BOMBAY HIGH COURT

Dialdas Parmanand

Vs.

P.S. Talwalkar

Special Civil Appln. No. 983 of 1956

(Chagla, C.J. and Tendolkar, J.)

10.08.1956

JUDGMENT

Chagla, C.J.

1.This petition challenges the validity of Act VII of 1956 being an Act passed by Parliament. The petitioner carries on business of dealing in curios, novelty goods, piece goods etc. at Bombay and he is a registered dealer under the Bombay Sales Tax Act 1953. For the period commencing from 1st April 1954 to 31st March 1955 the petitioner elected as and from the 23rd February 1955 to pay tax on his sales instead of tax on his purchases. In the course of assessment for this period he was taxed on his purchases from persons outside the State of Bombay from the 1st April 1954 to the 23rd February 1955 on the sum of Rs. 2,55,534-5-6. The petitioner's contention was that these purchases were not liable to tax under the Sales Tax Act as they were made in the course of inter-state trade or commerce.

2. In order to understand the contentions of the parties, it is necessary in the first place to look at the provisions of the Constitution and to consider what are the powers of the State Legislature and of Parliament with regard to imposing tax on sales and purchases. Turning first to the legislative competence of Parliament, we find entry 42 in List I of the Seventh Schedule which deals with Inter-State trade and commerce. Turning to List II which deals with the legislative competence of the State Legislatures, under entry 54 power is conferred upon the State Legislature to legislate with regard to taxes on the sale or purchase of goods other than newspapers. Article 286 imposes a restriction on the legislative competence of the State Legislature and the restriction falls under four different heads. The State Legislature is prevented from imposing tax on the sale or purchase of goods where such sale or purchase takes place outside the State, or in the course of the import of the goods into, or export of the goods out of, the territory of India, and from imposing a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-state trade or commerce, and from imposing a

tax on the sale or purchase of any such goods as have been declared by Parliament by law to be essential for the life of the community. It will be noticed that the restriction with regard to taxing sale or purchase which is outside the State and a sale in course of import of goods into, or export of the goods out of, the territory of India, is absolute. With regard to a sale which takes place in the course of inter-state trade or commerce, the restriction is not absolute because clause (2) of Article 286 enables Parliament by law to provide otherwise. Therefore, if Parliament removes the restriction, or, in the language of the Supreme Court, removes the ban, then the legislative competence of the Legislature may extend even to tax sales which take place in the course of inter-state trade or commerce. With regard to essential goods also the restriction is not absolute because the Legislature may tax goods which are essential for the life of the community, and if the bill has been reserved for the consideration of the President and has received his assent, then the tax can be validly imposed. Reference may be made to the Explanation to Article 286 which explanation, as the explanation itself says, is intended for the purpose of sub-clause (a) and that explanation introduces a legal fiction and by that legal fiction a sale is deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State. Therefore, if we find a State in which goods have been delivered for consumption then by reason of this explanation and by reason of the legal fiction introduced into this explanation, that State, which might be called, as has been called by the Supreme Court, the delivery State, becomes the State in which the sale is deemed to have taken place.

3. Now, the construction of this explanation led to considerable difficulties and a case went up to the Supreme Court from this High Court where the Supreme Court had to consider the effect of this explanation, and the decision of the Supreme Court is to be found in *State of Bombay v. The United Motors (India) Ltd*[1]*.;* What the Supreme Court in effect did was to apply the explanation not merely for the interpretation of Article 286 (1) (a) but also for the purpose of interpretation of clause (2) of Article 286, and the view taken was that if a sale was within the State, by reason of the explanation that sale was not affected by the restriction contained in clause (2) of Article 286. To use the language of the learned Chief Justice (at p. 1085 of SCR) :

> "We are of opinion that the operation of clause (2) stands excluded as a result of the legal fiction enacted in the explanation, and the State in which the goods are actually delivered for consumption can impose tax on inter-State sales or purchases. The effect of the Explanation in regard to inter-state dealings is, in our view, to invest what, in truth, is an inter-State transaction with an Intra-State Character in relation to the State of delivery....."

This question was later reconsidered by the Supreme Court and the Supreme Court in *The Bengal Immunity Co. Ltd. v. The State of Bihar and others*[2]*,* came to a contrary conclusion, and what the Supreme Court held was that the explanation cannot be extended to clause (2) of Article 286 and it cannot control or limit the ambit of clause (2). In other words, the view taken by the

Supreme Court was that each of the restrictions to which attention has been drawn is separate and independent and it is not permissible to read into cl (2) of Article 286 the words of the Explanation which on the face of it are only intended for the purposes of the restriction contained in Article 286 (1) (a).

4. Now, it is a matter of historic knowledge that States in India had been subjecting to tax, sales or purchases which although inter-State in character satisfied the terms of the Explanation. In other words, if there was delivery of goods for consumption in a

[1]1953 SCR 1069

[2](1955) 2 SCR 603: AIR 1955 SC 661

particular State, that State purported to tax that sale although the nature and character of that sale was inter-State. The Government of India was faced with this situation that the States had imposed this tax on the basis of the earlier Supreme Court judgment and they had collected the tax, and to give effect to the recent judgment of the Supreme Court might have led to a serious economic crisis all over the country. In order to meet the situation Parliament enacted Act VII of 1956. The Act followed upon an Ordinance No. III of 1956 which was promulgated on 30-1-1956. The Act is in terms substantially identical with the Ordinance and in construing the Act we must constantly keep before us the background and the reasons which led Parliament to put this legislation on the statute book. The Act is a validating Act and what it validates is the law of a State imposing or authorizing the imposition of tax on the sale or purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between 1-4-1951 and 6-9-1955. It will be noticed that the validation is for a specific purpose and for a specific period. The laws of the State are validated in so far as they impose a sale or purchase tax where such sale or purchase took place in the course of inter-State trade or commerce, and the laws are validated to the extent that they imposed a tax during the period mentioned in the Act, viz., between 1-4-1951 and 6-9-1955, and the Act makes it clear that no law shall be deemed to be invalid or ever to have been invalid merely by reason of the fact that such sale or purchase took place in the course of inter-State trade or commerce. Therefore, the validation is not to go beyond the particular incidence in the law which taxes a sale or purchase in the course of inter-State trade or commerce, and the validation proceeds further to validate all taxes levied or collected or purporting to have been levied or collected during the aforesaid period.

5. The Act has been challenged on various grounds and we will proceed to deal with the various grounds which have been very ably and very strenuously put forward before us by Mr. Palkhivala. The first contention is that Parliament has no competence to legislate with regard to sales or purchase tax. It is pointed out rightly that the power of the State Legislature to legislate with regard to taxes on purchase or sale arises from the Constitution itself. It is the Constitution that confers the power upon the State Legislature. It is not a power that is conferred upon the State Legislature by Parliament, nor does the State Legislature act as a delegate or an agent of Parliament in legislating with regard to sales or purchase tax. It is therefore said that Parliament can only validate such law as it can itself pass and if Parliament cannot enact a sales or purchase

tax Act, much less can it validate the imposition of such a tax. In advancing this argument what is overlooked is the true nature and character of the law passed by Parliament. It is erroneous to suggest that in placing Act VII of 1956 on the statute book, Parliament was legislating with regard to the imposition of a tax on sales or purchases. Parliament was exercising its legislative competence with regard to a power which is expressly conferred upon it by the Constitution. Under Article 286(2) it is only for Parliament to remove the restriction upon the legislative competence of the State Legislature to tax inter-State sales or purchases and it is in the exercise of that power that Parliament has passed this Act. It is true that the language used by Parliament is "validation of State laws." But implicit in the validation is the clear object of Parliament to remove the ban and the restriction placed upon the State Legislature by Article 286 (2) and which removal could only be brought about by Parliamentary legislation. Therefore, the legislative function that Parliament was performing in passing this Act was not imposing any tax on sales or purchases, nor trespassing upon the State field, but acting under Article 286(2) and providing by legislation that the restriction upon the competence of the State Legislature shall be removed and that the legislative competence, as it were, restored without this particular restriction.

6. It is then urged that Parliament cannot validate what the Constitution prohibits and it is said that the Constitution having prohibited the State Legislature from taxing inter-State sales which took place in the course of inter-State trade or commerce, Parliament cannot remove that prohibition. There is a clear fallacy underlying this argument. There is no prohibition against a State Legislature imposing a tax upon sales or purchases which take place in the course of inter-State trade or commerce. There is a restriction, but the Constitution itself provides for the removal of that restriction. This is not a case where there is a total prohibition as in the case of Part III from any Legislature contravening any fundamental right. That prohibition undoubtedly cannot be removed by Parliament and it can only be removed by an amendment of the Constitution itself. But it is stretching the meaning of the expression "prohibition" to say that when the Constitution places a restriction which can be removed by Parliament itself, that when Parliament acts pursuant to that power, it is doing something in violation of the Constitution.

7. It is then said that the principle of validation is the same as the principle of ratification and the doctrine of validation can only apply where an act has been performed by an agent without authority and the principal makes good that lack of authority by confirming or validating the act of the agent, and it is pointed out that if the State Legislature is not the agent of Parliament, the doctrine of validation cannot apply to the relationship subsisting between Parliament and the State Legislature under the Constitution. Attention was drawn to two American cases, *United States v. Conrad Heinszen*[3], and *Rafferty v. Smith Bell and Co*[4] where the doctrine of ratification is explained. In one case the President of the American Republic passed a law with regard to the Philippine Islands without the sanction of the Congress, and in the other case the Philippine Legislature passed a law without the sanction of the Congress, and in both the cases the Congress ratified the act of the President and the Legislature, and what the Supreme Court of America held was that the ratification or validation was proper. In our opinion, the doctrine of ratification has

no application to the question that we have to consider. As we have already pointed out, this is not a case where Parliament is purporting to ratify or validate the act of its agent. This is a case where Parliament is legislating under an express power conferred upon it by the Constitution and once the true nature of Parliamentary legislation is understood then no question of ratification can possibly arise.

8. It is then said that although the Act may validate the State legislation, it does not lift the ban or remove the restriction, and unless that has been done the power of the State Legislature to impose the tax cannot arise. We have already pointed out as to what is the true nature and character of Parliamentary legislation and in our opinion by necessary intendment by passing this Act, if not in express terms, Parliament did intend to and succeeded in carrying out that intention of lifting the ban or removing the restriction placed upon the State Legislature under Article 286(2).

9. It is then urged that even if Parliament was functioning under Article 286(2), that

[3](1907) 206 US 370

[4](1921) 257 US 226

legislative function can only be exercised prospectively and not retrospectively. Now, it is a well established canon of construction in Constitutional cases that if the Constitution confers sovereign power upon a Legislature within its own ambit, the power to legislate on a particular topic can be exercised in all its aspects. The Legislature may legislate prospectively or retrospectively and it cannot possibly be suggested that Parliament is not sovereign within its own ambit. Therefore, if the power to provide otherwise under Article 286(2) was conferred upon a sovereign Legislature, that power can be exercised not only prospectively but also retrospectively. Faced with this Mr. Palkhivala suggested that even so the language of Article 286(2) itself makes it dear that the legislative power conferred upon Parliament by that Article can only be exercised prospectively. He said that the construction of the words used precludes a construction which gives power to Parliament retrospectively to lift the ban, and for this purpose reliance was placed upon a decision of the Privy Council reported in *Punjab Province v. Daulat Singh*[5]*,* The Privy Council there was considering section 298 of the Government of India Act. Sub-Section (1) of section 298 contained a general prohibition to the effect that

> "No subject of His Majesty domiciled in India shall on grounds only of religion, place of birth, descent, colour or any of them be ineligible for office under the Crown in India, or be prohibited on any such grounds from acquiring, holding or disposing of property or carrying on any occupation, trade, business or profession in British India". Then there was an exception under sub-section (2) and that was to the following effect:
> "Nothing in this section shall affect the operation of any law which
> (a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of agricultural land and situate in any particular area, and owned by a person belonging to some class recognised by the law as being a class of persons engaged in or connected with agriculture in that area to any person not belonging to any such class.....". The

Punjab Legislature passed a law with regard to past sales or mortgages in other words, the Punjab Legislature, retrospectively wanted to exempt sales or mortgages under sub-section (2) from the operation of section 298(1), and the question that the Privy Council had to consider was whether the attempt of the Punjab Legislature was lawful, and the Privy Council accepts the view of Mr. Justice Varadachariar that the word "prohibit" can only mean the forbidding of a transaction, and such a direction is appropriate only in respect of transactions to take place subsequently to the date of the direction, and cannot include an attempt to reopen or set aside transactions already completed, or to vacate titles already acquired. Therefore, the decision of the Privy Council turned on the construction of the word "prohibit" used in the Government of India Act. When we turn to our Constitution, the language used by the Constitution-makers is "Parliament may by law otherwise provide". There is nothing in the word "provide" which necessarily suggests only futurity. "Provide" is a colourless word and it may include both retrospective and prospective legislation. It is therefore difficult to understand how the construction of a particular word in the Government of India Act can help us in the construction of an entirely different word used in the Constitution. It should also be borne in mind that the prohibition the Privy Council was considering was against the state Legislature and the prohibition was contained in the Government of India Act which Act could have

[5]48 Bom LR 443

been modified by the British Parliament. We are here dealing not with the legislative competence of, in a sense, a subordinate Legislature. We are dealing here with the legislative competence of the sovereign Parliament of India, and even assuming that on the language such a construction was possible, it would be totally opposed to all conceptions of the sovereignty of a Legislature to hold that a sovereign Legislature has not the legislative competence to legislate retrospectively as much as prospectively.

10. It is finally said that Article 286(2) contains a condition precedent and therefore that condition precedent must first be complied with before the State Legislature can impose a tax contemplated by that Article. It is urged that Parliament has reversed the process which the Constitution has laid down and according to Mr. Palkhivala the process is first the lifting of the ban or the removal of the restriction by Parliament and then the State Legislation. But here we have a State legislation and then a subsequent lifting of the ban. In our opinion it is a mistake to look upon the provision of Article 286(2) as a condition precedent. We start with the legislative competence of the State Legislature that is an undisputed fact. If the State Legislature were to pass a law taxing inter-State sales, that law cannot be challenged on the ground of competence. But what the Constitution has done is to have placed a limitation or restriction upon that power and once that restriction is removed the competence is unquestioned and undisputed. Therefore, Article 286(2) deals not with any condition precedent, nor with the compliance of any condition, before the State Legislature can legislate, but it deals with a restriction or a ban which has to be removed in the manner laid down by that article in order to make the law passed by the State Legislature valid. Therefore, if Parliament could remove the restriction antecedent to the State

legislation, equally so it could remove the ban retrospectively and validate a law which was only invalid because the ban had not been lifted and the restriction had not been removed.

11. The next head of Mr. Palkhivala's argument is on the basis that the Parliamentary legislation is a valid legislation. His contention is that even if the ban was retrospectively lifted, the State law which was unconstitutional and therefore dead should have been re-enacted or re-vitalised, and as the State Legislature has not re-enacted the law, therefore, no reliance can be placed on the validating Act in the absence of something which would become effective by reason of the validation. For the purpose of this argument strong reliance is placed on the doctrine of American law which was enunciated by the Supreme Court in *Saghir Ahmad v. State of U. P*[6]. Mahajan C. J. at p. 728 (of SCR); at p. 739 of AIR) quotes from the learned author Professor Cooley from his work on Constitutional Limitations:

> "A statute void for constitutionality is dead and cannot be vitalised by a subsequent amendment of the Constitution removing the constitutional objection but must be re-enacted".

Now, there are three answers to this contention. The first, and what seems to us to be conclusive, is that the Constitution itself provides the machinery for curing the defect which was to be found in the original State legislation. If the Constitution provides for removal of the defect, it is impossible to suggest that the Act which can be set right and in

[6] (1955) 1 SCR 707

which a defect can be removed is dead and requires re-vitalizing. Mr. Seervai drew our attention to an American case which has given effect to this principle and that is *Wilkerson v. Rahrer*[7] The conflict arose between an Act of the Congress and an Act of the Kanas Legislature and, what the Supreme Court held was that it was not necessary, after the passage of the Act of Congress of August 8, 1890, to re-enact the law of Kansas of 1889, forbidding the sale of intoxicating liquors, in that state, in order to make such State law operative on the sale of imported liquors. At p. 577 Chief Justice Fuller in his judgment states:

> "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

The second answer is that if the Act is dead as suggested by Mr. Palkhivala, then the power which we have held Parliament possesses to legislate retrospectively is meaningless. You only legislate retrospectively when you want to give effect to something you are doing at a point of time antecedent to your legislation, and if Parliament was retrospectively validating the law or lifting the ban or removing the restriction, then that power could not be exercised if the law

whicn it was seeking to validate was dead and had to be re-enacted. Then the removal of the restriction by Parliament would be prospective and the State Legislature would have to re-enact the law. The final answer is that it is incorrect to suggest that the State law we are considering is unconstitutional. The doctrine of Professor Cooley, assuming it is a valid doctrine applicable to India, a point we will presently consider, only applies to unconstitutional laws and it is impossible to suggest that the State laws imposing tax on purchases and sales which take place in the course of inter-State trade or commerce were unconstitutional laws. As already pointed out, they were passed by a Legislature which was competent to legislate on that topic. They did not contravene any fundamental right embodied in Part III. The only defect in the law was that it was passed, as it were, without the prior sanction or permission of Parliament. Such a law cannot be described as an unconstitutional law. The Supreme Court in a subsequent judgment, *Bhikaji Narain Dhakras v. The State of Madhya Pradesh*[8]*,* has considered the question whether an unconstitutional Act is dead or not. At p. 599 (of SCR) : (at pp. 784-785 of AIR) Mr. Justice Das, Acting Chief Justice as he then was, points out the distinction that is observed by American Constitution writers between pre-Constitution and post-Constitution laws, but he goes on to say that American authorities can have no application to our Constitution apart from this distinction of pre-Constitution and post-Constitution laws. Of course, that decision turned on the construction of Article 13 which rendered void laws to the extent of such inconsistency and on that the Supreme Court held that they were not dead for all purposes. But although we are not dealing with Article 13, it will be difficult to hold that by reason of the absence of Parliamentary legislation under Article 286(2) the State legislation was dead for all purposes. It did not operate to the extent that it imposed a tax not justified by the Constitution and when the ban was lifted that irregularity was set right and the law could operate to tax the sales with regard to which

[7](1891) 140 US 545

[8](1952) 2 SCR 589: AIR 1955 SC 781

Parliament had passed the necessary legislation.

12. It is then urged by Mr. Palkhivala that on the construction of the provisions of the Sales Tax Act there is no charge upon sales which are inter-State sales. Turning to the Bombay Act, the charging sections are sections 8, 9 and 10. Sections 8 and 9 deal with sales tax and Section 10 with purchase tax, and in the definition of "sale" which is contained in Section 2(13) the Explanation to Article 286 is incorporated. In other words, by reason of the charging section and by reason of the definition of "sale" accompained by the provisions of the Explanation, it is clear that the Legislature charged to tax sales within the State including those sales which may be outside the State but by the legal fiction of the Explanation were deemed to be sales within the State. Now, Section 46 exempted from tax expressly sales outside the State of Bombay or in the course of the import of the goods into the territory of India, or the export of the goods out of such territory, or (b) in the course of inter-State trade or commerce, except in so far as Parliament may by law otherwise provide, and what is urged by Mr. Palkhivala is that inasmuch as when the Act was passed Parliament had not otherwise provided, inter-State sales and purchases were exempted. In our opinion, the proper view to take of this legislation is that there was an imposition of tax on sales including inter-State sales, but the imposition on inter-State sales was

not effective until the restriction under Article 286, was removed, and that is exactly what Section 46(b) provided. It did not exempt inter-State sales or purchases altogether, but the tax was to operate upon the sales or purchases if Parliament by law so provided, and therefore when the restriction was removed retrospectively we must read this Act and construe it as if before the passing of the Act Parliament had provided that the State Legislature may impose tax on inter-State sales and purchases. Therefore, reading the charging Sections and Section 46 and the validating Act, there can be no doubt that on the validating Act being passed the inter-State sales and purchases were subjected to tax and they came within the operation of the charging sections 8, 9 and 10.

13. What is finally urged by Mr. Palkhivala under this head is that everything being conceded, even so the validating Act can only validate what is invalid and he says that if he can satisfy us that there is nothing invalid in the Bombay Sales Tax Act, then the validating Act cannot apply to the Bombay Act. It is pointed out that section 46 does nothing more than reproduce the provision of the Constitution and Mr. Palkhivala rather indignantly says that it is patently impossible for anyone or any Court to suggest that a section which embodies a provision of the Constitution can be invalid and can be validated by the validating Act. It is also said that what is illegal or what was illegal was not the law but the exaction by the executive. If the law reproduced the provision of the Constitution, then the executive had to act according to the provisions of the Constitution and if the executive failed to do so and imposed tax which was not justified, then what should have been validated was the action of the executive and not the law itself. Mr. Palkhivala says that the Bombay Legislature has passed a perfectly proper piece of legislation, it has introduced all the proper principles of the Constitution into it, and so there was nothing wrong in it, nothing to cure and nothing to validate. Now, whatever force there may be in this argument, we are concluded by the recent decision of the Supreme Court in (1955) 2 SCR 603: AIR 1955 Supreme Court 661, which was considering the Bihar Act which embodied Section 33, which is almost identical in terms with section 46 of our Act, and as this decision has been considerably canvassed by both sides and both sides have put forward their own views as to exactly what the Supreme Court decided, it is perhaps necessary to look into it in some detail. The petitioner in that case was a person non-resident in Bihar and he was challenging the imposition of tax by the Bihar Government and the Bihar Sales Tax Authorities, as appears from p. 616 of SCR maintained that under Section 33, which was substantially based on Article 286 of the Constitution and was inserted in the Act by the President's Adaptation Order promulgated on 4-4-1951, all sales in West Bengal or any other State under which the goods had been delivered to the State of Bihar as a direct result of the sale for the purpose of consumption in that State were liable to Bihar Sales Tax. Therefore, this was the contention of the Bihar Sales Tax Authorities. What is urged by Mr. Palkhivala is that four questions were raised by the Supreme Court as requiring decision, and the fourth question was that on a true construction of the Act itself it does, not apply to the sales sought to be taxed, and Mr. Palkhivala points out that the Supreme Court has left this question undecided. At p. 664 of SCR it is stated in the judgment: "In the view we have taken on question (A) it is not necessary for us, on this occasion, to discuss the other

questions, (C) or (D)." and (D) is the fourth, question relevant for this discussion. What Mr. Palkhivala has overlooked is the passage at p. 667 of SCR of the judgment, where after interpreting Article 286 and after dissenting from the earlier decision of the Supreme Court, the learned Acting Chief Justice says:

> "In view of the interpretation we have put upon, Article 286 it must follow that the charging section of the Act read with the relevant definitions "cannot operate to tax inter-State sales or purchases and it must be held that as Parliament has not otherwise provided, the Act, in so far as it purports to tax sales or purchases that take place in the course of inter-State trade or commerce, is unconstitutional, illegal and void."

Therefore, what was declared to be unconstitutional, illegal and void were the charging sections of the Act read with the relevant definitions, and as the Bihar Government purported to tax under the charging section the Supreme Court held that the charging section was illegal or inoperative to the extent that it was contended that by that charging section inter-State sales could be taxed. In other words, the view of the Supreme Court was that the charging section of the Act could not operate to tax inter-State sales and therefore the relevant section was invalid. and when we turn to the final order which is at p. 841 of SCR the Supreme Court makes it clear by directing that

> "Until Parliament by law provides otherwise, the State of Bihar do forbear and abstain from imposing sales Tax on out-of-State dealers in respect of sales or purchases that have taken place in the course of inter-State trade or commerce even though the goods have been delivered as a direct result of such sales or purchases for consumption in Bihar."

Therefore, the flaw or the defect which the Supreme Court found in the Bihar Act was the failure by Parliament providing otherwise within the meaning of Article 286(2), and the injunction was to last only so long as Parliament had not so provided. It was as a result of this judgment that Parliament stepped in, provided otherwise, removed the restriction, lifted the ban, and validated the charging section so as to make it operative upon inter-State sales. Therefore, in our opinion, it is entirely untenable to urge and it is not possible to contend in view of the Supreme Court decision that the law which we are considering is a valid law and it is only the executive action that was unjustified and which ought to have been validated.

14. The final contention put forward is with regard to the proper interpretation to be placed upon the expression "levy and collection" used in Section 2 of Act VII of 1956, Now, frankly, the matter is not free from difficulty. It is quite possible to take the view for which the Attorney General, the Advocate General and Mr. Seervai have contended. There is great force in the arguments put forward by these learned counsel. But there is equal force in what has been urged by Mr. Palkhivala and Mr. Bhagwati. Now, we must look upon Act VII of 1956 as validating a law imposing a tax. It may therefore, as far as construction is concerned, fall in the same category as a taxing statute, and it is well settled that if there is any doubt or ambiguity as to the

construction, the benefit of the doubt or construction must go to the subject. If Parliament or the State Legislature imposed a tax or intended to collect any moneys due as a result of an imposition of tax, then clear words must be used which would render the subject liable. What has happened in this petition is that the assessment order has been passed on 29-2-1956, and the contention of Mr. Palkhivala is that inasmuch as the order of assessment is passed after the period specified in the Act, viz., between 1-4-1951 and the 6-9-1955, the assessment order is not a valid order and no action can be taken pursuant to that order. What is said by counsel appearing on behalf of the Union of India, the State of Bombay and the State of Bihar is that the first part of Section 2 validates the law imposing the tax and once that is done any action taken under a valid law cannot be challenged. If the Sales Tax Act validly imposes a tax on inter-State sales and purchases by reason of the validating Act, then it is not open to the assessee to challenge any proceedings taken under that Act, and if the assessment order was made under a valid law, then the attempt to challenge it on the ground that it was passed after the 6-9-1955 is a futile attempt. It is also pointed out that the latter part of Section 2 which provides: "and all such taxes levied or collected or purporting to have been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law", are not words of limitation. It is said that "and" only means with the result of consequences and Parliament merely points out some of the results or consequences that would follow upon the validation of the State law. It is also said that a Legislature very often ex-majore cautela uses words which ought not to be construed as words of limitation or detracting from the generality of expressions used earlier in the provision of the law. It is also said that the expression "levied or collected" is a comprehensive expression describing the result of the imposition of the tax. Mr. Palkhivala points out that whereas the first part validates the imposition of tax by the Legislature, the second part validates what the executive has done pursuant to the law, and that proper effect must be given to both parts of Section 2, and the validation with regard to the action of the executive is limited to the levy or collection within the period specified. It is quite clear that Act VII of 1956 contains a limited provision with regard to the removal of the restriction under Article 286(2). The removal is limited to the law imposing a particular kind of tax and is also limited with regard to the period, and therefore it is said that even with regard to executive action what is validated is the action taken within the period specified in section 2. If the section taken is subsequent to that period, then it does not afford any protection. Now, the expression "levy" contains many connotations and what particular connotation should be given to that word would depend upon the context. Mr. Justice Kania in - *'Sir Byramjee Jeejeebhoy v. Province of Bombay*[9]*',* construed "levy" in the context of the Income Tax Act to mean "take necessary steps to collect." and we also find this expression used in two Articles of the Constitution, Articles 269 and 270 which deal with the power of the Union Government. Article 269 deals with the duties and taxes which shall be levied and collected by the Government of India, and Article 270 deals with the Taxes on income other than agricultural income which shall be levied and collected by the Government of India.

15. Therefore, "levy" in our opinion in this context must mean any step taken or any proceeding

initiated for the ultimate purpose of determining the liability of the assessee and finally collecting the tax. In every taxing statute the various processes are the imposition of the tax by the Legislature itself, the determination of the quantum of tax to which the subject is liable for which usually a machinery is set up, and finally a machinery for the summary recovery of the tax. The first question that we have to consider is, would this section apply if no step whatever had been taken by the taxing authority between the period specified in section 2 and the proceedings were initiated for the first time after the 6th September 1955? In our opinion, it would not be true to say of proceedings initiated after the 6th September 1955 that it was a tax levied, leave alone collected, between 1st April 1951 and 6th September 1955. We are not prepared to accede to Mr. Palkhivala's contention that not only must the proceedings be initiated before the 6th September 1955 but the liability determined by a proper assessment order, and he says that as the assessment order in this case was made after the 6th September 1955 there is no liability upon the petitioner. In our opinion, the relevant factor to consider is not the making of the assessment order, but any proceeding which starts, as it were the process of levying. We find it difficult to believe that Parliament wanted to give authority to the State and that is what it really comes to merely because the law imposed the tax as between the 1st April 1951 and 6th September 1955, to start levying that tax after the 6th September 1955, because what the Attorney General and the Advocate General and Mr. Seevrai are contending for is that the State under this Act has the legal authority to start levying a tax after the period mentioned in Act VII of 1956. To accept the contention of these learned counsel would be not to give proper effect to the latter part of section 2. We would only be concentrating on what Parliament has enacted in the first part and ignoring the words used in the second part of section 2. Therefore, in our opinion a tax cannot be validly levied under the charging section of the Bombay Act if there has been no levy till the 6th September 1955, and we have made it clear in our judgment that "levy" means any proceedings taken for the purpose of ascertaining the liability of the assessee to pay tax.

16. The Bihar Act which came up before the Supreme Court has also come up before us for consideration and the Bihar Government is before us justifying the imposition of tax under that Act. Now, excepting for a few distinguishing features, to which we shall presently refer, the position of the two Acts is identical, and what we have said in our judgment with regard to the Bombay Act would also apply to the Bihar Act. With regard to the Bihar Act, which is Act XIX of 1947, it came into force on the 21st June 1947, and section 33, which corresponds to section 46 of our Act, was incorporated in the Act by the Adaptation of Laws (Third Amendment) Order passed on the 4th April 1951 and it was put into force from 26-1-1951. Therefore, the position is that although the Act is pre-

[9]42 Bom LR 10, at p. 56: (AIR 1940 Bom 65 (75, 76) at pp. 75-76)

Constitution Act, on the 26th January 1951 after the Constitution came into force the Constitutional provision embodied in Article 286 was incorporated in that Act. Now, what is said about this Act is that whatever might be the position with regard to the Bombay Act, there was no lifting of the ban under the validating Act as far as this Act was concerned, because the Act was passed as far back as 1947. In putting forward this contention what is ignored is the

competence of the Provincial Legislature under the Government of India Act. Under the Government of India Act the Bihar Legislature was competent to tax all sales including sales which were affected in the course of inter-State trade or commerce. Therefore Act XIX of 1947 was passed by a competent Legislature. Section 33, to use the language of the Supreme Court, imposed a conditional ban which prevented the charging section from operating to tax certain sales which came within the ban and that ban was lifted on the 1st April 1951 and once that ban was lifted, under the charging section the inter-State sales and purchases could be taxed.

17. Now, on this petition we have proceeded on the basis that certain facts are established and the facts on which we have proceeded to consider this petition are that the goods were delivered and were intended for consumption in the State of Bombay. It is on that basis that the purchase tax has been challenged by the petitioner on the ground that the purchase was in the course of inter-State trade or commerce. Now, having held that the validating Act is valid and these sales and purchases can be taxed by reason of the validating Act, it would be open to the Petitioner to establish any questions of fact which would not render him liable to pay tax even though the Sales Tax Act has been duly and properly validated. These questions can only be agitated before the Tribunals set up under the Sales Tax Act itself and not before us. We only say this in order not to prejudice the right of the petitioner to put forward his contentions at the proper time and before the proper authority.

18. Therefore, as far as this petition is concerned, the petition in view of our judgment must fail and must be dismissed.

19. The petitioner to pay the costs of the respondents. Costs fixed at Rs. 1,000/- for each party.

Petition dismissed.