

**(1968) 05 KAR CK 0002**

**In the Karnataka High Court**

**Case No :** Writ Petns. No"s. 1096 and 1097 of 1966, 1393, 1800, 2069, 2160, 2161, 2637 to 2639, and 2995 to 2997 of 1967, 92, 108, 221, 240, 392, 293, 520 to 524, 612, 627 to 631, 639, 640, 832, 862 to 864, 944, 950 to 954, 957, 959 to 961, 985,986, 989, 1016, 1041

D. Cawasji and Co.

APPELLANT

Vs

State of Mysore and Others

RESPONDENT

**Date of Decision :** 02-05-1968

**Acts Referred:**

Constitution of India, 1950 — Article 14, 226, 311 (2)  
Mysore Elementary Education Act, 1941 — Section 9, 9 (1)  
Mysore Excise Act, 1901 — Section 22, 23

**Citation :** AIR 1969 Kar 23 : (1968) ILR (Kar) 492 : (1969) 1 MysLJ 461

**Hon'ble Judges :** M. Sadasivayya, J;D.M. Chandrashekhar, J

**Bench :** Division Bench

**Judgement**

Chandrashekhar, J.—The petitioners are Excise Contractors who had or have secured exclusive privilege of retail vending of Toddy, Arrack or Beer in different areas or shops in the old Mysore area of the new State of Mysore. In these petitions under Article 226 of the Constitution the validity of the levy of Education Cess on "shop rents" in respect of Arrack, Toddy and Beer, and on Tree Tax and Tree Rent, has been challenged.

2. As many common questions arise for determination in these petitions, they were heard together and we are disposing them of, by this order.

3. Briefly stated, the history of the impugned levy is as follows:

Education cess on the aforesaid items was sought to be levied under the Mysore Elementary Education Act, 1941 (hereinafter referred to as the "Education Act,") which was enacted prior to the Constitution by the then Princely State of Mysore to amend and consolidate the law relating to elementary education in Mysore. After Bellary district (excepting 3 Taluks) became part of the then State of Mysore on formation of Andhra State under the Andhra State Act, 1953, this Act

was not extended to Bellary District and it continued to apply only to the then State of Mysore except Bellary District, u/s 119 of the States Re-organization Act his Act has constituted to be in force in the old Mysore area except Bellary District.

4. The Mysore Compulsory Primary Education Act, 1961, enacted by the new State for the entire State of Mysore repealed only Chapters VI and VII of the 1941 Act and the rest of the 1941 Act continues to be in force in the Old Mysore Area. Section 9 of the 1941 Act which provides for levy of Education cess occurs in Chapter III and has not been repealed.

4A. Sub-section (1) of Section 9 of the Education Act, as originally enacted, read thus:

9(1), The Government may, for carrying out the purpose of this Act, levy throughout or in any part of Mysore an education cess or an additional education cess or any or all such items of State revenue or revenue forming part of a tax under the Municipalities Act, 1933, or the District Boards Act, 1962, at rates not exceeding those specified in the Schedule to this Act.

5. The relevant part of the Schedule to the Act as it stood originally, read:

#### SCHEDULE

Items on which Cess may be levied. Maximum rate of levy.

1. Items on which local Cess is now levied. Three pies in addition to the present rate of so as not to exceed a total of 9 pies in the rupee.

2.....

6. By the Elementary Education (Amendment) Act, 1944, for sub-section (1) of section 9 of the Original Act, the following sub-section was substituted:

(1) The Government may for carrying out the purpose of this Act, levy throughout or in any part of Mysore, an education cess on any or all of such items of State revenue or of tax levied under any Act or rule constituting Local Bodies in Mysore and at such rates as are specified in the Schedule to this Act.

7. In the Schedule to the Act, the said amending act substituted the words "2 pies in the rupee" in the second column.

8. The Schedule was further amended by the Mysore Elementary Education (Amendment) Act, 1955, and the relevant part of the schedule as amended reads:

#### SCHEDULE

Items on which Cess may be levied. Maximum rate of levy.

All items of land revenue, forest revenue, and excise revenue on which education cess is now being levied. 9 pies in the rupee.

9. The provisions pertaining to items of excise revenue, will now be adverted to.

10. Manufacture, import, export, transport, sale possession and consumption of alcoholic liquor, opium and other narcotics, and raising revenue therefrom, were governed by the Mysore Excise Act 1901, which was enacted by the then State of Mysore which was an independent sovereign State. This Act was extended to Bellary District by the Mysore Revenue Laws (Extension to Bellary) Act, 1955. u/s 119 of the States Re-organization Act, this Act continued to be in force in the Old Mysore Area until it was repealed by Section 72 of the Mysore Excise Act, 1965, Which extends to the entire new State of Mysore with effect from 30-9-1967.

11. Section 17 of the 1901 Act empowered the Government to levy a duty, inter alia, on manufacture and sale of alcoholic liquor. Section 18 read:

18. Such duty may be levied in one or more of the following ways :

(a) by duty of excise to be charged in the case of spirits or beer either on the quantity produced in or passed out of a distillery, brewery or ware-house licensed or established u/s 12 or Section 14 as the case may be; or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the government may prescribe;

(b) xx xx xx xx xx

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege-

(1) of manufacturing or supplying by whole-sale, or

(2) of selling by retail, or

(3) of manufacturing or supplying by whole-sale and selling by retail any liquor or intoxicating drug in any local area and for any specified period of time ;

(d) by fees on licenses for manufacture or sale;

(e) xx xx xxx

12. Section 15 of the 1901 Act provided that no liquor shall be sold without a licence from the Deputy Commissioner, Section 16, inter alia, empowered to grant to any person the exclusive privilege of selling by retail any Indian made liquor, on such conditions and for such period as the Government deemed fit. No grantee of such privilege could sell until he received a licence from the Deputy Commissioner. Section 24 provided, inter alia, for grant of license subject to such conditions as the Government might direct generally or in any particular case. Section 25 empowered the Excise Authorities to require every grantee of license to execute a counterpart agreement in conformity with the tenor of his license.

13. Section 29 of the 1901 Act empowered the Government to make rules for the purpose of carrying out the provisions of that Act. Under Sections 16 and 29 of

that Act and in exercise of all other powers enabling the Government, in that behalf, the Government framed Rules called "Rules Regulating Sale of Excise Privileges" (hereinafter called the Rules). These Rules were made under several Notifications between the years 1933 and 1942. Rule 23 of these Rules provides, inter alia, that the amount for which the privilege has been purchased shall be payable in twelve monthly instalments together with Education in Cess. In the Note to this Rule kinds of liquor relevant for these petitions, items of Excise Revenue and the rates of cess are detailed as under:

Kind Items Rate per Rupee

Toddy Tree Tax, Tree Rent and Shop Rent 9 pies

Arrack, Beer "

14. Under the Mysore excise Act 1901, the exclusive privilege of retail vending of Toddy in different areas (generally each Taluk or City constituting an area) was sold by auction or tender-cum auction. Every licensee (who secured the exclusive privilege of vending Toddy) had to secure Toddy by tapping Toddy yielding trees either in Government groves assigned to his shops by the Excise Authorities, or trees in the lands of private persons with whom he had made private arrangements. The licensee had to pay to the State Tree Tax at the prescribed rates (varying according to the kind of palm tree from which Toddy juice is extracted) for the number of trees tapped by him. Where he tapped trees belonging to the Government he had to pay, in addition, Tree Rent to the State.

15. Under the Mysore Excise Act, 1901, the exclusive privilege of retail vending of Arrack in different areas (generally each Taluk or City constituting an area) was sold by auction or tender-cum-auction. The licensee (who secured the exclusive privilege of vending arrack) had to secure his requirement of Arrack from the Government Distillery on paying the price of arrack and duty thereon.

16. Under the Mysore Excise Act, 1901, the exclusive privilege of selling Indian made Beer in sealed bottles in shops in localities notified by the Excise Commissioner, was sold by auction or tender-cum-auction. The licensee (who secured such privilege) had to purchase his requirement of bottled Beer from breweries approved by the Excise Authorities and to pay to the State such duty as was fixed and notified by the Government from time to time.

17. The consideration paid by the licensee to the State for the exclusive privilege of vending Toddy, or Arrack or Beer, is popularly known as "shop Rent".

18. In the Notifications calling for bids and/or tenders for the exclusive privilege of retail vending of Toddy, Arrack and Beer, it used to be stated that Education Cess should be paid in accordance with Condition 23 of the General conditions applicable to all Excise Licences, and the kind of liquor, items and rates on and at which such cess was payable, were also detailed.

19. Section 23 of the new Excise Act which provides for the ways of levying

excise duties, reads:

23. Ways of levying such duties--Subject to such rules regulating the time place and manner, as may be prescribed excise duty and countervailing duty u/s 22 shall be levied in one or more of the following ways as may be prescribed, namely:

(a) rateably on the quantity of any excisable article produced or manufactured in or issued from a distillery, brewery manufactory or warehouse, or imported into the State.

(b) in the case of spirit or other liquor produced in any distillery established or any distillery, brewery or manufactory licensed under this Act, in accordance with its quality or strength, or in accordance with such scale of equivalents calculated on the quantity of materials used, or by the degree of attenuation of wash or wort, as the case may be, as may be prescribed:

(c) in the case of toddy, by tax on each tree from which toddy is drawn:

(d) by fees on licenses in respect of the manufacture or sale of any excisable article.

19A. Section 24 of the new Act purports to treat as excise duty, any sum accepted in consideration for grant of any lease relating to an excisable article. That section reads:

24. Excise Duty in respect of grant of leases:

Notwithstanding anything contained in Sections 22 and 23, the sum accepted in consideration of the grant of any lease relating to any excisable article u/s 17, shall be the excise duty or countervailing duty payable in respect of such excisable article in addition to any duty payable under sections 22 and 23.

19B. Section 26 of the new Act which deals with form and conditions of license is very similar to Section 24 of the 1901 Act.

20. Section 72 of the new Act which repeals earlier enactments in force in different areas of the new State ate, provides that Sections 6, 8 and 24 of the Mysore General Clauses Act shall apply, Consequently Rules including the Rules regulating Sales Excise Act, 1901, continue to be in force until corresponding Rules are under the new Act.

21. It is against the background of the facts set out above that the respective contentions have to be appreciated.

22. The Contentions advanced by the learned counsel for the petitioners may be formulated thus:

(i) Section 9 of the Education Act read with the Schedule, does not impose Education cess on "Shop Rent", Tree tax and Tree Rent;

(ii) Levy of Education Cess in only the old Mysore Area of the new State, is violative of Article 14 of the Constitution:

(iii) Shop Rent is not an excise duty and hence Education Cess, cannot be levied on Shop Rent;

(iv) Education Cess on Shop Rent is a tax on the business of vending Liquor and the amount of cess payable by any one person to the State cannot exceed Rs.250/- per annum; and

(v) As no separate procedure is provided by the Education Act for assessment and collection of Education Cess, it cannot be collected.

22A. Besides meeting these contentions the learned Special Govt. Pleader raised the following pleas in defence;

(i) Levy of Education Cess is saved by Article 277 of the Constitution;

(ii) Shop rent is a tax on luxuries; and

(iii) It is not open to the petitioners to question their liability to pay education Cess which they have agreed to pay under contracts with the State.

22B. We shall proceed to consider these contentions.

23. W. Ps. Nos. 639 and 640 of 1968 relate to the levy of Education Cess on Toddy Shop Rent and Tree Tax in Bellary District for the period 1-1-1968 (sic) to 30-6-1959 (sic). As seen earlier, the Education Act enacted by the former Princely State of Mysore, was not subsequently extended to Bellary District. As, the Education Act has no application to Bellary District, the levy of Education Cess in Bellary District is clearly without the authority of law.

24. Even in the Notification of Sale of Excise Privilege dated 30-10-1967 (in pursuance of which the petitioners in W. Ps. Nos. 639 and 640 of 1968 obtained the exclusive privilege of vending Toddy in certain Taluks of Bellary District). Clause 18 states:

"Education Cess at the rate of five paise per rupee shall be payable on shop rentals of Arrack and Toddy, on duty of arrack and on tree of toddy "Wherever applicable" (Underlining (here into " ") is ours).

25. Even the terms of the Notification of the sale of Excise Privilege did not purport to provide for payment of Education Cess in Bellary District where there is no levy of Education Cess under the Education Act

26. Thus it is beyond doubt that levy of Education Cess on the petitioners in W. Ps. Nos. 639 and 640 of 1968, is illegal.

27. The learned Counsel for the petitioners contended that even in the rest of the Old Mysore Area (excluding Bellary District), on a proper construction of the Education Act there is no charge of Education Cess on Toddy Shop Rent, Arrack

Shop Rent or Beer Shop Rent, and Tree Tax.

28. There is no controversy between the parties as to the meaning of the words "now levied" occurring in the original Schedule at the end of the words. "Items on which local cess is now levied." and the meaning of the words "now being levied" occurring in the amended Schedule at the end of the words. "All items of land revenue, forest revenue and excise revenue on which education cess is now being levied". Learned counsel are agreed that according to the original Schedule to the Education Act, Education Cess was leviable only on those items of which local cess was being levied when the Education Act was enacted in the year 1941. Likewise learned counsel are agreed that according to the Schedule to the Education Act, as amended in the year 1955, Education Cess is leviable only on those items of land revenue, forest revenue, and excise revenue on which Education Cess was being levied when the Elementary Education (Amendment) Act, 1955, came into force.

29. The learned Special Government Pleader did not dispute that Education Cess was not being levied on Arrack Shop Rent till the year 1965 and that for the first time it was stated in the Notification of Sale of Excise Privilege for the year 1966-67 that Education Cess should be paid on Arrack Shop Rent and Beer Shop Rent.

30. Even in Rule 23 of the Rules regulating sale of Excise Privilege, contained in the Mysore Excise Manual Vol. I (1956 Edition) all that is stated in respect of Arrack and Beer, is that Education Cess is payable on Duty. It has not been stated that Education Cess is payable on Arrack shop Rent or Beer Shop Rent.

31. In the Mysore revenue Manual, Vol. I (1938 Edition) at page 384 and in the Mysore Revenue Manual (1967 Edition) at page 660, in the Chapter, Cesses and Taxes, under the heading, Abkari, it is stated:

"Formerly, the Local Cess was being levied on the following terms:

(i) Arrack.

Note:--The cess is now merged in the still-head duty.

(ii).....

.....

(iv) Duty on beer

(Notification No. 312, dated 14th November 1871)."

32. It is clear beyond doubt that local cess was not being levied either on Arrack Shop Rent or on Beer Shop Rent in the year 1941, when the Education Act came into force, nor was education cess being levied on Arrack Shop Rent or on Beer Shop Rent in the year 1955 when the Mysore Elementary Education (amendment) Act, 1955 came into force. Hence there is no charge of Education Cess u/s 9 of the Education Act, on Arrack Shop Rent and Beer Shop Rent.

33. Learned counsel for the petitioners contended that even in regard to Toddy Shop Rent and Tree Tax, local cess was not being levied in the year 1941 and Education Cess was not being levied in the year 1955. In support of the contention reliance was placed on the following passage in the Mysore Revenue Manual (1938 Edition) Vol. I at page 334 and in the Mysore Revenue Manual (1967 Edition) at pages 660 and 661.

"Formerly, the local cess was being levied on the following items:

(i) x x x x

(ii) Toddy both date and bagani

(iii) x x x x

x x x x

But in the marginal note dated G. O. (F. I. 9243-54 S. R. 145-06-1 dt. 16th June 1907), the following directions have been given:

(a) The separate levy of a local cess on tree tax is abolished and the cess at present levied merged in the main item the rates of tree tax on the various kinds of trees being as follows:

x x x x x

x x x x x

(b) Levy of a local cess on toddy shop rental is also abolished;

(c) The cess on tree-rent is merged in the main item itself. N. B.--1/17th of the tree tax, the shop rental and tree rent collected, should be credited to Local Funds, in lieu of the one-anna cess formerly levied on these items (vide also Art. 41-Mysore Accounts Code, Vol. 1)"

34. From the above statement contained in both editions of the Mysore Revenue Manual., it is clear that local cess on Toddy Shop Rent, tree tax, and tree rent was abolished as early as in the year 1907. If local cess had been subsequently reimposed by any Government Order or by any legislative enactment it is reasonable to expect that it would have been so stated in the Mysore Revenue Manual, especially, of the 1967 edition. The learned Special Government Pleader has not been able to lay his hands on Government Order or Notification by which local cess was re-imposed before the Education Act came into force in the year 1941.

35. However the learned Special Govt. Pleader strongly relied on Rule 23 of the Rules Regulating Sales of Excise Privileges in support of his assertion that Education Cess was being levied on toddy Shop Rent, Tree Tax and Tree Rent when the Mysore Elementary Education (Amendment) Act, 1955 came into force. It is true that in the Mysore Excise Manual (1956 Edition) in the Note to rule 23 the items, Tree Tax, Tree rent and shop rent have been shown against Toddy and



the rate of Education Cess has also been stated. But it is not clear under what Government Order or Notification or statutory enactment Education Cess was levied on these items.

36. Further these rules have been framed u/s 16 and 29 of the Mysore Excise Act, 1901. It is true, as stated earlier that Section 16 empowered the Government to grant the exclusive privilege of manufacturing or selling liquor, on which condition it considered fit. But the power to impose a condition of licence, cannot go so far as to impose a new levy not provided by the Excise Act and not strictly required for the regulatory purposes of the licence. u/s 29 of the Mysore Excise Act, 1901, the Government is empowered to make rules for carrying out the provisions of that Act. To levy a Cess not provided by that Act, cannot be said to be for the purpose of carrying out the provisions of that Act, and would be outside the scope of the rule making power either u/s 16 or Section 29 of the Act.

37. But the learned Special Government Pleader argued that in the then Princely State of Mysore, His Highness the Maharaja was the absolute Sovereign and that there was no distinction between a legislative enactment and an executive order of His Highness, that in the preamble portion of the said Rules it has also been said that the said Rules have been made in exercise of all other powers enabling the Government of His Highness the Maharaja of Mysore in this behalf, and that de hors the power u/s 16 and 29 of the Mysore Excise Act it was competent for the Govt. of His Highness the Maharaja to provide, by rules, for levy of Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent.

38. Though there may be considerable force in this contention of the learned Special Government Pleader, the question still is whether rule 23 of the said Rules purports to impose a levy of Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent. We do not find from the language of Rule 23 that it itself purports to create any charge of Education Cess on these items. On the other hand, the Note to this Rule seems to proceed on the assumption that there has been a lawful charge of Education Cess on these items by some other provision of law; and the Rules merely provide that Education Cess payable on these items shall be paid along with the monthly kist.

39. Thus it has not been shown that Education Cess was being levied under any government Order, Notification, or statutory enactment or rule thereunder when the Mysore Elementary Education (amendment) Act, 1955, came into force.

40. The learned Special Government Pleader contended that even of Education Cess on Toddy Shop Rent, Tree Tax, Tree Rent had not been imposed by any other law before 1955, Education Cess has all along been factually levied and collected on these items, and that since it was being so levied when the Mysore Elementary Education (Amendment) Act, 1955, came into force, the charge of Education Cess on these items, is attracted u/s 9 of the Education Act and the Schedule as amended in 1955. In other words, according to this argument, factual levy of Education Cess (and not necessarily levy under any authority of

law), is what amended Section 9 read with amended Schedule to the Education Act, contemplates.

41. We are unable to accede to this contention of the learned Special Government Pleader. The necessary implication of the words "on which education cess is now being levied" occurring in the amended Schedule to Education Act, is that such cess is being lawfully levied and not without the authority of law. The Schedule to the Education Act was amended after the advent of the Constitution and hence it is reasonable to impute to the State Legislature not merely knowledge of, but also anxiety for compliance with, Art. 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law. That the Legislature did not have in mind any unauthorised levy of collection, is clear from the fact that neither the original Education Act nor the amending Act of 1955 contains any provisions for validating any levy or collection made without the authority of law.

42. Thus the contention of the petitioners that the provisions of the Education Act as amended from time to time, do not impose a charge of Education cess on Arrack shop Rent, Beer Shop Rent and Toddy Shop Rent, Tree Tax and tree Rent, is well founded. As Education Cess is sought to be levied under that Act, and not under any other enactment, in the view we have taken, normally it would have been unnecessary to consider other contentions of the petitioners. But since the matter may be taken in appeal to the Supreme Court having regard to the large financial effect of our decision, we consider it advisable to deal with all contentions advanced by the parties to avoid the necessity for a remand in the event of the supreme Court disagreeing with our view on the first ground.

43. Mr. S. Shiva Swamy, learned counsel for some of the petitioners contended that after the formation of the new State of Mysore, the continuance of the levy of Education Cess in only one area of the State namely, the old Mysore Area, when there is no corresponding levy in other areas of the State, would offend Art. 14 of the constitution. It was also argued by Mr. Shiva Swamy that when there was assimilation of the laws relating to primary education, in different parts of the new State by enacting the Mysore Compulsory Primary Education Act, 1961, it was not permissible to continue the operation of Section 9 of the Education Act providing for levy of Education Cess in the Old Mysore Area (except Bellary District).

44. In support of his contention, Mr. Shiva Swamy relied on certain observations of the Supreme Court in *Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others*, . There, it was contended that the existence of two laws with respect to religious and charitable endowments in different areas of the state of Andhra Pradesh, was hit by article 14. Dealing with that contention the Supreme Court pointed out that the new State of Andhra Pradesh consists of two areas, one which came from former Andhra state and the other from former Hyderabad State.

The supreme Court observed:

"These two areas naturally had different laws. We are told that steps are being taken to assimilate the laws in the two different parts of the State and to bring them under one common pattern. But that naturally takes time and complete assimilation of the laws has not yet taken place. We are further told that the question of having one law for the public trusts of religious or charitable nature is under the active consideration of the state Government. In these circumstances it would not be right to strike down all laws prevailing in the two parts of the State because of certain differences in them arising out of historical reasons....."

45. Mr. Shiva Swamy argued that from the above observations it can be inferred that the Supreme Court would have held the existence of two different laws in the different areas as offending Art 14, but for the assurance given on behalf of the State that steps were being taken to assimilate the laws in two different parts of the State and that the question of having one law for the public religious and charitable trusts, was under the active consideration of the Government. Mr. Shiva Swamy further argued that no such assurance was forthcoming from the State in the present cases and that even after assimilation of the laws relating to compulsory primary education, the levy of Education Cess is perpetuated in the Old Mysore Area.

46. On the other hand, the learned Special Government Pleader referred to the decision of the Supreme Court in *Bhaiyalal Shukla Vs. State of Madhya Pradesh*, in which the Supreme Court held that the existence of different laws in different parts of Madhya Pradesh could be sustained on the ground that such differentiation arose from historical reasons and a geographical classification based on historical reasons.

47. In *Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others*, the Supreme Court has referred to its earlier decision in *Bhaiyalal Shukla Vs. State of Madhya Pradesh*, and has not dissented from it. Upholding the continuance of different laws in different parts of the State in *Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others*, was not based on any assurance given on behalf of the Government of Madhya Pradesh that uniformity of laws would be brought about in near future. Therefore from the mere circumstance in *Anant Prasad Lakshminivas Generiwal Vs. State of Andhra Pradesh and Others*, the Supreme Court noticed the assurance given on behalf of the State that steps were taken to assimilate different laws in different parts of the State, it cannot be inferred that but for such assurance the Supreme Court would have necessarily struck down the laws because of the differences in them in different parts of the State of Andhra Pradesh.

48. Though it is desirable that uniformity is brought about throughout the State as to levying or not levying Education Cess, we are not satisfied, on the materials before us, that the continuance of the levy of Education Cess in the Old Mysore Area (excluding Bellary District) offends Art. 14 of the Constitution.

49. It was next contended by learned counsel for petitioners that Arrack Shop Rent, or Beer Shop Rent or Toddy Shop Rent is not an excise duty on Arrack, Beer or Toddy respectively and hence Education Cess cannot be levied on such Shop Rent.

50. It is common Ground between the parties that the impugned levy is a tax though called a cess. As explained by Hidayatullah J., (as he then was), in his dissenting judgment, the term cess is generally used when the levy is for some special administrative which the name (health cess, education cess, road cess etc.) indicates.

51. Mr. M. K. Nambiar learned counsel appearing for some of the petitioners, argued that under the Education Act, Education Cess is levied as a surcharge or an increment to an existing tax and that it partakes the character of the principle tax on which it is an increment.

52. In R.C. Jall Vs. Union of India (UOI), , the Supreme Court after considering the decisions of the Federal Court and of the Privy Council on the point, explained the nature of excise duty thus at page 1287:

"Excise duty is primarily a duty on the production or manufacture within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

53. In A.B. Abdulkadir and Others Vs. The State of Kerala and Another, the nature of the system of collecting tobacco revenue by auctioning the right to sell in retail tobacco in shops, came up for consideration. Wanchoo, J. (as he then was), who spoke for the Bench said at page 927:

"It is obvious that this system of auction is not a system of levying tax because it has nothing to do with the levy on each sale, which is the essence of a sales tax. It seems that in the former States of Travancore and Cochin, auction system continued right upto the time the Constitution came into force and even for sometime thereafter. It seems under the circumstances that the auction system which was in force was only a method of realising duty through the grant of licenses to those who made the highest bid at the auctions."

54. In Suram Ruth Co. v. Deputy Commr. (Excise) (1966) 1 Mys LJ 554, the validity of the levy of Health Cess on Toddy Shop Rent and Arrack Shop Rent was assailed. Health Cess was sought to be levied on these items under the Mysore Health Cess Act, 1962. Section 3 of that Act provides for levy of Health Cess at the rate of 9 naye paise in the rupee inter alia, on all items of Land Revenue and on duties of excise leviable by the State on alcoholic liquor manufactured or

produced for human consumption.

55. Upholding the contention that arrack Shop Rent and Toddy Shop Rent, were duties of excise, this is what Hegde, J. who spoke for the Bench of this Court, said at page 567:

"In the matter of collection of excise duty on liquors, one of the methods commonly used by almost all of the States in the country and that from a very long time is either by leasing out the right to sell those liquors for a specified sum or by auctioning that right. This mode of collection was in vogue even before the Constitution was drafted, nay even before the Government of India Act, 1935 was enacted. Therefore, we can safely presume that the Constitution makers were aware of those procedures. There is nothing in the Constitution which can be said to disapprove those methods."

56. But the decision of this Court in Suram Ruth Co.'s case (1966) 1 Mys LJ 554 was reversed by the Supreme Court in Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., .

57. After analysing the real nature of Toddy Shop Rent, Sikri, J., who spoke for the majority said at p. 1521:

"The taxable event is not the manufacture or production of goods but the acceptance of license to sell. In other words, the levy is in respect of the business of carrying on the sale of toddy. There is no connection of any part of the levy with any manufacture or production of any goods. To accept the contention of the State would mean expanding the definition of "excise duty" to include a levy which has close relation to the sale of excisable goods. It is now too late in the day to do so."

58. The earlier decision of the Supreme Court in A.B. Abdulkadir and Others Vs. The State of Kerala and Another, was considered and distinguished by the majority of the Bench. Sikri, J., speaking for the majority, stated thus at page 1522:

"It is true that Wanchoo, J., referred to the practice of public auctions of the right to possess and sell excisable goods but what he said was that the amounts realised from these auctions was excised revenue; he did not say that the amount realised was excise duty as such in the strict sense of the term."

59. The learned Special Government Pleader did not dispute that the ratio of the majority decision in Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., would apply to Arrack Shop Rent, and Beer Shop Rent also and that in view of the majority decision in that case, Toddy Shop Rent, Arrack Shop Rent, or Beer Shop Rent, cannot be regarded as a duty of excise. He however submitted that he should not be understood as giving up his contention that Shop Rent is a duty of excise, so that it may be open to the State to urge before the Supreme Court in any appeal from our decision, that the majority of the Supreme Court in Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., may be

reconsidered.

60. In the light of the majority view of the Supreme Court in *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, , Section 24 of the new Excise Act (Mysore Act 21 of 1966) which declares that the sum accepted in consideration of grant of any lease relating to excisable articles, shall be the excise duty, cannot expand the definition of excise duty and cannot render Shop Rent as a duty of excise.

61. Learned counsel for the petitioners contended that unless Arrack Shop Rent, or Toddy Shop Rent, is itself a tax, there can be no levy of surcharge or additional duty on such Shop Rent, that it is clear from the decision of the Supreme Court in *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, that Shop Rent is not a duty of excise; and hence Education Cess cannot be levied on Shop Rent which is not a tax.

62. It was contended by learned counsel for petitioners that the Education Act imposes Education Cess on an existing item of tax or duty and not on any other source of revenue. Our attention was drawn to the observations of the Supreme Court in *Shinde Brothers" Case 1967 SC 1512* while considering the nature of the Health Cess levied under the Mysore Health Cess Act 1962. The material portion of Section 3 of that Act reads:

2. Levy of Health Cess--There shall be levied and collected a health cess at the rate of nine paise in the rupee on--

(i) all items of land revenue;

(ii) all items of state Revenue mentioned in Schedule A..... Schedule A includes duties of excise on alcoholic liquor. Sikri, J. who spoke for the majority of the Bench in *Shinde Brothers" case*, said at page 1519:

"It seems to us clear that the legislature was levying a health cess on a number of items of State revenue or tax and it adopted the form of calling it a cess and prescribed the rate of nine naye paise in the rupee on the State Revenue or tax. Section 4 of the impugned Act makes it quite clear that the cess is leviable and recoverable in the same manner as items of land revenue, State revenue or tax. "In the context, the word "on" in Section 3 does not indicate that the subject matter of taxation is land revenue or State revenue but that 9 percent of the land revenue or State Revenue is to be levied and collected, the subject matter remaining the same as in the law imposing land revenue or any duty or tax. If we read Sections 3 and 4 together the fact that the words "surcharge" or "additional duty" have not been mentioned does not detract from the real substance of the legislation."

(Underlining (herein " ") is ours).

63. The learned Special Government Pleader argued that Education Act imposes education Cess on excise revenue which is of wider import than excise duty; that

excise revenue comprises of not only duties of excise but other sources of revenue like fee, rent, fine and confiscation under the Excise Act. He referred to Section 3(1) of the Mysore Excise Act, 1901, which read:

3. In this Act, unless there be something repugnant in the subject or context--

(1) "Excise revenue" means revenue derived or derivable from any duty, fee, tax, rent, fine or confiscation imposed or ordered under the provisions of this Act or of any other law for the time being in force relating to liquor or intoxicating drugs.

64. He also referred to Section 2(11) of the Mysore Excise Act, 1965, in which the definition of "Excise Revenue" is the same as in the 1901 Act. The learned Special Government Pleader further argued that even if Shop Rent is not a duty of excise, it is one of the items of excise revenue on which the Education Act levies Education Cess; that there is material difference between the language of Section 3 of, and Schedule A to, the Health Cess Act, and the language of Section 9 of the amended Schedule to, the Education Act; and hence the observations of the Supreme Court in *Shinde Brothers*" case regarding the nature and scope of Health Cess have no application to Education Cess.

65. Though clause (ii) of Section 3 of the Health Cess Act mentions items of State revenue, Schedule A to that Act refers only to duties of excise and not to excise revenue. But in the amended Schedule to the Education Act, the items referred to are land revenue, forest revenue and excise revenue.

We think, the learned Special Government Pleader is right in contending that the scope of the amended Schedule to the Education Act, is wider than that of Schedule "A" to the Health Cess Act, and that under the Education Act the levy of Education Cess is not confined to duties of excise only, but extends to items which are not duties of excise but still come within excise revenue. We think, the learned Special Government Pleader is right in contending that the scope of the amended Schedule to the Education Act is wider than that of Schedule "A" to the Health Cess Act, and that under the Education Act the levy of Education is not confined to duties of excise only but still comes within excise revenue.

66. The learned Special Government Pleader contended that both the Mysore Excise Act, 1901, and the Education Act were enacted before the Constitution when there was no limitation on the legislative competence of Mysore legislature; that even if Shop Rent comes within a category of tax which is beyond the legislative competence of the State under List II of the Seventh Schedule to the Constitution, Education Cess on the Shop Rent can be continued to be levied under Article 277 of the Constitution; and hence it would not be necessary to ascertain into which category of tax, Shop Rent would fall.

67. On the other hand, learned Counsel for the petitioners contended that though the Education Act was first enacted in the year 1941 before the advent of the Constitution, the charging provisions for the Education Cess, namely, Section 9 and the Schedule to the Act were amended by the Elementary Education

(Amendment) Act, 1955; that the protection under Article 277 is not available to Education Cess, and that it is necessary to ascertain the nature and character of the Shop Rent to determine whether the State is competent to levy Education Cess on Shop Rent after the advent of the Constitution.

68. Even if a pre-Constitution tax or cess is outside the legislative competence of the State, Article 277 saves continuance of such tax until provisions made to the contrary by Parliament by law. In *Rama Krishna Ramanath Vs. The Janpad Sabha, Gondia*, the Supreme Court laid down that for continuance of a tax u/s 143(2) of the Government of India Act, 1935 (which corresponds Art. 277 of the Constitution), three conditions should be satisfied. In a later decision *The Town Municipal Committee, Amravati Vs. Ramchandra Vasudeo Chimote and Another*, the Supreme Court held those very three conditions are equally applicable for continuance of a tax under Article 277 of the Constitution. Those three conditions are:

- i) The tax was one which was lawfully levied;
- ii) the identity of the body that collects the tax, the area whose benefit the tax is to be utilised and the purpose for which the utilisation is to take place continue to be the same; and
- iii) The rate of tax is not enhanced nor its incidence in any manner altered.

69. We shall now examine whether Education Cess levied on Arrack Shop Rent, Toddy Shop Rent, or Beer Shop Rent, under the Education Act satisfies these tests to attract the benefit of Article 277 of the Constitution. As we have already held there is no charge of Education Cess on Arrack Shop Rent, Toddy Shop Rent, or Beer Shop Rent, Tree, Tax, or Tree Rent either under the Education Act as originally enacted or as amended by the Elementary Education (Amendment) Act, 1944. Even if Education Cess was levied, as a matter of fact, on these items of Excise Revenue, it (Education Cess) cannot be said to have lawfully levied. Thus education Cess on Shop Rent does not satisfy the first of the above three conditions.

70. It was contended by learned counsel for the petitioners that the second condition also is not satisfied because the area for whose benefit Education Cess is levied has not remained the same.

71. Section 7 of the Education Act provided that there shall be constituted in each District an Elementary Education Fund to which all collections from Education Cess and certain other receipts should be credited. Section 8 provided that all expenses incurred by the Government on elementary education in any District should be paid out of the Elementary Education Fund for that District. Sections 7 and 8 were repealed by the Mysore Elementary Education (Amendment) Act, 1955.

72. The effect of the repeal of Sections 7 and 8 of the Education Act, is that the proceeds of Education Cess will go to the consolidated Funds of the State and will



become part of it, whereas before such repeal such proceeds would go to a separate earmarked fund for each District, and such fund had to be utilised only for meeting the expenses incurred on elementary education in that particular District. Thus before the commencement of the Constitution the area for whose benefit Education Cess was utilised, was each of the nine Districts of the then State of Mysore. But after the Mysore Elementary Education (Amendment) Act, 1955 repealed Sections 7 and 8, the proceeds of Education Cess, which goes to the consolidated Funds of the State, will be available for the benefit of the entire new State of Mysore. We think the learned counsel for the petitioners are right in contending that even the second of the aforesaid three conditions, has not been satisfied.

73. On account of the first two of the aforesaid three conditions not being satisfied, the saving under Article 277 is not available to Education cess on Shop Rent, if Shop Rent falls outside any of the Entries in List II of the Seventh Schedule to the Constitution.

74. The learned Special Government Pleader next contended that Shop Rent comes within the ambit of Entry 8 of List II which reads "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

75. The learned Special Government Pleader said that the language of any Entry in the Legislative Lists in the Seventh Schedule to the Constitution, should be given the widest scope which their meaning is fairly capable and that each general word should, accordingly be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be comprehended in it. We think this rule of interpretation of legislative Entries, is well accepted, and beyond any controversy.

76. But it is difficult to accept the further proposition of the learned Special Government Pleader that the legislative power to regulate or restrict manufacture, sale, and consumption of liquor would include the power to impose any tax which has the effect of discouraging consumption of liquor. No doubt, one of the objects of imposing taxes on liquor may be to check consumption. As observed by the Supreme Court in *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, one of the purposes of the regulation of manufacture and trade in liquors is to raise revenue. Nevertheless, as pointed out by the Supreme Court in *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, , taxation is considered as a distinct matter for the purpose of legislative competence and the power to tax cannot be deduced from a general legislative Entry as an ancillary power. The legislative power to tax alcoholic liquor must be derived from one the Entries of Taxation, i.e. Entries 46 to 63 in List II, of the Seventh Schedule. It has already been held that Shop Rent is not a duty of excise and does not come within Entry 51.

77. The learned Special Government Pleader contended in the alternative that Shop Rent can be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh Schedule to the Constitution. That entry reads:

"Taxes on Luxuries including taxes on entertainments, amusements, betting and gambling."

78. This contention was taken up by the State in its additional counter-affidavit and we permitted the State to raise that contention. The learned Special Government Pleader argued that intoxicating liquors like Toddy, Arrack and Beer, are luxuries and hence Arrack Shop Rent Toddy Shop Rent and Beer Shop Rent can be regarded as taxes on luxuries.

79. Learned counsel for the petitioners disputed the proposition that alcoholic liquors are luxuries. The petitioner in W. Ps. Nos. 1393, 1800 of 1967 and 612; 944; 1016; 862, 863, 864 and 832 of 1968 filed additional affidavit in which he averred that Toddy is not an item of luxury at all. Learned counsel for the petitioners argued that the State has not placed any material at all in support of its assertion that alcoholic liquors are articles of luxuries.

80. The learned Special Government Pleader referred to the decisions of Kerala High Court in T.K. Abraham and Others Vs. State of Travancore-Cochin, and Chacko Chacko Kaithakuttu Veedu and Others Vs. Board of Revenue, State of Kerala and Others, in which tobacco was held to be an article of luxury. The learned Special Govt. Pleader argued that if tobacco is an article of luxury, there can be no doubt alcoholic liquors are articles of luxury.

81. Without deciding, we shall assume for sake of arguments that alcoholic liquors are articles of luxury. Before Shop Rent can be regarded as a tax on luxuries, it must first be established that Shop Rent is a tax. In Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc., Sikri J., who delivered the majority judgment, observed that Toddy Shop Rent is a payment for the exclusive privilege of selling Toddy in certain shops and that the licensee pays what he considers to be equivalent to the value of that right.

82. As stated by B. K. Mukherjee, J. (as he then was) in The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , one of the essential characteristics of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax; in other words, there is no element of quid pro quo between the tax payer and the public authority. Since the payment of Shop Rent is for the benefit which the licensee gets in form of exclusive privilege to sell liquor in certain area or in certain shops, Shop Rent cannot be regarded as a tax at all.

83. Even assuming for the sake of arguments that alcoholic liquors are articles of luxury and that Shop Rent is a tax, we shall examine whether Shop Rent can be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh

Schedule to the Constitution.

84. Mr. K. Sreenivasan, learned counsel for some of the petitioners, drew our attention to Section 18 of the Mysore Excise Act, 1901, which provides that duty in liquor may be levied by payment of a sum in consideration of the grant of any exclusive or other privilege of selling by retail. Mr. Sreenivasan also pointed out that in section 24 of the Mysore Excise Act, 1965, the Legislature has declared that the sum accepted in consideration of the grant of any lease relating to any excisable article u/s 17, shall be the excise duty. Mr. Sreenivasan argued that though that declaration is ineffective in rendering Shop Rent a duty of excise, it is not open to the court to regard Shop Rent as a tax on luxuries coming within Entry 62, in List II, where there is express legislative declaration that Shop Rent is a duty of Excise.

85. We think that there is considerable force in this contention. There is no manifestation of the legislative intent to treat alcoholic liquors as articles of luxury and to impose tax on the as articles of luxury. On the other hand, the legislative intent appears to be to collect excise revenue in the form of Shop Rent.

86. Learned counsel for the petitioners argued that taxes can be classified as taxes on person, like Poll tax and Income tax, taxes on things like property tax, and taxes on transactions and activities like sales tax and Excise Duty, and that a tax on luxuries under Entry 62 in List II of the Seventh Schedule, is a tax on articles of luxury and not a tax on enjoyment or activities leading to enjoyment. In support of this proposition learned counsel for the petitioners relied on the observations of the Bombay High Court in *State of Bombay Vs. R.M.D. Chamarbaugwalia and Others*, , Chagla, C. J. speaking for the Bench, said at page 11:

"With regard to luxuries it is significant to note that the plural and not the singular is used, and the luxuries in respect of which a tax can be imposed under entry 62 is a tax on goods of articles which constitute luxuries, and it is again significant to note that the topic of luxuries only is to be found in entry 62 in the taxation power and not in either entry 33 or 34. That clearly shows what was contemplated was a tax on certain articles or goods constituting luxuries and not legislation controlling an activity which may not be a necessary activity but may be unnecessary and in that sense a luxury.

87. Reference was also made to the following observations of the Kerala High Court in *Chacko Chacko Kaithakuttu Veedu and Others Vs. Board of Revenue, State of Kerala and Others*, :

"It seems to me that "luxury tax" is a tax on an article in order that it might be a luxury tax, this article must be an article of luxury."

88. Learned counsel for the petitioners argued that Shop Rent is not levied on the articles of luxury, namely alcoholic liquors, nor on the person who consumes liquor and thereby engages in an activity of luxury, but is collected from the

vendor of the liquor for the liquor for the exclusive privilege of selling liquors, and there is no proximate nexus between the levy of Shop Rent and the consumption of alcoholic liquors.

89. The learned Special Government Pleader argued that a tax on luxuries can be levied on a person who vends articles of luxury as he will indemnify himself at the expense of persons using articles of luxury. In support of his contention, he relied on the decision of the Supreme Court in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, in which the validity of tax levied on the promoters of lotteries and prize competitions came up for considerations.

90. Under entry 62 in List II, Taxes on Luxuries include taxes on entertainment, amusements, betting, and gambling. The Bombay High Court had struck down section 12-A of the Bombay Lotteries and Prize Competitions Control and tax Act on the ground that that section did not fall within Entry 62, for, it imposed a tax not on the gamblers but on the promoters of prize competition and the tax so levied could be regarded as a tax on the trade of prize competition carried on by such promoters. The Supreme Court held that the Bombay High Court had taken too narrow a view of the matter. Upholding the validity of the tax, S. R. Das, C. J. who spoke for the Bench, said at pp. 710 and 712:

"Entry 62 talks of taxes on betting and gambling and not of taxes on men who bet or gamble..... It is a kind of tax which, in the language of J. S. Mill quoted by Lord Hobhouse in *Bank of Toronto v. Lambe* (1887) 12 A.C. 575, is demanded from promoter in the expectation and intention that he shall indemnify himself at the expense of gamblers who sent entrance fee to him....."

91. The tax levied u/s 12-A of that Act was on the sum received or due in respect of lottery or prize competition or in a lump sum having regard to the circulation or distribution of newspaper or publication containing forms of entries for prize competition. The Supreme court was of the view that in the ultimate analysis it was a tax on each entry fee received from each individual competitor. In other words, there was direct correlation between the amount of tax levied on the promoter and the total value of entry fee received by him.

92. The learned Special Government Pleader then referred to the decision of the Supreme Court in *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, . There, tax on entertainment was levied on cinemas, dramas and circus at certain rates per show, and on horse races and amusement parks at certain rates per day. The validity of the tax was challenged by a cinema exhibitor.

93. The Supreme Court upheld the tax as falling within Entry 50 in List II to the Seventh Schedule to the Government of India Act, 1935, which read, "Taxes on luxuries or entertainments or luxuries." The Supreme Court said that there is no reason to give a restricted meaning to this Entry so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments or amusements, that there can be no reason to differentiate

between the giver and the receiver of luxuries, entertainments or amusements, and that both may with equal propriety be made amenable to the tax.

The following passage in the judgmental p.585 brings out the distinction between tax on luxuries and tax on trade or calling:

"..... Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show there is no tax. A lawyer has to pay a tax or fee to take out a license irrespective of whether or not he actually practices. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the license chooses to do so. The impugned tax is a tax on the act of entertainment resulting in a show."

94. From the aforesaid two decisions of the Supreme Court, the propositions that emerge are, (i) that a tax on luxuries be imposed either on the person providing or giving luxuries or on the person receiving luxuries, or both; and (ii) that the amount of tax on the luxuries must be correlated to the value, quality, or quantity of luxuries and the tax should not be imposed for the privilege of carrying on any trade or calling providing luxuries.

95. We shall now apply the aforesaid two propositions to determine whether Shop Rent can be regarded as a tax on luxuries. That the tax is levied on the vendor of Liquors and not on the consumers of liquor, is not, by itself, a factor that militates against the tax being a tax on luxuries. But the material question is whether Shop Rent is imposed for the privilege of selling alcoholic liquors or whether it is correlated to the quality, quantity or value of liquors sold by the Vendor.

96. In *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, , Sikri, J., delivering the majority judgment in that case examined the true character of the nature of Toddy Shop Rent and observed inter alia, that it is a payment for the exclusive privilege of selling Toddy in certain shops, that the licensee pays what he considers to be equivalent to the value of such right, that he may sell little, less or more than anticipated depending on various factors, and that what he recoups would depend upon the amount of sales and the conditions prevailing during the licensing year. His Lordship further observed at page 1521 that the levy of Shop Rent is in respect of the business of carrying on the sale of Toddy.

97. In the light of their opinion expressed by the majority of the Bench in *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, we must hold that Shop Rent is not correlated to the quality, quantity, value of luxuries i.e. liquors but is imposed for the privilege of vending liquor, and hence it cannot be regarded as a tax on luxuries coming within Entry 62 in List II of the Seventh Schedule to the Constitution, even if it is assumed that alcoholic liquors are articles of luxury and Shop Rent is a tax.

98. Learned counsel for the petitioners contended that Education Cess on Arrack, Shop Rent, Toddy Shop Rent, and Beer Shop Rent, is a tax on trade falling under Entry 60 in List II, and that under Article 276(2) of the Constitution, the total amount payable in respect of any one person shall not exceed Rs. 250/- per annum. Support for this contention was sought to be derived from the observation of Sikri, J., in *Shinde Brothers'* case that the levy of Toddy Shop Rent is in respect of the business of carrying on the sale of Toddy.

99. But we think this observation cannot be understood as laying down that Toddy Shop Rent is a tax on trade in Toddy. As stated earlier, His Lordship observed that Shop Rent is a payment for the exclusive privilege of selling Toddy in certain shops and Shop Rent which is a payment for such benefit, is not a tax at all. If Shop Rent itself is not a tax there is no question of its being a tax on trade or calling. Education Cess which is in the nature of a surcharge or an increment to an existing tax, cannot be levied on Shop Rent which is not a tax, and the purported levy of Education Cess on Shop Rent cannot be regarded as a tax on trade and calling.

100. Lastly it was contended by learned counsel for the petitioners that Education Cess cannot be levied on any item of Excise Revenue as the Education Act contains no provisions for assessment, for giving opportunities to tax-payers to put forth their objections as to their liability and the extent of such liability, and for collection. And that in the absence of a machinery for assessment and collection, Education Cess cannot be collected.

101. An identical contention was considered and repelled by the Supreme Court in *Ahmedabad Manufacturing and Calico Printing Co. Ltd., Ahmedabad and Others Vs. State of Gujarat and Others*, . Hidayatullah J., (as he then was), who spoke for the Court said at page 1920:

"Finally there is the argument that the Cess Act, in not providing its own procedure of assessment and in not giving the tax-payers an opportunity for putting forward their objections by way of representation appeal or otherwise before the tax is finally fixed offends the principles of natural justice. This argument is not correct. The cess is nothing but an addition to existing taxes. As it is a percentage of another tax, the determination of the cess is not by an independent assessment. It is an arithmetical calculation based on the result of assessment under other Act or Acts. Those Acts allow the raising of objections and provide for appeals. It is only the result of assessment after scrutiny, objections and appeals which forms the basis for the application of a percentage. There is no need for further scrutiny objections or appeals. Nor is the Cess Act bad because it is not self-contained in the matter of assessment. In all cases of imposition of cesses for special administrative purposes (such as health cess, road cess, education cess etc.) this method is followed. Being an addition to another tax this is the only method possible. The legislation on the subject of imposition, levy and collection of a cess is made complete by incorporation of and reference to another piece of legislation. This practice is neither ineffective

nor unconstitutional and cannot be said to be bad."

102. In view of the above pronouncement, the last contention of the petitioners has no substance.

103. The learned Special Government Pleader contended that it was not open to the petitioners to question their liability to pay Education Cess on Shop Rent Tree tax and Tree Rent, as they had entered into contract with the State before obtaining licences to vend liquors, and had agreed to pay Education Cess on the said items of Excise Revenue, and that they were bound to pay Education Cess under such contracts even if levy of Education Cess was without the authority of law.

104. In reply to this contention, learned counsel for the petitioners urged that any agreement to pay a tax or cess which is not imposed under any authority of law, is void and unenforceable and does not create any legal obligation to pay such tax or cess, nor precludes the petitioners from claiming refund of such tax or cess paid to the State.

105. Reliance was placed on the decision of the Supreme Court in *Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc.*, . There Rules 148(3) and 149(3) contained in the Indian Railway Establishment Code, Vol. I, which empowered the Railway Authorities to terminate the services of a Railway employee by serving a notice on him, were held to be repugnant to Art. 311(2) of the Constitution. It was however urged on behalf of the Railway Authorities that Railway servants who entered into service with full knowledge of these Rules, could not be allowed to complain that the Rules contravene Art. 311 and are, therefore, invalid. Repelling that contention, this is what Gajendragadkar, J., (as he then was), who spoke for the majority, said at page 611:

"In our opinion, this approach may be relevant in dealing with purely commercial cases governed by rules of contract, but it is wholly inappropriate in dealing with a case where the contract or the rule is alleged to violate Constitutional guarantee afforded by Article 311(2) and even as to commercial transactions it is well known that if the contract is void, as for instance, u/s 23 of the Indian Contract Act, the plea that it was executed by the party would be of no avail. In any case, we do not think that the argument of contract and its binding character can have validity in dealing with the question about the constitutionality of the impugned rules."

106. Disposal of the privilege to vend liquor is not purely a matter of contract. It is governed by the statute namely, the Mysore Excise Act. Powers and obligations of the State and Rights and liabilities of the licencees are governed by the Statute and the rules thereunder. Further Art. 265 of the Constitution declares that no tax shall be levied or collected except by authority of law. A tax cannot be levied or collected by the State under a contract. A contract to pay a tax not levied by the authority of law, is inconsistent with Art. 265 of the Constitution, and is in the same position as a contract which violates the Constitutional

guarantee afforded by Art. 311. Hence the mere fact that before obtaining licences to sell liquor, the petitioners had executed in favour of the State contracts covenanting to pay Education Cess on certain items of Excise revenue, would not render levy on Education Cess valid if such levy is without the authority of law.

107. However, the learned Special Government Pleader argued that there was no legal impediment to the petitioners agreeing to pay to the State certain additional amounts or certain percentage over and above their respective bid amounts or amounts tendered by them to obtain the exclusive privilege of vending liquor and that the covenant to pay Education Cess can be construed as covenant to pay certain amounts or a certain percentage over and above bid or tender amount. But what the petitioners have covenanted to pay in the contracts entered with the State, was Education Cess and not any such amounts or percentage of bid or tender amounts other than Education Cess. If what they had undertaken to pay by way of Education Cess, is found to be tax without the authority of law such undertaking is void, and cannot be treated as an undertaking to pay a specified amount or a specified percentage of bid or tender amounts.

108. Our conclusion may be summed up thus:

- i. The Education Act does not impose the charge of Education Cess on Arrack Shop Rent, Toddy Shop Rent, and Beer Shop Rent, Tree Tax, and Tree Rent;
- ii. Continuance of the levy of Education Cess in the Old Mysore Area of the new State of Mysore, has not been shown to offend Art. 14 of the Constitution;
- iii. Shop rent is not a duty of excise and hence Education Cess cannot be levied on Arrack Shop Rent, Toddy Shop Rent or Beer Shop Rent;
- iv. Education Cess on Shop Rent, is not a tax on trade as Shop Rent is not a tax on trade;
- v. Education Cess can be levied and collected even in the absence of provisions of creating a machinery for assessment and collection of Education Cess.
- vi. The levy of Education Cess on Shop Rent after the commencement of the Constitution is not saved by Art. 277 of the Constitution;
- vii. Shop Rent not being a tax is not a tax, on luxuries; and
- viii. The petitioners can question the validity of the levy of Education Cess on Shop Rent, Tree Tax and Tree Rent in spite of their having agreed to pay Education Cess on these items.

109. In view of the above conclusions, the levy of Education Cess on Arrack Shop Rent, Toddy Shop Rent, and Beer shop Rent, Tree Tax and Tree Rent, is hereby declared invalid.

110. The next question is as to what relief should be given in these petitions.



Most of the petitioners have sought for a direction restraining the authorities from collecting Education Cess on Arrack Shop Rent, Toddy Shop Rent or Beer Shop Rent, or on Tree Tax or on Tree Rent. Many of them have also prayed for refund of amounts illegally collected from them by way of Education Cess. Once the levy of Education Cess on the said item is held to be invalid, a direction restraining the authorities from collecting such cess, should follow. Accordingly, a direction to that effect is issued in each of the cases.

111. Regarding refund of amounts collected illegally from the petitioners by way of Education Cess, the learned Special Government Pleader contended that the petitioners should file separate suits claiming such refund, that it would be open to the State to raise in such suits the plea of limitation, and that we should not grant the relief of refund in these petitions.

112. In *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, the Supreme Court held that if it is established that payment, even though it be of tax, has been made by the party labouring under a mistake of law, the party is entitled to recover the same, that the party receiving the same is bound to repay or return it and that no distinction can be made in respect of a tax liability and any other liability on a plain reading of section 72 of the Indian Contract Act. We think it does not admit of serious doubt that the petitioners have paid Education Cess on Arrack Shop Rent, Toddy Shop Rent, or Beer Shop Rent or Tree Tax, and Tree Rent under a mistake of law, that is under a mistaken impression that they were liable to pay Education Cess on these items. Hence they are liable to recover the same subject to the law of limitation.

113. On the question whether a suit for refund is the appropriate remedy or whether a refund should be ordered in proceedings under Art. 226 of the Constitution, the Supreme Court said in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*, that in a petition under Art. 226 of the Constitution, even if the court finds that the impugned assessment was void, being made under a void provision of law and the payment was made under a mistake, still the Court is not bound to exercise its discretion directing repayment. The Supreme Court added:

"Whether repayment should be ordered in the exercise of this discretion will depend in each case on its own facts and circumstances. It is not easy nor is it desirable to lay any rule for universal application. It may however be stated as a general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus. Again, where even if there is no delay the Government of the Statutory Authority against whom the consequential relief is prayed for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his remedy by the ordinary mode of action in a civil court and to refuse to exercise under Art 226 of the Constitution.

114. Learned counsel for the petitioners argued that the petitioners became aware of the illegality of Education Cess on several items of Excise Revenue, only after the Supreme Court rendered decision in *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, holding levy of Health Cess on Toddy Shop Rent was invalid, that the said decision was rendered only on 26-9-1966, and that all these petitions have been filed well within three years of that date.

115. Apart from the ground that Shop Rent is not a duty of Excise which ground that parties must have known only after the pronouncement of the Supreme Court in *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, we have upheld the contention of the petitioners that the Education Act does not impose a charge to Education Cess on Arrack Shop Rent, Toddy Shop Rent and Beer Shop Rent, Tree Tax, and Tree Rent. When the petitioners became aware of this ground of invalidity of Education Cess on all or any of the aforesaid items of Excise Revenue, is, *prima facie*, a triable issue.

116. In W. Ps. Nos. 950 to 954; 957 and 959 to 961 of 1968 the periods in respect of which Education Cess had been paid by the petitioners on Arrack Shop Rent and Toddy Shop Rent, have not been specified. Hence we cannot issue any direction for the refund of sums paid by the petitioners by way of Education Cess on Arrack Shop Rent and Toddy Shop Rent. However it will be open to those petitioners to make representation before the authorities for refund of such amounts after furnishing the necessary details, and if such representations made, the authorities shall consider their claims for refund in the light of our pronouncement but without prejudice to any objection on the ground of limitation.

117. In W. Ps. Nos. 832 and 863 of 1968 the claim is for refund of Education Cess paid on Toddy Shop Rent and Tree Tax respectively for the year 1963-64. The petitions have been filed more than three years after the close of those years. Likewise in W. Ps. Nos. 985 and 986 of 1968 the claims relate to refund of Education Cess paid on Toddy Shop Rent for the year 1952-53. The petitions have been filed more than 14 years after the close of that year. The question of limitation regarding these claims, may arise for consideration. Hence in these four petitions we do not direct any refund of Education Cess, but leave it open to these petitioners to seek their remedy by way of suit or other proceedings, if they so desire.

118. In W. Ps. No. 1393 of 1967, the petitioners have claimed refund of the amounts paid by him towards Education Cess on Toddy Shop Rent for the period 1964-65 to 1966-67. The petition was filed on 24-6-1967. We have directed refund of amounts, if any, paid by him subsequent to 24-6-1964, leaving it open to him to seek his remedy by way of suit or other proceedings if he so desires, in respect of amounts paid by him, if any, prior to 24-6-1964.

119. In W. P. No. 2161 of 1967, the petitioner has claimed refund of amounts paid by him towards Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent

for the period 1962-63 to 1966-67. The petition was filed on 18-9-1967. We have directed refund of amounts, if any, paid by him subsequent to 18-9-1964 leaving it open to him to seek his remedy by way of a suit or other proceedings if he so desires, in respect of payments, if any, made prior to 18-9-1964.

120. In W. P. No. 864 of 1968 the petitioner has claimed refund of amounts paid towards Education Cess or Tree Tax for the period 1964-65. The petition was filled on 14-3-1968. We have directed refund of amounts, if any paid subsequent to 14-3-65 leaving it open for him to seek his remedy in respect of payments, if any, made prior to 14-3-1965, by way of suit or other proceedings if he so desires.

121. We shall now detail below our directions for refund in individual petitions:

122. W. P. Nos. 1096 and 1097 of 1967: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent for the period 1-7-1966 to 30-6-1967.

123. W. P. 1393 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner subsequent of 24-6-1964, towards Education Cess on Toddy Shop Rent for the period 1964-65 to 1966-67.

124. W. P. No. 1800 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent paid for the year 1967-68.

125. W. P. No. 2069 of 1967: The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Arrack Shop Rent for the year 1967-68.

126. W. P. No. 2160 of 1967. The Respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the year 1967-68.

127. W. P. 2161 of 1967: The respondent is directed to refund the amounts if any, paid by the petitioner subsequent to 18-9-1964 towards Education Cess on Toddy Shop Rent, Tree Tax and Tree Rent for the period 1962-63 to 1966-67.

128. W. Ps. Nos. 2637 to 2639 of 1967: The respondents are directed to refund the amounts, if any, paid by the petitioners on towards Education Cess on Beer Shop Rent for the year 1967-68.

129. W. P. No 2995 of 1967: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

130. W. Ps. Nos. 2996 and 2997 of 1967 and 92 f 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent and/or Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

131. W. Ps. Nos. 108 and 221 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent and Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

132. W. P. 240 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

133. W. Ps. Nos. 392, 393 and 520 to 524 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent, and Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

134. W. Ps. Nos. 612, 627 to 631 of 1968, 639 and 640 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

135. W. P. No. 862 of 1968: The respondents are directed to refund the amount, if any, paid by the petitioner towards Education Cess on Tree Tax for the year 1967-68.

136. W. P. No. 864 of 1968: The respondents are directed to refund the amounts if any, paid by the petitioner subsequent to 14-3-1965 towards Education Cess on Tree Tax for the year 1964-65.

137. W. P. No. 944 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Tree Tax for the year 1965-66.

138. W. P. No. 989 of 1968: The respondents are directed to refund the amount if any, paid by the petitioner towards Education Cess on Toddy Shop Rent and Tree Tax for the period 1-1-1968 to 30-6-1969.

139. W. P. No. 1016 of 1968: The respondents are directed to refund the amounts if any, paid by the petitioner towards Education Cess on Tree Tax for the year 1966-67.

140. W. Ps. Nos. 1041 and 1044 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioners towards Education Cess on Arrack Shop Rent for the months of January and February 1968.

141. W. P. No. 1090 of 1968: The respondents are directed to refund the amounts, if any, paid by the petitioner towards Education Cess on Arrack Shop Rent and Toddy Shop Rent for the period 1-1-1968 to 30-6-1969.

142. W. Ps. Nos. 1105, 1106, 1109 and 1110 of 1968: The respondents are directed to refund the amounts if any paid by the petitioners towards Education Cess on Arrack Shop Rent for the period 1-1-1968 to 30-6-1969.

143. W. Ps. Nos. 1107 and 1108 of 1968: The respondents are directed to refund the amounts if any, paid by the petitioners towards Education Cess on Toddy

Shop Rent for the period 1-1-1968 to 30-1969.

144. In all these petitions, parties are directed to bear their own costs.

145. Order accordingly.