

(1980) 09 CAL CK 0032

In the Calcutta High Court

Case No : F.M.A. No. 732 of 1979 with connected appeals

Debabrata Basu and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 26-09-1980

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 246, 276(2)

West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979 — Section 16

Citation : 85 CWN 133 : (1983) 139 ITR 548

Hon'ble Judges : P.K. Banerjee, J;M.K. Mukherjee, J

Bench : Division Bench

Advocate : A.K. Dutt, R.C. Deb, S. Bhunia, P.K. Sengupta, Debi Prasad Pal, P.N. Biswas, N. Das and R.N. Bajpai, for the Appellant;S. Chatterjee, R.N. Bajoria and S.N. Dutta, for the Respondent

Judgement

Banerjee, J.—These appeals at the instance of a number of petitioners are against the judgment passed by the Hon"ble Judge discharging the rules obtained by them.

2. All of them argued that the Act, being the West Bengal State Tax on Professions, Trades, Callings and Employments Act, 1979, is ultra vires and as suit bad in law. Before dealing with the question it is convenient for us to state the provisions of the Act. We are not going to quote the whole Act, as it is, but we are only mentioning the main provisions of the Act against which the challenge was sought to be made. The preamble of the Act provides "for the levy and collection of tax on professions, trades, callings and employments for raising additional resources for the benefit of the State and for matters connected therewith or incidental thereto". The Act was promulgated, it got the assent of the Governor on March 31, 1979, and it came into force on and from April 1, 1979.

3. In so far as we are concerned in these appeals, all the petitioners are

practising advocates enrolled under the Advocates Act, 1961, and entitled to practice in this court as well as in the Supreme Court. The definition of person has been given in Section 2(f) in the following terms :

"A person means any person who is engaged in any profession, trade, calling or employment in West Bengal and includes....."

Section 3 of the Act is the section for the levy and charge of the tax. It specifically provides that subject to the provisions of Article 276 of the Constitution of India, there shall be levied and collected a tax on professions, trades, etc., in accordance with the provisions of the Act. Section 3(2) provides that every person engaged in any profession, calling, etc., under one or the other of the classes mentioned in the second column of the Schedule shall be liable to pay to the State Government tax at the rate mentioned against the class of such persons in the third column of the said Schedule. So far as the petitioners are concerned they fall under item 2 of the Schedule to the Act. u/s 5(2) of the Act every person, as in these cases, the advocates engaged in the profession liable to pay tax under the Act, shall obtain a certificate of enrolment from the prescribed authority in the prescribed manner. In exercise of powers conferred by Section 25 of the Act, the West Bengal State Tax on Profession, Trade, Callings and Employments Rules were framed on March 31, 1979. In so far as the professional people are concerned they are required to apply for a certificate of enrolment in the manner prescribed in Rule 4(1) and the prescribed authority will issue a certificate of enrolment under Rule 4(4) in form II-A, wherein the amount of tax payable by the holder according to the Schedule, and the date by which it shall be paid will be mentioned, and such certificate shall serve as a notice of demand for the purpose of Section 10 (vide Section 5(5) of the Act). Section 10 provides that if an enrolled person fails, without reasonable cause, to make payment of any amount of tax within the time or date specified in the notice of demand the prescribed authority may, after giving him a reasonable opportunity of being heard, impose upon him a penalty not exceeding fifty per cent. of the amount of tax due. u/s 11 all arrears of tax, penalty, interest and fees under the Act shall be recoverable as arrears of land revenue. In Section 14 of the Act provision has been made for appeal, revision and rectification of mistakes. Section 19 of the Act provides that any person or employer who, without reasonable cause fails to comply with any of the provisions of the Act or the Rules made thereunder shall be punishable with fine which may extend to five thousand rupees and where the offence is a continuing one, with a further fine which may extend to fifty rupees for every day during which the offence continues.

4. We have not quoted the provisions verbatim, inasmuch as, the Hon"ble single judge in his judgment has quoted all the provisions hereinbefore stated. In so far as the Schedule of the Act is concerned, we may profitably quote the relevant item which runs as follows:

"2(a) Legal practitioners including solicitors and notaries public ;

- (b) Medical practitioners including medical consultants and dentists ;
- (c) Technical and professional consultants including Architects, Engineers, Chartered Accountants, Actuaries, Management Consultants and Tax Consultants;
- (d) Chief Agents, Principal Agents, Special Agents, Insurance Agents and Surveyors or Loss Assessors registered or licensed under the Insurance Act, 1938 (4 of 1938), where the standing in the profession of any of the persons mentioned above is-
 - (i) less than two years Rs. 50 per annum,
 - (ii) two years or more but less than five years Rs. 100 per annum,
 - (iii) five years or more Rs. 150 per annum :

Provided that in case of a person of the above category who is liable to pay Income Tax the rate of tax under this Act shall be Rs. 200 per annum."

For the purpose of appeal, revision and rectification of mistakes the procedure has been provided for in Chap. VII, Rules 19 to 24 and the notification appointing the different authorities mentioned therein, have been produced before us.

5. Mr. Arun Kumar Dutt, on behalf of the appellants contended that though the Legislature has invoked the powers given under Article 276(2) of the Constitution of India and in the preamble, it has been accordingly stated that it is a tax on profession, trade and calling, still, in the same breath by the preamble, the Legislature has sought to bring in incidental and ancillary matters in regard to the same. Mr. Dutt argued that the incidental and ancillary matters cannot be included in the statute, inasmuch as, it is beyond the power of the State Legislature. Mr. Dutt relied upon the case in *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, , and argued that the ancillary measures are fundamental. He also relied upon the case reported in 80 *Lawyer's Edition* 477, in order to support his contentions. Mr. Dutt contended that the express power of taxation has been provided in Article 276(2) read with Entry No. 60 of List II and as such there cannot be any other power by implication nor the ancillary or implied power can be spelt out from the Entry No. 60 of List II. Mr. Dutt, further contended that the implied powers are not incidental and ancillary powers and where there is an express provision for taxation, an implied power cannot be invoked. He relied upon the case in *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad*, .

6. Mr. Bajoria in reply to the above argument of Mr. Dutt contended that all the powers which are necessary for the implementation of the admitted constitutional powers granted to the State Legislature under Entry No. 60 of List II come within the power of taxation impliedly and there is no difference between the implied power and ancillary powers. It appears to us that, on this question Mr. Bajoria is correct in his submission and the case cited by Mr. Dutt has no relevance. In the case of *M.P.V. Sundararamier and Co. Vs. The State of Andhra*

Pradesh and Another, , the Supreme Court equated the implied and ancillary powers. Similarly in the case of The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another, and The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc., ; Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others, the Supreme Court, equated the implied power with incidental or ancillary power. It was also held by the Supreme Court in the case reported in The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another, :

" It is a fundamental principle of constitutional law that every thing necessary to the exercise of power is included in the grant of such power,"

In the case of M. Pentiah and Others Vs. Muddala Veeramallappa and Others, , the Supreme Court held that when the statute gives an express power, implied power inconsistent with the express power cannot be inferred. Item No. 60 of List II, gives power to the State Legislature to tax on profession, trade and commerce. If that power has been rightly exercised in accordance with Article 276, the provisions providing for the realisation and recovery of tax in the statute can be implied within the scope of Item No. 60 of List II itself, otherwise the power given to the Legislature to impose tax becomes otiose as otherwise there will be no provision for the realisation of tax. In the case of M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, , it has been specifically stated that entries in legislative list should be construed liberally. The express power to tax on profession, etc., has been given in Item No. 60 of List II. The offer power which has been made for the purpose of collection of tax is a power implied or ancillary to the powers already given under Item No. 60 of List II of the 7th Schedule. We are, therefore, of the opinion, that Mr. Dutt, is not right when he stated that in view of the preamble which shows that the Act is to provide for the levy and collection of taxes on profession, trade and commerce, etc., and for matters connected therewith or incidental thereto, the Act cannot be a valid piece of legislation under Item No. 60 of List II. In our opinion, this argument is misconceived and is not supported by the judgments referred to by Mr. Dutt. The case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , which was placed before us by Mr. Dutt in order to say that the implied power cannot be equated with the incidental power, does not, in our opinion, support his contention. In the last twos lines of para. 86, it is quite clear that the Supreme Court equated the implied power with the incidental or ancillary powers. On our question, " if the words incidental thereto were not in the preamble could it be said that the powers were there in the statute for the purpose of recovery of taxes, etc." Mr. Dutt said that it was possible to hold that if the incidental and ancillary powers were not referred to in the preamble, the Legislature could make the provision but since the words " incidental thereto " have been used, they must be given the strict meaning. We have already said that the incidental power and implied power are the same thing. It appears to us that when the power to tax is vested in the State by dint of the provision of the Entry No. 60 of List II of the 7th Schedule, it automatically

enables the State Legislature to enact such a provision in order to enforce the realisation and recovery of tax from a person who is to pay the tax. The powers may include the collection of tax and also such power as is necessary in order to enforce the fiscal provision. Mr. Dutt relied upon the cases in *M. Pentiah and Others Vs. Muddala Veeramallappa and Others*, and *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, , but the cases do not support Mr. Dutt's contention that implied power and ancillary or incidental powers have different connotations.

7. Mr. Dutt also argued on certain points which, in our opinion, are not very relevant. He made his argument relying on the Professional Tax (Limitation) Act, 1941, but in the present case, we are, however, concerned with the Act of 1979. Therefore, Article 277 of the Constitution or Professional Tax (Limitation) Act, 1941, has no relevancy in the matter. On the basis of these provisions and on the basis of the judgments in *Union Colliery Company of British Columbia Limited v. Bryden* [1899] AC 580 and *A. G. of Alberta v. A. G. of Canada*, AIR 1939 PC 53. Mr. Dutt contended that, in view of these judgments, it is only Parliament which can legislate in the matter, and not the State. Relying upon the case in [1899] AC 580, Mr. Dutt contended that (p. 588).

" The abstinence of the Dominion Parliament from legislating to the full limit of its powers, could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by Section 91 of the Act of 1867."

In our opinion, this case has no relevance in respect of the facts of the present case. In the present case, there is no question of Parliament legislating as the State Legislature has the power under Item No. 60 of List II to legislate on the matter on its own and, therefore, there is no question of an assignment of the legislative power to the provincial legislature by Parliament. Mr. Dutt relied upon the other case of *A. G. of Alberta v. A. G. of Canada*, AIR 1939 PC 53 and contended that it was not competent either for the Dominion or a province under the guise or the pretence or in the form of an exercise of its own power to carry out an object which was beyond its power to trespass on the exclusive powers of the others. There cannot be any doubt about the above legal proposition but as we have already said, the State legislature has enacted the impugned legislation which comes within the four corners of its own power under Article 276 read with Article 246 and Item No. 60 of List II.

8. Mr. Dutt next contended that the legislation, as in the present case, must be done by Parliament in accordance with the proviso to Article 276(2) and that the proviso cannot stand in isolation. We have already said that the proviso has no application in the facts of the present case and as such the Supreme Court's decision in *The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc.*, ; *Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others*, , relied upon by Mr. Dutt has no relevancy in the matter. In our opinion, in view of the clear words in Article

276(2) read with Entry No. 60 of List II, the State Legislature has power to levy tax on profession, trade or calling but there is a limitation of power, that is, quantum of such tax should not be more than Hs. 250 per annum.

9. Mr. Dutt, then contended that the word "standing" is a misnomer and not being denned, it is vague and uncertain. Mr. Bajoria contended, true it is that the word " standing " has not been denned, but, the word "standing" has a particular meaning which according to the dictionary is a duration spent in the profession. From Section 3(2) of the impugned Act it is clear that unless a person is engaged in the profession, he is not to be taxed and Section 3(2) of the Act must be read along with Schedule 2 to the Act. In our opinion, the word " standing " must be given its ordinary meaning and it will mean the period of time, the person is engaged in the profession. This meaning can also be clear when we see that the different quantum of tax has been fixed on the basis of the duration of a person's engagement in such profession.

10. Mr. Dutt contended further that there is no provision for a reference to the High Court which is always provided in fiscal statutes and, therefore, the Act is bad. It appears to us, however, that an appeal has been provided for u/s 14(4) of the Act and the appellate order is also revisable by the prescribed authority u/s 14(3) of the Act. Mr. Dutt, further contended that the special mode of recovery of tax u/s 16 is, bad in law. We do not think it is, because such provisions are made, if the general provisions cannot produce the desired effect. Regarding the collection of tax, we see no reason why the tax cannot be recovered by the special mode of legislation. Mr. Dutt relied upon the case of K.A. Abbas Vs. The Union of India (UOI) and Another, and contended that the special mode of recovery of tax u/s 16 of the Act is an unreasonable restriction and, therefore, a violation of Article 19(1)(g). In our opinion, .the case cited does not support Mr. Dutt and we are of the opinion that the special mode of recovery of tax does not violate Article 19(1)(g) at all,

11. Mr. R. C. Deb, appearing for the Bar Council of West Bengal, argued firstly that by imposing a professional tax at the rate of Rs. 200, on those lawyers who were paying Income Tax, the legislature is trying to extend their power to a tax on profession, on the basis of other sources of income of the professional people. It was argued by Mr. Deb that an advocate may not earn anything from the profession, but because of his other sources of income for which he is liable to pay Income Tax, he is also being taxed purportedly on profession.

12. In reply to this argument of Mr. Deb, Mr. Bajoria. contended that the tax on advocates having more than five years practice is Rs. 150, but the proviso provides that if the advocate coming under Item No. 2 of the Schedule pay? Income Tax he is to pay at the rate of Rs. 200 per year. It is, according to Mr. Bajoria, a yardstick or a measure of tax but it is not a tax on income. Mr. Bajoria is correct in his submission. In the case of R.R. Engineering Co. Vs. Zila Parishad, Bareilly and Another, , which is the most recent case on the matter, it has been held in paras. 18 and 19 that if the pith and substance of the Act is to levy a tax

on profession, it is competent for the Legislature to tax on the basis of payment of Income Tax, which is made a yardstick, for the incidence of taxation in the present case, is not on income but on the person being engaged in the profession. Unless he is engaged in the profession, being enrolled as an advocate, he will not be fastened with the taxable event. The proviso to the Schedule of Entry No. 2 also provides that if the person engaged in the profession is an Income Tax payee he is to pay Rs. 200 per year or in other words this is a measure of tax to be paid but it is not a tax on the income itself. In fact such type of measurement for the purpose of taxation has been considered by the Supreme Court in a number of cases. Mr. Bajoria contended that if a person who is to pay tax under the I. T, Act has other agricultural income for which Income Tax is not applicable, still, for the purpose of fixation of the Income Tax his income from the agricultural properties is taken into consideration. In our opinion, we need not go to this extent. It is sufficient for us to hold that the tax is one on the profession and not on the income, as sought to be argued by Mr. Deb.

13. Mr. Deb's second contention was that the penalty was also a tax and as such if taken together it is more than Rs. 250. It violates Article 276(2) of the Constitution of India and, therefore, is ultra vires. According to Mr. Deb, if the tax is not paid and penalty is levied it becomes an additional tax and, therefore, in view of the Supreme Court judgment in Commissioner of Income Tax, Andhra Pradesh Vs. Bhikaji Dadabhai and Co., , it is ultra vires. In the said case, their Lordships of the Supreme Court were considering the Finance Act of 1950. The Hyderabad Income Tax Act, was expressly kept alive in respect of the periods prior to April 1, 1950. It was held, inter alia, that though under the Hyderabad I.T. Act, distinct provisions were made for the recovery of penalty, that did not alter the true character of the penalty imposed. Imposition of penalty is a necessary concomitant or incident of the process of assessment, levy and collection of tax. On the basis of this judgment, Mr. Deb contended that the penalty is an additional tax and being more than Rs. 250 per annum is without jurisdiction and ultra vires. According to Mr. Bajoria, however, the penalty or interest is never a tax, it is argued that art, 366(28) of the Constitution of India defines tax and the tax imposed on the taxing event, that is, u/s 3 of the present Act. In our opinion, the case on which Mr. Deb relied, does not help Mr. Deb. The taxing event is Section 3 of the Act. If, however, any person of his own volition does not pay tax, then all the provisions of the Act to enforce the payment of tax are to be applied. The tax may be realised as land revenue and the person not paying the tax may have to pay a penalty for the same. In the facts of the present case, in our opinion, it can never be said that the tax as contained, in the Act or the penalty as provided for, or the collection, etc., of the tax is a taxing event. According to us, the penalty cannot be said to be an additional tax.

14. In the decision in Soma Sundarams (Private) Ltd. Vs. Commissioner of Income Tax, Karnataka, , it has been held that penalty and interest cannot be equated with " tax " as defined under the Constitution. A penalty and for that

matter interest is not a taxing event. Interest is fastened if the tax is not paid within a certain time and penalty also comes only when the assessee comes within the mischief of Section 10 of the Act and not otherwise. Non-payment of tax neither u/s 10 or for that matter u/s 9 is a taxing event. If a person who is to pay tax u/s 3 of the Act does not pay within time he is to pay such penalty or interest. It has been held, in a case reported as Soma Sundarams (Private) Ltd. Vs. Commissioner of Income Tax, Karnataka, , while considering the effect of super profits tax, by the Hon"ble Judges of the Division Bench of the Karnataka High Court that Section 2(43) of the I.T. Act, 1961, defines tax which is chargeable under the provisions of that Act. Therefore, what is levied under the charging provisions of the Act, that is, Section 4, can be called Income Tax. Interest, penalty and fine which are payable under the other provisions of the Act cannot be termed as Income Tax, whether imposed for the purpose of enforcing the levy of Income Tax. Therefore, the penalty levied u/s 271(I)(a) of the I.T. Act, 1961, cannot be equated with the Income Tax. In a case, in Additional Commissioner of Income Tax Vs. Burugupalli China Krishnamurthy (decd.) and Others, , it has been held by the Andhra Pradesh High Court that the concept of tax, penalty and interest are not the same but separate and distinct. Hence tax cannot be equated with penalty or interest. Their Lordships of the Andhra Pradesh High Court relied upon the case in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . The Supreme Court at page 700, while explaining the case of C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, , observed as follows (at p. 700 of 76 ITR):

" One line of argument which has prevailed particularly with the Allahabad High Court in LAL CHAND GOPAL DAS Vs. COMMISSIONER OF Income Tax, U.P. AND V.P., is that there was no essential difference between tax and penalty because the liability for payment of both was imposed as a part of the machinery of assessment and the penalty was merely an additional tax imposed in certain circumstances on account of the assessee's conduct. The justification of this view was founded on certain observations in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, . It is true that penalty proceedings u/s 28 are included in the expression "assessment" and the true nature of penalty has been held to be additional tax. But one of the principal objects in enacting Section 28 is to provide a deterrent against recurrence of default on the part of the assessee. The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the legislature considers to be against the public interest It is significant that in C.A. Abraham's case, this court was not called upon to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an additional tax were made in a different context and for a different purpose. It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of quasi-criminal proceedings,"

In the case of Hindustan Steel Ltd. Vs. State of Orissa, , the Supreme Court held,

inter alia, in so far as the penalty is concerned, that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so.

15. The next argument of Mr. Deb is that the power relating to penalty and interest is excessive and unreasonable and, therefore, ultra virse of Article 19(1) (g) of the Constitution of India. In reply to this argument of Mr. Deb, Mr. Bajoria contended that the provision is not a restriction and not in violation of the fundamental right. It is argued by Mr. Bajoria that the entries in Schedule VII must be given the widest interpretation and, in the case *The Commissioner of Commercial Taxes and Others etc. Vs. R.S. Jhaver and Others etc.*, ; *Commissioner of Commercial Taxes and Others Vs. Ramkishan Shrikishan Jhaver and Others*, , in para. 12, it has been held that the entries in the legislative list must be given the widest interpretation. In a case reported as *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, , on which Mr. Bajoria relied, it has been held that the principle in construing words conferring legislative power is that the most liberal construction should be put on the words so that they may have effect in their widest amplitude. None of the items in the list is to be read in a narrow restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the legislative ambit of the Entry as ancillary or incidental. It is also permissible to levy penalties for attempted evasion of taxes or default in the payment of taxes properly levied.

16. Regarding the colourable exercise of power it has been held by the Supreme Court that a thing is colourable which is, in appearance only and not in reality what it purports to be. If the legislation apparently enacted under the Entry in the List, falls in plain truth and fact within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, the pith and substance of the Act has to be ascertained. If it is found that the legislation was made under a particular Entry, the motive is beside the point and it is not possible to hold that the legislature is competent to legislate. In the present case, in our opinion, there is no doubt that the legislature is competent to legislate under Entry No. 60 of List II and as such the State Legislature has a power to enact the Legislation and, therefore, not ultra vires of Article 19(t)(g). In that view of the matter, all the arguments of Mr. Deb must fail.

17. Mr. P.K. Sengupta appearing for some of the appellants contended that the definition given in Section 2(f) of the Act is an inclusive definition. The definition

of " person " means any person who is engaged in any profession and includes an HUF and it is argued that there is no machinery in the Act as to how this engagement is to be found out. Though Section 14 provides for an appeal etc., yet the said persons who are not serious about the profession may not get any relief by preferring an appeal and as such the right to appeal, becomes illusory. It was also argued by Mr. Sen Gupta that as the Calcutta Municipal Act and the Bengal Municipal Act have already been enacted in exercise of the power to tax on the profession, trade or calling, the State Government cannot now enact the legislation under Item No. 60 of List II, This argument has no substance in so far as we are concerned, inasmuch as, this question was specifically raised in the case MR. KAMTA PRASAD AGGARWAL ETC. Vs. EXECUTIVE OFFICER, BALLABGARH and Another, . The Supreme Court held that Article 276 of the Punjab Panchayat Samitis Act and Zila Parishads Act were not bad on the ground that the total tax imposed on profession, etc., by the State and the Samitis exceeded the maximum limit of Rs. 250 as stated in Article 276 of the Constitution of India. The Supreme Court held that the words in Article 276 that the total amount payable to the State or to any one of the Municipality, District Board, Local Board or other Local Authorities cannot mean that the word "or" is used in a conjunctive sense as a substitute for the word " and ". The word " or " is used in a disjunctive sense. When the proviso speaks of any State or any such Municipality, it indicates that both can tax separately to the limit imposed by Article 276. Mr. Sengupta, further contended that the word " engagement " which appears in the body of the Act in particular in Section 3 is not properly defined and, therefore, is vague and unworkable. If a particular word is not defined in a statute, the word should be taken on its dictionary meaning. The word " standing " is not denned and, therefore, according to Mr. Sengupta, because of the non-definition of these two words, the Act becomes unworkable. In our opinion, and as discussed earlier, it is not so, as the standing at the Bar has a particular connotation, that is, the duration of practice of an advocate or the professional man. A particular advocate's standing is of 3 or 5 years, means he has been practicing at the Bar for 5 years. The word " engagement" also in a popular sense means that the person is engaged actually in any profession or is carrying on the profession. Therefore, we do not think that in the word " standing " as stated in the Schedule read with Section 3(2), there is any vagueness or uncertainty about the taxability. Reading Section 3(2) along with the Schedule, it is clear to us that any person who is engaged in the profession, trade or calling and has a standing, that is, the duration, mentioned in the Schedule, will be amenable to the taxable incident. In our opinion, to get a tax from any person under the statute, two conditions must be satisfied (1) that the person must be engaged in the profession, and (2) depending on his duration or his standing in the profession the quantum of tax as mentioned in the Schedule is to be paid. It is argued by Mr. Sengupta that the Act is bad in law in not providing for any machinery for assessment. In our opinion, Mr. Sengupta is not correct in his submission. From the different provisions of the Act, earlier referred to, it will appear that every person liable to pay tax under the Act (other than a person

earning salary or wages in respect of whom the tax is payable by his employer) shall obtain a certificate of enrolment from the prescribed authority in the prescribed manner. In so far as the professional people are concerned they are more or less self assesses. He must apply for enrolment and the prescribed authority shall consider the application and grant the certificate, if he is otherwise satisfied. It appears that u/s 8 of the Act, the date of payment is also fixed. In that view of the matter, in our opinion, the above contention of Mr. Sengupta cannot be correct.

18. An argument has been made about the burden of the taxation on the junior members of the Bar who have just entered the profession. From the facts brought to our notice, it is clear that the State Govt. has already exempted a person who has just entered the profession and as such may not have the capacity to pay the professional tax. That apart, according to us, it is not possible for the court to judge whether a person has the capacity to pay and on the basis of that to hold that the particular provision is ultra vires. It appears to us that even if the capacity to pay is a relevant consideration for the purpose of the imposition of the tax, the judicial authority cannot set aside a taxing provision on the ground that the person engaged in the profession has no capacity to pay, as that has to be left to the legislative authority for consideration. In the present case, in our opinion, it cannot be said that the amount of the tax to be paid by different persons engaged in the profession as advocates is excessive or confiscatory in nature and that it should be struck down as an unreasonable restriction for carrying on the trade, profession or calling and as such violative of Article 19(1)(g) of the Constitution of India.

19. Dr. Debi Pal challenged the Act on the ground of legislative incompetence of the State Legislature on the professional people under Article 14 of the Constitution of India. It is argued by Dr. Pal that in imposing the tax, the earning capacity of the taxpayer has to be considered ; or in other words, the criterion is that the earning capacity of the person engaged in profession must be considered before the incident of tax is fastened on him and that earning must be from the profession in order that only the income from the profession may be taxed and not any other income. It is argued, assuming for a moment, that an advocate who is engaged in the profession does not earn anything from the profession but earns from other sources he has still to pay professional tax. In support of his contention, Dr. Pal relied upon Item No. 1 of the Schedule wherein, for imposing the tax on the salaried people, the guideline is their income, unlike the professional people. Accordingly, he argued, that unequals were treated equally. In our opinion, it cannot be said that there is unequal treatment of any professional people in the Schedule. In so far as the professional people are concerned, they are a class by themselves and all of them have been treated equally. Nothing has been shown by which it can be said advocates inter se have been treated differently. Dr. Pal referred to the cases in Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, , State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, , Devi Das Gopal Krishnan and Others

Vs. State of Punjab and Others, , The State of Kerala Vs. Haji K. Haji K. Kutty Naha and Others etc., and Avinder Singh and Others Vs. State of Punjab and Others, , which support Dr. Pal's proposition that unequals should not be treated equally, but, this cannot be applied to the facts we are concerned with. Earning capacity can never be the very criterion as the basis of tax. The payment of tax is regulated by law. The imposition of tax is for a public purpose and the levy of tax is for the general revenue. The capacity may be a consideration for the levy of tax to be legally imposed. In our opinion, when a person is taxed, only the incident of taxation in the particular Act is important. When a person is engaged in a profession and his standing is for more than five years in the profession, he is to pay a particular amount as professional tax. It is quite possible that he may not have earned from the profession but that does not make any difference because, in our opinion, the payment of Income Tax of a person engaged in the profession is the yardstick by which a tax is leviable on profession. In that view of the matter, in our opinion, Dr. Pal's argument that the tax is a violation of Article 14 of the Constitution of India is not a valid argument and cannot be sustained.

20. Mr. Bajoria, on behalf of the State, contended that there are machineries for making the assessment. He relied upon the preamble to the statute as also Section 3(2) of the Act and argued that on the word " engagement " the charge of the tax depends. If a person, who is enrolled in the Bar Council's Enrolment Register, is not actually engaged in the profession, he is not liable to pay professional tax. If he is engaged and if he comes within the mischief of Schedule, taxability is attached to him. The income, according to him, is the yardstick for the tax. It is argued that a professional man has to himself apply for enrolment and the prescribed authority would enroll such person and give an enrolment number. It is argued by Mr. Bajoria that the enrolled persons have to pay tax at the rate of 2% u/s 9(3) of the Act. u/s 10, a penalty not exceeding 15% can be levied. Appeal has been provided u/s 14(6) of the Act. u/s 16, the special mode of recovery of tax cannot be said to be unreasonable restriction of the tax (sic). In another case, in SECOND-GIFT TAX OFFICER, MANGALORE Vs. D. H. NAZARETH., , while considering the legislative power of Parliament to enact laws relating to the G.T. Act, their Lordships of the Supreme Court held that the pith and substance of the G.T. Act, 1958, is to place the tax on the gift of property, which may include land and building. It is not a tax imposed directly on the land and building, but it is a tax upon the value of the total gift made in a year which is above the exempted limit. There is no tax upon the land and building as units of taxation. Indeed, the lands and buildings are valued to find out the total amount of the tax and what is to be the tax on them for the land and building. It is only a measure of the value of the land and the building. Gift-tax is thus not tax on lands and buildings as such but it is a levy on a particular use which is the transmission of title by a gift. Applying these principles in these cases, it appears to us that under the impugned Act, for the purpose of quantifying the tax, the capacity to pay Income Tax has been taken into

consideration.

21. The next question which was argued is about the vires of the section being in violation of Article 14 of the Constitution of India. Dr. Pal and Mr. Bhunia argued that unequals are treated as equals and, therefore, the Schedule to the Act is ultra vires being discriminatory. Dr. Pal relied upon the decisions in *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, *State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others*, *Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others*, *The State of Kerala Vs. Haji K. Haji K. Kutty Naha and Others etc.*, and *Avinder Singh and Others Vs. State of Punjab and Others*. Mr. Bajoria contended that the broad question that unequals cannot be treated as equals, cannot be disputed. But, it is argued that different items in the Schedule cannot be equated to a common item or, in other words, the salaried man and professional man cannot be on the same footing. Therefore, the whole contention of Dr. Pal and that of Mr. Bhunia cannot be accepted to be correct. It is quite apparent from the Schedule that different persons are of different classes. The wage-earners, companies, co-operative societies, professional men and others as in the Schedule cannot constitute the same class of persons and, therefore, are differently treated as to the extent of taxation. It is quite apparent, so far as we are concerned, to hold that the salaried person cannot be equated with the professional men and as such Article 14 of the Constitution is out of the way. In our opinion, if there is discrimination between the different sets of lawyers or for that matter those of the same class, then the question would have been otherwise. All the lawyers have been equally treated. Lawyers of three years' standing are to pay professional tax at the rate of Rs. 50 per annum, the persons engaged in the profession for more than three years and less than five years are to pay Rs. 100 per annum and the persons practising in legal branch for more than five years are to pay Rs. 150 per annum, provided however, in case any person of the above category pays Income Tax, he will have to pay Rs. 200 per annum. The payment of Income Tax, according to us, has been made a measure of tax on all these persons. In our opinion, therefore, the challenge that the Act is ultra vires cannot be accepted to be correct.

22. Mr. Bhunia also relied upon the cases in *In Re: The Special Courts Bill, 1978*, *State of Gujarat and Another Vs. Patel Ramjibhai Danabhai and Others*, and *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, and contended that entries 77-78 is the yardstick of taxation. It appears to us that this argument cannot be correct. Entry 60 of List II is the field of taxation and has nothing to do with the practice, etc., of the professional people. In our opinion, on this question, no argument can now be agitated in view of the Supreme Court decision in *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana and Others*. Item No. 70 of List I and Item No. 26 of List III cover the field. In that view of the matter, it is argued that the Legislature is incompetent to legislate on the subject. He relied upon the case in *O.N. Mohindroo Vs. The Bar Council of Delhi and Others*. The Supreme Court while considering the Advocates Act of

1961, in particulars. 38, with reference to entries 77-78 of List I, held that as the power of legislation relating to those entitled to practise in the Supreme Court and the High Court is carved out from the general power to legislate in relation to legal and other professions in Entry No. 26 of List III, it is an error to say that the Act is a composite legislation, partly falling under entries 77-78 of List I and partly under Entry 26 of List III. In this view, the right of appeal to the Supreme Court u/s 38 of the said Act, creates a jurisdiction and power in relation to a matter falling under entries 77-78 of the Union List, and the Act would, therefore, fall under Article 138(1) and not Article (2) of Article 138. It cannot be said that Section 38 falls under Article 138(2) and is invalid on account of its having been enacted without a special agreement with the State Govt. Mr. Bhunia further argued that to tax in relation to Item No. 60 of List II is within the legislative competence of the State Govt. but when the lawyers are concerned this must be read along with Item Nos. 77-78 of List I and Entry No. 26 of List III. In our view, this argument has no substance. We have already held that this Act comes under Entry No. 60 of List II of the Schedule VII and, therefore, the State Legislature is competent to legislate and it does not fall either under entries 77-78 of List I or Entry 26 of List III. Mr. Bhunia further argued that the basic structure of the Constitution has been violated by enacting the provision "of the Act. In our opinion, this is a preposterous argument. Mr. Bhunia elucidated the argument that the basic structure of the Constitution is in the manner as follows :

" If this tax as levied is enforced, the lawyers will be entitled to deduction from the Income Tax and thereby the Central Government's share will be reduced to that extent and ultimately the State will suffer because if the Income Tax is divided between the different States by the Central Government, the quantum of money they will get will be reduced."

Therefore, according to Mr. Bhunia, the basic feature of the Constitution is violated as the structure of the Constitution is federal. We are at a loss to find justification or reasoning of the argument advanced by Mr. Bhunia. In the recent Supreme Court decision in V.C. Shukla and Others Vs. State (Delhi Administration), , the Supreme Court held, rejecting an argument based on the Central Legislature, namely, Special Courts Act, (1979) as follows :

" It was then submitted that as the declaration is based on the result of an investigation held by a Central agency even though the offences were alleged to have been committed in a State, it affects the basic structure of the Constitution and is, therefore, void. This argument, in our opinion, is also misconceived. The doctrine of the violation of basic structure of the Constitution or its fundamental features applies not to the provisions of a law made by a State Legislature or Parliament but comes into operation where an amendment made in the Constitution itself is said to affect its basic features like fundamental rights enshrined under articles 14, 19, 31 or the power of amendment of the Constitution under article 368 and so on. The doctrine has no application to the

provisions of a Central or State law because if the statute is violative of any provision of the Constitution it can be struck down on that ground and it is not necessary to enter into the question of basic structure of the Constitution at all."

It is argued by Mr. Bhunia that this is not a tax but cess. We are not concerned with it at all because the preamble to the Act provides that this is a tax and this is for the benefit of the State and cannot be said to be a cess. Mr. Bajpayee, followed by Mr. Bhunia, argued that there is no authority in the Act who can decide the persons to be taxed and the quantum of such taxation.

23. All the learned advocates argued that every person who is engaged in profession--whether they earn anything from the profession or not have to pay professional tax. Argument was advanced about the hazards of new entrants into the arena to make out the existence in the profession. But in regard to the capacity to pay tax, unless it becomes confiscatory, it is not possible for the court to interfere with the legislative intent. It appears to us that it is not possible to say that the tax fixed on the different entities is so heavy that it becomes unreasonable. There cannot be any doubt that whether the petitioner has the capacity to pay must have been considered by the legislature, inasmuch as the person having less years of practice has been given burden to a little extent and when practice is growing the burden is increased and when a person pays Income Tax, that is taken to be the yardstick for the purpose of assessment of tax on his being engaged in the profession. Whether he earns from the profession or not it is not necessary for us to consider the same, inasmuch as his income is not being taxed. Being an Income Tax payee, his status is considered and his engagement in the profession has made, him liable to pay professional tax at Rs. 200 as provided, as such. In that view of the matter, there is no merit in these appeals.

24. The appeals are, therefore, dismissed.

25. Lastly, we deal with the appeal preferred by the LIC Agents' Association wherein Mr. Biswas contended that the legislation is a colourable piece and at least his clients are not liable to pay as they are employees of the LIC and as such they are not engaged in the profession. We are, however, not concerned with that part of the case. If they are employees of the LIC, they will be liable to pay at the rate stipulated in Serial No. i. But whether they are employees or not we are not concerned to consider the same in this proceeding. We are, however, of the opinion, that neither the taxation is colourable nor does the tax imposed violate arts. 14 and 19 of the Constitution and there is no vagueness about it. In that view of the matter, in our opinion, there is no merit also in the appeal preferred by Mr. Biswas' clients.

26. This appeal is also dismissed.

27. There will be no order as to costs in all the appeals.

Monoj Kumar Mukherjee, J.

28. I agree.