

(1981) 09 GUJ CK 0001

In the Gujarat High Court

Case No : Sales Tax Reference No"s. 9 and 12 of 1978

Pokardas and Brothers and Another

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 16-09-1981

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 5(1), 5(2)

Central Sales Tax Act, 1956 — Section 14, 15

Gujarat Sales Tax Act, 1969 — Section 18, 5(1), 66, 66(1), 69

Citation : (1982) 51 STC 88

Hon'ble Judges : V.V. Bedarkar, J;B.K. Mehta, J

Bench : Division Bench

Advocate : S.L. Mody, N.I. Mody and R.D. Pathak, for the Appellant; J.R. Nanavati, Government Pleader, instructed by H.V. Chhatrapati of Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Mehta, J.—At the instance of the assessee in Sales Tax Reference No. 12 of 1978, the following question is referred to us for our opinion u/s 69(1) of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as "the Gujarat Act" for the sale of brevity) :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that tarpaulins are not prepared from cotton fabrics or textile fabrics, and therefore, their sales amounting to Rs. 31,775 are not covered by entry 18(a) of Schedule II, Part A, to the Gujarat Sales Tax Act, 1969, as contended by the applicant but are covered by entry 13 of Schedule III to the said Act as held by the sales tax authorities ?"

2. The question arises in the following circumstances :

The assessment year with which we are concerned in this reference is from 6th May, 1970, to 31st March, 1971. The assessee is a dealer reselling cotton canvas cloth, hosiery, rain coats, eyelets, tarpaulins, etc. In the course of the assessment for the said period, the Sales Tax Officer had subjected these sales

to tax under entry 13 of Schedule III to the Gujarat Act. This conclusion of the Sales Tax Officer was upheld by the Assistant Commissioner who partially allowed the appeal against the order of the Sales Tax Officer imposing penalty with which we are not concerned in this reference. The assessee, therefore, carried the matter in appeal before the Gujarat Sales Tax Tribunal in course of which the assessee contended in the first place that the tarpaulin should be classified as cotton fabrics not liable to be taxed under entry 37 of Schedule I to the Gujarat Act, and in the alternative, they should be treated as articles prepared from textile fabrics, and therefore, liable to be taxed under entry 18(a) of Part A of Schedule II to the Gujarat Act. The Tribunal was not impressed with any of these contentions since according to the Tribunal the assessee was not able to establish that the tarpaulins were cotton fabrics impregnated or coated with preparation of cellulose derivatives or other artificial plastic material, and therefore, they were not cotton fabrics as defined in item 19 of the First Schedule to the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Excise Act" for the sake of brevity), which definition has been incorporated in entry 37 of Schedule I to the Gujarat Act. The alternative contention was rejected since, in the opinion of the Tribunal, the waterproof cloth out of which tarpaulins have been prepared cannot be held to be textile as the waterproof cloth has got altogether different use from that of textile and in commercial parlance also it cannot be classified as textile fabrics. In support of this view, the Tribunal relied on the two decisions of the Madras High Court in *M. Jeewajee and Co. Vs. The State of Tamil Nadu*, . The Tribunal, therefore, held that since tarpaulins are not goods specified in any of the schedules to the Gujarat Act, they should be subjected to tax under the residuary entry 13 of Schedule III thereof. The appeal of the assessee was, therefore, dismissed. Being aggrieved with this order of the Tribunal, the assessee has, therefore, sought the reference of the question set out above to us for our opinion.

3. In Sales Tax Reference No. 9 of 1978 a slightly truncated question has been referred to us for our opinion u/s 69(1) of the Gujarat Act at the instance of the assessee. The question is in the following terms :

"Whether, on the facts and in the circumstances of the case the Tribunal is correct in holding that tarpaulins are not prepared from cotton fabrics or textile fabrics and are, therefore, not covered by entry 18(a) of Schedule II, Part A, to the Gujarat Sales Tax Act, 1969 ?"

4. The above question has been referred to us since the assessee lost his case before all the authorities up to the Tribunal which have held that the tarpaulins are liable to be taxed under entry 13 of Schedule III to the Gujarat Act. The Tribunal so held against the assessee following its earlier decision in *Pokardas & Brothers v. State of Gujarat* which is the subject-matter of Sales Tax Reference No. 12 of 1978.

5. At the outset we must refer to some debate which has taken place as to whether in view of the precise question referred to us where the scope of

reference is restricted to the applicability of entry 18(a) of Part A of Schedule II to the Gujarat and consequential consideration of entry 13 of Schedule III to the said Act in view of the non-applicability of entry 18(a), it is open to the applicants to enlarge the scope of the reference by urging that the goods under consideration, namely tarpaulins, can be classified as cotton fabrics, and therefore, exempt from sales tax under entry 37 of Schedule I to the Gujarat Act. This controversy should not detain us any longer for obvious reasons. In the first place, the question which has been referred to us in Sales Tax Reference No. 12 of 1978, as set out hereinabove, requires us to answer whether the Tribunal was justified in holding, inter alia, that tarpaulins are covered by entry 13 of Schedule III to the Gujarat Act as held by the sales tax authorities. Now, entry 13 of Schedule III to the Gujarat Act is a residuary entry which takes in its sweep for purposes of subjecting the goods to tax all those goods other than those specified from time to time in section 18 and in Schedules I and II and the preceding entries of Schedule III. In order, therefore, to answer the question we must address ourselves to the basic question as to whether tarpaulins are classified or not under any of the entries of Schedules I, II and III. Unless we address ourselves to this question and answer it, it is not possible for us to advise the Tribunal on the question which has been referred to us. It cannot be gainsaid that the contention which has been urged before us on behalf of the assessee in both these references that tarpaulins must be classified as cotton fabrics under entry 37 was urged in terms before the Tribunal. The Tribunal has in the statement of case referring the question to us stated, inter alia, as under in para 3 :

"..... After referring to the definition of "cotton fabrics" in item No. 19 of the First Schedule to the Central Excises and Salt Act, 1944, and finding that an article known as tarpaulin is prepared by superimposing the solution of wax and other chemicals on the canvas cloth and also further finding that the wax and other chemicals are not preparations of cellulose derivatives or other plastic materials as defined in item No. 19 of the First Schedules to the Central Excises and Salt Act, 1944, this Tribunal held that tarpaulins does not fall within the description of item No. 19 as referred to above."

6. In the main order disposing of the appeal of the assessee, the Tribunal has recorded as under, after setting out the definition of "cotton fabrics" as was in force at the relevant time from item No. 19 of the First Schedule to the Excise Act :

"We asked Mr. Shukla to produce any certificate of competent authority to show that the solution of wax and other chemicals is of either cellulose derivatives or artificial plastic materials but that cannot be produced by Mr. Shukla. Thus, the position is that something else is superimposed on the canvas cloth and hence, processed cloth from which tarpaulin has been prepared by stitching edges with eyelets is undoubtedly not cotton fabrics because of superimposition of wax and other chemicals"

7. It, therefore, cannot be urged successfully as has been sought to be done by the learned Government Pleader appearing for the State Government that the assessee is not entitled to agitate this question as to whether tarpaulins can be classified as cotton fabrics not liable to be taxed under entry 37. What is the scope of the jurisdiction of the High Court hearing reference u/s 66(1) of the Income Tax Act, 1922, has been succinctly indicated by the Supreme Court in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , where the majority court expressed its views as under :

"..... The jurisdiction of a court in a reference u/s 66 is a special one, different from its ordinary jurisdiction as a civil court. The High Court, hearing a reference under that section, does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal. It acts purely in an advisory capacity, on a reference which properly comes before it u/s 66(1) and (2). It gives the Tribunals advice, but ultimately it is for them to give effect to that advice. It is of the essence of such a jurisdiction that the court can decide only questions which are referred to it and not any other question

..... Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that section 66(1) requires is that the question of law which is referred to the court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of section 66(1) of the Act

..... sometimes the questions are framed in such general terms that, construed literally, they might take in questions which were never in issue. In such cases, the true scope of the reference will have to be ascertained and limited by what appears on the statement of the case"

8. The principle affirmed by the Supreme Court in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., applies with equal force to the scope of the powers of the High Court hearing reference u/s 69 of the Gujarat Act. In the present case, as indicated above, the question itself is clear enough since the Tribunal has referred to us for advice as to whether the Tribunal was justified in taxing tarpaulins under entry 13 of Schedule III to the Gujarat Act which by necessary implication would require to be considered whether the said goods would or would not fall under any of the entries of Schedules I, II and III other than entry 13 of Schedule III. In that view of the matter, we do not think that in considering the contention of the assessee that tarpaulins should be classified as cotton fabrics under entry 37 we are over-stepping our powers or for that matter enlarging the scope of the reference.

9. It is obvious then that the answer to the question referred to us would depend on the determination as to whether the tarpaulins can be classified as goods specified in any of the entries of Schedule I or II to the Gujarat Act. The crux of the problem is, therefore, whether tarpaulins can be classified as "cotton fabrics" under entry 37, and therefore, not liable to tax, and if the answer is in the negative, whether they should be treated as ready-made articles prepared from textiles, and therefore, liable to be taxed under entry 18(a) of Part A of Schedule II to the Gujarat Act.

10. On behalf of the assessee a twofold argument has been advanced in support of their contention that tarpaulins are cotton fabrics. In the first place, it is urged that having regard to the enlarged definition of "cotton fabrics" in item 19 of the First Schedule to the Excise Act, as amended retrospectively with effect from 1st March, 1955, the legislative mandate must be carried out by substituting the amended definition in the statute book and should be read as if it was all along there at all the relevant times including that of the present assessment. Secondly, it was urged that since entry 37 is referential legislation, on matter of principle and authority, the amended definition must be incorporated in entry 37 since that part of the Gujarat Act is supplemental to the incorporated part of the Excises Act and reading the subsequent Act de hors the earlier Act would render that part of subsequent Act wholly ineffective and unworkable. We shall deal with the counter contentions urged on behalf of the State Government by the learned Government Pleader to repel the above contentions at appropriate stages while dealing with the contention of the assessee.

11. What is the effect of retrospectivity of an amending Act has been pithily stated by the Supreme Court in *M.K. Venkatachalam, I.T.O. and Another Vs. Bombay Dyeing and Mfg. Co., Ltd.*, . The Supreme Court was required to consider in that case the effect of section 13 of the Indian Income Tax (Amendment) Act, 1953, which inserted a proviso to section 18A (5) of the Income Tax Act, 1922, providing that an assessee was entitled to interest not on the whole of the tax paid in advance but only on the difference between the tax so paid and the amount of tax determined on regular assessment. The respondent-assessee-company before the Supreme Court was assessed to tax for the assessment year 1952-53 by assessment order made on 9th October, 1952, in which it was given credit for the amount of interest on the entire amount of the tax paid in advance u/s 18A(5) of the Income Tax Act, as it stood before the amendment. The amending section was deemed to have come into force from 1st April, 1952, with the result that the assessee-company having regard to the amended provision was entitled to interest only on the difference between the tax paid and the tax assessed. The Income Tax Officer exercised his power u/s 35 of the 1922 Act and rectified the mistake in the order of assessment and made a demand of the difference. The assessee-company, therefore, moved the High Court of Bombay for a writ of prohibition on the ground that there was no mistake apparent from the record as the order of assessment was valid in the light of the provisions then stood. The High Court granted the writ as prayed for. In appeal at the

instance of the Income Tax Officer, the Supreme Court, while reversing the decision of the Bombay High Court, held that the amended provision should be deemed to have been included in the principle Act as from 1st April, 1952, for all purposes, and therefore, the provision must also be deemed to be part of the main section 18A on the date of the passing of the assessment order and consequently the assessment order was inconsistent with the proviso to section 18A and must be deemed to suffer from the mistake apparent on the face of the record. Gajendragadkar, J., speaking for the court, observed in that case as under at page 150 :

"..... Prima facie it may appear somewhat strange that an order which was good and valid when it was made should be treated as patently invalid and wrong by virtue of the retrospective operation of the Amendment Act. But such a result is necessarily involved in the legal fiction about the retrospective operation of the Amendment Act. If, as a result of the said fiction, we must read the subsequently inserted proviso as forming part of section 18A(5) of the principal Act as from April 1, 1952, the conclusion is inescapable that the order in question is inconsistent with the provisions of the said proviso and must be deemed to suffer from a mistake apparent from the record"

12. In Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras, a similar situation as the one which confronts us had arisen. There, the respondent-assessee-company for the assessment year 1948-49 contended that the assessment should be made at the uniform rate of 3 pies per rupee throughout the year on the basis of the turnover of the previous year u/s 7 of the U.P. Sales Tax Act, 1948. The Sales Tax Officer held that the rate of 3 pies per rupee was only to apply to the assessable turnover for the first 69 days and the rate of 6 pies per rupee was to apply for the rest of the year as per the notification issued by the Government u/s 3-A of the said Act. At the instance of the assessee, a reference was made to the High Court of Allahabad, and the High Court following its earlier judgment in Modi Food Products Limited v. Commissioner of Sales Tax, U.P. [1955] 6 STC 287 All held in favour of the assessee. The Commissioner carried the matter in appeal with special leave to the Supreme Court. The U.P. Legislature inserted a new provision, namely, section 31, in the U.P. Sales Tax Act, 1948, by amending Act of 1962 for purposes of neutralising the effect of the decision of the Supreme Court in Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd., where the Supreme Court had held that if the assessee had elected to submit his return on the turnover of the previous year u/s 7 of Act 15 of 1948 he was liable to be assessed to sales tax at the rate in force on the first day of the year of assessment, because the liability arose on that date and any subsequent enhancement of the rate by virtue of a notification u/s 3-A did not alter that liability. The new section 31 introduced by the aforesaid amending Act provided that notwithstanding the option exercised by the assessee tax would have to be computed in the light of the rates prevailing the 1948-49 as if they were projected upon the turnover of the previous year. This amendment was also given retrospective operation. The assessee contended before the

Supreme Court that the court could exercise only an advisory jurisdiction and the advice could be tendered only on the question referred in the light of the law as was applicable at the date when the reference was made and it could not give its opinion based on any subsequent amendment in the Act. Negating this contention, the Supreme Court held that if the law which the Tribunal seeks to apply to the dispute is amended, so as to make the law applicable to the transaction in dispute, it would be bound to decide the question in the light of the law so amended. It further held that when the question has been referred to the High Court and in the meanwhile the law has been amended with retrospective operation, it would be the duty of the High Court to apply the law so amended if it applies and that by taking notice of the law which has been substituted for the original provision, the High Court is giving effect to the legislative intent and does no more than what must be deemed to be necessarily implicit in the question referred by the Tribunal, provided the question is couched in terms of sufficient amplitude to cover an enquiry into the question in the light of the amended law, and the enquiry does not necessitate investigation of fresh facts.

13. In view of this settled legal position, therefore, if the legislative mandate is to read the amended definition as if it was on the statute book from 1st March, 1955, any other reading of law on the the statute book would not only defeat the legislative intent but would be wholly unjustified on principle or authority.

14. It would, therefore, be necessary to set out what was the definition of "cotton fabrics" in item 19 of the First Schedule to the Excise Act at the relevant time of the assessment, and then to refer to the enlarged definition as inserted in the said item by the amending Ordinance, namely, the Central Excises and Salt and Additional Duties of Excise (Amendment) Ordinance, 1979 (No. 12 of 1979), promulgated on 24th November, 1979, and for that matter the amending Act, namely, the Central Excises and Salt and Additional Duties of on and from 24th November, 1979. Item 19 of the First Schedule to the Excise Act so far as material for our purposes read as under :

-----						Item	No.
Description	of	goods	Rate	of	duty	(1)	(2)
-----						(3)	(3)
						"19.	Cotton
fabrics - "Cotton fabrics" means all varieties of fabrics manufactured either wholly or partly from cotton and includes dhoties, sarees, chadders, bed-sheets, bed spreads, counterpanes, table-cloths embroidery in the piece, in strips or in motifs and fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial plastic materials but does not include any such fabric if it contains -							

15. It should be noted here that under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Act No. 58 of 1957) (hereinafter referred to as "the Additional Excise Duties Act"), which had been placed on the statute book with effect from 24th December, 1957, additional duties of excise are levied and

collected on certain goods specified therein which, inter alia, include cotton fabrics. The word and expression "cotton fabrics" has been given the same meaning as it bears under the relevant item 19 of the First Schedule to the Excise Act by section 2(c) of the Additional Duties of Excise Act, 1957. The Central Excises and Salt and Additional Duties of Excise (Amendment) Act, 1980 (hereinafter referred to as "the amendment Act"), effected amendment in the First Schedule to the Excise Act as well as the First Schedule to the Additional Duties of Excise Act with retrospective effect as appointed in the amending Act. By section 2 of the amending Act, section 2(f) of the Excise Act has been amended by inserting sub-clause (v) after sub-clause (iv) in section 2(f). The material part of the amending Act provides as under :-

"2. Amendment of section 2. - In the Central Excises and Salt Act, 1944 (hereinafter referred to as the Central Excise Act,) in section 2, in clause (f), after sub-clause (iv), the following sub-clause shall be inserted, namely :-

"(v) in relation to goods comprised in item 19-I of the First Schedule, includes bleaching, mercerising, dyeing, printing, water-proofing, rubberising, shrink-proofing, organdie processing or any other process or any one or more of these processes;"".

16. The amendment made in item 19 of the First Schedule to the Excise Act by section 3 of the amending Act so far as material for our purposes read as under :

"3. Amendment of First Schedule. - In the Central Excises Act, in the First Schedule, -

(i) in item No. 19, for sub-item I, the following sub-item shall be substituted, namely :-

"I. Cotton fabrics, other than (i) embroidery in the piece, in strips or in motifs, and (ii) fabrics impregnated, coated or laminated with preparations of cellulose derivatives, or of other artificial plastic materials -

(a) cotton fabrics, not subjected to any process Twenty per cent ad valorem.
(b) cotton fabrics, subjected to the process of Twenty per cent bleaching, mercerising, dyeing, printing, ad valorem."" water-proofing, rubberising, shrink-proofing, organdie processing or any other process or any two or more of these processes.

Similarly by section 4 of the amending Act, the First Schedule to the Additional Duties of Excise Act was amended in the following terms :

"4. Amendment of First Schedule. - In the Additional Duties of Excise (Goods of Special Importance) Act, 1957, in the First Schedule, -

(i) in item No. 19, for sub-item I, the following sub-item shall be substituted, namely :-

"I. Cotton fabrics, other than (i) embroidery in the piece, in strips or in motifs,

and (ii) fabrics impregnated, coated or laminated with preparations of cellulose derivatives or of other artificial plastic materials -

(a) cotton fabrics not subjected to any process Five per cent ad valorem. (b) cotton fabrics, subjected to the process Five per cent of bleaching, mercerising, dyeing, printing, ad valorem." water-proofing, rubberising, shrink-proofing, organdie, processing or any other process or any two or more of these processes.

Section 5 of the amending Act makes a special provision as to the duties of excise on cotton fabrics and other materials during a certain past period and validation thereof. The material part of the section relevant for our purposes provides as under.

"5. Special provisions as to duties of excise on cotton fabrics, woollen fabrics, man-made fabrics, etc. during a certain past period and validation. - (1) Every Central Act as in force at any time during the period commencing with the appointed day and ending with the day immediately preceding the date of commencement of this Act, and providing for or relating to the levy of duties of excise on -

(a) "cloth", "cotton cloth" or, as the case may be, "cotton fabrics",

(b) "woollen fabrics",

(c) "rayon or artificial silk fabrics" or, as the case may be, "man-made fabrics",

shall have and shall be deemed to have always had effect during the said period as if -

(i) such "cloth", "cotton cloth" or, as the case may be, "cotton fabrics" comprised for the purposes of the duty leviable under that Act -

(A) a sub-item covering such "cloth", "cotton cloth" or "cotton fabrics" not subjected to any process mentioned in sub-clause (v) of clause (f) of section 2 of the Central Excises Act, as amended by this Act; and

(B) a sub-item covering such "cloth", "cotton cloth", or "cotton fabrics" subjected to any such process or any two or more such processes,

and the rate of duty specified in such Act with respect to such "cloth", "cotton cloth" or "cotton fabrics" had been specified separately with respect to each of the aforementioned sub-items thereof;

.....

.....

.....

(iv) the amendments to clause (f) of section 2 of the Central Excises Act made by section 2 of this Act had been in force at all relevant times subject to the modifications that the reference therein -

(A) to the "goods comprised in item No. 19-I of the First Schedule" shall be construed as a reference to such "cloth", "cotton cloth" or, as the case may be, "cotton fabric";

(B) to the "goods comprised in item No. 21(1) of the First Schedule" shall be construed as a reference to "woolen fabrics";

.....

.....

.....

Explanation. - In this section -

(a) "appointed day", in relation to -

(i) "cloth", means the 1st day of January, 1949;

(ii) "cotton cloth", means the 28th Day of February, 1954;

(iii) "cotton fabrics", means the 1st day of March, 1955."

17. Section 5(2) of the amending Act provided for the validation of any rule, notification or any action or thing made, issued, taken or done before the commencement of the Act in respect of cotton, woollen or rayon fabrics and the levy and collection of duties on the said articles and also prohibiting the filing of suit or proceeding for the refund of duties so levied and collected and also prohibiting the enforcement of any decree or order made by the court directing refund of such duties.

18. The net effect of the amending Act is to validate the actions taken and the excise duty levied and collected on the cotton fabrics and other goods specified in the amending Act by including the processed goods of cotton fabrics and such other specified goods from the appointed day as prescribed in the Act till the commencement of the amending Act. We are concerned with this amending Act only in so far as the definition of "cotton fabrics" in item 19 of the First Schedule to the Excise Act has been enlarged by amending section 2(f) of the said Act. It is this part of the amending Act which has been heavily relied upon by the learned Advocates for the assesseees for urging that with effect from 1st March, 1955, cotton fabrics would also include, inter alia, water-proof cotton fabrics and if this enlarged definition has been put on the statute book with retrospective effect from 1st March, 1955, by the amending Act, the appropriate incorporation has to be read in entry 37 of Schedule I to the Gujarat Act since for all intents and purposes the definition of "cotton fabrics" in item 19 of the First Schedule to the Excise Act must be read accordingly, and though it may appear strange that this definition was not in fact on the statute book, it should be deemed to have been a part of the statute, namely, item 19 of the First Schedule to the Excise Act, as a result of the legal fiction of the retrospectivity granted by the legislative mandate. This contention of the learned Advocates for the assesseees has been

sought to be repelled by the learned Government Pleader on two grounds. Firstly, it has been urged on behalf of the State Government that the amending Act was only for purposes of validation of certain actions taken by the excise authorities in respect of the goods specified in the amending Act and the excise duties collected and levied thereon and the legal fiction of its retrospective operation cannot be carried beyond that purpose for which the amending Act has been placed on the statute book. Secondly, it has been urged that since entry 37 of Schedule I to the Gujarat Act is a referential piece of legislation, no amendment made in the incorporated provisions of the parent Act can be read into the subsequent Act on recognised principles of interpretation.

19. We must reject the counter contention of the learned Government Pleader for the obvious reason that we have to consider the result that the necessarily involved in the legal fiction about the retrospective operation of the amending Act. If as a necessary sequel to an amending Act the legislative mandate is to read the enlarged definition of the term, namely, in the present case "cotton fabrics" with effect from 1st March, 1955, we must read the definition accordingly and decided as if the enlarged definition was on the statute book which incorporated it for all intents and purposes from 1st March, 1955. Any other reading of law on the basis that the enlarged definition was not in fact on the statute book would be wholly unjustified on principle and authority. It is no doubt true that the enlarged definition has been inserted in the Excise Act in the first instance by Ordinance No. 12 of 1979 which came into force on 24th November, 1979, and was followed up by Act No. 6 of 1980 which came into force on 24th November, 1979. The amending Act has given this enlarged definition the retrospective effect from 1st March, 1955. The Tribunal has no doubt to decide the appeal according to law as it stood at the relevant time but after the reference was made to us, if the law is amended retrospectively, we are bound to answer the question referred to us in the light of the amended provision, provided the answer does not require any further examination of facts and the question referred is wide enough to include the point which is canvassed. As held by the Supreme Court in *Commissioner of Sales Tax, U.P. Vs. Bijli Cotton Mills, Hathras*, if the law has been amended retrospectively during the pendency of the reference proceeding, it would be the duty of the High Court to apply the law so amended if it applies by taking notice of the law which has been substituted for the original provision and the High Court by doing so gives effect to the legislative intent and does no more than what must be deemed to be necessarily implicit in the question referred by the Tribunal, provided the question is couched in terms of sufficient amplitude to cover an enquiry into the question in the light of the amendment law, and the enquiry does not necessitate investigation of fresh facts. We have, therefore, to see as to what is exactly the amended provision. By section 2 of the amending Act which has inserted sub-clause (v) after sub-clause (iv) in section 2(f) the process, inter alia, of waterproofing in relation to goods comprised in item 19-I of the First Schedule to the Excise Act, has been included in the definition of "manufacture", and

therefore, the conclusion is inescapable that cotton fabrics would include not only those specified goods in the original entry before the amendment but would also include, inter-alia, the processes of waterproofing or any other process or any one or more of those processes including in the new clause (v), and which are carried out on cotton fabrics. The net effect of the amendment inserted in section 2(f) of the Excise Act by the amending Act is that so far as the goods of cotton fabrics are concerned as comprised in item 19-I of the First Schedule to the Excise Act, they would also include bleached, mercerised, dyed, printed, waterproof, rubberised, shrink-proof, organdie processed of cotton fabrics also. It is no doubt true that the amending Act has been put on the statute book for purposes of validating certain actions taken by the excise authorities in connection with the processed goods, inter alia, of cotton fabrics, and the excise duty levied and collected thereon as if they are the goods manufactured and also with a view to prohibit any legal proceedings being initiated for the refund of the excise duty so levied or against the enforcement of the decrees or orders passed by the courts. Nonetheless, the necessary result of the amendment is that the definition of "cotton fabrics" has been amended with retrospective effect so as to include even the processed goods which will also cover and take within its sweep the waterproof goods. It cannot be said that the legal fiction of the retrospectivity granted by the amending Act is sought to be projected beyond its original purpose as contended by the learned Government Pleader. Unless the amended definition is read as part not only of the original Act, but also of the Gujarat Act as if it was on the statute book with effect from 1st March, 1955, the amending Act would not achieve its tall purpose for which it has been placed on the statute book. We have, therefore, to reject the contention of the learned Government Pleader that in reading the amended enlarged definition for purposes of construing entry 37 in the context of the facts of the present case, we will be travelling beyond the object of the amending Act.

20. The learned Government Pleader, therefore, attempted to persuade us that on the principle of interpretation, we are not justified in reading the enlarged definition of "cotton fabrics" in entry 37 of Schedule I to the Gujarat Act. This contention of the learned Government Pleader, therefore, raised a question as to what exactly the principle of interpretation applicable in cases of referential legislation and whether the court is entitled to consider the amendment effected in the incorporated provisions of law in the earlier Act. It is well-recognised legislative practice to incorporate by reference, if the legislature so chooses, the provisions of some other earlier Act in so far as they may be relevant for the purposes and in furtherance of the scheme of the objects of the subsequent Act (vide *Agrawal Trading Corporation and Others Vs. The Collector of Customs and Others*, .

21. In *Bajaya Vs. Gopikabai and Another*, , the Supreme Court was concerned with the meaning of the expression "personal law" used in section 151 of the M.P. Land Revenue Code, 1954. There were no words in section 151 or in any other provisions of the M.P. Land Revenue Code limiting the scope and width of the

expression "personal law" to that prevailing on 5th February 1955, when the said Code came into force. A question arose as to whether the personal law as amended up to the date on which the succession of tenure-holder's interest opened can be applied or not. In that context, the court, speaking through Sarkaria, J., held that the words "on his death" used in section 151 clearly show that the legislative intent was that "personal law" as amended up to the date on which the devolution of the tenure-holder's interest is to be determined, shall be the rule of decision. The Supreme Court thereafter observed as under :

"27. Broadly speaking, legislation by referential incorporation falls in two categories : First, where a statute by specific reference incorporates the provisions of another statute as of the time of adoption. Second, where a statute incorporates by general reference the law concerning a particular subject, as a genus. In the case of the former, the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. In the case of latter category, it may be presumed that the legislative intent was to include all the subsequent amendments also, made from time to time in the generic law on the subject adopted by general reference. This principle of construction of a reference statute has been neatly summed up by Sutherland, thus :

"A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted." (Vide Sutherland's Statutory Construction. Third Edition, Art. 5208, p. 5208).

Corpus Juris Secundum also enunciates the same principle in these terms :

"..... Where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof, the reference will be held to include the law as it stands at the time it is sought to be applied, with all the changes made from time, at least as far as the changes are consistent with the purpose of the adopting statute.""

22. The learned Government Pleader relied on this decision of the Supreme Court in support of his contention that in the present case where the legislature has by specific reference incorporated in entry 37 the provision of item 19 as in force at the time of adopting, the legislative intent cannot be read the subsequent amendments automatically in the adopting statute. The learned Advocates for the assesseees, however, contended that it is not an invariable principle of interpretation that where an incorporation is of certain provision from the earlier statute, the amendments made in the earlier statute cannot be read in the subsequent statute. In their submission, this is not an invariable rule but is one which is subject to exceptions. In support of their contention, the learned Advocates for the assesseees relied on the decision of the Supreme Court in *The State of Madhya Pradesh Vs. M.V. Narasimhan*, . A question arose before the

Supreme Court in that decision in the context of the amendment made in the Indian Penal Code in the definition of "public servant". The said words were not expressly defined in the Prevention of Corruption Act, 1947, and it has borrowed the definition from section 21 of the Indian Penal Code, and thereof, it was a definition which amounted to legislation by incorporation. The question which arose before the Madhya Pradesh High Court was, whether any subsequent amendment, addition or alteration made in the Indian Penal Code would or would not affect the incorporated provision in the Prevention of Corruption Act, 1947. The High Court held that any subsequent amendment, addition or alteration in the Indian Penal Code would not at all affect the incorporated provision in the Prevention of Corruption Act, and therefore, the various amendments to section 21 of the Indian Penal Code could not be projected in the provisions of the Prevention of Corruption Act, and therefore, the accused M. V. Narasimhan-respondent before the Supreme Court, who was an employee of a Government company would not be within the mischief of the term "public servant" as defined in the Prevention of Corruption Act, 1947. In that context, the Supreme Court set out as to what is exactly the scope of the principle of interpretation in cases of referential legislation where only a definition provision is incorporated from an earlier Act. The Supreme Court, speaking through Fazl Ali, J., upholding the contention urged on behalf of the State of Madhya Pradesh observed that having regard to the preamble and objects of the Prevention of Corruption Act and the Penal Code, there could be no doubt that the Prevention of Corruption Act was a statute supplemental to the Indian Penal Code, and that being the position, any amendment in the definition of section 21 of the Penal Code would have to be necessarily read in section 2 of the Act. The Supreme Court considered the earlier decisions of the court in this connection and ultimately summed up the position as under in paragraph 16 at page 1841:

"16. On a consideration of these authorities, therefore, it seems that the following proposition emerges :

Where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases :

- (a) where the subsequent Act and the previous Act are supplemental to each other;
- (b) where the two Acts are in *pari materia*;
- (c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly unworkable and ineffectual; and
- (d) where the amendment of the previous Act, either expressly or by necessary intendment, applied the said provisions to the subsequent Act."

23. The learned Government Pleader on behalf of the State Government urged that if we are inclined to read that entry 37 of the Gujarat Act is a piece of referential legislation supplementing the Excise Act and the Additional Duties of Excise Act, it would be tantamount to abdication of legislative functions by the State Legislature, which would be in that case presumed to have incorporated without applying its mind. In other words, he urged that the contention advanced on behalf of the assesseees to read the amended definition of "cotton fabrics" in the Excise Act and the Additional Excise Duties Act as if incorporated in entry 37 of the Gujarat Act because there is legislation by incorporation, it would result in abdication of the legislative functions of the State Government since it would amount to adoption not only of the law as it existed but also as it might exist in future from time to time. In support of his contention, the learned Government Pleader relied on the decision of the Supreme Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, . On behalf of the assesseees this contention is sought to be repelled by urging that this is not a case of excessive delegation of powers since entry 37 of the Gujarat Act cannot be attached on the ground that the said statute did not provide in terms for adoption and/or application of the amended provisions of the Excise Act by the Parliament in future which was a case in *B. Shama Rao Vs. The Union Territory of Pondicherry*, .

24. We are afraid that the learned Government Pleader was not right in trying to persuade us that our view to read the future amendments in the definition of "cotton fabrics" in the Excise Act or the Additional Duties of Excise Act as incorporated in entry 37 of the Gujarat Act on well-recognised principles of interpretation of referential legislation on the ground that it would amount to abdication of duty by the State Legislature, is not well-founded. The decision of the Supreme Court in *B. Shama Rao Vs. The Union Territory of Pondicherry*, clearly supports our view. The facts in the said case were that the Legislative Assembly of the Union Territory of Pondicherry passed the Pondicherry General Sales Tax Act, 1965, which received the assent of the President on 25th May, 1965. Section 2(1) of the Act provided that the Madras General Sales Tax Act, 1959, as in force in the State of Madras immediately before the commencement of the said Act shall extend to and come into force in the Union Territory of Pondicherry subject to certain modifications and adaptations specified in that section. Section 2(2) of the Act provided that the Madras General Sales Tax Rules, 1959, and any other rules made or issued under the Madras Act and similarly in force, were to apply to Pondicherry. The Pondicherry Government issued a notification dated 1st March, 1966, bringing into force the Madras General Sales Tax Act, 1959, as extended by the Pondicherry Act on Pondicherry as from 1st April, 1966. In the meanwhile, the Madras Act was amended with effect from 1st April, 1966, by the Madras Legislature. The Pondicherry Legislature passed the Pondicherry Sales Tax (Amendment) Act, 1966, whereby it was, inter alia, provided that the Madras General Sales Tax Rules, 1959, and any other rules made or issued under the said Act and similarly in force in so far as their application is required for the purpose of effectively applying the

provisions of the said Act shall also extend to and be in force in the Union Territory of Pondicherry until such time as the rules are framed under the Pondicherry Act. In that context the Pondicherry Act was challenged on the ground of excessive delegation of the legislative power. The majority Court held that there was a total surrender in the matter of sales tax legislation by the Pondicherry Assembly, and therefore, the Pondicherry Act was void or still-born. The majority view was expressed by Shelat, J. (as he then was) and at page 225 the court ruled as under :

"The question then is whether in extending the Madras Act in the manner and to the extent it did u/s 2(1) of the principle Act the Pondicherry Legislature abdicated its legislative power in favour of the Madras Legislature. It is manifest that the Assembly refused to perform its legislative function entrusted under the Act constituting it. It may be that a mere refusal may not amount to abdication if the legislature instead of going through the full formality of legislation applies its mind to an existing statute enacted by another legislature for another jurisdiction, adopts such an Act and enacts to extend it to the territory under its jurisdiction. In doing so, it may perhaps be said that it has laid down a policy to extend such an Act and directs the executive to apply and implement such an Act. But when it not only adopts such an Act but also provides that the Act applicable to its territory shall be the Act amended in future by the other legislature, there is nothing for it to predicate what the amended Act would be. Such a case would be clearly one of non-application of mind and one of refusal to discharge the function entrusted to it by the instrument constituting it. It is difficult to see how such a case is not one of abdication or effacement in favour of another legislature at least in regard to that particular matter."

25. This part of the ruling of the court clearly indicates that the Pondicherry legislation was held to be void since it not only applied the Madras Act or the Rules as were in force but also the Act as may be amended in future, and to that extent there was a complete non-application of mind. The immediate succeeding paragraph in the decision of Shelat, J., at page 225 indicates as to whether in cases of referential legislation it is permissible to read the future amendments from the principal Act. The said observation read as under :

"But Mr. Setalvad contended that the validity of such legislation has been accepted in In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950, and particularly in the matter of heading No. 4 as summarised by Bose, J., in Rajnarain Singh Vs. The Chairman, Patna Administration Committee, Patna and Another, . In respect of that heading the majority conclusion no doubt was that authorisation in favour of the executive to adopt laws passed by another legislature or legislatures including future laws would not be invalid. So far as that conclusion goes Mr. Setalvad is right. But as already stated, in arriving at that conclusion each learned Judge adopted a different reasoning. Whereas Patanjali Sastri and Das, JJ., accepted the contention that the plenary legislative power includes power of

delegation and held that since such a power means that the legislature can make laws in the manner it liked if it delegates that power short of an abdication there can be no objection. On the other hand, Fazl Ali, J., upheld the laws on the ground that they contained a complete and precise policy and the legislation being thus conditional the question of excessive delegation did not arise. Mukherjea, J., held that abdication need not be total but can be partial and even in respect of a particular matter and if so the impugned legislation would be bad. Bose, J., expressed in frank language his displeasure at such legislation but accepted its validity on the ground of practice recognised ever since *Burah's* case (1878) 5 IA 178 and thought that that practice was accepted by the Constitution-makers and incorporated in the concept of legislative function. There was thus no unanimity as regards the principles upon which those laws were upheld

26. In our opinion, therefore, this cannot be said to be abdication of the legislative functions for obvious reasons which are as under : In the first place, the State Legislature concerned before passing the Gujarat Act applied its mind and decided that cotton fabrics should have the same meaning as assigned to it in the Central Excise Act since having regard to the purpose and object underlying the impost of excise duty as well as sales tax on such important commodities like cotton fabrics. In the second place, the legislature prescribed a policy and provided a definition which should be in consonance with the definition of "cotton fabrics" as understood in the Excise Act since any inconsistency or repugnancy may have far reaching consequences on the inter-State trade and commerce. In other words, as Fazl Ali, J., said in *In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950*, that the legislature embodied a policy, defined a standard and directed the authority chosen to act up to certain prescribed limits and not to go beyond them.

27. We are of the opinion that the Gujarat Act contains a policy as we shall presently point out and the policy was clear and precise so as to furnish guidance to the executive to implement them. The contention about abdication of the legislative functions by the State Legislature in trying to incorporate the future amendments in the the Excise Act should, therefore, be rejected.

28. The learned Advocate for the assessee, therefore, urged that since entry 37 is a referential legislation which is supplement to the Excise Act and the Additional Duties to Excise Act, on matter of principle and authority, it must be held that the amendment made in the earlier Act must necessarily be read into the subsequent Act; otherwise the incorporated provision in the subsequent Act would be wholly ineffective and unworkable. In order to decide this contention, therefore, we have to look shortly to what is the history of this referential legislation.

29. The legislative history in this contention has been traced in detail in *Hind Engineering Co., Rajkot Vs. Commissioner of Sales Tax*, . We need not set out in extenso the entire legislative history but it would be profitable to shortly refer to

the same. Under the Bombay Sales Tax Act, 1953, "cotton fabrics" as such were not exempted. It was only handloom cloth which was exempted from the liability of tax. In 1956, the Central Government in the interest of inter-State trade or commerce, declared certain goods of special importance in the course of inter-State trade and commerce. The said goods were known as declared goods under the Central Sales Tax Act, 1956, which received the President's assent on 21st December, 1956. It should be recalled that cotton fabrics were not included in the list of the declared goods. Two-fold restriction was placed by section 15 of the Central Sales Tax Act. The first restriction was as regards the rate of tax which enjoined that the State shall not charge sales tax or purchase tax on declared goods exceeding 2 per cent and the second restriction was that such tax shall not be levied at more than one stage. The result of this twofold restriction was that the State Governments were exposed to likely loss of revenue. In order to compensate State Governments for this apprehended loss of revenue, the Additional Duties of Excise Act, 1957, was enacted and put on the statute book with effect from 24th December, 1957. The reason underlying the enactment of this Additional Duties of Excise Act has been stated by the Division Bench of this Court in *Hind Engineering Co., Rajkot Vs. Commissioner of Sales Tax*, in the following terms :

"..... The proposal to levy additional duties of exercise on the said goods was a part and parcel of the integrated scheme under which sales tax levied at different rates by the States on certain goods was ultimately substituted by the levy of additional duties of excise on such goods and the States were compensated by payment of a part of the net proceeds of the said additional levy of duties of excise on such goods collected during each financial year"

30. Section 3 of the Additional Duties of Excise Act provided for the levy and collection of duties of excise on certain specified goods in addition to the duties chargeable on such goods under the Excise Act. "Cotton fabrics" were amongst the goods specified by the said section. Section 4 provided for the distribution of a part of the net proceeds of the additional duties thus collected amongst the States. u/s 7 of the said Act, as originally enacted, "cotton fabrics" amongst other goods were declared to be goods of special importance in inter-State trade or commerce and it was specifically provided that every sales tax law of a State shall, in so far as it imposes or authorises the imposition of a tax on the sales or purchases of declared goods, be subject as from the first day of April, 1958, to the restrictions and conditions specified in section 15 of the Central Sales Tax Act, 1956. The necessary steps to complete the scheme were taken when the Bombay Sales Tax (Special Exemptions) Act, 1957, was put on the statute book. The preamble of this Act, inter alia, stated that it was enacted with a view to exempt the sales or purchases of certain goods which became assessable to an additional duty of excise. Cotton fabrics as such were not included in the category of exempted goods under this amending Bombay Act of 1957. The Indian Parliament thereafter amended the Central Sales Tax Act by the Central Sales Tax (Second Amendment) Act (No. 31 of 1958) which came into force from

1st October, 1958. Cotton fabrics as defined in item No. 12 of the First Schedule to the Excise Act were added to the category of goods declared by section 14 of the Central Sales Tax Act to be of special importance in inter-State trade or commerce and original section 15 of the Central Sales Tax Act was substituted by a new section 15 by this amending Act. Besides prescribing the twofold restriction which was three in the original section 15, a further provision was made for making a refund to a person who has paid sales tax or purchase tax under the State law in respect of the declared goods which were sold in the course of inter-State trade or commerce. Thus, the tax already paid in respect of such goods was made refundable by new section 15 which was inserted by the aforesaid Central Sales Tax (Amendment) Act. When the Bombay Sales Tax Act, 1959, was put on the statute book with effect from 25th September, 1959, it provided u/s 5(1) that notwithstanding anything contained in the Act but subject to the conditions or exceptions, if any, set out against each of the goods specified in column 3 of Schedule A, no tax shall be payable on the sales or purchases of any goods specified in that schedule. Entry 15 of Schedule A specified "cotton fabrics" which were not liable to payment of tax on the sale or purchase as provided in section 5(1). The definition in entry 15 was "cotton fabrics" as defined in item 12 of the First Schedule to the Central Excises and Salt Act, 1944. Now this item 12 was remunerated as item 19 by the Central Excises (Conversion to Metric Units) Act, 1960. The State Government, therefore, by a notification issued u/s 5(2) of the Bombay Sales Tax Act, 1959, which was adopted and enforced in the area under the jurisdiction of the State of Gujarat, amended this entry 15 by providing that "cotton fabrics" would be as defined in item 19 of the First Schedule to the Excise Act and would be exempt from the liability of sales tax or purchase tax, as the case may be, pursuant to the renumbering of item 12 as item 19 by the Central Excises (Conversion to Metric Units) Act, 1960. The Gujarat Sales Tax Act, 1969, which has been placed on the statute book with effect from 6th May, 1970, has repealed the Bombay Sales Tax Act, 1959, and u/s 5(1) the goods specified in Schedule I have been exempted from the liability of payment of sales tax or purchase tax subject to the conditions prescribed therein and accordingly entry 37 with which we are concerned has exempted cotton fabrics as defined in item 19 of the First Schedule to the Excise Act from the liability of sales tax or purchase tax, as the case may be. There is no condition governing this exemption prescribed under the said schedule. Meanwhile it should also be recalled that by the Finance Act, 1969, which received the President's assent on 13th May, 1969, item No. 19 of the Excise Act which provided for duty on cotton fabrics was again amended and the material part of that item so far as relevant for our purposes reads as under :

"19. Cotton fabrics -

"Cotton fabrics" means all varieties of fabrics manufactured either wholly or partly from cotton and includes dhoties, sarees, chadders, bed-sheets, bed spreads, counterpanes, table-cloths, embroidery in the piece, in strips or in motifs and fabrics impregnated or coated with preparations of cellulose

derivatives or of other artificial plastic materials but does not include any such fabric if it contains -

.....

....."

31. It should be further stated for completing the history that this item was again amended by the amending Act, 1980, as stated above. This is shortly the legislative history of this item which has passed through many vicissitudes.

32. Having regard to the legislative history it cannot be a matter of debate and it is not in the larger interest of the State to dispute that the entry pertaining to cotton fabrics in the schedule exempting goods from sales tax is supplemental legislative provision to the Central Sales Tax Act as well as the Excise Act and the Additional Duties of Excise Act. As a matter of fact, there is an integrated scheme evolved in connection with the goods of special importance in inter-State trade or commerce. The wholesome scheme of national integrity in the matter of commerce and trade is sought to be protected and preserved by providing against State intervention which is not always motivated by purely economic and fiscal consideration. Any attempt to divorce these well-connected provisions would have disastrous consequences, the immediate and ultimate implications of which, it is difficult to comprehend. Any attempt therefore to read the exemption provision contained in the Gujarat Act de hors the intimately connected provisions of the Excise Act and the Additional Duties of Excise Act may possibly result in rendering the exemption provisions wholly ineffective and unworkable. We are, therefore, of the opinion that since the referential legislation contained in entry 37 is supplemental to the Excise Act as well as the Additional Duties of Excise Act, the amendments made in the original incorporated provision must necessarily project and must be read as a part of the referential legislation contained in entry 37. The exception specified by the Supreme Court in *The State of Madhya Pradesh Vs. M.V. Narasimhan*, , namely, where the subsequent Act and the previous Act are supplemental to each other, would squarely apply to the present case, and therefore, the incorporated provisions have to be read with all the amendments made in the borrowed provisions from time to time. In that view of the matter, therefore, we must read the enlarged definition as effected by the amending Act of 1980 in the referential legislation contained in entry 37 as if the law was all along the same according to the enlarged definition with effect from 1st March, 1955, and therefore, at all the relevant times of the assessment.

33. The learned Government Pleader, therefore, urged that even if the court is justified in reading the amended provision as if it is a part of the original referential legislation as contained in entry 37, even then on the user's test which is the real test to be applied, tarpaulins cannot be classified as cotton fabrics since tarpaulins cannot be put to the use for preparing garments or as furnishing fabrics. In support of his contention reliance was heavily placed on

various decisions and particularly on the decision of the Supreme Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers . This contention which has been urged on behalf of the Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, the Government has found favour with the Tribunal. The next question of law which, therefore, arises is, whether the Tribunal was justified in applying this principle of user's test which it did by relying on two decisions of the Madras High Court in (i) M. Jeewajee and Co. Vs. The State of Tamil Nadu, . No doubt, on principle as well as on authority, the user's test is well-recognised; vide Hind Engineering Company's case [1973] 31 STC 115 BC where a Division Bench of this Court held that the process of superimposition of rubber on the cotton fabrics brought about such a basic change in its character, nature and form that the base material loses its identity and would convert into altogether a different commercial commodity which, therefore, could not be said to fall within the meaning of the expression "cotton fabrics".

34. In State of Gujarat Vs. Prakash Trading Co., Ahmedabad, the Supreme Court held that shampoo is a kind of liquid soap and it has all the essential ingredients of a soap and its liquid state would not alter the basic character of shampoo and take it out of the category of soaps. It is also no more open to debate that if the identity of an article is changed in the sense that it obtains a different characteristic having different use and name as recognised in the commercial world, it ceases to be the original article vide Ganesh Trading Co., Karnal Vs. State of Haryana and Another, , where the question was whether the appellant who was carrying on the business of buying paddy and after getting it husked either in their own mills or in other mills sold the rice to Government and other registered dealers was entitled to claim exclusion of the turnover relating to paddy over which purchase tax had been paid. Rejecting the claim of the dealer-assessee, the Supreme Court held that the appellants were not entitled to the deduction since paddy did not continue to be paddy after dehusking and rice and paddy are two different things in ordinary parlance and that, therefore, when paddy is dehusked and rice produced, there has been a change in the identity of the goods.

35. In Tungabhadra Industries Ltd. Vs. The Commercial Tax Officer, Kurnool, a question arose as to whether a dealer was entitled to deduction from the total amount of the price of goods sold under a bill the amount of railway freight under rule 5(1)(g) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, read with rule 18(2) thereof. In that context, a question arose whether hydrogenated groundnut oil (commonly called vanaspati) was "groundnut oil" within the meaning of rule 18(2) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939. The Madras High Court has held that as a result of the process of refinement of the groundnut oil, the hydrogenated oil which was ultimately produced was a different product having a distinct characteristic and name recognised in the commercial sense, and therefore, cannot be treated as groundnut oil. Reversing this view of the Madras High

Court, the Supreme Court held that neither mere absorption of other matter, nor intermolecular changes necessarily affect the identity of a substance as ordinarily understood, and having regard to the chemical character of the hydrogenated oil, there is no change in its essential nature and it retains an oil - a glyceride of fatty acids - that it was when it issued out of the press. It is equally recognised that where a commodity retains a continuing substantial identity through the processing stage, it cannot be said to be a new article that has come into existence. The Supreme Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam Vs. Pio Food Packers, was concerned with the question as to whether processed pineapple slices can be said to be commodity other than the original pineapple fruit, and therefore, not entitled to claim exemption from levy of purchase tax u/s 5A(1)(a) of the Kerala General Sales Tax Act, 1963. The Supreme Court, speaking through Pathak, J., rules that where there is no essential difference in identity between the original commodity and the processed article it is not possible to say that one commodity has been consumed in the manufacture of another, and although it has undergone a degree of processing, it must be regarded as still retaining its original identity. In the course of the judgment, reference was made to the decision of the Supreme Court of the United States in East Texas Motor Freight Lines v. Frozen Food Express 100 LEd 917 and the decision in Anheuser-Busch Brewing Association v. United States 52 LEd 336. The following passages were quoted from the decision of the Supreme Court in Anheuser-Busch Brewing Association's case 52 LEd 336 .

"Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labour and manipulation. But something more is necessary There must be transformation; a new and different article must emerge, "having a distinctive name, character or use"."

"At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been "manufactured"."

36. The learned Government Pleader, therefore, urged that if the basic canvas cloth which is a cotton fabric has undergone some process by application of wax, etc., a new article having a distinct character, name and use recognised in the commercial circle comes into existence, and therefore, it cannot be classified as "cotton fabrics". We are afraid that this is too spacious a contention to which we can adhere to. The reasons for our disagreement are as under :

In the first place, we have to answer the question whether the Tribunal was justified in holding that tarpaulins are not cotton fabrics. The dispute can be resolved only by reference to the definition of the term "cotton fabrics" in entry 37 of the Gujarat Act read with item 19 of the Excise Act. If the definition in item 19 takes into its sweep the tarpaulins which has the water-proofs quality, there is no scope for invoking the principle to user's test. The use to which tarpaulins are put to is, in our opinion, immaterial for deciding the question whether they can be classified as cotton fabrics or not since cotton fabrics are defined. The facts

which have been found by the Tribunal are in the following terms :

"..... Now, tarpaulin has got cloth as base but solutions of wax and other chemicals have been spread over this cloth. Then, this processed canvas cloth is cut and edges are stitched with eyelets and it is thereafter sold as tarpaulin"

37. While rejecting the contention urged before the Tribunal on behalf of the assessee that tarpaulins are cotton fabrics, the Tribunal relied on the failure on the part of the learned Advocate for the assessee to produce a certificate from the competent authority to show that the solution of wax and other chemicals is of either cellulose derivatives or artificial plastic materials. Now this approach of the Tribunal, in our opinion, was not justified for the simple reason that the Tribunal has to address itself to the question whether after the processing, namely, application of wax and other chemicals, the product which has emerged had assumed different characteristics than those of cotton fabrics. There is an additional reason for disapproving this approach of the Tribunal which has come into existence after the reference has been made, namely, the enlarged definition by the amending Act of 1980 which has in effect and substance entitled the waterproof cloth for being treated as cotton fabrics. In support of the view which has been canvassed by the Tribunal two decisions of the Madras High Court have been relied on and again pressed before us at the time of hearing of this reference.

38. In *The State of Tamil Nadu Vs. East India Rubber Works*, the question was whether waterproof cloth, such as rexine, P.V.C. cloth, rubberised or synthetic waterproof fabrics, etc., made with cloth as base, are not textiles falling within item 4 of Schedule III to the Tamil Nadu General Sales Tax Act, 1959. The Madras High Court held that inasmuch as the processed articles have different properties and characteristics and are intended for different use, and since in commercial circles they are treated as entirely different from cloth or textile they cannot be rightly classified as textiles falling within item 4 of Schedule III to the Tamil Nadu Sales Tax Act.

39. In *M. Jeewajee and Co. Vs. The State of Tamil Nadu*, these very articles of tarpaulins were the subject-matter of the reference. The assessee, who was a dealer in tarpaulins cut proceed canvas cloth, stitched the edges with eyelets and sold the finished product as tarpaulins, claimed that the tarpaulins would fall within the expression "textiles" and would be exempt u/s 8 of the Tamil Nadu General Sales Tax Act, 1959. The claim was rejected by the Madras High Court following its earlier decision in *The State of Tamil Nadu Vs. East India Rubber Works*, that since tarpaulin was sold as a separate finished product, it cannot be treated as textile falling under the relevant item exempting the goods from the liability of sales tax. The reasoning which has weighted with the Madras High Court in not classifying the waterproof cloth or for that matter the tarpaulins as textile was that having regard to the distinct use and the name recognised in commercial world they cannot be classified as textiles. In other words, the

Madras High Court applied the user's test or the commercial sense in which the products are recognised and understood. Now it should be noted that the Punjab and Haryana High Court in *Porritts and Spencer (Asia) Ltd. Vs. State of Haryana*, was concerned with the question as to whether dryer felts can be classified as "textile". On difference between the two learned Judges constituting the Division Bench, the matter was placed before the third learned Judge of that court where by majority it was held that textile, in the everyday parlance of the ordinary merchant and consumer-public, means clothing, furnishing and the like, and therefore, it must be understood in the same sense under the Sales Tax Act, and therefore, it cannot be interpreted to include materials like dryer felts specially manufactured for industrial purposes. The Punjab and Haryana High Court in this connection referred to the decision of the Madras High Court in *East India Rubber Work's case* [1974] 33 STC 399 Mad where on the same reasoning the Madras High Court has also held that waterproof cloth or for that matter tarpaulins cannot be classified as textiles. In appeal at the instance of the assessee, the Supreme Court reversed this decision of the Punjab and Haryana High Court as reported in *Porritts and Spencer (Asia) Ltd. Vs. State of Haryana*, where Bhagwati, J., speaking for the court held as under at pages 436-438 :

"There can, therefore, be no doubt that the word "textiles" in items 30 of Schedule B must be interpreted according to its popular sense, meaning "that sense which people conversant with the subject-matter with which the statute is dealing would attribute to it". There we are in complete agreement with the Judges who held in favour of the revenue and against the assessee. But the question is : What result does the application of this test yield ? Are "dryer felts" not "textile" within the ordinary accepted meaning of that word ? The word "textiles" is derived from the Latin "texere", which means "to weave" and it means any woven fabric. When yarn, whether cotton, silk, woollen, rayon, nylon or of any other description or made out of any other material is woven into a fabric, what comes into being is a "textile" and it is known as such. It may be cotton textile, silk textile, woollen textile, rayon textile, nylon textile or any other kind of textile. The method of weaving adopted may be the warp and woof pattern as is generally the case in most of the textiles, or it may be any other process or technique. There is such phenomenal advance in science and technology, so wondrous is the variety of fabrics manufactured from materials hitherto unknown or unthought of and so many are the new techniques invented for making fabric out of yarn that it would be most unwise to confine the weaving process to the warp and woof pattern. Whatever be the mode of weaving employed, woven fabric would be "textiles". What is necessary is no more than weaving of yarn and weaving would mean binding or putting together by some process so as to form a fabric. Moreover a textile need not be of any particular size or strength or weight. It may be in small pieces or in big rolls : it may be weak or strong, light or heavy, bleached or dyed, according to the requirement of the purchaser. The use to which it may be put is also immaterial and does not bear in its character as a textile. It may be used for making wearing apparel, or

it may be used as a covering or bed-sheet or it may be used as tapestry or upholstery or as duster for cleaning or as towel for drying the body. A textile may have diverse used and it is not the use which determined its character as textile. It is, therefore, no argument against the assessee that "dryer felts" are used only as absorbents of moisture in the process of manufacture in a paper manufacturing unit. That cannot militate against "dryer felts" falling within the category of "textiles", if otherwise they satisfy the description of "textiles".

..... It is true that our minds are conditioned by old and antiquated notions of what are textiles and, therefor, it may sound a little strange to regard "dryer felts" as "textiles". But it must be remembered that the concept of "textiles" is not a static concept. It has, having regard to newly developing materials, methods, techniques and processes, a continually expanding content and new kinds of fabric may be invented which may legitimately, without doing any violence to the language, be regarded as "textiles". Take for example rayon and nylon fabrics which have now become very popular for making wearing apparel. When they first came to be made, they must have been intruders in the field of "textiles" because only cotton, silk and woollen fabrics were till then recognised as "textiles". But today no one can dispute that rayon and nylon fabrics are textiles and can properly be described as such. We may take another example which is nearer to the case before us. It is common knowledge that certain kinds of hats are made out of felt and though felt is not ordinarily used for making wearing apparel, can it be suggested that felt is not a "textile" ? The character of a fabric or material as textile does not depend upon the use to which it may be put. The uses of textiles in a fast developing economy are manifold and it is quite common now to find "textiles" being used even for industrial purpose. If we look at the Customs Tariff Act, 1975, we find in Chapter 59 occurring in section XI of the First Schedule that there is a reference to, "textile fabrics" and textile articles, "of a kind commonly used in machinery or plant" and clause (4) of that chapter provides that this expression shall be taken to apply inter alia to "woven textile felts of a kind commonly used in paper-making or other machinery" This reference in a statute which is intended to apply to imports made by the trading community clearly shows that "dryer felts" which are "woven textile felts of a kind commonly used in paper-making machinery" are regarded in common parlance, according to the sense of ordinary traders and merchants, textile fabrics. We have, therefore, no doubt that "dryer felts are "textiles" within the meaning of that expression in item 30 of Schedule B."

40. The Supreme Court, therefore, disapproved the application of user's test even in case of determination of the question as to what goods can rightly be classified as "textiles". The Supreme Court has gone to the length of referring as to what meaning is ascribed under similar fiscal legislation of Customs Tariff Act, 1975, like the Excise Act for purposes of finding out the real connotation of the term "dryer felts" which was in submission of the assessee should be treated as textiles.

41. Another decision of the Supreme Court is in Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others, where the question at issue was whether rayon tyre cord fabrics which is used in the manufacture of tyres can be rightly classified as rayon fabric covered by item 18 of the Schedule to the Rajasthan Sales Tax Act, 1954, and therefore, exempt from sales tax under the Central Sales Tax Act, 1956. The relevant entry 18 in the Schedule to the Rajasthan Sales Tax Act was in the following terms :

"All cotton fabrics, rayon or artificial silk fabrics, woolen fabrics as defined in the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Central Act 58 of 1957)."

42. The Additional Duties of Excise (Goods of Special Importance) Act, 1957, defined "rayon or artificial silk fabrics" by assigning the same meaning to it as given in item 22 of the First Schedule to the Central Excises and Salt Act, 1944. Now, item 22 of the First Schedule to the Central Excises and Salt Act, 1944, was in the following terms :

""Rayon or artificial silk fabrics" means all varieties of fabrics manufactured either wholly or partly from rayon or artificial silk and includes embroidery in the piece, in strips or in motifs and fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial plastic materials"

43. In terms, therefore, the Supreme Court was concerned with the construction, width and amplitude of an entry which is in pari materia with the one with which we are concerned in this reference. It was common ground before the Supreme Court that rayon fibre is spun into rayon and twisted into cord which were arranged lengthwise and were packed 25 to an inch. By a process of weaving, cotton threads are wefted through a loom across the cords which were packed not more than two to five per inch. The unprocessed rayon was sold in the form of rolls in the market and after initial chemical treatment it was put through a process of rubberizing in the tyre manufacturing plant. The rayon tyre cord fabric was used as a reinforcing base in the manufacture of tyres, and therefore, was a product generally intended for industrial use. The rayon tyre cord employed as a component in the manufacture of rayon tyre cord fabric was also directly as such and it was sold packed on cones, somewhat like yarn is sold. In that context the Supreme Court considered whether they could be said to be rayon fabrics. Pathak, J., speaking for the court negated the contention urged on behalf of the State Government that the Additional Duties of Excise (Goods of Special Importance) Act, 1957, enacted by the Parliament could not have intended the expression "rayon fabrics" to include rayon tyre cord fabrics. After referring to the earlier decision of the said court in Porritts and Spencer (Asia) Ltd. Vs. State of Haryana, , it was ruled as under at pages 260-261.

"On a comprehensive consideration of the material before us, there is no escape from the conclusion that by and large a tyre cord fabric is regarded as a textile fabric. The peculiar feature that the tyre cord constitutes the dominating element

indicating the use to which the fabric is put and the close concentration in which it is packed in contrast to the light density with which the weft thread is woven does not detract from the conclusion that what we have is a textile fabric. We are concerned with the product manufactured and sold by the appellant. It is wholly immaterial that once tyre cord fabric has, in the hands of the tyre manufacturer, undergone, the process of rubberizing and is embedded in the tyre body the significance of the weft thread is greatly reduced. It may also be that in the more modern process of manufacturing tyres what is used is cabled rayon with hawser twists with the cords assembled in parallel order and rubberized without the intermediate process of weaving on a loom. The material on the record, however, indicates that the product manufactured by the appellant does not fall in that category. It is a woven fabric in which the intermediate process of weaving the weft thread across the warp cord is an integral stage of manufacture. When the purchaser buys the product, it is the entire integrated woven fabric which he buys, it is not merely the tyre cord by itself. If tyre cord was all that he desired, he would purchase that commodity, which is readily available, and not tyre cord fabric. We may also point out that item 22 of the First schedule to the Central Excises and Salt Act speaks of "all varieties of fabrics", language wide enough to include the rayon tyre cord fabric manufactured by the appellant."

44. Our attention was invited by the learned Advocates for the assesseees to one paragraph in the said decision at page 261 where concession was made on behalf of the State Government as to what would be the fabrics impregnated or coated with preparation of cellulose derivatives or other artificial plastic material. The concession is in the following terms :

"It was contended by Shri L. N. Sinha, for the respondents, that industrial fabrics are not envisaged within the expression "rayon fabric" in item 22 of the First Schedule to the Central Excises and Salt Act. As we have already pointed out, the item refers to "all varieties of fabrics" and it will be noticed that item 22(3) speaks of fabrics impregnated or coated with preparations of cellulose derivatives or of other artificial plastic materials which, we are told, would include rubberized cloth, tarpaulin cloth, P.V.C. cloth, waterproof cloth and tent cloth. A whole range of fabric is included."

45. It was, therefore, urged relying on this passage that tarpaulins would be covered under all varieties of fabrics. We are not, however, inclined to conclude the question by solely relying on this passage where some concession appears to have been made by the parties before the Supreme Court. The only question, therefore, is, as we have stated, whether the Tribunal has committed an error in holding that tarpaulins are not cotton fabrics. We are of the opinion that having regard to the enlarged definition of the term "cotton fabrics" in item 19 as effected by the Finance Act, 1969, as well as by the amending Act of 1980, tarpaulins must be held to be cotton fabrics. If that is the correct classification, and we have no doubt in our mind about that, there is no necessity for considering whether they are articles manufactured from the textiles, and

therefore, liable to be taxed under entry 18(a) of Part A of Schedule II to the Gujarat Act. However, the learned Government Pleader urged that since the Tribunal has considered it from that angle, we must address ourselves to that part of the question which raises the issue whether the Tribunal was justified in holding that tarpaulins are not articles prepared from the cotton fabrics or textile fabrics. It would, therefore, be necessary to set out what was the precise entry at the relevant time. Entry 18(a) reads as under :

"18(a). Ready-made garments and articles (not being garments and articles to which entry 35 in Schedule I applies) prepared from any textile or handloom fabrics including those which have been embroidered or otherwise decorated when sold at a price exceeding ten rupees per article or suit"

46. The learned Advocates for the assessees have advanced their arguments only by way of alternative contention. The submission of the learned Advocates for the assessees is that having regard to the legislative history of this entry, the scope and width of the words "articles prepared from textiles", etc., cannot be put down on principles of *ejusdem generis* or *noscitur a sociis*. On behalf of the State Government, the view of the Tribunal is supported on the ground that having regard to the commercial parlance and the different use to which the tarpaulins are put and the nature of the end-product and its characteristic, the Tribunal was justified in not classifying it as article prepared from textile. It is not necessary for us to go into the elaborate debate which had taken place at the Bar but suffice it for our purposes to say that the view of the Tribunal was neither justified nor correct in view of the decision of the Supreme Court in *Porritts and Spencer (Asia) Ltd. Vs. State of Haryana*, as well as *Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others*, where the Supreme Court has ruled that articles like "dryer felts" or "rayon tyre cord fabric" in spite of processing does not lose its characteristic as textile and, therefore, entitled to be treated as textile. In that view of the matter, therefore, the result is that this reference is accepted and we must answer the second part of question referred to us in Sales Tax Reference No. 12 of 1978 as to whether the Tribunal was justified on the facts and in the circumstances to hold that tarpaulins are covered by entry 13 of Schedule III to the Gujarat Act in the negative and in favour of the assessee and against the State Government by holding that the goods should be classified as cotton fabrics falling under entry 37 of Schedule I and therefore not liable to tax.

47. The question in Sales Tax Reference No. 9 of 1978 would be required to be reframed so as to bring out the dispute between the parties clearly in issue. The reframed question would thus read :

"Whether, on the facts and in the circumstances of the case, the Tribunal is correct in holding that tarpaulins are not articles prepared from cotton fabrics or textile fabrics, and therefore, not covered by entry 18(a) of Schedule II of Part A to the Gujarat Sales Tax Act, 1969, but are covered by entry 13 of Schedule III to the said Act as held by the sales tax authorities ?"

48. We answer this reframed, namely question as under :

The second part of the question, namely, whether the Tribunal was justified in holding that tarpaulins are covered by entry 13 of Schedule III to the Gujarat Sales Tax Act in the negative, that is, in favour of the assessee and against the revenue by holding that the goods should be classified as cotton fabrics falling under entry 37, Schedule I, and therefore not liable to tax.

49. The first parts of the questions in both the references are not required to be answered in view of the matter which we have taken because it is in our opinion academic.

50. The State Government shall pay costs of Sales Tax Reference No. 12 of 1978 to the assessee.

51. There should be no order as to costs in Sales Tax Reference No. 9 of 1978.

52. References answered accordingly.