

(1991) 04 PAT CK 0007

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2336 of 1990 (R)

Indian Aluminium Co. and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 09-04-1991

Acts Referred:

Citation : (1991) 04 PAT CK 0007

Judgement

S.B. Sinha, J.—The Petitioners in this case, Inter alia, have prayed for a declaration that Section 3(2) of the Bihar Electricity Duty Act, 1948 (Bihar Act 36 of 1948) (hereinafter to be referred to as the said Act is ultravires the Constitution.

2. The fact of the matter lies in a very narrow compass.

The Petitioner generates electrical energy for consumption in its own factory allegedly owing to shortage in supply of electrical energy by the Bihar State Electricity Board.

According to the Petitioners, it also sup-plies under the direction of the State of Bihar, a part of the electrical energy generated by it to the Railway Administration. It is, however, not a sanction holder within the meaning of Section 28 of the Indian Electricity Act, 1910,

3. The Petitioners questioned the vires of Section 3(2) of the Act inter alia on the ground that the State had no jurisdiction to levy electricity duty which is in the nature of excise in view of Entry 84 List. I of the 7th Schedule of the Constitution of India.

4. The Petitioners further contended that in any event as in terms of Section 3(2) of the Act, certain exemptions have been provided to the Establishments mentioned therein, but as the exemption for payment of duty either in whole or any part have not been granted to the Petitioner, the same is ultravires Article 14 of the Constitution.

5. At the time of admission, by an order dated 3.12.1990 the contention of the Petitioners with regard to the lack of competence of the State Legislature to enact the said Act was rejected in view of a decision of the Supreme Court in *The Jiyajeerao Cotton Mills Ltd. Vs. State of Madhya Pradesh*, and this application was directed to be heard inter alia on the question as to whether the said Act is ultravires Article 14 of the Constitution of India or not.

6. Mr. S. Pal, learned Counsel appearing on behalf of the Petitioner submitted that whereas by reason of Clauses (a), (b) and (d) of Sub-section (2) of Section 3 of the Act, total exemption from payment of electricity duty has been granted to the persons named therein, partial exemption has been granted to the licensees in D.V.C. as envisaged in clause "c" and "e" thereof. It was submitted by the learned Counsel that the State even in the matter of exemption from payment of tax cannot make any discrimination except on discernible reasons and/or valid classifications.

7. learned Counsel in this connection has submitted that the State in its return has not mentioned any reason as to how and in what manner captive producers of electrical energy like the Petitioners has been denied the privilege of exemption from payment of electricity duty whereas the persons similarly situated, namely the licensee or the D.V.C. were so exempted.

According to the learned Counsel, the Petitioners being similarly situated with those of the other producers was entitled to grant of exemption from payment of electricity duty.

Learned Counsel further submitted that the very fact that in terms of Sub-section (2) of Section 4 of the Act, a licensee is entitled to recover from the consumer the amount which falls to be paid by it as duty in respect of energy sold to the consumer, goes to show that the object of the Act was that even the licensee is entitled to recover the amount of fee from the consumers to the extent the same was sold to them.

8. learned Counsel in this connection has strongly relied upon *State of Rajasthan Vs. Mukanchand and Others*, ; *Motor General Traders v. State of Andhra Pradesh* reported in AIR 1984 SC 121; *Rattan Arya and Others Vs. State of Tamil Nadu and Another*, .

Learned Counsel also relied upon *Khas Karanpura Collieries Ltd. and Others Vs. State of Bihar and Others*, ; *Umesh Chandra Sinha Vs. V.N. Singh and Others*, and *Annapuran Match Industries, Cudapah Vs. The Union of India and Another*, .

9. learned Counsel next contended that the Petitioners had been by mistake paying the surcharge on electricity duty in terms of Section 3A of the said Act, although prior to the amendment carried out in Section 3A thereof, by reason of Act No. 2 of 1990 which came into force with effect from 30th January, 1990, the Petitioner was not required to pay any surcharge.

According to the learned Counsel, thus, a sum of Rs. 7,55,595/- has been paid

by the Petitioner to the Respondent as would be evident from Annexure-4 to the writ application.

10. It appears that the Petitioners had been paying the surcharge in terms of the amendment carried out in the year 1985 with effect from 1.8.1985 in terms of Section 3A of the Act which was inserted by Bihar Act No. IV of 1985 with effect from 1.8.1985 and has stopped payment of such sum only on 7.4.1987. According to the learned Counsel, the Petitioners are entitled to refund of the aforementioned sum of Rs. 7,55,595/-.

11. learned Counsel next contended that the Petitioner is also entitled to a writ of certiorari for quashing the order of demand contained in Annexure 8 to the writ application whereby a penalty for a sum of Rs. 21,632.15 was imposed.

According to the Petitioner, it was given a notice to show cause on 20th July, 1990. (Annexure-5) as also the notice dated 24.8.-1990 as contained in Annexure-6. The Petitioner disputed his liability to pay any surcharge.

12. According to the Petitioner 10.9.90 was the date fixed for hearing in the said matter and on that date the Petitioner intended to deliver a letter dated 8.9.1990 to Respondent No. 2 but as on 10.9.1990 a bandh was observed the Petitioner's representative could not attend the court of Respondent no 2 and on 12.9.1990 the aforementioned letter dated 8.9.90 as contained in Annexure-7 was delivered. But despite the same, by the impugned order dated 22.9.1990, the Petitioner was informed that a sum of Rs. 21,632.15 has been levied upon him by way of penalty.

13. Mr. Pal contended that from a perusal of the impugned order of penalty which is contained in Annexure-12 to the rejoinder filed by the Petitioner to the counter affidavit of the State, as also from a perusal of the impugned order dated 22.9.1990 as contained in Annexure-8 to the writ application, it would appear that the authority found that no surcharge was payable by the Petitioners. According to the learned Counsel if no surcharge is payable by the Petitioners, the question of imposing any penalty does not arise. It was further submitted that no reason has been assigned as to why the penalty should be imposed.

In this connection, learned Counsel has referred to Hindustan Steel Ltd. Vs. State of Orissa,

14. learned Counsel next contended that many event, Respondent No. 2 is not the prescribed authority to impose such a penalty within the meaning of Rule 11A of the Bihar Electricity Duty Rules.

15. In this case, a counter affidavit has been filed. In the said counter affidavit, as indicated hereinbefore, no statement has been made as to why the captive producers of electrical energy have not been granted any exemption from payment of duty.

16. However, with regard to the imposition of penalty by reason of Annexure-8 to

the writ application, it was submitted that the Petitioner was given previous notice also but it did not appear. It was further stated that on 10.9.90 a partial bandh was observed and as such the representative of the Petitioner could have attended the office of the Respondent No. 2.

17. In view of the rival contentions aforementioned, the following questions arise for consideration in this application:

1. Whether the Petitioner has been discriminated against in the matter of exemption from payment of electricity duty?
2. Whether the Petitioner is entitled to a direction of this Court directing the Respondents to refund a sum of Rs. 7,55, 595/- deposited by the Petitioner by way of surcharge in terms of Section 3A of the Act?
3. Whether in the facts and circum-stances of this case, a penalty should have been imposed upon the Petitioner by Respondent No. 2 in terms of Section 5A of the said Act?

Re. Question No. 1:

18. The said Act was enacted for levy of duty on the sales and consumption of electrical energy in the province of Bihar as it appears from the preamble thereof

Section 2 (a) defines consumer as meaning any person who is supplied with energy by a licensee.

"Energy" has been defined in Section 2(b) of the said Act as meaning "electrical energy when generated, transmitted, supplied or used for any purpose except the transmission of a message.

"Licensee" has been defined in Section 2(c) which means a person who has obtained sanction u/s 28 of the Indian Electricity Act to engage in the business of supplying energy.

Section 3 of the Act reads as follows:

Incidence of duty. (1) There shall be levied and paid to the State Government on the units of energy consumed or sold, excluding losses of energy in the transmission and transformation, a duty at the rates specified in the First Schedule:

Provided that no duty shall be leviable on units of energy:

(i) consumed by the Central Government or sold to the Central Government for consumption by that Government;

(ii) consumed in the construction, maintenance, or operation of any railway by the Central Government or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction maintenance or operation on any railway;

(iii) consumed by the licensee in the construction, maintenance and operation of his electrical undertaking;

(iv) consumed by or sold by any class of persons exempted from payment of duty u/s 9;

(v) consumed by, or in respect of, or sold for consumption in any:

(a) mine, as defined in the Indian Mines Act, 1923.

(b) industrial undertakings;

except to the extent specified in the Second" Schedule;

(vi) consumed for any purpose which the State Govt, may, by notification, in this behalf declare to be a public purpose and such exemptions, may be subject to such conditions and exceptions if any, as may be mentioned In the said notification.

(2) When a licence holds more than one licence, duty shall be payable separately in respect of each licence.

Section 3A was inserted by Bihar Act No. 4 of 1985 which came into force with effect from 1.8.1985; by reason whereof a provision for imposition of surcharge was made.

Section 3A reads as follows:

3A. Surcharge. - (i) Subject to the provision of Clauses (a), (b) and (c) of Sub-section (2) of Section 3, every licensee shall pay in addition to the duty payable under Sub-section (I) of Section 3, surcharge at the rate of two paise per unit of energy consumed on sold.

(2) Notwithstanding anything to the contrary contained in this Act, no licensee who is liable to pay surcharge shall be entitled, to collect the amount of this surcharge as such from the consumer.

(3) All provisions of this Act and the Rules framed thereunder, relating to the payment, assessment, recovery and refund of the duty shall also apply to the payment, assessment, recovery and refund of the surcharge.

Section 4 provides for payment of duty by a licensee. In terms of Sub-section (1) of Section 4, however, licensee is liable to payment of electricity duty at the time and in the manner prescribed on the units of energy consumed by him or sold by him to the consumer.

In terms of Sub-section (2) of Section 4, however, the licensee is entitled to recover the amount which falls to be paid by him as duty in respect of the energy sold to the consumer.

Sub-section (4) of Section 4, however, provides that every person including any Department of the State of Bihar other than a licensee who generates energy for

his own use or for the use of his employees, or partly for such use and partly for sale, shall pay every month at the time and in the manner prescribed the proper duty payable u/s 3 on the units of energy consumed by him or his employees or sold by him.

Section 5A provides power to impose pen-alty for failure to furnish returns or pay duty:

(1) If any licence or other person who is liable to pay duty under Sub-section (4) of Section 4, fails, without any reason-able cause to furnish returns or to pay the duty due according to such returns, within fifteen days from the expiry of the due date, the prescribed authority may direct that such licence or other person shall pay, in addition to the amount of duty payable by him, by way of penalty, a sum not exceeding five rupees for every day for which the default continues.

(2) Any penalty imposed under Sub-section (1) shall be without prejudice to any punishment that may be imposed under the provision of clause (a) of Section 8.

By reason of Section 9, exemption can be granted to any person or class of persons, notified in this behalf from the duty payable under this Act and such exemptions may be subject to such condition and exceptions, if any, as may be mentioned in the said notification.

19. From the preamble of the Act, there-fore, it is evident that levy of a duty "is not only on sale but also consumption of electrical energy. Sub-section (1) of Section 3 of the Act provides that a duty shall be levied and paid to the State Government on the units of energy consumed or sold including loss of energy in transmission and transformation.

The duty at the rates specified in the schedule of Sub-section (1) of Section 3 however is subject to Sub-section (ii) thereof.

In terms of Sub-section (ii) of Section 3 of the Act, no duty is leviable on units of energy consumed by the Government of India or sold to Govt. of India for consumption in the construction, maintenance or operation of any railway.

20. The aforementioned classes of consumers, therefore, enjoy total exemption from payment of any electricity duty subject to the conditions and limitations specified therein By reason of clauses "c" and (sic) of Sub-section (2) of Section 3, the consumption by a license for the construction, maintenance and operation of his eletrical under a king and consumption of electrical energy to the extent of con-sumption have been exempted.

21. The electricity duty imposed in terms of the said Act is a "tax" and not a "fee". As noticed hereinbefore, in Jiyajeerao Cottos "Mills (supra), it was held by the Supreme Court that the State had the requisite legislative competence to enact the said Act, payment of electricity duty is a tax and is, there-fore, imposed under the authority of law.

22. It is now well known that power of the State to classify for the purpose of

taxation is of wide range and flexibility The State has a right to select a person or object it would tax and a Statute would not be up to a tax on the ground that it taxes some person or objects and not others.

Article 14 of the Constitution of India is not readily invoked for the purpose of holding that a tax imposed is discriminatory in as much as thereby only a class of persons has been taxed. A tax, thus, imposed upon the consumption and sale of electrical energy upon a person subject to the exemption granted therein has also to be viewed from the angle.

23. In Video Electronics Pvt. Ltd. and Anr. v. State of Punjab and Anr. reported in (1990) 3 SC 87 it was held:

Concept of economic barrier must be adopted in a dynamic sense with changing conditions. What constitutes an economic barrier at one point of time often ceases to be so at another point of time it will be wrong to denude the people of the state of the right to grant exemptions which flow from the plenary powers of legislative heads in List II of the Seventh Schedule of the Constitution. In a federal polity, all the States having powers to grant exemption to specified class for limited period such granting of exemption cannot be held to be contrary to the concept of economic unity. The contents of economic unity by the people of India would necessarily include the power to grant exemption or to reduce the rate of tax in special cases for achieving the industrial development or to provide tax incentives to attain economic equality in growth and development. When all the States have such provisions to exempt or reduce rates the question of economic war between the States inter se or economic disintegration of the country as such does not arise. It is not open to any party to say that this should be done and this should not be done by either one way or the other. It cannot be disputed that it is open to the States to realise tax and thereafter remit the same or pay back to the local manufacturers in the shape of subsidies and that would neither discriminate nor be hit by Article 304(1) of the Constitution. In this case and as in all constitutional adjudications, the substance of the matter has to be looked into to find out whether there is any discrimination in violation of the constitutional mandate.

Article 14 enjoins upon the State to treat every person equal before the law while Article 304(a) enjoins upon the State not to discriminate with respect to imposition of tax on imported goods and the locally made goods. The Petitioners made reference to several decisions of this Court, namely, H. Anraj v. Government of Tamil Nadu, Indian Cement v. State of Andhra Pradesh Weston Electronics v. State of Gujarat West Bengal Hosiery Assn v. State of Bihar wherein it has been reiterated that difference in rates of sales tax is hit by Articles 301 and 301 but the said conclusion, were arrived at in the context of a controversy not in the present form and the question of exemption as such did not arise in these cases, as explained later. These cases were not at all concerned with granting of exemption to a special class for a limited period on specific conditions of maintaining the general rate of tax on the goods

manufactured by all those producers in the State who do not fall within the exempted category at par with the rate applicable to imported goods as we have read these cases. Hence it was not necessary in those decisions to consider the problem in its present aspect. If, however, the said power is exercised in a colourable manner intentionally" or purposely to create unfavourable bias by prescribing a general lower rate on locally manufactured goods either in the shape of general exemption to locally manufactured goods or in the shape of lower rate of tax, such an exercise of power can always be struck down by the courts. That is not the situation in the instant cases. The aforesaid decisions, therefore, are not authorities for the general proposition that while maintaining the general rate at par, special rates for certain industries for a limited period could not be prescribed by the States.

24. In *Sri Krishna Das Vs. Town Area Committee, Chirgaon*, it was held:

The contention that the tax is discriminatory in view of the exemptions granted to some of the products and to those that enter the TAC by rail or motor transport is equally untenable. It is for the legislature or the taxing authority to determine the question of need, the policy and to select the goods or services for taxation. The courts cannot review these decisions. In paragraph 16 of the counter affidavit, the TAC tried to explain the reason for not taxing salt, sugar and rice stating that they were not local produce but were imported from distant places and that the tax was levied only on the local produce which came from the neighbouring places. Courts cannot review the wisdom or advisability or expediency of a tax as the court has no concern with the policy of legislation, so long as they are not inconsistent with the provisions of the Constitution. It is only where there is abuse of its powers and transgression of the legislative function in levying a tax, it may be corrected by the judiciary and not otherwise. Taxes may be and often are oppressive, unjust, and even unnecessary but; this can constitute no reason for judicial interference. When taxes are levied on certain articles or services and not on others is cannot be said to be discriminatory colley observes : "Every tax must discriminate; and only the authority that imposes it can determine how and in what direction". The TAC having decided to impose weighing dues on the goods mentioned in the bye-laws it is not for the court to question it on the ground that some similar commodities or commodities arriving by rail or road were not subjected to the tax.

25. In *Express Hotels Private Ltd. Vs. State of Gujarat and Another*, , the Supreme Court held that luxury tax which has been levied on ser-vices for lodging is not ultrarvires Article 14 of the Constitution.

26. In *Ranchi Wine Dealers Welfare Association and Ors. v. State of Bihar and Ors.* reported in 1991 B.B.C.J. 129. : 1991 (1) PLJR 161 a Division Bench of this Court, of which was a member, held:

Recently, the Supreme Court in *Federation of Hotel and Restaurant v Union of India* : AIR 1990 SC 637 observed;

A taxing statute is not per se a restriction on the freedom under Article 19(1)(g). The policy of a tax in its effectuation might of course, bring in some hardship in some individual cases. But that is inevitable so long as law represents a process of abstraction from the generality of cases and reflects the highest common factor.

in that case it was further held that a taxing statute although is not outside the purview of Article 14 but the same having regard to wide variety of diverse economic criteria that go into formulation of a fiscal policy in which it has a wide latitude in the matter of selection of persons, subject matter and funds etc. for taxation. The tests of vice of discrimination in a tax law are accordingly less rigorous. The policy decision in respect of minimum guaranteed quota whereby the State intends to increase its revenue. in our opinion, would also come within the purview of the aforementioned dictum of the Supreme Court. In such a situation, in our opinion, the policy decision of the State can neither be said to be arbitrary or discriminatory so as to attract the provisions of Article 14 of the Constitution of India.

27. Judged on the touchstone of the decisions of the Supreme Court, it is evident that whereas Clauses (a) and (b) of Sub-section (2) of Section 3 grants exemption to any Railway company etc. form a class by itself. As noticed hereinbefore so far as clause (d) of Sub-section (2) of Section 3 is concerned, the same provides for a grant of power to the State of Bihar to exempt any person from payment of duty. Such a power is quasi-legislative in character. Clauses "c" and "d" merely grant exemption to the licensees and D.V.C. which are also classes by themselves. A licensee is a person who has been granted a licence in terms of Part 11 of the Indian Electricity Act to supply energy or a sanction holder within the meaning of Section 28 thereof which is also engaged in the business of supply of electrical energy.

28. The licences granted to the licensees under the provisions of Indian Electricity Act, 1910 are subject to the regulations contained in the said Act. The State, thus, cannot be said to have committed an illegality in specifying the licensees as a separate class inasmuch as he is supplying and/or selling electrical energy to the consumers and, thus, it cannot be proper to subject it to levy of duty even in respect of the consumption of energy for the construction, maintenance and operation of his electrical undertaking.

29. Construction, maintenance and operation of an electrical undertaking by a license for bulk production and bulk sale to the consumers certainly would stand on a different footing.

30. So far as D.V.C. is concerned, it has been constituted and incorporated in terms of the provisions of D.V.C. Act, 1956.

Damodar Valley Corporation which thus produces electrical energy in bulk and sells electrical energy to different consumers is a class by itself. Such classification made by reason of Sub-section (2) of Section 3, therefore, appears

to be reasonable and valid.

31. Mr. Pal has not disputed that the Petitioner being not a licensee, it cannot claim the same benefit as that of a licensee or any other organization. He, however, submitted that such classification must be found on a equitable differentia and such differentia must have rational relation as to the object sought to be achieved by the Statute or the concerned statutory provision.

32. Supply of electrical energy to a consumer like the Central Government and/or Railway Company for their entire captive consumption must be held to stand on a different footing. Central Government or the Rail-way companies are not producers of electrical energy but merely consume the same. They carry out activity in public interest and for the benefit of the public at large. So far as the persons who have been granted exemption by the State of Bihar in terms of Section 9 is concerned, they may also stand on a different footing.

33. While granting such exemption, the State must take into consideration various relative factors. The exemption granted u/s 9 is not automatic but depends on exercise of such jurisdiction by the State of Bihar if in its opinion, consumption by a producer of electrical energy is entitled thereto. However, such an order has to be passed subject to the conditions which may be imposed thereby.

34. It is not the case that the Petitioner applied for exemption from payment of duty in terms of Section 9 of the Act and the same was refused by the State.

So long it does not say that the State should also exempt it from the payment of duty u/s 9 of the Act, challenge of the vires of Sub-section (2) of Section 3 on the ground of discrimination per se is not available to the Petitioner.

35. As indicated hereinbefore, even a licensee or Damodar Valley Corporation has not been given part exemption whereas licensee has been given part exemption with regard to the consumption of electrical energy for construction, maintenance and operation of electrical undertaking; Damodar Valley Corporation has been granted exemption only in respect of its consumption for generation, transmission and distribution. It is evident that the functions of licensee under the Indian Electricity Act and the Damodar Valley Corporation under the Damodar Valley Corporation Act, as indicated hereinbefore, are to carry out public utility services and it cannot be said that if it has been granted exemption from payment of electricity duty by the Legislature in respect of matters enumerated hereinbefore," such classification is not based on intelligible differentia nor can it be said that such differentia has no rational relation to the object sought to be achieved by the Statute.

36. It is now well known that constitutionality of a Statute is to be presumed and the burden of proof is upon a person who questions the constitutionality thereof on the ground that the same is discriminatory in nature.

37. In my opinion, the Petitioner has failed to make out a case that Section 3

(2) of the Act is ultravires Article 14 of the Constitution.

38. Sub-section (4) of Section 4 of the Act is an independent provision. The same although is a part of Section 4, it embraces within its fold all persons except the licensee. It is interesting to note that even a department of the State Government has not been given ex-emption from payment of duty although it may also generate electrical energy for its own use of its employees, or partly for its own use and partly for sale.

39. It is well known that the Statute has to be read as a whole and thus Sub-section (4) of Section 4 of the Act cannot be read as a meaning that electricity duty is payable only by a person who sells electrical energy.

40. The Legislature in its wisdom in inserting Sub-section (4) of Section 4 has contemplated a situation like the Petitioner which generates electrical energy not only for his own use but also sale to other consumers. In the event it intends to have any power to recover the same from the consumers in respect of the energy sold to him it has to be licensee as envisaged under clause "c" of Section 2 of the Act, in this view of the matter, I am of the view that Section 3(2) of the Act cannot be struck down on the ground of discrimination. The decisions cited by the learned Counsel are of no assistance in this case.

41. In *Umesh Chandra Sinha v. V.N. Singh and Ors.* reported in AIR 1968 Patna 3, a Full Bench was considering the vires of an Ordinance whereby seats were reserved for the children of University employees and in that case the relevant provisions of the Ordinance were struck down on the ground that there was no reasonable nexus between the object intended to be achieved by the Ordinance on the one hand and the principle on which the children of the employees of the University are selected for preferential treatment on the other.

42. In *Khas Karanpura Collieries Ltd. and Others Vs. State of Bihar and Others*, , a Full Bench of this Court was considering the question raised at the instance of the State about the vires of the provisions of Section 30A of the Mines and Minerals (Regulation & Development) Act and it was held that on the preamble and on reading Section 30A, it was quite clear that in the provisions of Section 30A no discrimination whatsoever was involved.

43. In *Annapurna Match Industries, Cuddapah v. Union of India and Anr.* reported in 1971 A.P. 69, a Division Bench of the said High Court was considering the question of vires of notification dated 30.4.66 and it was held that exposing the factories of the same category to a higher rate of excise duty on the more circumstance of the licencees of such factories as having applied for before or after 1.4.1964 is wholly unrelated to the objects of the Act. It was further held that clause 4 and 6 of the proviso resulted in imposition of higher duty on factories similarly placed and authorised the executive to treat them differently and on that ground the same was struck down as ultravires.

44. It may be mentioned that in *D.G. Gose and Co. (Agents) Pvt. Ltd. Vs. State*

of Kerala and Another, . the Supreme Court upheld the validity of choice of April 1, 1973 as the date of imposition of the building tax. It was held that choice of a date as a basis for classification cannot always be, dubbed as arbitrary even if any particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances.

45. At the cost of the petition it may be mentioned that a law imposing tax cannot be struck down on the ground that the result of the taxation is to impose unequal burdens on different persons. It is also well known that in the matter of Taxation Laws the court permits a greater latitude to the discretion of the Legislature. In such matters, the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if the same was not unreasonable.

46. In Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, it was held:

Besides the Legislature which is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate; vide Raja Jagannath Baksh Singh Vs. The State of Uttar Pradesh and Another, It would be idle to contend that a State must tax everything in order to tax something. In tax matters, the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.

It is, of course, true that the validity of tax laws can be questioned in the light of the provisions of Articles 14, 19 and Art 300 if the said tax directly and immediately imposes a restriction on the freedom of trade; but the power conferred on this Court to strike down a taxing statute if it contravenes the provisions of Articles 14, 19 or 301 is to be exercised with circumspection bearing in mind that the power of the State to levy taxes for the purpose of governance and for carrying out its welfare activities is a necessary attribute of sovereignty and in that sense it is a power of paramount character. In what cases a taxing statute can be struck down as being unconstitutional is illustrated by the decision of this Court in Kunnathath Thathunni Moopil Nair Vs. The State of Kerala and Another, . In that case, a careful examination of the scheme of the relevant provisions of the Travancore-Cochin Land Tax Act No. 15 of 1955 satisfied this Court that the said Act imposed unreasonable restrictions on the fundamental rights of the citizens, conferred unbridled power on the appropriate authorities, introduced unconstitutional discrimination and in consequence amounted to a colourable exercise of legislative power. It is in regard to such a taxing statute which can properly be regarded as purely confiscatory that the power of the Court can be legitimately invoked and exercised. In our opinion, it would be idle to suggest that a tax imposed by the Act in the present case should be struck down because it has taxed only tea and jute.

47. In Manna Lal and Another Vs. Collector of Jhalawar and Others, , a Constitution Bench of the Supreme Court upheld the validity of Rajasthan Public Demands Recovery Act whereby a special facility for the recovery of the dues

was given to the Government as a Banker.

48. In view of the decision of the Supreme Court in *Jiyajee Rao Cotton Mill Ltd.* (supra), it is clear that the State has power to levy electricity duty in view of Entry 53 of List II of the Constitution of India, the word "consumption" according to the Supreme Court, should be accorded the meaning which it had under various Electricity Acts including Indian Electricity Act, 1910.

The Supreme Court held:

If we read the two definitions together, omitting the non-essentials, consumer would include "any person who consumes electrical energy supplied by a person who generates electrical energy for his own consumption"

The Supreme Court further held:

But the word "consumption" has a wide meaning. It means also "use-up" "spend" etc. The mere fact that a series of laws were concerned only with a certain kind of use of electricity that is consumption of electricity by persons other than the producer cannot justify the conclusion that the British Parliament in using the word "consumption" in Entry 48-B and the Constituent Assembly in Entry 53 of List II wanted to limit the meaning of "consumption, in the same way. The language used in the legislative entries; in the Constitution" must be interpreted in a broad way so as to give the widest amplitude of power to the Legislature to legislate and not in a narrow and pedantic sense.

49. Thus this case squarely falls within the purview of decision of the Supreme Court in *Ramakrishna Dalmia* (supra); in *Khyerbari Tea Co.* (supra) and in *Manna Lal and Anr.* (supra). There cannot be any doubt that exemptions has been granted to the authorities and the departments mentioned in Sub-section (2) of the Act stand on a different footing and the classification so made is based upon reasonable differentia and there are also discernible reasons therefore which is evident from the face of the law.

50. Thus even if the State in its return has not brought in any circumstance to justify the classification, the same, in our opinion, is wholly immaterial as the reasonable differential with regard to the classification of persons in whose favour exemption has been granted is apparent on the face of the Legislation.

51. It is also relevant that even if Section 3(2) of the Act is struck down, the Petitioner shall not benefit thereby. This Court, in exercise of its jurisdiction under Articles 226 of the Constitution cannot also give any direction to the State to make necessary legislation. The Supreme Court in *State of Himachal Pradesh and Another Vs. Umed Ram Sharma and Others*, quoted with approval Benjamin N. Cardozo in "The Nature of Judicial Process" as under:

The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.

He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.

52. It is true, as has been suggested by Mr. Pal that the State has the power to grant exemption u/s 9 so as to enable it to carry out its duty to see that Article 14 is not violated.

53. For exercise of such a power, the State must have materials before it so that it may take into consideration the difficulties faced by a particular consumer or a purchaser in the matter of payment of electricity duty. Such materials were required to be placed by the Petitioner by making a representation in that behalf before the State. The Petitioner evidently as noted hereinbefore has not filed any such application nor did it bring any material to show as to how it has become entitled to an order of the State granting exemption to it either wholly or in partially.

For this purpose, as noticed hereinbefore, materials have to be placed before the State Government.

54. It is not a case where the State must exercise its power u/s 9. It does not have any statutory duty to grant exemption to each and every person who ask for it. This discretion to exempt any person from payment of electricity duty applies to those persons which in its opinion are so entitled. Such exercise of jurisdiction is quasi legislative in character and not executive in character. Determining the choice of priority and formulating perspective thereof is matter of policy.

A court of law is not the forum where the conflicting claims of priorities or policies should be debated. See the observation of the Supreme Court in *B. Krishna Bhat v. Union of India* 1990 (2) U.J. (SC) 198 .

55. In this view of the matter, in my opinion, it cannot be held that Section 3(2) of the Act is ultravires Article 14 of the Constitution.

Re. Question No. 2:

Admittedly Section 3A of the Act was amended with effect from 30th January, 1990. Before that date, therefore, there was no occasion for the Petitioner to pay any surcharge. The Petitioner has paid a surcharge to the extent of Rs. 755596.86 during the period August, 1985 to March, 1987. It is entitled to the refund thereof.

56. In paragraphs 14 and 15 of the writ petition, the Petitioners have stated as follows:

The Respondent No. 2 by a letter dated 28th of November, 1985, purported to direct your Petitioners to pay surcharge at the rate of 2 paise per unit with effect

from 1st of August, 1985 alleging that your Petitioners were covered by the said Section 3A introduced by the Bihar Finance Act, 1985.

Your Petitioner No. 1 by a letter dated 18th of March, 1986 disputed its liability to pay any surcharge on the ground that it was not a licensee within the meaning of the said Act. Ultimately, however, your Petitioner No. 1 started paying the surcharge demanded under protest and continued to do so between August, 1985 and March, 1987.

57. It is, therefore a clear case where the Petitioner made payment of surcharge by mis-take and under protest. It made payment although it did not have any statutory liability therefor. A tax cannot be realized from a person in view of Article 265 of the Constitution of India unless he is liable to do so under a Statute.

58. Realization of illegal tax amounts to deprivation of property within the meaning of Article 300A of the Constitution of India In this situation, the Respondent must be directed to refund the aforementioned sum of Rs. 755596.86 ps. to the Petitioner at an early date and preferably within a period of one month from the date of receipt of a copy of this order.

59. Re Question No. 3:

From a perusal of order dated 10.9.1990, it would appear that penalty was imposed only because no representative of the Petitioner attended on that date. It has been contended on behalf of the Petitioner, which fact has not been disputed, that 10th September was being observed as a Buudh. Although it has been stated in the counter affidavit that the bandh was merely partial, it must be held to be a reasonable ground for the Petitioner for not being able to attend the hearing. Further imposition of penalty is quasi criminal in nature. Thus it was obligatory on the part of Respondent No. 2 to state the reason as to why he thought it fit to impose penalty upon the Petitioner.

60. In Hindustan Steel Ltd. Vs. State of Orissa, , it was held that the discretion to impose penalty must be exercised judicially. It was further held that penalty would" ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest; or acted in conscious disregard of its obligation. But not in case where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

In that case, it was held that no case for imposition of penalty has been made out

61. Recently in Nirmat Ram Pujara and Ors. v. The Agricultural Produce Market Committee and Anr. reported in 1990 BLT 416, this Court following the decision of the Supreme Court in Hindusthan Steel's case (supra) held that penalty should not be levied only because it is lawful to do so.

62. The Petitioner should have been given an opportunity of hearing before a penalty could have been levied or before order dt. 10.9.90 could have been given effect to inasmuch as from a perusal of Annexure-8 it is evident that no tax was imposed which evidently means that the Petitioner was not liable to pay any surcharge for the months of February and March and in that view of the matter, the question of payment of any penalty might not have arisen in this view of the matter, Annexure-8 cannot be sustained and is accordingly quashed.

Respondent No. 2 is, therefore directed to pass a fresh order after giving an opportunity of hearing in accordance with law.

63. At the time of admission, by order dt. 3.12.90, the Petitioner was directed to deposit the amount of penalty and it was further observed that if the said amount is deposited, the Bench hearing the application may consider the desirability of grant of interest on the said amount at the time of hearing.

64. in view of the fact that the after is being remitted to Respondent No. 2 for fresh hearing on the question as to whether penalty should be imposed upon the Petitioner or not, "it is made clear that in the event it is held that no penalty is payable by the Petitioner the amount of Rs. 21,632.15 deposited by the Petitioner shall be refunded to it together with interest @ 6% per annum from the date of deposit till the date of actual refund.

65. In the result, this application is allowed in part. Annexures 8 and 12 are quashed. However, there will be no order as to costs.

R.N. Sahay, J.

66. I agree