(1996) 03 AHC CK 0039

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 805 of 1995

Natraj Chhabigrih, Sigra		APPELLANT
	Vs	
State of U.P. and another		RESPONDENT

Date of Decision: March 22, 1996

Acts Referred:

- Allahabad High Court Rules, 1952 - Rule 5, 6
- Constitution of India, 1950 - Article 13, 13(1), 13(2), 136, 137
- Evidence Act, 1872 - Section 165
- Uttar Pradesh Cinemas and Taxation Laws (Amendment) Act, 1989 - Section 3
- Uttar Pradesh Entertainments and Betting Tax Act, 1979 - Section 3
- Uttar Pradesh Sales Tax Act, 1948 - Section 29

Citation: AIR 1996 All 375 : (1997) 1 RCR(Civil) 321

Hon'ble Judges: S.R. Alam, J; Om Prakash, J; A.P. Misra, J

Bench: Full Bench

Advocate: S.N. Singh and R.N. Singh, for the Appellant; Additional Advocate General and Rakesh Dwivedi, for the Respondent

Final Decision: Disposed Of

Judgement

@JUDGMENTTAG-ORDER

A.P. Misra, J.

A Divisional Bench has referred for reconsideration, a decision of earlier Division Bench in Civil Misc. Writ Petition No. 1190 of 1994 (Kamla Palace v. Stale of U. P.) decided on 10th July, 1995, in view of the decision of the Supreme Court in State of Bihar and Others Vs. Sachchidanand Kishore Prasad Sinha and Others, . In Kamla Palace (supra) this Court held proviso to sub-section (1) of Section 3-A of the Uttar Pradesh Entertainment & Betting Tax Act, 1979 (hereinafter referred to as "the Act") and the Government Orders issued thereunder as ultra vires.

2. Short facts are, Uttar Pradesh Legislature by way of Uttar Pradesh Entertainment & Betting Tax (Amendment) Act, 1992 (U.P. Act No. 14 of 1992), published on 11th April, 1992, introduced amendment in Section 3-A of the Act, which authorised the proprietor of a Cinema to realise an extra charge of twenty-five paise per ticket for admission to be utilised for maintenance of the cinema premises. But by proviso excluded the proprietor of such cinema receiving any incentive scheme from the State Government. Earlier by the Government Order dated 21st July, 1986 grant-in aid was provided to the newly constructed cinemas in a town not having a population of more than one lac. Under this such cinema-exhibitors were entitled for cent per cent, tax exemption for the first year, seventy-five per cent, in the second year and fifty per cent in the third year and for an area having population less than 20,000, cent per cent, tax exemption for two years, seventy-five percent, for the third year and fifty percent, for the forth and fifth years, subject to condition that admission rate shall not be more than rupees five. This was substituted by another Government Order dated 18th July, 1989, also as an incentive to the newly constructed cinemas granting total exemption from payment of entertainment tax for the first two years, seventy-five per cent, for the third year. Thereafter an other Government Order dated 14th May, 1992, granted incentive to the newly constructed cinema-houses for a period of three years granting exemption to the extent of seventy-five per cent of the amount of entertainment tax payable by it. The condition of not charging admission fee at more than rupees five was maintained.

3. Then came another Government Order on 15th November, 1994, giving incentives to another class of cinema-owners, whose cinema exhibition was closed before Ist January, 1992, and continued to be closed till 15th November, 1994. Under this proprietors were entitled to incentive equal to thirty percent, of the'' entertainment tax payable for a period of three years provided they enter into agreement that they would continue to run the cinema-hall even after the lapse of incentive period for a further period of five years and, if they fail, the entire amount of incentive received viz. exemption from lax would be recovered as arrears of land revenue. Section 3-A(1)(a) introduced through U. P. Act No. 14 of 1992. entitled to the cinema-owners to charge 0.25 paise per ticket as maintenance charge being exempt from tax provided it is only utilised for the maintenance of cinema premises. By earlier amendment, facility to centrally air-cooled and centrally air-conditioned cinemas by permitting additional charge of ten paise and twenty paise respectively was granted. Subsequently, by Government Order dated 17th October, 1994, collection of maintenance charge, aforesaid, was further enhanced to rupee one per ticket. The petitioner has challenged the proviso of Section 3-A(1), which excludes proprietors of cinema receiving grant-in-aid from the State Government under any incentive scheme from realising this extra charge under clause (a) to be discriminatory and violative of Article 14 of the Constitution.

4. The amended/substituted Section 3-A reads as under:--

"3 A. Extra charges for maintenance of cinema and air cooled and air conditioned facility :--

(1) Notwithstanding anything contained in this Act, the proprietor of a cinema may realise from the person making payment for admission to an entertainment in such cinema :--

(a) an extra charge of twenty-five paise which shall be utilised for maintenance of the cinema premises,

(b) incase of a centrally air-cooled or centrally air-conditioned cinema a further extra charge of ten paise and twenty-five paise for air-cooling or air-conditioning facility respectively during the period commencing on the fifteenth day of March in any year and ending on the fifteenth day of October next following :

Provided that the proprietor of a cinema receiving grant-in-aid from the State Government under any incentive scheme shall not be entitled to realise extra charge under clause (a) during the period such grant-in-aid is received by him.

(2) The amount charged under sub-section (1) shall not be deemed to be payment for admission to an entertainment.

(3) Where the extra charge referred to -

(a) in clause (a) of sub-section (1) has not been utilised for maintenance of cinema premises,

(b) in clause (b) of sub-section (1) has been realised without providing the air-cooling or air-conditioning facility, as the case may be, the amount so realised shall be deemed to represent the aggregate of additional payment for admission to the entertainment and entertainment-tax payable thereon."

5. Thus the crux of controversy is whether proviso to section 3-A, as amended (as aforesaid) under which the petitioner falls is violative of Article 14 of the Constitution of India as held in the case of Kamla Palace (supra) or is intra vires in view of decision of the apex Court in State of Bihar and Others Vs. Sachchidanand Kishore Prasad Sinha and Others, .

6. At the out-set learned counsel for the petitioners has raised preliminary objections on the maintainability of this reference in view of the Full Bench decision of this Court, reported in 1995 All Civil Journal 220 (Rana Pratap Singh v. State of U. P.).

7. Learned counsel for the petitioner Shri R. N. Singh. with vehemence, raised the following preliminary objections about the maintainability of this reference :--

(i) The present reference does not fall within the parameter of the law as laid down by the Full Bench in Rana Pratap Singh''s case (supra).

(ii) On the date of this reference, there is no issue which remains to be decided as the proviso to Section 3-A of the Act has been declared to be ultra vires.

(iii) In view of Kamla Palace (supra) this writ petition, under which this reference arises, is barred by the principles of res judicata by virtue of Section 11 Explanation VI of the CPC (CPC).

(iv) In any case State having not gone in appeal to the Supreme Court against the earlier decision in Kamla Palace (supra) cannot seek reference in any subsequent case.

8. Repelling this preliminary objection, for the State, learned Additional Advocate General Shri Rakesh Dwivedi, at the out-set, with equal vehemence and confidence, referred to the Full Bench decision of this Court that such preliminary objection is barred after reference is made by the Chief Justice. This, in effect, is preliminary to the preliminary objection of the petitioner.

9. He referred State of Uttar Pradesh and Others Vs. Firm Deo Dutt Lakhan Lal, , where it is held after reference by the Chief Justice under Chapter V, Rule 6 of the Rules of the Court founded on the recommendation of a Division Bench, the reference cannot be said to be not maintainable.

10. Next attacking Ground No. (i) the contention is, the case of Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, does not lay down any exhaustive parameter and, in any case, the present case would fall within the said parameter. On ground No. (ii) the argument is even when a provision is declared ultra vires, the provision is not effaced but remains on the statute book, only it is unenforceable in law. That is why, in such cases, only writ of mandamus is sought not to enforce it and not a writ of certiorari for quashing it. Truly, a provision declared ultra vires it is said to be stillborn but revived when appeal. Review is allowed or by retrospective constitutional amendment which removes the constitutional infirmity. Similarly it would also revive in reference when contrary to the earlier declaration of law is laid. Challenge to Ground No. (iii) is that the principle of resjudicata u/s 11 Explanation VI, CPC, is not applicable on the facts and circumstances of this case noril restricts the power of Court in reference to set at rest an earlier wrong declaration of law relieving from perpetrating continuing wrong on the subject. Lastly, countering Ground No. (iv), the argument is, there is no constitutional or statutory bar not to consider similar point in a subsequent case except those covered by the principles of resjudicata. It is only a question of exercise of discretion of the Court. This would depend on the facts and circumstances of each cases and, in any case, this bar, if at all, could only be to a party not to the Court to refer a matter as in the present case.
Returning to the preliminary objection of the petitioner, learned State counsel submits, the preliminary objection about the maintainability of this reference is no more open now. In State of Uttar Pradesh and Others Vs. Firm Deo Dutt Lakhan Lal, :

"21. Sri S. N. packer, appearing in Special Appeals Nos. 918 and 931 contended that there is conflict between the two Full Bench decisions and that in any case referring the special appeal to a larger Bench was not correct or justified. The special appeals have been referred to this Bench by an administrative order of the Chief Justice and it has no jurisdiction to consider its merits. It derives its jurisdiction over the special appeals from the order of the Chief Justice passed under Rules of the Court, and it has not been alleged that it is against any provision of Rules of Court. The Chief Justice passed the order on a judicial order passed by a Bench that to resolve the conflict between the two Full Bench decisions that may be referred to a larger Bench, e. g., a Bench of at least five Judges. It is not open to any member of this Beneh to question that order of the Division Bench, and I can only express surprise at the suggestion made by counsel that he can do so and that this Bench can hold that the order passed by the Chief Justice referring the special appeals to a Bench of five Judges was not proper or legal."

11. To the similar effect is the decision in 1982 AWC 575 : (1982 ALJ 1116) (Ram Sewak v. Deputy Director of Consolidation" (para 2 of All LJ):--

".....So long the order passed on administrative side by Hon''ble the Chief Justice is not set aside or rendered academic, due to change in law etc. the bench hearing the reference, is in our opinion bound to decide the question referred to it. Even otherwise it would be contrary to judicial comity to return the reference on such pretext that the question does not arise, or the learned single Judge may frame appropriate question."

12. Further constitution of a larger Bench by the order of Chief Justice even where there is no specific provision under Rules of Court, the Chief Justice could in a given ease constitute under his inherent powers Pramatha Nath Taluqdar Vs. Saroj Ranjan Sarkar,

"12..... The Chief Justice. 1 think, must possess such an inherent power in the matter of constitution of Benches and in the exercise thereof he can surely constitute a larger Bench in a case of importance where the Division Bench hearing it considers that a question of the correctness or otherwise of earlier Division Bench decision of the same Court will fall for consideration in the case."

13. But the argument for the petitioner is not that the present reference is incompetent or invalid, but whether it falls within the parameter of Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, . There is no challenge to the constitution ^ this Bench. In State of Uttar Pradesh and Others Vs. Firm Deo Dutt Lakhan Lal, the constitution of the larger Bench itself was challenged. The constitution of this Bench is by the order of Chief Justice, which is not under challenge. Hence, State''s preliminary objection to the preliminary objection of the petitioner fails.

14. Before examining the parameter fixed in the case of Rana Pratap Singh (supra) to what extent it limits the scope of reference if any, and to what extent the present reference overflows such restriction, it is appropriate to scrutinise various authorities cited at the Bar to spell out the law on the subject for its application in the present case.

15. The word ''stare decisions'', connotation of binding judicial precedent, fixing parameter, if any, for making reference to a larger Bench are all devices evolved by the Courts for maintaining its own judicial discipline, decorum and propriety and to maintain its judicial comity. It is neither to be found in any statute nor in the Constitution. Self devised restrictions, controlling ones dispositions, insulating its possible outflow effecting others, are all stroll towards divinity, which is hall mark of a civilised society. It is this divine inheritance which has devolved on judiciary, gives it the splendor and strength. Such, including the principle of ''stare decisions'' etc. are all natural concomitant of its inbuilt discipline. This gives stability and uniformity in the administrative law both to the subject and Courts. This keeps Courts within its bound and in spite of different opinions, they follow this procedure with respect. Otherwise any settled law could be unsettled any day, leading to dumping of innumerable judgments of each individual reasoning making it difficult to follow, surfacing the judicial chaos. In this regard it is significant to note the celebrated words of Bukley, J. in Produce Brokerers Co. Ltd. v. Olym-pia Oil & Cake Co. Ltd. 1916 AC 314:

"I am unable to adduce any reason to show that the decision which I am about to pronounce is right. On the contrary, if I were free to follow my own opinion, my own powers of reasoning such as they are. I would say that it is wrong. But I am bound by authority -- which, of course, it is my duty to follow -- and following authority, I feel bound to pronounce the judgment which I am about to deliver."

16. This shows how naturally the self discipline rule of ''stare decisions'' is followed by the Judges in administering justice. But this in no way is stumbling block for the development and progress of law. Every word of a statute or Constitution is dynamic not static, otherwise fast changing social orders, needs and requirements with resultant problems and crisis unless interpreted so, would instead of rendering justice would result in injustice. No one is infallible. So also we rendering judgments. That is why, while maintaining the rigour of binding judicial precedent, if such judgment is perpetuating, continuing injustice, the error of which is apparent on the face of record or against any binding judicial precedent, against any constitutional or statutory provisions, contrary to any settled principle of law or even with the change of social fabric requires reconsideration being of public importance, to set back on the track another equally important principle is evolved by referring such matters to a larger Bench. Both principles of ''stare decisions'' and ''reference'' are not contrary but complementary to each, evolving and developing the law with an eye solely to render justice. All methodologies, principles, procedures are coined by

Judges in aid to and are subservient to deliver justice to the subject. They are not to be interpreted which restricts this reach. It is in essence, within this sphere, catena of authorities are to be found as cited at the Bar.

17. The principle of binding judicial precedent is well sealed. Not only decision of higher Courts are binding on the Courts lower in hierarchy, even in the same Court it binds Bench of lower number of Judges even to equal number of Judges of coordinate jurisdiction. Thus judgment of a Division Bench is binding on subsequently consumed Division Bench of co-ordinate jurisdiction (equal number of Judges). It cannot decide contrary but has an option with judicial sanction to refer it to a larger Bench.

18. Thus, the principle of ''stare decisis'' or binding judicial precedent is well settled. This is more so in the Indian Courts. As the American Supreme Court the highest Court of each Stale of United States, namely. Supreme Court of Slate sit in one Bench the difficulty is not there but in our Courts with the pressure of work the distribution of cases to Benches specially the Courts where there are large number of Judges, this principle has been evolved for maintaining judicial decorum, propriety and discipline and also, for not unsettling the well settled law by each individual view unless it is overruled by the higher Court or a larger Bench. Thus, even where the Bench of a coordinate jurisdiction having a different view of any earlier such Bench, the proper course open is to request the Chief Justice to refer the matter to a higher Bench.

19. In Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel,

"(7). Before parting with the case, it is necessary to deal with certain questions of fundamental importance in the administration of justice which the judgment of Raju. J. raises. The learned Judge observed -- (1) that even though there is a judgment of a Single Judge of the High Court of which he is a member of or a Division Bench of that High Court, he is not bound to follow that precedent, because by following the precedent the Judge would act contrary to S. 165 of the Indian Evidence Act. and would also violate the oath of office taken by him. when entering upon his duties as a Judge under the Constitution: and (2) that a judgment of a Full Bench of the Court may be ignored by a single Judge, if the Full Bench judgment is given on a reference made on a question of law arising in a matter before a single Judge or a Division Bench. Such a judgment, according to Raju. J. would "not be a judgment at all" and "has no existence in law."

"(8) The observation made by the learned Judge subvert the accepted notions about the force of precedents in our system of judicial administration. Precedents, which enunciate rules of law form the foundation of administration of justice under our system. It has been held time and again that a single Judge of a High Court is ordinarily hound to accept as correct judgments of Courts of co-ordinate jurisdiction and of Division Benches and of the Full Benches of his Court and of this Court, The

reason of the rule which makes a precedent binding lies in the desire to secure uniformity and certainty in the law."

20. In Shri Bhagwan and Another Vs. Ram Chand and Another,

"It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to he reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the mailer to a Division Bench, or- in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."

21. In this case Supreme Court deprecated and did not approve learned single Judge deciding a case against principle of Division Bench.

22. To the same effect is Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., .

This also gives effect to the same principle.

"..... We find it difficult to understand how a Bench of two Judges in Ject Ram''s case could possibly overturn or disagree with what was said by another Bench of two Judges in Moti Lal Sugar Mill''s Case. If the Bench of two Judges in Jeet Rain''s case found themselves unable to agree with law laid down in Motilal Sugar Mill''s case they could have referred Jeet Ram''s case to larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a co-ordinate Bench of the same Court."

23. State of West Bengal Vs. Falguni Dutta and Another, .

This is also to the same effect.

"4. We may incidently mention that when the learned single Judge was disinclined to follow the earlier two decisions of other learned Single Judges of the High Court the proper course was to refer the matter to a Division Bench for decision."

24. D.K. Yadav Vs. J.M.A. Industries Ltd.,

This holds, once an authority to the law is laid down the same should he followed as a binding precedent, but the only alternative is, in case of difference, to refer it to the larger Bench (at p. 1999 of AIR):--

".....It is settled law that an authoritative law laid after considering all the relevant provisions and the previous precedents, it is no longer open to be recanvassed the same on new grounds or reasons that may be put forth in its support unless the Court deemed appropriate to refer to a larger Bench in the larger public inhereit to

advance the cause of justice."

25. 1988 All WC 828 (FB), Prasant Gaur v. State of U. P.

"69. We could like to add that normally practice of this Court is that when a learned single Judge does not agree with a decision of a Division Bench, he may request the Chief Juslice to constitute a larger Bench and the Chief Justice normally constitutes a Division Bench to consider the matter."

25-A. AIR 19S2 SC 1302, F. C. I. v. Yadav Engineer & Contractor

"14.....Times without number this Court has observed and decorum require that if a learned single Judge hearing a matter is inclined to take the view contrary to the earlier decision of a Division Bench of the same High Court, it would be judicial improperly to ignore that decision but after referring to the binding decision he may direct that the papers be placed before the Chief Justice of the High Court to enable him to constitute a larger Bench to examine the question....."

25-B. Mohar Singh (Dead) by Lrs. Vs. Devi Charan and Others,

"..... .That was a decision which the learned Judge in the present case should have considered himself hound by unless there was a pronouncement of a larger bench to the contrary or unless the learned Judge himself differed from the earlier view in which even the matter had had to go before a Division Bench."

25-C. Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc.,

"21..... the position in India approximately more closely to that obtaining in the United Slates rather to the position in England where Parliament could rectify the situation by a simple majority, and to that in Australia, whore the mistake could he corrected in appeal to the Privy Council. The learned Judge observed :-- "There is nothing in our Constitution which prevents from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public."

"28. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the Courts sanctified by repealed affirmation over a century of time. ... the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges."

"30. Upon the aforesaid considerations, and in view of the nature and potential of the questions raised in these cases We are of the view that there was sufficient justification for the order dated 23 September, 1985 made by the Bench of two learned Judges referring these cases to a larger Bench . . . The preliminary objection raised by learned counsel for the respondents to the validity of the reference is

overruled."

26. Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, .

Head-note (A)

"One must remember that pursuit of the law. however, glamourous it is, has its own limitation on the Bench. In a multi-judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a single Judge or a Division Bench docs not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review which isapartofour constitutional scheme, it is the duty of judges of superior Courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches, The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public .would be a dilemma to obey or not to obey such law and it ultimately falls into disrepute."

27. Shridhar Vs. Nagar Palika, Jaunpur and Others, .

Holds the same principles as above.

"3..... as has been reiterated in a number of decisions of this Court that if a single Judge, disagree with the decision of another single Judge, it is proper to refer the matter to a larger Bench for an authoritative decision. But in the instant case the learned Judge acted contrary to the well established principles of judicial discipline in ignoring those decisions."

28. 1995 Supp (2) SCC 671 : (AIR 1994 SCW 2789) Collector of Central Excise, Hyderabad v. Fenoplat (P) Ltd. (I)

This also enunciates same principle pertaining co-ordinate Bench. This was a case where the earlier Bench did not consider the proviso, hence reference was made to the higher Bench.

"12. ... This was evidently done because the attention of the Bench was not invited to the proviso. As indicated herein above, while setting out T.I.22, the proviso is omitted which, however, has material hearing. It is not known what would have been the conclusion if the provision would have been noted.

"14. In the above circumstances, it is but proper that the matter is placed before a Bench of three Judges. Let the records be, therefore, placed before the Hon''ble Chief Justice for doing Ihc needful."

29. Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others,

" 19. But, even if in our view the decision in Cloth Traders case is erroneous, the question still remains whether we should overturn it. Ordinarily we would be reluctant to overturn a decision given by a Bench of this Court, because it is essential that there should be continuity and consistency in judicial decisions and law should he certain and definite. It is almost as important that the law should be settled permanently as that it should he settled correctly. But there may be circumstances where public interest demands that the previous decision be reviewed and reconsidered. The doctrine of stare decisions should not deter the Court from overruling an earlier decision, if it is satisfied that such decision is manifestly wrong or proceeds upon a mistaken assumption in regard to the existence or continuance of a statutory provision or is contrary to another decision of the Court."

30. By these authorities it is clear that binding judicial precedent means a decision of the higher Bench is binding on the lower Bench and even on a later co-ordinate Bench of an earlier equal number of Judges. The later such Bench cannot decide contrary to the earlier such Bench.

31. Shri R. N. Singh''s main thrust at this juncture is not disputing the principle of stare decisions or binding judicial precedent of even of a co-ordinate Bench. But since none of these cases spell out a parameter for making a reference this would he of no avail for that we have to fall on the parameter fixed in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, . Further decisions of the Supreme Court, in making reference, is to be judged from different perspective as there is no further right to appeal, while reference by High Court has to be restrictive as there is right of appeal against its decisions.

32. Reference was made to State of Punjab and others Vs. Surinder Kumar and others,

"6. ... .It is, therefore, futile to suggest that if this Court has issued an order which apparently seems to be similar to the impugned order, the High Court can also do so. There is still another reason why the High Court cannot be equated with this Court. The constitution has, by Art. 142, empowered the Supreme Court to make such order as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, while dealing with a writ petition, is circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from Judge to Judge."

33. Tt is true, none of the cases of the apex Court has laid down parameters as in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, . hence, we would he considering here under whether there is any thing in the said parameter which excludes the present reference. So far the case of Surinder Kumar (supra) it has no application as that dealt with Article 142 of the Constitution relating to enlarged Supreme Court''s power which is not with the High Court. Further principle in the various Supreme Court cases is not confined to the reference in that Court only but to other class of cases with specific reference to cases arising in the High Court. In fact, reference are always for reconsideration of any law settled by earlier decision. Finality of that judgment is also there as either the appeal against that being dismissed or no appeal preferred. Thus reference are always in such contingency. The reference on this account by itself could not be refused. In that broad sphere no reference could be made the High Court as against its order, appeal always lies to the Supreme Court. The law once laid down if found subsequently against binding judicial precedent or being per incuriam or for other reasons said herein before, it cannot be doubted that it can always be set at right by making reference. However, further question when a party to the earlier proceeding not preferring an appeal be permitted to raise the same issue in subsequent proceedings would be discussed while dealing with petitioners (iv) preliminary objection.

34. The Court cannot give restrictive interpretation which erodes the judicial principle and imprisons and retards within it the fruits of justice. The principle of stare decisions on the one hand settle the law, bring uniformity in its applicability, its obedience exhibits splendor of judicial discipline but it does not forestall progress or development of law or to correct obvious wrong as aforesaid. To obviate this stagnation the Court inherently devised reference to a larger Bench. This is one of the well settled principle since long.

35. With this, now we proceed to examine the parameter, its extent, limitation, if any. to refer a matter to a larger Bench and whether the present case falls within or outside the law as paid down in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, . In Rana Pratap Singh''s case, a reference was sought by the learned single Judge to refer to a larger Bench for reconsidering the decision of earlier two Full Benches as learned Judge thought that these decisions were wrongly decided.

36. The Pritam Kaur Vs. Surjit Singh, found approval of this Court in Full Bench in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, of the following passage on which strong reliance is placed by the petitioner, which specifies the parameter:

"The reference was answered in these terms, "it would follow as a settled principle that the law specifically laid down by the Full Bench is binding upon the High Court within which it is rendered and any and every veiled doubt with regard thereto does not justify the reconsideration thereof by a larger Bench and thus put the law in a

ferment afresh. The ratio of the Full Benches are and should be rested on super foundations and are not to be blown away by every side wind. It is only . within the narrowest field that a judgment of a larger Bench can be questioned for consideration. One of the obvious reasons is. where it is unequivocally manifest that its ratio has been impliedly overruled or wittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court. Secondly, where it can be held with certainty that a co-equal Bench has laid down the law directly contrary to the same, and, thirdly where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam by altogether failing to take notice of a clear-cot statutory provision or an earlier binding precedent. It is normally within these constricted parameters that a similar Bench may suggest a reconsideration of the earlier view and not otherwise. However, it is best in these matters to be neither dogmatic nor exhaustive yet the aforesaid categories are admittedly the well accepted ones in which an otherwise binding precedent may be suggested for reconsideration."

37. Pritam Kaur Vs. Surjit Singh, foundation of Prem Lata and Others Vs. Sikandar Ali and Others, both were cases where learned single Judge doubted the decisions of earlier Full Bunches, yet the Court with caution only expressed the anxiety any and every veiled doubt" docs not justify the reconsideration by a larger Bench the law specifically laid down by the Full Bench; the ratio of Full Benches "are not to be blown away by every side wind." This anxiety was expressed to keep curb on referring to a larger Bench of a settled principle law laid down by a Full Bench on any and every veiled doubt or to blow it over casually as like by a side wind. This anxiety is also because of a doubt by a learned single Judge doubling decision of Full Bench as was the fact in that case though Division Bench while formulated reference included within it for consideration of reference by a co-ordinate Bench also. Narrowness or fixation of parameter, if any, of the reference, if any. has to be judged in this back ground. But the question still is what is this limitation. It is clarified further by the words, "it is only within the narrowest field that a judgment of a larger Bench can be questioned for reconsideration." Hence it does not speak about reference by co-equal Benches as in the present case.

38. In Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, adopts reasoning and the parameters as laid down in the case of Pritam Kaur Vs. Surjit Singh, , which is quoted in paragraph 15 of the judgment. The parameters, as laid down, are as following :

(a) On every veiled doubt with regard to the law laid down by a Full Bench does not justify reconsideration by a larger Bench;

(b) Where it is unequivocally manifest that the ratio of Full Bench has been impliedly or directly overruled by the superior Court or larger Bench of the same Court, reference could be made:

(c) Where co-equal Bench has laid down law directly contrary to each other, reference could be made:

(d) The judgment of a larger Bench is rendered, by failing to take note of a clearcut statutory provision or earlier binding judicial precedent, reference could be made.

39. Thus argument is even within these parameters the present case fells as earlier Bench has not taken into consideration various provisions of Act, roles and notifications of statutory force, even otherwise these parameters are not exhaustive but illustrative. Before considering whether the present reference falls within these parameters, the words used in Pritam Kaur Vs. Surjit Singh, make it abundatly clear that it is not exhaustive but illustrative. The same is evident by the following words :

"It is normally within these constricted parameters that a similar bench may suggest reconsideration of the earlier view that not otherwise. However, it is best in these matters to be either dogmatic nor exhaustive yet the aforesaid categories are admittedly the well accepted one in which an otherwise binding precedent may be suggested for consideration."

Finally the words;

"However, it is best in these matters to be neither dogmatic nor exhaustive yet the aforesaid categories are admittedly the well accepted ones in which an otherwise binding judicial precedent may be suggested for reconsideration."

The use of expression ''nor exhaustive'' clearly suggests that the parameter is not exhaustive, but illustrative. It is also clear that reference should not be made on any and every veiled doubt. However, this has not restricted a reference, if there could be any possible error on account of earlier judgment not taking note of, any relevant statutory provisions, rules, notification, or any binding judicial precedent.

40. Thus, this decision lays down principle as a guidance to the learned Judges in making reference with special references to the laws laid down by the Full Benches. This is more as a guidance and caution in exercising such power, of course, it has not approved reference by learned single Judge of referring to larger Bench based on his veiled doubt of a settled law as laid down by the Full Bench. Thus, ratio of this case is that on any veiled doubts reference be not made but could be based on few illustrated and other which could be culled out on the facts and circumstances of each case confining within judicial discipline. If it could at all be said, parameter is restrictive, only not to refer on any veiled doubt. More appropriately in the words of Black Stone :

"It is an established rule to abide by former precedents when the same points come again into litigation, as well to keep the scale of justice even and steady and not likely to waver with every Judge''s new opinion, us also because the law in that case being solemnly declared and determined, what before was uncertain is now become a permanent rule, which it is not in the breath of any subsequent Judge to alieror

vary according to his private sentiments."

41. In Ambika Prasad Mishra v. Slate of U. P. : [1980]3SCR1159 . a Constitution Bench held that every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. It does not lose its authority "merely" because it was badly argued, inadequately considered and fallaciously reasoned.

42. It is also significant what has been recorded by the distinguished Krishna lyer, J. in the case of Ambika Prasad : [1980]3SCR1159 (supra): "Every new discovery or argumentative novelty cannot undo or compel reconsideration of a judicial precedent."

43. The law of reference to a larger Bench, apart from it being based on long practice in India is also enshrined in Rules of the Court as in present under Chapter V Rule 6 of the High Court Rules, framed under Article 225 of the Constitution of India. But they arc all, as aforesaid. procedure to deliver justice. Thus, the parameter, viz. power to reference has not to be scrutinised in a very closed jacket formula.

44. The anxiety was not to unsettled a settled law on personal sentiment and view. This apart has not considered a reference by a co-equal Benches of co-ordinate jurisdiction as the present case though such reference was also made. But even if this covers such cases the question is whether parameters restrict the present reference to be falling apart from the said parameter. The argument for the State is the decision of Kamla Palace (supra) has not taken into consideration essential provisions of Act, rules and notifications in the consideration, on the other hand, it is argued by the petitioner that that Bench was aware of the same may not have referred it.

45. Thus, we come to the conclusion that the decision in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, the parameter is only illustrative and not exhaustive. That was with special reference to the reference by lower denomination Bench seeking reference as against higher denomination Bench. It has only dealt with specifically where contradictory law is laid down by co-equal Benches of co-ordinate jurisdiction. But the principle and ratio applicable to all including co-equal Benches is that for any and every veiled doubt or casually no reference should be made unsettling a settled law.

46. In this back drop examining the present reference where it has doubted the incrimination of Section 3-A of the Act in Kamla Palace (supra) being against the decisions of the apex Court. could not be said to be such as made on any veiled doubt merely or could be one to be rejected on preliminary objection. The question whether decision in Kamla Palace (supra) has correctly laid down the law or being alive of (he provisions of the statute and the law could yet be held not correctly decided is a question to be decided when contentions on merit are to be considered but not as preliminary objection. Hence, it is held, the present reference is within the

law as laid down in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, . This point fails. The question to what extent the Kamala Palace (supra) is contrary to apex Court decision or whether there was non-consideration of relevant provisions of the Act would be considered and dealt with while considering submissions on merit.

47. This bring us to the (ii) preliminary objection for the petitioner. Repelling this, it has been urged, even if a provision or an Act is declared ultra vires, it is not wiped out from the statute books. Only effect is that it is unenforceable against the subject but the moment the reason for invalidity is removed it is brought to life. That is why for such ultra vires law a writ of certiorari is never sought but only a writ of mandamus.

48. Prabodh Verma and Others Vs. State of Uttar Pradesh and Others,

"20. .....it is somewhat astonishing to find a prayer asking for a "a writ in the nature of certiorari calling for the records of the case and quashing the U. P. Ordinance No. 2 of 1978". The claiming of such a relief shows a lack of understanding of the true nature of the writ of certiorari."

"31. A writ of certiorari can never be issued to call for the record or paper and proceedings of an Act or Ordinance. The writ of ceritorari and the writs of habeas corups. mandamus, prohibition and quo warranto were known in English Common as "prerogative writs". "Prerogative writs" are to be distinguished from "writs of right" also known as "writs of course."

"50. ... (3) A writ of certiorari or a writ in the nature of certiorari cannot be issued for declaring an Act or an Ordinance as unconstitutional or void. A writ of ceritorari can only be issued by the Supreme Court under Article 32 of the Constitution and a High Court under Article 226 of the Constitution to direct inferior Courts, tribunals or authorities, to transmit to the Court the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same.

(4) Where it is a petitioner''s contention that an Act or Ordinance is unconstitutional or void, the proper relief for the petitioner to ask is a declaration to that effect and if it is necessary, or though necessary to ask for a consequential relief, to ask for a writ of mandamus or a writ in the nature of mandamus or direction, order or injunction re straining the concerned State and its officers from enforcing or giving effect to the provisions of that Act or Ordinance."

49. It is further urged thus statute declared ultra vires still is brought to life by removing the cause of it may. be by setting aside such declaration by the competent Court, or by amending the law removing the defect of its invalidity. Further High Courts being superior Courts exercising sovereign power also have residuary inherent power and even if there be no procedure prescribed to refer the matter, could refer a case if case be such consequently declare what is declared ultra vires

to be valid. It has all the powers of sovereign, except what is taken away by the Constitution or any other law for the time being in force.

50. Halsbury''s Law of England, IV Edn. Vol. 10. p. 713 :--

"713. Limits of jurisdiction. The chief distinctions between superior and inferior Courts are found in connection with jurisdiction, prima facie, no matter is deemed to be beyond the jurisdiction of a superior Court unless it is expressly shown to be so, while nothing is within the jurisdiction of an inferior Court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular Court."

51. Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another,

"60. There is yet another aspect of this matter to which it is necessary to refer. The High Court is a superior Court of record and under Art. 215 shall have all powers of such a Court of record including the power to punish contempt of itself. One distinguishing characteristic of such superior Courts is that they are entitled to consider questions or their jurisdiction raised before them. This question fell to be considered by this Court in Special Reference No.] of 1964 In the matter of: Under Article 143 of the Constitution of India, . In that case, it was urged before this Court that in granting bail to Keshav Singh. the High Court had exceeded its jurisdiction and as such, the order was nullity. Rejecting this argument this Court observed that in the case of a superior Court of Record, it is for the Court to consider whether any matter falls within its jurisdiction or not. Unlike a Court of limited jurisdiction, the superior Court is entitled to determine for itself questions about its own jurisdiction. That is why this Court did not accede to proposition that in passing the order for interim bail, the High Court can be said to have exceeded its jurisdiction with the result that the order in question was null and void."

52. M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa,

"67. The High Courts in India are superior Courts of record. They have original and appellate jurisdiction. They have inherent and planry powers. Unless expressly or impliedly barred. and subject to the appellate of discretionary jurisdiction of this Court, the High Courts have unlimited jurisdiction, including the jurisdiction to determine their own powers. (See Naresh Shridhar Mirajkar and Others Vs. State of Maharashtra and Another, .

"87. The judicial power of this country, which is an aspect of national sovereignty, is vested in the people and is articulated in the provisions of the Constitution and the laws and is exercised by Courts empowered to exercise it. It is absurd to confine that power to the provisions of imperial statutes of a bygone age. Access to Court which is an important right vested in every citizen implies the existence of the power of the Court to render justice according to taw. Where statute is silent and judicial

intervention is required. Courts strive to redress grievance according to what is perceived to be principles of justice, enquiry and good conscience.

"89. In the words of Chief Justice Marshall:--

"The jurisdiction of Courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself...."

53. A.R. Antulay Vs. R.S. Nayak and Another,

"43. ... In rectifying the error, no procedural inhibitions should debar this Court because no person should suffer by reasons of any mistake of the Court. The Court, as is manifest gave its directions on 16th February, 1984. Here no rule of res judicala would apply to prevent this Court from entertaining the grievance and giving appropriate directions."

54. But the contention for the petitioner is. no inherent power could be exercised by the Court to set aside its earlier judgment. Even in Antulay''s case, which is strongly relied by the State firstly lays down for exercise of such power incase the earlier judgment is a nullity. Secondly, it can not be cited as precedent as the power was exercised by the Supreme Court in view of the peculiar facts and circumstances of that case. This decision itself records this be not treated as precedent in view of peculiar circumstances of that case. It is further contended where higher Bench sets aside the principle of smaller Bench it only lakes its precedentiary value but does not set aside the earlier judgment, which can only be done in cases of nullity.

55. Shivdeo Singh v. Stale of Punjab AIR 1963 SC 1909 was a case for cancellation of the order of allotment passed in favour of ''B'', the High Court cancelled the order in favour of ''B'' though he was not a party to the writ proceedings. Subsequently ''B'' filed a petition under Article 226 for impleading him as a party to ''A''s writ petition and re-hearing the whole matter. The High Court allowed the writ petition. It is held that there is nothing under Article 226 of the Constitution which precluded the High Court review its any order which inheres in every Court of plenary jurisdiction. Paragraph 8 of the said decision is quoted as under:

"8. Learned counsel contends that Article 226 of the Constitution does not confer any power on the High Court to review its own order and, therefore, the second order of Khosla, J. was without jurisdiction. It is sufficient to say that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court to plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

56. B.C. Chaturvedi Vs. Union of India and others, was a case where the question of moulding relief of punishment as awarded by the Tribunal was raised. It was held even High Court would be within its jurisdiction to mould the relief to do complete

justice even in the absence of Article 142 of the Constitution. The relevant portion of this judgment is quoted as under (para 23 of AIR):--

"It deserved to be pointed out that the mere fact that there is no provision parallel to Article 142 relating to the High Courts, can be no ground to think that they have not to do complete justice and if moulding or relief would do complete justice between the parties, the same cannot be ordered. Absence of provision like Article 142 is not material, according to me. This may be illustrated by pointing out that despite there being no provision in the Constitution parallel to Article 137 conferring power of review in the High Court, this Court held as early as in Shivdeo Singh''s Case AIR 1963 SC 1909 that the High Courts to can exercise power of review which inheres in every Court to plenary jurisdiction. I would say that power to do complete just ice also inheres in every Court, not to speak of a Court to plenary jurisdiction like a High Court of course this power is not as wide which this Court has under Article 142."

57. Stale contention is when an Act declared ultra vires could be revived even after several years when it is set aside in appeal, it would also stand revived when reference holds it intra vires. Theapneals and references are merely procedures and are part of the same Rules of the Court. The special appeal lies under Chapter VIII Rule 5 of the Rules of the Court, while reference to a larger Bench under Chapter V Rule 6. Further the High Court has repository of a sovereign powers and thus possesses an inherent to the extent there is no inhibition in the exercise of this either by the Constitution or any other law for the lime being in force.

58. (1985) 58 STC 393 (ALL) : (1085 Tax LR 2882) (FB) Deshraj Pushap Kumar Gulati v. Slate of Punjab.

Here provision of Section 4-B of Punjab Act was challenged relying on earlier High Court decision in Bata India Ltd. v. Slate of Haryana, (1983) 54 STC 226 SC : (1984 Tax LR 2982) where analogous provision Section 9(1) of the Haryana Sales Tax Act, 1973 was held to be ultra vires. In spite of this, not only provision of Section 4-B of Punjab Act was upheld, the High Court further declared Section 9(1) of the Haryana Act to be valid by reversing the decision Bata India Ltd. (supra) thus what was on that date stillborn was brought back. Thus was after Bata India Ltd. (supra) became final when no appeal was tiled.

59. In Hotel Balaji and others, Vs. State of Andhra Pradesh and others, etc. etc., the Supreme Court upheld Deshraj Pushap Kumar Gulati (1985 Tax LR 2882) (P & H) (supra). In Ashoka Marking Ltd. v. State of Bihar. 1970 UPFC 98 similar provision under Bihar Act as of Section 29-A of the U. P. Sales Tax Act was struck down. Later in State of Uttar Pradesh and Another Vs. Annapurna Biscuit Mfg. Company, on that Section 29-A itself was struck down. Subsequently, R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, . set aside its earlier decision in Ashoka Marketing Ltd. (supra). Later in Indo International Industries v. State of U.

P. 1983 UPTC 1195 : (1981 Tax LR 2902) (All), learned single Judge held in view of R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, Section 29-A intra vires. However, in Commr. of Sales Tax v. S/S Hind Chemicals Industries. (1986 UPTC 413) another learned single Judge doubted this decision and referred it to larger Bench, since R. S. Joshi''s case (supra) did not specifically overrule Annapuma Biscuit''s case. The larger Bench ultimately in view of R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another, upheld Section 29-A to be valid. Here again what was stillborn on the date it was declared valid, as earlier held ultra vires that being not in the statute book was by legal concept brought back or made alive. As we have said they are all devise and methodology created by the Courts to render justice.

60. Thus, we see what was declared as ''stillborn'' was declared to be alive. It picturises both the concept of being declared as ''stillborn'' and being declared back ''alive'' from very inception. They are each by the act of the Court. These are old conceptional traditional ways, coined by the Courts, to render justice. That is why the effect of ultra vires declaration is only non-enforceability of such provision against the subject.

61. To further iron out the creases, let us examine what is the effect of law having declared ultra vires.

62. In Behram Khurshed Pesikaka Vs. The State of Bombay, .

Relevant para (10-A) is quoted as under :

"Where a Statute is adjudged to he unconstitutional, it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void, it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in into is true also as 10 any part of an act which is found to be unconstitutional and which consequently has to be regarded as having never at any time been possessed of any legal force..."

63. According to Cooley it is as if it had never been in existence. Field, J. in Norton v. Shelby County (18S5) 118 US 425 (C) states it is inoperative as though it had never been passed. Fottachaeter refer it as Courts may ignore it as law. In other words never had any legal force. Willoughby enunciates by declaration of provision ultra vires the Court does not annul or repeal the statute. It does not strike the statute from the statute book. When new litigant brings new suit based on the same statute, the formal decision may be relied only as a precedent. According to Wills "A judicial declaration of the unconstitutionally of a statute neither annuls nor repeals the statute but has the effect of ignoring or disregarding it so far as the determination of the rights of private parties are concerned." Further in the case of Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, , the same view is taken. Para 9 of the said decision is quoted as under :

"The meaning to be given to the word "void" in An. 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,

64. The significant observations in M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, , are quoted asunder (at pp. 489 and 491-2 of AIR):--

"42. Now in considering the question as to the effect of unconstitutionally of a statute, it is necessary to remember that unconstitutionally might arise either because the law is in respect of a matter not within the competence of the Legislature, or because the matter itself being within its competence, its provisions offend some constitutional restrictions. But does it follow from this that both the laws are of the same quality and character, and stand on the same footing for all purposes ? This question has been the subject of consideration in numerous decisions in the Amer-ican Courts. and the preponderance of authority is in favour of the view that while a law on a matter not within the competence of the legislature is a nullity, a law on a topic within its competence but repugnant to the constitutional prohibitions is only unenforceable. This distinction has a material bearing on the present discussion. If a law is on a field not within the domain of the Legislature, it is absolutely null and void and a subsequent cession of that field to the Legislature will not have the effect of breathing life into what was a stillborn piece of legislation and a fresh legislation on the subject would be requisite. But if the law is in respect of a matter assigned to the Legislature but its provisions disregard constitutional prohibition, though the law would be unenforceable by reason of those prohibitions, when once they are removed, the law will become effective without re-enactment."
"47. The result of the authorities may thus be summed up : Where an enactment is unconstitutional in part but valid as to the rest, assuming of course that the two portions are severable, it cannot be held to have been wiped out of the statute book as it admittedly must remain there for the purpose of enforcement of the valid portion thereof, and being on the statute book, even that portion which is unenforceable on the ground that it is unconstitutional will operate proprio vigore when the constitutional bar is removed, and there is no need for a_ fresh legislation to give effect thereto."

65. Deep Chand Vs. The State of Uttar Pradesh and Others,

This case considered the effect of pre-constitutional law being invalid in view of Article 13 of the Constitution after coming into force (at pp. 659-60 of AIR):--

"The effect of the decision may be stated thus: The learned Judge did not finally decide the effect of Art. 13(2) of the Constitution on post-Constitution law for the simple reason that the impugned law was a pre-Constitution one. Art. 13(1) was held to be prospective in operation and therefore did not affect the pre-existing laws in respect of things done prior to the Constitution. As regards the post-Constitution

period, Art. 13(1) nullified or rendered all inconsistent existing laws ineffectual, nugatory or devoid of any legal force or binding effect with respect to the exercise of the fundamental rights. So far as the past acts were concerned, the aw existed notwithstanding that it did not exist with respect to the future exercise of the said rights. As regard the pre-Constitution laws, this decision contains the seed of the doctrine of eclipse developed by my Lord the Chief Justice in Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, where it was held that as the pre-Constitution law was valid made, it existed for certain purposes even during the post-Constitution period. This principle has no application to post-Constitution laws infringing the fundamental rights as they would be ab initio void in toto or to the extent of their contravention of the fundamental rights."

66. The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, . This summarises the law on the subject. The question posed was even a law takes away or abridges the fundamental rights of the citizen under Article 19(1)(f) of the Constitution, whether it would be void and, therefore, non est in respect of non-citizens, (at P. 1309 of AIR).

"36. If the meaning of word "void" in Art. 13(1) is the same as its meaning in Art. 13(2) it is difficult to understand why a pre-Constitution law which takes away or abridges the rights under Article 19 should remain operative even after the Constitution came into force as regards non-citizens and a post-Constitution law which takes away or abridges them should not be operative as respects non-citizens. The fact that pre-Constitution law was valid when enacted can afford no reason why it should remain operative as respects non-citizens after the Constitution came into force as it became void on account of its inconsistency with the provisions of Part III. Therefore, the real reason why it remains operative as against non-citizens is that it is void only to the extent of its inconsistency with the rights conferred under Article 19 and that its voidness is, therefore, confined to citizens, as ex hypothesis, the law became inconsistent with their fundamental rights alone. If that be so, we see no reason why a post-Constitution law which takes away or abridges the rights conferred by Article 19 should not be operative in regard to non-citizens as it is void only to the extent of the contravention of the rights conferred on citizens, namely, those, under Article 19."

This was the foundation of the argument for the State which has a great force that a law even if declared void remains on the statute. Referring to the case of Jagannath Vs. The Authorised Officer, Land Reforms and Ors, a post-Constitution Act, which was struck down for the violation of fundamental rights was, therefore, still born was held, has still an existence without re-enactment, for it being put in the Ninth Schedule. Relevant paragraph 43 of the said judgment is quoted below :

"Although the general rule is that a statute declared unconstitutional is void at all times and that its invalidity must be recognised and acknowledged for all purposes and is no taw and a nullity, this is neither universally nor absolutely true, and there

are many exceptions to it. A realistic approach has been eroding the doctrine of absolute nullity in all cases and for all purposes. (See Warring v. Colpoys 122 F 2d 642) and it has been held that such broad statements must be taken with some qualifications. See Chicot County Drainage District v. Baxter State Bank Ark.(1939) 308 US 371, that even an unconstitutional statute is an operative fact. See Warring v. Colpoys. 122 F 2d 642, at least prior to a determination of constitutionality."

67. H.M. Seervai Constitution of India IVth Edition in para 8.30 summarises the law on the subject at pages 415 and 416:

(1) There is a distinction between a law unconstitutional for lack of legislative power and a law unconstitutional because violative of provisions of the Constitution other than those which relate to the distribution of legislative power.

(2) A law which is unconstitutional for lack of legislative competence is void ab initio; a law which unconstitutional for violation of constitutional limitations is unenforceable as long as it continues to violate constitutional limitations. Such a law, whether pre-Constitution or post- Constitution is not wholly void if it violates fundamental rights it is merely eclipsed by [he fundamental right and remains, us it were, in a moribund condition as long as the shadow of fundamental rights falls upon it. When that shadow is removed the law begins to operate proprio vigore from the date of such removal unless it is retrospective.

(3) A law void for lack of legislative competence is not revived if legislative power is subsequently given to the legislature which enacted it, a 4aw partly void because of violation of constitutional limitations are removed.

(4) When a Court declares a law to be unconstitutional, that declaration does not repeal to amend the law, for to repeal or amend a law is a legislative and not a judicial function.

(5) The word ''void'' in Art. 13(1) and (2) does not mean ''repealed'' nor is a law declared void under Art. 13(1) or (2) obliterated from, the statute book. Such a law is not wholly void but by the express terms of the article is void only to the extent of its repugnancy to, or contravention of. the provisions of Part III relating to fundamental rights."

In U.S. Constitution 2nd Ed. Vol. I pp. 10 and 11 the following principle is laid down :

"In Norton v. Shelby Co. (1885 (118) US 425), Mr. Justice Field says: "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 doctrine that the judicial declaration of the unconstitutionality of a statute has not the effect of a veto or nullification or abrogation of the statute so as, in effect, to strike if from the statute books, is excellently slated by the Court of West Virginia in

Shephard v. Wheeling (30 W, va479). The Court says :

"The court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognise if. and determines the rights of the parties just as if such statute had no application. The court may give its reasons for ignoring or disregarding the statute but the decision affects the panics only, and there is no judgment against the statute. The opinion or reason of the court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book; it does not repeal...the statute. The parties to that suit are concluded by the judgment but no one else is bound. A new litigant may bring a new suit, based on the very same statute, and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. This constitutes the reason and the basis of the fundamental rule that a court will never pass upon the constitutionality of a statute unless it is absolutely necessary to do so in order to decide the case before it.

The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power it is not rendered valid, without re-enactment if later, by constitutional amendment, the necessary legislative power is granted. An after-acquired power cannot, ex proprio vigore, validate a statute void when enacted."

68. Thus what emerges is, a law could be declared ultra vires either being beyond the legislative competence, or being in conflict with or offending any provision of the Constitution, in the former, the law could be said yet to be legislated to be considered as law while in the later, legislated coined as law by the competent legislature but is void to the extent of its inconsistency with any provision of the Constitution. Though for both it is loosely said to be ultra vires, void and stillborn, yet there is difference in two. Similarly, in both class of cases such taw is said to be nullity but concept of nullity takes different colour in them. In the former it is truly ''stillborn'', in the later it is treated in law to be ''stillborn''. This is why in the later class of cases a law declared void or nullity remains on the statute book though erased from it being unenforceable. Thus, Court in such cases is said not to have repealed or annulled the statute. It simply refuses to recognise it. It is treated ineffective as unenforceable. Such laws are validated when cause of such offend is removed. It remains eclipsed by offending the Constitution. Eclipse denotes it being screened by such constitutional provision. Not to be seen. It is blind, though actually in existence. The moment screen is removed by removing cause of offend it takes effect, becomes enforceable and alive. So never removed from the statute book. Even nullity for the law of ultra vires has to be understood within this sphere. While in former when not legislated by [he competent legislature has truly not taken birth. Really it is stillborn. It is nullity in the true sense as if never existed at any point of lime. Thus, this nullity is in that absolute sense while in other ii is in the limited

sense. From all this it is clear without doubt in the later class of cases in which present case falls, oven where a provision of a statute is declared ultra vires, which is void and is to be understood to be stillborn but by the procedure prescribed by law in appeal/ review or reference what is still born is infused buck into life as life member. This re-enforces well considered and settled proposition viz. it remains on statute book and is not erased from it. So if in appeal and review a stillborn provision could be brought back to life, why could it not be applicable in cases of reference. Thus contention, on the date reference it is not on the statute book could not be a ground to refuse to consider the reference, hence this preliminary ground also fails.

69. However, one thing is to be kept in mind which goes without saying references are to settle the law correctly. It does not set aside earlier case. To what extent the overruling of law would have impact on any earlier decision specially in cases of law declared ultra vires or intra vires subsequently, including principle of res judicata or likely resultant injury or whether Court would or would not exercise its inherent power to review its earlier decision or to what extent subject of earlier decision need protection for any interregnum period are all questions to be considered on the facts under circumstances of each case. But that not by the Bench in reference but by the Bench which has to finally adjudicate the matter after reference.

70. Learned counsel for the petitioner urged with vehemence on the (iii) preliminary ground that principle of res judicata being applicable to writ petition, in view of decision in Kamla Palace (supra), the present writ petition in which reference is made is barred. So far, this question it is not the question referred to us. This apart, the question of res judicata depends on the facts and circumstances of each case to be considered by the Bench hearing this matter. Thus Full Bench is competent only to give its opinion on the limited question referred otherwise ii would be transgressing its jurisdiction. Hence, the preliminary objection (iii) of res judicata other present case being barred by virtue of Section 11 Explanation VI, CPC, we decline to go into it. This is without prejudice to the rights of the parties to raise it before the Bench concerned.

71. Learned counsel for the petitioner finally argued on preliminary ground No. (iv). The argument is, the State Government since not gone in appeal to the Supreme Court against decision of Kamla Palace (supra) which has become final in addition to res judicata, the State Government is precluded from raising the same question again in the present case. This again is a question not referred. This question is a question of discretion of the Court depending on the facts and circumstances of each case. It is again the question to be considered by the Bench before which this case is pending. Hence, this last preliminary ground also fails.

72. This apart, cumulative argument for the Stale is that in Kamla Palace (supra) the decision did not take into account the various schemes including the scheme under which the petitioner''s case falls. Further the said scheme being temporary in nature

and flexible in character. Further the earlier decision has not taken note of various provisions of the Ac! which distinguished one class from other, also the notifications conferring different rate of tax which has important bearing on the question of validity of the impugned provision. Thus, this reference cannot be thrown on the preliminary grounds. This has merit.

73. Thus, for all these reasons, all the preliminary objections for the petitioner fail.

74. Now we proceed to decide the reference on merits.

75. Before the matter was heard on merits Sarvshri L.P. Naithani, V.B.Singh and Govind Krishna sought permission to address this Court since they were counsel in the bunch writ petitions including Kamla Palace (supra), which is up for reconsideration. It might further affect their clients who were successful in the aforesaid writ petitions. Though we made it clear, nor we are adjudicating the impact of our opinion, if at all, on the decision already made, but permitted these counsel, even: notified in the list if any other counsel desirous to address this Bench may do so as in trencher. But we made it clear this may not be treated as precedent as in the present case reference was made very shortly after the earlier decision even before its fruits could be received. we permitted those counsel to assist this Court in view of those peculiar facts and circumstances of this case. In addition we also heard learned counsel for the petitioner Shri R.W. Singh and learned Additional Advocute General Shri Rakesh Dwivedi, for the Stale.

76. We have already given details of the various schemes under this Act and how by amendment the proviso to Section 3-A, which is under challenge, was brought on the statute bonk. The argument on the merits for the petitioner is that the referring order has not addressed itself to the reason and the words considered by the Bench in Kamla Palace (supra) except citing some decision. These decisions merely state the principle of interpreting a taxing statute. The earlier Bench has taken note of this principle, hence it cannot be a case for any error, but. if at all- it could be a case for setting aside the said judgment in appeal before the Supreme Court. The main ground for striking impugned proviso is, there is no justification for classification between the cinemas which were under some incentive schemes and other class of cinemas. By amending Act (Act No. 14 of 1992) in Section 3-A in sub-section (I) relevant sub-para (a) was introduced under which an extra charge of twenty-five paise, which was further enhanced to rupee one, was permitted to be realised for maintenance of the cinema premises. This right of a proprietor should be equally applicable to the proprietors of cinemas falling under the proviso, excluding such proprietors, the Court rightly held it to be discriminatory. Further referring order limiting the scope of proviso to new cinemas, reasoning they require lesser maintenance to justify their exclusion. is palpably wrong as proviso covers both old and new cinemas and both require maintenance. Various learned counsel referred the expanded meaning of the word ''maintenance'' by citing from Webster Dictio-nary. Random House Disctionary and other dictionaries to which we do not

feel it necessary to refer. Under which the word ''maintenance'' would not only cover maintenance of building, ground, furniture but even improvement of the cinema machines. Emphasis was, with the changing technology, to keep abreast with the developments to confer best possible entertainments and to survive in competition it requires up-dating projection, screening, audio visible effect and such developments would also be within the meaning of ''maintenance'', hence it cannot be said any class of cinema would not require maintenance.

77. It would be too benevolent to give such enlarged dictionary meaning to the word'' maintenance''. This would be displaced and would be contrary to the legislative intent in the context it is used. The word ''maintenance'' u/s 3(1) (a) refers and confines to ''cinema premises'' only. It would not include development of cinema industry based on new technological concepts, viz. development of machinery, screen, audio-video effects etc.

78. The second limb of argument is, there could be no justiciable classification between various class of cinemas for maintenance as every class needs maintenance and even if it could be said they are two classes the exclusion of cinemas falling under proviso is not based on any intelligent differentiation with the object sought to be achieved.

79. For the State the submission is, there is clear distinction between the cinema-owners receiving grant-in-aid under some incentive scheme and other cinema-owners. The grant-in-aid scheme has a life period of three to five years, hence the proviso class is temporary in nature and is optional. If any such cinema-owner, falling under proviso, feels that any other cinema is receiving better treatment, he can opt at any time, join that class, hence for this count it cannot be said that there is any dissimilar treatment. Further permitting the proprietor of other class of cinema to realise maintenance charge is also in the nature of incentive given to such class which was not yet to such class. So now all classes receive incentive in various forms. Thus granting any such incentive to it cannot be urged it to be discriminatory. Since incentive schemes under the proviso a fixed fees of Rupees five is only permitted to be charged relieving burden to rural public, permitting this additional charge would not only be exaction from such poor but would run contrary to the terms of such scheme. Thus, classification of exclusion is based on reasons and has an intelligent differentia and cannot be said to be violative of Article 14 of the Constitution. Shri Naithani, learned counsel, on the-wording of sub-section (2) of Section 3-A, namely, the amount charged under sub-section (1) shall not be deemed to be payment for admission to an entertainment con- tends it would not constitute to be part of tax. The scrutiny of this proviso cannot get shelter from attack which is available to a taxing provision. Shri V.B. Singh, learned counsel, emphasised that this charge is really not a tax but lee as it is not compulsory exaction but only permitted to be chargeable for the services to he rendered to the viewers, hence for the same reasons, as above, the

said proviso cannot get protection of a taxing statute. It is also submitted that this being a beneficial provision, if there are two possible interpretations, the one, which confers benefit should he adopted. For this he relied on B. Shah Vs. Presiding Officer, Labour Court, Coimbatore and Others, . Learned counsel Shri Govind Krishna supplemented the arguments on the same point. He relied on Gursahai Saigal Vs. Commissioner of Income Tax, Punjab, . This is also an authority for different eating between the tax and fee.

80. The contention since by deeming clause amount permitted to be charged, would not be treated to be entertainment, hence not a tax or it is a fee not a tax to which we are not adjudicating would make no difference in interpreting this provision as that of a taxing statute. The deeming clause'' or any provision not taxing or imposing some fees are all part of the same fiscal statute. They are merely means and ways to tax. not to tax, give incentives etc. which part of scheme of such statute. Even exclusion from taxation by deeming clause itself in effect is incentive, supporting an industry which ultimately results in better tax collection. A taxing statute cannot be piecemeal differently interpreted. Part as taxing and pan as non-taxing statute. Hence this part of argument is misconceived and rejected.

81. In Kamla Palace (supra) the learned Judges of the Bench, after referring to the principle on Article 14 and after taking note of the decision of Roop Chand Adlakha and Others Vs. Delhi Development Authority and Others, , recorded, for upholding classification under Article 14 mere classification is not enough but the same should have nexus to the object sought to be achieved. With reference to the Statement of Objects and Reasons of the aforesaid U.P. Amending Act (Act No. 14 of 1992), it was recorded that maintenance of cinema premises is for providing better facility to the viewers. Since maintenance is required irrespective of the grant-in-aid. hence there could not be any difference between the two classes of proprietors of cinema exhibitors. It is further recorded :

" Both are permanent cinema-houses. Both have been granted licences under the U.P. Cinema (Regulations)Act, 1995, and the Rules framed thereunder for carrying on their business. Both are governed by regulatory provisions of the sard Act and Rules. Both are obliged under the law to pay entertainment tax on all payments for admission to any entertainment. Both have been allowed to realise extra charges for air-cooling and air-conditioning. Both are required to he maintained for providing better facilities to the viewers."

Hence, it was held, there is no reasonable basis for treating cinema-houses getting grant-in-aid differently. It further records even there is no promissory estoppel in the matter by legislation, but people who have constructed pucca cinema-houses on the basis of incentive offered by the Slate, it will be highly unfair to deny benefit of this maintenance charge to such cinema-houses. Further there is no nexus between the basis of classification and the object sought to be achieved when object is for proper maintenance of cinema-house. However, in the penultimate paragraph of

the judgment it is recorded that in the matter of taxation la w the legislature enjoys greater latitude as regards classification. It further recorded but taxation laws are also subject to Article 14. Hence. for all the aforesaid reasons, impugned proviso was held to be ultra vires.

82. Learned counsel for the petitioner urged, the Bench deciding Kamla Palace (supra) was conscious of the interpretation of a laying statute. The contention is that the classification must have common character and similarly placed persons cannot be left out. Further object of a amending Act is better facilities to the viewers. Thus, maintenance charge has to he equally applicable in all classes of cinemas who would constitute to be one class.

83. In State of Sikkim Vs. Surendra Prasad Sharma and others, .

"... Of course, the classification must not be arbitrary but must be based on some distinct qualities and characteristics peculiar to the persons included in the ground and absent from those excluded and those peculiarities must have a reasonable nexus to the object proposed to be achieved. In other words, the doctrine of classification evolved by the courts permits equals to be grouped together and does not permit unequals to be treated by the same yardstick. Differential treatment becomes unlawful if it is arbitrary and not based on rational relation with the statutory objective. The emphasis is not only on de jure equality but also on de facto equality."

This holds that classification has to be based on distinctive qualities and must differentiate from the other. But it cannot be doubted that cinemas falling under the proviso have distinctive quality different from the one falling in the other class. They as a class are receiving incentives under some scheme and are either rural based or are which have been closed down which is quite distinct than the one which is not the other class covered by the main section.

84. Harbilas Rai Bansal Vs. State of Punjab and another,

Amendment to Section 30 of the East Punjab Act was under consideration. This gave preferential protection to the tenants of the residential accommodations and not to non-residential accommodations. It held though both residential and non-residential are two separate classes, but the classification has no nexus to the object sought to be achieved since tenants of both the classes require beneficial protection.

85. Next reliance was on LIC of India and Another Vs. Consumer Education and Research center and Others, holds even in the same class reasonable classification could be made, but it must have nexus to the object sought to be achieved. It also, as aforesaid, lays down how a taxing statute is to be interpreted.

86. Learned counsel for the petitioner Shri R. N. Singh strongly relied on Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others, :

"A larger Bench may not interfere with the view taken by a smaller Bench of this Court merely on the ground that the other view appears to the larger Bench to be better view and may command itself to be larger Bench."

87. It is true no question of overruling a law settled by the Court merely because another better view is possible. However, in the same paragraph it is further recorded Distributors (Baroda) Pvt. Ltd. Vs. Union of India (UOI) and Others,

" If, however, the decision of the smaller Bench is erroneous, the larger Bench has necessarily to interior with the decision of this Court as this Court will not permit a wrong decision to operate as good law of the land."

88. So, in every case it has to be seen not that better view is possible but whether the earlier view is erroneous by then it must be interfered with, since law declared by the Supreme Court is applicable throughout the territory of this country while the law declared by each High Court is applicable within the territory of that State. If such law, if erroneous if continues, it is incumbent duty of the judicial process to set it right.

89. In this backdrop let us consider Kamla Palace (supra). It is clear, this judgment has not taken into consideration, the class falling under the proviso are temporary in character and are flexible. Further the scheme of the Act taxing different rates having correlation with rural, semi-rural and urban areas, different incentive to different classes with varying degree of exemption from tax. Nexl some of the decisions referred in the referring order of the apex Court were not considered and the principle in one of the decisions of the Supreme Court though was referred, it in the penultimate paragraph but in its application with reference to various provisions of the Act were never tested or considered. Hence, now we embark upon the said considerations whether in the absence of the consideration of those points, it could be said that the said decision resulted to lay down the law incorrectly.

90. In nutshell the question is whether cinemas falling under proviso under the incentive scheme receiving grant-in-aid could be clubbed, in one class and even if it could be, whether such classification has any nexus to the object sought to be achieved. For this it is relevant to refer to the Statement of Object and Reasons of the aforesaid Amending Act (U.P. Act No. 14 of 1992):

" Statement of Objects and Reasons.-- The proprietors of Cinemas in the State have been facing financial crisis for the last several years due to the ever increasing popularity of exhibition of moving pictures through Cable T.V. network, Consequently the standard of maintenance of Cinema halls has deteriorated. The Cinema Exhibitors Federation has made a demand for grant of a certain percentage of Entertainment tax to the proprietors of Cinemas as the development allowance. Besides, the proprietors of centrally air cooled and centrally air conditioned cinemas, who have been allowed to realise extra charges of ten paise and twenty five paise respectively from persons making payment for admission to the

entertainments in the Cinema during the period from 15th of September in a year, have also represented for extension of the said period as such facilities to the Cinema viewers are necessary for further period beyond 15th day of September.

After considering the matter, with a view to ensure additional facilities to the public visiting cinema halls to view cinematograph exhibition it has been decided to amend the Uttar Pradesh Entertainment and Betting Tax Act, 1979 to allow, realisation of an extra charge of twenty five paise for the specific purpose of maintenance of the cinema premises and realisation of extra charges at the existing, rates for providing centrally air cooling or air conditioning facilities to the viewers for a period up to 15th of October, instead of 15th of September every year and to obviate the necessity of prior permission of the District Magistrate for such realisation. This Bill is introduced accordingly."

91. Argument for the petitioner and the foundation of decision of Kamla Palace (supra) is, since maintenance is required by all cinemas and as the object of amending Act is, facility to the viewer, and impugned proviso excluding certain classes and further this classification having no nexus with the object sought to be achieved, hence violative of Article 14 of the Constitution. While the other interpretation, advanced by the State is that its dominant object is, to render assistance to the dwindling cinema industry and in view of their representations this amendment was introduced, facility to the viewer is a natural and ancillary consequence. Before scrutinising and interpreting this object and reason one has to keep in mind, when doubts are raised about possible interpretation, it is necessary to refer to and lake aid of the well known Hey den''s Rule as laid in Heyden''s case ILR 1154 SC 637 also approved in The Bengal Immunity Company Limited Vs. The State of Bihar and Others,

"(a) What was the law before the Act (or Amending Act)?

(b) What was the mischief or defect for which the law did not provide?

(e) What is the remedy that the Act has provided?

(d) The Court must adopt that construction which suppresses the mischief and advances the remedy."

In spite of this being laid down many centuries back, is still contributing help in the interpretation of a provision and an Act. Let us now examine the impugned amending provision, introducing "maintenance charge in the light of the aforesaid objects and reasons.

92. It has to be seen what was the law period to this amendment ? What is the mischief or defect which earlier law did not provide; what remedy it has provided, finally interpret such amendment, which is subservient to the object sought to be achieved by advancing that remedy''. In this light we find which is evident from the Objects and Reasons that the proprietors of cinema since he-fore this amendment

were facing financial crisis for the last several years on account of video cable TV network. The Cinema Exhibitors Federation made representations for grant of certain percentage of entertainment tax to the proprietors of cinema, as development allowances. So financial crisis of the proprietors was the mischief or defect existed which was sought to be remedied. Thus right to collect this ''maintenance charge'' brought by amending was to remedy this, viz. confer help to the proprietors of cinema owners not to facilitate only the viewer. Maintenance of cinema exhibitors is part and parcel of and in inevitable duty of the proprietors. But it seems without giving help he cannot stand in the competition of this industry. The State decided to help such proprietors. Thus the objective of the amendment by permitting charging of maintenance charge and not treating it to be part of charge for entertainment to be taxed under the Act is solely to help the proprietors and not to viewer. Though it may result so. Thus, interpretation of the State will fall in line within the Heyden''s Rule. The preamble to which strong reliance is placed by the petitioners; "to ensure additional facilities to the viewer has to be tested in the light of the aforesaid rule by cumulative screening it with the Objects and Reasons and by this we are clearly of the opinion, there cannot be any other possible inferences than aforesaid.

93. Now with this in eye, let us see whether the classification is reasonable and whether it has any nexus with the object sought to be achieved.

94. Since last few years, the Legislature has been giving impetus to this cinema industry by bringing forth many schemes reducing their financial burden by granting tax concession in various forms. Salvaging any industry, with incentives, supporting under various provisions or schemes, even breathing life into dead are all part of larger objective to develop such industry finally resulting into larger contributions to the coffer of the State. The State when helps an invalid or limping industry it simultaneously helps itself by receiving in future tax or fees when such industry stand by itself by such help. With this in eye varying schemes were brought and gram-in-aid were given. The Kamla Palace (supra) case falls under the scheme of incentive for establishment of new cinema in the rural area while the petitioner case falls under the second category of incentive. scheme namely, the old closed cinemas, to reopen with the help of tax exemptions. These schemes render help not by loaning any money but by granting exemptions from chargeability of lax varying from total tax holiday to 20% varying from case to case and varying from three to five years. The same is the pattern even under the amended U. P. Act No. 14 of 1992. Both classes falling under the proviso and the other class the object is to help proprietors of cinema by granting exemption to tax. Since before this amending Act no incentive to the other remaining class was yet given which formed major or bulk of the cinema industry, was provided, who were heavily taxed up to 125%. Thus we do not find either the classification of the class falling under proviso and the other could be said to be based on no intelligible differentia nor could it be said, this classification has no nexus with the object sought to be achieved. Hence, this object

is achieved and thus the classification has direct nexus to the object sought to be achieved.

95. It is true the principle for testing the validity of a taxing statute has been recorded in the case of Kamla Palace (supra) in its penultimate paragraph, but with due regard we find, it escaped the attention of being tested with reference to the scheme and the various provisions of the Act and schemes under it, the underlying scheme of the classification, taxations including exemption, the gradual applications to the various classes the incentive schemes not applying to all at one time etc.. further no decisions of the apex Court with reference to any taxing statute was referred. Now, let us scrutinise the Act in this light. Section 3 (2) clearly indicates that from the very inception various classifications of its subject have been recognised for the purpose of lax under this Act. It starts with the word, "Nothing in sub-section (1)". which is a charging section "shall preclude the State Government from notifying different rules of entertainment tax for different areas or for different classes of entertainment of a different payment for. admission to the entertainment." Thus, creation of different class is for different areas, which very widely has been delegated to the State Government for imposing different rate of tax through notifications. Sec. 4 imposes lump sum lax on interior cinema travelling or temporary cinema. Section 4-A is tax on video cinema--also lump sum tax not exceeding Rs. 3,000/- for every week. Under sub-section (2) the State Government is further delegated to classify by notification even video-cinemas having regard to the population, number of permanent cinemas existing, areas where they are situate, different rates of entertainment tax for their different classes. Section 4-B is a tax on video show in public-service vehicles or hotels. This is also payment in lump sum amount per month not exceeding Rs. 1,500/- per month. Thus, we find the whole tenor of the Act not only makes varying classes but delegates even to the State Government to create various classes for the purpose of imposing tax. It is always open to tax a particular class and not to tax other, exempting one class not the other, giving incentive to one class not to others. One cannot say that pattern of exemption of lax for exemption should be equally applicable to all. The very structure and the schemes of the Act denotes to the contrary. We further seven u/s 3 it is given special compounding advantage to one class and by virtue of lax schedule the rate of entertainment tax for new cinemas in low population area varies from 20% to 25%; whereas in urban area it varies from 75% to 125%. This aspect was not considered before holding the impugned proviso as ultra vires. Even imposition of tax on different classes, falling under the proviso and the other classes u/s 3-A. the rate of lax are differently imposed through separate notifications. Thus we find classification and imposition of tax differently at different rates inter se even between the same classes falling under proviso and other classes, hence exclusion of the class falling under proviso as challenged cannot be said not to be based on intelligible differentia. This class of proviso already admitted to incentive now the other class being given the incentives yet not received. This cannot be construed as

violative of Article 14 of the Constitution.

96. Examining this from another angle, we find the various schemes under the proviso are temporary in nature varying from three years to five years. The class under proviso being temporary in nature and the very class after expiry of the said temporary period will qualify for the same benefit, and will join the other class. Even this temporary deprivation has reasons us aforesaid. They are already recipient of one benefit. If legislature does not confer two benefits at a time, no one can claim as a right for such condiment. In Equities or entitlement however good cannot constitute ground for holding provision ultra vires.

97. Another argument for the petitioner, is on one hand class falling under the scheme under the proviso there is restriction not to charge more than rupees five per ticket as admission, while there is no such restriction on other classes. However, this cannot constitute aground of attack of Article 14. These schemes are optional and this situation existed even at the time when the petitioner opted for the scheme. There was no compulsion to opt for this. Even now if he feels this fixation of rupees five, in any way, not beneficial and he can draw more benefit by opting out from the scheme he can do so. There is no restriction under the scheme. This is also the submission for the Stale.

98. In H.H. Shri Vishwesha Thirtha Swamiar and Others Vs. The State of Mysore and Another, .

Here imposition of surcharge on land revenue being temporary in nature even though was discriminatory was not held to be violative of Article 14 of the Constitution.

"19. It seems to us that this Court rightly distinguished the two above mentioned cases on good grounds. We have here a temporary measure imposing additional land revenue while resettlement and survey was being done in the entire State. This process necessarily takes a long time. It is stated in the judgment of the High Court that the settlement report was received by the Government only in 1963. In these circumstances it cannot be said that the State acted arbitrarily in imposing a surcharge on land revenue which was being levied under the existing settlement and Acts.

"21. ... In view of the facts of this case, the temporary nature of the Act. and the pendency of the re-settlement and survey proceeding we cannot say that the Legislature has acted contrary to the provisions of Article 14."

99. Similarly in the following cases the Supreme Court has held that temporary character for provision is an important aspect to he considered while adjudging the validity :

1. AIR 1963 SC 591, Khandige Sham Bhatt v. Agrl. I.-T. Officer.

2. State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others,

100. In fact, when the scheme for rural area was unfolded it Was with double objective, one not to burden rural people hence restriction not to charge more than rupees five as admission charge, second to give incentive for establishment of new cinemas in the rural areas by helping the proprietor of such cinemas by giving them holiday from tax to the various degrees of tax exemptions. In case petitioner''s argument is accepted that maintenance charge should be given as incentive to all, thereby meaning additional incentive to the one falling under the proviso class then people of the rural area will have to be further burdened with this additional charge and would also be contrary to the terms and conditions of the said incentive.

101. In judging the validity of a taxing statute it is well settled, the Legislature has very wide freedom and latitude in making classification to the subject to be taxed, areas, rate of tax. exemption and even conferring different incentives to different classes of subjects. It is also settled that burden is very heavy on the person challenging it, since various provisions involve fiscal and economic policies which are complex sometimes under coherent schemes requiring various classifications etc. That is why it is said Legislature need not tax all if wants to tax few only. Similarly, when two classes, if they are separately notified with different rate of tax cannot urge so unless similarly situated. In the present case the petitioner falling under the proviso cannot urge that they are similarly situated with the other class falling apart from proviso.

In Subhash Photographics and Others Vs. Union of India (UOI) and Others,

Subhash Photographies v. Union of India.

102. The Court held that the tax is a weapon to regulate economy and Court cannot question the legislative policy or wisdom. This may he to encourage some and not other or may be sometime to discourage others. That is why we find various schemes under the Act has given incentives to various classes not at one point of time. When any incentive come may be applied to one class only. It may be brought in phases. This cannot be said to be either discriminatory or violative of Article 14 of the Constitution.

103. Similarly, in The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another, the Constitution Bench observed (at pp. 1136 and 1138 of AIR) :--

"It may also be conceded that the uniform tax falls more heavily on some plantations than on others because the profits are widely discrepant. But does that involve a discrimination ? If the answer be in the affirmative hardly any tax direct or indirect would escape the same censure for taxes touch purses of different lengths and the very uniformity of the tax and its equal treatment would become its undoing. The rich and the poor pay the same taxes irrespective of their incomes in many instances such as the sales lax and the profession tax etc." It was further

observed :

"This indicates a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable."

104. Similarly, in R.K. Garg and Others Vs. Union of India (UOI) and Others, , the apex Court held that Article 14 does not forbid reasonable classification of persons, objects as transactions by the Legislature for the purpose of attaining specific ends.

105. In State of Maharashtra and Others Vs. Madhukar Balkrishna Badiya and Others, , it was held that taxing statute cannot claim immunity from Article 14 but in view of the intrinsic complexity of fiscal adjustments of diverse elements a very wide discretion and latitude in the matter of classification is permissible. Similarly, it was held in Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others, . Simibrly in Income Tax Officer, Shillong and Others Vs. R. Takin Roy Rymbai and Others, it was held that mere fact that a lax falls more heavily on some in the same category, is not by itself a ground to render the law invalid.

106. In P.M. Ashwathanarayana Setty and Others Vs. State of Karnataka and Others, . following observations were made: (at p. 119 of AIR) :--

"The lack of perfection in a legislative measure docs not necessarily imply its unconstitutionality. It is rightly said that no economic measure has yet been devised which is free from all discriminatory impact and that in such a complex arena in which no perfect alternatives exist, the Court docs well not to impose too rigorous a standard of criticism, under the equal protection clause, reviewing fiscal services."

107. Lastly, we find in the decision in the case of State of Bihar and Others Vs. Sachchidanand Kishore Prasad Sinha and Others, . the Court ruled if any classification is made in a fiscal statute, there will always be some instances where one gets an advantage and other suffers a disadvantage but that is no ground for invalidating a statute and more particularly a laying statute.

108. In view of the aforesaid reasons recorded by us, we are of the opinion that the law laid down in the case of Kamla Palace (supra) was not correctly laid down. We do not find any hostile discrimination between the class falling under the proviso and the other classes u/s 3- A of the Act. Hence, impugned proviso can not be held violative of Article 14 of the Constitution and. thus, are of the considered opinion, the said proviso is valid.

109. This reference is disposed of in these terms. The matter is now send back to the Bench concerned for disposal of this case on merit.

Om Prakash, J.

110. A Division Bench comprising R. A. Sharma and D, S. Seth, JJ disposed of a bunch of writ petitions (Civil Misc. Writ Petition No. 1190 of 1994 - Kamla Palace v. Stale of

U. P. and others being the leading case) by a judgment dated July 10, 1995 allowing all the writ petitions, striking down the proviso to subsection (1) of Section 3-A of the U. P. Entertainment and BettingTax Act, 1979 (briefly. the Act) and the Government Orders issued there- under holding that the proviso is violative of Article 14 of the Constitution of India.

111. To appreciate the judgment dated July 10, 1995, a brief reference to the facts of the case of Kamla Palace will suffice. In order to encourage the construction of new cinema halls in small towns having a population of not more than one lakh, the Government of Uttar Pradesh issued several incentive schemes forgiving grant-in-aid one after another; [he first scheme being dated September 17. 1983, followed by two more schemes of the same nature dated July 21, 1986 and July 18, 1989. Under these schemes a proprietor of a cinema hall -- constructed within a specified period - becomes entitled to a grant-in-aid in the shape of exemption of entertainment tax. Grant-in-aid varied with reference to period and population and also with reference to number of cinema halls located at a given time and at a given place.

112. Petitioners in the bunch of the Kamla Palance case constructed permanent cinema halls under the incentive schemes. By the Uttar Pradesh Cinemas and Taxation Laws (Amendment) Act, 1989 (for short, the Act of 1989) Section 3-A was inserted in the Act enabling the proprietor of a centrally air cooled or centrally air conditioned cinema hall to realise the extra charge of ten paise and twenty five paise for air cooling or air conditioning facility respectively per ticket. The amount so charged was exempted from payment of entertainment tax. By the Uttar Pradesh Entertainment and Betting Tax (Amendment) Act. 1992 (in short, the Act of 1992) sub-section (1) of Section 3-A was amended as follows :

"(1) Notwithstanding anything contained in this Act, the proprietor of a cinema may realise from the person making payment for admission to an entertainment in such cinema,--

(a) an extra charge of twenty five paise which shall be utilised for maintenance of the cinema premises;

(b) in case of a centrally air-cooled or centrally air conditioned cinema a further extra charge of ten paise and twenty five paise for air-cooling or air conditioning facility respectively during the period commencing on the fifteenth day of March in any year and ending on the fifteenth day of October next following :

Provided that the proprietor of a cinema receiving grant-in-aid from the State Government under any incentive scheme shall not be entitled to realise extra charge under clause (a) during the period such grant-in-aid is received by him";

(c) for sub-section (3), the following subsection shall be substituted namely -

"(3) Where the extra charge referred to, --

(a) in clause (a) of sub-section (1) has not been utilised for maintenance of cinema premises;

(b) in clause (b) of sub-section (1) has been realised without providing the air-cooling or air-conditioning facility, as the case may be the amount so realised shall be deemed to represent the aggregate of additional payment for admission to the entertainment and entertainment lax payable thereon."

By this amendment, sub-section (1) of Section 3-A was split up into two clauses : (a) and (b). Clause (a) was newly inserted in subsection (1) authorising the proprietor of a cinema hall-sans the facility of air-cooling or air-conditioning --to realise an extra charge of twenty five paise for being utilised for maintenance of the cinema premises and so was the proviso to sub-section (1) newly inserted.

113. The proviso disentitles a recipient of the grant-in-aid from the State Government under any incentive scheme to realise extra charge under clause (a) during the period such grant-in-aid is received by him.

114. The validity of the proviso was challenged by the petitioner in the bunch of the Kamla Palace case on the ground that they had been discriminated against the non-recipient of grant-in-aid in that the former were rendered ineligible by the proviso to realise extra charge of rupee one per ticket for maintenance of the cinema premises, the right of the latter to realise extra charge of rupee one per ticket for maintenance remained intact.

115. The Division Bench in the Kamla Palace case to conclude that the proviso is violative of Article 14, held as follows :

"Both types of cinema houses, i.e., those getting grant-in-aid and those not getting such an aid, are in the same position. Both are permanent cinema houses. Both have been granted licences under the U. P. Cinemas (Regulation) Act, 1955 and the Rules framed thereunder for carrying on their business. Both arc governed by regulatory provisions of the said Act and the Rules. Both are obliged under law to pay entertainment lax on all payments for admission to any entertainment. Both have been allowed to realise extra charges for air-cooling and air conditioning. Both are required to be maintained for providing better facilities to the viewers. These cinema houses form one class for the purposes of Section 3-A even if some of them are receiving grant-in-aid. There is no reasonable basis for treating cinema houses getting grant-in-aid differently. They stand in the same position."

In the result, the Division Bench (hereinafter referred to as the ''previous Bench'') allowed all the writ petitions in the bunch of the Kamla Palace case and the proviso to sub-section (1) of Section 3-A of the Act and the Government Orders issued thereunder were declared ultra vires.

116. Close on the heels of the decision of the Kamla Palace case. Civil Misc. Writ Petition No. 805 of 1995- Natraj Chhabigrih v. State of U. P. and another came up for

hearing before another Division Bench comprising B. M. Lal and M. C. Agrawal, JJ. (hereinafter referred to as the ''subsequent Bench'') which doubted the correctness of the judgment dated July 10, 1995 of the Kamla Palace case. The subsequent Bench was of the view that the judgment dated July 10, 1995 required re-consideration by a larger Bench, and therefore, by an order dated 17-8-1995 without deciding the writ petition finally directed as follows :

"Accordingly, papers be laid before the Hon''ble the Chief Justice for constituting a larger Bench."

117. Thereupon, Hon. the Chief Justice constituted a Full Bench by an order dated 25-8-1995/ 18-1-1996.

118. This is how the question whether the judgment in the Kamla Palace case lays down a good law has come up before the Full Bench.

119. Natraj Chhabigrih was closed down on 17-12-1990 and was re-opened on 19-6-1995 taking the benefit of grant-in-aid scheme dated Nov. 15, 1994. Under this scheme, the proprietor of a cinema hall who intended to revive the cinema business, became entitled to thirty per cent exemption of the total entertainment tax. Though the owner of the Natraj Chhabigrih received benefit under a different incentive scheme, he became disentitled to realise extra charge of rupee one per ticket under the proviso to subsection (1) of Section 3-A and to that extent he was at par with the petitioners of the Kamla Palace bunch.

120. The subsequent Bench was of the view that two categories of the proprietors of the cinema halls : (1) recipient of the grant-in-aid under different incentive scheme and (2) non-recipient of grant-in-aid are distinguishable and each category forms a separate class and, therefore, the proviso to sub-section (1) o f Section 3-A does not create hostile discrimination so as to violate Article 14.

121. Sri R. N. Singh, learned counsel appearing for the petitioner in the case of Natraj Chhabigrih, raised a preliminary objection that the decision in the Kamla Palace case is a binding precedent for the subsequent Bench of the coordinate jurisdiction and if at all it wants to differ, can differ from that only on the grounds : (1) that the ratio of the Kamla Palace case has been overruled-explicitly or impliedly-or whittled down by the subsequent judgment of the superior Court or of a larger Bench of the same Court, (2) that the co-equal Bench has laid down the law directly contrary to the same; and (3) that the judgment of the larger Bench was per incuriam. He submits that us none of such grounds is shown to have existed, it was not open to the subsequent Bench to differ from the previous Bench and, therefore, the reference is incompetent

122. The question for consideration is : when correctness of an earlier decision is doubted, whether it is open to a subsequent Bench of coordinate jurisdiction to refer the matter to a larger Bench to resolve the controversy authoritatively. There is

a catena of decisions pointing out that in the case of difference, propriety lies in making the reference to a larger Bench and it is not open either to a single Judge or a Bench of co-ordinate jurisdiction to embark upon taking a different view in a matter, and unsettled the things already settled.

123. In The Bengal Immunity Company Limited Vs. The State of Bihar and Others, . a seven Judges Bench of the Supreme Court assembled to consider whether the majority decision The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, should be reconsidered and then in the majority decision, the Supreme Court observed :

"There is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public."

The Supreme Court referred to the far reaching effect of the earlier decision in the United Motors (supra) on the general body of the consuming public, and concluded that the error committed in the earlier decision would result in perpetuating a lax burden erroneously imposed on the people, giving rise to a consequence "manifestly and wholly unauthorised." The Court further observed : "that if the decision is erroneous, as indeed we conceive it to be, we owe it to the public to protest them against the illegal tax burdens which the State are seeking to impose on the strength of that erroneous recent-decision."

124. The Supreme Court further cautioned that "the Courts should not differ merely because a contrary view appeared preferable. The Court affirmed that "we should not lightly dissent from a previous pronouncement of this Court." But if the previous decision was plainly erroneous, said the Supreme Court, there was a duty on the Court to say so and not perpetuate the mistake. The appeal to the principle of stare decision was rejected on the ground that (a) the decision intended to be overruled was a very recent decision and it did not involve overruling a series of decisions, and (b) the doctrine of stare decisis was not an inflexible rule, and must, in any event, yield where following it would result in perpetuating an error to the detriment of the general welfare of the public or a considerable section thereof.

125. The test laid down in The Bengal Immunity Company Limited Vs. The State of Bihar and Others, was that where an order has far reaching effect and is followed that would result in perpetuating an error to the detriment of general welfare of the public, then the Court owed a duty to the public to remove-the error, at the earliest.

126. In Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, , the Supreme Court held that in the case of difference of opinion with an earlier decision, reference to a larger Bench was a legal propriety. In Shri Bhagwan and Another Vs. Ram Chand and Another, , the Supreme Court expressed similar view (at page 1773) :

"It is hardly necessary to emphasize that consideration of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that inquiry sitting as single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety."

127. In Food Corporation of India v. Yadav Engineer and Contractor AIR 1982 SC 1302, the Supreme Court deprecating the tendency to over-took the binding precedent and taking a contrary decision without referring the lamented :

"Times without number this Court has observed that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view contrary to the earlier decision of a Division Bench of the same High Court, it would be judicial impropriety to ignore that decision but after referring to the binding decision he may direct that the papers be placed before the Chief Justice of the High Court to enable him to constitute a larger Bench to examine the question."

128. In The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, the Supreme Court observed that a revision of its earlier decision would be justified if there were compelling and substantial reasons to do so. In Sajjan Singh Vs. State of Rajasthan, , the Supreme Court laid down the test : "Is is absolutely necessary and essential that the question already decided should be reopened ?" and went on to observe : "the answer to this question would depend on the nature of the infirmity alleged in the earlier decision. its impact on public good and the validity and compelling character of the considerations urged in support of the contrary view". In Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others, , the Supreme Court held against the finality only where the subject was ''of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of later thought that it is wiser to be ultimately right rather than to be consistently wrong.''

129. The quintessence of all these authorities is that an error if it is so fundamental and has far reaching effect in that if it is allowed to continue, then that would affect the interest of general public, then earlier decision should be revised than perpetuating the error adding more agony to the general public and allow the wrong precedent to continue to hold to the field.

130. In The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, , the Supreme Court at page 1644 opined ;--

"It is not possible or desirable, and in any case it would be inexpedient to lay down any principles which should govern the approach of the Court in dealing with the question of reviewing and revising its earlier decisions. It would always depend upon several relevant considerations."

131. From this rule, it appears that no doctrinaire approach or straight jacket formula can be adopted when correctness of an earlier decision is doubted and a reference to a larger Bench is sought to be made.

132. In Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., , the Supreme Court be set with the same problem, observed in para 28 at page 1945 :

"There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the Courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should it in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention : of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions." Considering a catena of authorities and the nature and potential of the questions raised in the reference, the Supreme Court in Raghubir Singh (supra) held that there was sufficient justification for the order dated 23rd September, 1985 made by the Bench of two learned Judges referring these cases to a larger Bench for reconsideration of the questions decided in K. Kamalajammanniavaru (Dead) by Lrs. Vs. Special Land Acquisition Officer, and Bhag Singh and Others Vs. Union Territory of Chandigarh through the land acquisition collector, Chandigarh, .

133. Taking the most pragmatic view, the Supreme Court in Indian Oil Corporation Ltd. Vs. Municipal Corporation and Another, , in similar context held (at p. 1482).

"In reviewing and revising its earlier decision, the Court should ask itself whether in the interest of justice of the public or for any other valid and compulsory reason, it is necessary that the earlier decision should be revised."

134. In the case of Shridhar Vs. Nagar Palika, Jaunpur and Others, . the question was whether the post of Tax Inspector was to be filled through direct recruitment or promotion. The Municipal Board resorted to the mode of direct recruitment. Aggrieved, respondent No. 3 filed a representation before the Commissioner (Prescribed authority) who set aside the order of the Board holding that respondent No. 3 was entitled to promotion in view of the G. O. dated 10-4-1950. Learned single Judge of the Allahabad High Court affirmed the order of the Commissioner ignoring the decision of the Allahabad High Court in Rameshwar Prasad and Others Vs. Municipal Board Pilibhit and Others, . It was urged before the learned single Judge that the aforesaid decision was approved by two other learned Judges of the

Allahabad High Court in Writ Petition No. 4556 of 1965 Ram Kripal Garg v. State of U. P. dated 16-9-1966 and Writ Petition No. 235 of 1970- Inder Bahadur v. Municipal Board Mirzapur dated 20-10-1972 holding that the G.O. dated 10-4-1950 was ultra vires. The learned single Judge did not agree with the view taken in the aforesaid decisions, instead he took a contrary view in holding that the G.O. dated 10-4-1950 was valid and it required the Municipal Board to fill up the post of Tax Inspector only by promotion.

135. Surprised by the approach of the learned single Judge. the Supreme Court held (towards the end of para 3 at page 309) :

"It is well settled principle of judicial discipline as has been reiterated in a number of decisions of this Court that if a single Judge, disagrees with the decision of another single Judge, it is proper to refer the matter to a larger Bench for an authoritative decision. But in the instant case the learned Judge acted contrary to the well established principles of judicial discipline in ignoring those decisions."

136. In Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, ; the Supreme Court faced with the same situation had to say (at p. 267 of AIR) :

"The judicial decorum and legal propriety demand that where a single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is subversion of judicial process not to follow this procedure."

137. In Bal Kishun Das v. Har Narain AIR 1980 MP 43 a Full Bench held that the existence of two conflicting earlier decisions on the same point is not a condition precedent to the validity of a reference of any question for decision by a larger Bench.

138. In Ambika Prasad Misra v. State of U. P. : [1980]3SCR1159 , a Constitution Bench held that every new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent. It does not loose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned.

139. The foregoing authorities unequivocally rule down that an earlier decision is binding on a Bench of co-ordinate jurisdiction and if a subsequent Bench wants to differ from the earlier decision then the reference should be made to a larger Bench. The principle deducible from these authorities is that if there is a fundamental or grave error of such a character, which if allowed to continue, would affect the public interest, then the Court owes a duty to the public to correct that error, but a binding precedent cannot be overlooked merely because of the two plausible views, one view is more preferable or that some new argument has been discovered which was not considered earlier. When only one view is possible and if the view already taken runs counter to the legal position, then the previous

judgment containing an error has to be corrected.

140. Let us proceed to decide whether there is a fundamental error in the Kamla Palace Judgment.

141. Sri Singh submits that the authorities mentioned hereinbefore do not lay down a rule as to when a subsequent Bench can differ from the previous Bench, but they simply rule down that in case a subsequent Bench wants to differ from the previous Bench, then for judicial propriety, reference should be made to a larger Bench. There is no substance in this submission. In these authorities, the Supreme Court did not make the observation to make reference to a larger Bench tentatively or in an abstract manner, but contextually as that was based on the facts and circumstances of a given case, which are no more different from the facts of the cases in hand. If the facts of each such case were so as to not permit making a reference to a larger Bench, then the Supreme Court would not have theoritically observed that if a Bench of co-ordinate jurisdiction chose to differ, then reference was the only proper course. Therefore, it is not correct to say that the Supreme Court while making the observation that before taking a different view, reference should have been made to a larger Bench, did not consider the question whether reference to a larger Bench on the facts and circumstances of a given case was possible.

142-143. To revert to the main question whether there is a fundamental error in the judgment of the Kamla Palace case, it will be seen that the previous Bench failed to consider the following distinguishing features of the cinema halls, situate in a local area having population of not more than one lac. i.e., a tow populated area.

(1) The scheme of the Act was not considered in that the legislature has treated the cinema halls situate in a tow populated area, differently from those which are situated in a high populated area. The proprietor of such a cinema hall is entitled to pay a compounded payment to the State Government under the proviso to sub-section (1) of Section 3 in lieu of payment under sub-section (1). Under the Schedule to the Act, lesser tax is imposed on such cinema halls. Moreover the proprietor of a cinema hall, situate in a tow populated area, is entitled to the benefit of an incentive scheme. These benefits are not available to the other class of cinema halls, which are situated in high populated area.

(2) After the expiry of the grant-in-aid period, the cinema houses situate in tow populated areas, become entitled to realise extra charge and, therefore, the proviso to sub-section (1) of Section 3-A is temporary in effect and flexible in character. After the expiry of the grant-in-aid period, both classes of cinemas situate in tow and high populated areas, stand at par and both types of cinema houses become entitled to realise extra charge.

(3) If a cinema house situate in a low populated area, does not avail the benefit of any incentive scheme, then on par of other cinema houses that may realise extra

charge-- Only the cinema houses taking benefit under the incentive scheme are ineligible to realise extra charge for maintenance.

(4) The theme of the proviso to sub-section (1) of Section 3-A is : ''one class of cinema--one benefit.''

(5) No reference to earlier binding judgments germane to taxation field has been made by the previous Bench in its judgment. In the matter of adjudging validity of taxation law on the anvil of Article 14 of the Constitution, it is settled that the Legislature has extremely wide freedom and latitude in making classification based on various things like person, job, areas and other distinction. It is also settled that burden on the petitioner is extremely heavier than in the case of freedom of speech, religion etc. The reason is not far to seek. A matter of tax involves fiscal and economic policies, which fall in complex zones of legislation. The Courts are, therefore, reluctant to interfere with the fiscal legislature. The subsequent Bench in its referring order to a larger Bench cited several authorities relating to taxation laws and if the matter is seen in the perspective of those judgments, then the legal position would have been different.

(6) The previous Bench though stated in the referring order that in the matter of taxation laws, the legislature enjoys greater latitude as regards classification choosing persons and the articles to be taxed, but that principle has not been applied to the fact matrix of the bunch of the Kamla Palace case. The previous Bench pointed out in its judgment :

"It may be that for the old cinema houses amount of maintenance may be more as compared to the newly constructed cinema houses, but even newly constructed cinema houses are required to be maintained, although the amount for such maintenance may not be as heavy as that which is required for the old cinema houses. But that does not make much difference, "The question is not the one that both classes of cinemas need maintenance and that a newly constructed cinema may require lesser maintenance, but the question is whether requirement of nominal maintenance in the case of a newly constructed cinema hall is enough to classify new cinemas separately. (7) Cinemas not taking benefit under any incentive scheme are subjected to the payment of full entertainment tax but the other class of cinemas is exempt from the payment of entertainment tax either fully or partly depending on the stipulation of a grant-in-aid scheme.

(8) Since one class of cinemas was entitled to realise extra charge for maintenance and take other benefits under the Act, the Government made a policy to give some benefit to the other class of cinemas also, which was not entitled to any benefit but was simply subjected to full payment of entertainment tax.''"

(9) One of the conditions imposed under an incentive scheme dated July 21, 1986-Annexure ''3'' to the case of Natraj Chhabigrah--is that the cinemas taking benefit of such scheme shall not charge more than Rs. 5/- per ticket. Rationale

behind the ceiling on charges for admission is to provide cheap entertainment to the people of rural or tow populated areas. If extra charge of Re. 1/- per ticket is permitted to be realised from the viewers in the new cinemas taking benefit of any incentive scheme that would defeat the basic purpose of the grant-in-aid scheme.

144. These factors put together clearly indicate that there is fundamental error in the judgment of the Kamla Palace case. What is fundamental error ?

Omission to consider the basic features of an Act lead to a fundamental or substantial error, which is corrected will result into reversal of the earlier decision. The foregoing features of the Act if viewed in the perspective of taxation laws and in the light of the authorities cited in the referring order, then the conclusion on the validity of the proviso to sub-section (1) of Section 3-A would have been different in the bunch of the Kamla Palace case and that is how a fundamental error arose in that judgment.

145. For the reasons. I am of the considered opinion that the reference to a larger Bench is competent.

146. Sri Singh then argues that the subsequent Bench in the referring order simply quoted the authorities and has not given a full length reasoning to conclude that the proviso to sub-section (1) of Section 3-A is not violative of Article 14 of the Constitution. This reasoning is fallacious. The subsequent Bench has not decided the matter finally, but simply raised a doubt in the correct-ness of the judgment governing the bunch of the Kamla Palace case. The subsequent Bench cited the authorities just to show that the doubt entertained thereby is nut a veiled doubt, but substantial. cogent and fundamental. The subsequent Bench is not expected to decide the matter finally and then refer the dispute to a larger Bench. When the subsequent Bench seeks reference to a larger Bench, there is no need for it to discuss the matter at such length which may culminate into a decision. If the subsequent Bench is called upon to give a full length reasoning and write a complete order--not to be supplemented by any reason by the Court deciding the correctness of the reference-then that would seriously violate the fundamental principle that a subsequent Bench if wants to differ, should not embark upon to decide the controversy but should simply make a reference to a larger Bench. A reference if it is not made lightly and if it raises a doubt which cannot be said to be a veiled doubt, will be legally competent.

147. Nextly, Sri Singh submits that the previous Bench clearly Mated in the judgment dated 10-7-1995 that in the matter of taxation laws, the Legislature enjoys great latitude as regards classification, choice of persons and articles to be taxed, which is the underlining principle of the judgments relating to taxation laws and, therefore, it cannot be said that the previous Bench overlooked the authorities relating to taxation laws. He submits that when the principle underlining the judgments relating to taxation laws was correctly stated in its judgment by the

previous Bench, omission to cite and consider the relevant case law applicable to the fiscal laws was of no consequence. It is, therefore, urged by Sri Singh that the previous Bench took one view on the basis of the principles underlining the fiscal laws and that the subsequent Bench preferred another view on the same set of principles underlining the authorities cited it the referring order. The question is not the one whether the previous Bench cited the principle which can be deduced from the judgments relating to taxation laws, but the question is whether the principle stated by the subsequent Bench was correctly applied to the Kamla Palace case and whether the authorities even if they are cited--though they have not been cited in the Kamla Palace case -- have been correctly applied and viewed in a correct perspective. Mere reference to the authorities and reproduction of the principle underlining them is no! enough. For an errorless judgment what is essential is the correct application of the principles underlining the judgments relied on.

148. A Bench of three Judges deciding the case of Pine Chemicals Ltd. and Others Vs. Assessing Authority and Others, , took a view contrary to the decisions : (1) International Cotton Corpn. (P) Ltd. Ors. Vs. Commercial Tax Officer, Hubli, and Others, and (2) Indian Aluminium Cables Ltd. Vs. State of Haryana, . The former was sought to be reviewed in Commissioner of Sales Tax, J and K and Others Vs. Pine Chemicals Ltd. and Others, . Though the latter decisions were not only referred by the Bench deciding the case of Fine Chemicals (supra), but made them as a basis of its judgment and then the Bench hearing the review petition observed in para 10 at page 64 :

"It is. however, interesting to notice that when above two decisions were brought to the notice of the Bench, it referred to the ratio of the said judgments, but neither followed it nor made any attempt to proceed to make it a basis for their decision, notwithstanding that the said ratio ran exactly counter to one adopted by the Bench."

From this authority, it is clear that mere reference to the decisions and reproduction of the underlining principles is not enough but what is more important is their correct application to the facts of a given case. Therefore, the submission of Sri Singh that from the fact that the earlier Bench though failed to cite the relevant judgments, correctly stated the principle underlining the judgments relating to fiscal laws and. therefore. the only inference that can be drawn is that the subsequent Bench out of the two views, preferred one view and made the incompetent reference. has to be rejected. There is nothing to indicate that the previous Bench applied for principles underlining the judgments relating to taxation laws in the Kamla Palace bunch.

149. To recall the submission of Sri Singh that a subsequent Bench of a co-ordinate jurisdiction can differ from the earlier decision only on three grounds (1) where ratio of the earlier decision has been impliedly overruled or whittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court; (2)

where it can be said with certainty that a co-equal Bench has laid down a law directly contrary to the same and (3) where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam, it is nothing but appropriate to refer a Full Bench decision of this Court in the case of Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others, .

150. A Full Bench of five Judges of this Court which heard the case of Rana Pratap Singh (supra), relied on a Full Bench decision of the Punjab and Haryana High Court in Pritam Kaur Vs. Surjit Singh, . In that case, the Full Bench of P & H High Court held that as a settled principle that the law specifically laid down by the Full Bench, is binding upon the High Court within which it is rendered and any and every veiled doubt with regard thereto does not justify the reconsideration thereof by a larger Bench and thus put the law in a ferment afresh. The ratios of the Full Benches are and should be rested on surer foundations are not to be town by every side wind."

151. The Full Bench in Pritam Kaur Vs. Surjit Singh, then laid down the following parameters : (which are approvingly reproduced by the Full Bench in Oriental Insurance Co. Ltd. and Others Vs. Verda Ram and Others,

"It is only within the narrow west field that a judgment of a larger Bench can be questioned for reconsideration. One of the obvious reasons is, where it is unequivocally manifest that its ratio has been impliedly overruled or whittled down by a subsequent judgment of the superior Court or a larger Bench of the same Court. Secondly, where it can be held with certainty that a co-equal Bench has laid down the law directly contrary to the same, and, thirdly where it can be conclusively said that the judgment of the larger Bench was rendered per incuriam by altogether failing to take notice of a clear-cut statutory provision or an earlier binding precedent. It is normally within these constricted parameters that a similar Bench may suggest a reconsideration of the earlier view and not otherwise. However, it is best in these matters to be neither dogmatic nor exhaustive yet the aforesaid categories are admittedly the well accepted ones in which .an otherwise binding precedent may be suggested for reconsideration."

152. Fortified by Rana Pratap case (supra), Sri Singh strenuously urged that none of the three grounds existed to enable the subsequent Bench to differ from the previous Bench and, therefore, the reference is incompetent. While making this argument, Sri Singh omitted to take note of the above delineated portion from which it is manifest that the Full Bench in Pritam Kaur (supra) did not lay down an inflexible or a rigid rule The three grounds are not exhaustive as the Full Bench clearly pointed out that in such matters it is "best to be neither dogmatic nor exhaustive". The case of Pritam Kaur (supra) cannot be construed to rule down that a subsequent Bench can differ from the earlier Bench only on three grounds and none else. It will be a gross misunderstanding of the case of Pritam Kaur (supra) if that is given a restrictive interpretation that to differ from an earlier Bench, one of the three grounds must exist. The Full Bench in that case besides stating the three

grounds unequivocally ruled down that a subsequent Bench can differ from an earlier Bench normally on the stated grounds, but they are not exhaustive.

153. Therefore, the contention of Sri Singh that the reference made by the subsequent Bench not being based on any one of the above three grounds is incompetent, has to be rejected.

154. In support of his contention, Sri Dwivedi adverted to the case of A.R. Antulay Vs. R.S. Nayak and Another, . The Court in this case considered the question whether the directions given by the Court on 16-2-1984 as reported in R.S. Nayak Vs. A.R. Antulay, , were legally proper. On February 16, 1984 in an appeal filed by R. S. Nayak, respondent No. 1 directly under Article 136 of the Constitution, a Constitution Bench of the Court held that a member of the legislative assembly is not a public servant and set aside the order of the Special Bench. Instead of remanding the case to the Special Judge, the Supreme Court suo motu withdrew the special case from the Court of Special Judge and transferred the same to the Bombay High Court with a request to the learned Chief Justice to assign the case to a sitting Judge of the High Court for holding the trial from day to day. The appellant challenged the directions and then by a majority judgment, the Supreme Court held that the directions given by the Supreme Court suo motu to try the appellant by the High Court, are violative of Articles 14 and 21. The Supreme Court stated that jurisdiction can be created or enlarged only by the Legislature and not by the Supreme Court and the directions dated Feb. 16, 1984 being without jurisdiction and in contravention of the fundamental rights of the petitioner, are void. The Supreme Court also held that the directions were oblivious of the law and decisions in the case of the The State of West Bengal Vs. Anwar Ali Sarkar, . This judgment cannot be pressed into service by Sri Dwivedi, inasmuch as that arose from the case sought to be reviewed on ground of violation of fundamental rights, overstepping the jurisdiction and that being contrary to the earlier decision of the Supreme Court in the case of Anwar Ali Sarkar (supra).

155. Another submission of Sri Singh is that the proviso to sub-section (1) of Section 3-A of the Act having been declared ultra vires by the previous Bench goes out of the statute book and, therefore, there is nothing for the subsequent Bench for being reconsidered. To elaborate the argument, Sri Singh says that when a provision of. law is struck down being void or ultra vires, then that stands obliterated from the statute book unless revived in appeal or in review-legally permissible. He submits that no appeal was filed against the Kamla Palace case and, therefore, that judgment has become final and that consequently has gone out of the statute book finally. At a flash point this argumently of ingenuity-full-tooks very attractive, but on a deeper scrutiny, it lacks merit and has to be rejected.

156. In his book "The Constitutional Law of the United States" IInd Edition Vol. 1 Page 10, Westel Woodbury Wiltoughby, a celebrated commentator opined : "Thus, when any particular so-called law is declared unconstitutional by a competent Court

of last resort, the measure in question is not "annulled," but simply declared never to have been law at all, never to have been, in fact, anything more than a futile attempt at legislation on the part of the legislature enacting it."

157. In West Virginia in Shephard v. Wheeling, 30 W. Va. 479, the Court excellently stated :

"The Court does not annul or repeal the statute if finds it in conflict with the Constitution. It simply refuses to recognise it, and determines the rights of the parties just as if such statute had no application. The Court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the Court may operate as a precedent for the determination of other similar cases, but it does not strike the statute from the statute book : it does not repeal .....the statue.

158. There is a difference between the declaration of a statutory provision being void or ultra vires and repeal. When a provision or an enactment is repealed, it no more remains on the statute but similar is not the effect of a statutory provision being declared void or ultra vires. Repeal is done by the Legislature. One who can enact can repeal. The declaration of a provision being void or ultra vires is made by the Court by which a writ in the nature of certiorari cannot be issued against the Legislature for quashing any statutory provision. A writ of certiorari can only be issued by the Supreme Court or the High Court to direct the inferior Courts, Tribunal or authorities to transmit to the Court, the record of the case pending there for scrutiny or for quashing the same. When the petitioner contends that an Act or Ordinance is unconstitutional or void, proper relief for the petitioner is to ask is a declaration to that effect or to ask for a writ of mandamus restraining the concerned State or the Officers from enforcing or giving effect to the provisions of that Act or Ordinance (See Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, . It follows from this that when a provision is declared ultra vires or void, then the Court issues a writ of mandamus restraining the authorities from enforcing such provision. The Court'' does not quash or repeal the provisions declared ultra vires, but simply prohibits the authorities from enforcing the same. The effect of a provision being declared void or ultra vires is that ceases to be enforceable against those against whom that is declared ultra vires or void. However, a provision despite the declaration of being void or ultra vires continues on the statute book for several purposes, e.g., for the purposes or appeal; for being included in the 9th Schedule of the Constitution or for being subjected to review either under Article 137 of the Constitution before the Supreme Court or under the inherent powers, exercisable by the High Court to overrule its decision. The only effect of a provision being declared ultra vires or void is that it ceases to be enforceable and the authorities are injuncted by a writ of mandamus not to enforce the same but it remains on the statute book, notwithstanding its unenforceability.

159. In Jagannath Vs. The Authorised Officer, Land Reforms and Ors, , the Madras Land Reforms (Fixation of Ceiling of Land) Act, 1961 was declared void under the provisions of Article 13(2) of the Constitution. It was, therefore, contended that the legislation was void ab initio, inasmuch as it did not lie within the power of the State to make any law which abridged the right conferred by Part III of the Constitution, the measure was non est or still-born and any validating measure could not instill life therein: that the effect of the Act being struck down by the Supreme Court is that it had been effected from the statute book and to make any such Act operative, it was necessary not only to give it the protection against the violation of the fundamental right as was sought to be done by Art. 31-B but to get the State of Madras to re-enact the provisions there of. Rejecting such contention, the Court in para 23 at p. 435 held :

"These Acts even if void or inoperative at the time when they were enacted by reason of infringement of Article 13(2) of the Constitution, assumed full force and vigour from the respective dates of their enactment after their inclusion in the Ninth Schedule, read with Article 31-B of the Constitution."

It follows from this authority that even if an Act is declared void or still born, that does not go out of statute book and will stand revived upon being included in the Ninth Schedule.

160. In The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, , scanning several decisions particularly M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, ; Deep Chand Vs. The State of Uttar Pradesh and Others, and Mahendra Lal Jaini Vs. The State of Uttar Pradesh and Others, , the Court enunciated : (para 36. page 1309)

"If the meaning of the word "void" in Article 13(1) is the same as its meaning in Article 13(2) it is difficult to understand why a pre-Constitution law which takes away or abridges the rights under Article 19 should remain operative even after the Constitution came into force as regards non-citizens and a post Constitution law which takes away or abridges them should not be operative as respects non-citizens. The fact that pre-Constitution law was valid when enacted can afford no reason why it should remain operative as respects non-citizens after the Constitution came into force as it became void on account of its inconsistency with the provision of Part III. Therefore, the real reason why it remains operative as against non-citizens is that is void only to extent of its inconsistency with the rights conferred under Article 19 and that its voidness is, therefore, confined to citizens, as ex hypothesis, the law became inconsistent with their fundamental rights atone. If that be so, we see no reason why a post Constitution law which takes away or abridges the rights conferred by Article 19 should not be operative in regard to non-citizens as it is void only to the ex tent of the contravention of the rights conferred on citizens, namely, those under Article 19."

From such enunciation, it follows that both pre-Constitution as well as post-Constitution law remain voider inoperative to the extent the former is inconsistent with the rights conferred by Part III of the Constitution and to the extent the latter takes away the rights conferred by Article 19 on the citizens. Despite its voidness, pre-Constitution law continues to remain operative, insofar as it is not inconsistent with the rights conferred by Part III and the post-Constitution law continues to operate, insofar as it does not contravene the rights conferred by Article 19 ; meaning thereby that both continue to operate against non-citizens. This authority implies that a void law does not go out of the statute but despite voidness. it not only continues to remain on the statute, but it remains operative to the extent it is not inconsistent to the rights conferred by Part III or it does not infringe the rights conferred by Article 19, as the case may be.

161. In The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, , the Court propounded that a right does not exist in vacuum. They must always inhere in some person whether natural or juridical, and under Part III, they in here even in fluctuating bodies like a linguistic or religious minorities or denominations. And, when the sub-article says that the law would be void "to the extent of the contravention", it can only mean to the extent of the contravention of the rights conferred on persons, minorities or denominations as the case may be. Just as a pre-Constitution law taking away or abridging the fundamental rights under Article 19 remains operative after the Constitution came into force as respects non-citizens as it is not inconsistent with their fundamental rights, so also a post-Constitution taw offending Article 19 remains operative as against non-citizens as it is not in contravention of any of their fundamental rights.

The Court with perspicacity further held (para 37) :

"The same scheme permeates both the sub-articles namely, to make the law void in Article 13(1) Mo the extent of the contravention of those rights. In other words, the voidness is not in rem, but to the extent only of inconsistency or contravention, as the case may be of the right conferred under part III. Therefore, when Article 13(2) uses the expression "void", it can only mean, void as against persons whose fundamental rights are taken away or abridged by a law. The law might be ''still born so fur as the persons, entitles or denominations whose fundamental rights are taken away or abridged, but there is no reason why the law should be void or "still born is against those who have no fundamental rights." The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another, makes it clear that the terms : ab initio void, ultra vires, nullity, null and void or still born coined by the Courts are notional or fictional and no inference can be drawn there from that when a statutory provision is declared ultra vires, that is literally effected from the statute but despite voidness that continues to operate against those whose rights are not offended. The only effect of the declaration made by the Court that a given provision is ultra vires of the Constitution or the Act, is that it remains unenforceable, so tong

as it is not revived either by way of appeal, review or by inclusion in the Ninth Schedule or by overruling in exercise of inherent powers. By declaration of being ultra vires. Court does not repeal or quash a statutory provision but simply injuncts the authorities from enforcing a provision which it has declared ultra vires against the people who are affected thereby. But that continues to remain on the statute for several purposes. When a provision is declared ultra vires, the Court assumes that it goes out of the statute for alt purposes because that remains inoperative, unenforceable or lifeless, but in fact it continues to remain on the statute and can be resuscitated in several ways.

162. Therefore. Sri Singh is not right in saying that after the proviso to sub-section (1) of Section 3-A was declared ultra vires by the previous Bench, nothing remained for being re-considered by a larger Bench.

163. The reference being competent, the decks are cleared to turn to the merits of the case.

MERITS :--

164. The question for consideration is whether proviso to sub-section (1) of Section 3-A of the Act is violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been, the subject-matter of discussion in numerous decisions of the Supreme Court and the propositions applicable to cases arising under that Article have been repeated so many times during the period over the past four decades. They clearly recognise that classification can be made for the purpose of legislation but lay down that :

(1) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, the conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

(2) The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation provided such classification is not arbitrary.

165. It is clear that Article 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends.

What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature.

166. The question, therefore, is whether the classification made by the proviso to sub-section (1) of Section 3-A in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of equal protection clause in Article 14. Before embarking upon the Constitutional validity of the proviso said to be violative of Article 14. it is necessary to bear in mind certain well established principles, which have been evolved by the Courts as rules of guidance in discharge of its Constitutional function or judicial review.

167. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciate the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report, the history of times and may assume every state of facts which can be conceived existing at the lime of legislation.

168. Another rule of equal importance is that laws relating 10 the economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. Holmes, J. said that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through" any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

169. In R. K. Garg v. Union of Indida (198l) 4 SCC 675 : (AIR 1981 SC 2138), the Supreme Court dealing with constitutionality of economic legislation succinctly stated the principle of interpretation thus :

"The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex that many problems arc singular and contingent, that laws are not abstract propositions and do not relate to abstract units and arc not to be measured by abstract symmentry", "that exact wisdom and nice adoption of remedy are not always possible "and that judgment is largely a prophecy based on meagre and uninterpreted experience.

"Every legislation particularly in economic matters, is essentially empiric and it is based on expert annotation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid."

170. The Court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If there is any possibility of abuse, then legislature may itself come forward to enact a suitable amendatory legislation. This is me essence of pragmatic approach which must guide and in spite the legislature in dealing with complex economic issues.

171. The matter at hand has to be seen in the light of the above guiding principles.

172. Let us took at the scheme of the Act first. Proviso to sub-sect ion (1) of Section 3 of the Act which was inserted by the Act of 1989 state that the proprietor of a cinema in a local area having population not exceeding one lakh may in lieu of payment under sub-section (1) pay a compounded payment to the State Government on such conditions and in such manner as may be prescribed and at such rates as the State Government may from time to time notify. This creates two classes of cinemas (1) a class of cinemas which are situate in a local area having population more than one tack, i.e., in tow populated area, which can also be categorised as rural or semi urban area; and (2) a class of cinemas which are situate in high populated or urban areas. The proviso to sub-section (1) of Section 3 gives an option to the class of cinemas situate in tow populated area to make a compounded payment of tux in lieu of payment as envisaged by sub-section (1) of Section 3. The scheme of compounding payment cannot be availed by the class of cinemas situate in urban area. The Schedule to the Act prescribes the rate of entertainment tax for different classes of entertainment. The rates for cinemas situate in tow populated area, are lessor than the rates of tax payable by the other class of cinemas. Besides these benefits, the cinemas situate in tow populated area are entitled to the benefit of grant-in-aid scheme, introduced by the State Government from time to time. Instead of giving grant-in-aid in cash, the State Government gives such aid in the shape of exemption of entertainment tax. Thus, the cinemas situate in tow populated area are entitled to avail compounding payment, grant-in-aid and lesser rate of tax.

173. Classification is based on the factors : (1) newness of cinemas; (2) tow population, and (3) rural/semi urban area. The legislature for the purpose of tax structure took into consideration mode of cinema exhibition, area of exhibition, the population of local area, rate of ticket and existence of permanent cinemas. Can it be said that the classification is not based on intelligible differentia. The guiding factors clearly indicate that the differentia is not unreal, imaginary, irrational or arbitrary, but is substantial, intelligible and real.

174. The State Government introduced several incentive schemes to promote the growth of new cinema houses in the rural area/semi urban area. As already pointed oat such cinema houses were given the benefit of compounding payment, grant-in-aid scheme and lesser rate of tax. No such benefit was conferred on the other class of cinemas. This created imbalance between two classes of cinemas. The cinematograph exhibition business was seriously affected by the advent of cable T, V. Net work and video shows. This induced the cinema exhibitor federation to make a demand for grant of certain percentage of tax to the proprietor of the cinema as the development allowance. To encourage the people to invest more and more in jetting up air-cooled or air-conditioned cinema houses with a view to provide better facility to the viewers, an incentive to realise extra charge for a specified period was given which too was sought to be extended by the federation. To remove imbalance between two classes of cinemas, the Act of 1992 was enacted inserting Clause (a) and the proviso to sub-section (1) of Section 3-A. Sub-section (1) clause (a) reads as under :--

"S. 3-A (I) Notwithstanding anything contained in this Act the proprietor of a cinema may realise from the person making payment for admission to an entertainment in such cinema,--

(a) an extra charge of twenty five paise which shall be utilised for maintenance of the cinema premises :

Sub-section (I) clause (a) thus entitles the proprietor of a cinema to realise from the viewers an extra charge of twenty five paise, which was later enhanced to rupee one per ticket for maintenance of cinema premises. The State Government in view of the demand of the federation decided to give some relief to the cinema owners hit hard by cable T. V. boom. But instead of giving development allowance as demanded, the State Government authorised them to realise extra charge for maintenance and further decided not to give any further relief to the recipients of grant-in-aid who availed full exemption for some years and partial exemption for remaining years during which the grant-in-aid continued. It was done to maintain a balance between two classes of cinemas (cinemas located in tow populated area, entitled to substantial exemption of tax under grant-in-aid scheme and to lesser rate of tax under the Schedule to the Act and the other class of the cinemas, not entitled to any such benefit and being subjected to full entertainment tax).

175. From the proviso, it is evident that the legislature did not want to confer double benefit on the cinemas, situated in tow populated area availing the benefit of a grant-in-aid scheme. Only those cinemas are entitled to realise extra charge which are not taking the benefit of grant-in-aid under any incentive scheme. Grant-in-aid schemes also differed in character. Some cinema houses have been constructed under a grant-in- aid scheme. There is another class of cinemas, which for some reasons had to be closed down by their proprietors. For their revival, the State Government introduced a separate incentive scheme dated November 15, 1994.

(Annexure "2" in the case of Natraj Chhabigrih). Whereas the incentive scheme introduced for construction of new cinema houses, grant-in-aid was given by providing complete exemption of entertainment tax for a specified period, which was scaled down for me following years, covered by the grant-in-aid scheme; under the revival scheme, grant-in-aid was restricted only to thirty percent exemption of entertainment tax.

176. The proviso to sub-section (1) of Section 3-A renders the recipients of grant-in-aid scheme ineligible to realise extra charge only for the period during which they availed the benefit of grant-in-aid scheme. After the expiry of the period of agrant-in-aid scheme or after they withdraw from a grant-in-aid scheme, the proprietors of cinemas situate in tow populated area, come at par with the owners of other cinemas and become entitled to realise extra charge of rupee one per ticket for maintenance. The proviso thus has inbuilt flexibility, inasmuch as a recipient of the grant-in-aid becomes entitled to realise extra charge immediately after the expiry of the period of grant-in-aid scheme or after surrendering the benefit of grant-in-aid scheme.

177. The classification between two classes of cinemas, therefore, is not unreal, imaginary or arbitrary, but the classification is founded on intelligible differentia.

178. Then the question is whether the differentia which is the basis of the classification has rational nexus with the object sought to be achieved by the Act of 1992. The preamble of the Act of 1992 runs as follows :

"An Act further to amend the U. P. Entertainment and Retting Tax Act, 1979 with a view to ensure additional facilities to the viewers of cinematography exhibition."

Adverting to the statement of the objects and reasons as prefaced to the Act of 1992, Sri Singh submits that the Act of 1992 came to be passed with a view to ensure additional facility to the public visiting cinemas and, therefore, the object behind introducing clause (a) to sub-section (1) of Section 3-A is to ensure proper maintenance of the cinema houses irrespective of their location. On the other hand, Sri Dwivedi argues that the dominant object of the Act of 1992 is to remove the imbalance which arose in two classes of cinemas : situated (1) in tow populated area and (2) in urban areas; as the former were entitled to several benefits, no benefit was given to the latter and, therefore, to confer some benefit on the non-recipients of the benefit of grant-in-aid scheme, clause (a) to sub-section (1) of Section 3-A was inserted. Sri Dwivedi says that the dominant object of the Act of 1992 is not to ensure proper maintenance of the cinemas, because maintenance is the liability of the proprietor of a cinema under the terms and conditions of a licence and the Government never intended to underlay this responsibility, but to bring the non-recipients of the benefit of any grant-in-aid scheme to the level of the recipients to some extent clause (a) to subsection (1) of Section 3-A was inserted.

179. To find out the dominant object of an Act. it is not proper for the Court to confine to the preamble and the provisions of the Act. The preamble and the provisions of statute, no doubt, assists the Court in finding out its object and policy but its object and policy need not always be strictly confined to its preamble and the provisions contained therein.

180. In Punjab Tin Supply Co., Chandigarh and Others Vs. Central Government and Others, , the question came up for consideration as to what are the relevant factors to determine the object of an Act. The relevant facts of that case are that by virtue of the Punjab Re-organisation Act, 1966, the Union Territory of Chandigarh came into existence. The East Punjab Urban Rent Restriction Act, 1949 (for short, the Act) governing the erstwhile State of Punjab remained in operation even after the commencement of the Constitution. The Act was brought into force in the Union Territory of Chandigarh. By a notification dated November, 1, 1966 issued by the President, the Chief Commissioner was authorised to exercise and discharge the powers and functions of the State Government in relation to the Union Territory under the Act. Later, the East Punjab Urban Rent Restriction Act (Extension to Chandigarh) Act, 1974 (for short, the Extension Act) came to be passed.

181. In view of Section 3 of the Act. the Chief Commissioner published a notification dated 31 - 1-1973 exempting the buildings referred to there-infrom the operation of that Act. By the notification dated 31-1 -1973 which was issued u/s 3 of the Act, the Chief Commissioner exempted certain class of buildings, namely, new buildings for a period of five years.

182. The validity of the notification dated 31 -1-1973 was challenged on the ground that that was outside the scheme and policy of the Act and the same time discriminatory, is liable to be attack down. The argument proceeded on the assumption that the policy and object of Act can be gathered only from its preamble and the provisions contained therein and that in the instant case the preamble of the Act stated that it had been enacted to restrict the increase of rent of certain premises, situated within the limits of urban areas and the eviction of tenants therefrom and the Act has made provisions only for those purposes mentioned in the preamble, the Central Government which is only a delegation of the Parliament could not exempt totally certain new buildings from the operation for the Act. thus enabling greedy landlords to charge excessive rents and to evict at their sweet will the tenants who did not submit to their wishes. In the counter-affidavit filed for the Union Territory it was pleaded that the object of issuing the notification was to increase construction of new buildings in the urban areas of Chandigarh so that as the supply of housing accommodation increase, the pressure on the tenant as class may decrease.

The Supreme Court on these submissions held (para 12) :

"The preamble and the provisions of a statute, no doubt, assist the Court in finding out its object and policy, but its object and policy need not always be strictly confined to its preamble and the provisions contained therein. The object and policy of the Act which is now before us appears to be slightly wider than some of the key provisions of the Act, namely, fixation of fair rent and prevention of unreasonable eviction of tenants. The acute problem of shortage of urban housing as we all know has become a permanent feature throughout India. It is on account of the shortage of the number of houses in a urban areas, the landlords get an opportunity to exploit tenants who are in need of housing accommodation by compelling them to enter into unconscionable bargains. The Act is passed as one of the measures taken to mitigate the hardship caused to be tenants. The policy and object of the Act generally is mitigation of the hardship of tenants. Such mitigation can be attained by several measures, one of them being creation of incentive of persons with capital who are otherwise reluctant to invest in the construction of new buildings in view of the chilling effect of the rent control laws. Assart of the said scheme in order to persuade, them to invest in the construction of the new building exemption is granted to them from the operation of the Act for a short period of five years so that whatever may be the hardship for the time being to the tenants of the new buildings. the new building so constructed may after the expiry of the period of exemption be available for the pool of housing accommodations controlled by the Act. The impunged notification is not. therefore, ultra vires Section. 3 of the Act as in its true effect, it advance the scheme, object and purpose of the Act which are articulated in the preamble and the substantive provisions of the Act.
..... The Exemption granted for a period of five years only serves as, an incentive as stated above and docs not create a class of landlords who are forever kept outside the scope of the Act. The notification tries to balance the interests of the landlords on the one hand and of the tenants on the other in a reasonable way. We do not, therefore, agree with the submission that the notification either falls outside the object and policy of the statute or is discriminatory."

(Underlining mine)

183. Let us apply the principles underlining this authority to the facts of the case at hand.

The question arise :

(1) Does the proviso to sub-section (1) of Section 3-A advance the scheme object and purpose of the Act ?

(2) Does the proviso balance the interests of recipients and non-recipients of the grant-in-aid ?

If these questions tan be answered in the affirmative then it cannot be said that the differentia has no nexus with the object sought to be achieved by the Act of 1992.

184. As already pointed out, the exhibitor federation raised a demand before the State Government to part with certain percentage of entertainment tax realised from them as development allowance. This could have been given either in cash or by giving back to them the entertainment tax, realised from them in certain sercenlage. Instead of giving monetary help to the exhibitors in either manner as aforesaid, the State Government thought it fit to authorise cinema owners to realise extra charge per ticket by inserting clause (a) to sub-section (1) of Section 3-A with a rider that that could be utilised only for maintenance. Proviso to sub-section (1) of Section 3-A was also inserted simultaneously to strike balance between the recipient and non-recipient of a grant-in-aid. In absence of the proviso, the recipient of a grant-in-aid would have received double benefit: (1) the exemption from entertainment tax under the Grant-in-aid and (2) the extra charge. To adjust equities between two classes of cinema owners the proviso was made co-extensive and coterminous with the receipt of the benefit of grant-in-aid.

185. The policy of the State Government as evident from the grant-in-aid scheme dated July 21, 1986 which is available on record, is that the incentive scheme can be availed only by those cinemas, which do not charge per ticket more than rupees five. The rationale of such condition that the State Government wanted to provide entertainment to rural masses at a cheap rate and, therefore, the ceiling of the price of the ticket was fixed at rupees five. The proviso to sub-section (1) of Section 3-A is consistent to such policy of the State Government. If such ceiling is not imposed on the recipients of a grant-in-aid, then they will be free to charge any amount per ticket, as the non-recipients of a grant-in-aid are entitled and in that case the rural masses would be burdened more.

186. The impugned proviso, therefore, advances the scheme, object and purpose of the Act of 1992, notwithstanding the fact that it temporarily renders the recipient of a grant-in-aid ineligible to realise the extra charge.

187. The submission of Sri Singh that there is no nexus between differentia and the object of the Act of 1992 is, therefore, rejected.

188. Having finished the submissions of Sri R. N. Singh I proceed to the submissions made by Sri. L. P. Naithani an intervenor. Before the previous Bench, he appeared in the Kamla Palace case. He submits that the words ''extra charge'' occurring in the proviso to sub-section (1) of Section 3-A, are not in the nature of ''tax'' within the meaning of definitional clause (p) of Section 2 of the Act and, therefore, the proviso is not a part of the taxing statute and that being so, that, need not be interpreted in the perspective of a taxing statute. Clause (p) of Section 2 defines tax meaning entertainment tax, betting tax or the totalizator lax, as the case may be and includes surcharge, cess, penalty or any other charge levied under this Act.

189. The submission is that applying the principle of ejusdem generis, the words ''other charge'' will take colour from the preceding words, as mentioned in clause

(p). The definition of the word ''tax'' under clause (p) is not exhaustive but inclusive and the word tax thereunder includes surcharge, cess, penalty inter alia. He submits that the word ''charge'' occurring in clause (p) means a levy, that is, in the nature of revenue receipt. The extra charge realised by the proprietor of a cinema within the meaning of the proviso to sub-section (1) of Section 3-A, says Sri Naithani. is not levied and realised by the State Government towards revenue, but that is realised only by the cinema owners to be utilised for maintenance. Such proposition cannot be disputed inasmuch as the extra charge which is realised by the cinema owners is not in the nature of a levy.

190. But the question is not the one whether the proviso refers to the extra charge which is in the nature of a levy. The question is whether the proviso to sub-section (1) of Section 3-A is a part of the taxing statute and if so whether that is to be interpreted like a taxing statute or in a different manner. Inasmuch as the proviso is a part of the Act which is, no doubt, a taxing statute, the proviso deserves to be interpreted in the same manner in which rest of the statute is to be interpreted. Therefore, it is not correct to say that since the proviso refers to the extra charge which is not in the nature of a levy that cannot be interpreted as a taxing provision. The proviso may not be a taxing provision by itself but that being an integral part of the Scheme of the Act, which is, undoubtedly, a taxing statute, has to be interpreted in the same manner in which rest of the statute is to be interpreted.

191. Then he submits that the air conditioned and air cooled cinemas are entitled to realise extra charge under clause (b) of sub-section (1) of Section 3-A irrespective of the fact whether they are beneficiaries of agrant-in-aid scheme. The air conditioned and air cooled cinemas form a class by themselves and this is why the legislature has not included clause (b) in juxtaposet on to clause (a) under the proviso. From the business point of view, construction of the air conditioned and air cooled cinemas in tow populated/semi urban area may not be financially viable and. therefore, they may not be in such area in a large number, Moreover, the legislature wanted to encourage the investors to invest more and more in the air conditioned and air cooled cinemas which require bigger capital investment and. therefore, clause (b) is specifically omitted in the proviso.

192. Sri. V. B. Singh another intervenor representing the class of new cinemas in which the bunch of Kamla Palace case fall, argues that the object of the Act of 1992 is to provide additional facility to the viewers and that there is no nexus between the differentia and the object sought to be achieved by the said Act. This was already canvassed by Sri R. N. Singh and his argument has been rejected.

193. No new proposition was argued by Sri Covind Krishna who represents the cases governed by the grant-in-aid schemes dated September. 18, 1983 and July 21, 1986.

194. From the foregoing discussion, it follows that the proviso to sub-section (1) of Section 3-A of the Act is valid and that the judgment dated July 10, 1995 of the

previous Bench in the bunch of Kamla Palace case does not lay down a correct law.

195. The reference is disposed of accordingly and the matters are now remitted to the Division Bench which made the reference for deciding the case of Natraj Chhabigrah (supra) on merits.

196. As the point in issue arising in this case is quite important and as umpteen authorities have been cited in support of their subtle but interesting arguments, I prepared my own compressed draft judgment which I sent to my esteemed brother (A.P. Misra, J.) for his perusal and suggestion on 1st March, 1996 who returned the same with his own draft judgment for my perusal on 11th March, 1996 reaching almost the same conclusions, which 1 recorded in my own.

197. Conclusions being the same, I have nothing to add to his draft and stick to my views and the reasons.

198. For the reasons as contained in two separate judgments, we are of the opinion that the law laid down in the case of Kamla Palace (supra) was not correctly laid down. For the reasons given above, the impugned proviso to Section 3-A of the U. P. Entertainment and Betting Tax Act, 1979, is a valid piece of legislation. The present reference is disposed of accordingly and the case is sent back to the Bench concerned for the disposal of this case on merits.

199. Order accordingly.