

(1989) 10 AHC CK 0059

In the Allahabad High Court

Case No : Civil Misc. Writ No's. 2193 of 1976 and 1077 of 1983

Vyapar Mandal and Others

APPELLANT

Vs

The Municipal Board and Others

RESPONDENT

Date of Decision : 26-10-1989

Acts Referred:

Constitution of India, 1950 — Article 211, 254(1), 254(2), 277, 45
Uttar Pradesh Basic Education Act, 1972 — Section 10, 10A, 18, 18A, 3
Uttar Pradesh Municipalities Act, 1916 — Section 128(1), 128(14), 15, 68(1), 7(1)
Uttar Pradesh Primary Education Act, 1919 — Section 10, 13, 15, 17, 18

Citation : (1990) 1 AWC 17

Hon'ble Judges : S.D. Agarwala, J;A.P. Misra, J;A.N. Varma, J

Bench : Full Bench

Advocate : Sudhir Narain Agarwal and S.P. Gupta, for the Appellant; S.S. Bhatnagar, General, for the Respondent

Final Decision : Dismissed

Judgement

S.D. Agarwala, J.—These two writ petitions challenge the validity of the levy and demand of "Education Cess" by the Municipal Board, Bisalpur.

2. In the year 1919, U.P. Primary Education Act, 1919 (hereinafter referred to as the Primary Education Act) was enacted. In the said Act, it was provided that where a notification u/s 3 of the said Act is enforced, the Board, namely, the Municipal Board may impose a tax called the "Education Cess", the proceeds of which shall devoted solely to primary education. The State Government by a notification dated 24-5-1949 in exercise of the powers conferred by Section 128(1) (XIV) of the U.P. Municipalities Act, 1916 read with Section 15 of the Primary Education Act imposed education cess with effect from June 1, 1949 on all the commodities brought for sale or purposes of trade within the municipal limits of Bisalpur district Pilibhit. Initially the rate of tax was 3 annas percent on the value of all the goods imported into the Bisalpur Municipality. This rate was revised by a notification dated 22nd May 1951 and the rate was increased from 3 annas percent to 5 annas percent. By notification dated 18-11-1958 the rate was

further enhanced to 50 NP percent.

3. A Civil Misc Writ No. 7775 of 1975 was filed by Sohan Lal Om Prakash and others in this Court challenging the levy of education cess. A Division Bench of this Court by a judgment dated 12th February 1980 held that the amount realised by way of education cess was spent by the Board towards imparting education and not for any other purpose. In this petition, the sole challenge before" this Court was that the education cess had been levied solely for the purposes of primary education and the said amount was not being spent accordingly by the Board. After the above mentioned petition was filed in this Court another petition being Civil Misc. Writ No. 2193 of 1976 was filed again by Ram Murti Lal and Ors. challenging the levy of education cess. After the decision in writ No. 7775 of 1975, another writ petition was filed in this Court being Civil Misc. Writ No. 1077 Of 1983. his petition was filed by Vypar Mandal, Bisalpur and others against the Municipal Board again challenging the levy of education cess. The Writ Petitions filed by Ram Murti Lal and others and Vyapar Mandal and others came up for hearing before a Bench of this Court consisting of Hon"ble R.M. Sahai and J. N. Dubey, JJ. By an order - dated 30th June, 1985, the Bench Was of the view that the decision in writ No. 7775 of 1975 Sohan Lal Om Prakash and Ors. v. Municipal Board decided on 12th February 1980 required reconsideration and directed that the papers of the case be laid before Hon"ble the Chief Justice for placing it before a larger Bench. It is because of the reference made on 30th June, 1985 that the present two petitions have come up before the Full Bench for decision. In the referring order it has been categorically stated that the Petitioners" argument is not that the tax could not have been levied but the argument is that its levy was co-related with spending of the proceeds on the primary education and once primary education has been taken over by the State Government by enacting the U. P. Basic Education Act, 1972 (hereinafter referred to as the Basic Education Act) the entire purpose for which the levy could be made has become nonexistent.

4. Since both these petitions raise the same question of law we are deciding both of them a common judgment. We have heard Sri.S.P. Gupta, Senior Advocate - on behalf of both the Petitioners and Sir. S.S. Bhatnagar, learned Advocate General on behalf of the Respondents.

5. The first submission of the learned Counsel for the Petitioners is that the Basic Education Act impliedly repealed the Primary Education Act and as such the levy of education cess after the promulgation of Basic Education Act is wholly illegal and no demand can be made in respect of the same. The second submission of the learned Counsel is that even if the Basic Education Act did not impliedly repeal the Primary Education Act, then too u/s 15 of the Primary Education Act, it is clearly provided that the proceeds from "education cess" shall be solely devoted to primary education and since education cess is not being devoted solely to primary education, the demand of the education cess by the Municipal Board is wholly arbitrary and illegal.

6. In order to examine the first submission made by the learned Counsel, it is necessary to state the principle on which it has to be tested as to whether the Basic Education Act has impliedly repealed the Primary Education Act. In Principles of Statutory Interpretation by Sri G.P. Singh IIIrd Edition, page 435, it has been laid down as follows:

There is a presumption against a repeal by implication; and the reason of this rule is based on the theory that the Legislature while enacting law has a complete knowledge of the existing laws on the same subject matter, and, therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other law is further strengthened on the principle *expressio unius est exclusio alterius*. Further, the presumption will be comparatively strong in case of virtually contemporaneous Acts. The continuance of existing legislation, in the absence of an express provision of repeal, being presumed, the burden to show that there has been a repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act "that the two cannot stand together". But, if the two may be read together and some application may be made of the words in the earlier Act, a repeal will not be inferred.

7. In *Dharangadhra Chemicals Works v. Dharangadhra Municipality* AIR 1985 SC 1929, the Hon"ble Supreme Court had an occasion to consider as to in what circumstances, the courts can held that the subsequent statutes impliedly repeals the earlier statutes. In paragraph 10 of this judgment, the principle has been aptly laid down as follows:

It is true that repeal by implication is not ordinarily favoured by the Courts but the principle on which the rule of implied repeal rests has been stated in Maxwell on "Interpretation of Statutes" (Twelfth Edition) at page 193 thus:

If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together the earlier is abrogated by the later", vide *Kutner v. Phillips* (1891) 2 QB 267 at P. 272.

In *Zaverbhai Amaldas Vs. The State of Bombay*, this Court has approved the above principle in the context of two pieces of legislation, namely, The Essential Supplies (Temporary Powers) Act, 1946 as amended by Act III of 1950 (a Central Act) and Bombay Act No. XXXVI of 1947 the provisions whereof in the context of enhanced punishment were repugnant to each other. The Court held that the question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under the Bombay Act and the Central Act constituted a single subject matter and in view of Article 254(1) of the

Constitution Act III of 1950 (Central enactment) must prevail. The Court quoted with approval Lord Goddard's observations in *Smith v. Benabo* (1937) 1 KB 518, namely, "It is a well settled rule of construction that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the statute." After quoting these observations the court went on to say:

It is true, as already pointed out, that on a question under Article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the state law. We must accordingly hold that of the Essential Supplies (Temporary Powers) Act No. XXIV of 1946 as amended by Act No. III of 1950.

The aforesaid principle of implied repeal has been approved and applied in a couple of other decisions of this Court, particularly in *T. Barai Vs. Henry Ah Hoe and Another*, .

8. From the above mentioned principles of law enunciated by the Hon'ble Supreme Court, it is clear that if the later statute is identical with the earlier and they cannot both stand together then alone earlier is repealed by the later enactment. We have, consequently to examine as to whether the Basic Education Act as well as the Primary Education Act can both stand together or not. If both the Acts are identical and over the same situations then alone the Primary Education Act would be deemed to be impliedly repealed by the later Basic Act.

9. In *Minerva Talkies, Bangalore v. State of Karnataka* 1988 SC 526, Hon'ble K.N. Singh delivering the judgment in the court laid down the following principles of interpretation for determining what is the actual purpose of the Act. He held as follows:

The declared will of the legislature and the policy and purpose of the Act are discernible from the title, preamble and express provisions of the Act. The legislative will is declared by the Preamble of the Act which seeks to deal with the subject of enactment. Generally, preamble of an Act, briefly indicates the object of the legislation. It may not be exhaustive, but still it discloses the primary purpose of the legislation. If the express provisions of the Act are plain and unambiguous, it is always advisable to find out the purpose of the legislation from those provisions, but if the provisions are ambiguous and the courts face the difficulty in deducing the purpose of the Act from the express provisions of the Act, it is permissible to refer to the title and preamble of the Act to find out the legislative object, and the purpose of the Act.

The title of the Primary Education Act is stated to be an Act to provide for the extension of primary education in Municipalities in Uttar Pradesh. Preamble of the

Act reads that whereas it is expedient to provide for the extension of Primary Education in Municipalities in Uttar Pradesh and with the aforesaid object, to enable the Municipal Boards to introduce compulsory Primary Education. From the title as well as the preamble of the Act, consequently, it is apparent that the purpose of enacting the Primary Education Act was to extend the Primary Education in Municipalities of Uttar Pradesh and in certain areas to make the same compulsory.

10. Section 3 of the Act empowers the State Government to issue a notification to declare that the primary education of the male and the female children shall be compulsory in the whole or any part of the Municipality. This notification can only be passed unless the conditions laid down in Section 4 of the Act are fulfilled, viz., the Board has by a special resolution which has been passed by a vote not less than two-thirds of the members present at the meeting, and not less than one-half of the total number of members constituting the board, resolved that such Primary Education should be made compulsory and further the State Government is to be satisfied that the board is in a position to make and will make adequate provision in recognised primary schools for such compulsory Primary Education free of charge.

11. Section 5 lays down the manner in which the board may make an application to the State Government requesting for issue of notification u/s 3.

12. By Section 6, the board is authorised to appoint a school committee.

13. Section 7 enjoins upon the parents of the children to cause such child to attend the recognised primary school in the absence of a reasonable cause.

14. Section 8 enumerates the meaning of reasonable excuse.

15. Section 10 lays down the penalty which the parents will suffer in case they prevent the child to attend the school.

16. Section 13 specifically lays down that no fee shall be charged in any municipal school within the area in which a notification u/s 3 is in force in respect of the Primary Education of any child to whom such notification applies.

17. Section 15 which is very relevant and which enables, the board to impose "Education cess" is quoted below:

15. Taxation for the purposes of this Act-(1) Where a notification u/s 3 is in force, the board may impose a tax, hereinafter called the "education cess", the proceeds of which shall be devoted solely to Primary Education.

(2)The board may for the purpose of the education cess, select any of the taxes which it is authorised to impose under the principal Act, or may, for that purpose, increase any tax which is already levied under the provisions of the said Act, and in the later case, the income derived from the increase shall be deemed to be proceeds of the education cess.

(3) An education cess shall not be imposed unless the Board by a special resolution, which has been passed by a vote of not less than two-third of the members present, resolved that the imposition of such a tax is desirable and necessary.

18. Section 17 empowers the State Government to withdraw the notification u/s 3.

19. Section 18 empowers the State Government to make rules for the purposes of the Act.

20. Section 19 empowers the Board to make regulation to see that the notification issued u/s 3 of the Act is properly enforced.

21. On a reading of the relevant provisions of the entire Act, it is clear that the only purpose of enacting the Primary Education Act was to extend Primary Education in the Municipalities in Uttar Pradesh and to ensure that compulsory Primary Education is given in the areas notified by the State Government in consultation with the Municipality concerned. It is to be noted here that though this Primacy Education Act was enacted in the year 1919, but in effect it embodies the principles laid down in Article 45 of the Constitution of India which is one of the Directive Principles of State Policy wherein it has been laid down that the State shall endeavour to provide within a ,period of ten years from the commencement of this Constitution for "free, and compulsory education for all the children until they complete the age pi 14 years. It goes to the credit of the then legislature to have taken up this project of enforcing compulsory Primary Education in areas notified by the State.

22. The Basic Education Act was enacted in the year 1972. The State-meat of Objects and Reasons are quoted below:

Statement of Objects and Reasons-

(1) The responsibility for" Primary Education has so far rested with the Zila Parishads in rural areas and with Municipal Boards and Mahapalikas in urban areas. The administration of education at this level by the local bodies was not satisfactory, and it was deteriorating day by day. There was public demand for the Government to. lake immediate, steps for improving the education at this level. Hence for recognising, reforming and expanding" elementary education it become necessary for the State Government to take over its control into its own hands.

(2) Repeated demands had been made by all sections of the legislature also for the take-over of the control of elementary education by the State Government From local bodies. Echoing this public demand, the Governor had also in his address to both the houses of, the legislature on March 20, 1972, said that in order to strengthen the primary and junior High Schools and to increase their usefulness Government was going to assume full responsibility for its control and management.

(3) With a view to taking effective steps for securing the object of Article 45 of the Constitution, and fulfilling the assurances given in the Governor's address and respecting the popular demand it was necessary to entrust the conduct and control of elementary education to a virile institution which may be expected to inject new life into it and to make it progressive. It was, therefore, decided by the Government to transfer the control of Primary Education from the local bodies to the Uttar Pradesh Board of Basic Education with effect from the educational session 1972-73.

23. The title of the Act indicates that it is an Act to provide for the establishment of a Board of Basic Education and for matters connected therewith. Keeping the objects and reasons in mind along with the title of the Act, the only purpose for enacting the Basic Education Act was to establish a Board of Basic Education which board shall organise, coordinate and control the imparting of basic education in the State. Section 3 lays down the constitution of Board. Section 4 enumerates the function of the Board. Sub-clause (1) specifically lays down that it shall be the function of the Board to organise, coordinate and control the imparting of basic education and teachers training therefore in the State to raise its standard and to co-relate it with the system of education as a whole in the State. Sub-clause (2) of Section 4 further lays down that without prejudice to the generality of the provisions of Sub-section (1) the Board, shall in particular, have power mentioned in that behalf. Section 4 of the Act is quoted below:

4. Function of the Board-(1) Subject to the provisions of this Act it shall be the function of the Board to organise, co-ordinate and control the imparting of basic education and teacher's training therefore in the State, to raise its standard and to co-relate it with the system of education as a whole in the State.

(2) Without prejudice to the generality of the provisions of Sub-section (1) the Board shall, in particular, have power-

(a) to prescribe the courses of instruction and books for basic education and teacher's training therefore ;

(b) to conduct the junior high school and basic training certificate examination and such other examinations as the State Government may from time to time by general or special order assign to it and to grant diplomas or certificates to candidates successful at such examinations ;

(c) to lay down, by general or special orders in that behalf, norms relating to the establishment of institutions by the Zila Basic Shiksha Samitis or Nagar Basic Shiksha Samitis and to superintend the said Samitis in respect of the administration of institutions, for imparting instruction and preparing candidates for admission to examinations conducted by the Board ;

(cc) to take over the management of all basic schools, which before the appointed day, belonged to any local body ;

(d) to exercise supervisions and control over basic schools, normal schools, basic

training certificate units and the State Institute of Education ;

(e) to accord approval (with or without modification) to the schemes prepared by the Zila Basic Shiksha Samiti for the Nagar Shiksha Samiti for the development, expansion and improvement of and research in basic education-in any district or in the State or in any part thereof ;

(f) to acquire, hold and dispose of any property, whether movable, or immovable and in particular, to accept gift of any building or equipment of-any basic School or normal school on such conditions as it thinks fit ;

(g) to receive grants, subventions and loans from the State Government ;

(g-1) to have superintendence over the Zila Basic Shiksha Samitis and the Nagar Basic Shiksha Samitis in the performance of their functions under this Act, and subject to the control of the State Government, to issue directions to the Samitis which shall be binding on such Samitis ;

(g-2) to constitute sub-committees (from amongst the members of the Zila Basic Shiksha Samitis and Nagar Basic Shiksha Samitis) for such purposes as the Board thinks fit ;

(h) to take all such steps as may be necessary or convenient for, or may be incidental to the exercise of any power, or the discharge of any function or duty conferred or imposed on it by this Act:

Provided that the courses of instruction and books prescribed and institutions recognised before the commencement of this Act shall be deemed to be prescribed or recognised by the Board under this Act.

24. Section 9 of the Act provides for the transfer of employees serving under the local body exclusively in connection with basic schools to the Board.

25. Section 10 and 10-A of the Act provide for establishment of Zila Basic Shiksha Samitis and Nagar Basic Shiksha Samitis. Other sections of the Act relate to control by the State Government and the power to make rules. Section 18-A, however, is important and is quoted below:

18-A. Board to become tenant in respect of certain building-

(1) Where any building or part thereof was on the appointed day occupied as tenant by any local body for the purpose of any basic school, the tenancy in respect of such building or part shall, with effect from the said day, stand transferred in favour of the Board.

(2) Where any building or part thereof belonging to a local body was on the appointed day occupied by it for the purposes of any basic school, the Board, shall with effect from the said day, be deemed to have become licensee on behalf of the local body in respect of such building or part on such terms and condition as the State Government may by general or special order determine.

(3) The provisions of this section shall have effect, notwithstanding anything contained in any contract, lease or other instrument, or any law for the time being in force.

26. From a reading of the provisions of the entire Basic Education Act, it is clear that the only purpose of the Act is to organise, coordinate and control the imparting of basic education. Indisputably the basic education also includes the primary education. By this Act, consequently, the control of primary education has been given over to the Basic Education Board, but this does not take away the power of Municipality to establish basic schools and to maintain them. In fact, Section 18-A which has been quoted above clearly indicates that in case where a building of a Municipality was occupied by a basic school, the basic Education Board shall after the appointed day be deemed to have become licensee on behalf of Municipality in respect of such building. The ownership of the building in which the basic school is run continues to remain with the Municipal Board. It is only the management and other connected matters which has been taken over by the Basic Education Act under the provisions of the Basic Education Act.

27. Great stress has been laid by the learned Counsel for the Petitioners on Section 18 of the Act which provides that Section 68 Sub-section (1) of the U.P. Municipalities Act, 1916 shall be substituted by the following:

A board may, and if so required by the State Government shall, by special resolution, appoint the principal officers of its technical departments such as Civil Engineer, Assistant Civil Engineer, Electrical Engineer, Assistant Electrical Engineer, Waterworks Engineer," Assistant Waterworks Engineer, Electrical and Waterworks Engineer, Assistant Electrical and Waterworks Engineer or Overseer and also Secretary where there is already an Executive Officer

and that it has been further stressed that Section 73 of the Municipalities Act shall cease to apply in relation to Basic Schools.

28. The argument is that since the appointment of certain officers has been taken over from the Municipality and given to Basic Education Board, consequently, it should be deemed that the Municipality has got nothing to do with the Basic Education after the enactment of Basic Education Act. We do not agree with this submission since the control has been taken over by the Basic Education Board and the teachers working in the basic education schools run by the Municipality have been taken over for the purposes of management by the Basic Education Board, consequently, Section 68 Sub Clause (1) has been amended and substituted with the power given to the Basic Education Board to appoint" certain officers but that does not mean that the entire purpose of establishing a basic school or maintaining the same has been taken over by the Basic Education Board- In fact, Section 7(1)(o) of the Municipalities Act has not been repealed by the Basic Education Act. Section 7(I)(o) reads as follows:

7-Duties of Municipal Board-(1)It shall be the duty of every board to make

reasonable provision within the municipality for-(a)

(b) Establishing and maintaining primary schools ;

This power to establish and maintain primary schools has been retained with the Municipality by the Legislature.

29. On a reading of the Basic Education Act along with the provisions of the U.P. Municipalities Act, it is clear that the control over the basic education schools has been taken over by the Basic Education Board but the power of the municipality to establish and maintain primary schools have been left with the Municipal Board.

30. The Primary Education Act does not provide anything for the control over the primary schools. The field covered by the Primary Education Act is entirely different from that of Basic Education Act. The purposes of both the Acts are different. The scope also of both the Acts are different. As stated above, the Primary Education Act has been solely enacted for the purposes of introducing compulsory primary education. There is no such purpose under the Basic Education Act. Basic Education Act, no doubt, provides for taking immediate steps to improve the education at all levels, to reform and expand elementary education and to take over its control but this does not empower the State Government to issue any notification for making primary education compulsory in a particular area coming within a particular municipality.

31. In view of the above, we are clearly of the opinion that both the Acts are not identical and they can stand together. In the circumstances, we do not agree with the submission made by learned Counsel for the Petitioners that the Basic Education Act has impliedly repeated the Primary Education Act.

32. To enable us to consider the second submission of the learned Counsel, it is necessary to find what does "Cess" mean. The meaning of the word "Cess", as given in the Shorter Oxford English Dictionary, Vol. I, Third Edition, it is an "An assessment, tax or levy. It is not in the nature of a "fee". Article 277 of the Constitution also speaks of it differently than a fee. It is quoted below:

277. Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding (but those taxes, duties, cesses or fees are mentioned in the union List, continues to be levied and to be applied to the same purposes until provision to the contrary is made by the Parliament by Law.

33. In *Daulat Ram v. Municipal Committee, Lahore* AIR 1941 Lah 40, while considering similar provisions of the Government of India Act, the question came up as to what is "Cess" It was held as follows:

"Cess" as defined in Murray's Oxford Dictionary means specially in relation to

India "a tax levied for a specific object". It is no doubt said that sometimes it meant a rate levied by local authority and for local purposes ; but, as explained there, it is now superseded in general English use by the word "rate". Similarly, the word "duty" is defined in the same Dictionary as a payment to the public revenue levied upon the import, export, manufacture, or sale of certain commodities". "Tax" in legal parlance also means nothing more than money which individuals are compelled to pay for public purposes. It is impossible, therefore, to distinguish "tax" from "cess" or duty".

34. In *Shammugha Oil Mill v. Coimbatore Market Committee* AIR 1960 Mad 160, the word "Cess", as used in the Constitution of India, was interpreted a tax, and further it was held that there need not be quid pro quo between the service actually rendered and the amount of "cess" levied. It was opined by Ramchandra Iyer, J. as follows:

It was next contended that the words "cess by way of sales tax" were intended to camouflage what was really a fee and would rather indicate that it was not levied as a sales tax and that the levy being more than what was required for the services rendered by the market committee should be held to be invalid. The word "cess" has a definite legal connotation, indicating tax allocated to a particular thing, not forming part of the general fund. Instances may be found among Central Acts, Cotton Cess Act, 14 of 1923, the Indian Lac Cess Act, 24 of 1930, Agricultural Produce Cess Act, 27 of 1940, the Coffee Market Expansion Act, 7 of 1942, Coconut Committee Act, 10 of 1944. Salt Cess Act, 49 of 1953, The Central Tea Board Act 13 of 1919 (a) and Tea Cess Act, 9 of 1903 (b). All these enactments authorise levy of a cess. Amongst local Acts, mention may be made of the Madras Sugar Factories Control Act (Act 20 of 1949) which authorises the State Government to levy cess. Article 211 of the Constitution refers to "cess" as a special category of the taxes. According to its import the word "cess" is only tax and not a mere fee. It is, therefore, not necessary for the purpose of levy of cess there should be quid pro quo between the service actually rendered and the amount of tax levied, as it is not a fee but a tax.

35. Hon"ble Supreme Court had also an occasion to consider what meaning should be assigned to "Cess" and what is its nature in the case of *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.,* . Hon"ble Hidayatullah, J. in his minority judgment, explained its meaning, but the majority judgment did not express anything to the contrary. It was opined as follows:

The word "cess" is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used When the levy is for some special administrative expense which the name health cess, education cess, road cess etc. indicates. When levied as an increment in an existing tax, the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which it is an increment. By Schedule "A" (I) read with Section 3 of the Act, it is collected as an additional levy with a tax, which, as described in Sch. A, is undoubtedly one within the

powers of the State Legislature and has been so even prior the Constitution.

36. In the same years, in Ahmedabad Manufacturing and Calico Printing Co. Ltd., Ahmedabad and Others Vs. State of Gujarat and Others, , Hon"ble Hidayatullah, J. who delivered the judgment for the court reiterated his earlier view in the following words:

Now a cess is really a tax and it is generally imposed for providing money for some stated administrative purpose. It is usually collected as an addition to an existing tax. And so it is here. It is made as an addition to the tax already levied on lands and buildings. Since lands and buildings bear different kinds of taxes in the different zones, an attempt has been made to adjust the rates for the different zones presumably to make the levy equitable, regard being had to the situation and advantages to be derived from the expenditure on education.

37. In view of the above, we are clearly of the opinion that "cess" is really a tax and not a fee and it is not necessary for a "cess" that there should be a quid pro quo between the services actually rendered and the amount of tax levied.

38. In the instant case, "Education Cess" has been levied solely for the purpose of compulsory primary education in the area in respect¹ of which a notification has been issued by the State Government u/s 3 of the Primary Education Act. It is nothing but a tax levied for a specified object for public purposes. It is not necessary for the Municipal Board to establish quid pro quo between the services actually rendered and the amount of cess levied, but by virtue of Section 15 of the Primary Education Act, the Municipal Board is obliged to spend the entire proceeds of "education cess" solely for the purposes of primary education. It may spend it the same year in which it has been collected or it may collect the same and spend it ultimately for the purposes of primary education.

39. In the light of the above, we have to examine the facts of the two petitions, which are before us. In the petition filed by Ram Murti Lal and others, in paragraph 11, it has been stated that the Board collects about two lacs of rupees annually under the head "education cess" but has not to spend any single shell on education which has been taken over entirely by the Government who manages the same. The Board cannot utilise the money collected on account of education cess for its general administrative expenses.

40. The Municipal Board, Bisalpur, has filed a counter-affidavit. The averments made in paragraph 11 of the writ petition have been denied in paragraph 22 of the counter-affidavit. It has been categorically stated that the Municipal Board has been able to collect near about Rs. 1,50,000/- as education cess and it is incorrect that the amount is not being spent on the education.

41. In effect, from the pleadings of the parties, it is clear that the; Municipal Board's clear case is that it is not spending any amount realised as "education cess" for any other purpose except education.

42. In the writ petition of Vyapar Mandal and others, in paragraph 10 it has been

stated, that after the coming in of the Basic Education Act, the State Government is incurring expenses in payment of the salaries of the teachers. In paragraph 12 of the said petition, the income from cess from the year 1978-79 to 1981-82 has been stated as also the expenditure for the years 1978-79 to 1981-82. They are quoted below:

Income from Cess Expenditure 1978-79 2,18,512/-. 1978-79 16,793/-. 1979-80 2,00,000/-. 1979-80 22,000/-. 1980-81 3,04,593/-. 1980-81 8,712/-. 1981-82 3,20,000/- 1981-82 46,000/- 1982-83 4,00,000/-.

43. In paragraph 39 of the petition, it has only been stated that the Municipal Board, Bisalpur does not give any amount or fund to the U.P. Board of Basic Education. In this petition also, a counter affidavit has been filed in which the relevant paragraphs are 22, 37 and 53. In paragraph 22 of the said counter-affidavit, it has been categorically stated by the municipality that it is maintaining the building, furnitures and other equipments and that the municipality is not getting any grant for establishment, maintenance, development of the schools except a negligible grant of Rs. 5,000/- in 1981-82 and Rs. 35,000/- in 1982-83. It has been further stated that the municipality is providing other amenities in the school like water etc and maintain the play grounds etc.

44. In paragraph 37 of the said counter affidavit, it has been stated that the municipality is maintaining 14 primary schools and Junior High Schools besides extending financial aid to S.R.M. Inter College which is spent in the maintenance of its building, furnitures and equipments.

45. In paragraph 53 of the said counter affidavit, it has been again reiterated that the municipality is maintaining the school building etc. The Basic Education Board has till today not paid any rent to the Board. The Board is maintaining education office in the Municipal Board building and the Municipal Board is spending money in maintaining the office, including light, fan, water etc.

46. Thereafter, a supplementary affidavit has been filed in this petition on behalf of the Petitioner and, in reply, the municipality, in paragraph 4 of the supplementary rejoinder affidavit, has stated that the Municipal Board, Bisalpur, is still maintaining the primary school and is spending the amount in maintenance of the school and its building etc. The allegation that the amount is not being spent on maintenance of the primary school; is not correct and is denied. Annexure "SCA-I" to this supplementary rejoinder affidavit is a statement of the expenditure made.. on the schools. It shows that from 1975-76 to 1985-86, a sum of Rs. 2,85,662/- has been spent.

47. From the above facts, as stated in the pleadings, it is apparent that the Municipal Board, Bisalpur, is spending amounts towards education, though the entire amount, which it realises as education cess, has, no doubt, not been spent by it. As held above, the mere fact, that the entire amount, which has been collected in a particular year, if not spent in that year, does not make the cess as

illegal. It is always open to the municipality to collect the "education cess" from year to year and, ultimately, use the same for the purpose of the primary education, as laid down in the Primary Education Act. It can establish and maintain new schools, as is the duty cast on it by the U.P. Municipalities, Act. In our opinion, it cannot be said on the basis of the facts on the record that the municipality is spending the entire proceeds of the education cess for the purposes other than primary education. There is no evidence to show that the "education cess" realised by the municipality is being used for the purposes other than the primary education,

48. In *Gasket Radiators Pvt. Ltd. Vs. Employees' State Insurance Corpn. and Another*, the Hon'ble Supreme Court had an occasion to observe while considering the question of quid pro quo that merely because the benefits to be received are postponed, it cannot be said that there is no quid pro quo. It is true that ordinarily a return in presenting is generally present when fee is levied, but, simultaneity or contemporaneity of payment and benefit is not the most vital or crucial test to determine whether a levy is a fee or not.

49. It has been further observed that in fact, it may often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the fee levied. Hospitals, for instance, cannot be built in a day nor medical facilities provided right from the day of the commencement of the scheme, it is only after a sufficient nucleus is available that one may reasonably expect a compensating return. The question of how soon a return may be expected or ought to be given must necessarily depend on the nature of the services required to be performed and benefits required to be conferred.

50. The above observation made by the Hon'ble Supreme Court apply to the present case also. In the instant case, as we have already held above, "education cess" is really a tax and not a fee and there need not be a quid pro quo between the services actually rendered and the amount of tax levied. In the circumstances, it would be sufficient in law if education cess collected from year to year is consolidated and, ultimately, used solely for the purposes of the primary education. It can be collected for a number of years and, thereafter, it can be used for establishing and maintaining primary schools, which is a primary duty of the municipality u/s 7(1)(o) of the U.P. Municipalities Act. It can also use the funds for maintaining the already existing buildings in which the primary schools are being run or for any other purpose connected with the primary education. The Petitioners have not been able to establish, as observed above, that the fund is being used for the purposes other than primary education. We, consequently, do not find any merit in the second submission made by the learned Counsel for the Petitioner. In our opinion, consequently, the decision given in Civil Misc. Writ No. 7775 of 1975 on 12th February, 1980, is a correct decision and the levy and demand of education cess by the Respondent municipality, Bisalpur, is valid.

51. In the end, we may, however, observe that Section 17 of the Primary Education Act clearly provides that when the State Government is of the opinion that default has been made by any Board (municipality) in respect of its duties under the Act, it may, after giving the Board an opportunity of furnishing an explanation, cancel the notification issued u/s 3. It is always open to any person in case he finds that the municipality has committed default in not spending education cess solely for primary education purposes to bring it to the notice of the State Government and in case the State Government finds that there has been a default, it is open to the State Government to cancel the notification issued u/s 3 of the Act. Once a notification issued u/s 3 of the Act is cancelled, the question of levying "education cess" would not arise.

52. In view of the above, we do not find any merit in both these petitions. Both the petitions are, accordingly, dismissed. In the circumstances of the case, the parties are directed to bear their own costs.