
(1996) 12 KL CK 0022

In the High Court Of Kerala

Case No : W.A. 177, 181 and 184 etc. of 1991, O.P. No. 5462/92 and T.R.C. No"s. 89 and 92 of 1992

State of Kerala

APPELLANT

Vs

Peekay Enterprises

RESPONDENT

Date of Decision : 04-12-1996

Acts Referred:

Constitution (Forty-Sixth Amendment) Act, 1982 — Section 6
Constitution of India, 1950 — Article 19, 19(1)
Finance Act, 1984 — Section 5
Kerala General Sales Tax Act, 1963 — Section 59A, 9

Citation : (1996) 12 KL CK 0022

Hon'ble Judges : T.V. Ramakrishnan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : V.C. James, Government Pleader, for the Appellant; K.L. Narasimhan, Arikkat Vijayan Menon, Philip Antony Chacko and Abdul Salam, for the Respondent

Judgement

T.V. Ramakrishnan, J.—A batch of Writ Appeals, two Tax Revision Cases and an Original Petition are coming up before us on a reference and we are disposing of them by this common judgment as common questions arise for consideration in all the cases.

2. The Writ Appeals by the State are against the judgment of a learned Single Judge of this Court allowing a batch of similar Original Petitions. The challenge in the Original Petition was against the constitutional validity of certain provisions contained in the Kerala General Sales Tax (Second Amendment) Ordinance, 1989 (Ordinance 7 of 1989) (for short "the Ordinance") and the corresponding provisions in the Kerala General Sales Tax (Amendment) Act, 1990 (Act 3 of 1990) (for short "the Amending Act") whereby entries 155 and 179 of the First Schedule to the Kerala General Sales Tax Act, 1963 (for short "the Act") were amended with retrospective effect. The impugned provisions imposed sales tax on "agarbathis" and "garlic" at the rates mentioned in the relevant entries in the

First Schedule with retrospective effect. As per the judgment, the learned Single Judge has found that though the legislature has legislative competence to enact the impugned provisions retrospectively, they are, in the facts and circumstances, totally unreasonable and arbitrary in nature in so far as it imposes heavy sales tax liability retrospectively on transactions which were concluded long before the enactment of the law itself. The learned Judge has accordingly quashed the impugned provisions to the extent it has been given retrospective effect. The judgment of the learned Single Judge is under challenge in the Writ Appeals.

3. In the two Tax Revision Cases which relate to the provisions imposing tax liability on "garlic" retrospectively, the State is challenging the correctness of the decision rendered by the statutory authorities following the view taken by the Division Bench of this Court in Deputy Commissioner v. Hassim Trading Co. 1987 (1) KLT 710 that "garlic" is not taxable as "spices" and is exempt from taxation.

4. In the Original Petition, the Petitioner has challenged the provisions in the Ordinance and the Amending Act taking contentions similar to the one raised in the Original Petitions already disposed of by the learned Judge and which were accepted by him while allowing the earlier Original Petitions.

5. As regards "agarbathis", the dispute relates to the actual rate of tax leviable on the turnover relating to it during the relevant period, namely, from 1st April 1984 to 29th August 1989. Regarding "garlic", the question is whether any tax at all is payable during the period from 1st April 1984 to 29th August 1989.

6. Before dealing further with the points to be decided it would be useful to indicate briefly the legislative and executive actions adopted to impose sales tax on "agarbathis" and "garlic" and the relevant judicial pronouncements dealing with such actions.

7. Prior to 16th September 1980, neither "agarbathis" nor "raw bathis" nor "scented sticks" were in the First Schedule of the Act. They were then treated as items which are chargeable at the general rate of 5 per cent. However, in 1982, as per G.O. (Rt.) 344/82/PD, dated 20th May 1982, a clarification was admittedly issued u/s 59A of the Act declaring that "agarbathis" will come under entry 80 of the First Schedule which deals with "talcum powder", other perfumeries and cosmetics, not falling under any other item in that Schedule" taxable at 10 percent. That order was challenged in T.R.C. 72 of 1986 and other similar cases. A Division Bench of this Court, by judgment dated 28th May 1986 reported in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, , declared that the phrase "perfumeries and cosmetics" occurring in entry 80 of the First Schedule does not cover "agarbathis" and as such turnover on "agarbathis" cannot be taxed at 10 per cent. Though the State went up in appeal to the Supreme Court by filing a SLP against the said decision, the SLP was dismissed by the Supreme Court by order dated 10th March 1987. It may be relevant and useful to mention here itself that Section 59-A of the Act was

ultimately struck down by this Court as unconstitutional as per its judgment dated 15th November 1990 reported in T.C.M. Co. Ltd. v. State of Kerala 1991 (1) KLT 196. In the meanwhile, as per the provisions contained in the Finance Act of 1984, published on 28th July 1984, entry 80-B was introduced in the First Schedule with effect from 1st April 1984, which reads as follows:

80 B: Raw Bathis- At the point of first sale Rate 10 per cent in the State by a dealer who is liable to tax u/s 5

Even as per the new entry, the legislature did not expressly include "agarbathis" and "scented sticks" as specific items in the First Schedule. Later, by virtue of the Finance Act 18 of 1987, the original entry 80-B was renumbered as entry 155 without any change. Still later, presumably to overcome the legal bar created by the decision in 69 S.T.C. 29 and the dismissal of the SLP by the Supreme Court in the matter of imposing tax at 10 per cent on "agarbathis", the legislature took steps to amend the First Schedule bringing in necessary amendments in entry 155 by the Ordinance published in the Gazette on 28th September 1989. In the Ordinance, Clause 6(d) was incorporated to amend entry 155 adding the words "agarbathis and other scented sticks" after the word "raw bathis". Under Clause 1(2) of the Ordinance, Sub-clause (d) of Clause 6 was given retrospective operation with effect from 1st April 1984. Subsequently, the Ordinance was replaced by the Amending Act and it is challenging the retrospectivity given to the amendment, the Original Petitions have been filed by the dealers in "agarbathis". There is no challenge against the validity of the provisions of the Amending Act in so far as it acts prospectively.

8. As regards "garlic", the position was thus: u/s 9 of the Act, the goods specified in the third Schedule are not liable to sales tax either in respect of sale or purchase. "Garlic" is not an item of goods defined in the Act and specifically mentioned in any of the schedules. Similarly, vegetable is also nowhere defined in the Act. But entry 10 of the Third Schedule deals with vegetables. That entry reads as follows:

10. "Vegetables" (other than green ginger), whether roots, green fruits or leaves, used for human consumption including yam, potatoes, lime, sabola and tomatoes, except their manufactured products.

Entry 10 has an explanation which reads as follows:

Explanation.- The term "vegetables" shall not include any goods of the description specified in the First or Second Schedules.

In the light of the explanation, garlic was treated by the dealers as an item exempted from tax as covered by the entry "vegetables" in the Third Schedule. However, the Department used to impose tax on "garlic" also treating it as "spices" though not uniformly and in all cases. Assessee also used to challenge such moves often successfully in the absence of a proper provision in the Statute and an appropriate entry in the Schedules. Whether entry 10 dealing with

"vegetables" covers "garlic" or not was the specific subject-matter of the decision of this Court reported in Deputy Commissioner of Sales Tax Vs. Hassim Trading Co., . After the above decision, the State decided to bring sales of "garlic" within the sales tax net and by the Ordinance promulgated on 29th August 1989, an amendment was made to item 179 of First Schedule. Originally, entry 27 of the First Schedule dealt with "spices". Entry 27 reads as follows:

27. Spices (including chillies At the point of first and corriander seed) not sale in the State falling under any other by a dealer who is items in this Schedule. liable to tax under Section 5.

Subsequent to the amendment introduced by Act 18 of 1987, "spices" became entry 179 in the First Schedule. The entry is almost identical with the earlier entry. The amended entry came into force from 1st July 1987. After promulgation of the Ordinance, entry 179, as amended, now reads as follows:

179. "Spices" (including chillies, garlic and Rate of tax corriander seed) not falling under any is 8 percent other entry in this Schedule.

The amendment effected by Clause 6(e) of the Ordinance was given retrospective operation from 1st April 1984 as per Clause 1(2) of the Ordinance. The retrospectivity given to the amendment of the provisions in entry 179 by the Ordinance and the Amending Act was under challenge in the Original Petitions.

9. We may here itself refer to the relevant portion of the Statement of Objects and Reasons given at the end of the body of the Amending Bill which was passed as the impugned Act:

Government in G.O. (Rt) 344/82/TD, dated 28th May 1982 clarified that agarbathi is a perfumery. Accordingly assessments were completed treating agarbathi as a perfumery taxable at single point. But the Kerala High Court in Deputy Commissioner (Law) v. K.A. Lathif (1988) 69 S.T.C. 29 (Ker.) has held that agarbathi is not a perfumery or cosmetics. Similarly garlic was being treated as a spice and assessments completed accordingly. But the Kerala High Court in Deputy Commissioner v. Hashim Trading Co. (1987) 66 S.T.C. 240 has held that it is a vegetable. In the light of the above decisions the entire assessments so far completed have to be reopened. To avoid the situation Government decided to amend suitably the relevant provisions in the Kerala General Sales Tax Act, 1963 with retrospective effect from 1st April 1984.

10. The contention raised by learned Government Pleader, Sri V.C. James, on behalf of the State is simple and it is to this effect. From the date of G.O. (Rt) 344/82/PD dated 20th May 1982 onwards "agarbathis" were declared to be goods coming under entry 80 in the First Schedule which deals with "talcum powder, other perfumeries and cosmetics not falling under any other items in that Schedule". As such, dealers were liable to pay tax as clarified in the said Government Order. The clarification issued was found to be insufficient to justify the imposition and collection of tax on "agarbathis" only as per the decision of

the Division Bench dated 28th May 1986 reported in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, As such, it cannot be held that there was no authority to tax "agarbathis" prior to the Ordinance and the Amending Act. Entry 80-B of the First Schedule relating to "raw bathis" was introduced with effect from 1st April 1984 which was later re-numbered as entry 155. As per the impugned Ordinance and the Amending Act, the entry 155 was amended with retrospective effect from 1st April 1984 including "agarbathis" also in that entry so that the tax proposed to be imposed on "agarbathis" from 1982 onwards could be effectuated. In the facts and circumstances noted already, the Amending Act which replaced the Ordinance can only be treated as a validating act. Though there was no previous Ordinance or Act imposing tax on "agarbathis" and "scented sticks" which was invalidated, the principles applicable while testing the reasonableness and constitutionality of the validating acts should apply to the Ordinance and the Amending Act challenged in the Original Petitions. In the place of an Act or Ordinance there was an order issued in exercise of the power conferred u/s 59-A of the Act which was found to be illegal by this Court and it was to effectuate the unsuccessful actions taken to impose tax on "agarbathis" made earlier under the 1982 order that the Ordinance and the Amending Act was brought into force. The basic assumption made by the learned Single Judge to the effect that tax was sought to be imposed on "agarbathis" for the first time only after the promulgation of the Ordinance is not correct in the light of Government Order dated 20th May 1982, issued under the provisions contained in Section 59-A of the Act. So long as the clarification issued as per Government Order dated 20th May 1982 was in force, the dealers cannot be heard to say at least in regard to "agarbathis" that they have not collected tax from their customers as provided therein. The Government Order was found to be invalid only as per the decision in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, and finally by the Supreme Court on 10th March 1987 when it dismissed the SLP filed by the State against the decision in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, . In the case of "garlic" also, from 1st July 1987 onwards exemption was withdrawn and it was treated as an item taxable under the Act. Tax was sought to be imposed as if it is an item coming under "spices" though entry 179 dealing with "spices" was amended with retrospective effect only by the Ordinance and the Amending Act. In the circumstances, it was submitted that the learned Judge erred in declaring the retrospective effect given to the amended provisions in entries 155 and 179 by the Amending Act as illegal. The learned Judge ought to have held that the Ordinance and the Amending Act were liable to be treated as validating acts though not styled as validating acts and while considering the constitutionality and reasonableness of the provisions contained in the Ordinance and the Amending Act, the principles applicable to the validating acts ought to have been applied analogically at least in the facts and circumstances of the case. It was submitted that opportunity for the dealer for passing on the tax burden to the buyer is not a determining factor for upholding the validity of the taxation statute. As such, neither the fact that

dealers have no opportunity to collect tax from the buyer and to pass on the same to the State nor the fact that the dealers have not actually collected tax from the buyers and are forced to pay out of their pocket is sufficient justification for holding that retrospective operation given to the statute imposes an unreasonable burden and is expropriatory in character and as such retrospectivity given to the provisions is unconstitutional and void. Moreover, it was submitted that the contentions raised to the effect that if retrospectivity is sustained the business of the Petitioners will have to be closed down is one raised without any proper pleadings and evidence.

11. On behalf of learned Counsel appearing for the dealers in "agarbathis" and "garlic", who are Respondents in the Writ Appeals, Tax Revision Cases and the Petitioner in the Original Petition, learned Counsel Sri K.L. Narasimhan has led the arguments supported by Sri Arikkat Vijayan Menon, Philip Antony Chacko, Abdul Salam and others. Sri Narasimhan has strongly argued that the Ordinance and the Amending Act like those under challenge in the Original Petitions cannot be treated or equated to validating acts and has submitted that there is no scope for application of the principles applied by the Courts while determining the reasonableness and constitutionality of the validating acts to the instant cases. It was strongly submitted that there was no valid law made by the legislature imposing tax on "agarbathis" and "garlic" prior to the promulgation of the Ordinance. As such, the learned Single Judge was perfectly justified in proceeding on the basis that there was no legislation valid or otherwise subjecting the above two items of goods to tax prior to the Ordinance and the Amending Act challenged in the Original Petitions. It was also submitted that though absence of any opportunity to collect tax from the consumers and passing on to the State may not be decisive factor while deciding the question of constitutionality of a taxation statute, it is a very relevant consideration while considering the question of reasonableness of the enactment. It will amount to imposition of an unreasonable and harsh burden on the dealers. In such circumstances, tax imposed can only be considered as a penalty. Such a legislation can only be treated as expropriatory and unreasonable and as such violative of the provisions contained in Article 19 of the Constitution of India. Even assuming that it is competent for the legislature to legislate retrospectively while enacting a taxation statute, the reasonableness of the legislation is always open for consideration by the Courts and a legislation can always be invalidated on the ground of unreasonableness or arbitrariness.

12. Learned Government Pleader and learned Counsel appearing for the dealers have mainly relied upon the decisions referred to by the learned Judge in his judgment. Learned Government Pleader has also relied upon the following decisions apart from those mentioned in the judgment:

Polaki Motors v. State of Orissa 88 S.T.C 259; Rai Ramkrishna and Others Vs. The State of Bihar, ; Narottamdas Vs. State of Madhya Pradesh, ; Entertainment Tax Officer and Another Vs. Ambae Picture Palace, ; The District Controller of Stores,

Northern Railway, Jodhpur Vs. The Assistant Commercial Taxation Officer and Another, ; Bharat Engineering Co. Vs. The Assessing Authority and Another, ; Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, . These cases have been cited mainly as instances where the Courts have upheld the validity of retrospective tax enactments having effect for a considerably long period.

13. As the learned judge has elaborately discussed and analysed the various decisions referred to by both sides, we do not think that it is necessary for us to discuss such decisions in detail in this judgment once again. We need only refer to the relevant legal principles discussed and settled in those decisions indicating the relevant decisions in support of such legal propositions.

14. It is trite law that legislative power to impose tax also includes within itself the power to tax retrospectively. A long line of authorities of the Supreme Court have recognised the power of the legislature to enact laws including tax laws both prospectively and retrospectively. Further, it has been held that the power to legislate retrospectively embraces within its scope the power to validate actions taken and laws made which had been declared invalid by Courts provided the infirmities or vitiating factors are removed or cured legally [see The Union of India Vs. Madan Gopal Kabra, ; J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, ; Krishnamurthi and Co. etc. Vs. State of Madras, ; Ujagar Prints v. Union of India AIR 1989 S.C. 516 and Entertainment Tax Officer and Another Vs. Ambae Picture Palace, . Inability of the dealer to realise the sales tax from his customers during the period covered by retrospective operation of law is not a factor which affects the competence of the legislature to enact a law imposing sales tax retrospectively [see J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, and Krishnamurthi and Co. etc. Vs. State of Madras, . Where retrospective legislation has been undertaken mainly for the reason that the legislature or the delegated authority has failed to bring out its intention clearly in the principal act, such legislation is not normally open to attack either on the ground of legislative competence or on the ground of violation of Article 19(1)(g) of the Constitution of India. See Hiralal Rattanlal Vs. State of U.P. and Another etc. etc., and Epari Chinna Krishna Moorthy, Proprietor, Epari Chinna Moorthy and Sons, Berhampur, Orissa Vs. State of Orissa, . In testing whether a retrospective imposition of a tax operates so harshly as to violate the fundamental right under Article 19(1)(g) of the Constitution, the factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statutes struck down by Courts for certain defects, the period of such retroactivity and the degree and extent of any unforeseeable financial burden imposed for the past period etc. See Ujagar Prints v. Union of India 74 S.T.C. 401 : AIR 1989 S.C. 516. The length of time covered by the retrospective operation cannot by itself be a decisive test Rai Ramkrishna and Others Vs. The State of Bihar, and Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, . Further, in Indian Aluminium Co. etc. etc. Vs. State of Kerala and others, , the Supreme Court has laid down the tests to determine the validity of validating enactments thus:

The validity of the Validating Act is to be judged by the following tests:

- (i) whether the legislature 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.

In the same decision, after an exhaustive analysis of almost all important decisions of the Supreme Court and other High Courts dealing with cases relating to the constitutional validity of Validating Acts, the Supreme Court has formulated nine principles as emerging out of such decisions. Out of the nine principles enumerated therein, the following are relevant for our purpose:

- (i) 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.
- (ii) 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 tax on 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.

In *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, , the Supreme Court has indicated the possible methods in which the legislature can validate a tax declared as illegal in the following terms:

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 reenacted law. Sometimes the

legislature gives its own meaning and interpretation of the law under which 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.

In *Polaki Motors v. State of Orissa* 88 S.T.C. 259 it has been held thus:

It is well settled that the power to amend and to validate actions taken under statutes not sufficiently comprehensive to sustain those actions is a power ancillary or subsidiary to the power of legislation on any subject-matter within the competence of the State Legislature. It is also settled law that the legislature has the power to legislate retrospectively and also validate invalid laws, or invalid executive acts and notifications.

(emphasis supplied)

15. Bearing in mind the historical background and the legal principles indicated above, we may now deal first with cases relating to "agarbathis" and deal with "garlic" cases at the end.

16. On an analysis of the actions taken by the State to tax "agarbathis", as referred to already by us, the resultant legal position seems to be thus: As far as "agarbathis" are concerned, sales tax was attempted to be imposed and collected first by issuing G.O. (Rt) 344/82/PD, dated 20th May 1982 in exercise of the powers purported to have been delegated to the executive authorities u/s 59A of the Act by declaring that "agarbathis" will come under entry 80 of the First Schedule which deals with "talcum powder, other perfumeries and cosmetics, not falling under any other item in that Schedule". The tax payable in respect of the goods included in entry 80 was 10 per cent. It is true that this Court in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef*, has declared that the phrase "perfumeries and cosmetics" occurring in entry 80 of the First Schedule will not take in "agarbathis" and as such turnover on "agarbathis" cannot be taxed at 10 per cent. It is also true that later Section 59A of the Act was found to be unconstitutional as per the judgment dated 15th November 1990 in the case reported in *T.C.M. Co. Ltd. v. State of Kerala* 1991 (1) KLT 196. The specific case of the State set up in the counter-affidavit in the Original Petitions is that it is to effectuate the unsuccessful actions taken under the 1982 order to tax "agarbathis" and to avoid reopening of closed assessments that the Amending Act was passed by the legislature.

17. It is relevant to note that the object and reasons stated for retrospectively amending entries 155 and 179 was to avoid reopening of completed assessments regarding turnovers of "agarbathis" and "garlic" as a result of the decisions reported in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef*, and *Deputy Commissioner of Sales Tax Vs. Hassim Trading Co.*, respectively. This is evident from the portion of the Statement of Objects and

Reasons already quoted by us in this Judgment.

18. We may now briefly analyse the basic assumptions made and the reasons given by the learned Single Judge for his conclusions in his judgment dealing with "agarbathis" cases, with a view to find out how far they are sustainable in law. In paragraph 16, the learned Judge has observed that "in view of the two Bench decisions reported in *Dadha Pharma Pvt. Ltd. v. State of Kerala* 1990 (2) KLT 307 and *T.C.M. Co. Ltd. v. State of Kerala* 1991 (1) KLT 196, the clarification order dated 28th May 1982 issued u/s 59-A of the Act and Section 59-A itself should be deemed to be not inexistence at any time and, therefore, there is no possibility for the State claiming that the present Ordinance 7/89 and Act 3/90 are in the nature of clarification or validating the earlier legal decisions". In the very same paragraph, the learned Judge has also stressed the point that it is for the first time by virtue of Ordinance 7/89 dated 29th August 1989 that agarbathi and scented sticks are included in entry 155 of the First Schedule of the Act and that prior to 29th August 1989 there was no enactment, law or clarification which would cover agarbathi as an item taxable at the rate of 10 per cent. Again, in paragraph 21, the learned Judge has concluded the discussions so far by observing that "the present taxation is not in the nature of a validation of a taxing statute struck down by Courts and as such the protection available to the acts considered in *Empire Industries Limited and Others Vs. Union of India and Others*, and *Ujagar Prints v. Union of India* AIR 1989 S.C. 516 : 74 S.T.C. 401 is not available to the present Ordinance 7/89 and Act 3/90". We consider that the above assumptions are the main basis on which the learned Judge has come to the conclusion that the amended provisions are unreasonable, arbitrary and as such unconstitutional.

19. From the above observations or conclusions made by the learned Judge, it is fairly clear that the learned Judge has proceeded on the basis that the impugned Ordinance and the Amending Act cannot be treated as a validating enactment as there was no enactment, law or clarification prior to 29th August 1989 which was struck down or invalidated by any Court or imperfect or defective on account of mistakes committed by the legislature which the legislature wanted to cure as "minor repairs". On the above basis, the learned judge further held that tax was sought to be imposed on "agarbathis" for the first time as per the Ordinance with retrospective effect from 1st April 1984. Proceeding on the above assumptions, the learned Judge has found that for the first time tax was imposed retrospectively for a considerably long period of five years and four months. According to the learned judge, such imposition was bound to have the effect of imposing an unreasonable and unexpected burden and in many cases, such an imposition of tax which cannot be passed on to the buyer may result in the business being closed down.

20. As regards the decisions relied upon by the learned Government Pleader dealing with statutes having retrospective effect, the learned Judge found that they fall into three categories of cases. In paragraph 24 of his judgment, the

learned Judge has indicated the three different classes thus:

(1) Cases where the legislature has attempted to cure "a defect which arose due to defects in the law or as a result of Court's decisions" with a view to avoid making refund and reopening of the assessments.

(2) Cases where taxing statutes have been given retrospective operation for a very short period as in *Hotel Elite and Others Vs. State of Kerala and Others*, ; *Malabar Fruit Products Company and Others Vs. The Sales Tax Officer and Others*, and *Yusuf Shabeer and Others Vs. State of Kerala and Others*, etc.

(3) Cases where to get over the judgment of the High Court or the Supreme Court acts have been passed with retrospective operation.

After analysing and classifying the decisions thus, the learned Judge observed that "there is absolutely no decision relied upon by the Government Pleader which shows that retrospective imposition of tax for a period of five years and four months has been upheld by any Court". The learned Judge was of the view that the cases on hand will not fall into any of the three categories of cases where retrospective enactments have been upheld by the Courts. Further, the learned Judge found that "considering the fact that Ordinance 7/89 and Act 3/90 are instances of first time taxation, they can only have prospective operation and they cannot have retrospective operation". The question is how far the assumptions made, reasoning given and the conclusions reached are justifiable in the facts and circumstances of the case and the legal principles to be applied to the case.

21. In this connection, it is necessary to deal specifically with the three decisions relied on strongly by learned Counsel for the dealers in advancing their arguments and the learned Judge in upholding such arguments. The decisions we refer to are:

(1) *Shri Krishna Enterprises and Others Vs. State of Andhra Pradesh and Others*, ,

(2) *Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others*, and

(3) *The State of Andhra Pradesh Vs. V.V. Rama Rao and Company*, . The first observation to be made is that all the three decisions are cases dealing with imposition of tax for the first time with retrospective effect as rightly held by the learned Single Judge.

22. *Shri Krishna Enterprises and Others Vs. State of Andhra Pradesh and Others*, was a case where the validity of the provisions contained in Section 6 of the Constitution (46th Amendment) Act, 1982 was challenged by some of the hoteliers as unconstitutional. As per Section 6 of the amending act, supplies provided by eating houses to consumers were treated as sale assessable to tax for the first time with a further provision exempting Assesseees from such liability in cases where Assesseees are able to establish that they have not collected tax on supplies made by them to customers on the ground that no such tax could

have been levied or collected at that time, at any time on or after the 7th day of September 1978 and before the commencement of the amending act. On the basis of the 46th amendment, the Andhra Pradesh Sales Tax Act was amended and the amending provisions came into force only on 13th September 1985 with a provision corresponding to Section 6 of the Constitution Amendment Act. Till the passing of the State Act, there was no law or executive action or notification authorising the imposition of tax on eatables supplied and it was for that reason the Supreme Court has dismissed the review rejecting the contention that subsequent enactment would validate the position of tax observing that as there was no law imposing a liability on the supplies made by eating houses to its customers prior to the State enactment and since the State enactment was only a prospective legislation, the imposition of tax by the subsequent State enactment can only be prospective and as such there is no ground for reviewing the earlier decision rendered by it. *Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others*, was also a clear case where tax was imposed retrospectively for the first time with the object of widening the definition of "business" so as to include for the first time transactions, which without the amendment, fell outside the concept of "business" as understood and judicially determined till then. The learned Judge has specifically found that the amendment seeks to impose sales tax for the first time on transactions which till the amendment fell outside the purview of the Act. The object and reason of the amending act, which fell for consideration in the said decision itself, indicated that it was to widen the definition of "business" and to include into it transactions which were outside the definition of "business" till then and thus to enhance the revenue collection. It is in this background that the amending act was brought into force with retrospective effect and it was after noting the purpose for which the amending enactment was brought in, that the learned Judge has found the same to be an attempt to impose tax for the first time with retrospective effect and as such unreasonable and unconstitutional.

23. Of course, as observed by the learned Judge, *The State of Andhra Pradesh Vs. V.V. Rama Rao and Company*, is a case very similar to *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef*, . But, in *The State of Andhra Pradesh Vs. V.V. Rama Rao and Company*, , there was no law or executive order or notification imposing tax on "televisions" prior to the amendment of entry 3 of the First Schedule made in 1976 of the Andhra Pradesh General Sales Tax Act. The contention advanced on behalf of the Revenue in that case was only to the effect that even though "television" was specifically included in the entry only as per the amendment, it must be deemed to have been comprised in the entry from the very beginning itself as the amendment can only be considered as clarificatory in nature brought in with a view to eliminate any room for controversy or dispute. It was this contention which was repelled by the High Court. The important distinction which we discern in the two cases in *The State of Andhra Pradesh Vs. V.V. Rama Rao and Company*, and *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A.*

Latheef, is the existence of a notification or Government Order as the basis of the executive actions taken for imposing tax from 1982 onwards which were ineffectuated by the judicial decisions rendered by this Court in the case of Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, and the absence of any such executive notification or actions in the case of The State of Andhra Pradesh Vs. V.V. Rama Rao and Company, . As analysed above, we find that the learned Judge was not justified in applying the principles laid down in the above three decisions to the facts and circumstances of the cases on hand and deciding the issue on that basis.

24. Examined in the light of what is discussed above, we find that the main or basic assumption that there was no enactment, law or circular imposing tax on "agarbathis" prior to 29th August 1989 and that it is for the first time as per the Ordinance tax was imposed retrospectively with effect from 1st April 1984 is not fully correct. There was, in fact, G.O. (Rt.) 344/82/PD, dated 20th May 1982 issued u/s 59A of the Act clarifying that "agarbathis" will come under entry 80 of the First Schedule which deals with "talcum powder" other perfumeries and cosmetics not falling under any other item in that schedule" and are taxable under that entry. In our view, it has to be held that tax at the rate of 10 percent was sought to be imposed on "agarbathis" at least on the basis of the Government Order dated 20th May 1982. It was treated as a legal authority to impose and collect tax at 10 per cent on turnover of "agarbathis". Of course, it has now been found to be insufficient, invalid and inoperative from its inception as a result of the decisions rendered by this Court in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, , Dadha Pharma P. Ltd. v. State of Kerala 1990 (2) KLT 307 and T.C.M. Co. Ltd. v. State of Kerala 1991 (1) KLT 196. In other words, the delegation of authority made by the legislature as per Section 59A of the Act as well as the action of the delegated authority in issuing the order dated 20th May 1982 was invalidated by Court's decision and it was the act of invalidation which has resulted in ineffectuating the attempt to tax "agarbathis". As such, it may not be correct to say that there was no law or executive action taken to impose tax on "agarbathis" prior to 29th August 1989 and that it was for the first time tax was retrospectively imposed on "agarbathis" as per the Ordinance in question. Though the order purported to have been issued in exercise of the delegated authority was found to be ineffective as an authority for taxing "agarbathis" as per the decision in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, it may not be legitimately possible to make an assumption that there was no authority actually provided for by the Government Order for imposition of tax on "agarbathis" during the period from its issuance till it was declared to be ineffective and inoperative as a basis for imposition of tax by this Court. It was on the basis of an authority purported to have been delegated by the legislature u/s 59A of the Act that the Government Order was issued to clarify that "agarbathis" would come within entry 80 of the First Schedule. So long as that order was in force, no dealer could have normally ignored to act according to the

clarification contained in it. If he had ignored it, it can only be at his peril. There is no apparent reason to think that dealers were not acting in accordance with it. Though after the invalidation of Section 59A of the Act by the decision of this Court, the Government Order issued under that Section should be deemed as still born in law as observed by the learned Single Judge, still for the purpose of determining the nature of the subsequent enactment and to see whether it is a validating enactment or not, it should legitimately be considered as a law or at least as an executive action or notification which existed at the relevant time and on the basis of which tax was actually imposed and assessments were completed and tax collected on "agarbathis" till it was struck down by this Court later. As such, we cannot also agree with the view of the learned Single Judge that "there is no possibility for the State claiming that the present Ordinance 7/89 and Act 3/90 are in the nature of clarification or validating earlier legal position".

25. Analysing the factual and legal situation existing as on the date of the amending Ordinance, it can be seen that on the basis of a purported authority legislatively delegated u/s 59A of the Act, the executive authority has issued an order specifically declaring that "agarbathis" are taxable under entry 80 of the First Schedule to the Act. This was the manner in which tax was imposed for the first time on "agarbathis" at 10 percent which was till then taxable only at 5 per cent. Based upon the said notification, the Department has proceeded to impose tax and to demand the same from the dealers. Some of the dealers, have challenged the levy and demand so made in statutory appeals and revisions. Ultimately this Court, for the first time, categorically held in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, that "agarbathis" cannot be considered to be a "perfumery" or "talcum powder" occurring in entry 80 of the First Schedule and as such the turnover on "agarbathis" cannot be assessed as clarified in the order. That was on 28th May 1986. The SLP against the said decision was dismissed by the Supreme Court only on 10th March 1987. The direct result of the above decision of this Court was to ineffectuate the Government Order and the attempt to impose and collect tax on "agarbathis" for which definite action was taken at least from the date of issue of Government Order dated 20th May 1982. The Statement of Objects and Reason given at the end of the Bill, which was passed as an Act later, (which has already been quoted by us) would clearly show that it was to avoid the situation created by the decision reported in Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes) Vs. K.A. Latheef, regarding "agarbathis" that the Government has decided to amend suitably the relevant entry in the Act, namely, entry 155 with retrospective effect from 1st April 1984. The Statement of Objects and Reasons would also indicate that Government was faced with a situation of reopening of all assessments so far completed and it is to avoid such a situation that the amendment was brought in with retrospective effect. Taking note of the above background in which the impugned provisions in the Ordinance and the Amending Act were brought into force with retrospective effect, we find that it was to effectuate the action taken to impose tax on "agarbathis" and to avoid

the consequences of the judicial decisions rendered by this Court ineffectuating or invalidating such actions that the legislature has brought in the impugned provisions in the Ordinance and the Amending Act with retrospective effect. If this be the true legal position, we are inclined to take the view that what the legislature has done in this case, by bringing in the Ordinance and the Amending Act, is to render the judicial decisions ineffective by enacting a valid law on the topic within its legislative sphere curing the defects or removing the reasons for which this Court has invalidated the Government Order and the actions taken by the executive on the basis of the Government Order for imposing and collecting tax on "agarbathis" from 20th May 1982 onwards with retrospective effect from 1st April 1984. The defect which existed in the law or executive action earlier was the absence of a proper entry in the First Schedule of the Act including "agarbathis" therein. It was in the absence of a proper provision imposing tax that the levy and collection of tax was held illegal as per its decision in spite of the clarification issued as per the Government Order. Further, in *Dadha Pharma Pvt. Ltd. v. State of Kerala* 1990 (2) KLT 307 this Court found that the Government Order was one issued in excess or not in accordance with the power conferred u/s 59A of the Act. The legislature, while bringing in the amendment with retrospective effect, has cured the defects or removed the reasons for which this Court has declared the levy of tax as illegal by including "agarbathis" specifically in entry 155 of the First Schedule. Taking note of the background as analysed above and the objects and reasons for which the Ordinance and the Amending Act in question are brought in by the legislature, we are inclined to take the view that the impugned Ordinance and the Amending Act belong to the category of validating enactments and the principles applicable for determining the validity and reasonableness of the provisions in validating acts already indicated by us above should apply to the cases on hand also, even though the Ordinance and the Amending Act have not been described as such and there was no ordinance or act invalidated by judicial decisions to be validated by the Amending Act. As has been held in *Polaki Motors v. State of Orissa* 88 S.T.C. 259, it is a case where the legislature has legally exercised its legislative power to validate an invalid executive action or notification.

26. Further question to be considered is whether applying the tests applicable to the validating enactments, the impugned provisions can be considered as valid and constitutional or as unreasonable and arbitrary as has been held by the learned Single Judge. We have already quoted the principles to be applied to test the reasonableness and constitutionality of the retrospective taxing statutes and the various considerations which should be taken note of while deciding the reasonableness and constitutionality of such enactments. In the light of the Government order dated 20th May 1982, it may not be possible for the dealers to contend that they had no reason or authority to collect sales tax on "agarbathis" at least on and after the Government Order when they effected their sales. Even assuming that they have not in fact collected tax at the rate of 10 per cent from the customers and they have only collected tax at the rate of 5

per cent, it is their own mistake and that cannot be taken as a reason to hold that the provision imposing tax at 10 per cent retrospectively from 1st April 1984 is unreasonable and arbitrary and as such unconstitutional. In the light of the Government Order dated 20th May 1982 by which the delegated authority has sought to impose tax on "agarbathis", it cannot also be said that tax was imposed retrospectively for the first time from 29th August 1989 and there was no attempt even to collect tax on "agarbathis". The fact that this Court has invalidated the Government Order and ultimately the provisions contained in Section 59A of the Act itself may not be a sufficient ground to find that the retrospectivity given to the impugned provisions is unreasonable and arbitrary so long as the legislative competence to enact a retrospective enactment like the one challenged by the dealers in this case is conceded, in the light of the Government Order which was invalidated or ineffectuated by this Court later. Avoiding the legal effect of judicial decisions invalidating the enactments and the actions taken for the purpose of imposing tax and reopening of completed assessments is a well-known object or purpose for which validating enactments can be brought in legally with retrospective effect by a competent legislature. As such, it cannot be held that only because the provisions amending entry 155 of the First Schedule have been given retrospective effect, it is either unreasonable or arbitrary and as such unconstitutional. The mere fact that retrospectivity has been given for a fairly long period cannot also be a decisive factor in adjudging an enactment or provision as unreasonable or arbitrary. Taking note of the fact that from 1982 onwards ineffective actions were being taken to impose tax on "agarbathis", complete assessments, demand and collect tax and this Court has declared such orders and actions taken as illegal only in 1988, it may not be possible to hold that there was no valid or cogent reason for giving retrospective effect to the amended provisions treating the impugned enactment as a validating one for the purpose of avoiding the result of the judicial decisions and reopening of completed assessments. We would, accordingly, hold that applying the tests laid down for determining the reasonableness and constitutionality of the provisions contained in the validating taxing enactments, the impugned retrospectivity of the provision dealing with "agarbathis" cannot be held to be harsh or unreasonable and as such unconstitutional.

27. The contention that if retrospectivity is upheld, the dealers will be compelled to pay the entire tax liability for a considerably long period of more than five years out of their pocket and that they will be compelled to close down their entire business is a general contention taken without giving any specific details about the nature and extent of the business conducted, profit earned and the excess tax liability and such other relevant particulars. The Petitioners in the Original Petitions have also no explanation why they have not collected tax at 10 per cent on "agarbathis" on the basis of the Government Order dated 20th May 1982 at least till the disposal of the SLP by the Supreme Court on 10th March 1987. It is a case where Department was attempting to impose tax on "agarbathis" from 1982 onwards on the basis of the Government Order to the

knowledge of the dealers and if tax was not collected on the basis of the Government Order from the customers, dealers alone is to be blamed at least till 10th March 1987. As such, we do not find sufficient justification to hold the impugned provisions as unreasonable and as such unconstitutional finding that it will result in imposing an unexpected, unjust and unduly heavy financial burden on the dealers or that they will be compelled to close down their business if the provision is upheld as such. If at all, such hardships and losses can only be ventilated before the Government for the purpose of invoking its power to grant exemptions individually or on a general basis, if circumstances justify such exercise of power vested in the Government.

28. We would, accordingly, set aside the decision of the learned Single Judge in cases relating to "agarbathis" and would allow all Writ Appeal challenging such decisions. Accordingly, Writ Appeal Nos. 177, 181, 184, 195, 326, 327, 328, 391, 396, 485, 662, 695, 730, 735, 748, 815, 829 and 1395 of 1991 and 1687 of 1995 and 268 of 1996 would stand allowed, and Original Petitions Nos. 433/90, 1092/90, 1022/90, 9375/89, 7571/90, 10385/89, 1059/90, 7682/90, 2439/90, 10378/89, 9264/90, 722/90, 10114/89, 6529/90, 1114/90, 2035/91, 2680/91, 3412/90, 9473/90 and 10907/90 would stand dismissed, but without costs. In view of the above, O.P. 5462/90, which came up for consideration before us along with these batch, would also stand dismissed, but without costs.

29. In the case of "garlic", however, the position seems to be different. "Garlic" was not an item mentioned in any of the Schedules and as such it was totally exempt from tax till entry 179 was amended as per the Ordinance promulgated on 29th August 1989, which amendment was given retrospective effect as per clause I(2) of the Ordinance. Further, this Court has in Deputy Commissioner of Sales Tax Vs. Hassim Trading Co., held categorically that "garlic" is a vegetable coming within entry 10 of the Third Schedule of the Act and as such totally exempt from tax. There was no Act, Ordinance or any rule, Order or Regulation which could have been treated as law imposing tax on "garlic" till the Ordinance was issued. The case pleaded is only to the effect that tax exemption was withdrawn in 1987 and it was sought to be taxed as included in entry dealing with "spices". This is a contention raised without producing any material to substantiate the same and cannot be accepted in law.

30. In view of the indisputable fact that "garlic" was not an item included in any of the entries in any of the Schedules and was held to be totally exempt from tax as an item covered by entry 10 of the Third Schedule by this Court in Deputy Commissioner of Sales Tax Vs. Hassim Trading Co., , and "garlic" was included in entry 179 of the First Schedule only as per the Ordinance for the first time with retrospective effect, we are in full agreement with the view taken by the learned Single Judge as far as cases relating to "garlic" are concerned. There was neither any enactment nor any executive orders, notifications or circulars imposing tax on "garlic" prior to the Ordinance. The Department was imposing tax in some cases on the assumption that "garlic" is an item covered by the entry "spices"

introduced in original entry 27 of the First Schedule. Attempt to tax "garlic" on that basis was found to be illegal and unsustainable in Deputy Commissioner of Sales Tax Vs. Hassim Trading Co., It was thereafter entry 179 was amended with retrospective effect including "garlic" into that entry and tax at 8 per cent was legally imposed. As such, it is a case which falls squarely within the principles laid down in the decisions reported in Shri Krishna Enterprises and Others Vs. State of Andhra Pradesh and Others, , Shew Bhagwan Goenka Vs. Commercial Tax Officer and Others, and The State of Andhra Pradesh Vs. V.V. Rama Rao and Company, as held by the learned Single Judge. In this view, as regards "garlic", we are in full agreement with the reasoning and conclusion reached by the learned Single Judge and would, accordingly, uphold the decision in all the Original Petitions in which retrospective imposition of tax on "garlic" is challenged.

31. In the result, we would dismiss Writ Appeal Nos. 323, 354, 369, 372, 393, 394, 395, 525, 579, 660, 711, 728, 731, 734, 746, 772, 773, 783, 798, 814, 949, 991, and 1358 of 1991 with no order as to costs.

32. Four identically similar questions referred for decision in the two Tax Revision Gases relating to assessability of turnover of "garlic" are the following:

1. Whether the Tribunal is justified in law in holding that the Respondent Assessee is not liable to be taxed on the sales turnover of "garlic" under assessment year 1984-85?
2. Has not the Tribunal erred in law in confirming the order of the First Appellate Authority when "garlic" has been included in the category of Spices under entry 179 of the First Schedule with retrospective effect from 1st April 1984 by Ordinance No. 7/89 which is replaced by Act 3 of 1990?
3. Whether the Respondent Assessee is not liable to be taxed under turnover of "garlic" in the assessment year 1985-86 in view of the amendment of entry 179 in the First Schedule to the Kerala General Sales Tax Act brought in by Ordinance No. 7/89 which is replaced by Act 3 of 1990?
4. Whether the reasoning and conclusions of the Tribunal are correct in law?

In the view which we have taken in the Writ Appeals, we would answer the questions in the following manner:

- (a) Question Nos. 1 and 4 are answered in the affirmative against the revenue and in favour of the Assessee.
- (b) Questions No. 2 and 3 are answered in the negative against the revenue and in favour of the Assessee.

33. The Tax Revision Cases are disposed of accordingly.