

(1964) 11 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 250 of 1963

Ramgopal and Sons

APPELLANT

Vs

Sales Tax Officer, Surat and Another

RESPONDENT

Date of Decision : 27-11-1964

Acts Referred:

Bombay Sales Tax Act, 1946 — Section 12A, 12A(1), 12A(2), 12A(4), 21(4)
Constitution of India, 1950 — Article 19(1), 226, 286(1)

Citation : (1965) 16 STC 1005

Hon'ble Judges : P.N. Bhagwati, J; J.M. Shelat, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; J.M. Thakore, Advocate-General, M.G. Doshitt, Additional Government Pleader and B.R. Sompura, Assistant Government Pleader, for the Respondent

Judgement

Bhagwati, J.—This petition under Article 226 of the Constitution raises a question relating to the construction of section 12A(4) of the

Bombay Sales Tax Act, 1946, and in the event of the construction contended for on behalf of the State being accepted, challenges the vires of the

section on the ground of lack of legislative competence on the part of the State to enact it. In order to appreciate the questions arising in the

petition it is necessary to set out briefly the facts giving rise to the petition it is necessary to set out briefly the facts giving rise to the petition. The

facts are few and for the most part undisputed and may be briefly stated as follows :-

The petitioners are dealers carrying on business in cloth and at all material times they held a certificate of registration under the Bombay Sales Tax

Act, 1946 (hereinafter referred to as the Act). During the period 1st January, 1950, to 31st March, 1951, the petitioners effected various sales

outside the State of Bombay. Those sales being outside State sales were exempt from tax by reason of Article 286(1) of the Constitution but in the mistaken belief that they were taxable the petitioners initially paid a sum of Rs. 17,786-2-9 as tax in respect of such sales. The petitioners thereafter realising that these sales were not taxable, made an application for refund of the sum of Rs. 7,788-2-9 on 15th May, 1953. The Sales Tax Officer assessing the petitioners to sales tax accepted the claim of the petitioners to the extent of Rs. 10,361-5-6 and by an order dated 19th June, 1956, granted refund of the sum of Rs. 10,361-5-6 to the petitioners. Pursuant to this order of the Sales Tax Officer a refund order dated 26th July, 1956, for Rs. 10,361-5-6 was issued in favour of the petitioners and the petitioners obtained payment of the said amount. Since the relief granted by the Sales Tax Officer was only a partial relief, the petitioners preferred an appeal to the Assistant Collector of Sales Tax seeking relief in respect of the balance of the amount claimed by way of refund. The Assistant Collector of Sales Tax by his order dated 4th September, 1958, granted further relief to the petitioners but that relief was also partial and was confined to a sum of Rs. 4,000-1-3. No refund order was, however, issued in favour of the petitioners pursuant to this order of the Assistant Collector of Sales Tax. Before we proceed further to state what happened in regard to this amount of Rs. 4,000-1-3 which was ordered to be refunded as aforesaid, we may point out that the petitioners being dissatisfied with the disallowance of the balance of the claim for refund by the Assistant Collector of Sales Tax, preferred a revision application to the Additional Collector of Sales Tax on 29th December, 1958, and that revision application is still pending. We are, however, not concerned with the balance of the claim for refund which is pending adjudication in that revision application. In the meantime on 14th October, 1958, the petitioners received a notice from the Sales Tax Officer calling upon them to show cause why the sum of Rs. 10,361-5-6 refunded to the petitioners should not be forfeited u/s 21(4) of the Bombay Sales Tax Act, 1953, as the petitioners had not produced receipts from their purchasers showing that the amount returned had been refunded to them by the petitioners. This was followed by a notice dated 19th November, 1958, by which the Sales Tax Officer pointed out to the petitioners that the refund of Rs. 4,000-1-3 was being withheld as the same was to be

adjusted against the amount of Rs. 10,361-5-6 which was proposed to be forfeited. The petitioners by their letters dated 28th November, 1958,

and 16th December, 1958, challenged the right of the Sales Tax Officer to forfeit the amount of Rs. 10,361-5-6 refunded to the petitioners. The

Sales Tax Officer, however, did not accept the contentions of the petitioners and by an order dated 24th March, 1958, forfeited the amount of Rs.

10,361-5-6 and adjusted the sum of Rs. 4,000-1-3 in part payment of the said amount. The petitioners complained against this order of forfeiture

by preferring an appeal to the Assistant Commissioner of Sales Tax but the appeal was dismissed by the Assistant Commissioner of Sales Tax by

an order dated 28th August, 1961. The petitioners thereupon preferred a revision application to the Deputy Commissioner of Sales Tax and that

revision application, we are told, is still pending before the Deputy Commissioner of Sales Tax. It may be pointed out that in the meantime the

petitioners were compelled under the coercive machinery of recovery provided by the Act to pay the balance of Rs. 6,361-4-3 in pursuance of the

order of forfeiture with the result that the entire amount of Rs. 10,361-5-6 was recovered by the State from the petitioners. The Sales Tax Officer

also initiated proceedings for forfeiture of the sum of Rs. 4,000-1-3 by issuing a notice dated 22nd June, 1962. The petitioners replied to the

notice contending that the Sales Tax Officer had no right to forfeit the sum of Rs. 4,000-1-3 but it appears that the Sales Tax Officer was not

prepared to stay his hands and the petitioners thereupon filed the present petition against the Sales Tax Officer and the State of Gujarat as

respondents. The two main reliefs claimed in the petition were, first, that the notice dated 22nd June, 1962, issued by the Sales Tax Officer was

not warranted by the terms of section 12A(4) and that in any event it was illegal and void since section 12A(4) was ultra vires as being beyond the

legislative competence of the State Legislature and that a writ of mandamus should, therefore, issue to quash and set aside the said notice and a

writ of prohibition should issue prohibiting the respondents from acting upon the said notice or taking any proceedings in enforcement of it and,

secondly, that the respondents were under a statutory obligation to refund the sum of Rs. 10,361-5-6 wrongfully and illegally recovered from the

petitioners and that a writ of mandamus should, therefore, issue compelling the respondents to carry out this statutory obligation and to refund the

sum of Rs. 10,361-5-6 to the petitioners. On the petition being admitted a rule was issued and in opposition to the rule an affidavit made by the first respondent was filed on behalf of the respondents. It is not necessary to refer to the affidavit in detail beyond stating that in effect and substance all that it said was that the grounds on which the petitioners claimed relief in the petition were unjustified and that the first respondent was entitled to proceed against the petitioners u/s 12A(4) or in the alternative u/s 21(4) which was the corresponding provision under the Bombay Sales Tax Act, 1953, and to forfeit the sums of Rs. 10,361-5-6 and Rs. 4,000-1-3 under that provision. Since the vires of section 12A(4) were challenged in the petition a notice was issued to the Advocate-General and the learned Advocate-General, therefore, appeared at the hearing of the petition not only on behalf of the respondents but also in response to the notice issued to him.

2. It will be seen from what is stated above that the main question involved in the petition is whether the forfeiture of the sum of Rs. 10,361-5-6 effected by the revenue authorities and the notice to forfeit the sum of Rs. 4,000-1-3 issued by the first respondent are valid. Now the forfeiture was purported to be made by the revenue authorities u/s 21(4) of the Bombay Sales Tax Act, 1953, and so far as the notice of forfeiture is concerned, it was not stated under what provision of law it was issued, but having regard to the fact that during the relevant assessment period it was section 12A(4) which was in force, it was common ground between the parties at the hearing of the petition that the forfeiture and the notice were both u/s 12A(4) or, if they were not so justified, they were bound to fall. The attack of Mr. Kaji against the validity of the forfeiture and the notice was, therefore, confined to the applicability of section 12A(4). The attack was a twofold one. In the first instance he contended that on a true construction of section 12A(4), the forfeiture and the notice were not within the scope and ambit of section 12A(4) and if this claim of his was negatived, he submitted in the alternative that section 12A(4) was beyond the legislative competence of the State Legislature and was, therefore, void. The first contention raised a question of construction of section 12A(4) while the second raised a question of its vires.

3. Section 12A was introduced in the Act by Bombay Act I of 1949. Sub-section (2) of section 12A was subsequently amended by Bombay Act

XVIII of 1951, but during the period with which we are concerned in this petition, it was the unamended section which was in force. That section

was in the following terms :-

12A. Prohibition against collection of tax in certain cases -

(1) No person shall collect any amount by way of tax under this Act in respect of sales or supplies of any goods which are declared, from time to

time, u/s 7 as sales or supplies on which the tax is not payable.

(2) No person who is not a registered dealer shall in respect of sales or supplies of any goods collect from the purchaser any amount by way of tax

under this Act except in cases where it is required to do in order to comply with the conditions and restrictions imposed on him under the

provisions of any law for the time being in force.

* * *

(4) If any person collects any amount by way of tax in contravention of the provisions of sub-section (1) or (2) or if any registered dealer collects

any amount by way of tax in excess of the amount payable by him under this Act, the amount so collected shall, without prejudice to any

prosecution that may be instituted against such person or dealer for an offence under this Act, be forfeited to the Provincial Government and such

person or dealer, as the case may be, shall within the prescribed period, pay such amount into a Government treasury and in default of such

payment the amount shall be recovered as an arrear of land revenue.

4. Mr. Kaji contended that on a true construction of the various provisions of section 12A all that the section dealt with was collection of tax by a

dealer which was lawfully leviable under the Act And that since in the present case the sales were outside State sales and were, therefore, not

taxable under the Act, the section could not operate so as to entitle the State to forfeit any amount collected by the petitioners from the purchasers

by way of tax in respect of those sales. Mr. Kaji emphasized the words ""by way of tax"" occurring in sub-sections (1), (2) and (4) of section 12A

and contended that these words clearly showed that the section was intended to refer to collections of tax lawfully leviable under the Act. Now this

very contention was advanced before us in Kantilal Babulal & Brothers v. H. C. Patel, being Special Civil Application No. 641 of 1962 decided

on 2nd December, 1963 (Since reported at p. 973 supra) and we rejected it for reasons given by us in our judgment in that case. There we

analysed the provisions of sub-sections (1), (2) and (4) of section 12A and came to the conclusion that on a true construction of those provisions

the construction suggested on behalf of the petitioners could not be accepted and held that sub-section (4) applies to all cases where an

unregistered dealer collects any amount by way of tax from the purchasers or a registered dealer collects any amount by way of tax in excess of

the amount payable by him as tax under the Act irrespective of the fact whether the sales on which such amount is collected are sales on which tax

is lawfully leviable under the Act or not. This decision concludes the present contention and in view of this decision Mr. Kaji rightly did not address

any arguments to us in support of this contention.

5. Mr. Kaji then contended that, in any event, by a reason of section 30 introduced in the Act with retrospective effect from 26th January, 1950,

by the Bombay Sales Tax (No. 1) Ordinance, 1952, section 12A could not operate in respect of collection made by a dealer by way of tax on

sales which were outside State sales. He relied very strongly on the words :-

Nothing contained in this Act or the rules made thereunder shall be deemed to apply to any sale or purchase of any goods, where such sale or

purchase takes place outside the State of Bombay.

6. He contended that the expression ""nothing contained in this Act shall be deemed to apply to any outside State sales"" included section 12A, and

section 12A was, therefore, by virtue of section 30, deemed not to apply to outside State sales and collections by way of tax on outside State

sales were therefore outside the scope and ambit of section 12A. But this contention also stands answered by our decision in Kantilal Babulal &

Bros. v. H. C. Patel and Others (Since reported at p. 973 supra), and for reasons given in our judgment in that case, it must be rejected.

7. Mr. Kaji lastly contended relying on certain observations of N. H. Bhagwati, J., in The Bengal Immunity Company Limited Vs. The State of

Bihar and Others, , that, in any view of the matter, section 12A must be held applicable only to collections of amounts by way of tax made by a

dealer in respect of sales which were within the legislative competence of the State to tax, since any other construction would render the section

void as being beyond the legislative competence of the State. This contention must also, we are afraid, meet with the same fate as the previous

contention in view of our decision in *Kantilal Babulal & Bros. v. H. C. Patel* [1965] 16 S.T.C. 973.

8. That takes us to the next question, namely whether section 12A(4) was ultra vires, as being beyond the legislative competence of the Provincial

Legislature which enacted it. Now section 12A(4) was introduced in the Act by Bombay Act I of 1949 at a time when the Constitutional

document defining the legislative powers of the Central Legislature and the Provincial Legislatures was the Government of India Act, 1935. Mr.

Kaji contended that the power of the Provincial Legislature to tax sales of goods was derived from Entry 48 of List II of the Seventh Schedule to

the Government of India Act, 1935, which was at the relevant time in the following terms, namely, "Taxes on the sale of goods and on

advertisements" and the Provincial Legislature was therefore entitled in the exercise of its legislative power under that entry to make a law taxing

sales of goods and making all necessary incidental provisions in that behalf for levy and collection of sales tax, but that power did not extend to

enable the Provincial Legislature to enact a law providing that a dealer who collects by way of tax any amount which is not exigible as tax should

not be permitted to retain such amount but that such amount should be forfeited and paid over to the Government. He urged that in such a case,

the amount collected by the dealer not being exigible as tax, a provision for its forfeiture and recovery would not fall directly within the subject-

matter of Entry 48 and equally, it would not fall within ancillary or incidental power of legislation under that entry since the Legislature cannot under

the guise of exercise of ancillary or incidental power do indirectly what it cannot do directly. The provision was of such a nature and inasmuch as it

provided that though an amount collected by a dealer by way of tax was not exigible under the law as tax, still it should be made over to the

Government, it was beyond the legislative competence of the Provincial Legislature and was therefore ultra vires and void. The learned Advocate-

General appearing on behalf of the Revenue agreed that the power of the Provincial Legislature to legislate with respect to tax on sale of goods

was to be found in Entry 48 and that the validity of section 12A(4) must, therefore, be tested by reference to the true import of that entry, but he

contended that the section was within the legislative power of the Provincial Legislature as contained in that entry. He of course did not dispute that the subject-matter of the section did not fall directly within the subject of legislation expressly mentioned in Entry 48 since the section did not impose any tax on sale of goods. But he sought to justify the section on the ground that it constituted an exercise of legislative power on a matter ancillary or subsidiary to the primary and main power connoted by the entry and contained a provision necessarily incidental to effective legislation on the subject.

9. These contentions raise the question as to the true scope and ambit of the legislative power of the Provincial Legislature under Entry 48. Now in

order to arrive at a proper determination of this question, it is necessary to bear in mind the well-settled rule of interpretation of legislative power

that the most liberal construction must be put upon the words so that the same may have effect in their widest amplitude. While considering the

scope of the various entries in the Legislative Lists the widest possible amplitude must be given to the words used and as stated by Sir Maurice

Gwyer, C.J., in AIR 1941 16 (Federal Court) "each general word should be held to extend to all ancillary or subsidiary matters which can fairly

and reasonably be said to be comprehended in it." When legislative competence is conferred on a Legislature to legislate with regard to a particular

topic of legislation, the Legislature must necessarily also have power to legislate on all matters which are ancillary or subsidiary to the main subject,

for otherwise it may not be possible to have effective legislation on the subject. Vide *The Edward Mills Co. Ltd., Beawar and Others Vs. The*

State of Ajmer and Another, and The State of Rajasthan Vs. G. Chawla and Dr. Pohumal, . The proposition is now well-established and beyond

any controversy that the Legislature has power to legislate not only on a subject-matter which falls directly within the subject of the legislative entry,

but also on a subject-matter which may be ancillary or incidental to such subject. If it were not so, much of the legislation would be rendered

ineffective on the ground that provisions which are necessarily incidental of effective legislation on the subject primarily within the power of the

Legislature cannot be made on the ground that they fall outside the legislative entry. In every case, therefore, where a provision in an enactment is

challenged as beyond the legislative competence of the Legislature the first question that must be considered is whether the provision falls within the

express words of the entry conferring power on the Legislature which enacted the legislation. But even if it does not so fall its validity can yet be

sustained on the ground that it reflects an exercise of legislative powers on ancillary or subsidiary matters which can fairly and reasonably be

regarded as comprehended within the subject of legislation and contains a provision necessarily incidental to effective legislation on the subject.

Now admittedly in the present case, the subject-matter of section 12A(4) did not fall directly within the subject of legislation set out in Entry 48

since section 12A(4) did not impose any tax on sales of goods. The question which therefore requires to be considered is whether section 12A(4)

could be said to constitute legislation on an ancillary or subsidiary matter necessarily incidental to effective legislation on the subject of legislation

contained in Entry 48.

10. Now what is incidental or ancillary in a given case must depend upon the main legislation and the circumstances of the particular case. It is in

the last analysis a question of degree and it is not possible to lay down any hard and fast rule on the basis of which it can be said that a particular

provision is the result of an exercise of incidental or ancillary power of legislation or is necessarily incidental to effective legislation on the subject.

The object of the particular provision and the effect which it produces often assist in the determination of the question whether such provision can

properly be regarded as an exercise of ancillary or subsidiary power of legislation. The provision must be regarded in its true nature and character

and it must be ascertained having regard to the object or purpose of the provision as also the effect produced by it, as to whether it is really and

truly a provision relating to an ancillary or subsidiary matter or whether under the guise of making a provision on an ancillary or subsidiary matter,

what it really seeks to do is to trespass into some other field. It is in the light of these principles that we must approach the question before us.

While dealing with the argument of the petitioners in *Kantilal Babulal & Bros. v. H. C. Patel and Another* [1965] 16 S.T.C. 973 challenging the

validity of section 12A(4) on the ground of infraction of Article 19(1)(f) of the Constitution, we had occasion to consider the object and purpose of

the enactment of section 12A(4) and this is what we said in our judgment in that case in regard to the object and purpose for which section 12A(4)

appeared to have been introduced in the Act :-

Now as we have already pointed out above, section 12A was introduced in the Act by Bombay Act 1 of 1949. The reasons for its introduction

were obvious and it is necessary to refer to them in order to understand what was the evil for remedying which the section was enacted. The Act

levied tax on sales of goods by dealers whose taxable turnover exceeded certain limits varying according to the business carried on by them and

provided for registration of such dealers. But it is a matter of common knowledge - and it has been accepted as a fact both by economists and

courts - that the ultimate incidence of the tax always falls on the consumer. The dealer who is liable to pay tax always passes it on to the consumer

and it is the consumer who has ultimately to bear the burden of the tax. Now that may be alright when tax is actually payable by the dealer to the

State on the sale. He may in such a case pass it on to the purchaser and recover it from the purchaser. But under the guise of tax a dealer may

recover from the purchaser amounts which he is not liable to pay to the State as tax and may make illegal profits for himself. An unregistered dealer

would not be liable to pay any tax to the State on the sales effected by him and yet he may recover amounts from the purchaser in the name of tax

and thus abuse the provisions of the Act by making illegal gain for himself. A registered dealer may also not be liable to pay tax on any particular

sales effected by him either because they are exempt under the Act or because they are not taxable under the Constitution and yet he may unjustly

enrich himself by collecting from the purchaser amounts by way of tax when in fact no tax is payable by him on those sales. In such cases the result

would be that the Act would be utilised by the dealer as an instrument of exploitation of the consumer for extracting from the consumer under the

guise of tax moneys which are in fact not payable by the dealer to the State and which will only go to fill the pockets of the dealer. This situation

would indeed be intolerable and the State cannot possibly sit with folded hands and allow its statute to be abused by dealers exploiting the

consuming public in this manner under the cloak of the Act. To suffer illegal payments to be recovered in the name of tax would be nothing short of

permitting extortion. The Legislature, therefore, intervened and amended the Act by introducing section 12A. The object obviously was to ensure

the proper working of the Act and to prevent the law from being abused by dealers who might collect from the unwary and illiterate consuming

public moneys by way of tax when in fact no tax was payable by them. The Legislature first enacted a prohibition in sub-section (1) of section 12A

in regard to collection by way of tax in respect of sales exempt from tax u/s 7 and made it penal to contravene the provisions of that sub-section.

The Legislature then enacted in sub-section (2) of section 12A a prohibition against an unregistered dealer collecting any amount by way of tax

since no tax would be payable by him to the State and made the contravention of the provisions of that sub-section too, an offence. The

Legislature also provided in addition, in both these cases, another penalty, namely, the penalty of forfeiture in sub-section (4) of section 12A. This

penalty of forfeiture provided by sub-section (4) of section 12A was without prejudice to any prosecution which might be launched by the State

against the offending dealer who contravened the provisions of sub-section (1) or (2) of section 12A. The Legislature also provided in sub-section

(4) of section 12A the penalty of forfeiture in the case of a registered dealer who might collect any amount by way of tax from the purchaser in

excess of the tax actually payable by him under the Act. The provision enacted in sub-section (4) of section 12A was thus a provision imposing a

penalty of forfeiture and we find that this view of the character of the provision is supported by the decision of the Supreme Court in the State of

Bihar v. Rai Bahadur Hurdut Roy Motilall Jute Mills and Others [1960] 11 S.T.C. 17), where Gajendragadkar, J. (as he then was), also

characterised a similar provision in section 14A of the Bihar Sales Tax Act, 1947, as imposing a penalty of forfeiture. The sanction of this penalty

of forfeiture was imposed by the Legislature for the purpose of preventing dealers from abusing the provisions of the Act

11. It will be seen from these observations that section 12A(4) imposed a penalty of forfeiture in cases where any person collected any amount by

way of tax in contravention of the provisions of section 12A(1) or 12A(2) or any registered dealer collected any amount by way of tax in excess of

the amount payable by him under the Act and this penalty was imposed in order to secure that no person under the cloak of the provisions of the

Act or taking shelter under the provisions of the Act collected any amount by way of tax when no tax was payable by him or collected any amount

by way of tax in excess of the amount payable by him as tax under the Act. This provision imposing penalty of forfeiture was clearly an ancillary or

incidental provision necessary for the purpose of preventing misuse of the provisions of the Act, and carrying out the object of the Act was

necessarily incidental to effective legislation on the subject of tax on sales of goods. In fact, it stood on no different ground than the provision

enacted in section 24(1)(dd). Section 24(1)(dd) imposed one penalty namely, penalty, of imprisonment for contravention of the provisions of sub-

sections (1) and (2) of section 12A while section 12A(4) imposed another penalty, namely, penalty of forfeiture for contravention of the same

provisions and also where registered dealer collected any amount by way of tax in excess of the amount payable by him as tax under the Act. The

nature and character of both provisions was the same, namely, penal and if section 24(1)(dd) was within the legislative competence of the

Provincial Legislature as representing an exercise of ancillary or incidental power of legislation, and this position indeed could not be disputed by

Mr. Kaji on behalf of the petitioners, we do not see why section 12A(4) cannot be regarded as a provision enacted in the exercise of incidental or

ancillary power of legislation and therefore within the legislative competence of the Provincial Legislature.

12. Mr. Kaji, however, contended that there was a decision of the Supreme Court which clearly said to the contrary and that was the decision in

A. Abdul Quader and Co. v. Sales Tax Officer [1964] 15 S.T.C. 403). Since strong reliance was placed on this decision on behalf of the

petitioners and it was contended that this decision clinched the determination of the present question in favour of the petitioners, we will refer to this

decision in some detail. The provision which came up for consideration before the Supreme Court in this case was section 11(2) of the Hyderabad

General Sales Tax Act, 1950, and the question was whether this provision was within the competence of the State Legislature under Entry 54 of

List II of the Seventh Schedule to the Constitution which is an entry corresponding to Entry 48 of List II of the Seventh Schedule to the

Government of India Act, 1935. It was contended on behalf of the appellant that this provision did not fall directly within the subject of legislation

set out in Entry 54 nor could it be justified even as an incidental or ancillary provision permitted under that entry. This contention was upheld by the

Supreme Court which took the view that the provision contained in section 11(2) was not within the competence of the State Legislature under

Entry 54. Now in order to understand the ratio of this decision of the Supreme Court, it is necessary to notice the language of section 11(2) which

was in the following terms :-

11(2) Notwithstanding anything to the contrary contained in any order of an officer or tribunal or the judgment, decree or order of a Court, every

person who has collected or collects on or after 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this

Act, shall pay over to the Government, within such time and in such manner as may be prescribed the amount so collected by him, and in default of

such payment the said amount shall be recovered from him as if it were arrears of land revenue"".

13. The true meaning and legal effect of this provision was explained by the Supreme Court in the following words :-

Section 11(2) thus provides that amounts collected by way of tax though not exigible as tax under the Act ... shall be recovered from such person

as if they were arrears of land revenue. Clearly therefore section 11(2) as it stands provides for recovery of an amount collected by way of tax as

arrears of land revenue though the amount was not due as tax under the Act.

14. It will be clear from these observations that the way the Supreme Court read section 11(2) it did not enact a provision forfeiting an amount by

way of tax when such amount was not exigible as tax under the Act but merely provided that such amount shall be paid over to Government and it

was for this reason that the Supreme Court held that it was not competent to the State Legislature even in exercise of its ancillary or incidental

power of legislation to enact such a provision. The Supreme Court observed :-

All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of

the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is

not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to

Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be

ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of

ancillary or incidental power goes to the extent of permitting the Legislature to provide that though the amount collected - may be wrongly - by

way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The

Legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or

purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what section 11(2) has provided. Such a provision

cannot in our opinion be treated as coming within the incidental or ancillary power which the Legislature has got under the relevant taxing entry to

ensure that the tax is levied and collected and that its evasion becomes impossible

15. The Supreme Court in these observations emphasized that what was sought to be done by the provision enacted in section 11(2) was to

provide that though the amount collected by way of tax was not exigible under the law as made under the relevant taxing entry, it should still be

paid over to Government as if it were a tax. The State Legislature, therefore, purported to do indirectly what it could not do directly, namely,

recover the amount collected by way of tax as if it were a tax though in fact it was not a tax and could not be recovered as tax. An attempt was

made before the Supreme Court to justify the provision in section 11(2) as providing for a penalty, but the Supreme Court pointed out that as they

read section 11(2) they could not find anything in it to justify that it was a penalty for breach of any prohibition in the Act. They pointed out that the

Legislature had provided for penalties, for example, in sections 19 and 20, but section 11(2) was not a provision which had anything to do with

penalties and could not be justified as a penalty on the dealer. The Supreme Court then referred to section 20(c) which provided that any person,

who failed to pay the amounts specified in section 11(2) within the prescribed time, shall, on a conviction by a Magistrate, be liable to a fine and

observed that it was remarkable that this provision made a person punishable for his failure to pay to the Government an amount which was not

authorised as tax at all under the law but did not provide any penalty for collecting the amount wrongly by way of tax from the purchaser. The

Supreme Court observed that if such a provision had been made it might have been justified as a penalty for the purpose of carrying out the

objects of the taxing legislation. It is apparent from this that the Supreme Court did not regard section 11(2) as imposing a penalty but took the

view, prima facie of course, that if there had been a provision imposing penalty on a person for collecting any amount wrongly by way of tax, such

a provision might have been justifiable as an ancillary or incidental provision for the purpose of carrying out the objects of the Act.

16. Now unfortunately for the petitioners, the provision that we have in section 12A(4) in the present case is very much different from the provision

in section 11(2) which was before the Supreme Court. While section 11(2) did not talk of any forfeiture or penalty but merely provided that any

amount collected by way of tax shall be paid over to Government though no exigible as tax under the Act, section 12A(4), in terms clear and

explicit, provided for forfeiture of the amount collected by way of tax in the circumstances set out in the section and was made clearly on the face

of it a penal provision. An attempt was made on behalf of the petitioners to persuade us to hold that the words ""the amount so collected shall be

forfeited"" in section 12A(4) did not make any difference and that notwithstanding those words the character of the provision in section 12A(4) was

the same as that of the provision in section 11(2). But we cannot accept this contention. For reasons already given in an earlier part of the

judgment we are of the view that section 12A(4) prohibited a registered dealer from collecting any amount by way of tax in excess of the amount

payable by him under the Act and prescribed the penalty of forfeiture for breach of such prohibition. The use of the words ""the amount so

collected shall ... be forfeited"" is not without significance; forfeiture is a legal concept with a definite legal connotation and is always indicative of

penalty. The language of section 12A(4) also clearly showed that the provision was a penal provision. Any contravention of the provision of sub-

section (1) or (2) of section 12A was made punishable by imprisonment or fine u/s 24(1)(dd), and section 12A(4) provided that in case of such

contravention, the amount collected should be forfeited to the State Government without prejudice to any prosecution that might be instituted

against the offender for an offence under the Act. This provision clearly showed that the forfeiture of the amount on contravention of the provisions

of sub-section (1) or (2) of section 12A was also a penalty like the penalty of imprisonment or fine provided in section 24(1)(dd) and if it was

penalty in the case of contravention of the provisions of sub-sections (1) and (2) of section 12A, it would equally be penalty in the case of a

registered dealer who collected any amount by way of tax in excess of the amount payable by him under the Act. Moreover, we have already held

that the provision in section 12A(4) to be a provision imposing a penalty in *Kantilal Babulal & Bros. v. H. C. Patel* [1965] 16 S.T.C. 973) a

decision which is binding upon us. But the matter does not rest there. This view of the character of the provision in section 12A(4) which we are

taking is supported by the decision of the Supreme Court in *State of Bihar v. Rai Bahadur Hurdut Roy Moti Lall Jute Mills and Others* [1960] 11

S.T.C. 17). The provision which came up for consideration before the Supreme Court in that case was section 14A of the Bihar Sales Tax Act,

1947, the proviso to which was in the following terms :-

Provided that if any dealer collects any amount by way of tax, in contravention of the provision of this section or the conditions and restrictions

prescribed thereunder the amount so collected shall, without prejudice to any punishment to which the dealer may be liable for an offence under

this Act, be forfeited to the State Government and such dealer shall pay such amount into the Government treasury in accordance with a direction

issued to him by the Commissioner or any officer appointed u/s 3 to assist him and in default of such payment, the amount shall be recovered as an

arrear of land revenue.

17. Gajendragadkar, J., as he then was, delivering the judgment of the Supreme Court, characterised this provision as imposing a penalty of

forfeiture and this is what he said in regard to this provision :-

The effect of this proviso is clear There can be no doubt that before the penalty of forfeiture can be imposed upon the dealer under the

proviso it must be shown that he has acted contrary to the conditions and restrictions prescribed by the Rules. It would not be enough to show that

the collection of the amounts in question by the dealer is otherwise illegal or improper. The contravention of the statutory provision contained in

section 14A or of the Rules prescribing conditions and restrictions in that behalf alone can form the basis of the imposition of the penalty under the proviso.

18. The learned Judge also observed a little later in the course of the judgment :-

In dealing with this question we cannot ignore the fact that the relevant provisions which fall to be construed in the present appeal impose a serious

penalty on the registered dealer, and so, even if the view for which the appellant contends may perhaps be a possible view, we see no reason why

the other view for which the first respondent contends and which appears to us to be more reasonable should not be accepted.

19. In view of these observations of the Supreme Court, we do not think that it is possible to take any other view as regards the character of the

provision enacted in section 12A(4). That provision was clearly a provision providing for penalty to be imposed on a person who collected any

amount by way of tax in contravention of the provisions of sub-sections (1) and (2) of section 12A or on a registered dealer who collected any

amount by way of tax in excess of the amount payable by him under the Act. This being the true nature and character of the provision enacted in

section 12A(4), the ratio of the decision of the Supreme Court in Abdul Quader's case [1964] 15 S.T.C. 403) cannot apply and we must hold

that this provision was a valid exercise of incidental or ancillary power of legislation under Entry 48 and was, therefore, within the legislative

competence of the Provincial Legislature.

20. In this view of the matter, the petition fails and will be dismissed with costs.

21. Petition dismissed.