

(1955) 06 GAU CK 0005

In the Gauhati High Court

Case No : Civil Rules Nos. 8, 9, 26 and 32 of 1955

H.P.Barua

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 06-06-1955

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 19(1)(g), 19(1)(g), 245

Citation : AIR 1955 Guw 249

Hon'ble Judges : Sarjoo Prosad, C.J.; H.Deka, J and Ram Labhaya, J

Bench : Full Bench

Advocate : R.K.Goswami, S.M.Lahiri, S.C.Bordoloi, P.Choudhary, N.N.Phukan , K.M.Lahiri, D.N.Medhi, A.C.Sampath Iyengar, S.K.Ghose, Advocates appearing for Parties

Judgement

Sarjoo Prosad, C. J.

1. The petitioners in these cases, have challenged the constitutionality of a legislation called the Assam Taxation (On Goods carried by Roads or Inland WaterWays) Act, being Act 13 of 1954. It is claimed for the State that the Act is well within its legislative competence under the powers vouchsafed to the State Legislature by virtue of Art. 246(3) read with entry 56, List II of the Seventh Schedule to the Constitution. The attack on the legislation is directed on various grounds. It is contended that it contravenes Art. 301 of the Constitution and thus violates what the petitioners call their guaranteed right of free trade, commerce and intercourse in the "territory of India.

It is also urged that the Act infringes their fundamental rights under Art. 19 (1) (g) of the Constitution: that the legislation is discriminatory in character and is hit by Art. 14; and that it is an unauthorised encroachment on entry 52 of entry 84 of List I, the Union List. I may observe at the outset that most of the important submissions of Mr. Iyengar, who has addressed the leading argument for the petitioners, are covered by my decision in "Atma Ram Budhia v. State of Bihar", AIR 1952 Pat 359 (A), a Special Bench decision in which my other two

colleagues almost entirely concurred.

I find that the above decision has been quoted with approval by Rajainannar C. J. sitting with another learned Judge in a recent case of "P. Mathurai Filial v. State of Madras", AIR 1954 Mad 569 (B), where a similar legislation a9 the one in instance was in question. I do not however claim infallibility for my judgment and I would have gladly revised my views if in the varied and versatile presentation of the subject by Mr. Iyengar I had found anything substantial to deflect me from the opinion which I then held. I regret to say that after giving my anxious consideration to all his arguments I have nothing to that effect.

(2) It is idle to repeat what I said in my earlier judgment. It is well known that in deciding about the validity of an impugned legislation, the real test is whether in pith and substance, the Act falls under an authorised legislative Field. If it does, then the mere fact that incidentally or in its ancillary effect it trenches upon some other legislative fields also will not invalidate the legislation the pith and substance doctrine is not new. It is now too well established by successive authoritative judicial pronouncement to have any repetition. There is a large volume of decisions on the point both English and Indian.

My knowledge goes back to the eighties of the last century when in "Russel v. R.". (18:821 7 AC 829 (C), the principle of "the true nature and character of the legislation", or, what is called, "the pith and substance of the legislation" was early enunciated. Ever since then, the principle has held the held in nil matters of statutory interpretation and helped many an impugned legislation to survive the test of judicial scrutiny. I have no desire to encumber this judgment with a reference to all those earlier decisions, but it appears to me necessary to consider just a few of the latest pronouncements on the point.

In "Commonwealth of Australia v. Bank of New South Wales", (1950) AC 235 (D), Lord Porter when delivering the opinion of the Judicial Committee of the Privy Council in an appeal from the Commonwealth of Australia quoted the famous dictum of Lord Watson in "Salomon v. Salomon and Co.", (1897) AC 22 at p. 38 (E):

"In a Court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."

His Lordship then proceeded to observe thus:

"The same idea is felicitously expressed in an opinion of the English law officers Sir Roundel Palmer and Sir Robert Collier cited by Isaacs J. in "James v. Crown", 43 CLR 386 at p. 409 (F): "It must be presumed that a legislative body intends that which is the necessary effect of its enactments: the object, the purpose and the intention of the enactment, is the same"

The learned Judge adds:

"By the "necessary effect", it needs scarcely be said, those learned jurists meant the necessary legal effect, not the ulterior effect "economically or socially".

Fazl Ali J. after having reviewed in "State of Bombay v. P. N. Balsara", AIR 1951 SC 318 (G), the earlier decisions on the pith and substance rule, held as follows:

"It is well settled that the validity of an Act is not affected if it incidentally trenches on matters outside the authorised field and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature."

I shall be content to close my discussion of the tonic by reference to a passage from another recent decision of the Supreme Court in "Dwarkanadas Shrinivas v. Sholanur Spinning and Weaving Co. Ltd.". AIR 1954 SC 119 (H). where Mahajan J. as he then was, stated the law thus:

"In order to decide these issues it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature has really done; the Court, when such questions arise, is not over persuaded by the mere appearance of the legislation. In relation to constitutional prohibitions binding a Legislator it, is clear that the Legislature cannot disobey the prohibitions merely by employing indirect method of achieving exactly the same result. Therefore in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation."

In short, therefore, it comes to this that in judging about the validity of the Act impugned before us. we have to see whether in with and substance or in its true character and nature it falls within the legislative field assigned to it under entry 56 of List II of the Seventh Schedule to the Constitution. But before I take up this matter. I consider it desirable to clear the ground by disposing of some of the other contentions of Mr. Iyengar.

(31 Mr. Iyengar claims that even if the state Legislature had the power to enact a legislation of this kind under the head assigned to it in entry 56, the power was restricted by Art. 301 of Part XIII of the Constitution which overrides all legislative powers both of the Union and the States. Article 301, according to the learned counsel, is subject only to the provisions of Part XIII of the Constitution and to no other part and thus it must be held by a mere parity of reasoning that all other parts of the Constitution are subject to Art. 301 not excluding even Part III.

He suggests that inasmuch as the imposition of the tax interferes with the freedom of trade, commerce and intercourse it should be held to be invalid. The argument has a twofold concept. In the first place, it presupposes that taxation

of this kind necessarily interferes with the freedom of trade, commerce and intercourse as mentioned in Art. 301. In the second place, it assumes that irrespective of the legislative powers enjoyed by the State Legislatures under any other provisions of the Constitution, it must be hit by Art 301 unless it is saved by any other Article of Part XIII in which that Article occurs.

Both these assumptions in my opinion are unsound. Mr. Iyengar has cited numerous authorities bearing on S. 92 of the Australian Constitution to fortify his submissions on the point. The reference to these decisions may be useful but in acting upon them the basic distinction between a unitary and a federal type of constitution should not be lost sight of: the more so where legislative powers, between the Union and the State Legislatures, have been carefully distributed by exhaustive enumeration of legislative subjects in the various lists appended to the Seventh Schedule of the Constitution.

It is to be remembered that in Australia all taxing powers belong to the States, except those which are specifically reserved to the Commonwealth; and the question in Australia always is whether a particular tax falls within the field of taxation reserved to the Commonwealth or not; there can be no overlapping of particular legislative spheres. The decisions from Australia, must therefore be treated with caution when interpreting the language of the present Constitution.

Sir Maurice Gwyer, C. J. sounded this note of warning "In the matter of Central Provinces and Berar Sales of Motor Spirit and Lubricates its Taxation Act. 1938". AIR 1939 P. C. 1 (I). His Lordship discussed the distinctive features of the various, Constitutions of Canada, Australia and the United State and observed:

"Disputes with regard to central and provincial legislative spheres are inevitable under every federal constitution, and have been the subjectmatter of a long series of cases in Canada. Australia and the United States, as well as of numerous decisions on appeal by the Judicial Committee. Many of these cases were cited in the course of the argument.

The decisions of Canadian and Australian Courts are not binding upon us. and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgment of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed.

But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution Which the Court is interpreting; and since no two Constitutions are in identical terms it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another.

This may be so even where the words or expressions used are the same in both

cases; for a word or a phrase may take a colour from its context and bear different senses accordingly"

The eminent Chief Justice repeated the same warning in a subsequent decision in "Province of Madras v. Boddu Paidanna and Sons". AIR 1942 PC 33 (J). The above observations were of course made in connection with the Government of India Act, 1935 wherein a federal constitution was adopted, but they applied with equal force to the present Constitution of India where the distribution of legislative powers between the Centre and the States is almost on the same lines as those between the Federal Government and the Provincial Legislature under the Government of India, Act.

That being so, I am not disposed to hold on the analogy of S. 92 as discussed in the Australian cases cited by Mr. Iyengar that Art. 301 of the Constitution has any such overriding attribute as is assigned to it by the learned counsel. But says Mr. Iyengar Constitutional differences apart, the relevant phraseology of S. 92 is the same as that of Art. 301 of the Constitution of India and the cases relied upon by him have an important bearing on the meaning and import of these expressions and in understanding the true scope of "freedom" of trade and commerce.

He argues that transport or carriage is the vital artery of trade and commerce or to quote a more felicitous simile transport is to commerce what vital motion is to the living body: it is commerce itself; and therefore any import of the nature envisaged by entry 56 of List II of the Constitution is a direct interference with the freedom of trade, commerce and intercourse and violates Art. 301. Entry 56 entitles the State Legislature to levy a transport or carriage tax on goods and passengers because of the use of the road and inland waterways and not because the goods and passengers have any relation to trade and commerce.

Incidentally the transport of the goods or passengers may be in connection with trade or commerce, but the tax envisaged by the entry has no direct connection with them. The nature of the tax as defined by Entry 56 is wholly different and has nothing to do with freedom of trade, commerce and intercourse. Even a Constitution like the Indian Constitution where endeavour has been made to define the respective legislative heads as precisely and elaborately as possible there is bound to be some amount of overlapping, but an endeavour should be made not to give a technical and pedantic construction to the language of the Constitution so as to lead to conflicts and defeat some of its provisions but a fair construction with a view to reconcile the differences if any. The provisions should be so read as to make them harmonise.

Jayakar J. elaborated the principle of interpretation in the above Motor Spirit case (I) (ibid)¹ thus:

"That the provisions of an Act like the Government of India Act, 1935 should not be cut down by a narrow and technical construction, but, considering the magnitude of the subjects with which it purports to deal in very few words,

should be given a large and liberal interpretation so that the Central Government, to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces, to a great extent, but again within certain fixed limits, are mistresses in theirs: see "H. M. Edward v. Attorney General for Canada", (1930) AC 124 at pp. 136 and 137: (AIR 1930 PC 120) (K).

It is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent authority to deal with matters falling within these classes of subjects (mentioned in the Central and Provincial Lists) exists in each Legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should existIn this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections so as to reconcile the respective powers they contain and give effect to all of them.

In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand; see "Citizens Insurance Co. v. Parsons," (1882) 7 AC 96 at pp. 108 and 109 (L).

In the interpretation of a completely selfgoverning constitution founded upon a written organic instrument (such as the Government of India Act of 1935) if the text is explicit, the text is conclusive alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words, establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either recourse must be had to the context and scheme of the Act: see "Att. Gen. for the Province of Ontario v. Att. Gen. for the Dominion of Canada," (1912) AC 571 at p. 583 (M)."

Even if we impart a very wide significance to the words used in Art. 301, I am not prepared to hold that the imposition of tax such as the one contemplated by entry 56 of List II interferes with the freedom of trade, commerce or intercourse. In that event, many of the taxes which the State Legislature is authorised to levy under the various heads enumerated in List II will have to be declared unauthorised as amounting to interference with trade or commerce and sales tax would be a prominent casualty.

Article 265 prescribes that no tax shall be levied or collected except by authority of law. This authority of levying and collecting taxes is given to the State Legislatures by virtue of List II read with Art. 246 of the Constitution. If we adopt the interpretation suggested by Mr. Iyengar it will lead to a serious inroad upon the rights of the States to raise revenue for their own finances and to an annihilation of the efforts of the makers of the Constitution to safeguard such rights which is evidenced by the enumeration of the various legislative heads in the Lists themselves.

The very fact that there are some entries which deal specifically with trade and

commerce shows that entry 56 of List II is not directly concerned with them. For instance, entries 26 and 27 in List II deal specifically with trade and commerce within the State and production, supply and distribution of goods. They are subject to entry 33 of List III the concurrent list, which applies to trade and commerce in and the production, supply and distribution of, the products of industries, where the control of such industries, by the Union is declared by Parliament by law to be expedient in the public interest.

This entry 33 of List III again is to be read with entry 52 of List I which enables the Union Parliament to legislate in regard to industries, the control of which is declared by Parliament by law to be expedient in the public interest. These entries "evidently seem to make a distinction between legislations under these heads dealing in particular with trade, commerce and industry and distribution and supply of goods, and legislations under the other entries specified in List II. To legislations under the former category, the provisions of Part XIII and Art. 301 may be attracted, but not necessarily to legislations under the latter category.

The pith and substance rule or the rule of colourable legislation will always enable the Court to determine whether in reality the Legislature concerned has kept within its legislative bounds and merely casually encroached on other legislative fields or whether it has directly invaded an unauthorised field of legislation; or whether under the guise of acting under an authorised head of legislation, it has really gone beyond its legislative bounds. I will not venture to enumerate or even to anticipate the various kinds of cases in which these questions may arise.

Such an attempt would be obviously futile and speculative. Each case will have to be decided on its own facts and on the terms of the legislation itself. It therefore follows that mere imposition of tax on transport or carriage of goods and passengers contemplated by entry 50 of List II does not amount to interference with the freedom of trade and commerce as contended by the learned counsel¹ for the petitioners. For the reason aforesaid I cannot entertain the suggestion that Art. 301 of Part XIII is so far reaching in its effect as to override all the other legislative powers given under the "Constitution either to the Union or the State" Legislature.

Article 301 runs thus:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free." Mr. Iyengar suggests that the freedom of trade and commerce and intercourse is guaranteed, subject only to the provisions of Part XIII of the Constitution and it is not subject to any other Part of Constitution. He argues that this freedom of trade obviously means absolute freedom including the freedom from taxation and therefore any legislation which seeks to curtail that freedom must be held to be in violation of this mandatory provision of the Constitution and therefore void. He claims that this freedom of trade, commerce and intercourse is on par with the fundamental

rights guaranteed by the Constitution if not even higher.

I have already dealt with these contentions earlier; but Mr. Iyengar derives some support for his contention from a recent decision of the Bombay High Court in "State of Bombay v. Charnarbauwalia," 57 Bom LR 288 (N), wherein : Chagla C. J. observed that the legislative competence of Parliament and the State Legislatures must be read subject to Art. 301 or in other words, neither the Parliament nor the State Legislature could legislate so as to interfere with, the freedom of trade, commerce and intercourse throughout India.

According to his lordship Art. 301 was perfectly general and every legislation under whichever topic it might fall must be subject to the overriding provision of Art. 301 which makes trade, commerce and intercourse throughout the territory of India free. These observations have to be confined to the context in which they were made. In that case, it was of course held that a tax imposed on goods coming from Mysore to Bombay or any other activity carried on in Mysore with the residents of Bombay amounted to interference with the freedom of trade and intercourse.

It may have been so on the facts of that case and if the taxation did amount to interference with trade and intercourse, the remarks of the learned Chief Justice that the provision of Art. 301 will have an overriding effect may be true. But I am not prepared to go to the length of holding that Art. 301 will affect every legislative field which deals with taxation. That would mean enlarging the scope of that Article beyond its legitimate bounds.

I am therefore unable to entertain this argument for reasons already discussed. Part XIII may not be subject to the other parts, but it does not [necessarily follow that the other parts must therefore be subject to part XIII of the Constitution. In interpreting the Constitution, which is in the nature of an organic whole, one is to interpret it in such a way as to harmonise the various parts of it and not so as to make them conflict with each other. I therefore hold that the legislation is not hit by Art. 301 of the Constitution.

(4) I shall now consider whether the legislation is discriminatory in its character and therefore in violation of Art. 14. Mr. Iyengar concedes that it is open to the Legislature to make a reasonable classification of persons and objects for the convenience of legislation. The classification may be made on different basis provided the classification is not palpably unreasonable and arbitrary. He therefore does not seriously contend that in choosing tea and jute as objects of taxation, the Legislature did make any illegal discrimination.

He, however, contends that even in the case of tea and jute, a distinction has been made between tea carried in chest and jute carried in bales and those commodities carried otherwise. He argues that there is no rational basis for exempting from taxation these commodities carried otherwise than in chest or bales. For the purpose of a valid classification, two ingredients are essential (i) there must be an intelligible basis for differentiation and (ii) that the said

differentiation, must have a rational relation to the object of the legislation.

It is suggested that in leaving out of account tea and jute carried otherwise, the Legislature has adopted no rational basis for serving the object of taxation envisaged by the Act. The answer to this contention is obvious. The Courts have to permit wider classification under the power of taxation if possible, than merely in the exercise of the police powers. The reason for it undoubtedly is the urgent need for revenue by the various governmental agencies.

"A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates of taxation if it does so reasonably. The Constitution does not say how cases shall be decided. All that it says is that the States shall not deny to any person equal protection of the laws." (Willis on Constitutional Law, p. 587).

There may be a rational basis for not levying any tax on tea and jute carried otherwise than in chest and bales respectively. It appears that these commodities are largely sent out of the garden or factory in chest's and bales and very small quantities are left for the purpose of consumption otherwise. The Legislature therefore may have considered it uneconomical or even impractical to tax and collect taxes on tea and jute left after they have been packed and transported in chests and bales. There is therefore no substance in this contention of Mr. Iyengar.

(5) Mr. Iyengar has also argued that the impost levied by the Act is in the nature of an excise duty and as such it encroaches on entry 84 of List I, the Union List. He has again cited a number of Australian cases to explain the import of the term "excise duty". I find it unnecessary to deal with these cases because in my opinion the meaning of the term "excise" has been sufficiently explained in the judgments of the Federal Court of India.

An excise duty, whatever its derivative significance, has come to acquire now a technical meaning, namely that it is a tax on articles or goods produced or manufactured. The liability to the tax arises on the production or manufacture of goods and has nothing to do with the sale or movement thereof. The tax may be realisable on the goods manufactured even if the goods are destroyed by fire or otherwise. It is possible that this tax may have to be paid by the manufacturer or producer just at the same time as he may have to pay a sale tax on the disposal of the goods.

Thus the manufacturer or producer may have to pay both the excise duty as also the sales tax, but the two impositions are entirely different in character. The tax on transportation of goods is similarly quite a different kind of impost in its very nature from that of excise duty payable by the manufacturer or producer. In AIR 1939 FC 1 (I), Sir Maurice Gwyer C. J. held with reference to excise duty that

"its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home

consumption. I am satisfied that that is also its primary and fundamental meaning in India; and no one has suggested that it has any other meaning in Entry 45". This entry 45 was in the Government of India Act, 1935 which now corresponds to Entry No. 84 of List I of the present Constitution. The learned Chief Justice further observed:

"In the present case, it could not be suggested that the tax on retail sales has any connection with production; it is also imposed indifferently on all motor spirit and lubricants, whether produced or manufactured in India or not. I do not say that this is conclusive, but it is to be taken into consideration. And I think that the distinction drawn by the learned Judge corresponds in substance with the distinction which it seems to me ought to be drawn in the case of the federal and provincial spheres in India, that is, between the taxation of goods at the stage of manufacture or production and their taxation by the provincial taxing authority (as in Australia by the State) after they have become part of what I have called the common stock of that Province."

His Lordship had occasion to clarify this last observation in a subsequent decision in AIR 1942 FC 33 (J), in these words:

"I may perhaps be myself responsible for some of the confusion which seems to have arisen, by reason of the suggestion which I made in AIR 1939 PC 1 (I) that the Central Legislature should be regarded as having power to impose duties on excisable articles before they become part of the general stock of the Province, that is to say, at the stage of manufacture or production, and the Provincial Legislature has exclusive power to impose a tax on sales thereafter."

In using these words I intended to do no more than suggest a convenient dividing line between the two spheres of jurisdiction; taut I certainly did not mean to elevate the dividing line into a legal principle, the application of which might attract those numerous American authorities, of which perhaps "Brown v. State of Maryland", (1827) 12 Wheat 419 (O), was the first, where the question has been considered at what point commerce ceases to be interstate or foreign commerce and becomes the domestic commerce of a State and taxable by it.

I should much regret if any contribution of mine to the elucidation of the problems which come before this Court were thought to have included the introduction of some kind of "originalpackage" doctrine and all the refinements and complications which that doctrine has brought in its train in the Courts of America." These decisions adequately explain the meaning of excise duty; but it will have to be seen on the construction of the impugned Act itself whether in substance the tax levied under it amounts to imposition of excise duty, irrespective of any carriage or transportation of the goods, or it is really a transport or carriage tax imposed on the goods in question. I will therefore advert to this point in dealing with the terms of the legislation itself.

(6) The real point therefore is whether the legislation challenged before us is a legislation covered by entry 56 of List II of the Seventh Schedule to the

Constitution. In construing the Act, one has to keep in the forefront the pith and substance doctrine which I have discussed above. Entry 56 is as follows:

"Taxes on goods and passengers carried by road or on inland waterways." The words of the entry have to be given their full effect and have to be construed in a natural and liberal sense. But at the same time they have not to be so construed as to destroy the very significance of the context in which they appear. To some extent this entry in List II appears to have been adopted with modification from entry 52 of the Government of India Act which ran thus:

"Dues on passengers and goods on inland waterways."

We thus find that in the entry as it now stands in the Constitution there were three distinct changes introduced: in place of "dues" we find the word "tax", for "passengers and goods", the order has been reversed and "goods and passengers" has been substituted and the word "by road" has also been added to "inland waterways". There is no doubt that the above changes have enlarged the scope of the entry. The whole object of that entry appears to be to enable the State Legislature to impose tax on the transportation of goods and passengers by the road and inland waterways.

Inland waterways must evidently refer to waterways which are used for navigation by public boats or crafts. Similarly, "road" here cannot possibly refer to private roads or tracks but must refer to public roads used for traffic both vehicular and pedestrian as of right. The contention of the learned AdvocateGeneral that the word "road" must be held, to include both private and public road does not appeal to me. As I said, the entry has to be construed as a whole. Thus the State Legislature is empowered under this head to impose tax for the carriage or transportation of goods on such roads or inland waterways.

"Goods" has of course been defined under Art. 363 (12) of the Constitution to include all materials, commodities and articles. I feel doubtful whether the meaning of this expression should be confined merely to merchandise and should not be extended to cover even cases of goods and chattels which are carried on roads or inland waterways but not meant for merchandise: in other words, whether "luggages" also should not be included in this head. Mr. Lahiri concedes that the word "passengers" means travellers in public conveyances, because a man cannot be a passenger in his own vehicle. But he argued at the same time, the word "passenger" must also imply passengers carried in private vehicles.

Even if it does, in my opinion, it is a distinction without any difference. I find it difficult to see how it would be practicable to realise such taxes from owners of private cars or vehicles who may sometimes carry in addition to themselves some other passengers. These considerations however should not bother us for the present as here we are concerned merely with goods. I agree that for the purpose of levying this transport tax it is all the same whether the goods are carried by public or by private carriers. In either event, on the ground of their transportation and use of the roads or inland waterways these goods would be

subject to taxation under this Act.

My conclusion therefore is that Entry 56 of List II empowers the State Legislature to levy a transport or carriage tax on goods and passengers for use of public roads or inland waterways, which the members of the public have a right to use but which the State has to maintain for facility of traffic. I do not think it justifiable to limit the connotation of the words "goods and passengers" or the mode of their carriage with reference to the entry. The levy of the tax on these objects would depend upon the discretion of the Legislature concerned determined by the practical exigencies of the particular case in view.

It was also suggested in the arguments that the words "goods and passengers" have to be read together and no tax could be levied on the one to the exclusion of the other. Emphasis is laid on the conjunction "and". The argument, though attractive, does not bear scrutiny. We have been taken through various such entries in the list. These entries are all enabling and empower the legislature to tax both the objects. It was therefore open to the Legislature to tax goods and passengers either individually or collectively.

(7) The terms of the Act itself have now to be examined to ascertain whether it does in fact impose a tax as provided by this entry. The Preamble to the Act, its long and short title all go to indicate that it is an Act to provide for the levy of a tax on certain goods and passengers carried by road or inland waterways. These provisions are strictly in conformity with the terms of entry 56 of List II.

The preamble to an Act discloses the primary intention of the Legislature, but it cannot override the provisions of the Act, if in fact these provisions are in conflict with the preamble itself and lead to some result not warranted by the preamble. As it has been observed earlier we should not be overpersuaded by the mere appearance of the Act, but should examine the whole gamut of the Legislation to determine its true nature and character.

The short title of the Act is contained in S. 1 of the Act itself which also defines its extent and commencement. But the most important part of the Act is S. 3 which defines the liability to the tax. This is admittedly the charging section, the other sections of the Act being its necessary corollaries. Naturally therefore the section has been subjected to minute scrutiny. It runs thus:

"Subject to the provisions of this Act and with effect from such date as the Government may, by notification appoint, being not earlier than thirty days from the date of the said notification, (a) manufactured tea in chests carried by motor vehicle, cart, trolley, boat animal and human agency or other means except railways and airways shall be liable to a tax of one piece per pound of such tea and this tax shall be realised from the producer (b) Jute carried in bales by motor vehicle, cart, trolley, boat animal and human agency or any other means except railways and airways, shall be liable to a tax of eight annas per maund of such jute which shall be realised from the dealer:

Provided that no tax shall be levied under this Act on any jute or tea in respect of which such tax has already been paid." Sections 4 and 5 provide for charging the tax on the total net weight carried during a return period which is to be determined in a prescribed manner. The other provisions relate to filing of returns, assessment, penalties, appeals etc. I shall confine my attention largely to S. 3. There are certain prominent features of that section which at once strike the mind of the reader:

(1) It imposes a, tax on tea and jute, two principal goods of trade and commerce in Assam, the Tea Industry being controlled by law enacted by Parliament as it appears from the Tea Act, (Act 29 of 1953);

(2) the tax under the Act is realisable from the "producer" or "dealer" as the case may be not from any carrier of the goods. The words "producer" and "dealer" have been defined under S.2 of the Act. The liability to impose the tax remains on the "producer" or the "dealer" irrespective and independent of any question that title to the goods prior to their carriage may have passed to someone else, who thereafter carried the goods on "his own account and not on account of the "producer" or "dealer";

(3) the rate of tax is charged on the weight of the goods, namely at one piece per pound of tea and eight annas per maund of jute and is payable on the net weight carried during a return period;

(4) the tax bears no relation whatsoever to the length of the road or inland waterways used; and

(5) the section itself mentions nothing about the carriage of the goods on roads or inland waterways. On the contrary the qualifying clause "carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means except airways" is so comprehensive as to cover any movement of the goods even from one part of the factory or tea garden to any other part.

(8) The presence or absence of the features explained in items 1 to 4 above does lend some countenance to the case of the petitioners that the tax sought to be levied by S. 3 of the Act is more akin to excise duty. At any rate, those factors do not strengthen the inference that the tax proposed is in the nature of a transport or carriage tax on the goods for user of roads or inland waterways. But the question is whether the qualification contained in the clause indicated in item 5 above makes any difference to the character of the impost and brings it. within the ambit of entry 50.

Here again, Mr. Iyengar contends that the qualifying clause is merely a camouflage and does not improve the position; the word "carried" in that clause would include any movement of the goods and as some movement of the goods is bound to take place, even of the tea. packed in chests or of tea jute in bales, whether inside or outside the factory or the garden, the qualification of "carriage" loses all its significance. In substance, therefore, according to the

contention of the learned counsel, it is a tax on goods produced or manufactured at source and this conclusion is sought to be reinforced by the fact that in any case the tax is realisable only from the producer or dealer and is assessed on the weight of the goods.

These arguments are undoubtedly weighty. I also realise that there is no legislative precedent for a legislation of the kind in question before us. In the case of a transport tax on goods of the nature contemplated by entry 56, it is reasonably expected that the tax imposed would bear some relation to the distance of the road or inland waterways covered by the goods in their course of transit. It is essentially a tax on goods and passengers for the use of the road or inland waterways during transit.

In the case of Bihar, Madras and Punjab, the taxes levied were all in proportion to the fares and freights; in other words, not only upon the weight of the goods but also upon the distance covered (vide: AIR 1952 Pat 359 (A); AIR 1954 Mad 569 (B) and "Surendara Transport and Engineering Co. Ltd. v. State of Punjab", AIR 1954 Punj 264 (P)). I was seriously thinking whether it could not be possible for the Legislature to provide some kind of a graded tax not only upon the weight of the goods but also upon the distance of the road or inland waterways, through which they travel within the State.

But the learned Advocate General suggests that in the circumstances of these goods it was perhaps impracticable to do so. It is not disputed that tea and jute are important commercial goods in Assam and are despatched largely in chests and bales outside Assam. In the very nature of things, the transmission has to be by road or inland waterways: but more often the distance covered was an uncertain factor. Very few of these goods are actually, if at all sold out in the factory or garden for carriage by the vendees. The transmission is by private trucks or lorries owned by the producers or dealers, themselves or by common carriers requisitioned by them.

Some of the gardens have even railway sidings adjoining their premises. Government therefore could not collect profitably the taxes from the carriers even if there were some few instances of title to the goods having passed to others before their carriage. In such cases, it may be that because the goods are carried actually by somebody in his own rights the producer or dealer could not be made liable for any payment of the tax.

For the above reasons, I think that the learned Advocate General is right in contending that the Legislature in the circumstances thought it fit to impose the tax in the manner indicated in S. 3. The section does not stand by itself; it has to be read along with and in the light of S. 1 of the Act which clearly indicates that the Act is an Act of taxation of goods carried by road and inland waterways. Any ambiguity in S. 3 is removed by S. 1 which undoubtedly brings the tax within the ambit of entry 56.

So read the conclusion is obvious that the tax operates on the goods as they

move out of the factory or garden for being carried by road and inland waterways. The producer or dealer must be liable for the payment of the tax but if before the goods leave the factory the title to the goods has already passed to some one else, and the actual¹ carriage outside is not by the dealer or producer but by others in their own rights, the liability for the tax so far as the dealers or producers are concerned would be evidently extinguished. These are, however, matters of detail in the working of the Act; but read in that light, it is obvious that the Act fulfils the requirements of entry 56 and is within the legislative bounds assigned to the State Legislature.

Even the State Legislatures" within their own sphere of legislative activity are sovereign and have to enjoy sufficient discretion in enacting taxing statutes. It is for the Legislature to tap the various sources of revenue on which it can legitimately operate under the Constitution. It is for the Legislature to select the objects of the tax, to determine the basis of liability, to declare the person or persons on whom the liability will fall and to provide for an adequate machinery through which the tax is to be collected.

Therefore, whatever doubts may arise on the language of S. 3 itself, those doubts would be dispelled if the section is read in the light of the declaration made by S. 1 of the Act and the meaning of S. 3 where necessary modified accordingly. This is enough to dismiss the criticism that in pith and substance, the impugned Act does not fall¹ within the ambit of entry 56 of List II of the Seventh Schedule, but is a mere attempt under cover of that entry to legislate on unauthorised fields and to impose a tax not permissible under the law.

In view of what I have said above. the question of the tea industry being a controlled industry under the Indian Tea Act does not affect the validity of the present legislation and there is no encroachment on entry 52 of List I, the Union List.

(9) I do not think I can essentially add anything more. I have had the advantage of reading the elaborate judgment prepared by Ram Labhaya J. I concur in his conclusions though for reasons Somewhat different from those assigned by him.

(10) In the result, it should be held that the Assam Taxation (On Goods Carried by Roads¹ and Inland Waterways) Act, Act 13 of 1954 is constitutionally valid and should be upheld. The applications must therefore fail and are rejected accordingly. There will be a consolidated hearing fee of Rs. 600 payable to the State of Assam by the petitioners to be distributed equally on the number of petitions filed.

RAM LABHAYA, J.:

(11) This order shall dispose of four Civil Rules Nos.8, 9, 26 and 32 of 1955. These rules were issued on petitions under Article 226 of the Constitution of India. The petitioners have assailed the constitutional validity of the Assam Taxation (On Goods Carried by Roads or Inland Water ways) Act, 1954. The

grounds on which the validity of the Act is challenged are common to all the petitions.

(12) The impugned Act was passed by the Legislature of the State of Assam. It received the assent of the Governor of Assam on 9/4/1954 and took effect from 16/1/1954. The professed purpose of the Act is to levy tax on goods carried by road or inland waterways in the State of Assam. Section 3 of the Act provides that "manufactured tea in chests carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means except railways and airways shall be liable to a tax of one piece per pound of such tea and this tax shall be realised from the producer....."

Section 4 authorises the levy on the total net weight carried during a return period".

(13) On 30/6/1954 the Commissioner of Taxes, Assam, in the exercise of his powers conferred upon him by subsection 3 of Section 7 of the impugned Act issued a notification dated 21/6/1954 by which returns under the aforesaid Act for the period from 16/1/1954 to 30/9/1954 and subsequent periods were asked for by 30/10/1954. Petitioner in Rule No. 8 submitted a return and also paid a sum of Rs. 1445/2/3 under protest.

The petitioner in Rule 32 likewise submitted a return and paid Rs. 9,415/15/. The petitioner in Rules Nos. 9 and 26 did not submit any return, nor did they pay any tax. In all the cases the validity of notices issued by the taxing authorities under the impugned Act is also challenged on the ground that the Act itself has no constitutional validity and therefore no action by any authority could be taken under it for purposes of assessment of the tax or its realisation.

(14) The challenge to the validity of the impugned Act rests on the following grounds:

(1) The Act, the Rules and the notifications under it are ultra vires the Constitution by reason of the repugnancy of the Act to the provisions of Article 301 in Part XIII of the Constitution. The impost, it is urged, has the effect of interfering with the freedom of trade, commerce and intercourse provided for by Article 301. The tea, it is averred, has to be transported to Calcutta for sale, that being the market both for internal consumption and export abroad.

The tea thus passes through the State of Assam and goes to Calcutta in West Bengal. It is carried by road or waterways from one State to the other. Taxation on tea essentially interferes with trade and commerce in the commodity.

(2) The tea is a controlled industry, the Parliament having declared that it was expedient in public interest that the control of this industry should pass to the Union, the tea industry therefore fell under entry No. 52 of List I of the Seventh Schedule to the Constitution. The Union Government alone had the power to regulate the manufacture, production, supply, distribution or transport of tea and also to fix the price of tea. Attention is drawn in support of this argument to the

provisions of the Tea Act, 1953.

It is urged that all the stages of the industry upto the point of sale and export are within the control of the Union. The impugned Act conflicts with the provisions of the Central Act and therefore is invalid and inoperative.

(3) The tax under the Act, it is contended,, is no more than a duty of excise under another name, being in reality an excise, duty it constitutes an encroachment on the Central sphere. The Central Government alone has the power to levy excise duty under Entry No. 84 of the Union List on goods manufactured or produced in India.

(4) The impugned Act contravenes the provisions of Article 14 of the Constitution of India, been in its nature a discriminatory piece of legislation. It is contended that the tax is levied only on the manufactured tea in chests, not on manufactured tea in other containers. Besides, tea and jute are the only commodities which are taxed.

(5) The impugned legislation is not within the ambit of Entry 56 of List II of the Seventh Schedule. It was outside the limits of the competence of the State Legislature and is colourable inasmuch its under the guise of legislation under Entry 56 of List II it levies a tax on trade, commerce and intercourse, which is also not distinguishable from excise duty.

(15) The learned Advocate General has stoutly defended the legislation. He has tried to repel all grounds of attack. His case is that the legislation 111 question is within the ambit of Entry 56 of List II. The entry authorises the levy of a tax on goods carried by road or inland waterways. The impugned Act levies a tax on goods carried by road or inland waterways within the limit of the State. He argues that taxation of the goods in question does not interfere with the freedom of trade and commerce in the commodities on which it has been levied. In his view Article 301 provides for the freedom of trade, commerce and intercourse from restrictions other than those that may be implied in the act of permissible taxation.

He points out that provisions relating to taxation are independent of Part XIII and that taxation alone does not necessarily involve any conflict with the requirements of Article 301. He contends further that the tax is not on the produce or manufacture of goods. It is essentially on carriage and therefore it is distinguishable from excise duty. It also does not interfere with the Central control of the tea industry under the Tea Act of 1953. He also disputes the charge that the Act is in any way discriminatory and offends against the provisions of Article 14 of the Constitution.

(16) The Act purports to provide for the levy of a tax on specified goods (tea and jute) carried by road or inland waterways in the State of Assam. In the words of the preamble it was thought "expedient to impose a tax on certain goods carried by road or inland waterways". By Section 1 of the Act it was enacted as follows:

"(1) This Act may be called the Assam Taxation on Goods Carried by Roads or Inland Waterways) Act, 1954. (2) It extends to the whole of Assam".

The main question is whether the State Legislature was competent to impose the tax it had in view. The impugned Act purports to have been passed in the exercise of the powers of the State legislature under Entry 56 of List II of the Seventh Schedule of the Constitution. The learned Advocate General has claimed validity for it only under this head. The entry reads as follows:

"Taxes on goods and passengers carried by load or on inland waterways".

The corresponding entry under the Government of India Act reads as follows:

"Dues on passengers and goods carried on inland waterways".

In the draft Constitution the only change introduced was that the word "dues" was replaced by "taxes". In the Constitution the power of taxation, under this heading was enlarged by including within its scope "goods or passengers" carried by road also. The State Legislature therefore has power to levy a tax on goods and passengers carried by road or inland waterways. Almost every word of the entry has been the subject matter of argument. The petitioners are producers of tea. They grow and manufacture it.

Tea packed in chests is the result of agricultural and manufacturing operations. The large bulk of it is admittedly transported to Calcutta in the State of Bengal, which is the major tea market in India. The tea is carried through the State of Assam. It may be carried by road or inland waterways or by rail or air. Tea carried by rail or air is not liable to tax under the Act. Manufactured tea in chests when carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means (except railways and airways) is liable to tax. This is clear from the language of Section 3 of the Act which creates the liability to tax.

The tax in the case of tea is to be realised from the producer and it is to be charged on the total net weight carried during a return period (vide Sections 3 and 4).

It is contended that the impost does not fall under entry 56 for the following reasons:

- (1) That it is a tax on goods only and not on goods and passengers.
- (2) Tea is taxed even if carried on a private road, if Section 3 is construed literally.
- (3) Tea is taxed before its first sale.
- (4) The incidence falls on the producer and not on the carrier as intended by the entry. He is under an obligation to keep accounts which are open to inspection by the taxing authorities. The tax is in substance an excise duty.
- (5) It does not operate as a tax for the use of the road as tax is charged on the

basis of the net weight regardless of the distance that the tea is carried.

(6) There is a conflict between the preamble and title on the one side and the charging section on the other.

(17) In order to determine whether the limits of competence have been exceeded by the State Legislature we have to discover first the scope of the entry itself.

(18) The word "taxes" has been substituted for "dues". The word "dues" would be within the scope of the word "taxes", for all levies and imposts by the State in the exercise of its sovereign power for public purposes would be "taxes". Tax includes the imposition of any tax or impost whether general or local or special (vide clause 28 of Art. 366). The word "dues" if examined on a historical basis may indicate the purpose that the revenue is to serve. At one time such dues were realised for the purposes of local bodies. A levy may be limited to a particular purpose. Where the word "tax" alone is used without qualifying words, the collections would form part of the general revenue. There would be no earmarking of the revenue for a limited purpose.

The extent to which taxation under the entry may be resorted to, may thus be determined by the needs of the State or the capacity of the people to bear it. The effect of substituting "dues" by "taxes" is that any implication that the word dues carried with it in regard to the use of the money collected is now gone. The change does not add to the States' power of taxation in theory. It may have removed some implied restrictions on the use of the money collected under this entry. The scope of the entry has however been considerably enlarged by inclusion within its scope taxation on goods and passengers carried by road which was not possible under the Government of India Act.

(19) The expression "goods" has been defined in Article 306, clause 12 of the Constitution. It includes all materials, commodities and articles. It was so defined in the Government of India Act, 1935 also. The definition is not made exhaustive in spite of its wide sweep. All materials, commodities and articles are included. All these may be "goods". But when these commodities, articles or materials pass from the hand of the trader to the consumer for personal use, the expression "goods" is generally not applied to them. They are then personal effects and if the person to whom they belong is travelling with his personal effect, they would be described as his luggage.

There is a distinction between "goods" on one side and "personal effects" and "luggage" on the other. Everything falling within the scope of cl. 12 of Art. 366 would be goods till they become "personal effects". All materials, commodities and articles which go to make "personal effects" must have been "goods" at one stage. There is nothing in the definition to suggest that the expression "goods" is not used in the general sense or that it is so wide as to include within its grasp all "personal effects" of individuals which they hold for use and not for trade and commerce. The definition of goods in the Sale of Goods Act is also on the same

lines.

"Goods" under this Act mean every kind of movable property other than the actionable claims in money etc. What appears to be implied in the expression "goods" is brought out in express terms in the definition given in the Motor Vehicles Act. Here the word "goods" does not include "luggage" or "personal effects". In *R. v. City of London Court*, (1883) 12 QBD 115 (Q), it was held that "the claims arising" in relation to the Carriage of Goods in any Ship" is confined to claim respecting Merchandise, and does not include claims respecting Personal Luggage." "Goods" according to Oxford English Dictionary are saleable commodities, merchandise and wares. The expression is chiefly applied to manufactured articles.

I think the expression "goods" which includes all materials, commodities and articles carries with it the implication that materials, commodities etc. are for purposes of trade. Goods have essentially a commercial character. The expression would not include in its ambit luggage" and "personal effects". Stated shortly "goods" whatever the expression may include, would mean trade goods or goods of a commercial character.

(20) The word "passenger" has not been defined in the Constitution. The dictionary meaning of the expression is a person who travels in a public conveyance. According to Oxford English Dictionary the expression now has the implication of the use of a public conveyance on payment of fare or under a contract.

(21) "Goods" and "passengers" have to be carried before they become liable to tax. Carriage is an essential part of the process which attracts liability to taxation. If goods remain where they are produced or manufactured, they do not become liable to tax. It is only on carriage that liability arises. Passengers have to be carried by public conveyance or public carriers before they can be taxed. This is because of the necessary implication of the expression "passenger". The expression "goods" carries no such implication. Goods therefore when carried by a common or public carrier or even through the agency of a private carrier, would attract the liability to taxation. The word "carried" also occurs in entry 89 of List I which corresponds to entry 56 of List II.

Both these entries authorise taxes on goods and passengers when carried in the manner specified in the entries. The word used is "carried" as distinguished from "carrier". Mr. Iyengar has argued that the word "carried" implies "carried by a common carrier. The word "carried" has a large scope. It does not imply carried by a common carrier necessarily. Interpreting this word in entry 56 as carried by a common or a public carrier is limiting the scope of the entry. The expression may not be qualified the way it is suggested.

All that entry 56 requires is that goods should be carried by road or inland waterways. It makes no mention of the agency through which goods are carried. Goods may be carried by a vehicle belonging to the producer or by a hired

vehicle. They would be carried even if the vehicle is not hired. The mere fact that the vehicle utilised belongs to the producer would not put the goods outside the entry which permits taxation of goods carried by road or inland waterways. Therefore goods even when carried without the employment] of a common, or public carriers, would fall within the ambit of the entry.

(22) The word "Carrier", in its general sense, means a person who undertakes to transport the goods of other persons from one place to another for hire." (Wharton's Law Lexicon, Fourteenth edition, page 164). Carriage by road or inland waterways also involves employment of carriers though employment of private carriers on road and even on inland waterways would not take goods so carried out of the ambit of the entry. Carriage or carrying does not necessarily imply carrying by common carriers alone.

(23) Section 3 which creates the liability to tax authorises taxation of manufactured tea in chests carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means except railways and airways. If the entry is limited to carriage through common or public carriers, S. 3 may well be outside the competence of the State Legislature. This however would not be a correct reading of the entry. It permits taxation of goods carried without placing any limitation on the form of the agency that is employed for carriage. The restriction in the case of passengers arises from the implication of the term "passenger" itself.

There being no such implication of the word "goods" the State Legislature had power to tax manufactured tea when carried in any of the modes specified in the section. As laid down in "Navinchandra Mafatlal v. Commissioner of Income Tax, Bombay City", (S) AIR 1955 SC 58 at p. 61 (R1), the cardinal rule of interpretation is that words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in their widest amplitude.

The entries in the Lists of the Seventh Schedule are meant to demarcate legislative spheres and they have not to be given any narrow or restricted meaning. It is not appropriate to read implied restrictions on the legislative powers in these entries. They should receive full effect and the legislative power conferred by them should not be cut down by placing any restricted or narrow meaning on them. Nothing may be read into the entry which does not exist, particularly when its effect is to restrict the scope of the entry.

(24) The carriage has to be by road or by inland waterways. "Road" in the entry should be interpreted as a "public road". That is the meaning that is normally given to it in legislative enactments. In "Curtis v. Embery", (1872) 7 EX 369 at p. 372 (S), it was held that

"a road as used in the Act of Parliament must manifestly mean a public road, a

road which the public have a right to use for passage." The word road is on a par with inland waterways so far as its nature or quality goes. Navigability is the characteristic of inland waterways. These waterways are public in character.

The carriage has to be by road or waterways of a public character. Mr. Lahiri has contended that the word "road" in the entry also should be given its widest meaning and should not be restricted to public roads. This he considers, would be restricting the scope of the entry. I am unable to subscribe to this view. The word "road" also occurs in entry 13 of List II, which relates to communications, that is to say, roads, bridges, ferries and other means of communication not specified in List I.

The Legislatures of the States have power to legislate about the means of communication enumerated in entry 13 of List II. It seems fairly obvious that roads, bridges, ferries about which legislation is authorised by this entry, have a public character. The expression "road" in this entry could not conceivably include "private roads". It should have the same meaning in the two entries unless the contrary meaning is indicated by the context. There is no such indication.

On the other hand the indication given, by the entry is that the road like the inland waterways should have a public character. If regulatory legislation under entry 13 is limited to public roads, it is difficult to agree to the proposition that tax on goods would be possible even though carriage on a public road was no part of the process of carriage. The road to which the public have a right of access is a highway.

It becomes a national highway if so declared by a law made by Parliament. The carriage of trade goods and passengers contemplated by entry 56 is carriage on roads to which public have access.

(25) Mr. Lahiri has referred to "Hares v. Curtin", (1913) 2 KB 328 (T), in support of his contention. It was found in this case that the route from the child's residence to a school consisted in part of a cart track which passed through a field forming part of a farm in the occupation of the child's father, and which constituted the approach to the house from the highway." It was held that the word "road" in the particular bylaw was not confined to highways or to roads constructed for the purpose of carrying every class of traffic.

"Road" read in the context in, which it occurred, was given a limited meaning. But the decision does not lay down any rule of general application. All that was held was that in that particular bylaw the word "road" was not confined to highways or to roads constructed for the purpose of carrying every class of traffic. The decision therefore is not helpful in interpreting the meaning of the word "road" in entry 56.

(26) It is not necessary that a "tax" should be levied only when goods and passengers travel together. Mr. Iyengar has argued that "goods" and

"passengers" go together. He has argued that it is a combination like loaves and fishes, goods and chattel, stars and stripes. Argument by analogy is always very weak. The analogies are generally not perfect. The expressions to which reference has been made do not support the contention. "Goods" and "passengers" are not generally used in the sense in which loaves and fishes, or stars and stripes are used.

There are several entries in the Lists which include within their scope more items than one. The word "and" is not always used as a conjunction converting two items into one. There is no legal difficulty in taxing goods only or passengers. The two items in entry 56 are enumerative as in the case of several other entries. The entry therefore creates no compulsion for dealing with "passengers" and "goods" together in any scheme of taxation.

(27) The title and the preamble of the Act use the language of entry 56. Section 1 also provides that the Act may be called the Assam Taxation (on goods carried by roads or inland waterways) Act, 1954. This section also borrows the language of entry 56. This shows the extent of the power given to the State in the matter of taxation under the entry in question. All goods carried by road or inland waterways can be taxed under the Act. The words in S. 1 of the Act and at other places where they are used, must bear the same meaning as they have in entry 56. The legislation is professedly under that entry.

The legislature has obviously adopted a wise expedient. It could not do better than adopting the language of the entry itself, leaving it to the Court to interpret both the entry and the Act by which power under the entry is made use of. The interpretation that may be placed on the language of the entry would also be the interpretation to which the provisions of the Act, where that language is used, must yield to. Seen in the light of the entry it would appear that the Act does not make any excessive use of the legislative power which the entry confers on the legislature; nor does it contravene any prohibition.

(28) It must however be noticed at this stage that S. 3 of the Act which creates the liability to tax in respect of tea and jute is not in express terms limited to goods carried by road or inland waterways. It is pointed out that under this section goods carried on private roads or waterways may also be taxed, the only exception being for goods carried by railways and airways. The exception even, is regarded as illusory, for, in order to send goods to railway station or to aerodrome some distance has normally to be travelled. Therefore in a way, goods transported by means of railways or airways also do not escape taxation.

The argument is that the charging section enlarges the scope of the Act and travels beyond the limits of the competence of the State Legislature with respect to taxation of goods under entry 56.

(29) Section 3 read in isolation, may possibly yield to the interpretation placed on it. However if the Act is read as a whole there can be no manner of doubt that what the legislature intended was that goods carried by roads or inland

waterways alone be taxed under the Act. The title and the preamble both give clear indication of this intention. According to "Raj Mai v. Harnam Singh", AIR 1928 Lah 35 (U), Tek Chand T. after considering different views as to the true place of the preamble in a statute observed at pp. 3738 as follows :

"The prevailing rule of construction which seeks to reconcile these conflicting dicta may be thus expressed: Where the enacting part is explicit and unambiguous, the preamble cannot be resorted to control, qualify or restrict it; but where the enacting part is ambiguous, the preamble can be referred to explain and elucidate it..... If on a review of the whole Act a wider intention than that expressed in the preamble appears to be the real one, effect is to be given to it notwithstanding the less extensive import of the preamble." Lord Halsbury L. C. in "Powell v. Kamton Park Racecourse Co.", (1899) AC 143 at p. 157 (V), enunciated the law on the point in these terms :

"Two propositions are quite clear, one that a preamble may afford useful light as to what a statute intends to reach, and another that if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment." The contention raised is that the charging section does not limit carriage of goods to carriage by road or inland waterways. It is expressed in clear and unambiguous terms. It may not be qualified or restricted by what is contained in the title of the Act or in the preamble. This view, in my opinion, is not sound. If the conflict had been between S. 3 and the preamble, the principle that the preamble may not be utilised to qualify or restrict the meaning of the Act might well have been called in aid.

Here the Act itself contains another explicit provision which the learned counsel for the petitioners has not taken notice of. Section 1 of the Act relates to short title, extent and commencement of the Act. It provides that

"(1) This Act may be called the Assam Taxation (On Goods Carried by Roads or Inland Waterways) Act, 1954.

(2) It extends to the whole of Assam." Section 1 being undoubtedly an integral part of the Act has to be read with S. 3. The two sections read together complete the picture. The Act is for taxation of goods carried by road or inland waterways. Section 3 while enumerating different forms which carriage may take, excludes carriage by railways and airways. There is no conflict between S. 1 and S. 3. The intention of the legislature becomes quite clear when the two are read together.

Both are parts of the same Act. According to recognized canons of construction, the two should be so interpreted as to avoid any conflict between them. An interpretation which gives meaning and effect to both and which advances the purpose of the Act should be favoured, assuming that the two interpretations are possible. But no great effort of the mind, no stretching or straining of language or words is necessary to say that what was intended was that goods with which the Act deals when carried by road or inland waterways were intended to be taxed.

This intention can be gathered from the provisions contained in the Act itself without relying on the words of the preamble. The intention was not to extend the operation of the Act beyond the provisions contained in, S. 1. .

(30) I am not impressed by the argument of the learned Advocate General that carriage even by private roads or waterways not public or not accessible to public was within the ambit of the Act. The legislation, is on the strength of entry 56. The word "road" in the entry and in the Act must have the same meaning. I have already come to the conclusion that the expression "road" in entry 56 is limited to public roads to which public have access. When, railways and airways are excluded, carriage by road or inland waterways alone could bring the legislation under entry 56 and the legislature obviously was aware of it.

Carriage inside the garden by road or inland, waterways to which public have no access is not carriage that would be hit by the Act. What is intended is carriage outside the place of production or manufacture. If there is no carriage from the place of production or manufacture, it would be a case of tax on production or manufacture which would not be distinguishable from excise duty. It would also not be carriage by road and inland waterways as provided by the Act.

It is possible that tea or jute may have to be carried by public road for taking it to the railway station or an aerodrome from where it is to be carried by rail or air. In that case the liability to tax would be attracted no matter how small the distance that the tea travels by a public road. The Act does not provide for computing tax on distance. It is on weight and therefore liability to tax would be incurred even if a relatively short distance is travelled by a public road.

This may be hard. But the Courts are not concerned with any hardship that a piece of legislation may cause where it is obviously within the competence of the legislature. They have no power to relieve hardship in such cases. The remedies for any real hardship lie elsewhere.

(31) The tax no doubt is on goods. But according to my interpretation of the entry it is not necessary for taxation under the Act to combine goods and passengers. "Goods" alone could be taxed. The Act correctly construed does not permit taxation when tea or jute is carried on a private road. In this respect there is no conflict between the preamble and the title on the one side and the charging section on the other. Section 5 has no such implication. Tea and jute both may be taxed under the Act even before their first sales. Entry 56 does not prohibit taxation before first sales provided its conditions are fulfilled. If goods are carried by road or inland waterways, they may be taxed.

The tax could be collected through the carrier on the producer and the manufacturer. The entry in question does not expressly or by necessary implication make the carrier alone liable for it. Where the State has the power to tax goods carried by road, its powers in the matter of collection, are plenary and the fact that the producer and the manufacturer have been made liable for the tax is a mere accident of administration". It involves no contravention of any

constitutional prohibition.

Taxation under entry 56 is of the indirect variety. It ultimately falls on the consumer. As held in AIR 1952 Pat 359 (SB) (A), the State is fully justified in imposing obligations upon the citizens concerned to assist in the collection of taxes.

(32) I am unable to subscribe to the proposition that the element of carriage expressly made a condition for liability to tax is illusory. If it were so, the tax would not be easily distinguishable from an excise duty as observed above. I feel convinced however that the tax under the Act is within the scope of entry 56 and is distinguishable from a duty of excise.

(33) Entry 84 of the Union List provides for duties of excise on tobacco and other goods manufactured or produced in India with certain exceptions with which we are not concerned in this case. Entry 51 of the State List also relates to duties of excise on goods manufactured or produced in the State enumerated in the entry. There is thus a division between the Union and the State in regard to duties of excise. Side by side with the duties of excise we have entry 89 of the Union List and Entry 56 of the State List.

These entries distribute the field of taxation between the Union and the States with respect to taxes on goods and passengers. There is some little difference in the phraseology. Entry 89 of List I to which entry 56 of List II corresponds, provides for terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights. Entry 56 provides for taxes on goods and passengers carried by road or inland waterways.

The entries are similar in nature. The taxation permitted by these entries to legislatures covers the same field, though the area in each case is defined and delimited. It follows that the framers of the Constitution made a distinction between duties of excise which may fall under entries 84 (List I) and 51 (List II) on the one side and entries 89 (List I) and 56 (List II) on the other.

Taxes under entries 89 and 56 are something separate and distinct from duties of excise. It should therefore be possible for the Central and the State Legislatures to impose these taxes under these entries without encroachment on the field of excise duties. We have therefore to find the line of demarcation between the two in order to determine whether the legislature by taxing goods under entry 56 has consciously or unconsciously levied what may be regarded as a duty of excise.

The power of the State to levy excise duties is limited to alcoholic liquors and other items mentioned in entry 51 of List II. Tea and jute are not included. If the impost is of the nature of an excise duty, there would be encroachment on the Central sphere. The learned counsel for the petitioners argues that excise duty is a duty or tax on goods manufactured or produced. It is a tax on commodities. It is to be collected from the producer on production or manufacture.

He regards the tax in question as possessing all the elements of an excise duty and therefore beyond the competence of the State. He has derived support for his argument mainly from several Australian decisions particularly "Commonwealth Oil Refineries Co. v. South Australia", 38 ComW LR 408 (W) and "Matthews v. Chicory Marketing Board", 60 ComW LR 263 (X). He has read extensively from these judgments. He has also referred to AIR 1939 FC 1 (I) in this connection.

(34) It is not necessary now for us to examine critically decisions from Australia or America for discovering the nature of the excise duty. Their Lordships of the Privy Council in "GovernorGeneral in Council v. Province of Madras", AIR 1945 PC 98 (Y), observed that little assistance could be derived from the consideration of other Federal Constitutions and of their judicial interpretation when considering the question whether taxes on first sales amounted to excise duties.

Excise duty was not unknown to law before the Constitution came into force. Its meaning, significance and import have been brought out in authoritative decisions of the Federal Court and the Privy Council. Their Lordships also pronounced on the nature and the requirements of excise duty. These decisions afford ample guidance for determining whether the impost in this case could possibly be regarded as a duty of excise.

(35) The question as to the nature of the excise duty came for consideration first in AIR 1939 FC 1 (I) and again in AIR 1942 FC 33 (J). In the first case it was examined in all its bearing. Its history was traced. The sense that it conveyed in England and Australia was noticed. The meaning that the expression carried in the Constitution Act (1935) was ascertained by an elaborate survey of the available material and the decisions under the Australian and American Constitutions were all examined. The authoritative elucidation as to the nature of the excise duty contained in AIR 1942 FC 33 (J), received the approval of their Lordships of the Privy Council in AIR 1945 PC 98 (Y).

Their Lordships concurred in the cogent reasoning of the Federal Court in AIR 1942 FC 33 (J). These decisions were given under the Government of India Act, 1935. The entries relating to excise duties in the Seventh Schedule of the Constitution are in the same language and in any case the expression "duties of excise" has undergone no change by reason of the political changes which replaced the Government of India Act by the Constitution..

The conception of duties of excise remains the same. These authorities therefore give what has been understood by "duties of excise" in India since duties of excise came to be recognised in this country.

(36) The word excise is of Dutch origin. It assumed different connotations at different times. Originally it was used in the sense of toll or tax. During the seventeenth century it acquired in the United Kingdom the sense of a tax on certain articles of luxury such as spirits, beer, or tobacco produced or manufactured in the United Kingdom. By 1939 the expression was used to cover

all duties and taxes which together with customs duties were collected and administered by the Commissioners of Customs and Excise. But its primary and fundamental meaning in England is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption.

C. J. Gwyer felt satisfied that this was its primary and fundamental meaning in India too. AIR 1939 FC 1 at p. 6 (I). In his view there was no reason in theory why an excise duty could not be imposed even on the retail sale of an article if the taxing Act so provided. Dealing with the question whether the excise duty could be imposed on home produced goods at any stage from production to consumption, he observed as follows :

"Subject always to the legislative competence of the taxing authority, a duty on home produced goods will obviously be imposed at the stage which the authority find to be the most convenient and the most lucrative, however it may be; but that is a matter of the machinery of collection, and does not affect the essential nature of the tax. The ultimate incidence of an excise duty, a typical indirect tax, must always be on the consumer, who pays as he consumes or expends; and it continues to be an excise duty, that is a duty on home produced or home manufactured goods, no matter at what stage it is collected."

He proceeded to state, his conclusion in the following terms :

"If therefore, a Legislature is given power to make laws "with respect to" duties of excise, it is a matter to be determined in each case whether on the true construction of the enactment conferring the power, the power itself extends to imposing duties on home produced or home manufactured goods at any stage up to consumption, or whether it is restricted to imposing duties, let us say, at the stage of the production or manufacture only. A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implications of the context, and even by considerations arising out of what appears to be the general scheme of the Act."

(37) In AIR 1939 FC 1 (I), the question was whether the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act was ultra vires of the legislature of the Central Provinces and Berar. The legislation was under entry 48 of List II of the Government of India Act, which permitted taxes on the sale of goods. After considering the effect of relevant entries the learned C. J. observed as follows :

"In my opinion the power to make laws with respect to duties of excise given by the Constitution Act to the Federal Legislature to be construed as a power to impose duties of excise upon the manufacturer or producer of the excisable articles, or at least at the stage of or in connection with, manufacture or production, and that it extends no further." At page 11 he observed that

"the Central Legislature will have the power to impose duties on excisable articles

before they become part of the general stock of the Province, that is to say at the stage of manufacture or production, and the Provincial Legislature an exclusive power to impose a tax on sales thereafter." Sulaiman J. when distinguishing a duty on goods produced or manufactured from duty on sale of goods observed (at page 23) that the essence of a tax on goods manufactured or produced is that the right to levy it accrues by virtue of their manufacture or production. It is immaterial whether the goods are actually sold or consumed by the owner or even destroyed before they can be used. If duty is imposed on the goods manufactured or produced when they issue from the manufactory, then the duty becomes leviable independently of the purpose for which they leave it and irrespective of what happens to them later. On the other hand, a duty on the sale of goods cannot be levied merely because goods have been manufactured or produced."

Jayakar, J. expressed the view (at page 36) that "if the proper import of an "excise duty" is that it is a tax on, consumption, there is no reason why the State should not have power to levy and collect it at any stage before consumption, namely from the time the commodity is produced or manufactured upto the time it reaches the consumer." He thought there was no rational ground for limiting the right of a State to levy an excise duty at any time it chooses before the commodity reaches the consumer. He however held that the wide meaning which he gave to the expression "duties of excise" in item No. 45 of List I was curtailed or modified by item 48 of List II which provided for taxes on the sale of goods. The scheme of the Seventh Schedule furnished the justification for excluding from the scope of "duties of excise" taxes on the sale of goods provided for in entry No. 48 of List II.

(38) All the three learned Judges agreed that tax on the retail sale of motor spirit and lubricants was not a duty of excise and therefore the Provincial Legislature had not exceeded its powers in taxing the retail sales of these commodities.

(39) In AIR 1942 FC 33 (J), the question was whether a tax levied on the first sale of goods produced or manufactured could in the nature of things be regarded as a tax on the sale by the manufacturer or producer or it was a duty of excise, which in that case the Provincial Government was not competent to impose. Referring to the earlier decision in AIR 1939 FC 1 (I), Chief Justice Gwyer observed as follows :

"All the members of the Court were of opinion that the Legislature was competent to impose such a tax, though their reasons differed. Jayakar, J. held that all taxes on the sale of goods "for purposes of consumption", by which he presumably meant taxes on retail sales, ought to be regarded as exclusively within the competence of the Provincial Legislature, provided that they were in no way connected with the production or manufacture of the goods within the province; but that all other taxes on the sale of goods were duties of excise and therefore exclusively within the competence of the Central Legislature.

The other two members of the Court were not prepared to go to these lengths, and in effect drew the dividing line between the Central and Provincial spheres at the point of manufacture or production. They were of opinion that, on the true construction of Entry No. 45 in List I and Entry No. 48 in List 2, the power of the Central Legislature to impose duties of excise was a power to impose duties on the manufacture or produce of the goods and did not extend further, the power to impose a tax upon the sale of goods after manufacture or production, being reserved to the Provinces." The majority view was given effect to in AIR 1942 FC 33 (J). In doing so the learned C. J. accepted the general division between the Central and Provincial spheres of taxation, which commended itself to the majority of the Court in that case. The majority view, he observed,

"recognized that the expression "duty of excise" is wide enough to include a tax on sales; but where power is expressly given to another authority to levy a tax on sales, it is clear that "duty of excise" must be given a more restricted meaning than it might otherwise bear. On the other hand the fact that "duty of excise" is itself an expression of very general import is no reason at all for refusing to give to the expression "tax on sales" the meaning which it would ordinarily and naturally convey."

In this case the decisions in 38 ComW LR 408 (W) and 60 ComW LR 263 (X), were considered. The propositions laid down in these cases were not followed on the ground that in the Indian Act there were two complementary powers, each expressed in precise and definite terms. There was thus no reason in the view of their Lordships for giving a broader interpretation to the one rather than to the other and there was no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods.

The famous American, case of 12 Wheat 419 (O), was also considered. This decision was distinguished. The conclusion reached was that a tax on first sales even when payable by the producer or the manufacturer was a tax on the sale of goods within the competence of the Provincial Legislature and not a duty of excise under the Government of India Act.

(40) In AIR 1945 PC 98 (Y), a decision given on appeal from the decision of Federal Court in "GovernorGeneral in Council v. Province of Madras", AIR 1943 FC 11 (Z), their Lordships of the Privy Council were called upon to consider the effect of entry No. 45 of the Federal Legislative List and entry 48 relating to taxes on the sale of goods of the Provincial Legislative List. The Act in question provided for the levy of a general tax on the sales of goods in the Province of Madras. The expression "duty of excise" was considered by their Lordships to be somewhat flexible. In their view it could undoubtedly cover a tax on first sales and perhaps on other sales and it may in a proper context have an even wider meaning.

Consistently with the decision in AIR 1942 FC 33 (J), their Lordships held that

"a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods. Here again their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in the *Boddu Paidanna's* case (J). The two taxes, the one levied upon a manufacturer in respect of his goods, the other upon a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping.

The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time upon the occasion of its sale. But that method of collecting the tax is an accident of administration: it is not of the essence of the duty of excise which is attracted by the manufacture itself."

Their Lordships came to the conclusion that the tax imposed by the impugned Act was not a duty of excise in the cloak of a tax on sales.

(41) It is of the essence of the excise duty no matter at what stage it is imposed that the tax must be on production and manufacture. A tax on goods produced and manufactured when they leave the factory could be easily a duty of excise if the general concept of excise duties is taken into account. But the question is not what the expression "duties of excise" may include within its scope speaking generally. The expression has to be interpreted in the context in which it occurs. The Constitution provides for duties of excise and distinguishes these duties from a tax on the carriage of goods. Both the heads of legislation appear in the Union and the State Lists.

An excise duty may be imposed and collected at the time when, goods produced or manufactured leave the factory or the place of production. But where the Constitution in express terms makes a distinction between "duties of excise" and "taxes on goods carried" the meaning of the expression, "duties of excise" must be cut down or curtailed to the extent that it is necessary to give effect to the entries in both the Lists which authorise taxation on goods carried by railways or airways and by road or inland waterways. It is necessary to enable State Legislatures to tax goods carried by road or inland waterways. If the scope of "duties of excise" is not cut down, entry 56 and its corresponding entry in List I become nugatory.

These entries could not have been meant to be mutually exclusive. Entry No. 56 has to be read along with the entries relating to excise duties. It has to be given some meaning. There is no justification for interpreting "duties of excise" in entry No. 84 in such a way as to exclude legislation under Entry 56 by the State. The power that the Constitution has given to the State under Entry 56 may not be completely taken away merely because the Parliament has the power to impose excise duties on tea and jute and not the State Legislatures. The two

entries should not be interpreted in such a way that one excludes the other.

An interpretation which gives effect to both and avoids the conflict, ought to be preferred according to recognised canons of interpretation. As observed by Chief Justice Gwyer in AIR 1939 FC 1 at p. 10 (I):

"it is a fundamental assumption that the legislative powers of the Centre and Provinces (now States) could not have been intended to be in conflict with one another, and therefore we must read them together and interpret or modify the language in which one is expressed by the language of the other a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field when by reading the former in a more restricted sense, effect can be given to the latter in its ordinary and natural meaning." Jayakar, J. also treated entry No. 48 of the Provincial List as an exception to item No. 45 of List I, though he gave a very wide meaning to the expression "duties of excise". In AIR 1942 FC 33 (J) (at p. 37) the view was reiterated against in the following terms :

"The case however is different where, as in the Indian Act, there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other; and there is certainly no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods."

The reasoning applies fully to the facts of this case. There is no earthly reason why the power of the State to tax goods and passengers when carried by road or inland waterway be completely nullified or taken away in order that the words "duties of excise" in entry 84 of the Union List should have a very extended meaning that it may have acquired. If that meaning was intended to be given to it by the framers of the Constitution, they would not have provided for taxation on the carriage of goods by air, rail, sea, inland waterways or roads.

The tax on goods and passengers carried was treated as something distinct from duties of excise. The fact that the entry includes passengers also makes its distinctive character manifest. Their Lordships of the Privy Council in AIR 1945 PC 98 (Y) adopted the same ratio by extending their full approval to the decision in AIR 1942 FC 33 (J). The two entries in question in that case were reconciled even though in their Lordships' view the expression "duties of excise" could cover a tax on first and perhaps on subsequent sales also.

(42) A tax where the carriage is of the essence may not be regarded as a duty of excise. Carriage necessarily involves the use of transport of some character. The relevant entries provide for transport of goods by road, inland waterways or rail or air. The bulk of the tea produced in Assam is transported to Calcutta, the biggest market for tea in the country. The same is true of jute. Without this element of transport the tax could not be levied under the entry 56. This serves to distinguish it from an excise duty.

An "excise duty" is a tax on commodities produced or manufactured in India for consumption in the country, no matter at what stage the duty is imposed. But transport or carriage is not a necessary requirement in the case of an excise duty. On the other hand the distinguishing feature of a tax under Entry 56 is that the goods taxed must be transported. Without it no taxation is possible. There is no such limitation so far as the duty of excise is concerned. It has been shown above from an examination of the scheme of the impugned Act that the carriage of tea and jute by road or inland waterways is the foundation of liability to tax under the Act.

(43) in *E. R. Croft v. Sylvster Dunphy*", AIR 1933 PC 16 (ZI), their Lordships of the Privy Council held that when power is conferred to legislate on a particular topic it is important in determining the scope of the power to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Chief Justice Gwyer in AIR 1939 FC 1 at p. 12 (I), also thought that he was entitled "to look at the manner in which Indian Legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties. He noticed that there were several Central excise duties in force in India at the date of the passing of the Constitution Act, imposed respectively upon motor spirit, kerosene, silver, sugar, matches etc.

In all the Acts by which these duties were imposed it is provided that the duty is to be paid by the manufacturer or producer, and on the issue of the excisable article from the place of manufacture or production. Mr. Iyengar has relied on these decisions and Acts and has contended that duties of excise are recovered from the producer and the manufacturer when the goods leave the place where they are manufactured. The tax under the Act is recoverable from the producer or the manufacturer and is recoverable when the goods leave the factory or the place of production. According to legislative practice therefore it should be treated as a duty of excise. He urges that the element of carriage which has been introduced in the Act is a sort of camouflage.

It conceals the real nature of the tax or the duty and provides for it a sort of disguise. He refers to the contention of the learned Advocate General that the duty can be imposed even if carriage is on private road or on a water channel, even within the limits of a tea estate and points out that the Act if so interpreted, reveals its real nature and shows clearly that the State was taxing goods produced or manufactured.

I have come to the conclusion that the interpretation that the learned Advocate General has placed on S. 3 of the Act is not correct. In my view tea and jute become taxable under S. 3 only when they are carried by a public road or an inland waterway. If carriage is a necessary part of the process which attracts liability to taxation, then the element of carriage cannot be regarded as illusory

It would clearly distinguish the tax from an excise duty, for, the producer and the

manufacturer can escape liability by not transporting the goods. The decisions on which Mr. Iyengar has relied therefore are of no assistance to him. They support the proposition that excise duties are imposed on the manufacturer and the producer on the issue of the excisable articles from the place of production. But they lend no support to the contention that every tax or duty on the producer or the manufacturer is necessarily a duty of excise. Mr. Iyengar reads into the decisions more than what they contain.

A producer or a manufacturer may have to pay duties of excise to the Central Government. He may be liable also to pay sales tax to the Government of the State. The sales tax may be imposed at the stage when goods leave the factory as a result of the sale. The tax on sales would still be distinguishable from the duty of excise. The tax here no doubt is payable by the producer or the manufacturer. But it is not on produce and manufacture alone for the obvious reason that the liability arises only when goods are carried by a public road or an inland waterway and this circumstance provides a real line of demarcation between a duty of excise and a tax under entry 56.

The fact that goods produced and manufactured must of necessity be carried from the place of production also is not enough for converting taxes under entry 56 on goods transported into excise duties. If such a conversion were possible, it would involve disregarding carriage or transport of goods which is a necessary element of entry 56.

(44) Section 3 of the Act also provides that manufactured tea in chests carried by motor vehicle, cart, trolley, boat, animal and human agency or any other means except railways and airways shall be liable to tax. An attempt has been made to enumerate the different kinds of conveyances that may be employed for carriage of manufactured tea in chests. The description is not exhaustive, for, all unspecified means except railways and airways are included. Tea therefore, if carried by road or inland waterways whatever the method or the means can be taxed. In enumerating certain types of conveyances including human agency, the legislature has not exceeded its powers under entry 56, for, entry 56 merely provides a tax on goods carried.

The entry does not specify that goods in order to be taxable under entry 56 must be carried by any particular kind of vehicle. Carriage is not limited, for instance, to carriage by mechanically propelled vehicles. If there is carriage of goods it would be within the scope of the entry. It was wholly unnecessary for the legislature to mention in the section the different means by which carriage could be effected, for carriage in whatever way it is effected, attracts liability to taxation under entry 56.

Limiting carriage to any particular kind of transport is to restrict its scope and this can be done only by reading something into the entry which does not exist. If goods are carried by boat or trolley, or animal or human agency, they would; be taken as carried within the meaning of entry 56. Apart from the general rule

that these entries, have to be interpreted liberally so that they could be given effect to in their widest amplitude, even if the entry is given its ordinary natural grammatical meaning, carriage cannot be limited to carriage by or through any particular kind of vehicle. By mentioning these different means of transport the legislature therefore has not travelled beyond the confines of its competency.

(45) It is next argued that the impugned Act is hit by Art. 301 of the Constitution. The requirement of the Article is that trade, commerce and intercourse throughout the territory of India shall be free. Tax on tea and jute restricts the freedom of commerce. Article 301 is subject to the provisions of Part XIII alone and since the legislation in question is not protected by any of the other Articles of that Part, its repugnancy to Art. 301 is fatal to it.

(46) In order to dispose of this contention we have to determine what meaning is conveyed by the two expressions "commerce" and "free" which occur in the Article.

(47) The Constitution of the United States of America contains no express provisions guaranteeing freedom of trade and commerce. But Art 1 of S. 8 (3) of the Constitution empowers the Congress, to regulate commerce. Section 92 of the Commonwealth of Australia Act provides that on the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation, shall be absolutely free.

(48) The word "commerce" has been interpreted in numerous decisions of the Supreme Court (U.S.A.). The decisions give it a very wide meaning. It is enough for our purposes to see whether, carriage or transport even when no sale has taken place or no profit is made, is within the ambit of the expression "commerce". At one time the Supreme Court (U. S. A.) held that goods were the subject of commerce but passengers were not. But that view was discarded later and it was held in "Gloucester Ferry Co. v. Pennsylvania", (1885) 114 US 196, (22) that transportation of persons was included in commerce.

The sending of telegrams, transport of electric current and gas and of films of prize fights were held to be within the ambit of the expression "commerce". It follows that transport is almost always commerce. The Supreme Court did not consider profit as a necessary element of commerce. Notwithstanding the trend of decisions which give a very wide meaning to the expression "commerce", it is difficult to define the expression. According to Willis (page 287)

("the decisions of the United States Supreme Court are irreconcilable. They leave us in doubt whether commerce is trade or intercourse, whether it must be for profit or may be without profit, whether it is confined to tangibles or may include intangibles").

It is however clear that traffic is definitely included in the expression "commerce" and the least that may be deduced from these decisions is that traffic and commercial intercourse are commerce.

(49) The word "occurs" in S. 92 of the Australian Constitution and even in Australia the expression has retained the wide significance and import that it carried in the United States. Dixon, C. J., expressed his opinion on the significance of the expression in "87 CLR 49 at p. 67 (Z3), He adopted the very language of Johnson J., in "Gibbons v. Ogden", (1824) 22 US at p. 229 (Z4) and held that the carriage of merchandise from one State to another is not a thing incidental to interState commerce, but is the very thing itself, inseparable from it as vital motion is from vital existence.

The opinion of the distinguished judge so pithily and so forcefully expressed, received the imprimatur of their Lordships of the Privy Council in "Hughes v. State of New South Wales", 19543 All ER 607 (75). At page 628 their Lordships reproduced the opinion of Dixon C. J., and expressed their agreement with the observations made by the C. J. in expressing his personal opinion. The words "trade", "commerce" and "intercourse" of the Australian Constitution appear in Art. 301 of the Constitution. They need not necessarily bear the same meaning in the Indian Constitution, Words take colour from their context. The setting in which they appear can give them a different shade of meaning.

The question that then arises is whether they have any distinctive meaning, extended or restricted in Art. 301 of the Constitution of India. The learned AdvocateGeneral has not contended that the word "commerce" bears any different meaning in our Constitution. He has not tried to give it any restricted meaning. It is however not necessary for the purposes of this case to decide its full implication or the limits of its amplitude. Here the tax is on goods which are carried for commercial purposes. There is transportation of commercial goods. The learned AdvocateGeneral did not appear to dispute that such carriage of goods as was contemplated by the impugned Act would be covered by the word "commerce".

To this extent therefore the view of the expression "commerce" which prevailed in the United States and Australia can be followed without any difficulty. For, whatever else the expression may convey, it would include traffic or transport of commercial goods. The case of the learned AdvocateGeneral therefore was not that the carriage or transport of tea or jute which is taxed by the impugned Act is no part of commerce as used in Art. 301.

He argued that taxation does not restrict the freedom of trade or commerce and therefore Art. 301 of the Constitution was not offended by the impugned legislation.

(50) Article 301 provides that subject to the other provisions of Part XIII, trade, commerce and intercourse shall be free in the territory of India. The freedom provided for is throughout the territory of India. It is thus both interState and intraState. Trade, commerce and intercourse even inside the State has to be free whatever meaning the word "free" may carry. This is as it should be. For, curtailment or abridgment of freedom of trade and commerce inside the State

could easily affect adversely the freedom of trade in the country. The object with which this freedom was reserved for trade and commerce etc., is to maintain the economic unity of the country. The purpose could not have been achieved completely if freedom for trade and commerce had been only interState.

The mandate of the Article therefore is that freedom for trade, commerce and intercourse shall be throughout the territory of India. The territory includes all the States. Freedom throughout the territory would lose much of its meaning if all States could impose restrictions on trade within the territorial limits of the States. This view receives support from the language of Art. 302. The Parliament may under Art. 302 impose restrictions on trade, commerce and intercourse between one State and another or within any part of the territory of India in public interest. This Article is an exception to the mandate of Art. 301 and shows more clearly the scope of Art. 301. Where any law of the State restricts the freedom of inter or intraState trade or commerce, it would conflict with the requirements of Art. 301.

(51) The freedom provided by Art. 301 for trade, commerce and intercourse is not absolute. It is qualified being expressly made subject to the other provisions of Part XIII. Art. 302 authorises the Parliament to impose by law such restrictions on trade and commerce which may be required in public interest. Discrimination and I preference in the matter of imposing restrictions is permitted only when the Parliament is dealing with the situation arising from the scarcity of goods in any part of the territory of India.

(52) Article 304 provides two exceptions. Under it the legislature of a State may by law impose on goods imported from other States any tax to which goods manufactured or produced in the State are subject, but in such a manner as not to discriminate between goods imported and goods produced in the State. It may also impose reasonable restrictions on the freedom of trade, commerce and intercourse within the State as may be required in public interest, though any bill or amendment for this purpose can be introduced or moved only with the previous sanction of the President.

(53) The effect of Arts. 302 and 304 is that restrictions may be placed on trade, commerce and intercourse by the Union or the State by law and in public interest, though the State may legislate only with the previous sanction of the President. The need for previous sanction provides a guarantee that power would be exercised in public interest and not to the detriment or the jeopardy of economic unity of the country.

(54) Legislation imposing restrictions on trade and commerce is covered by entry 42 of the Union List, entry 24 of the State List and entry 33 of the Concurrent List. These entries do not provide for taxation in express terms. It is however obvious that they authorise legislation imposing restrictions on trade and commerce which Arts. 302 and 304 expressly allow. Restrictive legislation within the limits imposed by the provisions contained In Part XIII is thus permitted both

to the Union and the State Legislatures within their spheres. The power may in certain circumstances be exercised concurrently.

(55) Mr. Iyengar has contended that Art. 301 creates a guaranteed right. He has virtually claimed, for the rights created or recognized by this Article the characteristics of fundamental rights. He could not argue that rights under Art. 301 were fundamental. They were not included in Part III of the Constitution. The guarantee provided by Art. 32 also is not available for the enforcement of rights under Part XIII. The description of rights under Art. 301 as guaranteed rights is merely confusing.

It has no constitutional significance. The rights created by this Article are like other legal rights enforceable by appropriate proceedings.

(56) Article 301 may be distinguished from the provisions contained in Art. 19 (1) (g) of the Constitution. Art. 19 (1) (g) guarantees to the citizens the right to practise any profession or carry on any occupation, trade or business. Both trade and business are included in this clause of Art. 19. There appears to be a clear distinction between the purposes of the two provisions in the Constitution.

While Art. 19 (1) (g) guarantees to the citizens freedom in the matter of trade, profession or business, Art. 301 provides for freedom of trade, commerce and intercourse within the territory of India. It may be said that while the one provides freedom for the individual in the matter of the choice of his trade, profession or business, the other provides for freedom of trade and commerce not in a particular state but in the whole of the territory of India.

Free flow of traffic subject to the provisions contained in Part XIII is secured by Art. 301, for traffic is surely within the scope of the expression "commerce". In "Moti Lal v. Govt. of the State of Uttar Pradesh", AIR 1951 All 257 at p. 323 (FB) (Z6), Agarwala J., expressed the view that Art. 301 contemplates the rights of trade, business or intercourse in motion, while Art. 19 (1) (g) dealt with the right of occupation, trade or business at rest.

It follows that if the freedom of individuals to carry on trade or business is restricted, the case falls under Art. 19 (1) (g), but if the restriction embraces within its scope a particular trade or business with reference to movement from one place to another, the case would fall within the ambit of Art. 301.

(57) We may now proceed to examine the contention which forms the crux of Mr. Iyengar's argument under this head. Shortly stated the question is whether the tax imposed on goods carried is a restriction on the freedom of trade or commerce within the meaning of Art. 301 and is directly hit by it. Its answer depends on the connotation of the expression "free".

It has to be ascertained as to what it is that the trade, commerce and intercourse is to be free from. In other words, is the freedom provided for trade, commerce and intercourse merely freedom from restrictions partial or total, on the free flow of commodities or does it include freedom from taxation also which may

indirectly affect the freedom of trade and commerce by reason of the financial burden it necessarily imposes?

(58) The Supreme Court had no occasion so far to pronounce" on this question. Two recent decisions, one from the Bombay High Court and the other from the Rajasthan High Court hear on the point. I shall deal with them later. The importance of the question cannot easily be exaggerated. I have therefore given my very anxious consideration to the argument advanced and as at present advised I do not feel persuaded to subscribe to the proposition put forward by the learned counsel for the petitioners.

He wants us to read Part XIII in isolation on the ground that the effect of the opening words of Article, namely, "Subject to the other provisions of this Part" is that this Part is invested with an overriding effect of its own wherever it comes into conflict with other provisions of the Constitution. He takes it out of the Constitution so to say and wants to determine the constitutionality of the impugned legislation by the test it provides, regardless of any justification for it that other provisions in the Constitution may afford.

In his view provisions in other Parts of the Constitution including those relating to taxation cannot in any way abridge the freedom of trade, commerce and intercourse. Limitations on this freedom must fall within the four corners of Part XIII.

(59) Mr. Iyengar has brought a wealth of learning to bear on the point. The argument was alluring but I confess, I am left unconvinced. The Constitution with all its Parts is one document. It is a coordinate whole. Its Parts may be likened to the limbs of the body. These Parts are not designed to produce conflicts. As parts of the same body they have to work in harmony.

Each part ought to be so read that all receive full" meaning and effect. We have therefore to read Part XIII along with other relevant Parts of the Constitution to discover its real meaning. The words of Art. 301 on which Mr. Iyengar relies, do not provide enough support for his contention. The freedom of trade and commerce is no doubt limited by provisions contained in that Part.

But neither Art. 301 nor any other provision in Part XIII contains any such words as "notwithstanding anything contained in other Parts of the Constitution, trade, commerce and intercourse would be free". There is nothing in Part XIII or Art. 301 which makes it expressly or even by necessary intendment independent of the rest of the Constitution and if other provisions of the Constitution place limitations on it, it would be for the courts to reconcile conflicting requirements of different provisions, so that some meaning could be given to all the provisions placed expressly in the Constitution by its framers.

Total nullification or exclusion of a provision or of a part by another could not conceivably have been intended. The conflict may necessitate whittling down the ordinary or the general meaning of expressions in order to prevent exclusion of

one provision by the other. The different parts could not have been intended to be mutually exclusive. A legitimate presumption would be that the framers of the Constitution intended to produce a code, different parts of which could be worked harmoniously.

(60) We may now proceed to examine the effect of the two Parts of the Constitution which precede Part XIII. Part XI deals with the distribution of legislative business. The framers of the Constitution decided to constitute India into a democratic republic. The basic structure for the Constitution was provided by the Government of India Act, 1935. The States are autonomous units within their own spheres.

They got their share of sovereign power earmarked in the Constitution. The power of sovereignty carried with it the power to impose taxes. It is an essential attribute of the sovereign power. The State cannot exist, without taxation. In theory there can be no limit on the power of the State to levy taxes, as there is no limit to the powers of the sovereignty. The State may voluntarily surrender a part of its power of sovereignty. It may also place limits or restrictions on its power of taxation. Within the limits it may impose, it enjoys plenary powers of taxation. According to Cooley (Cooley's Constitutional Limitations, eighth edition, volume 2, page 986)

"taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty."

The power may be restricted by express constitutional limitations or restrictions.

(61) Mukherjea J. (as he then was) in "Commr. Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar", AIR 1954 SC 282 at p. 295 (Z7), when bringing out the distinction between a tax and a fee referred to what he regarded as a neat definition of the expression "tax". He quoted the observations of Latham, C. J. of the High Court of Australia in 60 ComW LR 263 at 276 (X), to the following effect:

"A tax is a compulsory exaction of money by public, authority for public purposes enforceable by law and is not payment for services rendered."

(62) The sovereignty in this country rests in the people, and they through their accredited representatives resolved to constitute India into a sovereign democratic, republic and gave to themselves the Constitution. The republic consists of States. The division of legislative power including the powers of taxation was necessary. One result of the division is that legislative spheres of the different legislatures are marked. The powers are defined and delimited, though the residuary power rests in the Parliament.

(63) Article 246 read with the three Lists of the Seventh Schedule corresponds to S. 100 and the Lists under the Government of India Act, 1935. That Act provided for a federal structure though the federal part could not be enforced. The

distribution of powers between the Centre and the Provinces in that Act has formed the basis of the distribution of the legislative power in the Constitution.

The Legislatures of States have exclusive powers of legislation with respect to matters in List II. The power is subject to the powers of the Union Legislature under Art. 246(1) and (2). List II enumerates specific heads of legislation. There are several entries in this List which gives the States the power to impose taxes by law

(64) Article 265 of Part XII of the Constitution recognizes the power of taxation both in the Union and the States. It provides that no tax shall be levied or collected, except by the authority of law. The restriction imposed is as to the manner of the imposition and collection of taxes. There is no express provision in the Constitution granting or conferring the power to impose taxes. It was not necessary.

It is a part of the sovereign power which the Union and the States stood invested with. It follows that taxation under appropriate heads in List II is within the exclusive jurisdiction of the Legislatures of States. It is expressly provided in Art. 246(3).

(65) Article 276 provides that no law of the State relating to taxes in respect of professions, trades, callings and employments for the benefit of the State.....shall be invalid on the ground that it relates to the tax on income. Articles 285 and 289 exempt Union and State properties from taxation. Article 286 lays down restrictions on taxes on the sales and purchase of goods.

Articles 287 and 288 relate to exemptions from taxation of consumption or sale of electricity and also electricity or water in certain circumstances. The greater portion of this Part is devoted to the distribution of revenues.

(66) It is interesting to observe that Art. 265 though expressed negatively has as large a sweep as Art. 301. The large and the unlimited power of taxation vesting in the State is limited by the condition that no tax shall be levied or collected except by authority of law. The taxes therefore have to be imposed by the Legislature. Some more exceptions to the general rule embodied in Art 265 are incorporated in this Part. These have been referred to above. Articles 276, 286, 287 and 288 are the instances.

A general restriction that all legislation imposing taxes on trade and commerce whether by the Union Legislature or by the Legislatures of the States must be in public interest apart from the public, purpose that it admittedly serves by adding to the revenues of the State, should have appeared in that Part. It might well have formed part of Art. 265. Taxes on trades or professions, on the sale of goods, on consumption, on sale of electricity or water, are exceptions of a specific and limited character.

If a general limitation was to be placed on the legislative power of all the legislative bodies, the appropriate place was in that Part. The only restrictions on

the powers of taxation are those incorporated in Part. XII

(67) Apart from the restrictions imposed on the power of taxation by the provisions contained in this Part, every law imposing a tax by the State Legislature must be under someone of the entries which authorise taxation. The residuary powers of legislation including the power to make laws imposing a tax vest in the Parliament. The entries in the State List taken together mark the limits of the power of the Legislature of the State.

Within these limits the Legislatures of the States have plenary power of legislation. Where power exists, it extends to all ancillary and subsidiary matters which can reasonably be taken to fall within the ambit of the particular head under which legislation is undertaken.

(68) The expression "trade, commerce and intercourse" covers a very vast field. If taxation per se under the entries which authorise taxation can be treated as a restriction on the freedom of trade and commerce, where it imposes a burden on it Art. 301 would very effectively restrict the power of taxation left both to the Union and the States

Not only tax on goods carried under Entry 56, but taxation under other entries e.g., Entry 52 permitting taxation on Entry of goods into a local area for consumption, use or sale, Entry 53 on the consumption or sale of electricity, Entry 54 on the sale or purchase of goods other than newspapers, Entry 57 on vehicles, whether mechanically propelled or not and Entry 58 on animals and boats would all be hit by the omnibus requirement of Art. 301.

It will have the same drastic effect on the powers of taxation of the Central Legislature under several entries, e.g., 83 duties of customs including export duties, 84 duties of excise, 85 corporation tax, 89 terminal tax on goods and passengers and 92 taxes on sale and purchase of newspapers and advertisements.

These entries cover a large part of the legislative field left to the Union Legislature under List I.

Its residuary powers of taxation when exercised in the region of trade, commerce and intercourse, will also be affected. The effect of Art 301 if interpreted in the way Mr. Iyengar suggests would be that greater part of the legislation by the Union and the State Legislatures will have to be justified under the provisions of Part 13 of the Constitution. Parliament before imposing any tax under any entry of List I or in the exercise of its residuary power, where such taxation affects trade commerce or intercourse, would be bound by the requirement that the taxation should be in public interest.

Similarly, taxation by the State Legislatures under authorised heads when burden is imposed on trade, commerce and intercourse will have to lie in public interest under Art. 304(b). I am not convinced that this is the effect of Art. 301 read with Arts. 302 and 304, nor am I persuaded to: hold that this could be the intention of the framers of the Constitution.

(69) The undoubted purpose of Art 301 is to preserve and maintain the economic unity of India. It provides for free flow of traffic. It hits State barriers against the free flow of trade and commerce which is contemplated by it. Both prohibitions against and restrictions on the movement and free flow of goods and commodities would be hit by Art. 301. Yet trade, commerce and intercourse could not be absolutely free from all kinds of restrictions.

Articles 302 and 304 permit restrictions in public interest. It follows that any legislation which falls under Entries, 42 of List I, 26 of List II and 33 of List III which relate to trade and commerce, must conform to the requirements of Arts. 302 and 304.

Under these entries restrictions may be placed on the free flow of trade and commerce" in public interest Legislation which regulates trade, commerce and intercourse in public interest would be covered by Arts. 302 and 304. This does not admit of any dispute. The question is whether taxation per se regardless of actual effect on the free movement of goods and commodities is hit by Art. 301 as restrictive of or reducing the freedom of trade, commerce and intercourse. If so, it may be argued that restrictions contemplated by Arts. 302 and 304 include taxation and it must also be in public interest. The issue is as difficult as it is important.

But my answer to the question is that the two Parts of the Constitution namely Parts 12 and 13 are independent of "each other and self-contained. While Part 12 deals with finance including taxation, Part 13 deals with freedom of trade, commerce & intercourse & this freedom is freedom from restrictions other than those that may be imposed by permissible taxation under Art 246 read with the relevant entries.

It is obvious that direct legislation in regard to trade, commerce and intercourse is possible under the three entries referred to above. This legislation would be subject to the provisions contained in Part 13. Any restrictions that may be imposed on trade, commerce and intercourse, must be within the limits imposed by the provisions contained in Part 13.

Taxation and the power to impose taxes, are the subjectmatter of Part 12, and taxes may be imposed by appropriate legislatures within the limits set on their power by Art. 246 read with relevant entries. The only Article in Part 13 which deals with taxation is Art. 304(a). The existence of this solitary provision relating to taxation is not enough to give the whole Part an overriding effect over Part 12. The provision does not lend any support to the contention that taxes even under authorised heads should necessarily contravene Art. 301 and should therefore be in public interest as required by Arts. 302 and 304.

The purpose of cl. (a) of Art. 304 was merely to prevent discrimination against goods produced and manufactured inside the State in the matter of taxation when similar goods come into the State from outside. The implication of Art. 304(a) is that goods produced and manufactured inside the State may be taxed.

When they are so taxed, similar goods imported into¹ the State may also be taxed in order that they be not discriminated against. The provision was necessitated by the fact that the State Legislatures could not tax those imported goods under any specified head in List II

The clause in question assumes that the State Legislature may, notwithstanding the provisions contained in Art. 301, legislate for taxes on goods produced or manufactured in the State under someone or the other of the entries in List II. Where such power is exercised similar goods imported may also be taxed.

(70) Mr. Iyengar" himself conceded that the States were free to impose taxes on the sale and purchase of goods. It is undeniable that sales and purchases of goods would fall within the ambit of the expression "trade and commerce". No provision in Part 13 permits this taxation. If it is not possible to tax trade and commerce except under the provisions of Part 13, tax on the sale of goods would not be possible unless it conformed to the requirement of Art. 304(b); yet it was conceded that this was a legitimate item for taxation by the State Legislatures without conforming to the requirement of Art. 304(b)

The State Legislatures derive this power from Art. 246 of Part 12 read with the entries in List II. The imposition of sale tax within the conditions laid down in Art. 286 is possible only in pursuance of authority or power derived from Art. 246 read with the relevant entry vide "State of Bombay v. United Motors (India) Ltd.", AIR 1953 SC 252 at p. 254 (Z8). If the power to impose tax on the sale of goods is not hit by Art 301, taxation under other entries when it incidentally affects trade or commerce, should also be not hit by Art. 301.

(71) Mr. Iyengar relied on 1950 AC 235 (D) for showing how legislative intent may be ascertained. In this case their Lordships of the Privy Council when considering whether S. 46 of the Commonwealth Banking Act violated S. 92 of the Australian Constitution laid down (vide p. 237) two propositions in the following terms:

"The conception of freedom of trade, commerce and intercourse in a community regulated by law presupposed some degree of restrictions upon the individual, and two general propositions might be accepted: (1) that regulation of trade, commerce and intercourse among the States was compatible with its absolute freedom, and (2) that S. 92 of the Constitution was violated only when a legislative or executive act operated to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which might fairly be regarded as remote. That issue could only be decided by the court"

The provisions of the Constitution of India are not identical. Our Constitution expressly permits restrictions in public interest. These may be imposed by Parliament or by the State Legislatures in public interests though the State Legislatures can deal with a bill only if it has been introduced with the sanction of the President. Decisions under S. 92 of the Constitution ⁰¹ Australia therefore

may not apply "*mutatis mutandis*". But the general propositions afford useful guidance in interpreting the Constitution which has borrowed some terms from the Constitution of Australia.

Even under the Australian Constitution, it was held that S. 92 would be violated only if legislative or executive acts operated to restrict trade or commerce directly and immediately. This would be true of Art 301. The Constitution of India authorises both taxation and restrictions under certain express provisions and taxation by State Legislatures under entries of List II is not excluded on the ground that taxation per se is a restriction on the freedom of trade which Art. 301 seeks to preserve. But Art. 301 may be violated when legislation purporting to be under any of the authorised heads indirectly restricts or prohibits trade and commerce.

(72) The learned Advocate General has argued that taxation does not affect the freedom of trade and commerce at all and under no conceivable circumstances could taxation be hit by the mandate of Art. 301. He argues that all that Art. 301 aims at is that there should be free movement of trade & commerce. Any legislation regulating trade and commerce falling under Entry 42 of the Union List, Entry 24 of the State List and Entry 33 of the Concurrent List imposing restrictions would be hit by Art 301 if legislative power under relevant entries was exceeded.

Stated shortly, his point is that Art. 301 contemplates restrictions other than taxation on the free flow of traffic, throughout the territory of India and taxing enactments under authorised heads are completely outside the mischief of Art. 301. Mr. Lahiri's attitude towards Part 12 is exactly the same as that of Mr. Iyengar to Part 13. He claims an overriding effect for Part 12 which in my opinion it does not possess. If Mr. Iyengar's contention represented one extreme, this contention would provide the other. Article 301 provides for freedom of trade and commerce. There are numerous ways of curtailing or abridging this freedom. Trade and commerce in certain specified goods may be completely prohibited by direct legislation. It may be put under severe restrictions. Restrictions can take a large variety of forms. Taxation certainly would be one of those forms.

Instead of expressly prohibiting trade or commerce, it may be taxed so heavily that the impost may serve as a substitute for direct prohibition. Interpreting the expression "*absolutely free*" in S. 92 of the Australian Constitution, their Lordships of the Privy Council observed in 1950 AC 235 (D) at p. 299 as follows:

"Forty years of controversy on these words have left one thing at least clear. It is no longer arguable that freedom from customs or other monetary charges alone is secured by the section. On that the contending parties, while differing on almost every other point, are agreed."

It appears that there was no contest that pecuniary burdens in the form of taxes could restrict or abridge the freedom of trade. In fact this may be the most effective method of restricting the freedom of trade without saying so. When

therefore trade, commerce or intercourse is taxed even, though under entries not directly related to these items with the intention of restricting their freedom or when the legislation has that effect, it may be regarded as legislation outside the scope of the taxing entry under which the legislation is professedly undertaken.

It would then be colourable. Taxing entries are not designed for restricting or prohibiting trade and commerce. If taxation is utilised for achieving something which cannot be accomplished directly, it may be hit by Art. 301. Taxation in such a case would be a disguised attempt at by passing the obstacle created by Art 301. Taxation thus is not under all circumstances or wholly and completely free from the mischief of Art. 301. If that were so Part 12 may easily nullify its effect, a result which must be avoided.

(73) In "Saghir Ahmad v. State of U. P.", AIR 1954 SC 728 (Z9) the question before their Lordships of the Supreme Court was whether the U. P. State Road Transport Act (2 of 1951) was repugnant to the provisions contained in Art. 301 of the Constitution Their Lordships did not consider it necessary to decide the question, though they indicated possible arguments both for and against the view. Their Lordships observed that

the Australian Constitution indeed has no provision like Art. 19(1)(g) of the Indian Constitution and it is certainly an arguable point as to whether the rights of individuals alone are dealt with in Art. 19(1)(g) of the Constitution leaving the freedom of trade and commerce, meaning by that expression only the free passage of persons and goods, within or without a State to be dealt with under Art. 301 and the following Articles." The question was left open. This question does not directly arise in this case. Here the challenge to the Act is based not so much, on the provisions contained in Art. 19(1)(g) but on the ground that free passage of trade and commerce is obstructed by the questioned impost It may however be observed that Art. 19(1)(g) is undoubtedly a specific provision which guarantees certain rights to individuals in the matter of trade and business. Article 301 reserves freedom for trade and commerce and does not profess to deal with individual rights.

A distinction thus was made between the two by the framers of the Constitution and therefore in matters respecting individual rights, the application of Art. 19(1)(g) would be attracted. Where the grievance is as to the freedom of the passage of trade and commerce Art. 301 would come into play. Trade and commerce has to be free throughout the territory and as indicated by their Lordships in the observations reproduced above what it provides is that passage of trade and commerce or of traffic shall be free. This free passage may be prohibited. There may be partial prohibition through license and imposition of fees It may be indirectly made impossible by prohibitive taxation. The decisions in "George v. State of TravancoreCochin". AIR 1954 TravC 34 (Z10) and "State v. Philipose Philip", AIR 1954 TravC 257 (Z11) are distinguishable. In those cases the impugned Acts were directly hit by Art. 301 as they created direct prohibitions

against trade and commerce. The question whether taxation under an entry which the State Legislature has been expressly permitted to impose amounted to a restriction in all cases, regardless of the nature or the amount of the tax and its effect did not arise in these cases.

(74) Mr. Iyengar has referred us[^] to the observations of Mahajan C. I. in "Behram Khurshid Pesikaka v. State of Bombay", (S) AIR 1955 SC 123 at p. 145 (Z12) to the following effect:

"The legislative power of the Parliament and the State Legislatures as conferred by Arts. 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution." In his view

"a mere reference to the provisions of Art. 13 (2) and Arts. 245 and 246 is sufficient to indicate that there is no competency in Parliament or a State Legislature to make a law which comes into clash with Part 3 of the Constitution after the coming into force of the Constitution." Article 13(2) provides that

"the State "shall not" make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

These observations were made when effect of AIR 1951 SC 318 (G) declaring some sections of the Bombay Prohibition Act invalid was under consideration. The remarks were made in a different context and may not be regarded as laying down a general proposition governing cases in which the fundamental rights of an individual are not in question, though it would be unquestionable that the taxing power conferred on the Legislatures of the Union as well as of the States by the provisions contained in Arts. 245 and 246 read with entries in the respective lists cannot be so utilised as to render nugatory the prohibition contained in Art. 13(2) in regard to the fundamental rights.

The observations on which reliance has been placed would however indicate that the different parts of the Constitution have to be harmonized and cannot be read independently of each other or in isolation.

(75) Mr. Lahiri has relied on "Ananthakrishnan v. The State of Madras", AIR 1952 Mad 395 (Z13) in support of his contention. In this case levy of fees for enrolment as Advocate was called into question. It was argued that it was unconstitutional as it involved abridgment of the fundamental right to carry on a profession. The contention rested on Art 19(I)(g). Rajamannar C, J. expressed the view that

"Even if the right to act and plead is deemed to be a right comprised in the right to practise the profession guaranteed under Art. 19(I)(g) there is nothing in the Constitution to exempt such right wholly from the taxing power of the State, (using the word "State" in its larger definition under Art. 12). Article 265 which says "no tax shall be levied or collected except by authority of law" does not provide for any exemptions.

Articles 268, 269 and 276 and a number of entries in the three lists in the Seventh Schedule clearly indicate the scope of the taxing power as extending even to rights covered by Art. 19(1). But any taxation of the exercise of the fundamental right which aims at unduly abridging or destroying such right is unconstitutional "*Grosjean v. American Press Co.*", (1936) 297 US 233 (7,14) Relied on. But if the taxation is only for legitimate revenue purpose, then, it is not invalid merely because it may adversely affect any of the fundamental rights. This way of reconciling would leave room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional."

Venkatarama Aiyar J. was also of the same view. He observed that the operation of Part 12 was not cut down by Part 3 and the fundamental rights were within the powers of taxation by the State. The only distinctive feature of the case is that the taxing power of the State was being considered in relation to the freedom of professions guaranteed by Art. 19(1)(g). Trade or commerce was not a subjectmatter of taxation in that case. Even so, the principle laid down in that case is attracted.

The Chapter on fundamental rights was reconciled with the provisions relating to taxation contained in Part 12 and it was recognized that if the tax in a particular case was so unreasonable as to amount to a destruction of the right, the matter would be for the determination of the courts. The rights created by Art. 301 are no more sacred than the fundamental rights guaranteed by Part 3 of the Constitution. The rights under these parts would not exclude or affect adversely the taxing power of the State.

Yet if the taxing power is so utilised as to nullify rights under Part 3 or Part 13, the Legislation may be hit by the prohibitions contained in Art. 13 or Art. 301, as the case may be. In such cases, it will not be purely a case of taxation which does not restrict the freedom of rights guaranteed by Part 3 or Part 13. It would amount to abridgment and the curtailment of freedom by excessive use of the powers of taxation.

The powers of taxation have to be so utilised that the freedoms reserved by the Constitution are not taken away. Just as Part 13 does not shut out taxation of trade, commerce and intercourse under Art. 246 read with relevant entries, powers of taxation under Part 12 cannot be so used by the Union or the States so as to render nugatory the freedoms reserved for trade, commerce and intercourse

(76) In three States there has been legislation under Entry 56. In AIR 1952 Pat 359 (A) the validity of Bihar Finance Act was called into question. By S. 12 of this Act a tax on all passengers and goods earned by motor vehicles at the rate of two annas in the rupee on all fares and freights was payable to owners of such vehicles. It was held in this case that the impugned Act was a piece of legislation "directly dealing with the imposition of tax on goods and passengers and it

does not profess to impose any restrictions whatever either on interState trade or on trade with or within the State.

All the learned Judges of the Special Bench were agreed in the conclusion that such tax as was imposed by the Act did not adversely affect the freedom of inter or intraState trade and commerce. Taxation of the nature contemplated by the impugned Act was found to be within the ambit of Entry 56 of the State List and it was held that it did not interfere with trade and commerce. In AIR 1954 Punj 264 (P) the question of competence of the State Legislature to enact the Punjab Passengers and Goods Taxation Act, 1952 was considered. Section 3(3) of this Act provided as follows:

"Where passengers are carried or goods transported by a motor vehicle from any place within the State to any place outside the State, a tax shall be payable in respect of the distance covered within the State and shall be calculated on such amount as bears the same proportion to the total fare or freight as the distance covered in the State bears to the total distance of the journey." It was found that the subjectmatter of the Act fell under Entry 56 of the State List which empowered the State Legislature to make laws for taxes on goods and passengers carried by road or inland waterways and that it was constitutionally valid

(77) In AIR 1954 Mad 569 (10) the validity of certain provisions of the Madras Motor Vehicles (Taxation of Passengers and Goods) Act was assailed. The Act provided that on every passenger carried for hire or reward on any stage carriage, a tax (hereinafter referred to as the surcharge) shall be collected and paid to the Government at the rates and in the manner provided in that Act.

It was found that it was a tax on passengers and goods within the ambit of Item 56 of the State List. The Act was found valid with the exception of proviso 1 to S. 3 which was found to be repugnant to Arts. 14 and 19. Quite apart from some distinctive features, these decisions uphold the principle that imposition of taxes on goods and passengers under entry 56 was constitutional. The provisions of Part XIII were considered only in the Special Bench decision of the Patna High Court.

Sarjpo Prosad J. (as he then was) delivered the leading judgment of the Special Bench. This is the first decision in which the question raised before us directly arose and was fully dealt with. The erudite judge considered the question in all its bearings in an elaborate and a very wellreasoned judgment, which affords a complete answer to Mr. Iyengar's contention on this point. He held that the impugned Act is a legislation directly dealing with the imposition of tax on goods and passengers and it does not profess to impose any restrictions whatsoever either on interState trade or on trade with or within the State.

As a result Part 13 of the Constitution was found not to have been infringed. It follows from the proposition laid down by the learned Judge that taxation of goods and passengers under Entry 56 does not operate per se as a restriction on

trade and commerce. It was also found in the case that freedom of trade and commerce was not actually restricted. The implication is that courts may examine if taxation is intended to or actually results in Curtailment of the freedom of trade and commerce.

The decision when seen in its true perspective and in the light of its necessary implications yields a complete and a clear statement of the law on the point with which I am in respectful agreement. The two other decisions also supported the contention that taxation per se does not offend against Art 301.

Mr. Iyengar in the course of his criticism of these decisions has also pointed out that in all these cases the tax was in the ultimate analysis 011 the distance travelled. Therefore these Acts were in substance measures by which goods or passengers when carried were taxed.

He urges that the Assam Act does not take distance into consideration. Instead of die distance it is the weight which is the determining factor in regard to die quantum of tax which may be payable. This element he urges takes it out of the ambit of Entry 56, his contention being that the word "carriage" is introduced merely for purposes of form or appearance. In his view it is not a tax on carriage at all. It is a tax on goods produced and manufactured.

I have considered this point already when I dealt with the contention whether the tax was an excise duty in disguise. I have found that carriage is the material factor which creates the liability for taxation and therefore the tax is distinguishable from excise duty. Again the nature or the quality of the tax would not depend on what measure is adopted for fixing the amount payable in each case. It may be the distance travelled and in a particular case the legislature may well select the weight as the measure for purposes of taxation.

Entry 56 does not fetter the discretion of the legislature on this point As observed by their Lordships of the Privy Council in AIR 1945 PC 98 at p. 101 (Y), the "method of collecting the tax is an accident of administration". It is not of the essence of the tax which is attracted by carriage of goods by road or inland waterways.

(78) The power is to impose taxes on goods and passengers when carried in die manner laid down in the entry. In regard to the method and the manner of collecting die tax, the powers of die State Legislature are plenary and without limit. It cannot be said that in providing weight as the measure the Legislature has contravened any prohibition or has exceeded its powers of legislation. It is questionable whether in this case distance travelled could form a just or a fair basis for the imposition of die tax.

All tea carried by road or inland waterways goes to Calcutta from the producing centres. Tea carried to Calcutta may be carried all the way by the inland waterways. It may be carried by road for some distance and then by inland waterways or even by railway. Distance travelled could be by different means of

communication and it may not have provided a very equitable basis for taxation from the view point of the producer and the manufacturer.

The distinction pointed out by Mr. Iyengar does not take the legislation out of the ambit of Entry 56. It is true that legislation in the other three States under Entry 56 does not adopt weight alone as the measure for determining the tax payable. But these Acts are merely instances of the exercise of the power of the legislature under Entry 56. They may not be utilised in support of the contention that the only method of imposing tax on goods and passengers under Entry 56 is the one adopted in those cases. The entry is silent on that point.

The words of the entry have to receive their ordinary grammatical meaning. The power may not be curtailed by laying down how and in what manner tax may be computed when goods are carried by road or inland waterways. It is not the implication of the word "carried" used in the entry that the tax must depend on the length of the distance travelled and it may not justifiably be read into the entry. Any injustice or hardship involved in the method of computing the tax is not a matter for the courts to go into, if the legislation falls within the scope of the entry.

(79) The decision in "B. M. Amina Unima v. Incometax Officer", AIR 1954 Mad 1120 at p. 1124 (Z15), also does not support the contention of Mr. Iyengar. It was no doubt observed in this case that

"it is well settled that taxing legislation is also controlled by the fundamental rights guaranteed in Part III of the Constitution." But what was intended was made clear in the next paragraph. It was held that

"what Art. 19(1)(g) provides for is the right of a citizen "to practice any profession or to carry on any occupation, trade or business". The impugned provision (a taxing provision) does not in, anyway prohibit or even interfere with the right of either the petitioner or the minor to practice any profession or to carry on any occupation, trade or business.

What the impugned provision has done is to tax the income of the partnership business which the petitioner is left free to carry on and to the benefits of which partnership the minors are entitled. These rights are in no way affected by the taxing statute".

What was found therefore was that the tax did not interfere with the freedom to practise any profession or to carry on any occupation, trade or business. Seen in the light of the finding given, the authority might well support the contention raised by the learned Advocate General. In 57 Bom LR 288 (N), it was held that

"the legislative competence of Parliament and the State Legislature must be read subject to Art. 301 of the Constitution of India. Neither Parliament nor the State Legislature can legislate so as to interfere with the freedom of trade, commerce and intercourse throughout India. Article 301 is not a restriction on any one or other entry in the Seventh Schedule; it is perfectly general and every legislation

under whichever topic it may fall must be subjected to the overriding provisions of Art. 301, which makes trade, commerce and intercourse throughout the territory of India free. Article 301 of the Constitution is an overriding article both with regard to restrictions and taxation."

Mr. Iyengar has relied on this decision in support of his contention with respect to Article 301. It fully supports his argument. I have profound regard for the views of the distinguished Chief Justice who delivered the judgment in this case.

I regret I have found it difficult to give that overriding effect to Art 301, which the learned Chief Justice thought it had.

(80) Cbaga C. J. in 57 Bom LR 288 at p. 335 \\\), when interpreting Art. 301 observed as follows :

"Therefore, if it (Art. 301) is intended to be given effect to, it constitutes a clear restriction the legislative competence both of Parliament and of the State Legislature, because it should be noted that Art. 301 is only made subject to the other provisions of this Part, which is Part XIII, and not subject to the other provisions of the other Parts of the Constitution. Therefore the legislative competence of Parliament and the State Legislature must be read subject to Art. 301 In other words, neither Parliament nor the State Legislature can legislate so as to interfere with the freedom of trade, commerce and intercourse throughout India." The learned Chief Justice has given overriding effect to Art. 301 even over the provisions contained in Part 12 of the Constitution. It is true that Art. 301 is subject to the provisions of Part 13 and it has not been expressly made subject to the provisions of other parts of the Constitution. But same could be said of the other parts. Parts II and 12 also have not been made subject to Part 13. All these Parts have independent operation and they have to be given effect to as parts of one single¹ indivisible whole. These parts should not have overriding effect in the absence of express provision to that effectArticle 301 no doubt has the distinguishing feature that it is made subject to the provisions of the Part. But this requirement was necessitated "by the fact that Art. 301 embodied the principle about the freedom of trade, commerce and intercourse in an unqualified form. The provisions that follow engraft some necessary exceptions. Article 301 therefore had to be subject to the provisions which embodied these exceptions. These, words in my humble opinion do not give overriding effect to the entire! part over all other Parts of the Constitution. I hesitate to attribute any such intention to the framers of the Constitution.

(81) If overriding effect is not given to Art. 301, it would not hit taxation under authorised 1 leads when the free flow of trade and commerce is not restricted and the tax is imposed only for raising revenue. Freedom reserved by it is freedom from restrictions which obstruct the free flow of traffic Limited power to impose restrictions on freedom of trade, commerce and intercourse, has been left both to the Union and the State Legislatures. Only public interest would justify imposition of such restrictions. The nature of such restrictions can be

easily conceived.

Legislation may be undertaken to prevent trade or commerce from being utilised as an agency for promoting immorality, dishonesty or spread of any evil or harm to the people, to prevent kidnapping, or immoral traffic in women, to exclude from trade and commerce impure food stuffs, carrying or use of liquor in public, places or animals or persons with contagious diseases. The power to impose restrictions may also be utilised for demanding registration of cars even on payment of fees or for requiring the cars to carry lamps of a specified kind.

Other restrictions may be imposed on the use of the vehicles in regard to their speed and as to the manner of their use to prevent danger to the public. It is restrictions of this kind which Arts. 302 and 304 allow when they are in public interest. Legislation imposing such restrictions would fall under Entries 42 (List I), 26 (List II) and 33 (List III). Taxation could not be regarded as excluded by Article 301 or permitted only under Arts 302 and 304 when it is in public interest. All taxation serves a public purpose. It adds to the revenues of the State and the expenditure of the revenue is controlled by express provisions contained in the Constitution. I am finding it difficult to see how every measure of taxation could be justified on the ground that it was in public interest.

As shown above, restrictions other than pecuniary imposts on the free flow of trade and commerce may be, obviously in public interest. Instances of such cases have been given above. It is also conceivable that restrictions may not be in public interest and may have the effect of restricting or prohibiting the free flow of trade. Limiting the speed of vehicles to one mile an hour may make transport economically prohibitive. All this cannot be said about taxation per se. I therefore hesitate to hold that the framers of the Constitution thought that taxation even under authorised heads by the Union and the State should further be justified on the ground of public interest if it imposed any burden on trade, commerce and industry incidentally. If taxation under such circumstances is treated as a restriction per se, it should promote public interest otherwise than by adding to the revenue of the State.

The mere fact that the tax is for the purpose of raising revenue would not satisfy the requirements of Arts. 302 and 304. It could not be regarded as in public interest per se if Arts. 302 and 304 received full effect. It was in this view that Chagla C. J. held that a tax could not be justified per se and that it must be justified on some other ground than the ground of raising revenue. Taxes can be imposed only by law. Taxation must be covered by some heads of the relevant list. Taxation under authorised entries could conceivably be in public interest, apart from its being a source of revenue.

Taxation may be employed for bringing in prohibition steadily. But to say that taxation under authorised heads must necessarily have support from other circumstances, that it must promote public interest in some other form is putting a crippling limitation on the general power of taxation. The State would be put to

the necessity of showing in a court of law what public interest, even authorised taxation served. Factors which will have a bearing on this question would be numerous.

For one thing, every Act imposing a tax under an entry which imposes incidentally some burden on trade, commerce and intercourse, must specify or indicate how the tax imposed would be in public interest. It is not worthy that the burden would be incidental, for neither the Union Legislature nor the State Legislatures have (except under Art. 304 (a)) any power to impose taxes on trade, commerce and intercourse directly.

The three entries which authorise legislation under this head do not authorise taxation. They permit regulatory legislation. The only exception to the rule is in Art. 304 (a). It would be necessary then that pecuniary burden under entries which permit taxation must have some purpose other than the mere raising of revenue. Chap 13 and the entries in the three lists while distributing the legislative and also the taxing powers between the Union and the States give specific heads of taxation with the object of raising revenue.

They give no indication that besides adding to the revenues, taxation should serve some other purpose which may be in the public interest. By giving an overriding effect to Part 13, the effect of Part 12 is whittled down considerably. The power it confers is reduced very substantially. It would shut out taxation for raising revenue under several heads which are meant to be sources of revenue only.

The State cannot be run without taxation and that affords complete justification for taxation without any other subsidiary purpose.

(82) Taxation under most of the heads in the three lists would impose some burden on trade, commerce and intercourse, indirectly or incidentally. If then it must be in public interest, the issue whether it is in public interest or not would be justifiable. The courts will have the power of scrutiny and veto even though the legislatures are legislating for taxation under heads under which they have the power to legislate.

No such power has been conferred by the Constitution on the judiciary in express terms and I hesitate to read it as an implication of any provision in Part 13. Where power of judicial veto was meant to be given as in Part 3, it was given in terms which left no room for doubt as to the existence of the power. So vast a power could not have been left to be spelt out inferentially from the provisions contained in Part 13.

(83) In "AIR 1953 SO 252 (Z8)", their lordships of the Supreme Court considered the competence of the State Legislature to impose sales tax with reference to the provisions contained in Art. 286 (1). Their lordships were not interpreting Art. 301. Observations made by them when interpreting Art. 286 are not of any great assistance in interpreting Art. 301. In any case the decision does

not appear to me to support the contention that taxation "per se" under authorised heads of List I and List II would amount to abridgment or curtailment of the freedom of trade and commerce, if such taxation imposes any burden however slight on trade, commerce and intercourse incidentally.

(84) In "Surajmal Baj v. State of Rajasthan", AIR 1954 Raj 260 (Z16), it was held that imposition of octroi duty would amount to restriction on the freedom of trade guaranteed under Art. 301 and such an imposition was possible only under Art. 301 in public interest. This view also gives overriding effect to Art. 301 and treats taxation "per se" as curtailment of the freedom of trade, commerce and intercourse, regardless of the fact whether the free movement of traffic or of goods was restricted or curtailed by the impost in question.

This is the view that prevailed in the Bombay decision considered above. With great respect I find myself unable to subscribe to the view taken in these cases.

(85) My conclusion therefore is that Arts. 302 and 304 restrict the powers of the Union and the State Legislatures in the matter of legislation under entries 42 (list I), 26 (list II) and 33 (list III). Art. 301 is of wider application. It provides for free flow or movement of goods and traffic. Restrictions on it can be placed under Arts. 302 and 304. Restrictions abridging or curtailing the freedom of movement therefore must find justification from provisions contained in Part. 13.

But taxation "per se" under authorised heads of the three lists does not abridge or curtail the freedom provided for by Art. 301 which may not be so construed as to shut out all legislation relating to taxes under authorised heads by reason of the burden that it may incidentally place on trade, commerce or intercourse. It is possible however that taxation may be resorted to with a view to abridging or preventing the free flow of traffic.

Taxation also may go to such a limit that it may in effect abridge the freedom of trade and intercourse appreciably. Where taxation under authorised heads aims at or has the effect of abridging freedom or curtailing the freedom of trade, and commerce, it may be hit by the provisions contained in Art. 301. Legislation in such cases would be a colourable exercise of the powers of taxation.

It would not be competent, for, even taxation under authorised heads should be for purposes of raising revenue and not for killing trade, commerce or industry. It may not be permitted to trespass on the freedom reserved for trade, commerce and industry. This way the two parts of the Constitution receive full effect consistently with the requirements of each. Giving overriding effect to the one or the other would paralyse some part of the Constitution.

Some provisions would be rendered ineffective or nugatory. This is a result which in my humble opinion ought to be avoided by reconciling the demands of the two parts.

(86) I have come to the conclusion that the impugned Act falls within the ambit of entry 56 in pith and substance. The State Legislature intended to levy a tax on

goods carried by road or inland waterways. The Act gives effect to that intention and as a result tea and jute both produced and manufactured in the State are taxed when carried by road or inland waterways. The courts are undoubtedly entitled to look at "the substance of the Act imposing the tax in order to ascertain the true nature of the tax and to discover not merely what it says but what it really does.

"The established Courts of Justice, when a question arises in regard to a Constitution whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted.

If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions." These observations were made by Lord Selborne in "The Queen v. Burah", (1878) 3 AC 889 at p. 905 (Z17). The test so laid down was applied in "1936 AC 578 (Z18)". It would apply equally well where the question is as to the division of the powers between the Union and the States. "In a court of law or equity, what the legislature

intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." "(1897) AC 22 at p. 38 (E)".

Everyone is presumed to intend the direct and natural consequences of his acts. The legal effect of an enactment ought to be presumed to have been intended by the legislature.

"It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the object, the purpose and the intention of the enactment, is the same.....

By the necessary effect, it needs scarcely be said, those learned jurists meant the necessary legal effect, not the ulterior effect economically or socially." (43 CLR 386 at p. 409 (F)). In "AIR 1954 SO 119 (H), Mahajan J., when considering the provisions of the Ordinance for taking over the management and administration of Sholapur Spinning and Weaving Co. Ltd., observed that

"in order to decide these issues it is necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature has really done the Court, when such questions arise, is not overpersuaded by the mere appearance of the legislation. In relation to constitutional prohibitions binding a legislature it is clear that the legislature cannot disobey the prohibitions merely by employing indirect method of

achieving exactly the same result.

Therefore, in all such cases the Court has to look behind the names, forms and appearances to discover the true character and nature of the legislation."

These weighty pronouncements leave no doubt as to the powers of the court when it is called upon to decide whether legislative power has been exceeded or a constitutional prohibition has been violated by a legislature. It is not the form but the substance that is the determining factor. The substance of the Act may be discovered from all the provisions. Even rules framed may be taken into consideration "Prafulla Kumar v. Bank of Commerce Ltd., Khulna", AIR 1947 PC 60 (Z19).

The legal effect of the legislation would be presumed to be intended. It will be a pointer to the object or the purpose of the legislation. If the impugned legislation is examined in the light of the principles so authoritatively enunciated by distinguished judges, it is difficult to discover any gulf between the profession of the legislature and its actual achievement. It started with the intention of levying tax on goods carried from any point in the State by road or inland waterways.

It has reiterated this purpose in different parts of the Act. When framing rules for giving effect to the purposes of the Act, it has again repeated its intention as shown above. There is thus no attempt to do something which it had not power to do in the guise of legislation under entry 56 read with Art. 246, and unless taxation "per se" under this entry is hit by Art. 301, the legislation cannot be regarded as unconstitutional on the ground that it is colourable or that it exceeds the competence of the State Legislature.

I have already come to the conclusion that mere taxation of goods under entry 56 cannot be regarded as a violation of Art. 301. What the Article does provide is freedom for trade and commerce. Whatever else the word freedom may connote, it would not exclude authorised taxation by the States within their own sphere, when it actually does not interfere at all or to any appreciable extent with free flow or traffic of the commodities taxed, unless it could be said that Part 13 overrides the provisions contained in Part 12.

This proposition is amply refuted by the drastic consequences that follow its adoption. It is not based on any provision in the Constitution enacted in express terms or by necessary intendment. The Constitution is a compact Federal Whole. Its parts should harmonize and it must hold a balance between all of them. Taxation therefore "per se" would not be hit by Art. 301 unless it has the effect of actually restricting the freedom of trade in the sense that its free flow is either effectively discontinued or substantially curtailed.

I have no reason to think that the trade and commerce in this case is prohibited. It has not been contended that any appreciable volume of trade has been affected injuriously by the operation of the Act. In fact the State is taxing the sales of goods under the Sale of Goods Act. Both tea and jute which are taxed if

carried under the Act, are liable to the sales tax also if sales takes place within the province.

These are the only two very important commodities (except oil) which the State produces in large quantities and the bulk of the commodities producer! is exported. The market for tea and jute is at Calcutta. The commodities are exported in such a way that the bulk of the produce escapes sale tax. The commodities if sold here could yield substantial revenue to the State. When faced with this situation the State Legislature presumably decided to utilise its power under entry 53 for taxing these commodities.

The intention to restrict the freedom of trade in these commodities may not be attributed to the Legislature. Stopping or restricting trade and commerce in these two commodities would be highly detrimental to the interests of the State. The State Legislature could not think of killing the goose that lays the golden eggs. The freedom of trade in the commodities could not have been intended to be restricted even partially, much less totally.

In any case there is no basis for holding that the effect of the legislation has been to restrict the freedom of trade in these two commodities to any appreciable extent. Taxation in the circumstances of the case is not such that it may be regarded as an indirect way of achieving what could not have been accomplished directly. The legislation is not hit by Art. 301.

(87) Mr. Iyengar has urged next that tea is a controlled industry. The Parliament has by law declared that the control of the tea industry should vest in the Union in public interest. In this connection he refers us to the Tea Act No. 29 of 1953. He urges that the impugned Act interferes with the control which the Union has assumed in pursuance of the declaration made by the Parliament under entry 52 of List I. Legislation about tea including taxation is within the exclusive power of the Union Legislature.

The contention does not appear to be well founded. The corresponding entry in the State List is No. 24 which provides for legislation in respect of entries subject to the provisions of entry 52 of the Union List. Entry No. 33 in the Concurrent List also provides for legislation about trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union is declared by Parliament by law to be expedient In the public interest.

The result of the assumption of control by the Union of the tea industry is that legislation with respect to trade and commerce in tea and the production, supply and distribution of tea now falls under entry 33 of the Concurrent List. In consequence the State loses its exclusive powers under entries 24, 26 and 27 of list II. The powers now are concurrent. But this concurrence is limited to legislation under entries 24. 26 and 27 only.

These entries do not authorise any taxation. The assumption of control of the

industry under entry 52 would not interfere with the powers of the State Legislature under entry 56. That is a distinct head. The powers of taxation of the State Legislature under entry 56 or under other entries to tax commodities produced or manufactured in the State could not be taken away by a declaration of the Parliament by law that the control of the industry by the Union is in public interest. If power under the Constitution is to be taken away from the State Legislature, it should be necessary to amend the Constitution itself. The control of industry by the Union merely takes away the exclusive power of the State Legislature in respect of entries conferring other legislative power with respect to the industry the control of which has been taken over.

(88) Mr. Iyengar relying on "*Durgeshwar Dayal Seth v. Secretary, Bar Council, Allahabad*", AIR 1954 All 728 (Z20), has argued that "the power of a State to make laws with respect to any of the matters enumerated in Sen. VII, List 3 is subject to the exclusive power of Parliament, if it has any, to make laws with respect to the same matters". In this case the control of the industry was not taken over under entry 52.

The present case is distinguishable on facts. On the strength of this decision it may not be said in respect of industries the control of which has been taken over under entry 52 that they are within the exclusive power of the Parliament. But even assuming that the proposition laid down in "*AIR 1954 All 728 (Z20)*", would apply to an industry, the control of which has been taken over by the Union under entry 52, it would be limited to tea industry as distinguished from trade or commerce in tea.

The sphere of industry is production. It is when commodities have been produced that traffic in them begins. They then become part of the general stock. It is after the production stage that trade and commerce commence. If exclusive power could be claimed by the Centre, it would be limited to legislation with respect to the industry and not with respect to trade and commerce. In regard to trade and commerce the power is merely concurrent, vide entry 33 of List III.

In regard to the regulation of trade and commerce therefore, the power in the Centre should not be exclusive, it would be concurrent with the State. But as held above the Tea Act and the assumption of control by the Union do not take away the powers of taxation which the State Legislature had under entry 56. In regard to tax on goods and passengers the Union enjoys no exclusive power in fact no power at all, when goods and passengers are carried by road or inland waterways.

The Union Legislature can tax goods and passengers when carried by rail or air. There is therefore a clear line of demarcation between the powers of the Union and the State Legislatures and that the power of the Union is not affected by the legislation under entry 56.

(89) The Tea Act provides for control by the Union of the Tea Industry, including the control, in pursuance of the International Agreement now in force, of the

cultivation of tea in, and of the export of tea from. India and for that purpose to establish a Tea Board and levy a customs duty on tea exported from India. The main purposes are to control the cultivation of tea, its export from India and levy of customs duties on tea so exported.

Chapter III of the Act deals with control over tea cultivation. Chapter IV controls the export of tea and tea seed. Chapter V deals with Finance, Accounts and Audit. Under Chap. VI the Central Government may control the price and distribution of tea. Mr. Iyengar has referred us to S. 30 (a) permitting the fixation of prices of tea and S. 30(3) (c) which authorises the Government to regulate by licenses, permits or otherwise the production, storage, transport of distribution of tea or tea waste.

He argues that imposing tax on tea interferes with the control by the Central Government which is vested in it under S. 30 of the Act. The price control is interfered with, for burdens imposed on tea must naturally affect its price level. The argument though plausible is not sound. If imposition of a tax on tea under entry 56 interferes with the control of industry by the Union, the sales tax on tea would do likewise.

Enhancement of land revenue on land under tea cultivation would also have the same result. All this power of taxation is not taken away merely because the Union has taken control of the industry for certain specified purposes. Any taxes that may be imposed under powers which the Constitution confers on the State Legislatures may have to be taken into consideration when prices are fixed.

But so far as the fixation of the price is concerned that would remain the concern of the Central Government and its power to fix whatever prices it regards reasonable in view of all factors that may influence the determination, is not affected. It is worthy of note that there is no express provision in the Act which limits, controls or abridges the State's power of taxation under relevant entries of List II. The contention is repelled.

(90) The last contention raised by Mr. Iyengar was that the legislation is hit by Art. 14 of the Constitution. He urged that distinction is made in the Act between manufactured tea in chests and tea in bags. He stated that a small quantity of tea came out of the factories in bags. Later he said that the quantity was not quite small and part of it went out of the State also. On these facts he urged that the distinction between tea packed in different kinds of containers had no rational relation with the object of legislation.

Discrimination thus was repugnant to Art, 14. He relied on several decisions of the Supreme Court for showing what discrimination was obnoxious to the provisions contained in Art. 14. Law on the point now may well be regarded as settled. In a very recent decision of the Supreme Court reported in "Budhan Choudhry v. State of Bihar", (S) AIR 1955 SC 191 (Z21) Das J. who delivered the judgment of the Court lucidly stated it in the following passage:

"While Art. 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different bases, namely, geographical, or according to objects or occupation or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

The contention is that the object of the legislation is to raise the revenue. This object has no connection with the discrimination made between tea in different containers. In fact the discrimination goes against the very purpose of taxation under the Act.

(91) The statement of law on which reliance has been placed merely lays down the test for determining whether there has been discrimination which the Constitution forbids. Whether there is reasonable classification in a particular case is a question to be determined in each case and its decision depends on its own facts. The Supreme Court of U. S. A. has been permitting a wider discretion in classification under the power of taxation, than it has done under the police power.

"It (the State) is allowed to pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably." (Willis on Constitutional Law). In AIR 1953 SC 252 (Z8) the contention that the charging Ss. 5 and 10 fixing Rs. 30,000 and Rs. 5000/ as the minimum taxable turnover for general tax and special tax respectively are discriminatory and void under Art. 14 read with Art. 13 of the Constitution was not accepted.

It was held that no discrimination was involved in this classification which was perfectly reasonable when it was borne in mind that the State may not consider it administratively worthwhile to tax sales by small traders who had no organizational facilities for collecting the tax from their buyers and turn it over to the Government. Each State must, in imposing a tax of this nature, fix its own limits below which it does not consider it administratively feasible or worthwhile to impose the tax.

In the light of this decision it would appear that the classification may not be regarded as unreasonable or discriminatory. There is no material on the record for holding that tea in bags is carried by public roads or inland waterways in substantial quantities inside the State or outside the State. The bulk of the tea from the factory comes out in chests. Climatic conditions in Assam make it necessary.

It has not been shown that the tea left out from taxation which leaves the factory in bags is anything more than a negligible part of the total quantity produced. A small quantity of tea going out of the factory for local consumption round about, which is not carried for any considerable distance by road or inland waterways, could reasonably be exempted from taxation. A State may not be compelled to tax every ounce of tea. Administrative considerations can also support the classification to which objection has been taken. In "V. M. Syed Mohammad & Co. v. State of Andhra", AIR 1954 SC 314 (Z22) it was held that

"there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similarly circumstanced." I do not think this presumption has been rebutted. In fact no effort has been made to place facts before the Court which would show that there was any real discrimination between persons and things which would be hit by Art. 14.

(92) Tea and jute are the only commodities which have been taxed by the Act. Bub entry 56 creates no compulsion for taxing all commodities at the same time. It is for the State to decide which commodities to tax. Taxation under this head would depend on the needs of the State. Naturally luxuries will be taxed first. Commodities essential for the life of the community may not be taxed at all or may be taxed at lower rates. There is no substance in the contention that because tea and jute alone have been taxed by the Act, the Act is discriminatory.

(93) No assessments have so far been made in any of these cases under the impugned Act. It is not therefore necessary to decide questions of law or fact which may arise in these assessments. The Act provides an elaborate machinery for obtaining redress if errors of law or fact are committed by taxing authorities. In any case this is not the stage at which any such points arising in these cases may be considered.

Jurisdiction of this Court under Art. 226 may be invoked if necessary when remedies available under the Act have been exhausted.

(94) The petitions are dismissed and the Rules are discharged.

DEKA J. :

(95) I have had the advantage of reading the judgments prepared by my Lord the Chief Justice and my learned brother Ram Labhaya J., which have been just delivered. I am in total agreement with the views and reasons expressed by their Lordships as to the competence of the legislation, that had been attacked. In these circumstances, I have not thought it necessary to write any separate judgment myself.

(96) I agree that the Rules may be discharged. (Leave to appeal granted).

Rules discharged,