
(2007) 08 MP CK 0058
In the Madhya Pradesh High Court

Prism Cement Limited and Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 31-08-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 245, 246, 301, 302
Electricity (Supply) Act, 1948 — Section 3, 44, 62

Citation : (2008) 2 MPJR 269

Hon'ble Judges : S.R. Waghmare, J; Dipak Misra, J

Bench : Division Bench

Judgement

Dipak Misra, J.

Keeping in view the similitude of the factual matrix and the controversy of law involved this batch of writ petitions was heard analogously and is disposed of by this singular order. For the sake of clarity and convenience the factual matrix in W.P. No. 1860/2004 are explicated herein.

The petitioner in W.P. No. 1860/2004, a manufacturing cement industry installed a captive power plant at its own expenditure. The State of Madhya Pradesh was suffering from power crisis from the year 1991 and the M.P. State Electricity Board [for brevity 'the Board'] was failing to supply electrical energy to all classes of consumers as a result of which the State Government framed power-policy from time to time to encourage generation of power in private sector and to upgrade the industries to establish their own captive power plants. The State Government extended assurances to attract investment and to establish captive power plant on private basis which enabled the industries not only to produce for their own consumption but to sell surplus power which would effectuate in reduction of load of supply on the Board.

In pursuance of the said policy the petitioner after obtaining consent u/s 44 of the Electricity (Supply) Act, 1948 [for short 'the Act'] and the policies framed by the Board set up a captive generation plant. Such captive power generation plants were provided exemption of electricity duty in respect of power generating

plants. As pleaded, the State Legislature enacted M.P. Upkar Adhiniyam, 1981 [for short 'the 1981 Act'] for levy of certain cess. Levy of energy development cess was imposed on every distributor of electrical energy. In the year 2001 new power policy came into existence as a consequence of which cess of 20 paise per unit of electrical energy produced by the industries was imposed. In order to achieve the said purpose an ordinance, namely, Madhya Pradesh Upkar (Sanshodhan), Adhyadesh, 2001 was promulgated. The said ordinance was subsequently replaced by the M.P. Upkar (Sanshodhan) Adhiniyam, 2001.

The Madhya Pradesh Cement Manufacturers Association of which the petitioner is a member filed Writ Petition No. 3547/2001 challenging the Ordinance by which Section 3(2) of the 1991 Act was amended. During the pendency of the writ petition the State Legislature passed the Madhya Pradesh Upkar (Sansodhah) Vidheyak, 2001 and further enacted the Madhya Pradesh Upkar (Sansodhah) Adhiniyam, 2001 [for brevity 'the Amending Act of 2001'] which replaced the Ordinance of 2001. A Division Bench of this Court by order dated 21-11-2001 repelled the challenge and held that the amendment was constitutionally valid. It is put forth that the Amending Act of 1981 was further amended and named as M.P. Upkar (Dwitiya Sanshodhan) Adhiniyam, 2001. By the said amendment rate of energy cess on the distributors of electrical energy under Sub Section (1) of Section 3 was increased from 1 paise to 10 paise. The said increase was challenged in number of writ petitions.

It is pertinent to mention here that being aggrieved by order dated 21-11-2001 passed in W.P. No. 3547/2001 the M.P. Cement Manufacturers Association moved the Apex Court and the Apex Court while granting relief by order dated 1-03-2002 observed that question of refund of cess paid by the members of the M.P. Cement Manufacturers Association would be considered at the time of final hearing. During the pendency of the appeal before the Apex Court the State of M.P. further amended the M.P. Upkar Adhiniyam, 1991 by inserting an explanation to Sub-section (2) of Section 3. The challenge to the Amending Act 2001 was extended to the Amending Act of 2003.

As put forth the Apex Court allowed the appeal and came to hold that Section 3(2) of the 1981 Act as amended by the Amending Act 2001 and further amended by Amending Act 2003 were ultra vires the Constitution being outside the legislative competence of the State Legislature. While so holding the Apex Court directed refund of cess collected after 01-03-2002 to the appellants therein with interest at the rate of 9% per annum.

After rendering of the decision of the Apex Court the State Legislature in order to save the loss caused to the State exchequer enacted an Act namely, M.P. Upkar (Sanshodhan Tatha Vidhimanyatakaran) Adhiniyam, 2004 [for brevity 'the Validation Act of 2004'] on 15-4-2004 which is deemed to have come into force with effect from 29th June, 2001. The constitutional validity of the provisions of the said Act are challenged on various grounds. It is urged in the petition that the Validation Act is beyond the legislative competence of the State Legislature

as the effect of the Validation Act is still to levy energy development cess on the production of the electricity. It is put forth that there is hostile discrimination between the consumer buying from producers u/s 3(2) and the consumers buying from distributor u/s 3(1), as the cess is 20 paise per unit u/s 3(2) and 10 paise per unit u/s 3(1). It is contended that the classification not being with reference to the consumer but qua the producer, the discrimination among the producers amounts to taxing the producers. It is also set forth that the Validation Act is not preceded by due consultation with the State Electricity Regulatory Commission as required u/s 12(3) of the MP Vidyut Sudhar Adhiniyam, 2000 (for short "Sudhar Adhiniyam 2000"). In this backdrop it is prayed in the writ petition that Section 1(2) of the Act of 2004 and Section 3(2) of the 1981 Act as amended by the Act of 2004 be struck down as unconstitutional. There is a further prayer to strike down Section 3(1)(a) and 3(1)(b) of the Validation Act, 2004 as unconstitutional and to hold that the petitioner is entitled to refund of energy development cess collected from him with interest.

A return has been filed on behalf of the respondents No. 1 and 2 contending, inter alia, that the State is competent to levy cess on sale, supply and consumption of electrical energy and it can do so retrospectively. It is contended that by passing of the Validation Act the State Legislature has removed the lacuna and the retrospectivity given to the Statute has been given which is within the parameters of laws. The stand that there has been no consultation with the State Electricity Regulatory Commission is of no significance as such non consultation would not make the statute invalid and in the present case there was consultation with the Commission as per M.P. Vidyut Sudhar Adhiniyam. The Commission approved the proposed amendment but made certain observations in respect of utilisation of the cess and thereafter the matter was placed before the Council of Ministers and eventually Section 3(2) of the 1981 Act imposing cess at the rate of 20 paise per unit of electricity was passed by the State Legislature. The recommendations of the Commission has been brought on record as Annexure-R/1. The contention of the petitioners that there has been violation of Articles 301 and 302 of the Constitution of India is misconceived as the said Articles relate to interstate trade and commerce. The State Legislature has imposed cess on the captive power plant owners on the electrical energy sold, supplied or consumed by them and is not a tax on inter-State trade or commerce. There is variation in the price of electricity due to imposition of cess in M.P. and other State does not also deserve consideration inasmuch as neither the petitioners nor any other captive power plant owner is selling or purchasing the electricity from outside the State of M.P. and on such hypothetical basis an enactment cannot be declared unconstitutional. Cess collected from the petitioners shall be utilised only for the purposes which have been specifically mentioned and enumerated in Section 3(4) of the 1981 Act and, therefore, the allegations that cess is being collected to augment its financial status of the Board are misconceived.

It is the further stand of the respondents No. 1 and 2 that the Legislature, for the

levy of energy development cess of electrical energy sold or supplied to consumers, has created two categories or classes. First is those who are engaged in distribution of electrical energy for consumption and second those who generate electrical energy by installing their own captive power unit for the purpose of consuming by themselves or their employees or for the purpose of selling or supplying the same. The first category has been dealt with under the provision of Section 3(1) while the second category or class has been dealt with under Sub-section (2). Under the first category or class such statutory body like MPSEB etc. is covered as licensee distributor and whereas in the second category the individuals who have set up their own captive power unit for self consumption or for their employees are included. There is logical and rational criteria for classifying these to categories and prescribing different rates. It is further urged that the MPSEB, a distributor, distributes electrical energy all over the State and it has to suffer transmission and distribution losses up to 35% and hence, it is a class apart from those who have installed their own captive power generating units. Regard being had to the aforeaid, the State Legislature in its wisdom has prescribed energy development cess at 10 paise per unit in respect of MPSEB and 20 paise per unit in respect of those who are captive power generators. It is contended that there is intelligible differentia between the two categories/classes and by such classification no discrimination is caused and it does not offend Article 14 of the Constitution of India. It is further put forth that imposition of tax on consumption and sale of electricity comes within the legislative competence of the State as per Entry 53 of List II of the 7th Schedule to the Constitution and keeping that in view the amendment has been made and hence, the consent of the President of India was not necessary inasmuch as there is no overlapping repugnancy. It is further put forth that the Validation Act falls within the four corners of the legislative competence and validates the previous levy by removing the lacuna retrospectively and, therefore, the assail to the provision of the enactment is untenable.

A return has been filed by the respondent No. 3 contending, inter alia, that reasons of imposition of cess are evident from the object and reasons indicated in the Act of 2001. Cess has been imposed not on production of electricity but the same is levied on the electrical energy sold and supplied to the consumers or consumed himself or by his employees. After the judgment of the Apex Court, by amending, Validation Act 2004 the lacuna has been removed by the State Legislature and presently the cess has been imposed not on production or generation of electricity but on sale and consumption of electricity. It is averred that the Validation Act, 2004 validates levy already collected and the said Validation Act, 2004 does not suffer from any constitutional vice being passed by the competent legislature and it does invite frown of any of the provisions of the Constitution. It is also put forth that the stand that there has been violation of Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam has no legs to stand upon. It is the further stand in the return that by the Validation Act, 2004 the word 'production' has been substituted by 'sale and consumption of energy' with

retrospective effect and the State Legislature has the authority to enact a law retrospectively and, more so, for validating the levy. The assertion that Section 3(2) of the Validation Act, 2004 is discriminatory and unreasonable is totally unsupportable and unacceptable as the classification is neither bad nor does it entail in hostile discrimination. It is contended that the Board serves a public cause and is not a commercial organisation whereas captive power plants installed by private entrepreneurs are based on their own commercial and economic considerations.

We have heard Mr. L. Nageshwar Rao, Mr. Ravindra Shrivastava, Mr. Alok Aradhe, Mr. S.C. Sharma, learned Senior Counsel and Mr. Pankaj Rajmachikar, Mr. Jayant Mukhraj, Mr. Prem Francis and Mr. J.K. Pillai for the petitioners in various cases, Mr. P.N. Dubey, learned Deputy Advocate General for the respondents 1 and 2 and Mr. M.L. Jaiswal, learned Senior Counsel along with Mr. K.K. Gautam for the respondents 3 and 4.

The learned Counsel for the petitioners have raised the following contentions:

(i) The Validation Act, 2004 though has substituted the word/term "produce" in Section 3(2) of the 2001 Act and replaced by the words sold, supplied or consumed but in conceptual eventuality and in its quintessential nature the cess continues to be levied for production of electrical energy by captive power plants in respect of which the State Legislature does not have the legislative competence.

(ii) Any imposition of cess on production is within the domain of the Parliament but by validating the production the State Legislature has transgressed its legislative competence.

(iii) The State Legislature while enacting Section 3(1) of the Validation Act has not kept in mind that in a captive power plant between the source of generation and the point of consumption there is transmission which causes loss and hence, there is no difference between the quantum of electrical energy produced and what is consumed. Under such circumstances levy imposed tantamounts to be a levy on production and hence, it is a colourable exercise of power. The decision rendered in M.P. Cements Manufacturers Association (supra) the Apex Court had recorded that there will be transmission loss and that being a decision inter se parties, it is not open to the State Government to contend that there is no distinction between production and consumption of electricity from captive power plants.

(iv) The provisions contained in the Validation Act creating a classification qua imposition of energy development is unreasonable, discriminatory and arbitrary which invites the frown of Articles 14 of the Constitution of India thereby making it sensitively susceptible.

(v) Under the Act the basis of classification is founded on the source of power which can be a relevant factor inasmuch as the classification under the M.P.

Electricity Duty Act, 1949 is quo consumers and not the source of power.

(vi) The classification is not based or built on the bedrock of any intelligible differentia which distinguishes the captive power plants from others and in the absence of any rationale to the object sought to be achieved the provisions suffer from the vice of Article 14 of the Constitution of India.

(vii) The producer utilises a portion of requirement of electrical energy from its captive power plant and the balance from the MPSEB, the distributor, and therefore, the consumption is one and the same, yet the cess is levied on different parameters.

(viii) The paying capacity which finds place in Section 26(5)(a) of the M.P. Vidyut Sudhar Adhiniyam, 2000 for justifications for determining tariff has also stood superseded and deleted by Section 62(3) of the Electricity Act, 2003 and, therefore, the said provision is of no aid or assistance to justify the levy. The MPSEB was required to pay 20 paise per unit till February, 2006 and thereafter 10 paise per unit but there is no justification to treat the MPSEB and the present petitioners on a different footing. It is an acceptable fact in praesenti that the electricity sector has been corporatised and no more enjoys the monopoly of the said status and in fact, it is a money-making industry and ergo, cannot be conferred a distinct and different status.

(ix) The Validation Act, 2004 discriminates between captive power plants (CPPs) and IPPs inasmuch as CPPs are required to pay cess and the IPPs are not required to pay cess as a result of which consumers drawing from CPPs have to pay cess while a consumer drawing power from IPP is not required to pay any cess which tantamounts to hostile discrimination.

(x) A captive power producer having its plant inside the State of M.P. has to pay cess while a captive power producer who has a plant outside the State of M.P. and who consumers power within the State of M.P. from its CPP situated outside the State of M.P. has to pay no cess which entails in no discrimination. In this context example has been cited by indicating that M/s Hindustan Electro Graphite, Mandideep, Bhopal has set up a CPP in Chhattisgarh and consumes power from it in its plant at Mandideep, it is not required to pay any cess, but it is required to pay cess on energy produced in its CPP plant in Bhopal.

(xi) A consumer who purchases electrical energy from a distributor pays only 10 paise as cess whereas the same consumer who purchases electrical energy from CPP is required to pay 20 paise.

(xii) Under Rule 3 of the Electricity Rules, 2005 a CPP has captive consumption of 51% of its generation and the other having captive consumption of only 50% of its generation, the former will qualify as CPP and has to pay at the rate of 25 paise per unit on sale, supply or consumption whereas the later is not required to pay any cess.

(xiii) u/s 12(3) of M.P. Vidyut Sudhar Adhiniyam, 2003 it is mandatory for the

State Government to consult the MPERC in relation to any legislation proposed to be enacted affecting electricity industry but in the case at hand before enacting the Validation Act, 2004 though the State Government had sent the said proposal to the MPERC the same was not accepted and, therefore, the provisions contained in the Validation Act, 2004 are unsustainable.

(xiv) The Validation Act, 2004 is contrary to National and State Electricity Policy which encourages competition amongst different producers of electrical energy and further encourages private power producers and, therefore, the provisions are fundamentally arbitrary.

(xv) The impugned Act is not a valid legislative Act inasmuch as Section 3(1) of the of the Act stipulates that levy and collection made u/s 2 of the Amending Act should be deemed to have been levied and collected u/s 3(2) of the Principal Act. In other words the levy and collection of cess on production is to be treated as levy and collection of sale, supply or consumption. It is contended that the levy on the sale, supply or consumption can never be the same as that of production, for the validation of cess on production can be done only by the competent legislature, the Parliament. It is urged that the levy should have been validated by the Parliament and not by the State Legislature and, therefore, it is liable to be struck down.

(xvi) The defect pointed out by the Supreme Court regarding the legislative competence has not been cured as validation of levy and collection on production is still done by the State Legislature.

(xvii) A plain reading of Section 3 of the Act amply demonstrates that by creating an equivalence as regards levy and collection of cess on production to that on sale, supply or consumption the defect pointed out still remains which makes the Act absolutely unconstitutional.

(xviii) The retrospectivity conferred in Amendment Act is arbitrary and unreasonable inasmuch as an attempt has been made to validate the collection of cess already levied on production though by converting it to cess on sale, supply or consumption basically it still remains cess on production of electricity.

(xix) Section 3(2) of the Validating Act 2004 is only a provision for removal of doubts and it enables a person who has paid cess in excess of what was to be paid under the Principal Act on production or for a period for which he need not to pay to claim refund and the said provision does not deal with any claim for refund made under the amendment Act, 2004.

(xx) Section 4 of the 2004 Act provides that the amount collected by the State Government shall be utilised for the purpose mentioned in Section 4(a) to (k) and, therefore, the cess collected under the impugned Act is a compensatory tax and the principles applicable to fee would be applicable to the case at hand and, therefore, the amount collected by the State Government has to be utilised only for the objects mentioned in Section 4 of the Act and not for paying to the

MPSEB for their cross subsidies as admitted by State in Supreme Court in previous round of litigation. It is contended that only after the Validation Act 2004 came into being the State has now made a statement that the amount would be created in a separate fund as recommended by the MPERC but no record has been placed by the State Government and, therefore, the Validation Act deserves to be declared unconstitutional.

To bolster the contention as regards the legislative competence the learned Counsel for the petitioners have placed reliance on the decisions rendered in the cases of *State of Mysore Vs. West Coast Papers Mills Ltd. and Another*, ; *Swaroop Vegetables Products Industries v. State of U.P.* AIR 1984 SC 22; *The Delhi Cloth and General Mills Company Limited (now Shriram Industrial Enterprises Limited) and Another Vs. The Municipal Corporation of Delhi and Others*, ; *Shobha Bhatnagar Vs. State*, ; and *M.P. Cement Manufacturers' Association Vs. State of Madhya Pradesh and Others*, .

To increment the stand and stance the cess collected under the impugned Act is a compensatory tax and the principles applicable to fee will be applicable to the cases at hand, the decisions rendered in *Jindal Stainless Ltd. and Another Vs. State of Haryana and Others*, and *Vijayalashmi Rice Mill and Others Vs. The Commercial Tax Officers, Palakol and Others*, have been placed reliance upon.

To build the edifice and sustain the argument that the Validation Act suffers from the vice of Article 14 of the Constitution of India an unreported decision rendered in the case of *Godawari Power and Ispat Ltd v. State of Chhattisgarh and Ors.* (W.P.(T) No. 3447/2006 and other connected petitions), the National Tariff Policy, 2000 and National Electricity Policy, 2005 have been pressed into service.

To bolster and buttress the submission that the impugned Act is not a valid Validation Act especially as it has failed to remove the defect that the Apex Court had found in the previous decision *D. Cawasji and Co., Mysore Vs. State of Mysore and Another*, , *Indian Aluminium Co. etc. etc. Vs. State of Kerala and others*, , *M.P. Cement Manufacturers' Association Vs. State of Madhya Pradesh and Others*, , *Commissioner of Central Excise, Pondicherry Vs. ACER India Ltd.*, and *Bijender Singh Vs. State of Haryana and Another*, have been placed reliance upon.

Mr. M.L. Jaiswal, learned Senior Counsel countering the aforesaid submissions has advanced the following contentions:

(a) The stand that the levy of energy development cess still remains on production is a misconceived conception inasmuch as by amending the act the basic lacuna has been removed.

(b) The Act enacted by the State Legislature is within its legislative competence as the same falls under Entry 53 of List II of the VIIth Schedule of the Constitution and hence, the submission has really no legs to stand upon.

(c) The Validation Act meets the criteria of validating inasmuch as it is not an

enactment of simple validation but removes the defect and the base on which the earlier legislation was declared ultra vires.

(d) The present Validation Act is not simply a Validation Act but an amendment with validation and the amending part removes the infirmity in the tax component and brings it within the legislative competency of the State.

(e) The challenge of levy on the ground of discrimination is absolutely untenable inasmuch as the Board enjoys a different status since it is under the obligation to generate, transmit and distribute electricity in the entire State whereas the petitioners generate electricity in their captive power plant for their own use.

(f) It is further contended that the MPSEB is under obligation to give several concession to various categories of consumers whereas that is not applicable to the petitioners who have their own captive power plant.

(g) The duty of the Board is to supply electricity to the consumers which is upper most whereas such obligation is not cast on the petitioners. Classification made by the distributor and captive power generator is manifest and obvious in fact, and had such difference would not have been made it would have put the unequals in the same category.

(h) A tax cannot be declared violative of Article 14 of the Constitution on the ground of hostile discrimination of levy of tax inasmuch as mere discrimination is not adequate for realisation tax beyond constitution.

(i) Section 12(3) of the M.P. Vidyut Sudhar Adhiniyam is not applicable and does not extend to cover the field of taxation which is covered by the provision of M.P. Upkar Adhiniyam under which cess has been imposed on the electricity industry in general.

(j) The State Legislature by enacting law on the subject of imposition of tax/cess on electricity in exercise of legislative power under Entry 53 List II of the VII Schedule of the Constitution did not deliberately provide for consultation with the Regulatory Commission and, therefore, the use of general import and meaning used in the statute framed in exercise of power conferred have to be given restrictive meaning. It is put forth that the term "electricity duty" u/s 12(3) of M.P. Vidyut Sudhar Adhiniyam has to be restricted in its application and incorporation. In general relating to electricity enacted under Entry 38 List III and cannot have application to the parent statute which is a taxation law enacted under Entry 53 of List II of the VIIth Schedule of the Constitution.

(k) The provision relating to imposition of tax cannot be held unconstitutional or invalid on the ground that there is irregularity in utilisation of tax collected.

(l) The validity of the provision cannot be challenged on the basis of hyper technical and non-existent situation.

(m) There is no hitus between generation supply or consumption of electricity. The captive generating units of the petitioners are situated within their factory

premises on their own and the electricity generated is supplied and consumed at the commencement or at point of supply after generating electricity as meter has been installed which records number of units supplied and consumed and the cess is levied only on the electricity supplied by them. If the petitioners are paying electricity duty on the electricity sold, supplied or consumed they cannot be permitted to object to levy of such cess as it is done on self and number of units on the electricity sold supplied or consumed. It is put forth that there is classification of electricity supplied and consumed on the basis of meter reading and the petitioners are required to pay cess.

The learned Counsel for the respondents in support of their contentions that the State Legislature has the competence to pass the Validation Act has placed reliance upon the decisions rendered in the cases of Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, , A.K. Das v. National Federation of Cooperative Sugar Factories, , Vijay Mills Company Limited etc., etc. Vs. State of Gujarat and others, , A.B. Abdul Kadir and Others Vs. State of Kerala, , Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, and Bakhtawar Trust and Others Vs. M.D. Narayan and Others, .

The learned Counsel for the respondents to justify that the Act does not suffer from the frown of Article 14 and the classifications is proper has heavily relied on the decisions reported in Shashikant Laxman Kale and Anr. v. Union of India and Anr. : [1990]185ITR104(SC) .

To substantiate the contention that mere distinction is not good enough to render a classification for the purposes of taxation to be unconstitutional reliance has been placed on the decisions reported in Jaipur Hosiery Mills (P) Ltd., Jaipur Vs. The State of Rajasthan and Others, , Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, , Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others, , Indian Aluminium Company Limited and another Vs. Karnataka Electricity Board and others, , Venkateshwara Theatre Vs. State of Andhra Pradesh and Others, and State of Gujarat and Others Vs. Akhil Gujarat Pravasi V.S. Mahamandal and Others, .

To reinforce the submission that non-consultation with the Regulatory Commission as required u/s 12(3) of the M.P. Vidyut Sudhar Adhiniyam will not affect imposition of tax on sale, supply and consumption of electricity which comes under the penumbra of Entry 53 List II, the decisions reported in Ujagar Prints Vs. Union of India (UOI), and State of Rajasthan and Others Vs. Vatan Medical and General Store and Others etc. etc., have been referred to.

Before we advert to the various contentions raised at the Bar with regard to assail of the Validation Act it is appropriate to state what has been laid down in the case of M.P. Cement Manufacturers" Association Vs. State of Madhya Pradesh and Others, wherein the Apex Court dealt with legislative competence of the initial Act and after taking note of the explanation that was incorporated by way

of amendment to the Act in the year 2003 expressed the opinion in paragraph 25 and 27 as under:

25. The expression used by the Explanation is "for the purpose of subsection (2) of Section 3, the cess shall be levied on units of electrical energy sold or supplied". Since the purpose of Sub-section (2) of Section 3 continues to be a levy on production, the word "levied" in the context would at the highest mean "assessment" and not "imposition". It is not the respondents' case that any new or additional or alternative cess was sought to be introduced by the Explanation. Thus despite the Explanation, the charge in Section 3(2) continues to be on the production of the electrical energy units and nothing else. The proviso to subsection (2) of Section 3 continues to except electrical energy produced from the cess in certain cases. The Explanation, if it is read with the main provision, introduces certain contradictions and vagueness. A charging provision should be explicit, certain and clear in order to bind the subject. The outcome of the introduction of the Explanation to an otherwise unchanged Section 3(2) is a singularly ill drawn provision. The 2003 amendment was obviously introduced for the purpose of rectifying the obvious error in Section 3(2), an object which cannot be achieved by introducing an Explanation since an Explanation cannot be read changing or as interfering with the incidence of the levy. It is not for us, particularly when legislative clarity is required since the statutory provision imposes a tax, to untangle the legislative confusion.

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We are, therefore, of the opinion that the cess chargeable at all material times u/s 3(2) is only on the production of electrical energy units as far as producers of electricity for captive consumption are concerned and the Explanation does not serve to change the character of the tax from an impermissible to a permissible levy.

Thereafter, as is evincible, the Validation Act has been passed. The relevant provisions of the said Act are as under:

(2) Every producer of electrical energy shall pay to the State Government an energy development cess at the rate of 20 paise per unit on the electrical energy sold or supplied to a consumer or consumed by himself or his employees by his captive power unit or diesel or other generator set of more than 10 kilowatt capacity during any month:

Provided that no cess shall be payable in respect of electrical energy consumed by

- (i) the Government of India for consumption by that Government;
- (ii) the Government of India or a railway company for consumption in the construction, maintenance or operation of any Railway administered by the Government of India;
- (iii) the State Government for consumption by that Government;

(iv) a Rural Electric Co-operative Society registered under the Madhya Pradesh Cooperative Societies Act, 1960 (No. 17 of 1961);

(v) the local bodies including Municipal bodies and Panchayats for consumption in public street lamps in any market place of water works or any other places of public resort maintained by such bodies:

Provided further that the amount of energy development cess shall be collected by the Madhya Pradesh State Electricity Board or the successor entity and the amount so collected shall be made available to the State Government.

Section 3 of the Validation Act contains a provision for validation, which is extracted below:

3. Validation.-(1) Notwithstanding anything contained in any judgment, decree or order of any court, the energy development cess imposed and recovered or purported to have been imposed or recovered in pursuance of Section 2 of this Act, shall, for all purposes, be deemed to be and to have always been validly imposed and recovered as if Sub section (2) of Section 3 of the Principal Act as amended by Section 2 of this Act were enforced at all material times when such energy development cess was imposed or recovered and accordingly

(a) all acts, proceedings or things done or taken in connection with the imposition or recovery of such cess shall, for all purposes be deemed to be and to have always been validly done or taken in accordance with law;

(b) any cess imposed and recoverable in pursuance of the amendment made by Section of this Act for the period prior to the commencement of this Act may be recovered in the manner provided therefor;

(c) no suit or other proceedings shall be maintained or continued in any Court against the State Government or any person or authority whatsoever for the refund of any cess so paid or recovered.

(d) no court shall enforce any decree or order directing the refund of any cess so paid.

(2) For the removal of doubt it is hereby declared that save as provided in subsection (1) nothing in that sub-section shall be construed as preventing any person

(a) from questioning in accordance with the provisions of principal Act, the imposition of energy development cess for any period; or

(b) for claiming refund of the cess paid by him in excess under the principal Act.

It is contended by the learned Counsel for the petitioner that the State Legislature has the competence only to levy tax on consumption or sale of electricity but does not have the competence to levy tax on manufacturing, production or generation of electricity having regard to Entry 53 of List II and Entry 84 of List I and for that reason the Apex Court had struck down Section

3(2) of the Upkar Adhiniyam as amended by 2001 Amendment Act. By the Validation Act, though Section 3(2) is substituted levying the cess on the electrical energy sold or supplied to a consumer or consumed by itself or its employees, in fact, the levy continues to be on production and not on sale or consumption. It is so because the statement of objects and reasons make it clear that the object of the Validation Act is not to shift the point of levy from production to sale and consumption, but to save the heavy loss caused on account of the judgment of the Supreme Court. The amendment which tries to efface the decision of the Supreme Court instead of removing the infirmities which lead to the Supreme Court is invalid. The Apex Court has made it clear that there will be transmission loss of electrical energy between generation and consumption and the amount of electricity generated need not necessarily be the amount of electricity consumed/sold. As the newly substituted Section 3(2) of the Validation Act does not contain any provision for measuring or assessing the energy sold or supplied and equates energy produce to energy sold and supplied, the levy is on the production and not on the sale or supply. The intention continues to charge the producer.

Submission of Mr.Rao and Mr.Shrivastava, learned Senior Counsel for the petitioners is that the Apex Court on the earlier occasion had clearly expressed the view that cess is chargeable at all material times u/s 3(2) is only on the production of electrical units as per the procedures of electricity for captive consumption and there had been no change despite the explanation. Even after the Validation Act has been passed the nature and the character of the levy has not changed though an adroit attempt has been made to put it into the compartment of sale, supply and consumption.

Before we dwell upon this facet of the argument we think it profitable to refer to certain citations which lay down the principles relating to validity of a Validation Act.

In Shri Prithvi Cotton Mills Ltd. (supra) the Apex Court has observed as follows:

...Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a legislature sets out to validate a tax declared by a Court to be illegally collected under ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both

are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by reenacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the Court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax.

In *Bihar Sa Produce Marketing Board and Ors. v. Shankar Kakhana Bhandar and Ors.* the Apex Court considered the effect of Bihar Agricultural Produce Markets (Validation) Act, 1982, whereby the defect of non-publication of notification in the gazette was removed and it was ordained that the market fee levied, collected or to be levied and collected shall not be illegal and invalid merely on the ground of such non-application. The Apex Court has held as under:

...As a sequator, the contrary effect of any judgment, decree or order of any court was removed and the said notification as also the other notifications were mandated to be deemed to be valid and effective and all levies made and market fees collected deemed to have been validly realised, taken, done and issued as if the provisions of the Act were at all times in force. It appears to us that the High court was under the impression that since it had pointed out in a string of cases the effect of non- publication of notice, its decision could not be upset by the Validation Act. This impression of the High court was obviously wrong for the Validation Act had not directly attacked the judgments of the courts, but knocked off their basis by validating the non-publication to be as if valid publication. The defect having been removed, the basis of the set of cases decided by the High court stood knocked off and hence the Validation Act had a field to role over so as to justify the levies and the collections.

In *Vijay Mills Company Limited etc., etc. Vs. State of Gujarat and others*, the Supreme Court opined thus: From the above. it is clear that there are different modes of validating the provisions of the Act retrospectively, depending upon the

intention of the legislature in that behalf. Where the legislature intends that the provisions of the Act themselves should be deemed to have been in existence from a particular date in the past and thus to validate the actions taken in the past as if the provisions concerned were in existence from the earlier date, the legislature makes the said intention clear by the specific language of the validating Act. It is open for the Legislature to change the very basis of the provisions retrospectively and to validate the actions on the changed basis. The contention that the Validating Act cannot validate rules made or acts done prior to the date it was enacted, if accepted, will strike at the very root of the concept of retrospective validation. Law is an instrument which is forged to regulate the affairs of the society. Society can mould it to meet the needs felt from time to time. Society cannot be a slave of the instrument. The device of validating a statute is forged precisely to adopt the law to meet the exigencies of the situations. The validation, therefore, may be done in the manner required by the needs of the time. All that is required is that the agency which validates the statute must have the power to do it. The manner and method of doing it is to be left to the authority. If the intentions are clear, the validation has to be interpreted according to the intentions. The Courts have in fact upheld such validation regarding it to be an important weapon in the armoury of legislative devices.

In *A.B. Abdul Kadir and Others Vs. State of Kerala*, the Apex Court has held as under:

...As regards this validating Act being a colourable piece of legislation, if the levy, in question can be justified under a provision which is within the legislature competence of the State Legislature, the levy shall be held to be validly imposed and cannot be considered to be impermissible. Here what is sought to be done is to validate the recovery of licence fee for stocking and vending of tobacco. The State Legislature has sought to validate the recovery of the amounts already made by treating those amounts as luxury tax. The fact that the validation of the levy entailed converting the character of the collection from an impermissible excise duty into permissible luxury tax would not render it unconstitutional. The only conditions are that the levy should be of a nature which can answer to the description of the luxury tax and that the State legislature should be competent to enact a law for recovery of luxury tax. Both these conditions as stated above are satisfied. Moreover the legislature was acting within its power in giving retrospective operation to the impugned Act.

If a provision regarding the levy of luxury tax is within the competence of the state Legislature, the said Legislature would be well within its competence to enact a law for recovery of an amount which, though already refunded to a party, partakes of the nature of luxury tax in the light of that law. If an amount can answer to the description of luxury tax, there would be no legal impediment to recovering the same as luxury tax, even though initially it was recovered or sought to be recovered as something different from luxury tax.

In *Indian Aluminium Co. etc. etc. Vs. State of Kerala and others*, the Apex Court observed thus:

The validity of the validating Act is to be judged by the following tests: (i) whether the legislation enacting the validating Act has competence over the subject matter;

(ii) whether by validation, the legislature has removed the defect which the Court had found in the previous law;

(iii) whether the validating law is inconsistent (sic consistent) with the provisions of Chapter III of the Constitution. If these tests are satisfied, the Act can confer jurisdiction upon the Court with retrospective effect and validate the past transactions which were declared to be unconstitutional. The legislature cannot assume power of adjudicating a case by virtue of its enactment of the law without leaving it to the judiciary to decide it with reference to the law in force. The legislature also is incompetent to overrule the decision of a Court without properly removing the base on which the judgment is founded.

Eventually, their Lordships in paragraph 56 held as under:

56. From a resume of the above decision the following principles would emerge:

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the Court to give effect to them:

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the Legislature, Executive and Judiciary:

(3) In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free-play in their joints so that the march of social progress and order remain unimpeded. The smooth balance built with delicacy must always be maintained:

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The Court, therefore, needs to carefully scan the law to find out: (1) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the

Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The Legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the Legislature is competent to recover the invalid tax validating such a tax or removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the Court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the Legislature must have competence to do the same.

In *Bakhtawar Trust and Others Vs. M.D. Narayan and Others*, the Apex Court has observed: The decisions referred to above, manifestly show that it is open to the legislature to alter the law retrospectively, provided the alteration is made in such a manner that it would no more be possible for the Court to arrive at the same verdict. In other words, the very premise of the earlier judgment should be uprooted, thereby resulting in a fundamental change of the circumstances upon which it was founded.

...A decision of a Court of law has a binding effect unless the very basis upon which it is given is so altered that the said decision would not have been given in the changed circumstances.

In this context we think it appropriate to refer to decision rendered in *State of Mysore Vs. West Coast Papers Mills Ltd. and Another*, the Apex Court held as under:

7. We have set out the relevant provisions of the Act, and it would appear therefrom that electricity tax is payable on the units of energy consumed. The one question with which we are concerned in this appeal is whether electricity tax is payable in respect of the electrical energy which is lost in transmission as a result of transmission loss or transformer loss. So far as this question, is we are concerned, of the view that no tax is payable on the electricity so lost. The entire scheme of the Act is to tax the consumption of electrical energy. Where some energy is not consumed but lost before it reaches the point of consumption, the question of levy of tax on consumption of such energy would not in the very nature of things arise. The place of consumption of electrical energy is normally at some distance from the place where electrical energy is generated. Electrical energy has consequently to be transmitted through metal conductors to the place where it is consumed. Such transmission admittedly entails loss of some electrical energy and what is lost can plainly be not available for consumption and as such would not be consumed. If a person, for example, generates 100 units of electrical energy and loses 10 units in the process of transmission from the point of generation to the point of consumption, he would in the very nature of things be able to supply only 90 units of electrical energy to the consumers. The tax which would be payable on the electrical energy consumed in such a case would be only for 90 units and not 100 units. To hold otherwise and to realise tax on 100 units of electrical energy would be tantamount to levying tax on the generation or production of electrical energy and not on its consumption. Such a tax on the generation or production of electrical energy is plainly not permissible under the Act. The fact that the consumer happens in the present case to be the same company which generated electrical energy would, in our opinion, make no material difference.

In *D. Cawasji and Co., Mysore Vs. State of Mysore and Another*, their Lordships have held thus:

17. In view of the aforesaid judgment and order passed by the High Court amounts collected by the State by way of Sales Tax on items of excise, health cess and education cess on Arrack or special liquor from the appellant became refundable to the appellant. The impugned amendment has been passed, as the Statement of objects which we have earlier set out clearly indicates to override the judgment of the High Court and to enable the State to hold on to the amount collected as sales tax on excise duty, health cess and education cess, if any, on Arrack or special liquor. It has to be noted that the said judgment of the High Court in the earlier case had become final and conclusive inasmuch as the SLP filed against the judgment by the State was withdrawn. The State instead of seeking to test the correctness and effect of the judgment and order of the High Court thought it fit to have the judgment and order nullified by introducing the impugned amendment. The amendment does not proceed to cure the defect or the lacuna by bringing in an amendment providing for exigibility of sales tax on excise duty, health cess and education cess. The impugned Amending Act may not, therefore, be considered to be a Validating Act. A Validating Act seeks to

validate the earlier Acts declared illegal and unconstitutional by Courts by removing the defect or lacuna which led to invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any Act held invalid by a competent Court, the Act may become valid, if the Validating Act is lawfully enacted. But the question may still arise as to what will be the fate of acts done before the Validating Act curing the defect has been passed. To meet such a situation and to provide that no liability may be imposed on the State in respect of such acts done before the passing of the Validating Act making such act valid, a Validating Act is usually passed with retrospective effect. The retrospective operation relieves the State of the consequences of acts done prior to the passing of the Validating Act. The retrospective operation of a Validating Act properly passed curing the defects and lacuna which might have led to the invalidity of any act done may be upheld, if considered reasonable and legitimate.

In the instant case, the State instead of remedying the defect or removing the lacuna has by the impugned amendment sought to raise the rate of tax from 61/2% to 45% with retrospective effect from the 1st April 1966 to avoid the liability of refunding the excess amount of sales tax collected and has further purported to nullify the judgment and order passed by the High Court directing the refund of the excess amount illegally collected by providing that the levy at the higher rate of 45% will have retrospective effect from 1st of April, 1966. The judgment of the High Court declaring the levy of sales tax on excise duty, education cess and health cess to be bad become conclusive and is binding on the parties. It may or may not have been competent for the State Legislature to validly remove the lacuna and remedy the defect in the earlier levy by seeking to impose sales tax through any amendment on excise duty, education cess and health cess; but, in any event, the State Government has not purported to do so through the Amending Act. As a result of the judgment of the High Court declaring such levy illegal, the State became obliged to refund the excess amount wrongfully and illegally collected by virtue of the specific direction to that effect in the earlier judgment. It appears that the only object of enacting the amended provision is to nullify the effect of the judgment which became conclusive and binding on the parties to enable the State Government to retain the amount wrongfully and illegally collected as sales tax and this object has been sought to be achieved by the impugned amendment which does not even purport or seek to remedy or remove the defect and lacuna but merely raises the rate of duty from 61/2% to 45% and further proceeds to nullify the judgment and order of the High Court. In our opinion, the enhancement of the rate of duty from 61/2% to 45% with retrospective effect is in the facts and circumstances of the case clearly arbitrary and unreasonable. The defect or lacuna is not even sought to be remedied and the only justification for the steep rise in the rate of duty by the amended provision is to nullify the effect of the binding judgment. The vice of illegal collection in the absence of the removal of the illegality which led to the invalidation of the earlier assessments on the basis of illegal levy, continues to taint the earlier levy. In our opinion, this is not a proper ground for

imposing the levy at the higher rate with retrospective effect. It may be open to the Legislature to impose the levy at the higher rate with prospective operation but levy of taxation at higher rate which really amounts to imposition of tax with retrospective operation has to be justified on proper and cogent grounds. This aspect of the matter does not appear to have been properly considered by the High Court and the High Court in our view was not right in holding that "by the enactment of Section 2 of the impugned Act the very basis of the complaint made by the petitioner before this Court in the earlier writ petition as also the basis of the decision of this Court in D. Cawasji and Co. Vs. State of Mysore and Others, that the State is collecting amounts by way of tax in excess of what was authorised under the Act has been removed." We, accordingly, set aside the judgment and order of the High Court to the extent it upholds the validity of the impugned amendment with retrospective effect from 1st of April, 1966 and to the extent it seeks to nullify the earlier judgment of the High Court. We declare that Section 2 of the impugned amendment to the extent that it imposes the higher levy of 45% with retrospective effect from the 1st day of April, 1966 and Section 3 of the impugned Act seeking to nullify the judgment and order of the High Court are invalid and unconstitutional.

In view of the aforesaid enunciation of law what is required to be seen whether the Validation Act has merely tried to overrule the decisions of the Court by declaring that a decision of the Supreme Court is not binding or whether it has really altered the very base of the judgment of the Apex Court in M.P. Cement Manufacturer Association (supra) so that the decision could not have been rendered with regard to the altered legal provisions. In fact, as is perceptible, the Supreme Court has held that levy can be validated. Their Lordships have held that Legislature has the power to validate an invalid levy and can do so retrospectively. It is also expressed by their Lordships that the Legislature can also change the character of the tax or duty from impermissible to the permissible one but the tax or levy should be within the legislative competence. On a keener scrutiny of the provisions contained in the Validation Act the the incident of taxation from production and generation has changed to that of sale, supply and consumption. Section 3(2) that was considered by the Apex Court clearly provided for levy of cess on production that was not permissible. The substituted provision by Validation Act does not provide for levy of cess on production but stipulates levy of cess on sale, supply and consumption. Submission of Mr.Rao and Mr.Shrivastava, learned Senior Counsel appearing for the petitioners is that though the word `production' has been deleted, it is not a valid Act as the Act has been given retroactivity by which an attempt has been made not to refund the amount collected on the foundation of production. Submission of the learned Senior Counsel appearing for the petitioners is that the cess that is sought to be valid remains a cess on production itself because that component of cess collected is sought to be validated and further the transmission loss is not taken into consideration and thereby it is an impost of production.

Per contra Mr. M.L. Jaiswal, learned Senior Counsel and Mr. P.N. Dubey, learned Deputy Advocate General for the State would contend that there can be change of character of the tax from impermissible to permissible one and that has been done in the case at hand inasmuch as by substitution of the provision levy of cess on sale, supply and consumption, and such levy of cess is within the province of the State Legislature. The learned Counsel further contended that the language of the statute is quite clear and unambiguous and there is no reason to superimpose some other kind of interpretation as that would make the provision otiose which is not permissible in law.

Thus, it is the stand of the petitioners that the nature and character of the cess cannot be converted to one of cess on sale, supply and consumption, as the amount collectable as cess on sale, supply or consumption would be much less than production. The validating statute in a mechanical manner lays a postulate that the cess is deemed to have been collected on sale, supply and consumption with retrospective effect. By such a provision the whole collection of cess on production cannot be justified. In this context we may, at the cost of repetition, reproduce Sub-section (2) of Section 3 of the Validation Act. (2) For the removal of doubt it is hereby declared that save as provided in subsection (1) nothing in that sub-section shall be construed as preventing any person

(a) from questioning in accordance with the provisions of principal Act, the imposition of energy development cess for any period; or

(b) for claiming refund of the cess paid by him in excess under the principal Act.

Submission of Mr. Rao and Mr. Shrivastava, learned senior counsel for the petitioners is that the said provision cannot be construed to mean that if any amount become due to the producers of the captive power plants because of differential sum which is collectable in relation to cess leviable on sale, supply and consumption, the same can be refunded. The learned Senior Counsels would contend that the said provision is in a very narrow compass and it only deals with the refund on certain ground parameters but does not cover a conceptual parameter. On a careful reading of the said provision we are disposed to think that the said provision has to be read conjointly with Sub-section (1) of Section 3 to convey the meaning that by way of validation the amount that has become due would be deemed to be charged towards sale, supply or consumption from the effective date and the rest is refundable. It cannot be construed to convey that if the petitioners have paid in excess which was not due from them on production at the relevant time or there has been some error in calculation, only that sum is refundable. In this context we may fruitfully refer to the decision in Abdul Kadir (*supra*) wherein it has been held as under:

...It was held by this Court that if collections are made under statutory provisions which are invalid because they deal with a topic outside the legislative competence of the State Legislature, the Parliament can in exercise of its undoubted legislative competence, pass a law retrospectively validating the said

collections by converting their character into collections made under its own statute operating retrospectively. So far as the present case is concerned we have already pointed out above that it was within the competence of the State Legislature to make a law in respect of luxury tax and to recover that tax in the shape of licence fee for vend and stocking of tobacco. The State Legislature has sought to validate the recovery of the amounts already made by treating those amounts as luxury tax. The fact that the validation of the levy entailed converting the character of the collection from an impermissible excise duty into permissible luxury tax would not render it unconstitutional, The only conditions are that that levy should be of a nature which can answer to the description of luxury tax and that the State Legislature should be competent to enact a law for recovery of luxury tax. Both these conditions as stated above are satisfied.

We have referred to the aforesaid decision only to highlight conversion of character of collection from impermissible one to a permissible one but that should meet the requirement of the permissible levy. The stand of the petitioners that despite conversion the levy is still on production does not commend acceptance, for the validating statute not only has categorically restricted to the permissible levy but also has incorporated the provision which makes the converted levy effective and uncollectable one refundable. The matter would have been different had there been non-existence of Sub-section 2 of Section 3 of the Validation Act. The said provision, as we understand, would also cover the field where a computation can be done or made under the Validation Act as regards sale, supply and consumption and the same would not be liable to be refunded but the balance that was collected on the head of production which was not collectable and directed to be refunded by the Apex Court, can be refunded. Hence, we are not inclined to accept the submission of the learned Counsel for the petitioners that the Validation Act is still on production and further, the Validation Act is not a valid piece of legislation.

The next facet of argument deals with discrimination. It is contended that source of power cannot be a relevant factor for classification and further the classification is not founded on intelligible differentia which distinguishes the CPPs from others and such difference has no rational relation with the object to be achieved. It is contended that the company utilises a portion of its requirement of its electrical energy from the CPPs and the plants from MPSEB (Distributor) and, therefore, though the consumer is one and the same yet cess levied is based on source of electrical energy. It is also urged that CPPs are liable to pay 20 paise per unit till February 2006 and the Board was liable to pay 10 paise per unit. There has been a subsequent amendment by reducing the cess to 10 paise payable by CPPs. It is urged that in view of the Electricity Act, 2003 the National Tariff Policy, Electricity Policy and the paper published by Central Electricity Regulatory Commission there is no justification to make a distinction between the MPSEB and other CPPs inasmuch as the MPEB is like any other private power producer/distributor and it no more enjoys any monopoly or any special status and it is a money making entity like any other body-corporate. In

effect there is a total irrational classification and the same suffers from unreasonability or arbitrariness. On a perusal of the facts in entirety it is manifest that liability to pay cess u/s 3(1) is on distributors while the liability to pay cess u/s 3(2) is on the CPPs. The MPSEB is the sole producer of electricity in the entire State of M.P. whereas the petitioners are generating electricity on their captive power plants for their own use. A distributor is the generating company and has installed intensive transmission and distribution network whereas the petitioners being CPPs are not required to establish or maintain any such transmission or discrimination network. A distinction has to be drawn between MPSEB which is a power generating company and the petitioners who are captive power producers. The Board has a licence for generation and transmission and distribution whereas no licence is required to be obtained nor to be granted to the petitioners inasmuch as they are the simple captive power producers to produce energy for their own use. Quite apart from the above the MPSEB is required to supply electricity to various types and categories of consumers, namely, domestic, commercial, industrial and HT etc. whereas the petitioners cannot supply electricity to any other persons as they do not possess any licence or authority to do so and only are permitted to produce electricity in their captive power plants for self use. It is also useful to refer that the MPSEB is required to give several concessions and also tariff concession to various categories of consumers which the petitioners are not expected to do. The Board suffers up to 35% transmission and distribution losses whereas no such loss is suffered by the petitioners and even if suffered is negligible. That apart no such transmission network is either established or can be established by the petitioners as they are generating electricity within the factory premises and none of them undertake transmission of electricity. It is put forth that the Board is under obligation, may be through companies to supply electricity to its consumers on "No Profit, No Loss" basis and hence, it cannot be compared with the captive power plants owners.

Regard being had to the aforesaid aspects we are of the considered opinion, the parity claimed by the petitioners with the Board or its companies is totally untenable and the stand is sensitively susceptible.

In this context we may also take note of another aspect. A colossal complaint has been galvenised that there is discrimination between the CPPs and IPPs and between the consumers of CPPs and the consumers of the MPSEB. On discriminations various examples have been given. To take an example if there are two CPPs, one having captive consumption of 51% of its generation and the other having consumption of only 50% of its generation, then the former will qualify as a CPP under Rule 3 of the Electricity Rules of 2005 and has to pay cess at the rate of 20 paise per unit on sale, supply or consumption whereas the latter need not pay any cess. Similarly it is put forth that a consumer who purchases electrical energy from a distributor would pay only 10 paise as cess whereas the same consumer who purchases electrical energy from CPP would have to pay cess at 20 paise. In our considered opinion, the distinctions which have been

emerged are a necessary facet which have relevance to sale, supply and consumption. As we perceive the MPSEB, the distributor under licence is one class and the other categories are in another class. We have already indicated that the Board stands on a different footing than the other CPPs. Therefore, our irresistible conclusion is that there is no above-inclusiveness or equals are being treated as unequals. Analysing from this angle also, we perceive no violence is caused to Article 14 of the Constitution.

The next aspect that requires to be adverted relates to non consultation with the competent authority as engrafted u/s 12(3) of the Vidyut Sudhar Adhiniyam. Section 12(3) of the said Adhiniyam reads as under:

(3) The State Government shall consult the Commission in relation to any policy directive which it proposes to issue or any legislation is proposed to be enacted affecting the Electricity Industry and it shall duly take into account the recommendation, if any, given by the Commission within such reasonable time as the State Government may specify. Section 13 of the aforesaid Act reads as under:

13. Arbitration of disputes between the State Government and Commission. -(1) If any dispute or difference arises between the Commission and the State Government on the matters specified in Section 12, the same shall be referred to the Central Commission for decision.

(2) On such reference being made the person appointed shall as far as possible decide the reference within 90 days, and his decision on the matter shall be final and binding.

On a reading of the aforesaid provisions it is clearly perceptible that the said provisions are on general terms and the words used are "electricity industry". Section 12(3) has to be given restricted meaning which only covers the field of M.P. Vidyut Sudhar Adhiniyam and it cannot be allowed to entrench upon the field of tax/cess on electricity. The State Legislature while enacting the law on the subject of imposition of tax/cess on electricity in exercise of legislative powers vested in it under Entry 53 List II of the VIIth Schedule to the Constitution of India. In the M.P. Upkar Adhiniyam, 1981 and amended provisions thereon does not enjoin such consultation before imposing any cess. It is worth noting that the M.P. Vidyut Sudhar Adhiniyam which is a law made under Entry 38 List III with concurrent list of the Constitution. It cannot abridge or restrict the power of the State Legislature for imposition of cess on sale, supply or consumption of electricity under Entry 53 List II which is permissible. Quite apart from the above, a tax law and ensuing validation Act cannot be declared invalid or unconstitutional on the ground of infraction or of Section 12(3) of the Vidyut Sudhar Adhiniyam. In fact their Lordships have so clarified in M. P. Cement Manufactures Association (supra).

It is submitted by Mr. Ravindra Shrivastava, learned senior counsel for some of the writ petitioners that the State Legislature could not have passed the

Validation Act, 2004 inasmuch as if after the collection on production of electricity was required to be validated the same should have been done by the Parliament. It is urged by him that what is sought to be validated is the amount that is realized on production and the State was incompetent to pass such a legislation. The learned Senior Counsel to bolster the aforesaid submission placed reliance on the decision rendered in *District Mining Officer and Others Vs. Tata Iron and Steel Co. and Another*, . The detailed discussion in this regard is not necessary as the State Legislature by way of enacting the Validation Act, as we have already held, has not validated the levy collected on production but treated the collection to be a sale, supply or consumption with a further postulate with regard to refund in respect of the differential sum as envisaged under Sub-section 2 of Section 3 of the Validation Act. The same being the position there can be no scintilla of doubt that the State Legislature has the competence to pass the Validating Act in the manner in which it has been validated.

In view of the aforesaid analysis we record our conclusions in seriatim as under:

- (a) The stand and stance that the levy is still on production and, therefore, the State Legislature does not have legislative competence is unacceptable as the language of the statute is unambiguous and clear and relates exclusively to sale, supply and consumption and there is no colourable exercise of power.
- (b) The proposition that in a captive power plant what is produced and generated is consumed and, therefore, in quintessentiality, it is levy of cess on production or manufacturing is sans substratum as a distinction has been drawn between the terms "production" on one hand and sale, consumption and supply on the other.
- (c) The submission that the Parliament alone could have passed the Validation Act in respect of levy and to remove the base of the decision rendered in *M.P.Cement Manufacturer's Association* (supra) is neither sound nor correct.
- (d) The State Legislature has correctly amended the provision contained in Section 2(1) of the Validation Act which is within its domain and, therefore, the ground that it lacks the legislative competence is bereft of any substance.
- (e) The assailability to the effect that the Validation Act is not valid as the amount realized still relates to production, the provision being retrospective in nature, has no substantiality and substance and hence, deserves to be rejected, and as a logical and natural corollary it is held that the Validation Act has been validly passed by the State Legislature.
- (f) The Validation Act is not hit by Article 14 of the Constitution as the classification is reasonable and further the provisions do not suffer from any arbitrariness. The Validation Act cannot be regarded to be ultra vires because of non-compliance of the conditions precedent as engrafted u/s 12(3) of *Vidyut Sudhar Adhiniyam* because as both the statutes operate in different spheres and, in any case, a piece of legislation cannot be regarded as invalid because the

Regulatory Commission as contemplated under Vidyut Sudhar Adhiniyam has not been consulted.

(g) The assiduous asseveration that there can be passing of a legislation to convert impermissible levy to a permissible levy within the parameters of legislative competence but in the case at hand the conversion or change does not meet the conversion equivalence in an apposite manner, for the amount of energy cess collected on production cannot be adjusted with retrospective effect for the sum payable for sale, consumption and supply there is lot of difference in the amount, is without merit inasmuch as Sub-section 2 of Section 3 takes care of it by providing that sub-section shall be construed as preventing any person (a) from questioning in accordance with the provisions of principal Act, the imposition of energy development cess for any period; or (b) for claiming refund of the cess paid by him in excess under the principal Act.

(h) Each of the petitioners is entitled to get the differential sum computed as per Sub section 2 of Section 3 in respect of amount of energy cess on production and the amount presently realized under the heads sale, supply and consumption.

(i) The conclusion recorded at Sr. No. (g) above does not necessarily mean that this Court has recorded a finding that there is differential sum in each case as this Court has not dwelled upon this facet the same being not necessary while the constitutional validity has been addressed to.

(j) If any sum after computation falls due, as per law, the same shall carry interest as per the direction given by the Apex Court in M.P. Cement Manufacturers" Association (supra).

The writ petitions are accordingly disposed of. There shall be no order as to costs.