
(1954) 05 MP CK 0002

In the Madhya Pradesh High Court

Case No : Civil Miscellaneous Case No. 9 of 1953

Gwalior Sugar Co. Ltd. and Others

APPELLANT

Vs

State of Madhya Bharat

RESPONDENT

Date of Decision : 07-05-1954

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 226, 265
Gwalior Praja and Raj Sabha Act — Section 36, 41

Citation : (1954) 05 MP CK 0002

Hon'ble Judges : Dixit, J;A.H. Khan, J

Bench : Division Bench

Advocate : Veda Vyasa and Puttulal Dubey, for the Appellant; K.A. Chitale, General, for the Respondent

Judgement

Dixit, J.—This is an application under Article 226 of the Constitution of India for the issue of a writ or a direction in the nature of mandamus, directing the State of Madhya Bharat not to levy any cess on the Petitioner Company on the sugar-cane purchased by it and not to realise any cess from the said company, and to refund the amount already recovered as cess. The petition arises in the following circumstances.

2. On 1-5-1940 an agreement was entered into between the Government of the former Gwalior State and Sir Homi Mehta and others for the establishment of a sugar factory in Dabra. In pursuance of the agreement the Petitioner-company was floated, sugar factory was established at Dabra and in due course it went into production. On 20-6-1946, His Highness the Maharaja Scindia, the Ruler of the Gwalior State, constituted a committee

to consider the desirability of imposing a cane cess on the lines of the U.P. or Bihar and to recommend the procedure of fixation of sugar prices within the terms of the agreement subsisting between the Government and the factory.

One Minister and three officials of the State were appointed by name as

members of this committee. The committee submitted its report to the Gwalior Darbar on 23-7-1946 together with a "Guzarish" (Submission) from Sardar M.R. Phalke who was a member of the committee and who presided over the deliberation of the committee. Sardar Phalke was at that time also a Revenue Minister in the Government of His Highness the Maharaja Scindia. The Gujarish presented by Sardar Phalke contained the following submissions to the Darbar:

1. that "following U.P. policy it is essential to levy on the factory a cane cess of one anna per maund on all sugar-cane purchased by the factory."

2. that "the proceeds of the cess will primarily be used for cane development work and the utilization and administration of the fund will be under the Cane Development Board" A recommendation was also made as to how the Board should be constituted.

3. that "sugar prices will be fixed on the recommendation of this Board on the basis unanimously recommended in this report.

3. On this Gujarish His Highness the Maharaja Scindia passed on 27-7-1946 the order "Guzarish. sanctioned". On the basis of this order the Economic Adviser of the Gwalior Government wrote a letter to the Petitioner-company which stated inter alia:

With a view to expand cane area and cane yield in the Ilarsi commanded area so that the Gwalior Sugar Company Limited be put on a sound and stable basis, the Gwalior Government have decided to impose a cane cess of one anna per maund on all sugarcane purchased by your factory. The operation of this cess will start from the coming sugarcane crushing season. The proceeds of the cess have been earmarked for cane development work in Ilarsi region that will be undertaken by a Cane Development Board constituted for the purpose.

4. In reply the petitioner-company made several unsuccessful representations protesting against the levy of the cess. After the formation of Madhya Bharat the Petitioner again made a representation to the Madhya Bharat Government against the levy of the cess. This time also the Petitioner company was unsuccessful and was informed (that the imposition and recovery of the cess having been imposed in the past under "competent authority of His Highness the Maharaja of Gwalior was valid." Some time after the coming into force of the Constitution of India the company again appealed to the Government for the withdrawal of the cess.

According to the Petitioner, on this appeal a meeting of the officers concerned was called by the Adviser to the Government, and that as a result, the Adviser decided to recommend to the Government that the cane purchased by the Petitioner company from the Gwalior Agriculture Company should be exempted from cess, and that since the levy of a cess on the Petitioner company alone was not equitable, the Industries and Agricultural Departments and the Economic Adviser to the Government should study the question of the levy of the cess and

advise the Government

whether the cess should be continued and if so in what manner an uniform cess on all factories can be levied.

The Petitioner company further states that it has already paid to the Government a sum of Rs. 1,17,712/8/2 as cess in respect of the "seasons" from 1946 to 1948 and that the Government has now made a demand for the payment of the cess in respect of the subsequent "seasons" from 1949 to 1951 amounting to Rs. 2,79,632/14/9. The Petitioner-company says that the levy and demanded (sic) the cess is without the authority of law; that law was ever passed by the Legislature of (sic) while Gwalior State imposing the cess; that (sic) levy is repugnant to Article 14 of the Constitution (sic) infringes the Petitioner's right guaranteed (sic) Article 19(1)(g) ; and that the levy is in contraction of the terms of the agreement dated 1-5-(sic) mentioned above.

5. In the return filed by the Cane Development Officer on behalf of the State opposing the palliation (sic) it has been stated that the agreement date 1-5-1910 does not guaranty to the Petitioner company any exemption from the levy of the cess any other tax, except the export duty; that (sic) authority of the State to impose the cess cannot fettered or restricted by the terms of the agreement or a license granted thereunder; that Darbar Order dated 27-7-1946 is a law import (sic) the cess; that the operation of the cess was, (sic) municated to the company by a letter date (sic) 26-8-1946; that the Petitioner-company having quiesced and paid a part of the cess levied is precluded from raising the question of the vire (sic) the cess by this petition; and that in return for cess levied the Petitioner-company has been receiving (sic) advantages in the shape of regular and equate (sic) supply of sugar-cane of good quality graphs 9 and 10 of the return are as follows:

9. The Board was charged with the duty encouraging increased production of the sums (sic) cane and its quality and the sums collected. Cess were proposed to be utilized by the Government towards the development of sugar-(sic) but due to some technical difficulties of according in this procedure as pointed out by the that (sic) Hon"ble Finance Minister the Gwalior Dan (sic) ordered that budget of this work be put up-annually (sic) for sanction and the proceeds of the be deposited in the Government Treasury.

Large sums of monies were spent on sums of improved seeds, "manures, construction of, trucks and improved implements, etc., as (sic) on drainage, construction of pucca-roads, struction of water channels, in the Public (sic) and Irrigation Department. As a result of effort the area of the growth of sugar-cane creased from about 5,000/- acres to about 100 (sic) acres. This was in the ultimate analysis the benefit of the sugar manufacture of the Petitioner company.

10. Substantially all the sugar-cane required their factory, thus, becomes available to the (sic) Petitioner-company. It is by following, policy that the production of the sugar was paced-up so as to meet the crushing (sic) city of the

first Petitioner Company's factor state that the other sugar-mills in the Madhya Bharat are found to suffer from the disadvantages that the cane grown in the vicinity of factories is not adequate and does not crushing capacity. I state that the positive (sic) the first Petitioner company is distinctive advantageous to itself due to the reason (sic) facilities obtainable in that area as also protected (sic) by the State Government.

6. Mr. Veda Vyas learned Counsel for the Petitioners (sic) frankly and rightly stated before us that he (sic) not contesting the validity of the cess and its (sic) very from the applicant-company before (sic) 1950. He confined himself to the question of validity after the coming into force of the Condition. The validity was challenged mainly on (sic) grounds: (1) that the Darbar order dated 1-7-1946 (sic) relied upon by the opponent State is an altercative (sic) order and not a law imposing a cess within the meaning of Article 265; (2) and that even order is regarded as a law of the former (sic) State which was continued after the formation of Madhya Bharat it cannot be held to be altercative (sic) after the coming" into force of the Constitution (sic) as it infringes the Petitioner's foundational (sic) right under Article 19(1)(g) and is inconsistent (sic) with the provisions of Article 14 of the Constitution (sic) inasmuch as no cess has been levied on other (sic) factories in the State and the Petitioner-company alone has been prejudicially affected.

7. Under Article 265 no tax can be levied or deducted (sic) except by authority of law. If, therefore, (sic) Darbar order dated 27-7-1946 is an executive and not a law under Article 265, it is obvious (sic) and not justify the impost of the cess. The first (sic) question that, therefore, arises for consideration is, whether the said Darbar order is an executive (sic) order or a law. The question presents some qualities (sic). It has to be determined with reference to the provisions of the law-making machinery in (sic) in Gwalior State on 27-7-1946 and according to the forms and solemnities required in that State authentication of statutes and also with reference (sic) to the circumstances in which the Darbar (sic) was passed on 27-7-1946.

8. In 1929 and 1941 His Highness the Maharaja (sic) issued Proclamation declaring his intention to provide (sic) opportunities for increasing association (sic) subject with the administration of the State (sic) to establish a State Legislature in furtherance (sic) of his intention. The Proclamations were implemented and rendered effective by regulations made (sic). Ruler subsequently. The last of these regulations was the Gwalior Praja and Raj Sabha Regulation (sic) Sumvat 2002. It was promulgated on and (sic) and it defined the powers and functions (sic) of two Houses of the State Legislature. It is necessary to refer here in detail to the powers and functions of the Gwalior State Legislature, (sic) to say that they were somewhat similar to those enjoyed by the Provincial Legislatures under (sic) the Government of India Act, 1919. Section 36 of Regulation provided:

Notwithstanding anything contained in these (sic) Government may, in cases where (sic) legislation is required in any matter (sic) other than those affecting the peace and

transition (sic) of the State, submit to His Highness a (sic) and such Bill if assented to by is High Court (sic) shall have the force of law.

The provisions of Sub-clause (1) shall have weather (sic) the Sabhas are sitting or not; (sic) that, every such law shall remain in force for a period not exceeding one year and may be withdrawn by the Government at any time.

9. In the Proclamations and in the Regulations of Samvat 2002 the Ruler of the Gwalior State had reserved to himself the prerogative to make and pass laws without reference to the Legislature. Section 41 of the Regulations was as follows:

Nothing in these Regulations shall affect or be deemed to have affected the prerogative of His Highness to make and pass laws or to issue proclamation and Ordinances in His Highness' discretion without reference to the Praja Sabha or the Raj Sabha which right is hereby declared to be and to have always been possessed and retained by His Highness.

10. On the administrative side His Highness the Maharaja Scindia was advised by a Council of Ministers. The constitution of the Council of Ministers and its powers were defined by the Ruler by passing two orders, one on 24-4-1939 and another on 21-10-1940. Under these orders all measures of legislation and proposals for alteration in taxation were required to be submitted to the Ruler for orders with the opinion of the Council.

11. Before stating the contentions of the learned Counsel on the question of the nature of the Darbar Order dated 27-7-1946, it must be noted that the form and appearance of various laws enacted and Ordinances promulgated in Gwalior State in the years 1939-1948 were not different from those prevalent in the territory which was British India.

12. The argument of the learned Counsel for the applicants was that the Darbar Order dated 27-7-1946 was not a law because on the face of it, it was not in a form which was in vogue for laws in the quondam Gwalior State in 1946; that it was not enacted by the Legislature and was never published in the official Gazette; and that the proposals contained in the Guzarish submitted by Sardar Phallce, which were sanctioned by the Darbar Order of 27-7-1946 were not enforceable in any court of law.

Learned Counsel relied on Harla Vs. The State of Rajasthan, to show that as the Darbar order was not published in the Gazette it could not be regarded as a law. He also invoked the aid of the test indicated by me in Fathima Bi Vs. The State of Madras, to differentiate between the orders and rules made by a Ruler of a State, combining in himself the supreme legislative and executive authority, in his capacity as a supreme executive authority from those made in his capacity as the supreme legislative authority.

13. In reply the learned Advocate General did not dispute that there was no law of the Gwalior State Legislature imposing a cess on the Petitioner and that the Darbar Order of 27-7-1946 was not published in the Gazette. He, however, urged

on the authority of "Abeyesekera v. Jayatilake" 1932 AC 260 (C) that by virtue of the legislative authority, the Ruler of Gwalior State had reserved to himself in the proclamations made by him and in the Praja and Raj Sabha Regulations, Samvat 2002, he was perfectly" competent to pass the order dated 27-7-1946; that the said order was law as it imposed a cess and was a command of the Sovereign of the Gwalior State in whom were vested the supreme legislative and executive functions.

Learned Advocate General sought to distinguish the Supreme Court decision in *Harla Vs. The State of Rajasthan*, by saying that: it did not lay down that the publication in the Gazette of a statute or an order having the force of a law was necessary to its validity or to put it in operation. According to the learned Advocate General the Supreme Court decision was only to the effect that it would be against the principles of natural justice to punish or penalise a person under a law of which he has no knowledge.

14. On giving the matter my careful and prolonged consideration, I have reached the conclusion that the contention of the Petitioners that the Darbar Order dated 27-7-1946 is an executive order and not a law must be given effect to. The order in question is admittedly not a piece of legislation passed by the Gwalior State Legislature and assented to by the Ruler of the Gwalior State. It may be conceded that the Ruler having reserved to himself the prerogative to make and pass laws in his discretion without reference to the Legislature, he was competent to make any law imposing a cess on the Petitioner company.

But the important question which we have to consider is whether in making the order dated 27-7-1910 I he Ruler acted or purported to act in the exercise of his legislative authority. To say that he acted in his legislative authority because the order passed by him imposed a cess, is to beg the question. To say that anything the Sovereign chooses to command is law and, therefore, the order dated 27-7-1946 is a law, is to obliterate the distinction between the exercise by the Sovereign of his legislative authority and the exercise of the executive authority. There can be no law without a legislative act and when we speak of the making of law, we mean the exercise of discretion by the competent legislative authority in the State.

15. The essence of the law is that it is enforceable in the Courts of law and is not capable of being rejected by the Courts as uncertain. It was suggested by the learned Advocate General that as the Darbar Order dated 27-7-1946 compelled the Petitioner company to pay the cess and was not passed with its consent, the order is a law and not an executive order, In this connection he referred us to *Phaltan Sugar Works Ltd. Vs. Commissioner of Income Tax*, I do not think the element of compulsion can be a valid criterion for distinguishing a law from an executive order.

Instances of executive orders passed without the consent and against the wishes of the party affected by the order and of the party being compelled to obey such

an order are too common to require any enumeration here. The decision in *Phaltan Sugar Works Ltd. Vs. Commissioner of Income Tax*, nowhere lays down any such proposition that an executive order is one passed with the consent of the party affected thereby and whenever an order compels a person to do something then such an order is a law. The order 27-7-1946 is not in a form in which laws are enacted and promulgated in the manner (sic) were enacted and promulgated in the manner (sic) Gwalior State in 1946. There is thus no need to suggest that on the face of it, it is a law.

The order was not even published in Gazette. While it is true that in the absence of a constitutional or statutory requirement, publication is not necessary to the validity of a statute; (sic) put it in operation, the fact that the order 27-7-1946 was not published in the manner in which statutes and Ordinances used to be enacted in the former Gwalior State in 1946, is an indication (sic) that the order was not intended to operate as a law and that it was merely an administrative (sic) decision. The importance of the omission to publish the order in the Gazette lies in the fact that one of the circumstances on which it (sic) has been said that prima facie the order is a law (sic) is absent in the present case.

The learned Advocate General pointed out in a notification published in the Gwalior Government Gazette dated 29-11-1947 at page 147 which a cess was levied on all sugar-cane exported (sic) from Gwalior State for sale to sugar factories situated outside the Gwalior State, there is (sic) reference to the Darbar Order dated 27-7-1946 (sic) fail to see how a mere reference in this notification (sic) to the Darbar Order dated 27-7-1946 for purpose of explaining the reason for imposition (sic) of cess on sugar-cane exported from the State to (sic) be regarded as a notification of the Darbar Order dated 27-7-1946 itself.

In my view the decision of the Supreme Court in *Harla Vs. The State of Rajasthan*, is not of much assistance here. In that case the Supreme Court considered the question of publication in relation to the creativeness (sic) of a legislation which had been (sic) by the competent legislative authority of the manner (sic) Jaipur State but which had not been (sic) gazetted or published in the Gazette. This is not the case here. What we are concerned with, is the nature of an order passed by the Ruler of Gwalior State, and as I have said above, nothing in its form or in the manner in which it was made known to indicate that on the face of it, it is a law.

The circumstances in which the order was made (sic) also point to the conclusion that the order is an executive order. The *Guzarish* submitted to Darbar on 23-7-1946 was not a piece of agency (sic) legislation" put before the Ruler for assent u/s 36, Gwalior Praja and Raj (sic) Regulations, Samvat 2002. It was also not a draft of legislation or a tax proposal submitted to the Ruler for sanction along with the opinion of the Council of Ministers in accordance with the Orders of 24-4-1939 and 21-10-1940. *Guzarish* was merely a submission of the President (sic) of the Committee which the Ruler had appointed on 20-6-1946 to consider the question of the (sic) ability of imposing a cane cess on the sugar industry (sic) of the Petitioner-company. It is notable (sic) the members of the committee who were appointed by the Gwalior Darbar on 20-6-1946 were resigned (sic) by their

names and not by their official resignation (sic) and the Guzarish which was submitted for (sic) Sardur Pluilke was not in his capacity as Rene (sic) Minister but as the President of that committee. Having regarded to the Darbar Orders dated 4-4-1939 (sic) and 21-10-1910 laying down the constitution powers and procedure of the Council of considers I find it extremely difficult to hold that then His Highness the Maharaja Scindia sanction (sic) the Guzarish of the President of the communities (sic) up by him on 20-6-1946, he discharged a legislative function.

The learned Advocate General said that according to the Darbar Orders 24-4-1939 and 1940 (sic) the Ruler could discharge the legislative (sic) even when not moved to do so by the council of Ministers. This is no doubt true. But the normal procedure laid down by the afore (sic) Darbar Orders was not followed, then some trial is necessary to show that in passing the (sic) dated 27-7-1916 the Ruler of the Gwalior (sic) was discharging the legislative function (sic) is no such material.

This (sic) important circumstance which, in my opinion, part (sic) some light on the nature of the order dated 1946 (sic) is that in the Guzarish submitted on (sic) the Darbar's sanction was sought not to levy of the cess then and there but to the principle that.

Is essential to levy on the factory the cane (sic) of one anna per maund (sic) on all sugar cane (sic) purchased by the factory.

(sic) sanctioning the Guzarish, the Darbar, there took an administrative decision as to the liability and desirability of levying a cess on the (sic) factory. It is quite true that after the order (sic) passed the officers of the former Gwalior (sic) attempted to enforce the levy of the cess (sic) the Petitioner-company also reluctantly and protest paid the cess demanded. But a decision for administrative purposes and enforced such cannot by that enforcement become a law required the force and effect of law.

(sic) common knowledge that many administration decisions not having the force of law, were enforced former Indian States by fear tie influences which made it difficult for (sic) a body of men to act in defiance of the (sic) strongly held by the administrative authority (sic). In my judgment, the order dated 27-7-1946 Gwalior Darbar is only an executive order a law under Article 265 of the Constitution, (sic) order cannot justify the imposition of the cess the Petitioner-company, after 26-1-1950.

In the view I have taken of the nature of a Darbar Order dated 27-7-1946, it is strictly necessary for me to consider the contentions of learned Counsel for the Petitioners founded on (sic) and Article 14 of the Constitution of (sic) attacking the validity of the order dated (sic) on the assumption that the said order (sic) As, however, somewhat elaborate argument addressed to us on these points by the learned Counsel for the parties, I will very briefly indicate my opinion with regard to them.

The first objection was that the levy of the cess interfered with the Petitioner-company's right under Article 19(1)(g) because the company is not allowed to add the amount of the cess in the costs of production of sugar and that by this levy the company is compelled to run the factory at a great disadvantage and there is every likelihood of the Petitioner's business being "crippled". To support this contention Mr. Veda Vyasa cited the case of Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, I am unable to accede to this contention. The cess in question does not put any restriction on the Petitioner's, right under Article 19(1)(g).

There is a distinction between "a cess" and "a license fee". A "cess" is a tax levied for a specific purpose often with a prefixed word defining the object. A license" on the other hand involves a permission to trade subject to compliance with certain conditions. As pointed out in Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another,

a license fee on a business not only takes away the property of the licensee but also operates as a restriction on his right to carry on his business, for without the payment of such fee, the business cannot be carried on at all.

The cess imposed on the Petitioner-company is- clearly not a license fee. Mohammad Yasin's case- has, therefore, no applicability here. I am not impressed by the Petitioner's general statement that the cess puts a restriction on the Petitioner's right to carry on business as the cess is not allowed to be added to the cost of production and there is every likelihood of the Petitioner's business being "crippled" as a result of the cess. In the affidavit filed on behalf of the State, an attempt has been made to show that the burden of the cess actually falls on the consumers.

The Petitioner-company has not made any attempt before us to show with reference to disfigures of the cost of production, the selling price; of the sugar, the profits earned and the amount of cess demanded that the levy" of the cess has; brought about or is about to bring a total prohibition of the business" in a commercial sense and. from a practical point of view.

16. The second objection made to the order was: that it violated Article 14 as the cess was levied on the Petitioner-company alone and the other sugar- factories in the State are not required to pay any cess. The answer made by the learned Advocate- General was that the Darbar Order dated 27-7-1946 when it was passed, did not create any discrimination and that the discrimination, if any, arose out" of extraneous circumstances, namely, the formation of Madhya Bharat and due to the fact that in covenanting States other than Gwalior no such cess, was levied on sugar factories located there.

Learned Advocate General placed reliance on Ramjilal Vs. Income Tax Officer, Mohindargarh, to show that such a discrimination was not hit by Article 14. It was further said that as the cess levied against the Petitioner-company was .for a special benefit conferred on it and as no such benefit was made available to the

other sugar factories, the discrimination between the Petitioner-company and other sugar factories in the State was based on a reasonable classification. On this point I am disposed to agree with the learned Counsel for the Petitioner.

It is no doubt true that the differentiation between the Petitioner-company and the other sugar factories in the State of Madhya Bharat is not due to anything in the order dated 27-7-1946 of the Gwalior Darbar but due to extraneous causes,, i.e., the formation of Madhya Bharat and the absence of any cess on sugar factories in the covenanting States other than Gwalior. But as has been very recently pointed out by the Supreme Court in *The State of Rajasthan Vs. Rao Manohar Singhji*, even in such cases there is an infringement of the principle of equality.

In that case the Supreme Court considered the validity of an Ordinance which was in force in some of the covenanting States of Rajasthan and which was continued in those parts after the formation of Rajasthan, and the effect of which was to subject to a disability the Jagirdars of part of the State of Rajasthan in the management of their Jagirs, while leaving the Jagirdars of other parts wholly unaffected.

The Supreme Court observed that such an obvious discrimination however undesirable, was not open to any exception until the Constitution came into force on 26-1-1950 but that after that date it could be supported only on the ground that it was based upon a reasonable classification and not on the ground that the discrimination was not due to anything in the law itself, but due to extraneous causes. The learned Judges of the "Supreme Court distinguished the case of *Ramjilal Vs. Income Tax Officer, Mohindargarh*, and pointed, out that the case proceeded upon the principle that.

pending proceedings should be concluded according to the law applicable at that time when the rights or liabilities accrued and the proceeding commenced was a reasonable law founded upon a reasonable classification of the Assesseees which is permissible under the equal protection clause.

Here there is no question of any pending proceedings. The inequality in the matter of levy of cess between the Petitioner-company and other sugar factories in the State definitely arose on the formation of Madhya Bharat. It could not be objected to until 26-1-1950 when the Constitution of India came into force but thereafter it cannot be allowed to be continued if there is no reasonable classification to support it.

17. It was argued by the learned Advocate General that a reasonable basis for classification existed in the case before us in that the cess was levied for the sole benefit of the Petitioner-company and the proceeds of the cess were utilized for organizing the cultivation and supply of cane to the Petitioner on economic basis, while the other sugar factories in the State on whom no such cess has been levied have not received any benefit from the State.

The difficulty in the acceptance of the tion (sic) put forward by the learned Advocate", lies in the fact that on 11-11-1946 the (sic) the Gwalior State passed an order direction (sic) budget of the of cane development work show (sic) put up annually for sanction by the Government (sic) and the proceeds of the cess should be den (sic) in the Government Treasury. This has (sic) admitted in para 9 of the return filed on (sic) of the State. It will be remembered the Gusarish which had been sanctioned by 27-7-1946 contained the recommendation¹ proceeds of the cess should primarily be cane development work and the utilization administration of the fund should be under Development Board.

If, therefore, as appears from the relevant of the Revenue Department of the former (sic) State put up before us, after 11-11-1946 the proceeds of the cess were not earmarked spent on cane development work and were dited (sic) into the general revenue, then it maintained that the cess was levied against Petitioner-company for a special benefit (sic) or intended to be conferred on it. The (sic) the collections went to the consolidated fund out being specified or earmarked for the put with which the cess was levied, the cess (sic) character of being a "cess" and became, (sic) tax, and the quid pro quo element on reasonable classification was sought to be (sic) ceased to exist.

I am far from suggesting that classification taxation is not permissible. It is permissible (sic) the essence of a tax is the absence of quid (sic) the classification cannot obviously be based (sic), element of quid pro quo. It may for (sic) rest on the capacity to pay. In this connect would be pertinent to refer to certain observed made by the Supreme Court in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, which relied upon by both the part counsel for the supporting their arguments on the question ther after the Durbar Order dated 11-11- 194 (sic) cess did not retain its part character of being for one special benefit conferred on the p company.

In that case while dealing with the question legislative competence under entry 47 of the current List and under entry 97 List 1, their ships of the Supreme Court pointed out the tinction (sic) between a tax and a fee. Mukher who delivered the judgment of the Court" observed (sic).

A neat definition of what "tax" means has given by Latham C. J. of the High, Court Australia in "*Matthews v. Chicory (sic) Board*" 60 CLR 263 at p. 276 (I). (sic) according to the learned Chief Justice, is compulsory exaction of money by public at for public purposes enforceable by law not payment for services rendered". This inanition (sic) brings out, in our opinion, the (sic) characteristics of a tax as distinguished other forms of imposition which, in a (sic) sense, are included within it; It is said sence (sic) of taxation is compulsion, that is to say, is imposed under statutory power without the (sic) payer"s consent and the payment is enforced law(sic), vide - "*Lower Mainland Dairy v. rstal (sic) Dairy Ltd.*" 1933 AC 168 (J).

The second characteristic of tax is that it is imposition made for public purpose without reference to any special benefit to be conferred the payer of the tax. This is expressed by saying (sic) that the levy of tax is for the purposes general revenue, which when collected forms it of the public revenues of the State. As the (sic) of a tax is not to confer any special benefit upon any particular individual, there is, (sic) It is said, no element of "quid pro quo" between the tax-payer and the public authority; see (sic) Shirras on "Science of Public Finance", (sic) I, p. 203. Another feature of taxation is as (sic) it is a part of the common burden, the amount (sic) of imposition upon the tax-payer depends generally upon his capacity to pay.

18. He went on to say that the distinction between a tax and a fee lies primarily in the fact (sic) tax is levied as a part of a common burden (sic) a fee is a payment for a special benefit or (sic) it is a sort of return or consideration for rendered and (sic) rendered and that.

The money thus paid is set apart and appropriated specifically for the performance of such (sic) and is not merged in the public revenues (sic) benefit of the general public, it could be (sic) as fees and not a tax.

Regarding to the particular case before him, his (sic) observed:

(sic) the material fact which negatives the theory cess in the present case is that the money (sic) by levy of the contribution is not earned or specified for defraying the expenses the Government has to incur in performing Services. All the collections go to the consolidated fund of the State and all the expenses (sic) to be met not out of these collections but (sic) the general revenues by a proper "method" appropriation (sic) as is done in case of other (sic) expenses. That in itself might not be inclusive, but in this case there is total of any correlation between the expenses (sic) by the Government and the amount (sic) by contribution under the provision of (sic) and in these circumstances the theory of a (sic) or counter-payment or "quid pro quo" have any possible application to this (sic)

(sic) my opinion the above observations only report to the view I have taken that after (sic) Order dated 11-11-1946 when the, of (sic) the cess were credited in the general and, not earmarked for promoting the which it was levied, it could not be (sic) cess was imposed for conferring some (sic) on the Petitioner-company and that (sic) virtually a tax. The learned Advocate- argued that it was only for the purpose (sic) that the proceeds of the cess were (sic) be deposited in the Government Treasury. There is, however, no material to support the suggestion.

19. There is nothing to show that even after the collections went to the consolidated fund of the State, the money raised by the levy of the cess continued to be earmarked for conferring benefits, or rendering service to the Petitioner-company and that the expenses incurred on account of the services and benefits said to have been rendered and conferred were met out of the

proceeds of the cess and not out of the general revenues. In my opinion the levy of the cess on the Petitioner-company is discriminatory and in contravention of Article 14 of the Constitution.

20. For the above reasons this petition is allowed and the Opponent State is restrained from realising from the Petitioner-company any cess due from the company after 26-1-1950 under the Gwalior Darbar Order dated 27-7-1946. The State will pay the Petitioner-company the costs of this application Rs. 150/-.

A.H. Khan, J.

21. The Petitioner-company (the Gwalior Sugar Mills Ltd., Dabra) has presented this application under Article 226 of the Constitution for the issue of a writ or other direction, restraining the State of Madhya Bharat from realising any cess in pursuance of an order dated 27-7-1946, which it is contended is not a law, authorising the imposition of any cess, but is a mere executive order, which is bereft of the authority of law. It is also stated that the Petitioner-company has hitherto paid Rs. 1,27,712-8-2 as the cess and a prayer for the refund of this sum is also made.

22. We are asked to issue directions holding-

1. that the levy of the cess from its very inception (1946) was bad and that the amount hitherto paid on account of cess for seasons 1-946 and 1947-48 is, therefore, refundable and

2. that at any rate the imposition of the cess from 1950, the date the Constitution came in force, is ultra vires, because the levy is without the authority of law and that the levy and the demand both are repugnant to Article 14 and Article 19 of the Constitution.

23. It is a well established proposition of law that the validity of past transactions, which took place before the commencement of the Constitution, cannot be challenged under Article 226 of the Constitution, because the Article is not retrospective in its effect. For this reason, the counsel for the applicant has not pressed his claim for the refund of money paid before the Constitution came in force. What is left to us now is to consider whether the order dated 27-7-1946 can be treated as a law, imposing the tax on the applicant-company.

24. The short facts giving rise to the application are that in pursuance , of an agreement dated 1-5-40 between the Government of the former Gwalior State and the promoters of the Sugar Company, a sugar factory was erected at Dabra. The dispute which arose between the parties has its origin in a letter dated 26-8-1946, which the Petitioner-company received from the Economic Adviser, Gwalior Government (annexture B), which stated that with a view to extend cane area and cane yield the Gwalior Government have decided to impose a cane cess of one anna per maund on all sugar cane purchased by the company.

In answer to this, the Petitioner-company made a representation on 3-9-1946,

protesting against the imposition of the cess. Thus the correspondence between the Gwalior Government and the Petitioner-company went on, and, in a letter dated 27-9-1946 from Gwalior Government, it was said that it was after full consideration of the whole situation that it had been decided to levy the cess and that as the issue had been decided finally under Darbar order, the question of its revision or modification did not arise.

25. What we have to determine in this case is whether the Darbar Order dated 27-7-1946, referred to above, is an executive order or is it a piece of legislation which authorised the imposition of a cess on the purchase of sugar cane for the factory?

26. Before proceeding to consider the above question, it is well to remember that constitutionally speaking the sovereign powers of a State imply three things: the Executive, the Judiciary and the Legislature, each having its well defined boundary. But in an Indian State, the Ruler, being the head, held in his hand all these three powers of the State, and unless he had devised a constitution whereby he divested him Self of the powers and created a body to whom he entrusted them, the Ruler himself constituted the Executive, the Judiciary and the Legislature.

In other words, he performed all the three functions himself. In such an eventuality an effort should be made to find out in what particular capacity the Ruler acted in given circumstances. Even assuming that there was no distribution of power in the Gwalior State (a position which I propose to consider later on) and that the Ruler himself performed all these functions, it is yet necessary to consider in what capacity he passed the order dated 27-7-1946: whether it was in his capacity as a legislator or as the head of the Executive.

27. From file No. 21 of Samvat 2032, Revenue Department, Gwalior Government, it appears that on 20-6-1946, H.H. the Maharaja of Gwalior appointed a committee to consider the desirability of imposing a cane cess. This committee went into action and produced a report dated 23-7-1946, in which the committee made certain recommendations. When this was submitted to H. H., he merely put xdown on it "Guzarish sanctioned", and the contention put forth by the learned Counsel for the applicant is that these two words have not the effect of making it the law-it is a mere executive order, signifying acceptance of the recommendations of the Committee.

On the other hand, the learned Advocate General urges that these two words "Guzarish sanctioned" convert the report into a full fledged law and that on the basis of it, the cess is leviable. As the report is brief and is an important document, I would like to produce it in full. It (sic) follows-

Your Highness was graciously pleased to a committee to (sic) consider matters relating (sic) imposition of a pane cess and sugar price.

In obedience to Darbar orders the (sic) very carefully went into details of these

(sic) and unanimously came to the decision the (sic) order to put the industry on a sure and (sic) footing, it is absolutely necessary to development (sic) cane area and yield in the shortest possible (sic) For this purpose the committee beg to (sic) that following U.P. policy it is essential (sic) on the factory a cane cess of one anna (sic) on all sugar cane purchased by the factor

The proceeds of the cess will primary used for cane development work and the zation (sic) and administration of the full (sic) under a Cane Development Board to be tuted (sic) as follows:

1. Economic Adviser (sic)
2. Director of Agriculture (sic)
3. Controller of Supplies and Prices (sic)
4. Chief Engineer (sic)

The Senior Economic Assistant to the Economical (sic) Adviser will act as the secretary to the (sic)

Sugar prices will be fixed on the recommendations of this Board on the basis unabun (sic) recommended in this report.

In the interest of sugar industry and (sic) development the committee respectfully (sic) that the guzarish may be graciously sabction. (sic)

Guzarish sanctioned.

J.M. Scinda

28. The very appointment of the committee (sic) the face of it appears to be an, administrative measure. The committee after its deliber (sic) held that it was desirable to levy a cess. (sic) anna per maund, proposed the formation (sic) Board for cane development and suggested mode and method of fixing the price of (sic) H.H. did no more than concur in the recommandation (sic) made to him. All these proceed the act of the appointment of the committee the submission of its report and its approve H. H. appears to be on an administrative plan (sic).

To me it seems that the principle embody the report had been merely approved and the ground had been paved for the legislation might have followed on those lines but never did. The form in which the report is not form in which laws are made and (sic) gated. After all the law has some form or (sic) into which it is poured, sometimes called; it pings. But in the present instance, it is of all trappings and devoid of all forms and (sic) It is essential that a particular law should (sic) the period from which it would come (sic). If the report is deemed to be a law, it does from what date it will be operative. No (sic) the Darbar has been shown to that effect (sic)

The cess was however levied from the (sic) of 1946-47. If no period was indicated in (sic) itself as to when it will come in forced (sic). Ruler by any

subsequent order of his did not then the Economic Adviser, who demanded the (sic) Should be deemed to have enforced the order(sic) a date, about which the order itself is silent. (sic) if it is conceded for the sake of argument (sic) the Ruler possessed all manner of powers, what authority inherent or otherwise did the Economic viser (sic) possess to fix the period of the operation to (sic) the law?

And before I turn to other points, I must refer (sic) one more fact, which in my opinion, finally poses (sic) of the contention that the order is a valid (sic) of legislation. The report and its approval (sic) H. H. which together constituted the alleged (sic) never saw the light of the day. I refer to the (sic) circumstance that the law imposing the cess (sic) never published nor was it otherwise promulgated (sic).

29. The learned Counsel for the Petitioner-company has referred us to Harla Vs. The State of Rajasthan, (sic) which it is held that

(sic) the mere passing of a resolution by a Council (sic) of Ministers, purporting to enact the Jaipur (sic) Opium Act, without promulgation or publication (sic) of it in the Gazette or other means to make the (sic) Act known to the public is not sufficient to make (sic) it law.

(sic) be learned Advocate General thinks that the non-publication of the law is a matter of no consence (sic) and he has tried to distinguish the ruling (sic) the ground that it refers to the publication of (sic) law alone. It is true that the point in impute (sic) before their Lordships of the Supreme Court arise out of criminal proceedings but what reference does it make so far as the principle is concerned? Besides this, their Lordships in the of their judgment have referred with approval to "Johnson v. Sargant and Sons" (1918) (sic) 101 (K), which is a civil case.

Thus I am inclined to hold that law, whether it civil criminal or for the matter of that revenue, (sic) it becomes effective, must be published. In (sic) days when there was scarcity of paper and (sic) modern facility of the type was not available, were published either by the erection of stone (sic) (such as the edicts which we find on Ashoka,)(sic) or by beat of drums. Even in primitive (sic) publication in some form or other was essential therefore (sic) fore obedience to laws was expected. Their relationships have very aptly observed that.

The thought that a decision reached in the secret (sic) of a chamber (in this instance the palace) (sic) which the public have no access can nevertheless (sic) affect their lives, liberty and property, by (sic) mere passing of a resolution without any(sic) more, is abhorrent to civilised man. It (sic) his conscience. In the absence, therefore, (sic) any law, rule or custom (and here the learned Advocate (sic) General has referred to none) we hold law cannot come into being in this way. nugatlon (sic) or publication of some reasonable essential.

ditions of the hoary past (I refer to the Pillars) and the trend of modern jurispru- (sic) point in the same direction, namely, a (sic) it is given effect to must be published in some form or other. I put this question pointedly to the learned

Advocate General whether he can point out another instance of the Gwalior Law, which was not published and yet was enforced. He has not been able to do so. He has, however, contended that the order was made known to the Petitioner-company whom it concerned, and that this was publication enough.

Now when we speak of the law being published, we mean the propagation of law to all and sundry and not to any particular individual. In fact the communication of the order under dispute to the Petitioner-company alone, throws some light on the nature of the order itself. It is an administrative order because administrative order usually concerns an individual and to him alone it was therefore communicated.

30. Now let me examine the proposition from another angle. The order in question embodying the alleged law was passed on 27-7-1946. Let us determine what the law-making machinery was in force at that time.

31. It would be the task of a historian to make a general survey of the form of Government that existed in the State of Gwalior before its merger into the State of Madhya Bharat. But for our purpose it will suffice to state that as far back as year 1921, his late Highness, Sir Madhav Rao Scindia, established three councils: the first was known as Majlis A'mr (a nominated as well as, an elected body of citizens), the second was called Majlis Qanoon, and the third was styled as Majlis Khas, which was his cabinet. All the legislative measures passed through either one council or the other.

On assuming the reins of Government after the termination of the council of Regency, the present His Highness by two proclamations of year 1929 and 1941, declared his intention to provide for the increasing association of his subjects with the administration and with this end in view, he established two houses of legislatures-the upper and the lower-known as Raj Sabha and Praja Sabha. In form and structure they were analogous to the Provincial Legislatures of British India and their proceedings were regulated by rules called Regulations made by H.H. and promulgated on 23-2-1946.

By Section 41 of the Regulations, H.H. reserved to himself the Royal Prerogative to make and pass any law without any reference to the two Sabhas he had established. Broadly speaking the Ruler for all practical purposes divested himself of the legislative functions. Besides these legislative bodies, H.H. also created a Council of Ministers to advise him. Its constitution and powers were regulated by two orders (one dated 24-4-1929) and the other dated 21-10-1940). Under these orders all measures affecting alteration" in taxation were to be submitted to the Ruler for sanction with the opinion of the Council.

32. Thus we find that before the merger, laws were made in Gwalior either through the two legislatures or through the advice of the Council of Ministers. The Royal Prerogative of course remained untouched in either case. The order which is sought to be treated as a law, neither passed through any of the houses of legislature, nor was it submitted to H.H. by the Council of Ministers. So it was

not according to the legal machinery set up by H.H. himself.

The only other alternative left to us is to consider whether this "order" was passed in the exercise of the Ruler's prerogative, and, is therefore, a law. The reserving to himself the prerogative only shows the competency of the Ruler to make a law without reference to the legislature or the Council of Ministers. But did the Ruler act or purport to act in the exercise of his prerogative is the question?

33. In the first place there is nothing in the order itself to indicate that it was passed in the exercise of the Ruler's prerogative. Besides this, it is common knowledge that the prerogative is resorted to in exceptional circumstances, Here no circumstance has been shown to exist, which might have induced the Ruler to exercise his exceptional powers. And last but not the least, even though it may be a law made in the exercise of sovereign powers, yet it must be published in order to become effective. But this order was passed in the innermost recess of a palace and it never saw the light of the day and the claim made by the Advocate General that the order has the force of law cannot be supported by mere resort to the theory of the prerogative.

34. In view of the above discussion, it is unnecessary to consider the argument of the learned Counsel for the Petitioner founded on Article 19 and Article 14 of the Constitution, and in consequence I do not even touch upon it.

35. According to Article 265 of the Constitution no tax can be levied or collected, except by the authority of law and having held that the order dated 27-7-1946 has not the force of law, -it is a mere administrative order the contentions of the Petitioner-company must be allowed to prevail.

36. In the result the petition is partly allowed and the State of Madhya Bharat is restrained from any further realisation from the Petitioner-company of any cess due after 26-1-1950 under the order dated 27-7-1946. The Petitioner-company to get Rs. 150/- as costs.