate before this Court, for controversy whether the restrictions prohibited by Article 301 include restrictions which operate indirectly as well ? Hence I am unable to accept the contention of Sri Raghunathan that the impugned "Act", in any manner, is hit by Article 301 of the Constitution.

41. As I have earlier held that Section 4, the charging Section, is violative of Article 14 of the Constitution and as the other Sections are merely machinery provisions which cannot exist without the charging Section, the entire "Act" must be held to be void and, inoperative. Hence, I order that it be struck down.

42. Now as regards costs, as the petitioners have failed in most of their contentions, the proper order is to direct the parties to bear their own costs.

**Govinda Bhat, J.**

43. I have had the advantage of reading the Judgment, which my learned brother Hegde, J. has just delivered. Having regard to the full discussion of the arguments presented before us on questions III, IV, V, VI and VIII, formulated in paragraph 5 of his judgment, I find it unnecessary to add my observations on the said questions. The main questions presented for decision on the arguments presented before us are questions I, II and VII formulated in the said paragraph 3, with which alone I shall deal.

44. This batch of 54 writ petitions, which were heard together, raises the constitutionality of the Mysore Buildings Tax Act, 1962 (Mysore Act No. 4 of 1963), hereinafter referred to as the Act. The petitioners come from the Old Mysore, Bombay, Madras and Hyderabad areas of the New Mysore State formed on the Reorganization of States; they own buildings as defined in Section 2(4) of the Act; their buildings are either residential, non-residential, factories or workshops. The buildings of the petitioners are situated in one or other of the 'Rating Areas' specified in Schedule I of the Act.

45. The petitioners have challenged the Act on a number of grounds as ultra virus of the Constitution on the ground of want of Legislative competence and infringement of the Fundamental Rights guaranteed in Articles 14 and 19(1)(f) of the Constitution. My learned brother, whose Judgment has been just delivered, has very fully discussed the grounds

formulated as questions III to VI and VIII.

46. The challenge to the constitutionality of the Act, has been made mainly on the following two grounds : I. The Act is a piece of colourable legislation; it is not within the competence of the State Legislature; and in pith and substance, the impugned tax is a capital levy which is within the exclusive legislative jurisdiction of the Union-Parliament. II. That the basis of levy of the impugned tax being the total floorage area of all buildings owned by an Assessee in the same 'Rating Area' in disregard of the reasonable annual rent or capital value or type of building and its location, the exaction is arbitrary and has resulted in mal-apportionment of the tax burden and therefore, the Act violates Articles 14 and 19(1)(f) of the Constitution of India.

47. Grounds I and II formulated above., cover questions I, II and VII formulated by my learned brother.

48. The petitions have been opposed on behalf of the State by the learned Advocate-General and his contentions were, that the impugned Act falls within Entry 49 of List II of Schedule VII of the constitution of India, and that the basis of levy, is the total floorage area and not the capital or rental value, does not take the tax outside the scope of entry 49 of List, II; that the Legislature has absolute discretion its determine the standard for charging a tax liability and therefore, the challenge based on Articles 14 and 19(1)(f) are untenable. The learned Advocate-General has further contended that the further contention of the petitioner in W. P. 318/64 that the proviso (i) to Section 4 is inconsistent with the scheme of the Act, and therefore, unenforceable, is wholly untenable.

49. The Act called 'The Mysore Buildings Tax Act, 1962' has been passed by the State Legislature in the purported exercise of its powers under Entry 49 of List II of Schedule VII of the Constitution. The Act received the assent of the Governor on January 8, 1963, and came into force with effect from January 1st, 1964, by virtue of a Notification issued by the State Government in the Official Gazette.

50. In order to appreciate the contentions of the parties, it is necessary to briefly set out the relevant provisions of the Act. The preamble of the Act states that it has been enacted as "it is expedient to provide for the levy of a tax on buildings". Section 2 defines, inter alia, the expressions "buildings", "floorage", "local authority", "owner", "prescribed", "rating area", "residential building", and "Schedule". It is sufficient to set out the definitions of (a) building, (b) floorage, (c) rating area, and (d) residential building. The said terms are defined thus :

- (a) "building" means a house, outhouse, garage, or any other structure, or part thereof, whether of masonry, bricks, wood, metal or other material, but does not include any portable shelter or any shed constructed principally or mud, bamboos, leaves, grass or thatch or a latrine which is not attached to the main structure;
- (b) "floorage" means the area included in the floor of a building, and, where a building has more than one floor, the aggregate area included in all the floors together;
- (c) "rating area" means any area which is included or which may hereinafter be included in any part of Schedule I to this Act;
- (d) "residential building" includes a cattle shed, garage or store-room attached to a

residential building and used by the person occupying the building for the more convenient enjoyment of the building as a residential building;

Sub-Section (1) of Section 3 exempts buildings owned by the State and Central Governments or any local authority, and also buildings used principally for religious, charitable or educational purposes. Sub-Section (2) empowers the State Government to exempt from payment of tax any class of buildings, if in its opinion, it is necessary in the public interest so to do. The said Sub-Section for the reasons given by my learned brother is clearly unconstitutional. If one or other of the two grounds mentioned above fail, Sub-Section (2) of Section 3, being severable, the rest of the Act can stand.

51. Section 4 is the corner stone of the Act; that is the charging Section. The constitutionality of the Act rests entirely on its validity. It is necessary to set out that Section in its entirety, which reads :

"4. Levy of Buildings Tax.

(1) There shall be charged, levied and paid tax (hereinafter referred to as 'buildings tax') in respect of total floorage of every building.

(a) at the rate or rates specified in Sections A and B of Part I of Schedule II on residential buildings and non-residential buildings, as the case may be, situated in every rating area specified in Part I of Schedule I;

(b) at the rate or rates specified in Sections A and B of Part II of Schedule II on residential buildings and non-residential buildings, as the case may be, situated in every rating area specified in Part II of Schedule I;

(c) at the rate or rates specified in Sections A and B of Part III of Schedule II on residential and non-residential buildings, as the case may be, situated in every rating area specified in Part III of Schedule I :

Provided that -

(i) where more than one building in the same rating area is owned by the same person the buildings tax shall be levied on the aggregate floorage of all such buildings;

(ii) if any building consists of both residential and non-residential portions, the residential and non-residential portions shall be deemed to be separate buildings and the buildings tax shall be levied accordingly;

(iii) if any residential building is converted into a non-residential building by being put to non-residential use or otherwise, buildings tax shall be payable at the rates applicable to non-residential buildings, and credit shall be given to the tax already levied and collected in respect of the building as a residential building.

Explanation 1 - A building which is not liable to be taxed under this Act on account of its having a floorage of not more than one thousand square feet or two hundred and fifty square feet, as the case may be, shall become liable to be so taxed. If the floorage of the building is subsequently increased by new constructions or additions or combinations.

Explanation 2 - Where the floorage of the building which has already been taxed is subsequently increased by new extensions or additions or combinations, tax shall be

computed on the total floorage of the building including that of the new-extensions or additions or combinations and credit shall be given to the tax already levied and collected in respect of the building before such extensions or additions or combinations.

2. The building tax shall be payable by the owner of the building.

"(3) Subject to the provisions of Sub-Section (1), the buildings tax in respect of the floorage of any building shall not be payable more than once under this Act."

Section 5 provides for the mode of computation of floorage of buildings for the purpose of assessment under the Act. Section 6 provides for 'Returns' to be furnished by the owners of buildings. According to the said Section such 'Returns' shall be furnished,-

- (i) in, the case of buildings in existence on the date of commencement of the Act, within thirty days from the date of such commencement; and
- (ii) in the case of buildings the construction of which is completed after the commencement of the Act, within two months from the date on which the construction of the building is completed.

Section 8 makes provision for assessment and Section 9 provides for Notice of demand of the tax assessed. Sections 10, 11 and 12 deal with Appeals and Revisions. Section 25 empowers the State Government to make rules for carrying out the purposes of the Act. Section 27 enables the State Government, by notification in the official gazette, to empower the Local Authorities (Municipal Corporations etc.,) as may be specified in the notification, to levy and collect the tax on buildings situated in the area within the jurisdiction of such Local Authority. The Local Authority collecting the tax, however, is merely a collecting agent for the State and is entitled to retain ten per cent of the tax collected as the cost of collection, and is liable to pay the balance to the State Government.

52. Schedule I specifies the names of 121 Local Authorities in the State of Mysore, and all the buildings, subject to the exceptions contained in Sub-Section (1) of Section 3, situated within the jurisdiction of the said Local Authorities, are charged to tax by Section 4. Schedule I is divided into Parts I, II and III; the basis of the division being the population of the cities or towns, hereinafter referred to as the 'Rating Areas'. The Rating Areas having a population of more than 75,000 have been classified in Part I; Rating Areas having a population of more than 25,000 but not more than 75,000 in Part II; and Rating Areas having a population of more than 10,000 and not more than 25,000 in part III. Schedule II prescribes the rates of the tax in respect of the total floorage of buildings situated in the Rating Areas specified in Schedule I.

Schedule II provides for a progressive slab system of taxation based on the total floorage of buildings owned by the assessee. The rates are the highest in respect of buildings situated in the Rating Areas described in Part I of Schedule I; the rates for the buildings in the Rating Areas situated in Part II of Schedule I are lower than that of Part I; similarly the rates for buildings situated in Part III are lower than that under-Part II. A distinction is further made between residential and non-residential buildings, both as to the rates of taxation as well as the exemption limit under the slab system. In respect of residential buildings, on the first one thousand square

feet of the total floorage, the tax is Nil, while in respect of non-residential buildings, there is no such exemption limit provided the total floorage of the non-residential building exceeds two hundred and fifty square feet. This, in brief, is the scheme of the Act.

53. On an examination of the entire scheme of the Act, my learned brother has expressed his opinion that the unit of taxation under Section 4 is 'a building' and that the intention of the Legislature to levy tax on the basis of aggregate floorage of all buildings owned by an assessee in the same Rating Area as one unit, as contended by the learned Advocate-General on behalf of the State, has not been effectuated in clear language. I have utmost respect for the opinions of my learned brother, whose experience on the Bench is more than mine, but on careful deliberation and due consideration, I am unable to persuade myself to concur in his opinion that on a true and correct interpretation of the Act, the Legislative intent has not been effectuated in unambiguous language, or in, other words, that there is any room for doubt as to the clear intention of the Legislature. Having reached the conclusion that the unit of taxation under the Act is 'a building', my learned brother has not expressed any opinion on the question presented for decision whether the impugned tax falls within or outside the scope of Entry 49 of List II of Schedule VII, in case it is held that the Act levies a charge to tax on the basis, of the total floorage of all buildings (except exempted buildings) owned by an assessee in the same Rating Area.

54. The rules governing the construction of tax statutes are the same that govern any other statute, including the rules that the intention of the legislature governs, words are to be construed in their ordinary meaning, special words control general words, *expressio unius est exclusio alterius*, construction as a whole, contemporaneous construction, construction in, connection with other statutes etc. In the administration of the laws for the collection of the public revenue, it is in the first instance necessary to ascertain the legislative intent in their several provisions, and next to give effect to that intent in applying it to the subject-matter. The underlying principle of all construction is that the intent of the Legislature should be sought in the words employed to express it, and that when found it should be made to govern, not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review. In construing tax statutes, the substance and not the form is to be considered. Beyond the words employed, if the meaning is plain and intelligible, the court is not to go in search of legislative intent; but the legislature must be understood to intend what is plainly expressed, and then nothing remains but to give the intent effect. Statutes relating to taxation are to be so construed as to carry into effect the obvious intent of the legislature, rather than to defeat that intent by a too strict adherence to the letter. If the words of the law seem to be of doubtful import, it may then perhaps become necessary to look beyond them in order to ascertain what was in the legislative mind at the time the law was enacted; what the circumstances were, under which the action was taken; what evil, if any, was meant to be redressed; what was the leading object of the law, and what the subordinate and relatively unimportant objects." (1) *The Law of Taxation* by Dr. Cooley Vol. II, Paras 501 and 502. To the same effect in the view of the law laid down by the Supreme Court of India in *Abraham T. The Income-tax Officer, Kottayam, 1961* (2) BCK 765 at p, 771 I (AIR 1961 SC 609 at p. 612), wherein the Supreme court stated the rule thus :

"In interpreting a fiscal statute, the court cannot proceed to make good deficiencies it there be any; the court must interpret the statute as it stands and in case of doubt in a manner favor, able to the tax-payer."

We have to suppose that the legislature had in view in framing the provisions of any tax law, the existence of the following objects: (a) Providing a public revenue; and

(b) the securing of individuals against extortion and plunder under cover of the proceedings to collect the revenue.

The provisions for the achievements of the twin objects are important provisions of the law; other provisions may be made for subordinate purposes. "It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically construed with reference to the particular language in which they are expressed; When there is any ambiguity found, the construction must be in favor of the public; because it is a general rule that when the public are to be charged with a burden, the intention, of the legislature to impose that burden must be explicitly and distinctly shown." (1) The Law of Taxation by Dr. Cooley Vol. II, Para 503. The better rule according to Dr. Cooley, between the rules of strict construction and liberal construction, is the one stated in paragraph 505 of his treatise on taxation in Volume II :

"Revenue laws are not to be construed from the standpoint of the tax-payer alone, nor of the government alone. Construction is not to assume either that the taxpayer, who raises the legal question of his liability under the laws, is necessarily seeking to avoid a duty to the State which protects him, nor, on the other hand, that the Government, in demanding its dues, is a tyrant, which, while too powerful to be resisted, may justifiably be obstructed and defeated by any subtle device or ingenious sophism whatsoever. There is no legal presumption either that the citizen will, if possible, evade his duties, or, on the other hand, that the government will exact unjustly or beyond its needs. All construction, therefore, which assumes either the one or the other, is likely to be mischievous, and to take one-sided views, not only of the laws, but of personal and official conduct. The Government in its tax legislation is not assuming a hostile position towards the citizen, but is apportioning, for and as the agent of all, a duty among them; and the citizen, it is to be presumed, will perform that duty when it is clearly made known to him, and when the time of performance has arrived. Unjust exactions, if such are made, must be attributed to human imperfection, not to intent; and frauds and evasions are to be supposed exceptional. Without regard to whether tax statutes should receive a strict or a liberal construction, it is elementary that they should receive "a fair construction, to effect the end for which they were intended." Strict construction does not mean such a construction as to defeat the intention of the legislature. Where there is really no ambiguity, the rule that ambiguities must be resolved in favor of the taxpayer does not, of course, apply.

The rule of strict construction does not go to the extent of cutting off and shutting out all the lights that may be reasonably brought to bear in, determining the intention of the law-making power."

55. If we apply the above rules of interpretation, the correctness as to which there can be no doubt, it is clear to my mind that the charge to tax under Section 4 is on all the buildings owned by an assessee in the same Bating Area on the basis of the aggregate floorage of all such buildings. In none of the pleadings filed on behalf of the petitioners, a contention has been raised that on a true interpretation of the Act, the unit of taxation is 'a building' and not all taxable buildings owned by an assessee on the basis of the aggregate floorage at the rates specified in Schedule II. It is only in W.P. 318/63, that the petitioner, represented by his learned counsel Sri K. Srinivasan, had urged that on a true interpretation of the Act, that the tax is not to be computed on the basis of the total floorage of all taxable buildings owned by an assessee; but the pleadings in his case, which I shall presently set out, do not raise any such contention. One of the reliefs prayed for by the said petitioner in paragraph 3(b) of the petition reads thus :

"This Hon'ble High Court may be pleased to strike down the proviso to Section 4 of the Mysore Buildings Tax Act, 1962 from the Statute Book as an unconstitutional piece of legislation.' In paragraph 4 of the affidavit of the petitioner, filed in support of the said writ petition, after setting out portions of Section 4(1), Section 5, Section 6(1) and Rule 4(1) of the Rules, the grounds in support of the relief prayed for in paragraph 3(b) of the petition, have been set out thus :

"5. From the foregoing, it is evident that the scheme of the Act is to levy buildings tax in respect of each building separately.

6. However, the proviso to Section 4 of the Act reads :

"Provided that -

- (i) where more than one building in the same rating area is owned by the same person the buildings tax shall be levied on the aggregate floorage of all such buildings;
- (ii) if any building consists of both residential and non-residential portions the residential and non-residential portions shall be deemed to be separate buildings and the buildings tax shall be levied accordingly;
- (iii) If any residential building is converted into a non-residential building by being put to non-residential use or otherwise, buildings tax shall be payable at the rates applicable to non-residential buildings, and credit shall be given to the tax already levied and collected in respect of the building as a residential building.

7. The Supreme Court in the case of 1859-36 ITR 1 : AIR. 1959 SC 713) observed that the territory of a proviso is to carve out an exception to the main enactment and exclude something which otherwise would have been within the Section. The charging Section 4, as I submitted earlier, deals with levy, charge and payment of buildings tax in respect of the total floorage of every building. The proviso can only set as an exception to this charging Section; but on the contrary the proviso purports to levy tax on the aggregate floorage of all the buildings owned by the same person. This proviso is prima facie opposed to the scheme of the Act which is evidenced by the Various Sections and rule reproduced above which go to show that the object of the Act is to levy buildings tax separately in respect of each building.

8. There is no provision under the Act for computation of the aggregate floorage of all tile buildings owned by the same person and hence the proviso to Section 4 (1) of the Act is also ineffective." It was on the basis of the above pleadings that an argument was advanced by the learned counsel that the intention of the legislature has not been effectuated clearly and as such, there is a doubt, and the benefit of doubt has to be given to the taxpayer.

56. In order to appreciate the contention of the learned counsel on this question. It is necessary to set out clause 4 of the Bill and Section 4 of the Act side by side.

| <b>Clause 4 of the Bill</b>  | <b>Charge of buildings tax.- Section 4 of the Act. Levy of buildings tax.-</b>  |
|--|---|
| (1) Subject to the other provisions of this Act there shall be charged a tax (hereinafter referred to as "buildings tax") at the rate or rates specified in Schedule II in respect of the total floorage of every building the construction of which is completed on or after the first day of November 1956 and which has a floorage of one thousand square feet or more. | (1) There shall be charged levied and paid tax (hereinafter referred to as 'buildings tax') in respect of total floorage of every building,   |
| (a) at the rate or rates specified in Sections A and B of Part I of Schedule II on residential buildings and non-residential buildings as the case may be situated in every rating area specified in part I of Schedule I;   |   |
| (2) The buildings tax shall be payable by the owner of the building.   | (b) at the rate or rates specified in Sections A and B of Part II of Schedule II on residential buildings and non-residential buildings as the case may be situated in every rating area specified in Part II of Schedule I;        |
| Explanation 1. - For the purposes of this Section the construction of a building shall be deemed to have been completed when it has been actually occupied.  | (c) at the rate or rates specified in Sections A and B of Part III of Schedule II on residential and non-residential buildings as the case may be situated in every rating area specified in Part III of Schedule I; Provided that- |
| Explanation 2. - A building which is not liable to be taxed under the provisions of this Act on account of its having a floorage of less than one  | (i) where more than one building in the same rating area is owned by the same person the buildings tax shall be levied on the aggregate floorage of all   |

|  |   |
|--|---|
| <p>thousand square feet shall become liable to be so taxed if the floorage of the building is subsequently increased to one thousand square feet or more as computed in the manner specified in Section 5 by new constructions or additions or combinations.</p>   | <p>such buildings;</p>  |
| <p>(ii) if any building consists of both residential and non-residential portions the residential and non-residential portions shall be deemed to be separate buildings and the buildings tax shall be levied accordingly;</p>   |   |
| <p>Explanation 3.-Where the floorage of a building which has already been taxed is subsequently increased by new extensions or additions or combinations tax shall be computed on the total floorage of the building including that of the new extensions or additions or combinations and credit shall be given to the tax already levied and collected in respect of the building before such extensions or additions or combinations.</p> | <p>(iii) if any residential building is converted into a non-residential building by being put to non residential use or otherwise buildings tax shall be payable at the ratio applicable to non-residential buildings and credit shall be given to the tax already levied and collected in respect of the building as a residential building.</p>                    |
| <p>Explanation 4.-Where the floorage of a building which is not liable to be taxed under the provisions of this Act on account of its construction having been completed before the first day of November 1956 is on or after the said day increased by new extensions additions or combinations tax shall be computed only on the floorage of the new extensions or additions or combinations."</p>   | <p>Explanation 1.-A building which is not liable to be taxed under this Act on account of its having a floorage of not more than one thousand square feet or two hundred and fifty square feet as the case may be shall become liable to be so taxed if the floorage of the building is subsequently increased by new constructions or additions or combinations.</p> |

Explanation 2. - Where the floorage of the building which has already been taxed is subsequently increased by new extensions or additions or combinations, tax shall be computed on the total floorage of the building including that of the new extensions or additions or combinations and credit shall be given to the tax already levied and collected in respect of the building before such extensions or additions or combinations.

(2) The buildings tax shall be payable by the owner of the building.

(3) Subject to the provisions of Sub-Section (1), the buildings tax in respect of the

floorage of any building shall not be payable more than once under this Act."

The Bill has undergone material alterations at the Select Committee stage. The Bill as introduced in the Mysore Legislative Assembly was an exact copy of the Kerala Buildings Tax Act, 1961 (Kerala Act 19 of 1961). The Bill provided for levy of tax at the rate or rates specified in Schedule II thereto, in respect of the total floorage of every building, the construction of which is completed on or after the 1st day of November 1956, which has a floorage of one thousand square feet or more. The Select Committee made the following material alterations in the Bill which was finally passed by the Legislature.

(a) That all buildings in existence on the date of the commencement of the Act, and all buildings the construction of which is completed after the commencement of the Act, are charged to tax at slab rates prescribed in Parts I, II and III of Schedule II of the Act;

(b) Proviso (i) to Sub-Section (1) of Section 4 was introduced with the clear intent that where more than one building in the same Rating Area are owned by the same assessee, the tax should, be computed on the basis of the aggregate floorage of all such building; and

(c) The exemption given to factories and workshops was deleted.

57. Section 4 is the charging Section. The opening words of Sub-Section (1) of Section 4 reads :

"There shall be charged, levied and paid tax (hereinafter referred to as 'buildings tax') in respect of total floorage of every building. .... ."

(a) xx xx xx

(b) xx xx xx

(c) xx xx xx

Provided that -

where more than one building in the same rating area is owned by the same person the buildings tax shall be levied on the aggregate floorage of all such buildings;" An argument was advanced that while the main Sub-Section (1) of Section 4 states "that there shall be charged, levied and paid tax," proviso (i) has omitted the words "charged and paid", but only used the word "levied". I am unable to see any substance in this argument. The charging Section is to be interpreted in accordance with the rules of interpretation enunciated above. In my opinion, the word "charged" in the opening words of sub. sec. CD of Section 4 was redundant, and the word "levied" was sufficient to convey the intention of the Legislature. The word 'levy' as applied to taxation has no doubt been given a variety of meanings; it is sometimes used in an administrative sense as referring to the mere ministerial or executive acts of ascertaining and entering the taxes on the tax-book and collecting them, but in its proper sense as applied to the determination of the amount or rate to be charged, it is the formal and official action of the Legislative body invested with the power of taxation, whereby. It determines and declares that a tax of a certain amount, or of a certain percentage on value, shall be imposed on persons and property subject thereto." (3) 84 Corpus Juris Secundum - p. 679.

"When the word 'levy' or 'levied' is used in the charging Section, whether in the main Section or in its proviso, the only possible meaning to be given is that it is the

determination of the amount of rate charged by the legislature invested With the power of taxation. If the word 'levy' or 'levied' had been found in a Section or rule dealing with administrative or ministerial acts, it might be possible to hold that it was used in the sense of computation of tax. The drafting of Section 4, as my learned brother has rightly observed, is not happy; but the intention of the Legislature has been clearly indicated in that Section as could be seen from the proviso (i) of Sub-Section (1) and Explanations (1) and (2) of Section 4. If such was not the intention, the word 'total' in the opening words of sub-section (1) was unnecessary.

The expression 'floorage' has been defined in sub-section (5) of Section 2 meaning the aggregate area included in all the floors together. If the intention, of the Act was that the unit of taxation is 'a building' and not all buildings owned by the same assessee in the same rating area, the word 'total' preceding the expression "floorage of every building" in Sub-Section (1) of Section 4 was wholly unnecessary. In my opinion, there is no ambiguity or doubt as to what the legislature intended to tax, as is evident by Section 4, and the said Section charges to tax ail buildings owned by an assessee in the same Rating Area as the unit of taxation on the basis of the aggregate floorage of all such buildings at the rates specified in Schedule II.

58. The pith and substance of the Act, in my judgment, is that it levies, for the support of the State Government, a tax styled as "buildings Tax" on all buildings situated in the Rating Areas specified in Parts I, II and III of Schedule II at the rates specified therein, on the basis of the aggregate floorage area of all the buildings owned by an assessee either on the date of the commencement of the Act or in the case of buildings constructed thereafter, on the date of their completion land that the said tax is not payable more than once.

59. The power of taxation is the power inherent in the Sovereign State to recover a contribution of money in accordance with some reasonable rule or apportionment from the property or occupations within its jurisdiction for the purpose of defraying the public expenses. Entry 49 of List II of Schedule VII, read with Article 246 of the Constitution, does not operate as grant of the power of taxation to the State Government, but merely constitutes a limitation upon a power which would otherwise be practically without limit. The inherent power of taxation vested in the Sovereign State extends to everything, over which the Sovereign power extends, but, not to anything beyond its Sovereign power. Under a Federal system of Government, as ours, the power of taxation of the Union or State Government does not include things beyond their respective Sovereign power. Taxation is an act of sovereignty to be performed, so far as it conveniently can be, with justice and equality to all. Dr. Cooley in his classical Treatise on the 'Law of Taxation' states :

"The power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent Government. It is possessed by the Government without being expressly conferred by the people. The power is inherent in the people because the sustenance of the government requires contributions from them. In fact the power of taxation may be defined as "the power inherent in the sovereign state to recover a contribution of money or other property, in accordance with some reasonable rule or apportionment, from the property or occupations within its jurisdiction for the purpose of

defraying the public expenses". Constitutional provisions relating to the power of taxation do not operate as grants of the power of taxation to the government but instead merely constitute limitation upon a power which would otherwise be practically without limit. This inherent power to tax extends to everything over which the sovereign power extends, but not to anything beyond its sovereign power. Even the Federal government's power of taxation does not include things beyond its sovereign power."

The power of the State Government to impose taxes on lands and buildings, within its jurisdiction, is subject to the Constitutional limitations on that power, which would otherwise be practically without limit. The said limitations are :

- (1) the scope of the power limited by Entry 49 of List II of Schedule VII;
- (2) the guarantee of Article 14 against arbitrary enactment and in the case of property taxation the guarantee of reasonableness contained in Clause (6) of Article 19.

In AIR 1964 SC 925 the Supreme Court stated the law thus :

"It is well settled that when a power is conferred on the Legislature to levy a tax, that power itself must be widely construed; it must include the power to impose a tax and select the articles or commodities for the exercise of such power; it must likewise include the power to fix the rate and prescribe the machinery for the recovery of the tax. This power also gives jurisdiction to the Legislature to make such provisions as, in its opinion, would be necessary to prevent the evasion of the tax. In imposing taxes, the legislature can also appoint authorities for collecting taxes and may prescribe the procedure for determining the amount of taxes payable by any individual; all these provisions are subsidiary to the main power to levy a tax and, therefore, once it is shown that the tax in question has been levied on goods carried, it would be open to the legislature to prescribe the machinery for recovering the said tax. As was observed by Chief Justice Marshall in *McCulloch v. Maryland*<sup>33</sup>, 'the power of taxing the people and their property is essential to the very existence of Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The statement of the law must, however, be read subject to the condition that even tax statutes have to satisfy the test of reasonableness prescribed by Clause (6) of Article 19, and the fundamental right of equality before law guaranteed by Article 14 as well as the test prescribed by Article 301 .....

It is of course, true that the validity of tax laws 'can be questioned in the light of the provisions of Articles 14, 19 and Article 301 if the said tax directly and immediately imposes a restriction on the freedom of trade; but the power conferred on this Court to strike down a taxing statute if it contravenes the provisions of Article 14, 19 or 301 has to be exercised with circumspection, bearing in mind that the power of the State to levy taxes for the purpose of governance and for carrying out its welfare activities is a necessary attribute of sovereignty and in that sense it is a power of paramount character. In what cases a taxing statute can be struck down as being un-

constitutional is illustrated by the decision of this Court in 1961-3 SCR 77 : AIR 1961 SC 552. In that case a careful examination of the scheme of the relevant provisions of the Travencore-Cochin Land Tax Act (No. 15 of 1955) satisfied this Court-that the said Act imposed unreasonable restrictions on the fundamental rights of the citizens, conferred unbridled power on the appropriate authorities, introduced unconstitutional discrimination and in consequence, amounted to a colourable exercise of legislative power. It is in regard to such a taxing statute which can properly be regarded as purely confiscatory that the power of the Court can be legitimately invoked and exercised." It is by applying the above principles of law, as enunciated by our Supreme Court, the two grounds-of challenge to the Act formulated above have to be determined. I shall first deal with the Constitutional limitation on the power of the State contained in Entry 49 of List II of Schedule VII and next deal with the second

<sup>33</sup>(1819) 4 Law Ed. 579

ground of attack based on Articles 14 and 19. Re : Colorable legislation- :- In order to appreciate the contention resting on this ground it is necessary to determine the scope and ambit of the power of the State to levy tax on lands and buildings under Entry 49 of List II of Schedule VII. Article 246 of the Constitution reads :-

"(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) (Omitted as unnecessary.)

(3) Subject to Clauses (1) and (2), the legislature of any state has exclusive power to make laws for such State or any part thereof with respect to many of the matters enumerated In List II in the Seventh Schedule (in this Constitution referred to as the "State List")."

(4) (Omitted as unnecessary.) Entry 49 of List II of Schedule VII - State List - reads :

"49. Taxes on lands and buildings."

Before the commencement of the Constitution, of India, under the Government of India Act, 1935 the corresponding entry in the provincial Legislative List of the Seventh Schedule of that Constitution Act is Entry No. 42, which reads :

"42. Taxes on lands and buildings, hearths and windows."

There is one other Entry, to which reference may be made, in the Constitution of India as well as the Government of India Act, 1935, relating to local Governments. Entry 5 of the State List in the Constitution of India reads :

"Local Government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

The corresponding Entry in the Government of India Act, 1935, is Entry No. 13 of the Provincial Legislative List.

60. The federal scheme of Government was introduced for the first time in India by the

Government of India Act, 1935; until then, the pattern of Government was unitary. Before the coming into force of the Government of India Act, 1935, the Government of India Act, 1919, (9 and 10 Geo. 5) was in operation. Under the Government of India Act, 1919, the Governor-General was empowered to allocate revenues between the Central and Provincial Governments and also the Local Authorities. Under the Scheduled Taxes Rules, framed under the Government of India Act, 1913, the following were the taxes which were to be utilised by or for local authorities :

- "(1) a toll;
- (2) s tax on land or land values;
- (3) a tax on buildings;
- (4) a tax on vehicles or boats;
- (5) a tax on animals;
- (6) a tax on menials and domestic servants;
- (7) on octroi;
- (8) a terminal tax on goods imported from a local area, save where such tax is first imposed in a local area in which an octroi was not levied on or before the 6th July 1917;
- (9) a tax on trades, professions and callings;
- (10) a tax on private markets;
- (11) a tax imposed in return for services rendered, such as :
  - (a) a water rate;
  - (b) a fighting rate;
  - (c) a scavenging; sanitary or sewage rate;
  - (d) 8 drainage tax; and
  - (e) fees for the use of markets and other-public conveniences."

Vide paragraph 11 of the Report of the Taxation Enquiry Commission, 1953-54, Vol. III, page 358.

61. In exercise of the powers conferred by the Government of India Act, 1919 and the Devolution Rules made by the Governor-General, the concerned Provincial Governments enacted :

- (a) The Bombay Municipal Boroughs Act, 1925, which is in operation in the Bombay area of the new Mysore State;
- (b) The Madras District Municipalities Act, 1920, which, is in operation. In the Madras area of the new State of Mysore :
- (c) The Coorg Municipal Regulation, 1907, in operation in the Coors area.

The then Princely States of Mysore and Hyderabad enacted :

- (1) The Mysore City Town Municipalities Act, 1933, which is operative in all the Municipalities except the Bangalore Municipal Corporation area;

- (ii). The City of Bangalore Municipal Corporation Act, 1949; and
- (iii) The Hyderabad District Municipalities Act, 1936, which is in operation in the Hyderabad area of the State.

No uniform Act applicable to the entire Re-organized State of Mysore has yet been enacted, though the new State came into existence on November 1, 1956. All the above mentioned Acts, which may be referred to as the Municipalities Act, enacted by the appropriate Provincial or State Governments empower the respective Municipalities to levy a property tax on lands and buildings annually.

62. Section 73(1)(i) of the Bombay Municipal Boroughs Act, 1925, which is applicable to the Local authorities specified in Parts I, II and III of Schedule I situate in the Bombay area of the State, empowers the said Local authorities to levy an annual tax on buildings situated within the Municipal Boroughs on the basis of then- annual rental value. The scope of the said Section read with Rule 350-A with Rule 243 of the Rules framed under the said Act, came up for consideration before the Supreme Court of India in AIR 1963 SC 1742, and the said Rules charging tax on the basis of the capital value of the buildings was held ultra vires, reversing the decision of the High Court of Bombay reported in *Municipal Commr. Ahmedabad v. Gordhandas Hargovandas*<sup>34</sup>, I will have to refer to this decision when I come to deal with the scope and ambit of Entry 49 of List. II. Section 78(1) of the Madras District Municipalities Act, 1920, empowers every Municipal Council to levy, among others, a property tax which expression includes a tax on buildings. Sub-Section (2) of Section 81 of the said Act, provides that the basis of the levy of the property tax shall - be such percentage of the annual value of lands or buildings of both as may be fixed by the Municipal Council, subject to the provisions of Section 78. Section 35(a)(1) of the Coorg Municipal Regulation, 1907 empowers the Municipalities in Coorg to levy a tax on houses, buildings or lands situate within the limits of the Municipality, not exceeding seven and a half per cent of the gross annual letting value of the houses, buildings or lands. Section 64(b)(i) read with Section 65 (a)(iii) of the Mysore City Municipalities Act, 1933, which is in force in all the Municipalities except the Corporation area of Bangalore in the old Mysore area, empowers the Municipalities to levy a tax styled as "rate on buildings or lands or both" situated within the Municipality; though the basis of the levy is not specified in the Act, the actual levy is one the basis of the annual rental value of the buildings. The City of Bangalore Municipal Corporation Act, 1949, by Section 97 read with 99(2) empowers the Corporation by a resolution to determine the property tax to be levied at such percentage of the annual value of buildings and lands as may be fixed by the Corporation, provided that the aggregate of the percentage so fixed shall not be less than 12½ per cent or greater than 16 per cent of its annual value. The Hyderabad District Municipalities Act, 1956, by Section 96 read with Section 97 empowers the Municipalities situated within the Hyderabad area of the State to levy a property tax on lands and buildings provided that the aggregate of the percentage so fixed shall not in the case of any land or building be less than twelve and half per cent or greater than thirty per cent. In addition to the tax on property (lands and buildings) the various Municipalities and the Bangalore City Corporation, levy the following taxes :

- (1) Taxes on transfers of real property, based on the value of the property, and levied in addition to the state stamp duty.
- (2) Land cesses (local fund cesses or local rates), levied as a surcharge on land revenue.

- (3) Octroi (taxes on the entry of goods into the local area for use, consumption, or sale there-in) and terminal taxes on goods or passengers carried by road or inland waterway.
- (4) Taxes on professions, trades, callings, and employments, usually levied as a fee based on income or professional classification or both.
- (5) Taxes on vehicles (other than motor vehicles), animals, and boats.
- (6) Theatre taxes (in addition to the state entertainment taxes) usually levied at a flat rate for each performance.
- (7) Tolls (now seldom levied, except for use of new bridges).

Property tax, Octroi and terminal taxes are the main sources of revenue for the

<sup>34</sup> AIR 1954 Bom 188

Municipalities, and the Bangalore City Corporation in the State of Mysore. The most important source of revenue for the Municipalities is the property tax, as stated in the Harvard Law School World Tax Series (India) Page 64. As observed in the same treatise at pages 94 and 95 "Local taxes on land and buildings are assessed on the "annual value" or "ratable value", although in some States, village Panchayats are allowed the option or using "capital value" (fair market value) as the basis of the tax. The annual value is the reasonable rental value which in practice is normally the actual rent. In some states, the annual value may not exceed the controlled rent. When the reasonable rental value cannot be ascertained, the annual value may be computed as a "percentage of the estimated replacement cost of buildings, less depreciation, plus the fair market value of the land. This method of assessment is sometimes used for theatres, hospitals, and railroad properties. The annual value of places of entertainment is some times estimated as a percentage of gross receipts. In all States, the value of property is determined without regard to encumbrances. Annual value is usually fixed for periods of from three to five years, although under the Bombay Municipal Corporation Act, assessments may be revised annually. Rates of Tax :

The rates at which tax is imposed by Village Panchayats are relatively small and are generally subject to upper and lower limits fixed by the States. The rates of tax imposed by municipalities and municipal corporations are substantially better; most of the rates fall between 10% and 30% of annual value. In those few instance in which the tax rate is applied to "capital value", the rate is normally a fraction of 1%. In the State of Bombay, Industrial and commercial property is taxed at higher rates than residential property, in some municipalities and municipal corporation, the rates are graduated according to the annual value of the property on scales running from 16% to 23%. Regressive rate scales in effect in some localities, under which the amount by which the annual value exceeds a designated figure is taxed at one half or one quarter of the regular rate, are being eliminated. Concessional rates which have been granted to property owners occupying their own property are also disappearing.

Exemptions and Remissions : Properties of the Central Government are exempt from local property taxes under the Constitution unless they were taxable before 1 April 1937. However, the Central government has undertaken to pay for services rendered to it such as water and electricity, for which special rates are imposed, and also for such general services as street lighting and drainage which normally are accounted for within the general property tax rates. The Central Hallway Board also recompenses local titles in this manner in proportion to the service rendered to rail-road properties.

Although state governments are subject to local property taxes on properties located in municipal areas, the properties are generally taxed at reduced rates; In some states, however, payments in

lieu of property taxes are made. Some States exempt properties used for charitable, religious, or educational purposes. Property whose annual value is less than a specified amount is usually exempt. In general, exemptions apply only to the general rate and not to the service taxes. Remission of tax is granted in most states for taxable properties which, are unoccupied or vacant during a portion of the taxable year. Generally, the period of vacancy must be no less than 30 days and more frequently must exceed 60 days or 59 days. The tax remission normally is proportionate to the vacancy period."

63. When the Government of India Act, 1935, was under the anvil, the Joint Committee on Indian Constitutional reforms, examined the question of allocation of sources of revenue between the Federal and Provincial Governments. The said Committee, however, did not make a list allocating the sources of revenue exclusively reserved, as under the Devolution Rules, to the Local self-governments or local authorities. However, in paragraph 130 at page 72 of the Report, the Committee have made the following reference to the development of institutions of local self-government in the Provinces :

"We have alluded above to the development of institutions of local self-government in the Provinces. This allusion may furnish an opportunity of saying that though this subject did not come directly within the scope of our enquiry we are fully conscious of its great importance. Indeed, the progress of self-government in the Provinces of India will depend on the growth not only of responsible Governments at the top, but also of local self-governing institutions from the bottom from the village community or panchayat upwards. It is thus that the great mass of the Indian peasantry, constituting a vast majority of the people, whose welfare has been constantly in our minds during the whole course of our discussions, can be trained in those qualities of responsible citizenship which may thereafter entitle them to the full provincial franchise. These are matters upon which Indians must form their own conclusions; but we venture to express the hope that they will, from the first, give full attention to them."

64. For what reason the Constitutional Reforms Committee of the British Parliament did not make a separate list of the sources of revenue for the exclusive use of the local authorities, is not apparent from the Report; it may, possibly be, because under Entry 13 of List 11 of Schedule VII of the Government of India Act, 1935, the entire subject of local government is included in the Provincial Legislative List. That entry reads :

"Local Government, that is to say the constitution and powers of municipal corporations, Improvement trust, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration."

Annexure VI to the Report of the Joint Committee on Indian Constitutional Reforms enumerates the Lists of subjects intended to be allocated to the Centre and Provinces and also the Concurrent List. List II of Appendix VI enumerates the exclusive subjects intended to be allocated to the Provincial Governments. The subject of tax on lands and buildings subsequently incorporated as Entry 42 of List 11 of Schedule VII of the Government of India Act, 1935, did not form one of

the entries 1 to 77 of List 11 of Appendix VI of the Constitutional proposals. However, an Annexure was added in the Constitutional proposals to the proposed exclusively Provincial List. Entry 67 of the Provincial List read with Entry 8 of the Annexure to the said List, proposed to confer exclusive powers on the Provincial Legislatures to levy taxes on houses, animals, hearths, windows, vehicles, taxes on trades, professions and callings, etc. The said entries read :

"67. The raising of provincial revenue

(1) from sources and by forms of taxation specified in the Annexure appended to this list and not otherwise provided for by these lists; and

(ii) by any otherwise unspecified forms of taxation, subject to the consent of the Governor-General given in his discretion after consulting the Federal Ministry and Provincial Ministries or their representatives.

8. 'Taxes on personal property and circumstances, such as taxes on houses', animals, hearths windows, vehicles; Chaukidari taxes; sumptuary taxes; and taxes on trades, professions and callings."

(Underlining (here into ' ') is mine).

65. The District Municipalities Acts empowering the local authorities to levy tax on lands and houses etc., enacted before the coming into force of Government of India Act, 1935, were continued and they are still in force.

66. Taking advantage of the legislative power to levy 'tax on lands and buildings' conferred by Entry 42 of the Provincial List of the Government of India Act, 1935, the Province of Bombay, by the Bombay Finance (Amendment) Act, 1939, levied; for the first time in the history of India, a parallel tax on buildings and lands called 'the Urban Immoveable Property Tax' at ten per cent of the annual rental value of such buildings or lands - Vide Section 22 of Bombay Act No. IV of 1939. Certain classes of buildings like those exempted in Sub-Section (1) of Section 3 of the Act, were exempted from the operation of the Bombay Urban Immoveable Property Tax Act. The example of Bombay was followed by the Punjab Province, by enacting the Punjab Urban immoveable Property Tax Act, 1940 (Punjab Act 17 of 1940). Section 3 of the said Act levied an annual tax on buildings and lands situated in the Rating Area shown in the Schedule to the said Act at such rate not exceeding twenty per cent of the annual value of such buildings and lands, as the State Government may by notification in the Official Gazette direct in respect of each such Rating Area.

67. No other State, before the people of India gave to themselves this Constitution of India, ever conceived the idea of levying a parallel tax of lands and buildings situate within the jurisdiction of Municipalities and Corporations.

68. The scheme of the Government of India, Act, 1935, regarding the allocation of heads of subjects of legislation, so far as they are relevant for the purpose of these petitions, was re-incorporated, in the Constitution of India. It is relevant to state that the Constitution of India, did not expressly make any provision allocating the well-established sources revenue exclusively for the use of local Self-governments.

69. The Constitution of India, by Articles 280 and 281 made provision for the constitution of a Finance Commission, which shall consist of a Chairman and four other Members to be appointed by the President, the qualifications of the members by law to be determined by Parliament. Articles 280(3) of the Constitution casts a duty on the Finance Commission to make recommendations to the President as to -

- (a) the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds;
- (b) the principles which should govern the grants-in-aid of the revenues of the States out of the consolidated Fund of India; and
- (c) any other matter referred to the Commission by the President in the interests of sound finance."

Article 281 provides that 'the President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each house of Parliament.' in exercise of the powers conferred by Article 280, the President appointed the second Finance Commission after the inauguration of the constitution, consisting of the following members :

Chairman :

Dr. John Matthai (the then Hon'ble Minister to the Govt. of India)

Members :

Shri Vaikunth L. Mehta, former Finance Minister of Bombay.

Dr. V.K.K.V. Rao, Director, Delhi School of Economics, Delhi, (now a member of the Planning commission)

Shri K.R.K. Menon, Secretary to the Government of India, Ministry, of Finance, New Delhi.

Shri B. Venkatappiah, I C.S., Executive Director, Reserve Bank of India, Bombay, and

Dr. B.K. Madan, Economic Adviser, Reserve Bank of India, Bombay.

Sardar Indarjit Singh, lately Commissioner of Income-tax, Delhi, as Secretary to the Commission.

(6) Report of the Taxation Enquiry Commission, 1953-54, Vol. I. P. 1-2 - The terms of reference to the Commission which were settled in consultation with the State Governments were as follows :

- (1) To examine the incidence of Central, State and Local taxation on the various classes of people and in different States;
- (2) To examine the suitability of the present system of taxation - Central, State and Local - with reference to (a) the development programme of the country and the resources, required for it, and (b) the objective of reducing inequalities of income and wealth;
- (3) To examine the effects of the structure and level of taxation of income on capital formation and maintenance and development of productive enterprise;
- (4) To examine the use of taxation as a fiscal instrument in dealing with inflationary or deflationary situations.

- (5) To consider other relevant matters; and
- (6) To make recommendations, in particular, with regard to (a) modifications required in the present system of taxation, and (b) fresh avenues of taxation.

70. The Finance Commission (1953-54), hereinafter referred to as the Commission after issuing a detailed questionnaire, invited representations from the State, Central and Local Self Governments and the public and an opportunity was afforded to all concerned. The Commission have dealt with the question of local finance and taxation and their recommendations are contained in Volume 3 of their Report. (7) Report of the Taxation Enquiry Commission, 1953-54, Vol. III, page 362-363.

71. Strong representations were made, on behalf of the local self-government authorities before the Commission that the local bodies should have a definite and assured source of tax revenue and that this should be secured by the inclusion in the Constitution a separate list of tax which could be levied exclusively by and for the local bodies. The local Finance Enquiry Committee had recommended that definite sources of tax revenue should be assigned, but suggested that this object should be secured by the acceptance of a 'convention'. This is what the Finance Commission observed : (7) Report of the Taxation Enquiry Commission, 1953-54, Vol. III, pages 358, 359, 360 and 362.

"10. Constitutional Basis and safe-guard for Tax system for local bodies. One of the most pressing demands made has been that the local bodies should have a definite and assured source of the tax revenue and that this should be secured by the inclusion in the Constitution of a separate list of taxes which could be levied exclusively by and for the local bodies. The Local Finance Enquiry Committee recommended that definite sources of tax revenue should be assigned, but suggested that this object should be secured by the acceptance of a 'convention'. Several local bodies and non-official representatives on their behalf have given expression to the feeling that, because of the absence of a provision in the Constitution whereby specific taxes, or the proceeds from specific taxes, are earmarked for local bodies, State Governments have been encroaching on the sphere of local finance and that this tendency might so develop that ultimately the very existence and basis of local self-government would be in jeopardy. The fear is understandable, though the tendency to encroach has not, in point of fact, been as widespread and as detrimental as has often been assumed.

"11. Taxes reserved for utilization by or for Local Bodies. - Under the Scheduled Taxes Rules, framed under the Govt. of India Act, 1919, the following were the taxes which were to be utilized by or for local authorities :

1. a toll;
2. a tax on land or land values;
3. a tax on buildings;
4. a tax on vehicles or boats;
5. a tax on animals; -
6. a tax on menials and domestic servants; 7

7. an octroi;
8. a terminal tax on goods imported into or exported from a local area, save where such tax is first imposed in a local area in which an octroi was not levied on or before the 6th July 1917;
9. a tax on trades, professions and callings;
10. a tax on private markets;
11. a tax imposed in return for services rendered, such as :-

(a) a water rate :

(b) a lighting rate;

(c) a scavenging, sanitary or sewage rate;

(d) a drainage tax; and

(e) fees for the use of markets and other public conveniences. Examining these taxes, it is found that only in one state and in respect of one tax alone has there definitely been an encroachment to the direct detriment of the local bodies, viz., profession tax in Assam. The State Government levy the tax and the local bodies have not been permitted to levy it. In Madhya Pradesh, too, the State Government do levy a profession tax but at a relative low rate, at the same time they permit the local bodies also to impose as levy in the form of a tax on property and circumstances. The other tax which has been cited before as having been 'encroached upon' is the urban immovable property tax in Punjab and Bombay. But here again it may be pointed out that, by and large the levy of the State tax has not been so operated as to stand in the way of the local bodies themselves raising or increasing the corresponding general property tax. It may be added that the Government of PEPSU propose to levy a state property tax in all towns with a population of over 25,000; in such towns, however, only two municipalities actually levy a property tax. While noting the fact that instances of this kind have not hitherto had the effect of substantially detracting from the scope of local taxation, that is to say of the ability of local bodies to levy or increase the corresponding taxes themselves. We must concede that the tendency itself is one which, if unchecked, is likely to retard the growth of a proper system of local taxation. The feeling that, because all the relevant taxes are in the State List, no 'local' tax is safe from a parallel levy by the State Government, for the benefit of State as distinguished from local revenues, is one which is undoubtedly strong today, it is a feeling which needs to be effectively allayed. If the proper atmosphere is to be created for the efficient functioning of local self-government and if the proper leadership is to be attracted to the institutions of local self-government. We, therefore, agree that it is both desirable and necessary that certain taxes should in effect be reserved for being utilized solely by or for local bodies.

12. In the written memoranda and oral evidence of local bodies, and Institutions and Federations of Local Bodies, it has been represented that a 'convention' to this end would not be binding on the State Governments, and that, therefore, the reservation we have mentioned should be secured by the inclusion of a separate list of 'local' taxes in the Constitution itself. While we do not consider that a Constitutional amendment is called for, we very strongly recommend to the State Governments that the taxes which we indicate below should be allowed to be developed only by the local bodies or for them, and that, where the State Governments are at present exploiting any

of these taxes for appropriation to state revenues, they should gradually withdraw from the field, and meanwhile allot the proceeds from the taxes to the local bodies concerned. The State Governments must inevitably play an all important role in the development of local self-governing bodies. We are convinced that the recommendation we have made will secure, where it is now absent, an essential "prerequisite of that development, and express the hope that the recommendation itself will suffice, in the sense of commending itself to State Governments, and that, consequently, no amendment of the Constitution will even eventually be needed."

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| Recommendation regarding the taxes to be Reserved | 15. The taxes to be reserved for exclusive utilization should be reserved for local bodies. In the result we recommend that the following taxes in the sense we have already explained :- |
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- (1) 'Taxes on lands and buildings :'
- (2) Taxes on the entry of goods into the area of a local authority for consumption, use or sale therein, popularly known as octroi;
- (3) Taxes on vehicles other than those mechanically propelled;
- (4) Taxes on animals and boats;
- (5) Taxes on professions, trades, callings and employments; and
- (6) Taxes on advertisements other than advertisements published in the newspapers.

In addition to these, we consider two other taxes, viz., the theatre or show tax, and the duty on transfer of property (levied along with the stamp duty collected by the Government) as suitable taxes for utilization by local bodies and recommend that the State Governments should permit local bodies to levy these two taxes. The duty on transfer of property would be collected through Government agency and should appreciably augment the revenues of local bodies. We also recommend that two other taxes viz., taxes on goods and passengers carried by road or inland waterways and tolls should be permitted to be levied by local bodies; the first; as a complementary levy by those local bodies where the terminal taxes on goods or passengers carried by railway, sea, or air are levied by the Union Government for the benefit of the local body and the second, where the local body incurs expenditure for the bridge in respect of which the toll is to be levied. We need hardly add that these recommendations should not be construed as precluding the transfer of other taxes to any local body, wherever appropriate, if the State Governments consider such a course desirable."

(Underlining (here into ' ') is mine) It will be seen from the above recommendations of the Commission, that they recommended that property tax on lands and buildings should be earmarked for the exclusive utilization by the local authorities and that no parallel tax should be levied by the State for State purposes.

72. The said recommendations, among other recommendations, were laid before both Houses of Parliament on 14-11-1957. I may repeat that the terms of reference to the Commission were settled in consultation with the State Governments including the state of Mysore, and the terms of reference already set out above, comprehend within their scope and ambit the allocation of revenues between the State and the local authorities, and it is also clear that the recommendation of the Commission laid before the Houses of Parliament was that property tax on lands and

buildings should be reserved exclusively for the utilization of local authorities, and that no parallel property tax should be levied on lands or buildings by the State and that, the States of Bombay and Punjab, which had already levied such parallel tax for State purposes, were recommended to withdraw those taxes gradually.

73. Despite the specific recommendations of the Finance Commission on the terms of reference made by the President and laid before the Houses of Parliament as provided under Article 281 of the Constitution, the Government of the State of Kerala, when that State was ruled by the Communist Ministry, enacted the Kerala Buildings Tax Act, 1961, which was copied by the State of Mysore in the Bill as introduced in the State Assembly; but the Select Committee made the matter worse by making substantial alterations, to which I have already referred to.

74. What is the legal effect of the recommendations of the Commission laid before the Houses of Parliament, as provided under Article 281 of the constitutions Articles 280 and 281 are found in Chapter 1 of Part XII of the Constitution of India, dealing with Finance. Important Articles like Articles 265 and 286 are found in the said Chapter. That Chapter provides, inter alia, for certain taxes and duties to be levied and collected by the union Government but to be assigned to the states (vide, Article 269). 'Taxes on income other than agricultural income' is a Union subject coming within Entry 82 of the Union List of VII Schedule; yet Article 270 has made provision for distribution of the taxes on income levied and collected by the Union between the Union and the States in the manner prescribed. until a Finance Commission as contemplated under Article 280 was constituted, the President, by order; was empowered to prescribe the manner of distribution of the revenue between the Union and the States; after the Finance Commission was constituted, the distribution of Income-tax between the Union and the States is determined by Order made by the President after considering the recommendations of the Finance Commission (Vide; Article 270). The terms of reference to the Commission, to which reference has already been made, required the Commission to make recommendations as to the manner of distribution of revenues between the Union and the States, and after considering the said recommendations, the President made an Order, and in accordance with the said Order, the revenues mentioned in Articles 269 and 270 are being distributed between the Union and the States. There is no Article similar to Article 270 to determine the mode of distribution of the sources of revenue coming within the scope of the List II of the VIIth Schedule between the States and the Local self-governments. When the States of Bombay and the Punjab began to encroach on the sphere of local finance, because of the absence of a provision in the Constitution whereby specific taxes or the proceeds from the specific taxes are ear-marked for local bodies, strong representations were made before the Finance Commission of 1953-54. The Commission, it is necessary to note, had recommended the amendment of Article 280 of the Constitution, and the said Article was amended empowering the Union Government to levy Central sales-tax. The Commission recognized the danger apprehended by the propensity of some of the States to encroach on properly taxes which, throughout the history of India under the British administration had been exclusively reserved for the utilization of local self-government. The Commission did not recommend for the amendment of the Constitution and considered that a 'convention' reserving the sources of revenue recommended in Paragraph 15 of the recommendations already referred to, would be sufficient. The Commission strongly recommended that though, an amendment of the Constitution was not called for at that stage, that the taxes indicated in paragraph 15 which includes "taxes on lands and buildings, should be allowed to be developed only by the local bodies or for them, and that where the State Governments were then exploiting any of those taxes

for appropriation to State revenue, they should gradually withdraw from the field, and meanwhile allot the proceeds from the taxes to the local bodies concerned.

75. The hope entertained by the Commission by the setting up of a 'convention' however, was defeated by States, like Mysore and Kerala. It is a matter of deep regret that under the pattern of our Government under the Constitution, if the Commission's recommendations laid before both the Houses of Parliament under Article 281, when no objections were taken by any of the State including Mysore, are not respected and the States like Mysore prefer to act on the recommendations of a non-statutory Committee called 'The Mysore Resources and Economy Committee', which had no legal status, the purpose of Articles 280 and 281 will be defeated. 'The Mysore Resources and Economy Committee' in their report had made the following observations which were incorporated in the Statement of Objects and Reasons to the Bill, which was introduced in the Mysore Legislative Assembly;

"A considerable amount of 'shy' money, and sums saved by escapement of taxes, is at present going into property deals in the cities and larger towns in the state. The value of buildings and sites in cities like Bangalore and even in places like Mangalore, Hubli, Belgaum and Davangere has risen to unprecedented levels out of all proportion to their real worth. Speculative business in urban properties has developed into a regular trade. If not a racket, and those who make easy money out of it are also successfully escaping all taxes. Instead of the profiteering middlemen being allowed to enrich themselves at the cost of society and make fabulous incomes by speculation, the State should try and take a part of the caboodle through taxes. While there can be no disagreement as to the desirability of taking this kind of unearned increment, the only question for consideration is how it may be tapped. All the States have Betterment Levy Acts on their Statute Books for the recovery of a part of the increased value of lands due to irrigation facilities. If a levy of contribution from agriculturists owning irrigable lands is justified, there is greater justification to take away a share of speculative rise in the values of urban properties of social origin."

(Underlining (here in ' ') is mine) If a considerable amount of 'shy' money or monies that have escaped taxes had gone into property deals and in the construction of houses in cities like Bangalore, Mangalore, Hubli, Belgaum and Davangere in the Mysore state, the appropriate authority having jurisdiction to deal with the matter is the Union Government and not the State Government. 'The Mysore resources and Economy Committee', if I may say so with respect, were either ignorant of the provisions of Chapter XII of the Constitution and the recommendations of the Taxation inquiry Commission 1953-54, or they had no respect for the Constitution.

76. Whatever a non-statutory Committee, which had no legal status, might have said could have been ignored by the Court as unworthy of notice. But my greatest regret is that the same observations were incorporated in the Statement of Objects and Reasons in the bill introduced in the Mysore Legislative Assembly, by a Government which represents the people of the State.

77. Articles 280 and 281 of the Constitution, in my opinion, are intended for the purpose of

achieving co-ordination in tax matters between the Union and the State Governments on the one hand, and between the states and the local self-governments on the other; recommendations of the Commission which are made periodically are intended to serve the said purpose. The Commission in Volume I of their Report at page 167, paragraph 70, have observed

"that with the growing importance of public finance in our national economy, and the extent to which the Central, State and local constituents of the fiscal system are getting inter-linked, it is important to develop an integrated and national approach to problems of taxation and of expenditure, -whether in the Central or in the State - local fields."

78. In the history of the development of the American Constitutional Law, we find an example, whereby an Act of the Congress it became necessary to set up an authority called 'The Inter-State Commerce Commission' in the year 1887, by the Interstate Commerce Act. It is stated in 11 Am. Jur. page 127, (8) (11 Am. Juris, page 127) paragraph 153, that 'the rulings of the Commission upon points relating to inter-State Commerce over which it has jurisdiction are entitled to great respect ..... Commission's determination of fact will be accepted by the Courts if neither arbitrary nor unsupported by the evidence and in a proper case, will be given collateral effect.'

79. The status of the Finance Commission and its recommendations laid before both Houses of Parliament by an Order of the President, in my opinion, is far greater than the rulings of the Inter-state Commerce Commission in United States of America, because the Finance Commission under our Constitution is constituted under the Constitution, while the Inter-state Commerce Commission is created by an Act of the Congress. It must be remembered that the Rajya Sabha which corresponds to the American Senate represents the States in the Indian Union. The reference to the Commission was made in consultation with all the States of the Union and when the recommendations of the Commission were laid before each House of Parliament and there was no objection in the Rajya Sabha, which represents the States, those recommendations in my view, have the force of law which is binding on the states under the Indian Union.

80. Where rules made under an Act which prescribes that they shall be laid before Parliament for a prescribed number of days, during which period they may be annulled by resolution of either House, but if not so annulled, they are to be of the same effect as if contained in the Act, they must be treated for all purposes of construction or application or otherwise exactly as if they were in the Act. (9) Maxwell's Interpretation of Statutes, 8th Edition, pages 46-47. Is there any difference in principle when the rulings of a statutory commission created by the Constitution are placed before the Houses of Parliament and they are not objected to by the representatives of the states in the Rajya Sabha it seems to me that the recommendations of the Commission, until they are modified, if could be violated by one or other of the States in the Indian Union, it will be subversive of the Constitution. If India were to survive as a nation, we must have a strong national economy, for the promotion of which, co-ordination in tax matters between the Union and the State Governments on the one hand and between the States and local self-governments on the other, seems to me essential.

81. It should not be forgotten that we are expounding a Constitution, if each State looks to its own interest in disregard of the interests of the nation as a whole, what would be the result!' Supposing the Union Government which has the exclusive jurisdiction to levy tax on income

other than agricultural income, were to deny the States their share of the revenues in accordance with the recommendations of the Commission, what would be the reaction of the states ?

82. Our Constitution makers advisedly did not provide an exclusive list of sources of revenue for local self-governments, for the obvious reason, that under the Federal scheme of Government, the sovereign power is distributed between the Centre and the States; the state Governments are sovereign in their allotted field. One of the subjects over which the states, under the state List, have exclusive jurisdiction is, the subject coming within Entry 5 (Local Government). When the entire subject of Local Government is within the exclusive legislative sphere of the State Legislature, it was appropriate to include those sources of revenue which under the Governor-General's devolution Rules were allocated exclusively for the local governments, in the State List. By the provisions of Articles 280 and 281 contained in Part XII of the Constitution, provision was made for allocation of the sources of revenue as recommended by the Commission for the exclusive utilization of the local governments. The impugned Act by its section 27, to which reference has already been made, only allows Local authorities to retain collection charges and to pay 90 per cent of their collections to the State Government to the use of State.

83. In my opinion, the State Government is not entitled to levy a tax on land and buildings under Entry 49 of List 11 except for the exclusive benefit of the local self-governments (Municipalities and Corporations).

84. However, I do not want to express, a final opinion on this matter and would prefer to rest my conclusions on surer grounds., viz., the scope and ambit of the powers under Entry 49 of List II of Schedule VII of the Constitution. Entry 49 of the State List reads :

"Taxes on lands and building."

There is one entry in the Union List viz., Entry 86, on the basis of which it was contended that the impugned Act is colorable piece of legislation and that the pith and substance of the Act is to levy tax on 'the capital value' of the assets of the owners of buildings situated in the Hating Areas. That entry reads :

"Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies."

85. As observed by Mukherjea, J. as he then was, in 1954 SCR 1 : AIR 1953 SC 375, the doctrine of colorable legislation does not involve any question of *bona fides* or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific

legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colorable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these-powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in 1924 AC 328.

"Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the powers of the legislative authority. For the purpose of this investigation the Court could certainly examine the effect of the legislation and state into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires. In *Prashar v. Vasantsen*,<sup>35</sup> our Supreme Court has laid

<sup>35</sup> AIR, 1963 SC 1356 at p. 1367

down that :

"the Statement of Objects and Reasons for introducing a particular piece of legislation cannot be used for interpreting legislation if the words used therein are clear enough. But the Statement of Objects and Reasons can be referred to for the purpose of ascertaining the circumstances which led to the legislation in order to find out what was the mischief which the legislation aimed at."

In 1960 (2) SCR 671 at p. 678 : (AIR 1960 SC 554 at p. 559) the Supreme Court observed :

"When the constitutionality of an enactment is challenged on the ground of violation of any of the articles in part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e. its subject matter, the area in which it is intended to

operate, its purport and intent have to be determined. In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; *Bengal Immunity Co. Ltd. v. State of Bihar*<sup>36</sup> *Chamarbaughvala v. Union of India*<sup>37</sup> *Moti Das v. S.P. Sahi*<sup>38</sup>

Another principle which has to be borne in within examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the, purpose for which they are enacted. Presumptions is, therefore, in favor of the constitutionality of enactment, Charanjit Lal Chowdhuri Union of India AIR 1951 SC 41; *State of Bombay v. F.N. Bulsara*<sup>39</sup> *Mahat Moti Das v. S.P. Sahi*<sup>40</sup>."

86. In principle I see no difference, whether the constitutionality of a statute la challenged whether the ground that it violates the Fundamental rights guaranteed In Part III of the Constitution or on the ground of want of legislative competence. In either case, the same principles as enunciated by the Supreme Court have to be applied. In adjudicating upon the constitutionality of the impugned Act. It has to be remembered that the impugned Act has been challenged both on the ground of legislative competence and also, as violative of Articles 14 and 19 of the Constitution. I have already set out the history of the and its object. The Impugned Act tax on all buildings in existence on a special fiats without regard to their age, condition, capital value, or rental value, but merely on the basis of the total floorage area owned by the assessee. If the owner of a building has sold, his building a day prior to the coming into force of the Act, he is not chargeable to tax, but if he sells it a day after the coming into force of the Act, he is liable to pay the tax.

87. As already mentioned, the impugned tax is payable by the owner of the building

<sup>36</sup> AIR 1955 SC 661; R.M.D

<sup>38</sup> AIR 1959 SC 942

<sup>40</sup> AIR 1959 SC 942

<sup>37</sup> AIR 1057 SC 828

<sup>39</sup> AIR 1951 SC 318

not more than once (Vide, Section 4(3).) In the case of buildings, the construction of which is completed after the commencement of the Act, the owner of such buildings, within two months from the date of which the construction of the buildings is completed is liable to pay the tax. The quantum of the tax is dependent on the number of buildings owned by the assessee and not on the assessee and not on the floorage area of 'a building', if house 'A' in the only house owned by the assesses, he is liable to pay the least amount of the tax. But the same assesses is to higher tax if he owns more than one building.

88. There are three basic elements in levy of a tax :

- (1) What is the nature of the tax i.e. how is to be classified, viz. -
  - (a) Property tax;
  - (b) Excise tax;
  - (c) Income-tax;
  - (d) Capitation tax;

- (2) What is the subject of the tax.
- (3) What is the measure of the tax.

Jerome R. Hellerstein in his treatise on 'State and Local Taxation' at page 18, has classified taxes into above four categories.

89. That the nature of the tax, 33 comprehended in Entry 49, List II is a property tax, is not open to dispute. The subject of the impugned tax is 'buildings' as defined in the Act. The measure of the tax is the total floorage area of as buildings owned by the assessee.

90. As observed by Sir Maurice Gwyer, Chief Justice of India in *Re Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*<sup>41</sup>,

"The grant of power may be qualified by either express provisions in the same enactment, by implication of the contract and even by consideration arising out of the scheme of the Act".

91. Property taxes on lands and buildings have an ancient origin, in Athens, the land tax was originally levied on gross produce, but it gradually developed into a property tax imposed not only on land and houses but also on slaves, cattle, furniture and money, Home taxed many forms of personality as well as realty. In Europe, the early property taxes were levied on land but were gradually extended to buildings and cattle; until they became general property taxes. As new types of movable and intangible property developed, evasion became prevalent and assessment difficult. The principle of the general property tax broke down and personal property taxes were gradually abandoned. By 1800, the base of European property taxes had largely dwindled down to land alone or land and buildings. (14) State and Local Taxation, page 643, by J.R. Hellerstein.

<sup>41</sup>1938, AIR 1939 F.C. 1

92. The system of taxation on land and buildings in various countries of the world is given (15) (Encyclopaedia Britannica, Vol. 21) in Encyclopaedia Britannica in Volume 21, at pages 842-849.

"TAXATION LOCAL. The proportion of government costs that falls on the local and central authorities, respectively, varies widely from one country to another. In general, the local share is a larger proportion of the total in the federal states than the unitary states.

All tax powers in unitary states rest with, the central authority; local divisions have only delegated powers, in consequence, the local authorities are usually quite restricted in their choice of taxes, in federal states, on the contrary, the central government's powers of taxation have ordinarily been restricted, and the states or provinces have usually had wider independent powers of taxation than the central government itself in the beginning. Over long periods of time, however, the central government's tax powers have been extended to meet their ever-increasing obligations, until they have seriously encroached on the tax powers of the underlying authorities  
... ..

STATE AND LOCAL TAXATION IN THE UNITED-STATES.

State and Local Governments in the United States have a larger share of governmental functions than local governments in unitary states, and a proportionately larger share of governmental revenues and expenditures. There are at least three layers of government throughout the country -- federal, state and local ---each with its own tax powers .... The local sub-divisions have only delegated tax Powers. In practice they are usually restricted to the property tax for the major part of their Income. Consequently, the Wide diversity found among state tax system does not extend to the tax systems of the smaller units of government ..... The characteristic tax of the state and local tax systems of the United States is the general property tax. Property taxes began in colonial days as levies on specific forms of property, especially land and houses. The taxes were levied on capital value rather than rental value, but values were often determined, by arbitrary measures. Land was often classified, for example, as woodland, pasture or arable land, and the value per acre was the sale for all land of a given class. Houses were valued according to the number of doors, windows or chimneys. In the course of time, various classes of personal property were subject to taxation. The items selected - e.g., slaves, carriages, watches and clocks and money - were those that indicated unusual tax-paying ability. When these levies became numerous, they were combined in a single general property tax. The general property tax is a levy on all property; real and personal, tangible and intangible. Valuation for tax purposes is made by local assessors. The rate of the tax is determined annually by different taxing authorities, usually by the process of dividing estimated expenditures that are not provided for through other revenue sources by the value of taxable property. In other words, the property tax is usually the elastic element in the tax system, varying with expenditures. Up to the time of the American Civil War the tendency was, as indicated above, to combine various special levies into a general property tax. After the Civil War this tendency was reserved. One by one, various classes of property were withdrawn from the general property tax base, either to be taxed in other ways or to be exempted entirely. This tendency went so far in some states that only real estate remained subject to the tax ..... Real estate, on the contrary, in both visible and immobile, and consequently bears the brunt of the property tax levies. Real estate assessments for the entire United States amounted to four-fifths of the total by the 1950s. Valuation of real estate is an expert's Job, and local assessors have not always been chosen for their technical competence. This, together with political, pressures, has resulted in serious inequalities in the distribution of the property tax burden. In general, small properties are assessed at a higher percentage of true value than are large properties, principally because the assessor is better able to value a small house and lot than a large estate or department store. Also, there is a tendency to encourage new building through underassessment and to compensate by leaving values unchanged on the older, deteriorating properties. Much real estate is exempt. The larger part of this is government property, and large state or federal holdings in small local taxing jurisdictions have often created serious financial problems. However, there has been some effort to compensate such local units through special state or federal assistance. Nonprofit organizations for educational, religious or philanthropic purposes have regularly been encouraged of tax exemption, and there has been a tendency to extend exemption to small home owners, through homestead exemptions, and to tenants, through the exemption of low-cost housing, Projects. These exemptions made serious inroads on the local tax base. States endeavored to assist their local subdivisions by obtaining their own revenues increasingly from other sources. Property taxes supplied. 53% of state tax revenues in 1902 and only 3% in 1955. Even this assistance, however, left real estate taxes at high levels. Property owners-have sought protection from excessive taxes, through state legislation fixing the maximum rate that can be levied by the local authorities. These tax limits-

have been widely used but they have often proved arbitrary and have led to unbalanced local budgets or undesirable curtailment of local government services as well as to low tax rates. Much of the hardship suffered by property taxpayers arises from inequalities in the tax. If real estate were assessed equitably, the tax would not be unduly burdensome in most areas. Equitable assessment would not, of course, make the tax a satisfactory measure of ability. However, approximately half of local expenditures are for street improvements, police and fire protection and other services bringing direct benefits to the property owners. Welfare activities, education and other functions which would not benefit property owners as such are supported in increasing measure by federal and state governments....." Local Taxation in England and Wales has been dealt with at pages 845-846. The relevant portions are :

#### "LOCAL TAXATION IN ENGLAND AND WALES-

The sphere of local government in England and Wales, measured in terms of revenues and expenditures, is far more limited than is that of the national government. It is more limited, also, than the sphere of local government in federal states, and in many other unitary states. In 1931-32 less than one-third of government expenditure-in England and Wales was incurred by local authorities, and an even smaller portion of revenues came from independent local sources..... The local revenue system is very simple. At local units are supported largely from two sources - rates and grants. The first is the only tax the local authorities are permitted to levy, except for a few small county licenses that produce only a traction of 1% of local revenues. Grants come from the general revenues of the national government. The development of local rates and grants, and their relation to national tax revenue, is shown in Table VIII. It is apparent that in the century preceding World War II, there was a clear trend toward sharing an increasing proportion of national tax revenues with local governments through the system of grants. This trend was reversed with World War II, even though the absolute amount allotted for grants continued to increase. World War II increased national obligations, rather than local. The increased tax revenues were necessitated by way of expenditures; but greater central government participation was required also for civilian functions such as housing. In 1953-54 local rates were less than 10% of combined national and local tax revenues and grants had risen to more than half of all local revenues. **RATES - HISTORY AND DEVELOPMENT** - Local governments derived their authority to levy rates, the one important local tax, from the Act for the Relief of the Poor of 1601. It had been common practice, however, long before the law of 1601, to levy comparable rates. The Act of 1601 provided that every inhabitant of the parish should be taxed for the support of the poor "according to the ability of the same parish." No measure of ability was specified, and the tax developed into a personal tax levied in proportion to the rental value of the property occupied. Personal property was sometimes included in the assessment in the early history of the rates but had been definitely exempted by the middle of the 19th century. 'Thus rates became levies on those persons occupying land or buildings, designated as "rateable hereditament," within the jurisdiction of the local rating authority.' Vacant property is exempt from the rates in England and Wales. In Scotland, half of the tax is levied on the owner and half on the occupier'. 'The owner's share is levied on his property whether it is occupied or not. The occupier is assessed on rental value, which is usually determined by the actual rent paid for the specific property or similar properties. According to the Rating and Valuation Act of 1925, (Section 68), "gross value means the rent of which hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and if "the

landlord undertook to bear the cost of the repairs and insurance, and other expenses, if any necessary to maintain the hereditament in a state to command that rent." Specialized owner-occupied properties must receive special treatment. These are mostly business properties and the valuation is related to profits. Machinery is exempted. Provision was made for valuations every five years under the Rating and valuation Act of 1925, but actual changes in value became comparatively infrequent. This Act did not change methods of valuation materially, but it attempted to secure uniform valuations throughout the country. The base of the local rates was reduced from time to time by successive "deratings." The Agricultural Rates Act of 1896 exempted one-half of the rental value of agricultural land from local rates. In 1923 this exemption was increased to three-fourths, and in 1929 the total rental value of agricultural land was exempted. Agricultural buildings were exempted in 1925.

The Local Government Act of 1929, which derated all agricultural land, also derated industrial properties and railroads, reducing the "net annual value" to which the rates apply to 25% of full value. As early as 1848, the land used for the actual railroad line, but not including the property used for stations, had to be derated to this same percentage. Complete exemption was provided for the property of educational, religious and other non-profit organizations. This left as the most important ratepayers the occupiers of houses and commercial buildings. The proportion of the total valuation attributable to these by mid 20th century was approximately 95%.....

93. The British Commonwealth Countries, namely, Canada and Australia, are dealt with at pages 848 and 849. The Canadian system resembles that of the United States in many ways. With reference to Australia this is what the Encyclopedia (15) states :

"AUSTRALIA. - Australia, like Canada, has a federal government. The States have independent and widely varying tax systems; and municipalities here, as elsewhere, obtain their principal revenues from real estate taxes.

The local rates, as they are called, differ from the English rate and vary somewhat in the different states. In most States there are two separate levies-one on the unimproved capital value of land, and one on the improved value. In some States the latter is on rental value and thus resembles the English rates. In other States this, also, is on capital value. Real estate is assessed for these levies by a State official. The amount of the levy is, however, determined by local officials and varies with needs from one municipality to another and from one year to the next. Municipalities have no other important independent taxes, they obtain substantial grants from State governments and obtain some income from public-service enterprises and administrative charges."

94. Harvard Law School, "World Tax Series" deals with property tax in United Kingdom (16) Harvard Law School, "World Tax Series" - United Kingdom, at page 63 under the head "Description of Taxes on Capital". It states :

"The taxes summarized in this chapter are the "land tax", local taxes on real property ("rates"), "mineral rights duty, and "estate duty". purchase- tax, stamp tax, excise taxes and customs duty are summarized in Chapter 4.....

It is characteristic of the taxes discussed here, with the exception of estate duty, that they are measured by the rental value of property rather than by its capital value, for it is a general

principle of taxation in Great Britain that a direct tax should fall upon the income of an asset rather than upon the asset itself. Thus "rates", which are levied for the purpose of defraying expenses of local government, are applied to the annual rental value of occupied real property."

95. At page 67, under the head "Local Taxes on Real Property" - "Rates", after stating the historical background, it is observed thus :

" "Rates" are local taxes levied for the purpose of defraying the expenses of local government. "The rental value of property provides the tax base,' but rates are recoverable only against the person assessed with tax or against his personal property."

At page 68 of the same treatise, it is stated as to who is the tax-payer as follows :

" 'The Taxpayer :- Rates are imposed upon the "occupier" of property, rather than upon the owner.' Whether or not property is "occupied" and who is the occupier frequently raise difficult questions of fact which have occasioned extensive litigation. In general, property is occupied if it is more or less in continuous use and the occupant is the person who has general control of the property or portion of the property in question.

If the owner is the occupier of property being rated, the tax is levied upon him. In addition, the rating authority is empowered to require that all ratable property within its district of a ratable value of not more than £ 18 (in some instances £25) be "rated" upon the owner rather than upon the occupier. In addition, an agreement may be entered into between the rating authority and the owner whereby the owner will be rated with respect to properties for which rent is payable at less than quarterly intervals. These provisions for compulsory or voluntary rating of owners rather than occupiers are merely of administrative convenience and do not affect any agreement between owner and occupant as to who shall bear the burden of the rates. Where the owner is rated, he is compensated for what amounts to the performance of a service for the rating authority by a discount which varies between 7½% and 15 per cent of the amount payable, depending upon the circumstances. Regardless of whether the rate is assessed upon the owner or upon the occupant, the ultimate burden of the tax will fall upon the parties in accordance with any agreement made between them. Thus, if the lease provides that the tenant will bear the rates but the owner is the person who is rated, the owner is entitled to recover the amount of the rates from the tenant. In the absence of any agreement as to who shall bear the rate, the burden falls upon the occupier." (Underlining (here into ' ') is mine)

96. In Italy, the tax is levied either on the owner or occupier, and the basis of the tax is the rental value of the buildings. Antonio De Viti De Marco in his treatise on "First Principles of Public Finance" (17) at pages 263-254, translated by E. P. Marget at pages 253-254 has stated as follows :

"BASIS OF THE TAX.

In many countries, the tax on buildings is combined with the tax on land. In such cases, the building is usually regarded as an adjunct of the land, or, more precisely, as an improvement of

the land on which it is built. This theoretical construction has, however, been made obsolete by the fact that the increase in urban construction and the consequent development of the industry of building houses for rental purposes have made it impossible to regard the value of the building as an adjunct of the soil. Hence, in some countries as in Italy - the tax on buildings is no longer discussed from the standpoint of its analogies with the tax on land, but is discussed rather from the standpoint of the differences that distinguish the two types of tax; and thus it is possible to examine separately the tax problems involved, in accordance with the true facts of the situation. According to Italian law, which may be taken as typical of law which regards buildings as a separate object of taxation, the subject of the tax is the owner of the building, or the occupant, or the one having the use of it; the objects of the tax are buildings and all other permanent structures, which are taxed in proportion to their net income.

For the definition of taxable income the law takes as its standard of reference a building which is rented, and not one which is inhabited by the owner; so that, in the first case, the income is given by the rental, and in the second, it is estimated, by analogy, from the rental value of other buildings in a similar condition and location.

This total income is translated with net income by deducting a certain percentage of the rental for repairs, insurance, and all other possible sources of expenses or loss.

This, in broad outline, is the legislative basis of the tax on buildings. Despite its apparent simplicity, it involves many theoretical questions. First of all, it is necessary to define the economic function of the building. The latter may be capital if it serves for the production of an income, as in the case of farm-buildings and factories; on the other hand, it is direct good when it serves as a Habitation, either for the owner or a tenant. Now, farm-buildings and factories cooperate in the production of an income - agricultural or industrial-which is subject to the tax on land or the tax on 'moveable property' (or its equivalent), respectively. Hence arises the tendency of both theory and legislation to exempt farm and industrial buildings from the tax on buildings, in order to confine its basis to residences only. The Italian laws have recognized that farm-buildings have the character of capital; and for this reason these buildings have not been subject to appraisal, but only to topographical survey, because the income which they help to produce is already struck by the tax on land. The same treatment ought to have been applied to factories which help to produce industrial income. But the authors of the first Italian law on the subject stopped short in the face of the practical difficulty of defining a factory in such a way as to distinguish it. In the concrete case, from residences, as well as from other buildings, which have the character of capital. The difficulty is accentuated in centers of populations, where a building may easily change its purpose and where the principle ought logically to be extended to warehouses, cafes, and shops, which are instrumental goods for the trade and industry that they serve."

97. At pages 250 and 257, the principles of public finance, of the taxation on buildings has been dealt with by the learned author. Therein, he has stated that a residence is a consumer's goods; it is not a capital goods; it is therefore product or an income, and the tax may fall on the value of the house, but not on the income from the house - that is, on the income from an income. He further states that a residence is treated as capital and its rental is treated as income. He makes a distinction between residential buildings and shops on the one hand and factories, workshops, and farm-buildings on the other as constituting a distinct class. In the case of factories, farm-buildings and workshops etc., they are not consumer's goods in the economic sense, but capital, which produce income by the production of goods or agricultural products. Therefore, in several countries like Italy, factories, workshops and farm-buildings are exempt from building tax.

98. In the Kerala Buildings Tax Act, 1961, factories and workshops are exempted. In the original Bill introduced in the Mysore Legislative Assembly, factories and workshops were intended to be exempted, but, the Select Committee deleted that exemption and brought them all under the net of taxation.

99. I have already dealt with the history of legislation on taxation of lands and buildings on urban Real property since the commencement of British rule in India. In "Municipal Corporation in British India" (Vol. III, 1914 Edn.) at pages 153, by Sri Iyengar the position has been summarized thus :

"All municipal corporations in British India are empowered to levy taxes on all buildings and lands within their local limits subject to certain specific exemptions. The owners are made primarily liable in some municipalities while in others both the owners and occupiers are made liable. Taxes which they can levy form a fixed percentage on the ratable or annual values of all the said buildings and lands. The percentage varies in the different municipalities and the mode of ascertaining the ratable or annual value also varies."

The above passage has been quoted in the Judgment of the Supreme Court in AIR 1963 SC 1712. In that case the Supreme Court observed that :-

"All Indian statutes till 1911 dealing with municipal taxation impose a tax on the annual value of lands or buildings without always using the word 'rate', in some of the statutes the word 'rate' is used but the tax is again on the annual value," The Punjab Municipalities Act, (Act No. III of 1911) provided for levy of a tax; on buildings and lands and it further provided various modes for assessment, one of which is the annual letting value; the two modes provided in the Act were (a) a rate per square yard for the ground area; and (b) on the basis of running foot of frontage in streets and bazaars. Vide Section 61 of Punjab Act 3 of 1911. The Madras Village Panchayats Act, 1950, (Madras Act 10 of 1950) by Section 64 empowers Panchayats to levy house tax on all houses, other than huts, in the village on any of the following basis, namely, (a) annual value, (b) capital value, or (c) such other basis as may be prescribed. Rule (2) made by the State Government in exercise of the powers conferred by Sub-Section (1) of Section 64 of the Madras village Panchayats Act, 1950, empowered the Panchayat to levy house tax on the basis or their plinth area and their classification as (i) terraced, (ii) partly terraced and partly tiled or thatched, (iii) tiled. (iv) partly tiled and partly thatched and (v) thatched. The Finance Commission; (1953-54) in Vol. III of the Report, referred to the three modes or basis of levy of property tax on buildings, viz., (a) annual value of lands or buildings, (b) capital value and (c) plinth area taken with the type of construction, as under the Madras Rules referred to above. The Report (7) of the Commission, after discussing the merits of the three bases recommended :

"that the annual value, based on the rent at which properties may reasonably be expected

to be let, as at present interpreted in practice should be the normal basis for the levy of property-tax, subject to the basis of capital value being adopted in special cases of the type already noticed. With regard to properties of a class not ordinarily let or where the annual rent cannot be estimated, a percentage, not less than five per cent of (a) the estimated cost of construction of the building at the time of assessment (less a reasonable deduction on account of depreciation) plus (b) the estimated value of the site, may be taken as the annual rental value."

I have already referred to the value to be given to the recommendations of the Commission laid before the Houses of Parliament under Article 281 and not objected to by the States.

100. From the above historical review of the nature of property taxation on buildings, the following deductions follow :

- (1) that the tax has an ancient origin;
- (2) that the tax is a property tax;
- (3) In all countries of the world the tax is collected by the local authorities;
- (4) the basis of the tax is normally on the fair rental value, as recommended by the Commission ;
- (5) Normally, the tax in most of countries is on the 'occupier' of the building, though there is no legal bar to the levy of the tax on the owner; however, it is an occupier's tax.

101. Interpreting Entry 42 of List II of Schedule VII, Government of India Act, 1935, which corresponds to Entry 49 to the Constitution of India, the Federal Court of India, in AIR 1949 FC 81 after referring to legislative practice in India, interpreted the scope of the Entry and reached the conclusion that the tax may be levied, either on the 'occupier' or the owner. This is what the federal Court observed (in paragraph 9) :

"If therefore the legislative practice in India is to be taken into consideration, the appellant's argument could be met by saying that the British Parliament might well have intended to enable the provincial Governments to continue to impose taxes of the nature imposed in different parts of the country from many years passed. It seems, however, unnecessary to pursue the matter further, because, the point can, in our opinion, be disposed of on a surer ground. It appears to us that when the words used in the Act are clear and unambiguous and they are not unfamiliar or uncommon words or such words as may be aptly described as terms of art. It is unnecessary to travel beyond the Act for the purpose of construing them. Item 42 of List II deals with taxes on 'lands and buildings, hearths and windows'. There are no words in the Act to suggest that the tax is to be paid only by the occupier and not by the owner, and it seems to us to be wholly wrong to read into Item 42 words which do not occur there and thereby to limit the scope and meaning of the expressions used. It is suggested that all the words used in item 42 should be read together and that if they are so read, it must follow that the tax on buildings should be of the same nature as the tax on hearths and windows, which, it is said, must be in the nature of a 'consumption tax' payable by the occupier. This argument also appears to us to be based on unwarranted assumptions. The mere fact that the words 'hearths and windows'

occur along with the words 'lands and buildings' in Item 42, does not indicate that they must all be unnecessarily read together, and that the tax on lands and buildings must be of the same nature and incidence as the tax on hearths and windows. It is quite conceivable that the tax on buildings may be levied on the owner, whereas the tax on hearths and windows may be levied on occupier and vice versa. The correct position has, in our opinion been summed up very lucidly by the learned Chief Justice of the Lahore High Court in the following passage in his Judgment :

'It may well have been the policy of the British Parliament to tax occupiers of lands and buildings, etc., and not the owners. In each of the Acts referred to by Mr. Narotam Singh the tax was in terms imposed upon the occupier. The fact that it was the policy of the British Parliament to tax occupiers cannot be used to construe the words appearing in Item 42. It appears to me that if Parliament when enacting the Government of India Act intended Provincial Legislatures to tax occupiers only and not owners of lands and buildings, they would have said so. It would have been the obvious thing to say and the fact that they did not say so, makes it clear, to my mind, that Parliament intended Provincial legislatures to have power to impose any taxes on lands and buildings, hearths and windows, which they could legitimately do.

When words in a statute are clear and unambiguous, effect must be given to the plain grammatical meaning of the words. By no stretch of imagination can it be said that Item 42 is ambiguous. 'The words are clear and they entitle a Provincial legislature to impose taxes on lands and buildings, hearths and windows, without reference to who has to pay such taxes.' If the tax can legitimately be paid by the owner, it appears to me that Item 42 would cover such tax, as it would cover a tax legitimately payable by the occupier. It seems to me, therefore, that no assistance can be obtained from what had been the policy of the English Legislature in construing this particular Item.'

(Underlining (here into ' ') is mine)

102. The decision of the Federal Court has been referred to by the Supreme Court of India in AIR 1963 SC 1742 and that view has not been dissented from.

103. Their Lordships of the Supreme Court, however, were not directly concerned in that case with the interpretation of Entry 49 of the State List. But that decision, in my view, supports the conclusion that Entry 49 has to be read with Entry 5 of the State List, and that the scope and the ambit of the power under Entry 49 is that the sphere of legislation allotted to the State Legislature is to levy property taxes on lands and/or buildings, normally, on the basis of the annual value based on the rent at which the properties may reasonably be expected to be let, subject to the basis of capital value being adopted in special cases of the type mentioned in the Report of the Finance Commission already referred to; and in regard to the properties of a class not ordinarily let or where the annual value cannot be estimated, a reasonable basis of apportionment of the tax burden as determined by the legislature; and further, that the tax may be levied on the occupier or owner of the building. The Constitution of India has not made any distinction between taxes and rates. The term 'Rate' does not occur in any of the Entries either in the Government of India Act, 1933 or the Constitution of India. The word 'Rate' has a historical origin as already noticed.

Article 366(28) defines taxation thus :

" 'Taxation' includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly." Thus, it would be seen, that 'Rate' as mentioned in the Bombay Municipal Boroughs Act, 1925, and similar Acts, means tax coming within the ambit of Entry 40 of List II. It may be relevant to note that even under the Governor-General's Devolution Rules, the word used is 'tax' on lands and buildings which impost was reserved for the exclusive utilization of Local Boards. In my Judgment, the word 'taxes' in Entry 49 of the State List, having regard to the historical origin of the taxes on lands and buildings means nothing more or nothing less than 'rate' as construed by the Supreme Court in AIR 1903 SC 1742. I am not unaware of the observation, in the majority decision in that case, that, if the word 'taxes' had been used in Section 73 of the Bombay Municipal Boroughs Act, 1925, Rule 350-A read with Rule 243, the legality of which had been questioned in that case, may be *Intra vires*. Any observation of the Supreme Court is entitled to the highest respect. The scope of Entry 49 of the State List, however, did not come directly for decision before their Lordships of the Supreme Court in that case. Their Lordships had no occasion to consider in that case the recommendations of the Finance Commission 1953-54 laid before the Houses of Parliament under Article 281. As already observed, the recommendations of the Finance Commission upon points referred to them by the President under Article 280, and thereafter laid before the Houses of Parliament, are entitled to great respect. Therefore in my judgment, Entry 49 of the State List has imposed constitutional limitations on the legislative power of the State to impose tax on buildings except on the normal basis of the annual value based on the rent at which the building may reasonably be expected to be let, or any other reasonable standard of apportionment of tax burden, and that such tax could be levied only for the exclusive utilization of the local governments (Municipalities).

104. Now, what has the impugned Act done in this case ? It has levied a charge to tax on all the buildings owned by an assessee in the same Hating Area on the basis of the total floorage area of the building at the rates specified in Schedule II of the Act. As already found, if on a proper interpretation of Entry 49 of the State List, in exertion of which power, the State claims to have enacted the impugned legislation, the State may levy tax either on the 'occupier' or 'owner' and that having regard to the history of the taxation, the tax is really a tax on the occupier of the building, is it competent for the Legislature to charge to tax, buildings on the basis of the number of buildings owned by the assessee ?

105. If the tax contemplated under Entry 49 could be levied either on the occupier or the owner, the number of buildings owned by the owner cannot be taken into account in charging the tax. The Federal Court in AIR 1949 FC 81 approved the interpretation of Entry 42 of the Provincial List in the Government of India Act, 1935, (same as Entry 49 of the state List) as summed up very lucidly by the learned Chief Justice of the Lahore High Court in the passage already cited. The Federal Court has approved the following statement in the Judgment of the Lahore High Court "Words in the statute are clear and they entitle a Provincial Legislature to impose taxes on

lands and buildings, hearths and windows, 'without reference to who has to pay such taxes.'" (Underlining (here Into ' ') is mine)

106. The power is to levy a charge to tax on a building without reference to who has to pay such taxes. If the quantum of the tax is made to depend on the number of buildings owned by the assessee in the same Rating Area, the charge created by the impugned Act is open to the same objection as the mode of computation of compensation in the Kerala Agrarian Relations Act, 1961, struck down by the Supreme Court, where the amount of compensation did not depend upon the value of the land acquired, but on the quantum of the property which the owner was deprived of. The Supreme Court held that such mode of payment of compensation violated Article 14 of the Constitution - Vide *Karimbil Kunhikoman v. State of Kerala*<sup>42</sup>,

107. In my view, there is no difference in principle between the amount of compensation-varying with the quantum of the property owned by the assessee, and a property tax on buildings levied on a progressive scale according to the number of buildings owned by the assessee in the same Rating area.

108. Before I depart from this subject of legislative competence and conclude my conclusions on the question of colourable legislation, I wish to make a few observations as to the colourable nature of the Impugned legislation.

109. As already stated, the impugned Act levies a tax on buildings owned by the owner on, a particular day during the existence of the building. That tax is not payable more than once-under the Act in respect of the same building. The quantum of the tax, as already observed, is dependant upon the number of buildings owned by the assessee in the same Rating area. From the Statement of Objects and Reasons, to which I have already referred, the purpose of legislation is quite clear. It was enacted in order to enable the State to take a part of, what the Mysore Resources and-Economy Committee called 'shy' money from the owners of buildings. Because of Entry 86 of the Union List (Capital levy), subject to which the power under Entry 49 of the State List has to be construed, the respective spheres of the two powers have to be reconciled.

110. Entry 86 empowers the union Parliament to levy a tax on capital or impose what is called 'capital levy', in exertion of that power, the Union Parliament has enacted the Wealth Tax Act, 1957 (Central Act 28 of 1957), which charges to tax on the aggregate value of all assets owned by assessee on the valuation date. Owners of buildings are chargeable to wealth tax on the aggregate value of all their buildings owned on the valuation date of each financial year. The wealth tax is an annual capital tax which is a regular annual charge assessed on the basis of the capital wealth of a tax-payer. Entry 86 of the Union List also comprehends within its ambit a 'capital levy'. A 'capital levy' is a tax imposed once and for all, on the capital owned by the assessee and it carries an implicit and sometimes explicit undertaking by the State that the measure is not going to be repeated. If you impose a tax on one category of the assets owned by an assessee on the valuation date, you are still imposing a capital levy. It is open to the Union Parliament to levy a 'capital levy' on Urban Immoveable Property in exertion of its powers under Entry 86 of the Union List.

111. The taxes or rates levied under the different Municipalities Acts in operation In the different

Rating areas of the State are property taxes-coming within the scope of Entry 49 of the State List. If the State intended to levy property tax in exertion of its

<sup>42</sup>1962 Suppl. (1) SCR 869, at pp. 864 to 869 : (AIR 1962 SC 723 at pp. 738 to 740)

power under Entry 49, where was the need for the impugned enactment without repealing the provisions of the Municipalities Act ? If the intention of the Legislature were to levy a charge to tax on lands and buildings, all that was necessary was to enact a uniform Municipalities Act for the New State of Mysore and prescribe any rate which the Legislature thinks reasonable on the basis of the annual rental value. The very fact that a separate Act, as the impugned Act, was enacted to levy tax for state purposes, in my opinion, snows that the intention of the legislature really was to take a part of the wealth of the Urban property owners in the State. Therefore, it is a colorable piece of legislation. The name given to the tax and the apparent cloak or veil put on the statute cannot deceive the Court. The real pith and substance of the Act is a 'capital levy', and therefore, the impugned Act, in my judgment, is unconstitutional and hence void.

112. Re. Articles 14 and 19 : The learned Advocate General has strenuously urged that the Statement of Objects and Reasons should not be looked into, in construing the legislative intention for the enactment of the impugned Act, that the yard-stick of floorage area selected by the legislature elected by the citizens residing in the state, is a matter of legislative policy and that the Court would not be justified in striking down the Act on the ground that a Better basis to levy the charge, could have been devised. In other words, though the learned Advocate-General, did not state so, his argument amounts to this, that the Court would be acting as a 'super legislature' usurping by its exercise of judicial review, the legislative function.

113. There is a myth, in every generation and also in every country, where the pattern of Government under law is in existence, and the Judiciary by the exercise of its power of judicial review of legislative action strikes down an Act of the legislature as unconstitutional, that the Court is acting as a 'super legislature', when the Act struck down is an Act intended by the party in power to carry out its party ideology. This myth has always persisted ever since the time of the great Chief Justice John Marshall, when in his famous opinion rendered in *Marbury v. Madison*, he emphatically declared that it is the right and duty of the Court to declare an Act void for unconstitutionally. If I may adopt, with respect, the Observations of Arthur, J. Goidberg, Associate Justice, Supreme Court of the United States, in his lecture under the auspices of the Indian Law institute, New Delhi,

'the reality rather than the myth about the Court is that it exercises judicial review as a consequence of intent as well as tradition, and that Court's power is not a 'usurped power' but a part of a grand design to ensure the supremacy of the Constitution as law - supreme law to which all branches of Government executive, legislative and Judicial - State and Union - are subject. "There is also another myth that though judicial review was intended and is sanctioned by the Constitution, it is still undemocratic and therefore has to be regarded with alert suspicion and has to be exercised with greater restraint. It is not a denial but rather a supreme manifestation of democracy that the Fundamental rights of the least among us protected by our Constitution and safeguarded by an independent judiciary, and that history teaches us that democracy and an independent Judiciary are one and inseparable.... Show me a country where Judges are faithful to the popular will rather

than to the Constitution. It will not be a democratic country worthy of the name.

114. in *Gray v. Sanders*<sup>43</sup>, the Supreme Court of U.S.A. rendered a decision requiring the State Legislatures to be reasonably representative of the people they are supposed to represent but do not. This decision was intended to repair a flaw in the structure of Government which had been getting worse almost since the founding of the Republic. The flaw derived from the powers of legislature to fix the boundaries of Districts from which their own members are elected. As population shifted from country to City, these boundaries tended to remain unchanged or very little changed. The result was that the few voters in country districts could send too many representatives to State Houses and the many Voters in city districts too few. This gave country legislators disproportionate power, which they used to resist changes in apportionment of voting districts and thus to preserve their own dominance.

115. The Supreme Court of U.S.A. held that-mal-apportionment giving rise to inequality of voting power violated the Fourteenth Amendment to the Constitution. Though several States, conceding their delinquency in apportionment, accepted the verdict of the Supreme Court and started to comply, the rest refused. There were cries and complaints of the Supreme Court having usurped a legislative function. A Bill was introduced by one Mr. William Tuck of Virginia in the Congress, to deny the Federal Courts any Jurisdiction over legislative apportionment. The Bill was actually passed by the Congress, but when it came before the Senate, it was promptly buried because the elder Statesmen realised that if the precedent to nullify the decision of the Supreme Court is once set up, it would disrupt the nice balance between legislative and judicial branches of the State and that such a proposal threatened the whole pattern, of Government.

116. In my view, a direct property tax on. Real property ought to have a reasonable correlation to the value of the property to the assessee; if the Impost has no such reasonable co-relation, it is not a "tax", but it assumes the character of extortion or confiscations. Such an Impost would be violative of Articles 14 and 19 and would come-within the scope of the rule laid down by the Supreme Court in paragraph 45 of the judgment in AIR 1964 SC 825.

117. It is the legislative function to determine the standard or basis to apportion the tax , burden among the persons or property selected. Normally, the Court will not interfere with the legislative judgment unless it be shown that the basis determined by the legislature is unreasonable that the impost in effect and substance amounts to an extortion or confiscation, disguised as a tax measure. That in my view is the true-test for determination of the second ground of challenge formulated above.

118. Even in the absence of the equality clause of the Constitution, the very definition of the term 'tax' or 'taxation' implies apportionment of the tax burden from persons and property, levied by the State by virtue of its sovereignty for the support of government and for all public needs. In this context, it is necessary to refer to the following passages from the classical treatise of Dr. Cooley on Taxation. (21) :

<sup>43</sup>(1963) 372 US 368

Cooley on Taxation - Vol. 1. P. 61-62.

"So-called taxes are often not taxes within the local definition of the term. Taxes are the

enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. This definition of taxes, often referred to as "Cooley's definition," has been quoted and indorsed, or approved, expressly or otherwise, by many different courts."

P. 64-65.

"Taxes are supposed to be regular and orderly, and they are commonly required to be paid at regular periods. They differ from the forced contributions, loans and benevolences of arbitrary and tyrannical periods, in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution and a just apportionment of the burdens of government. In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule, and apportioned by the law according to some uniform ratio of equality. So the power is not arbitrary, but rests upon fixed principles of justice, which have for their object the protection of the taxpayer against exceptional and invidious exactions, and it is to have effect through established rules operating impartially."

Pages 72-73. Para 7.

"Taxation defined.-Taxation is a mode of raising revenue for public purposes. The term is ordinarily used to express the exercise of the sovereign power to raise a revenue for the expenses of government. It is the act of laying a tax, I.e., the process or means by which the taxing power is exercised. "Scientifically considered," says Mr. David A. Wells, "taxation is the taking or appropriating such portion of the product or property of a country or community as is necessary for the support of its government, by methods that are not in the nature of extortions, punishments or confiscations."

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Page 565, Para 262.

"Equality as meaning equality of sacrifice.- Equality of taxation means equality of sacrifice, i.e., the apportioning the contributions of each person towards the expenses of Government, so that he shall feel neither more nor less Inconvenience from his share of the payment than every other person experiences from his. Equality does not mean an equal tax against each person or against each lot - or piece of property."

119. Mukherjea, J. as he then was, who dell-the opinion of the Court in *Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirtha Swamiar, Shirur Mutt*<sup>44</sup>, defined what tax means at page 1040-1041 (AIR 1954 HC 282 at p. 295) thus :

"A neat definition of what 'tax' means has been..... Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay."

It is therefore, clear that apportionment of the tax burden is an essential factor in the determination of the basis for the charge to tax.

120. As observed earlier, the content of the power of taxation under Entry 49 of the State List is to levy a property tax on lands and buildings. A thing is called property because it has value; anything which has no value is not property. The value of the property to its owner or occupier or any one possessing any lesser rights, is its value to the owner or occupier. The levy of property tax, therefore, requires the legislation to fix a reasonable co-relation to the value of the property to the assessee; any other basis would constitute mal-apportionment and result in arbitrariness and inequality.

121. The only factor taken into consideration by the impugned Act for the purpose of apportionment is the size of the building, in disregard as to its age, location, rental value or capital value. What is material to the assessee, who is the owner of the property, is the present value of the property at the time of the assessment. That in a cardinal principle in the matter of valuation of premises for rateable purposes and that is stated in the Latin maxim *rebus sic stantibus* i.e. as they exist at the date of the valuation. *Abdullahai Lalji v. Executive Committee, Aden*<sup>45</sup>, That is also the principle stated as early as 1886 by the High Court of Madras in *Secy. of State v. Madras Municipality*<sup>46</sup>, by a Bench which consisted of Mr. Justice Muttusami Ayyar, one of the greatest Jurists our country has produced. The value or the reasonable rent which a building would fetch depends upon a number of factors viz., the nature of the property, its local situation the demand for the building etc. The *Queen v. London and North Western Rly. Co*<sup>47</sup>;

122. The Impugned Act levies a charge to tax solely and wholly on the basis of the size measured by the floorage area. Whether the building is situate in the costliest locality in the Metropolitan city of Bangalore or a city like Gulbarga, the tax is the same.

123. The Mysore Rent Control Act, 1961, has exempted the buildings constructed after 1st August 1957, from its fair rent provisions; while buildings constructed before, are subject to the fair rent fixed under the various Kent Control Act. Fair Rent Acts for urban house property were first brought into force during the a World War. The fair rents fixed under the said Acts do not contemplate a return more than six per cent on the capital value at that time, when the rupee was really worth its full value. Now, according to some of Use economists the rupee is worth only seventeen paise. A building constructed before 1-8-1957 for which fair rent had been fixed under the then existing Acts, and an assessee who has constructed building after 1-8-1957 who

<sup>44</sup>1954 SCR 10015

<sup>46</sup> ILR 10 Mad 38 at p. 42

<sup>45</sup> ILR 42 Bom 692 at p. 706 : (AIR 1918 Bom 200 at p. 202)

<sup>47</sup>(1874) 9 QB 134

is realizing high rents, are both subject to the same amount of taxation.

124. The size of the building, it is true, has a relation to the income or value, but that is only one of the factors that enters into the determination of the value of the property. As observed by James Maccoll and E.C.R. Hadfield in their book on British Local Government - (26) James E.

Maccoll and E.C.R. Hadfield on British Local Government P. 77.

"a satisfactory tax that is payable by most members of the community must be graded according; to capacity to pay. The size of the house occupied has, it is true, a relation to income, but the amount by rates a house of a certain size will pay varies enormously with the situation, those in Country areas paying less than those in towns."

125. For the above reasons, the basis of the tax under the impugned Act has no reasonable correlation to the value of the building to the assessee, and therefore, the impugned Act violates the fundamental rights guaranteed to the citizens of India, under Articles 14 and 19 of the Constitution of India, and being inconsistent with the provisions of Part III of the Constitution, the impugned Act is void.

126. For the above reasons, the order I propose to make is that the Mysore Buildings Tax, Act, 1962 (Act No. 4 of 1963) be struck down as unconstitutional and therefore null and void. In the circumstances of the case, there will be no order as to costs.  
Order accordingly.