The Mysore Spinning and Manufacturing Co. Ltd. and Others Vs The Deputy Commercial Tax Officer, II Circle, Non-Residents and Another

Court: Madras High Court

Date of Decision: Oct. 10, 1956

Acts Referred: Madras General Sales Tax Act, 1939 â€" Section 22

Citation: (1957) 70 LW 186 : (1957) 2 MLJ 167

Hon'ble Judges: Rajagopala Ayyangar, J

Bench: Division Bench

Judgement

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Rajagopala Ayyangar, J.
These are petitions for the issue of writs of prohibition directed against the Deputy Commercial Tax Officer,

Non-resident Special Circle, Madras requiring him not to take further proceedings in pursuance of the notice issued by him to the respective

petitioners. The point raised by the writ petitions at the stage of the final argument was as regards the constitutional validity of the Sales Tax Law

validation Act, 1956(Central Act VII of 1956) which we shall refer to as the impugned Act).

2. Before discussing the legal points raised, it would be useful to set out the main facts of the three cases which are nearly identical.

3. The petitioner in W.P. No. 37 of 1955 is the Mysore Spinning and Manufacturing Company, Bangalore. This company which manufactures

textile goods in Bangalore City was effecting sales in the State of Madras and the goods were delivered in Madras in pursuance of such sales. The

Deputy Commercial Tax Officer issued a notice to the petitioner on 25th November, 1954 reminding it of an earlier notice of his requiring the

petitioner to have itself registered as a dealer in regard to the four quarters of 1953-54 and the first two quarters of 1954-55 up to the date of the

communication and to submit the returns as regards the sales effected within the State. The petitioner was threatened with a prosecution in default

of its compliance. The facts in the other two writ petitions are almost identical except that while the petitioner in W.P. No. 76 of 1955 is a Mill in

Bangalore the petitioner in W.P. No. 490 of 1955 has its factory and registered office at Bombay.

4. In the affidavit in support of these petitions as originally filed the claim made was that the sales effected by these non-resident companies were

sales in the course of inter-state trade or commerce within Article 286(2) of the Constitution and that the law of the State namely Section 22 of the

Madras General Sales Tax Act which purported to levy tax on these sales was repugnant to the provisions of this article of the Constitution and

was therefore void. The first two petitions were filed in January 1055 and the last one in July of that year. While these petitions were pending the

Supreme Court delivered their Judgment in the The Bengal Immunity Company Limited Vs. The State of Bihar and Others, on 6th September,

1955 and there is now no controversy that if the law stood as declared by that judgment the transactions of sale which are sought to be assessed in

these cases would have been covered by Article 286(2) of the Constitution and, would, therefore be exempt from such taxation. By the time these

petitions came on for hearing, however, the Central Government had promulgated Ordinance III of 1956 and the Central Legislature had repealed

and re-enacted the provisions of the Ordinance by the Sales Tax Law Validation Act, 1956, the impugned Act.

5. The proper construction of the Sales Tax Law Validation Ordinance, 1956, which is in terms identical with the impugned Act came up for

consideration before us in Tax Revision Case No. 129 of 1955 (Mettur Industries Ltd. v. State of Madras (1957) 1 M.L.J. 356 : 7 S.T.C. 691.

We have explained the scope of the legislation and the taxes which are validated by it. In the course of our judgment we explained the position

thus:

...the effect of Section 22 was to render a sale within the State, one which fell under the Explanation to Article 286(1)(a), so that, from that date,

such sales became taxable under the Sales-tax Act, notwithstanding that in some cases, an inter-State element might have been involved in the

transaction. This really did not affect the enforceability of the levy in view of the decision of the Supreme Court in the The State of Bombay and

Another Vs. The United Motors (India) Ltd. and Others, which held that ''Explanation sales '' were outside the fetter imposed by Article 286(a).

But when this view was overruled by the Supreme Court in the The Bengal Immunity Company Limited Vs. The State of Bihar and Others, the

position which emerged was that.though these sales were '' inside '' sales for the purposes of the Sales-tax Act, the tax upon them became

obnoxious to the provisions of Article 286(2), and, therefore, they would have been exempt from tax. The Ordinance, therefore, applies to such

sales and the tax liability arising thereon, and after the Ordinance, the exemption based upon Article286(2) would no longer be applicable. The

conditions of the Ordinance are, therefore, fully satisfied.

6. Learned Counsel for the petitioners before us realised that on the construction which we adopted, the sales effected by the petitioners in the

present cases would have been taxable u/s 22 of the Madras General Taxes Act and therefore the assessment and levy of taxes on these sales

would be validated by Section 2 of the impugned Act. The attack, therefore, was primarily on the constitutional validity of the impugned Act. We

have, however, to point out that when Mettur Industries v. State of Madras (1957) 1 M.L.J. 356 : 7 S.T.C. 691 was argued before us, no point

was raised as regards the constitutional validity of the Validation Act but counsel confined his arguments to the proper interpretation of the

enactment. The questions now raised before us are not, therefore, covered by our previous decision.

7. The first contention of learned Counsel for the petitioners was that the impugned Act offended Article 245 of the Constitution. The argument

was that the impugned Act, was in substance a legislation on the subject of sales-tax, an enactment which, by its own force, imposed such a tax

authorising its levy, assessment and collection. It is not in dispute that under the distribution of legislative power effected by the Seventh Schedule

and Article 246(3) the Central Legislature has no power to enact laws in relation to any of the matters enumerated in the State List and that a tax

on the sale of goods is a subject enumerated in the State List. On this reasoning counsel contended that Parliament had in the impugned Act

legislated really on item 54 of the State List and for that reason the enactment was ultra vires. The same argument was also presented in a slightly

different form that though under Article 286(2) Parliament might by law make a provision permitting a State to impose a tax on the sale of goods,

where such sales took place in the course of inter-State trade, the power of Parliament is restricted to lifting the ban and did not extend to directly

enacting legislation which had the immediate effect of imposing such taxes. It was, therefore, urged that the power of Parliament was confined to

the lifting of the ban though this had to be effected by legislation and that it was the State that could thereafter taking advantage of the absence of

the ban enact legislation imposing taxes on inter-State sales. On this reasoning it was contended that State legislation had to await the lifting of the

ban by Parliament, and that the tax law which became legal by reason of Parliamentary legislation could not be made to operate retrospectively

before the date of the lifting of the ban. The logical consequence deduced from this was that Parliament itself could not lift the ban with

retrospective effect.

8. Stated in this broad form we do not see any substance in the argument. Under Article 245 of the Constitution, Parliament may make laws for the

whole of the territory of India subject to the provisions of the Constitution. Article 246 confines in Parliament the exclusive power to make laws

with respect to the matters enumerated in the Union List while the State Legislatures are vested with similar exclusive power to make laws for such

State in respect of the matters enumerated in the State List. Entry 42 of the Union List clothes Parliament with power to legislate with respect to

inter-State trade and commerce and in line with this Article 286(2) provides that,

A State law shall not impose or authorise the imposition of a tax on the sale or purchase of any goods where such sale or purchase takes place in

the course of inter-State trade or commerce: except in so far as Parliament may by law otherwise provide.

9. It is not, therefore, correct to draw any distinction between the normal power of legislation by Parliament with respect to matters in the Union

List and the power conferred by the opening words of Article 286(2). Both of them are legislative powers.

10. The question that next arises is whether Parliament has transgressed the power conferred by Article 286(2) read in the light of entry 42 of the

Union List, and has legislated so as to impose a tax on the sale of goods, a legislative subject committed to the States under the State List. Our

answer is that it has not. In considering this point one has to take into account the situation that arose as a result of the judgment of the Supreme

Court in the The Bengal Immunity Company Limited Vs. The State of Bihar and Others, which was. sought to be remedied by the impugned Act.

11. Under the Government of India Act, 1935, there was no ban on Provinces taxing saies or purchases in the course of inter-State trade and

most of the sales-tax legislation by States was enacted prior to the Constitution. These enactments therefore contained provisions which enabled

the States to tax sales notwithstanding that they occurred in the course of inter-State trade. The Constitution have imposed a ban on such taxes by

Article 286(2), providing, however, an escape by conferring on Parliament the power of permitting such taxes either unconditionally or subject to

such conditions or restrictions as might be imposed. As evidently it was considered that Parliament might take time to act, the Constitution

contained a Proviso to Section 286(2) enabling the President by order to direct that taxes which were levied lawfully by the States at the date of

the commencement of the Constitution could continue to be imposed notwithstanding that they contravened Article 286(2). But the life of the

Presidential Order was of short duration up to 31st March, 1951. It was apparently anticipated that a little over an year that was available between

26th January, 1950, when the Constitution came into force, and 1st April, 1951, afforded sufficient time for Parliament to take steps so as to enact

some rules subject to which States might impose these taxes. The Presidential Order permitting the levy of taxes on the sale of goods, which were

lawfully levied on 26th January, 1950, upto 31st March, 1951, was promulgated by a notification, dated 26th January, 1950, so that the finances

of the States were not disturbed by the coming into force of the Constitution.

12. The proper interpretation of Article 286(1) and (2) and the function of the Explanation to Article 286(1)(a) came up for consideration before

the Supreme Court. By a judgment, delivered on 30th March, 1953, in the The State of Bombay and Another Vs. The United Motors (India) Ltd.

and Others, the Supreme Court by a majority authoritatively laid down an interpretation of Article 286. If this decision stood, the States would not

lose much of revenue as taxes on most of the sales, which were previously brought within the scope of the taxation provisions of the Sales-tax Act

of the various States, could still be levied. The practical efiect, therefore, of the decision of the Supreme Court was that notwithstanding Article

286(2) of the Constitution and notwithstanding the absence of Parliamentary legislation within the opening words of Article 286(2), the States were

able to levy taxes practically on the same type of transactions as before. Then came the The Bengal Immunity Company Limited Vs. The State of

Bihar and Others, where the Supreme Court, again by a majority, overruled the decision in the The State of Bombay and Another Vs. The United

Motors (India) Ltd. and Others, holding that the Explanation to Article 286(1)(a) could not be read into Article 286(2) so as to render what might

be termed an ""explanation sale"" as a sale in the course of intra-State sale. This decision meant that the taxes levied on what might be termed

explanation sales "" were treated as illegal and the States were faced with two problems (1) having to refund taxes already levied and collected and

(2) to desist from levying or collecting tax notwithstanding that on the date when the tax liability accrued the States would have been entitled to the

taxes on the interpretation of Article 286 as it then stood, and the States had arranged their budgets on that basis. It was to remedy this dislocation,

that the Centre stepped in with the impugned enactment. Section 2, which is its operative portion, enacted:

Notwithstanding any judgment, decree or order of any Court no law of a State imposing or authorising the imposition of, a tax on the sale or

purchase of any goods where such sale or purchase took place in the course of inter-State trade or commerce during the period between the 1st

day of April, 1951, and the 6th day of September, 1955, shall be deemed to be invalid or ever to have been invalid merely by reason of the fact

that such sale or purchase took place in the course of inter-State trade or commerce and all such taxes levied or collected or purporting to have

been levied or collected during the aforesaid period shall be deemed always to have been validly levied or collected in accordance with law.

13. The dates mentioned in the section are significant. The 1st day of April, 1951, is the date when the Presidential Order under the Proviso to

Article 286(2) ceased to be in force and 6th day of September, 1955, the date on which the Supreme Court pronounced the judgment in the The

Bengal Immunity Company Limited Vs. The State of Bihar and Others, . The effect of this Act, therefore, was to continue the effect of the decision

in the The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, till the Judgment of the The Bengal Immunity Company

Limited Vs. The State of Bihar and Others, . It will be seen that u/s 2 Parliament did not impose any tax on the sale of goods but only validated

State legislation which enable such taxes to be levied. The legislation, therefore, which imposed the tax was by the States though it was antecedent

to the impugned Act and if in any particular State there was no tax on sales in the course of inter-State trade, such State could not on the terms

merely of Section 2, levy or collect the tax. The argument, therefore, that Parliament has, by the exercise of its legislative power, imposed a tax on

the sale of goods, is without force and has to be rejected.

14. It was next urged that Parliament could not retrospectively lift the ban imposed by Article 286(2). The argument was put in a slightly different

form by stating that State legislation must be enacted, subsequent to the lifting of the ban and that it could not precede it. For this purpose, reliance

was placed on the use of the expression ""may by law provide "" in the opening words of Article 286(2) as permitting only prospective legislation

and as forbidding retrospective operation being given to a Parliamentary legislation lifting the ban. In this connection reliance was placed on the

decision of the Privy Council in Punjab Province V. Daulat Singh (1946) F.C.R. 1 : (1946) F.L.J. 41 : (1946) 1 M.L.J. 426 and particularly a

passage dealing with Section 298 (2) of the Government of India Act, 1935, which ran:

Nothing in this section shall affect the operation of any law which (a) prohibits, either absolutely or subject to exceptions, the sale or mortgage of

agricultural land....

Lord Thankerton who delivered the Judgment of the Board said that the expression "" prohibit "" permitted only prospective legislation. The passage

ran:

In the opinion of their Lordships Sub-section 2(a) only excepts from the operation of Sub-section (1) a prohibition of future action, for the reason

expressed by Varadachariar, J., that the word "prohibit" can only mean the forbidding of a transaction, and such a direction is appropriate only in

respect of transactions to take place subsequently to the date of the direction, and cannot include an attempt to reopen or set aside transactions

already completed, or to vacate title already acquired.

Their Lordships, therefore, agree with the High Courts and the majority of the Federal Court that the benefit of Sub-section 2(a) cannot be claimed

for the impugned Act so far as it purports to operate retrospectively.

15. Learned Counsel for the petitioners urged that the words in Article 286(2) ""Parliament may by law otherwise provide"" should be construed

similar to the word ""prohibit"" in Section 298(2)(a) of the Government of India Act, 1935, and that in both the cases the legislation could only be

prospective. We are wholly unable to accept this argument. Under the Constitution, legislative power is conferred on Parliament by several

alternative phrases and unless there were restrictions flowing from the context or are specifically enacted we are unable to hold that any of these

forms prevents retrospective legislation which is an incident of every sovereign legislature. Without attempting to be exhaustive we might refer to

the following expressions used to designate the exercise of legislative activity. ""Nothing in this Article shall prevent Parliament from making any

law"", Articles, 16, 19 (2) and (6), 25(2)--""Subject to the provisions of any law made by Parliament"", Articles 137, 142 (1) and (2), 145, 146(2)

and 148 (4)--"" Parliament may from time to time determine"", Articles 75(6), 327-""Unless Parliament by law otherwise provides"", Articles 120(2),

133(3)--""Save as Parliament by law may provide "", Article 287--"" without derogation of the power of Parliament to make provision "" Article 2,--

Until Parliament by law otherwise provides ""- Articles 73(2), 100(3), 133(a), 135, 242-275(2), "" Parliament may by law provide "" Articles 2, 3,

22(7), 33, 34, 81(2), 124(5), 134(2), 138 to 140,230, 240, 241, 245, 262, 267, 286(2), 302 and 307. All these several forms convey the same

idea and each of them is apt to comprehend legislation both prospective as well as retrospective, subject of course to the provisions of the

Constitution, for instance Article 20. We are unable to see any analogy between the import of the word ""prohibit"" which was dealt with in Daulat

Singh"s case (1946) F.L.J. 41 : (1946) 1 M.L.J. 426 : (1946) F.C.R. 1 and ""provides"" which occurs in Article 286(2). In this connection we

shall refer only to one decision of the Federal Court in United Provinces v. Atiqa Begum (1941) 1 M.L.J. 65 : (1939) F.L.J. 97 : 1940 F.C.R.

110 construing the scope of the expression "" until Parliament by law otherwise provides "" which is one of the forms in which the legislative power is

referred to in the Constitution. The argument advanced before the Federal Court was that the expression "" until"" occurring in Section 292 of the

Government of India Act, 1935, designated a point of time and that before the legislative activity was manifested the pre-existing law would

continue, which meant in effect that Parliament could not legislate with retrospective effect. The learned Judges of the Allahabad High Court

adopted the construction of the expression "" until "" in Section 292 as barring a retrospective repeal of a legislation which was in force after the

Government of India Act, 1935. This view was rejected by the Federal Court. Dealing with the use of the expression ""until"", Sulaiman, J., said in

the United Provinces v. Atiqua Begum (1941) 1 M.L.J. 65 : (1939) F.L.J. 97 : 1940 F.C.R. 110 :

There is no doubt that the word "until" does ordinarily connote a point of time " Until altered, repealed or amended " is equivalent to saying" until

the alteration, repealment or amendment". This can have two possible meanings; first until the date from which the alteration, repealment or

amnedment takes place and second, the date on which the Act altering or repealing or amending the previous law is actually passed, or rather

when it comes into force. If the Act is retrospective, it would obviously operate from a date earlier than that on which it comes into force. If the

view taken in the High Court, were to prevail, then no legislation altering, repealing or amending the law which was in force when the Government

of India Act was passed, no matter how long afterwards it comes to be passed, can have any retrospective provision so as to affect any

transactions prior in time to the date when such Act is actually passed.

16. The view was held to be wrong and the learned Judge said:

It must, therefore, be held that there is nothing in Section 392 of the Government of India Act which debars the Central or a Provincial Legislature,

which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when

the Act is passed.

17. Varadachariar,J., said, at page 179:

The reason for a provision like that contained in Section 292 being the one already stated, it does not seem to me necessary or proper to lay undue

stress on the word " until" used in Section 292 and hold that the policy of this provision is different from that underlying similar provisions in the

other Constitution Acts above referred to, I see no justification for drawing a distinction between the statement that the previous law shall continue

in force subject to repeal or amendment by later legislation and the statement that it shall continue in force until repealed or amended by later

legislation.

18. We, therefore, hold that the impugned Act is within the legislative power conferred by Article 286(2) read with entry No. 42 of the Union List

and that it is not invalid or unconstitutional because it is retrospective in operation.

19. The next head of the argument advanced on behalf of the petitioner was directed to establish that at the date when the impugned Act was

passed there was really no valid State legislation in existence which could operate proprio vigors on the Parliamentary legislation lifting the ban

imposed by the Constitution on State taxation of inter-State sales. The contention has to be explained in some detail in order to appreciate its

constitutional significance. The steps in the reasoning were these : Parliament cannot, by its legislation, impose a tax on the sale of goods. Its

legislative competence is confined to lifting the ban unconditionally or with such qualification as it might choose fit to impose. But until the ban is

lifted the Constitution itself lays an embargo on State levying taxes on inter-State sales. Assuming for the purpose of argument that Parliament can

legislate retrospectively as regards the lifting of the ban, the only effect of such legislation would be to enable the State legislatures to enact laws

imposing taxes on sales in regard to permitted transactions so as to have effect from the date from which Parliament retrospectively lifted the has

To take the instant case, Parliament has lifted the ban on State taxation of inter-State sales on and from 1st April, 1951. Therefore, the State

legislature could impose a tax now so as to be effective from 1st April, 1951. This represents the entirety of the effect of Parliamentary legislation.

If there were no Valid State law imposing taxes on sales, by reason merely of the lifting of the ban a valid State law does not emerge. The General

Sales Tax Act of the Madras State in so far as it enabled the State to levy taxes on inter-State sales ceased to be a valid law on the coming into

force of the Constitution, since it was in contravention of the prohibition enacted by Article 286(2). No doubt the Presidential Sales-tax

Continuance Order, 1950, gave to that law life for the period ending 31st March, 1951, but the constitutional inhibition prevailed thereafter with

the result that the State law stood effaced in the absence of parliamentary legislation lifting the ban. The President, however, promulgated on 2nd

July, 1952, the Adaptation of Laws (Fourth amendment) Order, 1952, to have effect from 26th January, 1950, by which, a new Section 22 was

introduced into the Madras enactment. This section in effect reproduced the limitation embodied in Article 286 of the Constitution. This Order was

in virtue of the powers vested in the President under Article 372(2) of the Constitution which provided for the President making such adaptations''

and modifications to the law in force in the territory of India immediately before the commencement of the Constitution so as to bring it into accord

with the provisions of the Constitution. The net result of the above provisions was that as and from 1st April, 1951, when the Sales-tax

Continuance Order, 1950, lapsed, the power of the State to levy taxes on the sale or purchase of goods was controlled both by Article 286(2) of

the Constitution as well as Section 22 of the General Sales Tax Act which enacted it as part of the State sales tax law in the case of sales which

were of an inter-State character. The Supreme Court had in The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others,

understood exempted transactions in a particular manner and during the period when that decision stood there could be no challenge to the taxes

levied because the law declared by the Supreme Court was the law of the land. But when the Supreme Court by the decision in the The Bengal

Immunity Company Limited Vs. The State of Bihar and Others, overruled the previous, decision, the effect was that there was no valid State law

imposing a tax on the sales in the course of inter-State trade. If the State-law was, therefore, non-existent, as it is only a valid law that could be

conceived of as having any existence, the assumption by Parliament as to the existence of such a valid law cannot vivify that law for the purpose of

enabling it to be enforced. To put it in another form it cannot be brought to life except by the activity of a legislature which is competent to enact

that law and Parliament has no such competence. This in broad outline was the argument presented to us on behalf of the petitioner.

20. These contentions in our opinion deserve careful consideration. They involve in ultimate analysis the appreciation of the effect of a law being or

being declared unconstitutional by the Courts. In regard to this matter two alternative positions are possible, (1) an unconstitutional law has a

factual existence but is frozen and incapable of enforcement by reason of its contravening the Constitution. When, however, the constitutional ban

ceases to operate and that fetters, whose existence rendered that law moribund, are removed, the law which theretofore was so to speak in a state

of hibernation, springs into activity because the superimposed shackles are removed. This is one possible view. (2) The other possible view is that

a law which is repugnant to any provision of the Constitution is no law at all though found in print. When the Courts hold that a law is valid, it is

active and enforcea-eable but when the Courts declare that it violates the provisions of the Constitution, the effect of such a declaration or holding

is, as it were, to obliterate the law and efface it from the statute book. From this it follows that the lifting of the constitutional ban whose existence

led to the law being unconstitutional does not have the effect of resurrecting the law, the thesis is that an unconstitutional law is no law at all, that is,

it was non est in the eye of the law. It would be seen that the argument of learned Counsel for the petitioner was rested on the correctness of the

second alternative. After giving the matter our best consideration, we are of the opinion that it is the first of the alternatives that furnishes the correct

solution of this problem.

21. The statute we are now concerned with, viz., the Madras General Sales Tax Act is a pre-Constitution enactment and its provisions were

perfectly constitutional at the time when it was enacted and right upto 26th January, 1950. It was a law in force at the date of the commencement

of the Constitution and under Article 372(1) of the Constitution it was continued in force ""subject to the provisions of the Constitution."" One of

these provisions was Article 286(2), and in so far as the enactment permitted the levy of taxes on inter-State sales such portion of the law ceased

to be enforceable. This effect, however, was subject to two conditions which operated to prevent the entire effacement of that law. The first was

that the President could by order promulgated postpone the operation of the ban imposed by Article 286(2) upto 31st March, 1951. As the

President did exercise that power, it resulted in the law imposing such taxation being effective upto 31st March, 1951. Even thereafter the ban was

not absolute but expressly conditioned by the absence of Parliamentary legislation. Now that the Parliament has legislated with retrospective effect,

the question is whether in these circumstances the proper view is to hold that the Madras General Sales Tax Act in so far as it permitted taxes on

inter-State sales was obliterated from the statute book on 1st April, 1951, or whether, on the other hand, the statute was factually in existence but

was un-enforceable by reason of Parliament''s failure to lift the ban.

22. In this connection reference may be made to the construction of the analogous provisions in Article 13 of the Constitution. Though there were

some dicta by the learned Judges of the Supreme Court in the earlier cases in Shagir Ahmed v. The State Uttar Pradesh (1954) S.C.J. 819 and

Behram Khurshed Pesikaka Vs. The State of Bombay, which appeared to favour the view that a statute which contravened the fundamental rights

guaranteed by Part III had been obliterated from the statute book, the Supreme Court has specifically considered this question in Bhikaji Narain

Dhakras v. The State of Madhya Pradesh (1956) S.C.J. 48 : (1956) 1 M.L.J. 37 .The question before the Court was whether the C.P. and Berar

Motor Vehicles Act, 1939, as amended in 1947, which admittedly contravened the fundamental rights guaranteed under Article 19 as originally

enacted in the Constitution, could be enforced after 18th June, 1951 when it ceased to contravene Article 19 after the latter was amended. The

contention raised before the Court was that, although on the authority of the decision in Shagir Ahmed''s case (1954) S.C.J. 819 the enactment

became void as and from 26th January, 1950, under Article 13 of the Constitution to the extent of its repugnance to the provisions of Article 19(1)

(g), still the enactment could be enforced after 18th June, 1951, when by reason of the amendment of Article 19(6) of the Constitution effected by

the First Constitutional amendment Act, 1951, the Motor Vehicles Act ceased to be inconsistent with the fundamental rights guranteed under the

amended Article 19. On the other side, it was urged that the State Motor Vehicles Act, having once become void, by being inconsistent with

Article 19(1)(g) as it stood on 26th January, 1950, was dead and could not be vitalised by a subsequent amendment of the Constitution removing

the constitutional objection, unless it were re-enacted. His Lordship the Chief Justice, after noticing that this question was not specifically

considered by the Court in Shagir Ahmed''s case (1954) S.C.J. 819 nor in the Behram Khurshed Pesikaka Vs. The State of Bombay, went on to

observe:

The meaning to be given to the word '' void '' in Article 13 is no longer res Integra, for the matter stands concluded by the majority decision of this

Court in Keshavan Madhava Menon Vs. The State of Bombay, . We have to apply the ratio decidendi in that case to the facts of the present case.

The impugned Act was an existing law at the time when the Constitution came into force. The existing law imposed on the exercise of the right

guaranteed to the citizens of India by Article 19(1)(g), restrictions which could not be justified as reasonable under Clause (6) as it then stood and

consequently under Article 13(1) that existing law became void ''to the extent of such inconsistency''. As explained in Keshavan Madhava Menon

Vs. The State of Bombay, the law became void not in to to or for all purposes or for all times or for all persons but only '' to the extent of such

inconsistency '', that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the

citizens. It did not become void independently of the existence of the rights guaranteed by Part III. In other words, on and after the commencement

of the Constitution the existing law, as a result of its becoming inconsistent with the provisions of Article 19(1)(g) read with Clause (6) as it then

stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read

as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute-book. Such law existed for all

past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution as was held in Keshavan Madhava Menon

Vs. The State of Bombay, . The law contunued in force, even after the commencement of the Constitution, with respect to persons who were not

citizens and could not claim the fundamental right. In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become

inconsistent with Article 19(1)(g) read with Clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with

respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26th

January, 1950 and the :8th June, 1951, the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under

Article 19(1)(g).

The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution

(First Amendment) Act, 1951, was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so,

then it is not intelligible what '' existing law'' could have been sought to be saved from the operation of Article 19(1)(g) by the amended Clause (6)

in so far as it sanctioned the creation of State monopoly, for, ex hypothesi, all existing laws creating such monoopoly had already became void at

the date of the commencement of the Constitution in view of Clause (6) as it then stood. The American authorities refer only to post-Constitution

laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still born as it were. The American

authorities, therefore, cannot fully apply to pre-Constitution laws which were perfectly valid before the Constitution. But apart from this distinction

between pre-Constitution and post-Constitution laws on which, however, we need not rest our decision, it must be held that these American

authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of our

Constitution, are, by the express provision of Article 13, rendered void '' to the extent of such inconsistency ''. Such laws were not dead for all

purposes. They existed for the purposes of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against

non-citizens. It is only as against the citizens that they remained in a dormant or moribund condition. In our judgment after the amendment of

Clause (6) of Article 19 on the 18th June, 1951, the impugned Act ceased to be unconstitutional and became revivified and enforceable against

citizens as well as against non-citizens. It is true that as the amended Clause (6) was not made retrospective the impugned Act could have no

operation as against citizens between the 26th January, 1950 and the 18th June, 1951 and no rights and obligations could be founded on the

provisions of the impugned Act during the said period, whereas the amended Clause (a) by reason of its being expressly made retrospective had

effect even during that period. But after the amendment of Clause (6) the impugned Act immediately became fully operative even as against the

citizens. The notification declaring the intention of the State to take over the bus routes to the exclusion of all other motor transport operators was

published on the 4th February, 1955, when it was perfectly constitutional for the State to do so. In our judgment the contentions put forward by

the respondents as to the effect of the Constitution (First Amendment) Act, 1951, are well founded and the objections urged against them by the

petitioners are untenable and must be negatived.

23. In applying these observations to the present case, we should not omit to refer to two points of slight difference. Though almost the entirety of

the Madras General Sales Tax Act was a pre-Constitution enactment, Section 22, which was introduced by a Presidential Order under powers

vested by Article 372 (2) of the Constitution, was a post-Constitution law. But this, in our opinion, does not affect the principle, because Section

22 merely reproduced almost word for word the material provisions of Article 286, which even without such amendment would have applied to

control the taxation provisions contained in the said enactment Though Section 22 was designed merely to bring the Sales-tax Act into conformity

with the Constitution, it did not really add anything to the content of the law as it stood on the coming into force of the Constitution. In our opinion,

therefore, the fact that Section 22 was a post-Constitution law does not detract from the entirety of the Sales Tax Act, being in substance a pre-

Constitution enactment.

24. The second point of difference requires some more consideration. The restriction on the legislative power in relation to the imposition of taxes

on inter-State sales, is not derived from the limitation imposed by Part III of the Constitution, but arises out of the ban imposed by Article 286 of

the Constitution. Article 13, therefore, on the language of which their Lordships of the Supreme Court dealt with the matter arising in Bhikaji

Narain"s case (1956) S.C.J. 48 : (1956) 1 M.L.J. 37 does not in terms apply to the present. The question is, does it make any difference. In our

opinion it does not.

25. The power of the State to enact legislation imposing taxes on the sale of goods was within its legislative competence under the Government of

India Act, 1935 by reason of entry 45 of the Provincial Legislative List. It was in the exercise of this power that the Madras enactment was

passed. At the time when the law was enacted there was no ban on the taxation of sales notwithstanding that the sales were in the course of inter-

State trade. The legislation, therefore, naturally took the form of imposing a tax where the sale took place within the State, and by appropriate

amendments the classes of sales, which were deemed to have taken place within the State, were expanded and at the date when the Constitution

came into force, the charging provisions of the enactment brought within their ambit a multitude of transactions, including those which bore an inter-

State character. There being no distinction in the legislative power between inter-State and intra-State sales the same charging words covered the

two sets of transactions without any distinction. It was, however, by no means easy to define the locus of a sale. The enactment, however, fixed

upon some criteria as determining the locus within the State by indicating the territorial nexus, whose presence enabled the tax to be levied. As the

enactment did not proceed on the recognition of any dichotomy between internal and inter-State sales, one cannot by reference to the words of the

enactment merely discern any distinction between these two classes. It is difficult except possibly in concrete cases--and perhaps not even then

easily--to determine or define with precision a transaction taking place in the course in the inter-State trade, so that one cannot cut out from the

provisions of the enactment words whose elimination would exclude inter-State sales from the ambit of the charging provisions. What we are at

pains to point out is that it was a legislation which did not proceed on any recognition of the distinction between intra-State and inter-State sales

that was on the statute book when the Constitution came into force, and it was a law enacted in this form that became subject to the provisions of

Article 286(2) of the Constitution. Article 286(2) did not have the effect of affecting the legislative competence of the State to enact sales-tax

legislation. Power to levy taxes on the sale of goods, is, even under the Constitution, as it was under the Government of India Act, an exclusive

power of the State, and so not within the competence of Parliament, and this is so notwithstanding that the Constitution includes among the

legislative entries in the Union List, ""inter-State commerce "". The question that falls to be considered is the nature of the limitation imposed on the

exercise of this taxing power of the State.

26. In dealing with this, two matters deserve to be noticed. The first is the position when Parliament does not intervene by a law passed in terms of

the provision in Article 286(2). In such a case, where we have an enactment like the Madras General Sales-Tax Act which on its terms applies to

all transactions--intra-State as well as inter-State, anyone against whom an assessment is sought to be levied might be able to claim that the

transaction, which is sought to be included in his assessable turnover, is exempted from being so included by reason of the constitutional protection

afforded by Article 286(2). For instance, the same merchant might have transactions some of which are inter-State and others are intra-State. The

nature of each of these transactions would have to be investigated, and it is only in so far as the assessee is able to establish that the transactions

are clearly inter-State that he would be entitled to claim this exemption. It is therefore not right to regard the Sales-Tax Act as non-existent or

obliterated by reason of Article 286(2) of the Constitution, but only as a law, which though it exists must be so interpreted as not to be capable of

permitting taxation of exempted transactions, notwithstanding that on the language of the Sales-Tax Act the transactions might be brought to

charge. This result might be expressed somewhat differently by saying that the Article 286(2) is a constitutional injunction directed to the States

enjoining them not to levy or collect taxes in respect of inter-State sales or purchases. To the extent to which the State laws on their proper

construction permit such a levy, there would be an inconsistency or repugnancy between such laws and the prohibition or injunction of the

Constitution; and to that extent therefore the Constitution would prevail, and the State law would not be enforceable. What we desire to point out

is we have here not an invalid law, if such a term could be permitted, but a law which is unenforceable in regard to particular transactions. Viewed

thus, it would be seen that, once the ban is lifted, the original law which was unenforceable because of the existence of the ban imposed by Article

286(2) could now be enforced, since the law was dormant and was never dead. The opposite view is founded on the statement of the Law by

Field, J., in Morton v. Shelby 118 U.S. 425 where the learned Judge explained the position thus:

An unconstitutional Act is not a law, it confers no rights, it imposes no duties, it affords no-protection, it creates no office; it is in legal

contemplation as inoperative as though it had never been passed.

The practical difficulties in the application of this doctrine, as well as the inconveniences arising therefrom have led to this rule being riddled with

exceptions and qualifications even in America. In this connection we might refer to a passage in Mathew on American Constitutional System, pages

228 to 229, where this matter has been discussed and also to a learned note in 60 Harvard Law Review 437. In our opinion this rule is wholly

inapplicable in the present context and we do not consider it necessary to go more fully into this matter. This doctrine of Field, J., even if sound and

not subject to qualifications can never apply to a law like the Madras General Sales-Tax Act which was valid when enacted notwithstanding that

for some period the ban enacted by Article 286(2) prevented full force being given to its provisions. Article 286(2) of the Constitution did not

create an "" actual gap in the statute book "", in the sense that the Sales-Tax Act or some specified part thereof "" dropped out of the authorised text"",

to adopt the words of MacDer--mott in Ulster Transport Authority v. James Brown & Sons Ltd. 1953 North Ireland Reports 79

27. We therefore hold that this contention must also be rejected.

28. 3 Lastly learned Counsel for the petitioners urged that on a proper construc-truction, Section 2 of the impugned enactment only validated

assessments already made and did not enable proceedings to be taken with a view to an assessment in future, and that, as, in the present case, the

petitioners had not even submitted their returns, the respondent had no jurisdiction to call for the returns or to proceed to assess the petitioners.

This was the contention urged before us in Mettur Industries Ltd. v. State of Madras (1957) 1 M.L.J. 356 : 7 S.T.C. 691 where we expressly

repelled this argument. We do not consider it necessary to repeat our reasons for this conclusion.

29. In our opinion, Section 2 of the impugned Act has validated the law enabling the tax to be levied, and therefore it is open to the taxing

authorities to proceed under that law and assess the petitioners if the transactions in question are within the dates mentioned in Section 2.

30. These writ petitions fail and are dismissed. The petitioners will pay the costs of the respondent. Counsel''s fee Rs. 200 in each case.