

(1991) 07 DEL CK 0017

In the Delhi High Court

Case No : C.W.P. No. 2422/90 and others

Parekh Prints

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 09-07-1991

Acts Referred:

Citation : (1991) 45 DLT 456 : (1992) 37 ECC 78 : (1991) 36 ECR 167 : (1992) 62 ELT 253 : (1992) ILR Delhi 304

Hon'ble Judges : Dalveer Bhandari, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : Shri D.D. Thakur, G.L. Sanghi, B.R. Kapoor, R.K. Kapur, Sanjay Bhartari, N. Ganapathy, K.C. Dua and Vishnu Mathur, for the Appellant; Shri M. Chandrasekharan, A.S.G. and Ms. Savitha Sharma, S/Shri Pradeep Jain, H.S. Phoolka and Madan Lokur, for the Respondent

Judgement

D.P. Wadhwa, J.—In this batch of writ petitions numbering over 50, the petitioners who claim to be job processors doing the job work of cotton/man-made fabrics (supplied to them by wholesale traders on contract basis and returning the same in the shape of colour printing, dying, etc. as per the design requirements of the wholesale traders) challenge the levy of additional duties of excise under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (for short "the Act"). In fact they challenge the very validity of the Additional Duties Act. The petitioners want this court to issue an appropriate writ or direction restraining the respondents from levying and collecting the additional duties of excise which levy they say is ultra virus Article 366(29A) read with Articles 246 and 274 of the Constitution and the petitioners also seek quashing of the notifications dated November 25, 1987 (No. 254/87), December 9, 1987 (Nos. 260 to 262/87), January 19, 1988 (Nos. 4-5/88) and March 20, 1990 (Notifications No. 47/90 and 48/90) issued under the Central Excises and Salt Act, 1944 (for short the Central Excise Act) being ultra virus Article 274 of the Constitution. The challenge to these notifications was, however, given up since the petitioners said they were in fact challenging the constitutional validity of the

Additional Duties Act itself. Petitioners say that the additional duty of excise has been levied in lieu of sales tax which is State subject falling in Entry 54 of List II of the Seventh Schedule to the Constitution. They say the Union of India could not interfere with a subject falling under the State List (List II) and since the Additional Duties Act was enacted by Parliament in lieu of sales tax, the said duty of excise was ultra virus the provisions of the Constitution. They then say that since under Article 265 no tax could be levied or collected except by authority of law and since that authority was lacking, the Additional Duties Act is invalid and further that the notifications issued there under or under the Central Excise Act are again ultra virus the provisions of Article 274 of the Constitution which requires prior recommendation of the President to bills affecting taxation in which States are interested before it is introduced or moved in either House of Parliament.

2. The respondents refute the challenge to the validity of the Additional Duties Act and say that the enactment is relatable not to Entry 54 of the State List but to Entries 84 and 97 of the Union List (List I) of the Seventh Schedule to the Constitution. They say it has been so held even by the Supreme Court and earlier when the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980, was challenged in the Supreme Court in *Ujagar Prints Vs. Union of India (UOI)*, , the, petitioners never raised any challenge to the validity of the Additional Duties Act though nothing debarred them from doing so. This in brief is the controversy involved in these cases. On facts there is no dispute and there could not be any in the circumstances of the case.

3. As a matter of fact the arguments of the petitioners have gone back and forth. At one stage they said that they would not challenge the constitutional validity of the Act inasmuch as it had been introduced in the Parliament on the recommendation of the President and that the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980, was unconstitutional as it was not introduced in Parliament on the recommendation of the President inasmuch as under Article 274 no bill or amendment which imposed or varied any tax or duty in which States were interested could not be introduced or moved in either House of Parliament except on the recommendation of the President. The impugned notifications were challenged on similar grounds but with an added emphasis that here the tax was varied by an executive order and not by an enactment passed by the Parliament on the recommendation of the President and thus even otherwise bad under Article 274. It was also submitted that the impugned notifications has grouped the different headings and sub-headings together under the Central Excise (Tariff) Act, 1989, which amounted to amendment of the Schedule to the Act and could not be done by an executive order. The argument proceeded that Schedule could be amended only by Parliament. All these arguments were, however, not pressed and the arguments ended up by saying that the challenge was only to the constitutional validity of the Act itself. It may be noticed here itself that under Article 255 of the Constitution, no Act of Parliament and no provision in any such Act shall be

invalid by reason only that some recommendation as required by the Constitution to be given by the President was not so given, if assent to that Act was given by the President.

4. Part XI of the Constitution deals with relations between the Union and the States. In this, Chapter I deals with legislative relations one of these being the distribution of legislative powers. Various Articles in this Chapter tell us the respective powers of the Parliament and the State Legislatures to make laws. There are three Lists - Union List (List I), State List (List II) and Concurrent List (List III) in the Seventh Schedule of the Constitution which contain matters respecting which laws to be made by Parliament or the Legislature of any State. Parliament has exclusive power to make any law with respect to any matter not enumerated in Concurrent List or State List (Article 248). Such power includes the power of making any law imposing a tax not mentioned in either of those Lists : Entries 84 and 97 of the Union List are as under :

"84. Duties of excise on tobacco and other goods manufactured or produced in India except -

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

"97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

Entry 54 of the State List is as under :

"Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I."

5. Though we are not concerned with Entry 92A of the Union List, it may be noted and is as under

"92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce."

6. Under Article 252 Parliament has power to legislate for two or more States by consent respecting matters which are in the State List.

7. Part XII of the Constitution deals with the Finance, Property, Contracts and Suits. We are concerned here only with Chapter I relating to Finance. Under Article 265 no tax shall be levied or collected except by authority of law. Clause (1) of Article 266 insofar as it is relevant, is as under :

"266. (1) Subject to the provisions of Article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of

India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment and of loans shall form on consolidated fund to be entitled "the Consolidated Fund of India",....."

8. Under Clause (3) no moneys out of the Consolidated Fund of India shall be appropriated except in accordance with law and for the purposes and in the manner provided in the Constitution. Article 267 deals with Contingency Fund. Then Articles 268 to 279 deal with distribution of revenues between the Union and the States. Under Article 272 Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List shall be levied and collected by the Government of India, but, if Parliament by law so provides, there shall be paid out of the Consolidated Fund of India to the States to which the law imposing the duty extends sums equivalent to the whole or any part of the net proceeds of that duty, and those sums shall be distributed among those States in accordance with such principles of distribution as may be formulated by such law. Clause (1) of Article 274, insofar as it is relevant, is as under :

"274. (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested,....., shall be introduced or moved in either House of Parliament except on the recommendation of the President."

9. Clause (2) of this Article defines the expression "tax or duty in which States are interested" and it means -

(a) a tax or duty the whole or part of the net proceeds whereof are assigned to any States; or

(b) a tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

10. Article 275 provides for grants-in-aid from the Union to certain States as may be provided by the Parliament. Article 279 defines "net proceeds" as mentioned in the earlier Articles and means in relation to any tax or duty the proceeds thereof reduced by the cost of collection. Article 280 provides for constitution of a Finance Commission and the duty of the Finance Commission to make recommendations to the President as to the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under the Chapter "Finance" and the allocation between the States of the respective shares of such proceeds, and the principles which should govern the grants-in-aid of the revenues of the States out of the Consolidated Fund of India, and any other matter that may be referred to it in the interests of sound finance.

11. If we now refer to the Act it cannot be disputed that what it levies is a Union duty of excise referable to Entry 84 of the Union List and in any case to Entry 97 of that List. The validity of the levy of additional duty of excise under the Act has

been specifically upheld by the Supreme Court in Ujagar Prints case where it is said that the additional duty under the Act is of the same nature as the Union duty of excise. It was submitted before us that in Ujagar Prints case the challenge was only to the constitutional validity of the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980. We are unable to appreciate this submission. Under Clause (a) of Section 2 of the Act, "additional duties" means the duties of excise levied and collected under subsection (1) of Section 3. Sections 3, 4 and 5 of the Act are as under :

"3. Levy and collection of additional duties. - (1) There shall be levied and collected in respect of the goods described in column (3) of the First Schedule produced or manufactured in India and on all such goods lying in stock within the precincts of any factory, warehouse or other premises where the said goods were manufactured, stored or produced, or in any premises appurtenant thereto, duties of excise at the rate or rates specified in column (4) of the said Schedule.

(2) The duties of excise referred to in sub-section (1) in respect of the goods specified therein shall be in addition to the duties of excise chargeable on such goods under the Central Excises and Salt Act, 1944, or any law for the time being in force.

(3) The provisions of the Central Excises and Salt Act, 1944, and the rules made there under, including those relating to refunds and exemptions from duty, shall, so far as may be, apply in relation to the levy and collection of the additional duties as they apply in relation to the levy and collection of the duties of excise on the goods specified in sub-section (1)."

"4. Distribution of additional duties among States. - During each financial year, there shall be paid out of the Consolidated Fund of India to the States in accordance with the provisions of the Second Schedule such sums, representing a part of the net proceeds of the additional duties levied and collected during that financial year, as are specified in that Schedule."

"5. Expenditure to be charged on the Consolidated Fund of India. - Any expenditure under the provisions of this Act shall be expenditure charged on the Consolidated Fund of India."

12. Section 6 of the Act grants power to the Central Government to make rules. Section 7, which deals with the declaration of certain goods to be of special importance in inter-State trade or commerce, has since been repealed by the Central Sales Tax (Second Amendment) Act, 1958, w.e.f. 1-10-1958 and is, Therefore, of no relevance in the present controversy before us. Thus if we examine the provisions of the Act with reference to Article 265 read with Article 272 of the Constitution it is undisputable (and in fact not disputed) that the additional duties or Union duties of excise are being levied and collected by the Government of India by authority of law and additional duties so collected are being distributed among the States in accordance with the principles of distribution as formulated by the Parliament and provided in the Act. The Act

authorises the payment of additional duties out of the Consolidated Fund of India of which these form part and charging of any expenditure under the Act on the Consolidated Fund of India.

13. Any challenge to the constitutional validity of the Act should have ended at that. Still, however, the argument proceeds that though the additional duty is the Union duty of excise yet in sum and substance it is sales tax as the additional duties were imposed in lieu of sales tax which is in the domain of the States as per Entry 54 of the State List. To buttress this argument reference has been made to resolution of the National Development Council passed in December 1956, the Objects and Reasons of the Act, First (for 1989-90) and Second (for 1990-95) Reports of the Ninth Finance Commission, and principles of distribution of additional duties among the States which are different than those of the basic duties of excise under the Central Excises and Salt Act, 1944 as provided there by the Union Duties of Excise (Distribution) Act, 1979. It was submitted before us that in "pith and substance" the Act imposes sales tax which is within the domain of the States and the Act is thus a colourable piece of legislation and unconstitutional, Parliament not having any power to make any such law. In support of these submissions reference has been made to decisions from United States, Canada, Australia and of the Supreme Court. Supplementing these arguments it is submitted further that if the additional duties was Union duty of excise why it was that it was not being merged with the basic duties of excise and the Parliament could levy tax relating to matters in the State List only under powers conferred by Article 252 and not otherwise. It is stated that no State has ever authorised the Parliament to pass any law levying of sales tax. Reference in this connection was also made to the Wild Life (Protection) Act, 1972. Legislation in respect of this Act was relatable to Entry 20 of the State List in the Seventh Schedule (now since omitted by the Constitution 42nd Amendment Act, 1976, and brought in the Concurrent List Entry 17B) relating to protection of wild animals and birds respecting which Parliament had no power to make a law in that regard applicable to the State. The Legislatures of the various States passed a resolution empowering the Parliament to make law respecting Entry 20 which resulted in passing of the Wild Life (Protection) Act, 1972.

14. We find ourselves unable to agree with the submissions of the petitioners. Once having found that additional duties of excise under the Act fall within the four corners of Article 272 of the Constitution and the meaning of the enactment being plain and clear we find no room for applying the principles of interpretation or construction to conclude that in "pith and substance" the Act imposes a sales tax and is a colourable piece of legislation. Petitioners cannot be heard to say that though the additional duty is a duty of excise, though by different name, it is yet a sales tax. The argument is a contradiction in itself. Duty of excise is imposed on the manufacture and sales tax is imposed on the sales. It is as simple as that. When the language of the statute is clear and unambiguous and is a valid piece of legislation under the Constitution, we do not have to refer to the Objects and Reasons of the enactment or to the deliberations which preceded

the introduction of the Bill and the debates in the Parliament at the time of the passing of the enactment. Even the deliberations of the Finance Commission are not material in that case. Role of the Finance Commission is defined under the Constitution. The argument of the petitioners creates a paradoxical situation that we must go to some other material in order to destroy the plain meaning of the enactment. For academic purposes one may refer to all this material but it is unnecessary to test the validity of an enactment on the basis of extraneous material where the petitioners also admit that additional duties is a Union duty of excise relatable to Entry 84 of the Union List of the Seventh Schedule to the Constitution and is a law made by Parliament. We do not find that there is any occasion in the present case to import the doctrine of "pith and substance" to a valid piece of legislation whose meaning is plain and clear and is well within the scope of the Parliament. Reasons for passing an enactment could be any and so also the motives and these could well be discernible under the circumstances but the courts cannot go into that so long as the legislation falls within the framework of the power conferred by the Constitution. We cannot take notice of the argument that the Act in effect debars the States from imposing sales tax. There is no bar to that under the Act and we cannot certainly speculate on that. Such a situation has never arisen where a State has imposed sales tax on any of the commodities under the Act and thus deprived of its share in the additional duties of excise totally or partially.

15. The Act leaves no room for doubt that it imposes duties of excise which are in addition to the duties of excise under the Act of 1944 and all provisions of 1944 Act insofar those are applicable apply to the provisions of the Act. Preamble of the Act shows that distribution of the additional duties of excise is to be as per the recommendations made by the Finance Commission appointed under Article 280 of the Constitution.

16. Distribution of additional duties of excise among the States is as per the Second Schedule of the Act (Section 4). The Schedule provides that in case if during a financial year there is levied and collected in any State a tax on the sale or purchase of the commodities to which the Act applies, no sums shall be payable to that State out of the additional duties of excise in respect of that financial year, unless the Central Government by special order otherwise directs. Such a contingency has never arisen though. But then this provision is in accordance with Article 272 of the Constitution under which the sums are to be distributed among the States in accordance with such principles of distribution as may be formulated by law. This principle that a State shall not be entitled to any share in the additional duties of excise if it levies sales tax is certainly in accordance with the principles formulated by the Parliament and is valid under Article 272 of the Constitution.

17. The question is if the levy in question is forbidden by the Constitution either expressly or by necessary implication. The answer is obvious which is "No". What Mr. Thakur wants us is to question the policy formulated by the Parliament which

is impermissible. The Constitution gives to the Parliament in specific and unambiguous terms the power to impose the additional duties of excise and to lay the guidelines for its distribution among the States. Any limitation to these powers of the Parliament, as contended, is contradictory and destructive of these very powers. We are not concerned with the effect of the Act on the States which may be incidental, collateral or otherwise insofar as the Act does not impinge upon the field of legislation of the States and is within the legislative powers of the Union. The Act certainly does not meddle with the rights of the States to impose sales tax. If the direct effect in that case is to deprive the States of their share in the additional duties of excise and acts as a deterrent on the States in imposing sales tax on the commodities under the Act, that is no ground to hold the Act unconstitutional when it is admittedly under the legislative competence and power of the Parliament.

18. During the course of arguments it did appear to us as if the petitioners are arguing on behalf of various State Governments. When we pointed out that States were not parties and no State has ever complained in any court of law questioning the validity of the imposition of additional duties of excise, an application was filed before us to implead all the States in the country as parties to this litigation. Whether in view of the Act States should impose sales tax or not is certainly their affair and we find the petitioners to be incompetent to step into the shoes of the State Governments and plead on their behalf. It is not that the petitioners are actuated by any desire to pay sales tax rather than the additional duties and for that matter are agitating the cause of the State Governments. It is just that the petitioners want to avoid payment of additional duties of excise on the specious plea that it is in effect sales tax. We find the argument of the petitioners manifestly without reason.

19. In the judgments from foreign countries which were referred to, there was a dispute if the impugned legislation there fell within the scope of power conferred by Constitution on the Federal, Central or State legislation and it was in that context that the doctrine of pith and substance was invoked. But that is not the case here. There is no dispute that the Act falls within the four corners of the power conferred by the Parliament and it is relatable to Entry 84 and in any case Entry 97 of Union List in Seventh Schedule of the Constitution.

20. In *K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa*, the court examined the precise scope and meaning of the doctrine of colourable legislation and referred to its earlier decision in *The State of Bihar Vs. Maharajadhiraja Sir Kameshwar Singh of Darbhanga and Others*, and also to *Attorney-General for Ontario v. Reciprocal Insurers and Others - 1924 A.C. 328* *Attorney-General of Alberta v. Attorney-General for Canada 1939 A.C.117* *Union Colliery Co. of Br. Columbia Ltd. v. Bryden - 1899 A.C. 580* *Cunningham v. Tomeyhomma 1903 A.C. 151*, *Re Insurance Act of Canada - 1932 A.C. 41* *Moran v. Deputy Commissioner for Taxation, New South Wales - 1940 A.C. 838* The court said that the doctrine of colourable legislation did not involve any question of bona fide or mala fide on

the part of the legislature and that the whole doctrine revived itself into the question of competency of a particular legislation (legislature ?) to enact a particular law and that if the legislature was competent to pass a particular law, the motives which impelled it to act were really irrelevant. Whether a statute is constitutional or not was, thus, always a question of power. The court then observed as under :

"In other words, it is substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers. It is said by Lefroy in his well-known work on Canadian Constitution that even if the legislature avow on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires."

21. In *The King v. Barger* and in *The Commonwealth v. McKay* - 6 C.L.R. 41 the question was if the Excise Tariff, 1906 (No. 16) was an Act imposing duties of excise or was an Act to regulate the conditions of manufacture of agricultural implements. The High Court of Australia by majority judgment (3 : 2) held that it was an Act to regulate the conditions of manufacture of agricultural implements and was, Therefore, not in exercise of power of taxation conferred by Constitution. The Court observed :

"The powers substantively granted to the Commonwealth by the Constitution may be exercised to their utmost extent and in as plenary a manner as if the Commonwealth were a unitary State, subject only to the express limitation found in the Constitution itself and to the necessary freedom of the States to exercise without interference the powers reserved to them."

22. Following observations in the dissenting judgment may also be noted :

"If a legislative power is once granted, neither its abuse, nor its consequences, nor any purpose, motive, or object of the legislature can render its exercise illegal; any remedy for abuse, so long as the limits of the power are not exceeded, must rest with the electors and not with the court."

"The objections raised to the validity of the Excise Tariff, 1906 (No. 16) on the

ground alleged that it in substance regulates conditions of remuneration of labour, are in reality objections based on abuse of power, consequences, and the purpose, motive, and object of Parliament, and are Therefore beyond the competency of the Court to entertain."

"The Excise Tariff, 1906 (No. 16) should be construed according to the natural meaning of the language used by the legislature, and should not be turned by an argument of equivalence of effect into an enactment of a totally different character."

"As the Act merely imposes Excise taxation, the Constitution is not contravened."

23. In *United States of America v. William M. Butler* - 297 U.S. 1 : 80 (L. ED.) 477, levy under the Federal Agricultural Adjustment Act for processing and floor taxes on cotton was challenged being unconstitutional of the Constitution of the United States of America on the ground that the Congress exceeded its limited powers and trespassed upon powers reserved to the States in authorising and applying the taxes under the Act. The contention was upheld and the court by majority judgment held that the Act was one regulating and controlling agricultural production and invaded reserved rights of the States. It was also held that the levy, the appropriation of the funds raised, and the direction for their disbursement were but parts of the same statutory plan to regulate and control agricultural production and they were but means to an unconstitutional end. These conclusions were based on the interpretation of the Act itself from its language as various sections specifically spelled the purpose of the enactment and the objects it sought to achieve. The Court also held that the Act did not come under the clause in the Constitution conferring upon the Congress power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defense and general Welfare of the United States...."

24. The Court also observed as under :

"The function of the courts when an act of Congress is appropriately challenged as not conforming to the constitutional mandate is merely to ascertain and declare whether the legislation is in accordance with or in contravention of the provisions of the Constitution, and not to approve or condemn its policy."

"Every presumption is to be indulged in favor of faithful compliance by Congress with the mandates of the Constitution."

25. Dissenting judgment is by Mr. Justice Stone and with him two more Judges concurred. Stone J. observed that the Constitution(al) power of the Congress to levy an excise tax on the processing of agricultural production was not being questioned and the present levy was being held invalid (by majority), not for any want of power in Congress to lay such a tax to defray public expenditure, including those for the general welfare, but because the use to which its proceeds are put was disapproved. He said that regulation in the present case, if any there be, was accomplished not by the tax but by the method by which its

proceeds were expended, and would equally be accomplished by any like use of public funds, regardless of their source. He said the power to tax and spend was not without constitution constraints and one restriction was that the purpose must be truly national and another was that it might not be used to coerce action left to State control, and yet another was the conscience and patriotism of Congress and the Executive. Quoting Justice Holmes, he said, it must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. Stone J. further observed as under :

"A tortured construction of the Constitution is not to be justified by recourse to extreme examples of reckless congressional spending which might occur if courts could not prevent - expenditures which, even if they could be thought to effect any national purpose, would be possible only by action of a legislature lost to all sense of public responsibility. Such oppositions are addressed to the mind accustomed to believe that it is the business of courts to sit in judgment on the wisdom of legislative action. Courts are not the only agency of Government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds of any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction, is far more likely, in the long run, "to obliterate the constituent member's of "an indestructible union of indestructible states" than the frank recognition that language, even of a constitution, may mean what it says : that the power to tax and spend includes the power to relieve a nation-wide economic maladjustment by conditional gifts of money."

26. Finally the learned Judge also observed as under :

"The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint .For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

27. In *Union Colliery Company of British Columbia v. Bryden* - 1899 A.C. 580 (P.C.) (on appeal from the Supreme Court of British Columbia), the Court was examining the constitutional validity of Section 4 of the Coal Mines Regulation Act, 1890, where it was specifically enacted that "no boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground", and its application to Chinese. The question raised

directly concerned the legislative authority of the Legislature of British Columbia which depended upon the construction of Sections 91 and 92 of the British North America Act, 1867. These clauses distributed all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these Parliaments, it was not made a statutory condition that the exercise of such power shall be, in the opinion of a Court of Law, discreet. Insofar as they possess legislative jurisdiction, the discretion committed to the Parliaments, whether of the Dominion or of the provinces, was unfettered. It was the proper function of a Court of Law to determine what were the limits of the jurisdiction committed to them; but, when that point had been settled, Courts of Law had no right whatever to inquire whether their jurisdiction had been exercised wisely or not. The Court observed that Section 91, sub-section (25) extended the exclusive legislative authority of the Parliament of Canada to "naturalization and aliens" and that the subject to "naturalization" seemed prima facie to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they had been naturalized. The Court held as under :

"Their Lordships see no reason to doubt that by virtue of Section 91, sub-section (25), the legislature of the Dominion was invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of Section 4 of the Coal Mines Regulation Act, insofar as objected to by the appellant-company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and Therefore, trench upon the exclusive authority of the Parliament of Canada."

28. In *Edward T. Tuy v. Mayor and City Council of Baltimore* - 100 U.S. 434 the question was if an Ordinance of the City of Baltimore, authorised by a statute of Maryland and in pursuance of which vessels, landing at the public wharves of the City, laden with the products of other States, were required to pay wharfage fees which were not exacted from vessels landing thereat (?) with the products of Maryland was in conflict with the National Constitution. The Court held that wharfage fees, so exacted, could not be regarded, in the sense of former decisions, as compensation for the use of the City's property, but a mere expedient or device to build up the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other States, and the power of the National Government over commerce with foreign nations and among the several States, reached the interior of every State of the Union so far as it might be necessary to protect the products of other States and countries from discrimination by reason of their foreign origin. The Court also observed as under :

"It is admitted that such wharfage dues are not and never have been assessed

against parties or vessels bringing to that port potatoes or other articles grown in the State of Maryland.

The argument in support of the statute and ordinance upon which the judgment below rests is that the City, by virtue of its ownership of the wharves in question, has the right, in its discretion, to permit their use to all vessels landing thereat with the products of Maryland; and that those operating vessels, laden with the products of other States, cannot justly complain, so long as they are not required to pay wharfage fees in excess of reasonable compensation for the use of the City's property.

This proposition, however, ingenious or plausible, is unsound both upon principle and authority."

29. In *W. C. Hammer v. Roland H. Dagenhart* - 247 U.S. 251 the principal question was whether Congress had power to prohibit the shipment in inter-state or foreign commerce or any product of cotton mill situated in the United States, in which, within 30 days before the removal of the product, children under 14 years of age had been employed, or children between 14 and 16 had been employed more than eight hours in a day, or more than six days in any week, or between 7 P.M. and 6 A.M., it was contended by the Government that the provision was valid as the Congress had the power essential to the passage of the Act which was found in the commerce clause of the Constitution which authorised Congress to regulate commerce with foreign nations and among the States. The Supreme Court of United States by majority held that the Act in its effect did not regulate transportation among the States, but aimed to stand arise the ages at which children might be employed in mining and manufacturing within the States and that the grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of police power over local trade and manufacture. The Court distinguished its earlier decisions saying that in each of those cases the use of inter-state transportation was necessary to accomplish all harmful results and that in other words although the power over inter-state transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of inter-state commerce to effect the evil intended and that this element was wanting in the present case, the thing intended to be accomplished by this statute was the denial of the facilities of inter-state commerce to those manufactures in the states who employed children within the prohibited ages. The goods shipped were of themselves harmless. The Court said that if it held otherwise all manufacture intended for inter-state shipment would be brought under Federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the frames of the Constitution when they vested in Congress the authority to regulate commerce among the States. The Court, Therefore, held that the impugned Act exceeded the constitutional authority of the Congress. Justice Holmes in his dissenting judgment (three other Judges agreeing with him) said as under (relevant for our

purpose) :

"The objection urged against the power is that the states have exclusive control over their methods of production and that Congress cannot meddle with them; and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an Act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects; and that we are not at liberty upon such grounds to hold it void."

"The first step in my argument is to make plain what no one is likely to dispute, - that the statute in question is within the power expressly given to Congress if considered only as to its immediate effect, and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in inter-state or foreign commerce. Congress is given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when inter-state commerce is the matter to be regulated I cannot doubt that the regulations may prohibit any part of such commerce that Congress sees fit to forbid."

"The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state."

30. The exposition of law in all these cases is no different than what we have said. Though we have seen above that motive in passing an enactment is irrelevant and if the Act is within the powers conferred by the Constitution it would be beyond challenge, yet in all fairness to Mr. Thakur, who very strenuously argued for the petitioners, we may well note a resolution of the National Development Council, Statement of Objects and Reasons while introducing the Bill as well as the relevant extracts of the reports of the Ninth Finance Commission. We may also note here again that Mr. Thakur did not challenge the constitutional validity of the Act as such apart from saying it was colourable piece of legislation. Falling back on Article 272 this point was nevertheless urged by Mr. Kapur who was assisting Mr. Thakur. He said Article 255 was not relevant as far as the Bill which imposes or varies any tax or duty in which States are interested is introduced in either House of Parliament. He said if such a Bill was introduced without the recommendation of the President it would be unconstitutional irrespective of Article 255. The argument proceeds on the

basis that Article 255 falls in Chapter I of Part II of the Constitution while Article 274 is in Chapter "Finance" of Part XII of the Constitution. We are unable to agree with the argument of Mr. Kapur. We find Article 255 is all embracing and its language is explicit. Once the Act receives assent of the President any infirmity that the Bill was moved without the prior recommendation of the President ceases to be of any significance. We, Therefore, reject this argument. We may, however, note that argument was applied only with respect to the amendments to the Act made by the Additional Duties of Excise (Amendment) Act, 1985.

31. The decision which the National Development Council took in December 1956 was as under :

"The National Development Council agreed unanimously that sales tax levied in States on mill-made textiles, tobacco including manufactured tobacco, and sugar should be replaced by a surcharge on the Central Excise Duties on these articles, the income derived there from being distributed among States on the basis of consumption, subject to the present income derived by States being assured. The method of sharing and distribution should be referred to the Finance Commission."

32. The Statement of Objects and Reasons annexed to the Bill when it was introduced and which was passed was an Act is as under :

"The object of the Bill is to impose additional duties of excise in replacement of the sales taxes levied by the Union and States on sugar, tobacco and mill-made textiles and to distribute the net proceeds of these taxes, except the proceeds attributable to Union territories, to the States. The distribution of the proceeds of the additional duties broadly follows the pattern recommended by the Second Finance Commission. Provision has been made that the States which levy a tax on the sale or purchase of these commodities after the 1st April, 1958 do not participate in the distribution of the net proceeds. Provision is also being made in the Bill for including these three goods in the category of goods declared to be of special importance in inter-state trade or commerce so that, following the imposition of uniform duties of excise on them, the rates of sales tax if levied by any State are subject from 1st April, 1958 to the restrictions in Section 15 of the Central Sales Tax Act, 1956."

33. The report of the Ninth Finance Commission notes that additional duties of excise in lieu of sales tax were introduced in 1957 in pursuance to a decision of the National Development Council mentioned above. The Commission observed, as did the earlier Finance Commissions, that practice of levying additional duties of excise in lieu of sales tax was in the nature of tax rental arrangement. The argument of Mr. Thakur was that States could not abdicate their powers to levy sales tax as provided under the Constitution by agreeing to such an arrangement and though there may not be any bar on any State from levying sales tax but then it tended to lose its share in the additional duties of excise and the states were indirectly, Therefore, forced to abdicate their functions which they could not

have done directly. The Finance Commission was concerned to give recommendations on the principles of inter se distribution of net proceeds of additional duties of excise among the States. The Commission was also asked to give its recommendations on the merger of additional duties of excise with the basic duties of excise. In the course of its deliberations the Commission recorded the views of States on the subjects of the reference. It noted that barring the three north-east States and Goa all other States were opposed to the idea of merger for varying reasons and some States even opposed the tax rental arrangement itself. On the principles of distribution, the Commission after considering the submissions of the States was of the view that consumption of the commodities alone should be the criterion for distribution which appeared to it to be unexceptionable inasmuch as the additional duties were levied in lieu of sales tax which itself was a tax on consumption. The Finance Commission said that the fact remained and it could not be disputed that the proceeds of additional duties of excise were distributed only in pursuance of a tax rental arrangement between the Centre and the States which also clearly implied that this distribution could not be treated as devolution of grants-in-aid in the sense that these terms were normally understood. The Finance Commission also said that but for the tax rental arrangement the States would have been collecting sales tax on the current consumption of the relevant commodities. While dealing with the question of merger of the additional duties of excise with basic duties of excise, the Finance Commission recorded the objections of the States :

(1) The proceeds from the additional duties of excise did not attain the level of 10.8% which it was to reach within a stipulated period though the Central Government expanded the coverage of the goods under the Act by resorting to definitional changes;

(2) Many commodities were also subject to "Nil" rate of duty. These commodities were, Therefore, free not merely from the levy of additional duties of excise but also escaped the liability to sales tax which the States were prevented from imposing for the fear of forfeiting their share in the proceeds from the additional duties of excise;

(3) Low yield from the additional duties of excise vis-a-vis many-fold increase in the revenue from the sales tax during the period the Act has been in operation;

(4) States also apprehend that perhaps merger would remove completely the identity of additional duties of excise as a separated levy and would prejudice the interests of the States.

34. No Finance Commission has ever said in any of their reports that any States ever objected to the Act on the ground that it was unconstitutional being a colourable legislation. Rightly so as various Finance Commissions were concerned merely with the principles on which the additional duties of excise were to be distributed among the States.

35. We will also note that though the principles of distribution among the States

of the additional duties of excise are not the same as those of the basic duties of excise, but those basic duties of excise are also distributed under the Union Duties of Excise (Distribution) Act, 1979, on the recommendations of the Finance Commission.

36. In *The Commissioner of Income Tax, Madhya Pradesh and Bhopal Vs. Sodra Devi*, , the question before the Supreme Court was whether the word "individual" in Section 16(3)(a)(ii) of the Income Tax Act, 1922, included also a female and the income of the minor sons derived from a partnership to the benefits of which they had been admitted was liable to be included in the income of the mother who was a member of that partnership. In the course of discussion the court referred to the rules of interpretation of statutes. It said that the High Court in that case plunged headlong into a discussion of the reasons which motivated the Legislature in enacting Section 16(3) of Act IV of 1937 and took into consideration the recommendations made in the Income Tax Enquiry Report, 1936, and also the Statement of Objects and Reasons for the enactment of the same, without considering in the first instance whether there was any ambiguity in the word "individual" as used therein. The court observed that it was clear that unless there was any such ambiguity it would not be open to the Court to depart from the normal rule of construction which is that the intention of the Legislature should be primarily gathered from the words which were used, and it was only when the words used were ambiguous that they would stand to be examined and construed in the light of surrounding circumstances and constitutional principle and practice.

37. Mr. M. Chandrasekharan, learned Additional Solicitor General of India, submitted that once it is conceded that Act is relatable to Entries 84 and 97 of the Union List of the Seventh Schedule of the Constitution and the Supreme Court having held so in clear terms in *Ujagar Prints Vs. Union of India (UOI)*, , it cannot be contended that the Act has been made in colourable exercise of legislative power. He said this question in fact is no longer rest integra. He also referred to a decision of the Punjab High Court in *Everest Woollen Mills v. The State of Punjab and Another* - 1966 (18) S.T.C. 69 , where the constitutional validity of the Act has been specifically upheld. In that case it was held that merely because an excise duty was intended to replace a sale or purchase tax did not of itself by any logic convert the former into the latter. The Court observed that the Act did not impose a tax on the transaction of sale or purchase at all, but imposed only a duty of excise, and that duty of excise and sale or purchase tax were essentially different. The court also observed that objects and reasons of a statute could not control the plain meaning of statutory language, and that there was no ambiguity in the statutory language of the Act and that the duty of excise sought to be imposed by that Act could be no stretch be considered, because of the statutory objects and reasons, to be a tax either on sale or purchase of goods. In *Empire Industries Limited and Others Vs. Union of India and Others*, , the validity of the Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980, was upheld. By this amending Act

duties were sought to be imposed under the Act on the fabrics which were held to be not covered by the judgment of the Gujarat High Court and the Act also proposed to validate the levies which had been made in the past in respect of those fabrics. The judgment of the Gujarat High Court was subsequently upset by the Supreme Court in *Empire Industries* case. In *Empire Industries* case the amending Act of 1980 was challenged on the grounds : (1) whether the cotton fabrics subjected to the process of bleaching, mercerising, dyeing, printing, water-proofing, etc., amounted to "manufacture" as the Act stood prior to the Amending Act of 1980; (2) whether and in any event after the amending Act, the levy was valid (with this contention it was to be examined whether the amending Act was intra virus Entry 84 of List I of the Seventh Schedule to the Constitution and if not whether the amending Act could be said to be valid in any event under Entry 97 of said List I); and (3) whether the amending Act violated Article 14 or Article 19(1)(g) of the Constitution. The Court held that the amending Act was covered by Entry 84 and in any case under Entry 97 of List I of the Seventh Schedule. The court in *Ujagar Prints Vs. Union of India (UOI)*, , said that so far as the exclusive competence of the Union Parliament to legislate was concerned all that was necessary was to find out whether the particular topic of legislation was in List II or List III, and if it was not, it was not necessary to go any further or search for the field in List I. Union Parliament has exclusive power to legislate upon that topic or field. Of course, it has concurrent power also in respect of the subjects in List III. Mr. Chandrasekharan said it was nobody's case that the Act was relatable to Entry 54 of List II of the Seventh Schedule. The Supreme Court in *Empire Industries* case clearly held it was well recognised that tax might be imposed retrospectively and said on that ground it could not be challenged that by giving retrospective effect unreasonable restriction had been imposed on the fundamental rights conferred by Articles 14 and 19(1)(g). As noted above, the court also held that the process of bleaching, mercerizing ,etc. amounted to "manufacture" and thus subject to levy of additional duties of excise under the Act. *Ujagar Prints* case first came up before a Bench of the Supreme Court consisting of two Judges - *Ujagar Prints Vs. Union of India (UOI)*, . Two questions were raised for consideration. One was whether the process of bleaching, dyeing, printing, mercerizing ,etc. amounted to "manufacture" within the meaning of Central Excises and Salt Act, 1944, as it stood prior to its amendment by the amending Act of 1980, so as to attract levy of excise duty on the processed fabrics; and (2) whether, even if the processed fabrics were assessable to excise duty, what was the value on the basis of which the processed fabrics were liable to be assessed in the hand of the processors who carried on these processes on job work basis. The Court observed that the first question was concluded by the decision in *Empire Industries* case, but the Court expressed its disagreement with the second question which was also touched upon in the *Empire Industries* case. The Bench, Therefore, referred the matter to a larger Bench of five Judges and said the question whether the processing of grey fabric by a processor on job work basis constituted "manufacture" could also be considered by the larger Bench. The five Judges Bench decision in *Ujagar Prints* case, as noted above, is

Ujagar Prints Vs. Union of India (UOI), which upheld decision in Empire Industries case. In this case the Court also examined the doctrine of "pith and substance" and said as under :

"Entries to the legislative lists, are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Art. 246 brings in the doctrine of "Pith and substance" in the understanding of the exertion of the legislative power the wherever the question of legislative-competence is raised the test is whether the legislation, looked at as a whole, is substantially with respect to the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry, the matter may well be taken to be legislation on the topic."

38. Mr. Chandrasekharan also drew our attention to a decision of the Supreme Court in State of Kerala Vs. Attesee (Agro Industrial Trading Corporation), where the Court said :

"The (1957) Act also has a bearing on the sales tax levy of various States. By levying sales tax on an item covered by the Schedule to the (1957) Act, the State will have to forego its share on distribution of the proceeds of the additional excise duty levied. Whether it should impose sales tax on an item of declared goods, limited by the restrictions in Section 15 of the Central Sales Tax Act and at the risk of losing a share in the additional excise duty levied in respect of those very item, is for the State to determine."

It is Therefore, clear that there is no bar on the State Legislature to impose sales tax on the items covered under the Act. The Act was also referred to in another case by the Supreme Court in M/s. Mahalakshmi Oil Mills Vs. State of Andhra Pradesh, , where the question was whether the tobacco seed separated from plant and tobacco seed oil or cake would fall within the expression "tobacco or any form of tobacco", and thus, exigible to sales tax.

39. In all these cases the Act was never challenged as unconstitutional though the amending Acts were challenged for various other reasons. In view of the clear position of law such a challenge would have certainly been negated by the Courts even at the initial stages. It is not that the question if the Act was ultra vires, would not have occurred to the legal luminaries who had been appearing before the Supreme Court in these cases involving the Act. Or perhaps it might be that the question was left to be considered by the Courts in yet another round. There is no limit to the legal ingenuity as it would appear.

40. On filing of these petitions petitioners were able to get interim orders from this court under which the petitioners were to pay half of the amount of duty chargeable as per impugned notifications and for the balance half they were to give bank guarantees to the satisfaction of the Collector of Central Excise concerned. It was stated before us that bank guarantees were being furnished.

These bank guarantees were to be kept alive till disposal of the writ petitions. The Supreme Court has held that even if there is a prima facie case there should be no stay in matters involving collection of revenue. In Empire Industries case the Supreme Court had to say as under :

"If we may venture to suggest, in fiscal matters specially in cases involving indirect taxes where normally taxes have been realised from the consumers but have not been paid over to the exchequer or where taxes are to be realised from consumers by the dealers or others who are parties before the court, interim orders staying the payment of such taxes until final disposal of the matters should not be passed. It is a matter of balance of public convenience. Large amounts of taxes are involved in these types of litigations. Final disposal of matters unfortunately in the present state of affairs in our Courts takes enormously long time and non-realisation of taxes for long time creates an upsetting effect on industry and economic life causing great inconvenience to ordinary people. Governments are run on public funds and if large amounts all over the country are held up during the pendency of litigations, it becomes difficult for the governments to run and it becomes oppressive to the people. Governments' expenditures cannot be made on bank guarantees or securities. In that view of the matter as we said before, if we may venture to suggest for consideration by our learned brethren that this Court should refrain from passing any interim orders staying the realisations of indirect taxes or passing such orders which have the effect of non-realisation of indirect taxes. This will be healthy for the economy of the country and for the Courts."

41. The Court also went on to observe as under :

"Good deal of arguments were canvassed before us for variation or vacation of the interim orders passed in these cases. Different Courts sometimes pass different interim orders as the Courts think fit. It is a matter of common knowledge that the interim orders passed by particular courts on certain considerations are not precedents for other cases which may be on similar facts. An argument is being built up now-a-days that once an interim order has been passed by this Court on certain factors specially in fiscal matters, in subsequent matters on more or less similar facts, there should not be a different order passed nor should there be any variation with that kind of interim order passed. It is submitted at the Bar that such variance creates discrimination. This is an unfortunate approach. Every Bench hearing a matter on the facts and circumstances of each case should have the right to grant interim orders on such terms as it consider fit and proper and if it had granted interim order at one stage, it should have the right to vary or alter such interim orders. We venture to suggest, however, that a consensus should be developed in the matter of interim orders."

Lastly, Mr. Chandrasekharan said varying names had been given to Union Duty of Excise under various enactments and they did not cease to be so on account of different nomenclature and different principles under which the proceeds thereof

were assigned to the States by Parliament. In particular he referred to the Additional Duties of Excise (Goods of Special Importance) Act, 1957, the Cottage and Other Handloom Industries (Additional Excise Duties on Cloth) Act, 1953, the Mineral Products (Additional Duties of Excise and Customs) Act, 1958, the Cotton Fabrics (Additional Excise Duty) Act, 1957, and the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978. He also said that in fact the additional excise duties like auxiliary excise duty and special excise duty were being levied by Parliament under different Finance Acts and not by way of amendments to the Central Excises and Salt Act, 1944.

42. We find that for the petitioners perhaps litigation is business. After getting interim orders they find they are nothing to lose except in the shape of fees payable to counsel. They have collected additional duties of excise from the ultimate consumers but have not repaid the same to the credit of the Central Government and they thus utilised half of the duty so collected for their own purposes. The interim orders which the petitioners have obtained have adversely affected the States who are not parties to these petitions and were entitled to the share of the revenue levied and collected under the Act but would certainly have been deprived of the same all this period because of the stay. Petitioners cannot be permitted to make profit at the cost of public revenue. The petitioners must restore the advantage they had over the respondents because of the stay they enjoyed and consequently deprived the respondents of their lawful revenues during the period stay operated against them. During the course of hearing of these petitions we were informed by the learned Additional Solicitor General that a sum of Rs. 700/- crores has become due from the petitioners towards the additional duties of excise because of the stay. The amount is really staggering. Because of the view we have taken the petitioners were not entitled to withhold this amount after having collected duties of excise and then utilise the same for their own business purposes. We are told that the bank rate of interest is 17 1/2% per annum on commercial transactions as it was and we are of the opinion that not only that the respondents should be allowed to encash the bank guarantees forthwith, they should also be entitled to interest on these amounts at the rate of 17 1/2% per annum from the date the duty became payable but was stayed under the orders of this Court. Though when the interim orders were made there was no direction of payment of interest but we find that under writ jurisdiction we have such powers to bring the parties to the same level once the petitions are dismissed and interim orders vacated. Petitioners must restore the advantage they got to the detriment of the public revenue and to which advantage they were not entitled as we have held the petitions to be without any merit. Even otherwise we have power to award costs calculated in terms of interest at the rate and on the amounts and for the period above mentioned. We order accordingly. We find no merit in these writ petitions and would dismiss the same with costs as above mentioned. We separately assess counsel fee at the rate of Rs. 2,000/- in each of these writ petitions. Rule is discharged.