Amba Bhavani and Others Vs The Government of Andhra Pradesh and Others

Court: Andhra Pradesh High Court

Date of Decision: Jan. 29, 1986

Acts Referred: Andhra Pradesh General Sales Tax Act, 1957 â€" Section 14, 2, 2(1), 24A, 38

Citation: (1986) 63 STC 40

Hon'ble Judges: K. Bhaskaran, J; A. Lakshmana Rao, J

Bench: Division Bench

Advocate: F.S. Nariman, for J. Eswara Prasad, J. Chamanti, A. Venkatarami Reddi, D. Sudhakar Rao, S. Krishna, Philkhana Rama Rao, P. Venkata Rami Reddy, Vivekananda Swamy, S.R. Ashok, M.S.R. Subrahmanyam, I. Venkatanarayana, M.J. Swamy and B. Subhashan Reddy, for the Appellant; The Advocate-General and The Government Pleader for C.T., for the Respondent

Judgement

Lakshmana Rao, J.
All these writ petitions are disposed of by a common judgment as common questions arise for consideration in all of

them. The petitioners in all these writ petitions are either the persons engaged in the business of running a hotel, restaurant or eating house or the

hotels, restaurants or eating house themselves as the case may be. The relief sought for in all these writ petitions is for a declaration that section 6 of

the Constitution (Forty-sixth Amendment) Act, 1982, is unconstitutional and sections 6 and 38 of the Andhra Pradesh General Sales Tax

(Amendment) Act (No. 18 of 1985) are ultra vires articles 19(1)(g) and 21 and violative of articles 141, 265 and 300-A and for a direction to the

respondents not to levy or collect sales tax from the petitioners for the period prior to 10th April, 1985.

2. The facts relevant for the purpose of disposal of these writ petitions are not very much in dispute. In The State of Punjab Vs. Associated Hotels

of India Ltd., , the Supreme Court held that ""there was no sale when food or drinks were supplied to guests residing in a hotel and pointed out that

the supply of meals was essentially in the nature of a service provided to them and could not be identified as a transaction of sale"". Following that

principle it was reiterated in the subsequent decision in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, :

..... If that be true in respect of hotels, a similar approach seems to be called for on principle in the case of restaurants. ..... The classical legal

view being that a number of services are concomitantly provided by way of hospitality, the supply of meals must be regarded as ministering to a

bodily want or to the satisfaction of a human need. ..... In the result, we hold that the service of meals to visitors in the restaurant of the appellant

is not taxable .....

3. The review petition filed in that case was dismissed by the Supreme Court observing [in Northern India Caterers (India) Ltd. Vs. Lt. Governor

of Delhi, :

..... that where food is supplied in a eating house or restaurant, and it is established upon the facts that the substance of the transaction,

evidenced by its dominant object, is a sale of food and the rendering of services is merely incidental, the transaction would undoubtedly be exigible

to sales tax. In every case it will be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to

determine upon those facts whether a sale of the food supplied is intended.

4. When the State levied sales tax under the Andhra Pradesh General Sales Tax Act, 1957, on the supply of food or drinks in the hotels and

restaurants to the customers, the hoteliers questioned the validity of the levy on such transactions, on the basis of the decisions of the Supreme

Court referred to above, before this Court. A Division Bench of this Court held in Durga Bhavan and Others Vs. The Deputy Commercial Tax

Officer, Anantapur and Another, that such levy was was illegal. The legal position was summarised as follows :

1. If there is no right to carry away the food there would be no sale in favour of the customer.

2. Even if there is a right to carry away if in essence the transaction is a transaction of service and not a transaction of sale it would not be exigible

to tax.

3. If, however, where the customer has a right to take away the food if the dominant object is the sale of food and the rendering of service is

merely incidental, then the transaction would be a transaction of sale and not a service contract.

4. The question whether the dominant object was the sale of food or rendering of service would depend upon the facts and circumstances of each

case which has to be decided by the assessing authority in the light of the evidence before it.

..... sales across the counter will obviously be transactions of sale.

5. In that batch of cases, the assessment orders were quashed and the assessing authorities were directed to reconsider the matter in the light of the

principles enunciated in the decision. It is submitted by the learned counsel for the petitioner that pursuant to that decision reassessments were

made by subjecting only parcel sales to sales tax and the excess amounts collected from the various petitioners were refunded. Against the

judgment of this Court in Durga Bhavan and Others Vs. The Deputy Commercial Tax Officer, Anantapur and Another, the State Government

preferred an appeal and it is stated that the same is still pending in the Supreme Court.

6. While so, the Parliament enacted the Constitution (Forty-sixth Amendment) Act, 1982, which came into force on 2nd February, 1983. u/s 4 of

that Act clause (29A) was inserted in article 366 of the Constitution and it reads as follows :

(29A) "tax on the sale or purchase of goods" includes -

.....

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human

consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable

consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer,

delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

7. Section 6 of the Amendment Act which deals with validation and exemption is as follows :

6. (1) For the purposes of every provision of the Constitution in which the expression "tax on the sale or purchase of goods" and for the purposes

of any law passed or made, or purporting to have been passed or made, before the commencement of this Act, in pursuance of any such

provision, -

(a) the said expression shall be deemed to include. and shall be deemed always to have included, a tax (hereafter in this section referred to as the

aforesaid tax) on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for

human consumption or any drink (whether or not intoxicating) for cash, deferred payment or other valuable consideration; and

(b) every transaction by way of supply of the nature referred to in clause (a) made before such commencement shall be deemed to be, and shall be

deemed always to have been, a transaction by way of sale, with respect to which the person making such supply is the seller and the person to

whom such supply is made, is the purchaser, and notwithstanding any judgment, decree or order of any court, tribunal or authority, no law which

was passed or made before such commencement and which imposed or authorised the imposition of, or purported to impose or authorise the

imposition of, the aforesaid tax shall be deemed to be invalid or ever to have been invalid on the ground merely that the legislature or other

authority passing or making such law did not have competence to pass or make such law, and accordingly :-

(i) all the aforesaid taxes levied or collected or purporting to have been levied or collected under any such law before the commencement of this

Act shall be deemed always to have been validly levied or collected in accordance with law;

(ii) no suit or other proceeding shall be maintained or continued in any court or before any tribunal or authority for the refund of, and no

enforcement shall be made by any court, tribunal or authority of any decree or order directing the refund of, any such aforesaid tax which had been

collected;

(iii) recoveries shall be made in accordance with the provisions of such law of all amounts which would have been collected thereunder as such

aforesaid tax if this section had been in force at all material times.

(2) Notwithstanding anything contained in sub-section (1), any supply of the nature referred to therein shall be exempt from the aforesaid tax -

(a) where such supply has been made, by any restaurant or eating house (by whatever name called), at any time on or after the 7th day of

September, 1978, and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the ground that no

such tax could have been levied or collected at that time; or

(b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or

after the 4th day of January, 1972, and before the commencement of this Act and the aforesaid tax has not been collected on such supply on the

ground that no such tax could have been levied or collected at that time :

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or, as the case

may be, clause (b), shall be on the person claiming the exemption under this sub-section.

(3) For the removal of doubts, it is hereby declared that, -

(a) nothing in sub-section (1) shall be considered as preventing any person -

(i) from questioning in accordance with the provisions of any law referred to in that sub-section, the assessment, reassessment, levy or collection of

the aforesaid tax, or

(ii) from claiming refund of the aforesaid tax paid by him in excess of the amount due from him under any such law; and

(b) no act or omission on the part of any person, before the commencement of this Act, shall be punishable as an offence which would not have

been so punishable if this Act had not come into force.

8. Thereafter, the Commissioner of Commercial Taxes issued a circular dated 26th October, 1983, drawing the attention of the concerned officers

to the constitutional amendment and the need to take immediate action for making final assessments for the past years which had not yet been done

and the provisional assessment for the year 1983-84. Consequently, the assessing authorities made final assessments for the past years and

provisional assessments for the year 1983-84. Then the petitioners questioned the validity of the Constitution (Forty-sixth Amendment) Act, 1982,

and the assessment orders passed against them, before this Court by filing a batch of writ petitions. In those cases two contentions were raised.

They were - (1) whether section 6 of the Constitution (Forty-sixth Amendment) Act, 1982, was within the amending power of the Parliament

under article 368 of the Constitution and was valid, and (2) assuming that section 6 of the Constitution (Forty-sixth Amendment) Act, 1982, was

valid and validated the levy and collection of tax made on the foodstuff supplied by the petitioners, did it authorise the levy of sales tax on the

supply of foodstuffs without amending the definitions ""sale"" and ""turnover"" in the Sales Tax Act.

9. The Division Bench of this Court disposed of the batch of writ petitions by its decision in Hotel Dwaraka, Hyderabad Vs. The Union of India

and Others, holding that the exercise of the constituent power for validation of the State laws was lawful, section 6 of the Constitution (Forty-sixth

Amendment) Act, 1982, did not affect the basic structure of the Constitution, it was intended to remove the causes for ineffectiveness or invalidity

of the law and alter the conditions on the basis of which the judgment of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt.

Governor of Delhi, was rendered and thereby to nullify the effect of that judgment and it was intended to validate past transactions and levy and

collection of tax on such transactions. It was specifically held in that case at page 261 regarding the validity of transactions already made as follows

:

On a close reading of section 6 and the marginal note, we are clearly of the opinion that the section is only intended to validate transactions

already made and levy and collection of tax on transactions by way of sale of foodstuffs and beverages ....

10. However, regarding the imposition and collection of tax in future, i.e., after 2nd February, 1983, it was held that the section 6 of the

Amendment Act did not authorise the taxing authorities to levy and collect tax on the foodstuffs and beverages supplied by way of service in hotels,

restaurants and eating houses and such a levy and collection after 2nd February, 1983, could be done only by the amendment of the State law.

Therefore, the provisional assessment orders for the year 1983-84 were quashed. In that decision, it was categorically held that sections 4 and 6

were not ultra vires article 368 and were not violative of articles 14, 19(1)(g) and 21 of the Constitution of India.

11. Aggrieved by that decision to the extent it was against them, some of the petitioners preferred appeals in the Supreme Court. While they were

pending, the State Government promulgated on 10th April, 1985, the Andhra Pradesh General Sales Tax (Amendment) Ordinance, 1985,

amending certain definition clauses in section 2 such as ""dealer"", ""sale"", ""turnover"", ""tax"", etc., inserting new sections 5C, 5D and section 38 and

making some other amendments to the principal Act. Some of the relevant provisions of the Ordinance were given retrospective effect from 2nd

February, 1983. Subsequently, Ordinance No. 9 of 1985 was promulgated on 10th June, 1985, incorporating the very same provisions contained

in Ordinance No. 2 of 1985. That Ordinance was replaced by the Andhra Pradesh Sales Tax (Amendment) Act (No. 18 of 1985) which

contained the very same provisions incorporated in the earlier Ordinances. Some of the provisions of the Act after amendment by Act No. 18 of

1985 which are relevant for our purpose are extracted :

Section 2. (e) ''dealer'' means any person who carries on the business of buying, selling, supplying or distributing goods, or delivering goods on

hire-purchase or on any system of payment by instalments, or carries on or executes any works contract involving supply or use of material directly

or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes -

(i) .....

(ii) .....

(iii) .....

(iii-a) any person, who may, in the course of business of running a restaurant or an eating house or a hotel (by whatever name called), supply by

way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink

(whether or not intoxicating).

12. ""Section 2. (n) ''sale'' with all its grammatical variations and cognate expressions means every transfer of the property in goods whether as such

goods or in any other form in pursuance of a contract of otherwise by one person to another in the course of trade or business, for cash, or for

deferred payment, or for any other valuable consideration, or in the supply or distribution of goods by a society (including a co-operative society),

club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on goods.

.....

13. Explanation V. - Notwithstanding anything contained in this Act or in the Sale of Goods Act, 1930 (Central Act III of 1930), the sale of goods

includes the supply, by way of or as part of any service or in any manner whatsoever, of goods, being food or any other article for human

consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration

and such supply of any goods shall be deemed to be a sale of those goods by the person making the supply of those goods to the person to whom

such supply is made.

Section 2. (s) ''turnover'' means -

(i) .....

(ii) .....

(iii)(d) the aggregate of amounts charged u/s 5C or realisable u/s 5E :

.....

14. ""Section 2(q) ''tax'' means a tax on the sale or purchase of goods payable under this Act and includes, -

(i) .....

(ii) .....

(iii) .....

(iv) .....

(v) .....

(vi) a tax on the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human

consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable

consideration.

15. ""Section 5C. Tax in respect of supply of articles of food or drink in restaurants or catering houses or hotels. - Every dealer running any

restaurant or eating house or hotel (by whatever name called), who supplies, by way of or as part of any service or in any other manner,

whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or

service is for cash, deferred payment or other valuable consideration, shall on the total amount charged by the said dealer for such supply pay a tax

at the rate of five paise on every rupee on the aggregate of such amounts realised or realisable by him during the year :

Provided that no such tax shall be levied if the total turnover of the dealer including such aggregate during the year is less than -

(a) Rupees 50,000 during the period commencing from the 2nd February, 1983, and ending with the 30th June, 1985; and

(b) Rupees 1,00,000 from the 1st July, 1985.

16. Section 5D. (1) Notwithstanding anything in any judgment, decree or order of any court or any other authority, the assessing authority may

assess or reassess the amount of tax payable by -

(a) any dealer running a restaurant or any eating house or hotel (by whatever name called) in the course of business at any time on or after the 7th

day of September, 1978, and before the 2nd February, 1983; or

(b) any dealer running an establishment not being a restaurant or an eating house or a hotel (by whatever name called) at any time on or after the

4th day of January, 1972, and before the 2nd February, 1983, on his turnover relating to the supply of food or any other article for human

consumption or any drink (whether or not intoxicating) in accordance with the principal Act as amended by the Andhra Pradesh General Sales Tax

(Amendment) Act, 1985.

(2) Notwithstanding the expiry of any period of limitation specified in section 14 or section 24A an assessment or reassessment under sub-section

(1) may be made within a period of four years from the 2nd February, 1983.

17. ""Section 38 of Act No. 18 of 1985. - (1) Notwithstanding any judgment, decree or order of any court, tribunal or authority to the contrary,

any assessment (whether provisional or final), reassessment, levy or collection of any tax made or purporting to have been made, any action or

thing taken or done in relation to such assessment (whether provisional or final), reassessment, levy, or collection under the provisions of the

principal Act which imposed or authorised the imposition of or purporting to impose or authorise the imposition of, a tax on the supply, by way of

or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink

(whether or not intoxicating) for cash, deferred payment or other valuable consideration, before the 2nd February, 1983, shall be deemed to be as

valid and effective as if such assessment (whether provisional or final), reassessment, levy or collection or action or thing had been made, taken or

done under the principal Act as amended by this Act and accordingly :-

(a) all acts, proceedings, or thins done or taken by the Government or by any officer of the Government or by other authority in connection with

the assessment (whether provisional or final), reassessment, levy or collection of such tax shall for all purposes, be deemed to be, and to have

always been done or taken in accordance with law;

.....

(3) Notwithstanding anything contained in sub-section (1) any supply of of the nature referred to therein shall be exempt from the aforesaid tax -

(a) where such supply has been made, by any restaurant or eating house or hotel (by whatever name called), at any time on or after the 7th day of

September, 1978, and before the 2nd February, 1983, and the aforesaid tax has not been collected on such supply on the ground that no such tax

could have been levied or collected at that time; or

(b) where such supply, not being any such supply by any restaurant or eating house (by whatever name called), has been made at any time on or

after the 4th day of January, 1972, and before the 2nd February, 1983, and the aforesaid tax has not been collected on such supply on the ground

that no such tax could have been levied or collected at that time :

Provided that the burden of proving that the aforesaid tax was not collected on any supply of the nature referred to in clause (a) or as the case may

be, clause (b), shall be on the person claiming the exemption under this sub-section.

.....

18. Sections 5C, 5D, sub-sections (1), (2), (3) of section 38 and the amendment of the definition clause relating to ""dealer"" by insertion of sub-

clause (iii-a) have been given retrospective effect from 2nd February, 1983, under sub-section (2) of section 1 of the Amendment Act No. 18 of

1985. The validity of the various provisions of the Andhra Pradesh General Sales Tax (Amendment) Ordinance, 1985, were questioned before the

Supreme Court. The petitioners were permitted by the Supreme Court to withdraw the writ petitions and civil appeals filed by them in order to

enable them to file appropriate petitions in this Court. Accordingly they have filed these writ petitions.

19. It was submitted by Sri Nariman, the learned counsel for the petitioners, that in the State of Andhra Pradesh there was no law in force prior to

2nd February, 1983, levying or purporting to levy tax on the sale of food in hotels, restaurants and eating houses and in the absence of any such

law, section 6 of the Constitution (Forty-sixth Amendment) Act, 1982, was not applicable. To appreciate this contention, it will be necessary to

refer to some of the relevant provisions of the Andhra Pradesh General Sales Tax Act (No. 6 of 1957). In the preamble to the Act it was clearly

mentioned that the Act was made to consolidate and amend the laws relating to the levy of a general tax on the sale or purchase of goods.

Marginal note of section 5 reads :

Levy of tax on sales or purchases of goods"" and under that section every dealer except those that are mentioned thereunder is liable to pay tax on

his turnover. Whereas the learned Advocate-General has strongly relied on the decision in Shree Sajjan Mills Ltd. Vs. Commissioner of Income

Tax, M.P., Bhopal and Another, in support of his contention that the marginal note or heading is certainly a relevant factor to be taken into

consideration in construing the ambit of the section, the learned counsel for the petitioners, Sri Nariman has stressed, on the basis of the earlier

decision of the Supreme Court in Board of Muslim Wakfs, Rajasthan Vs. Radha Kishan and Others, that the marginal note appended to a section

cannot be used for construing the section. Under clause (a) of sub-section (2) of that section a dealer is entitled to levy tax in the case of goods

mentioned in the First Schedule at the point of sale and under clause (b) of sub-section (2) he is entitled to levy tax on the goods mentioned in the

Second Schedule at the point of purchase. Some of the goods mentioned in the First Schedule are -

Item Description of the goods

26 All liquors other than country liquor

33 Coffee

34 Chicory

44 Milk foods

44-A All other foodstuffs

49 Tea

110 Ice cream

117 Cakes, biscuits, etc.

129 Articles of cooked or baked food.

20. Thus, the Andhra Pradesh General Sales Tax Act contained provisions levying tax on the sale of foodstuffs and drinks served or supplied in the

hotels, restaurants and eating houses. As a matter of fact the hoteliers collected sales tax from the customers on the food and drinks served or

supplied to them and paid it to the State Government till the decision of this Court was rendered on 19th September, 1980, in Durga Bhavan and

Others Vs. The Deputy Commercial Tax Officer, Anantapur and Another, . Though the Andhra Pradesh General Sales Tax Act provided for the

levy and collection of sales tax on the food or drinks served or supplied in the hotels, restaurants and eating houses, in view of the decision of the

Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, that the supply or service of food in the hotels, restaurants and

eating houses did not amount to a sale and as such not taxable under the Sales Tax Act, this Court held in Durga Bhavan and Others Vs. The

Deputy Commercial Tax Officer, Anantapur and Another, that sales tax was not leviable on such transactions. However, in that case it was

observed that sales across the counter will obviously be transactions of sale. In none of the cases was it held or declared that the law levying or

purporting to levy tax on the sale of food or drinks in hotels, restaurants or eating houses was invalid for want of legislative competence. What all

that was decided by the Supreme Court and this Court was that the transactions by way of supply or service of food or drinks in hotels,

restaurants and eating were not sale transactions attracting the levy of sales tax.

21. The Parliament enacted the Constitution (Forty-sixth Amendment) Act, 1982, in exercise of the constituent power under article 368. u/s 4 of

that Act, the meaning of the expression ""tax on the sale or purchase of goods"" was enlarged as to include tax on the supply, by way of or as part of

any service or in any other manner of foodstuffs or drinks. Under the new clause (29A) inserted in article 366 supply of any goods shall be

deemed to be a sale of those goods. Section 6 provided that for the purpose of every provision of the Constitution in which the expression ""tax on

the sale or purchase of goods"" and for the purpose of any law made or purporting to have been made in pursuance of such expression, it shall be

deemed to include a tax on the supply. Under clause (b) of sub-section (1) of section 6 every transaction by way of supply or as part of any

service or in any other manner whatsoever of food or drink was deemed to be a transaction by way of sale. It was further provided thereunder that

all the taxed levied or collected or purporting to have been levied or collected under the law before the commencement of the Constitution (Forty-

sixth Amendment) Act shall be deemed always to have been validly collected in accordance with law. The provisions of sections 4 and 6 were

construed by this Court in Hotel Dwaraka, Hyderabad Vs. The Union of India and Others, . It was observed at page 250 :

What is sought to be achieved by the Constitution (Forty-sixth Amendment) Act is to remove the cause for ineffectiveness or invalidity and the

effect of the judgment of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . It is clear from the Statement of

Objects and Reasons that section 6 was intended to validate laws levying tax on the supply of goods mentioned in the provision and also

recoveries of tax made under any such law.

22. At page 259 it was further observed :

A reading of the Statement of Objects and Reasons appended to the Amendment Act and the marginal note to section 6 leaves no doubt that the

object of section 6 is only to remove the defect in the law, to validate levying of tax on the supply of goods, being food or any other article for

human consumption or any drink and also collection or recoveries made by way of tax under any such defective law. the marginal note of section 6

is ""Validation and exemption"". Clause (b) clearly says that every transaction by way of supply made before such commencement shall be deemed

to be and shall always be deemed to have been a transaction by way of sale.

23. On consideration of the provisions of the Constitution Amendment Act, 1982, in the light of the judgments of the Supreme Court in Shri Prithvi

Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, and Tirath Ram Rajindra Nath, Lucknow Vs. State of U.P. and

Another, this Court came to the conclusion that by enacting section 6, the Parliament removed the defect pointed out by the court in the then

existing law thereby nullifying the effect of the judgment in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, . Even in Durga Bhavan

and Others Vs. The Deputy Commercial Tax Officer, Anantapur and Another, when this Court pointed out the defect in the Andhra Pradesh

General Sales Tax Act and held that transactions by way of supply or service of food or drinks in hotels or restaurants will not be transactions of

sale exigible to tax, it was categorically laid down that so far as counter sales were concerned they were exigible to tax. So also, in Hotel

Dwaraka, Hyderabad Vs. The Union of India and Others, this Court took the view that there was law levying or purporting to levy tax on the sale

of food or drinks in hotels and restaurants in this State but die to the defect in the law, transactions by way of supply or service of food could not

be subjected to tax and that defect in law was cured by the Constitution (Forty-sixth Amendment) Act, 1982. So, we do not find force in the

contention that there was no law in the State levying or purporting to levy tax on the sale of food or drinks in the hotels and restaurants prior to the

Constitution (Forty-sixth Amendment) Act, 1982.

24. Equally, we are unable to accept the contention of Sri Nariman, the learned counsel for the petitioners, that Parliament does not have the

power to make the law validating the State laws in the exercise of its constituent power under article 368 and that section 6 of the Constitution

(Forty-sixth Amendment) Act, 1982, affects the basic structure of the Constitution. This aspect was dealt with by this Court in Hotel Dwaraka,

Hyderabad Vs. The Union of India and Others, and the above-referred contention was rejected by giving cogent reasons. We are in agreement

with that decision.

25. The next question that arises for consideration is whether the State Government is entitled to recover the tax from the dealers for the period

prior to 2nd February, 1983. This Court held in Hotel Dwaraka''s case 1958 58 STC 241 AP that section 6 of the Constitution (Forty-sixth

Amendment) Act did not authorise the imposition and collection of tar in future, that is, after 2nd February, 1983. The Governor of Andhra

Pradesh promulgated the Andhra Pradesh General Sales Tax Act (Second Amendment) Ordinance, 1985, and subsequently the Andhra Pradesh

General Sales Tax Act (Third Amendment) Ordinance, 1985, which was ultimately replaced by the Andhra Pradesh General Sales Tax

(Amendment) Act (No. 18 of 1985). u/s 6 of that Act, section 5D has been inserted in the principal Act. This section is given retrospective effect

from 2nd February, 1983, as per sub-section (2) of section 1 of the Amendment Act. Under this section, the assessing authority is conferred with

the power to assess or reassess the tax payable by a dealer running a restaurant or an eating house or a hotel at any time on or after 7th

September, 1978, the date on which the judgment in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, was rendered by the

Supreme Court and before 2nd February, 1983. Similarly in the case of a dealer running an establishment other than a hotel, restaurant or eating

house, the assessing authority is given power to assess or reassess the tax payable by such dealer at any time on or after 4th January, 1972, the

date on which the decision in The State of Punjab Vs. Associated Hotels of India Ltd., was rendered and before 2nd February, 1983. Under sub-

section (2) of section 5D, a period of four years from 2nd February, 1983, within which the assessment or reassessment may be made, has been

prescribed.

26. It is submitted by the learned Advocate-General that the provisions of section 5D referred to above give a clear indication that the legislature

intended to give further retrospective effect to the provisions of that section beyond 2nd February, 1983. As we have already stated, all the

transactions by way of supply of foodstuffs in the hotels, restaurants and eating houses prior to 2nd February, 1983, were validated u/s 6 of the

Constitution (Forty-sixth Amendment) Act, 1982. By virtue of the Amendment Act conferring legislative competence on the State Legislature to

make law levying tax on the supply of foodstuffs by way of or as part of any service in a hotel, restaurant or eating house, the State Legislature

inserted section 5D in the principal Act clothing the assessing authority with power to recover the tax payable by any dealer for the period prior to

2nd February, 1983, as specified therein. So it is obvious that the State Legislature has enacted section 5D, in view of the validation of the

transactions of supply of foodstuffs prior to 2nd February, 1983, in order to enable the assessing authorities to recover the tax payable by the

dealers for the period prior to that date. The learned Advocate-General has cited a decision of the Supreme Court in Ahmedabad M. & C,

Printing & Co. v. S. G. Mehta AIR 1983 SC 1436 in support of his contention that the legislature may affect substantial rights by either enacting

laws which are expressly retrospective or by using the language which has that necessary result and that such language may give an enactment

more retrospectivity than what the commencement clause given to it. In that case Hidayatullah, J. (as he then was), speaking for himself and

Raghubar Dayal, J., stated at page 1445 in para 34, the legal position in the following terms :

The date on which the amendment comes into force is the date of the commencement of the amendment. It is read as amended from that date.

Under ordinary circumstances, an Act does not have retrospective operation on substantial rights which have become fixed before the date of the

commencement of the Act. But this rule is not unalterable. The legislature may affect substantial rights by enacting laws which are expressly

retrospective or by using language which has that necessary result. And this language may give an enactment more retrospectivity than what the

commencement clause gives to any of its provisions. When this happens the provisions thus made retrospective, expressly or by necessary

intendment, operate from a date earlier than the date of commencement and affect rights which, but for such operation would have continued

undisturbed.

27. In view of the provisions of section 5D we are inclined to hold that its provisions have more retrospectivity from the respective dates

mentioned therein than the date of commencement, i.e., 2nd February, 1983, as provided in sub-section (2) of section 1 of the Amendment Act

No. 18 of 1985.

28. Section 5D is not in any way contrary to the decision of this Court in Hotel Dwaraka, Hyderabad Vs. The Union of India and Others, . What

all that was stated in that decision was that section 6 of the Constitution (Forty-sixth Amendment) Act did not authorise levy or imposition of tax in

future, that is, with effect from 2nd February, 1983, and this Court specifically laid down in that decision that the past transactions of supply of

food prior to 2nd February, 1983, were validated as deemed sales. It was also held that it was competent for the State Legislature to enact the

law imposing tax on foodstuffs supplied or served to the customers. It is, however, submitted by Sri Nariman, the learned counsel for the

petitioners, that even u/s 5D the State Government cannot recover tax for the period prior to 2nd February, 1983, as the definition of ""sale"" as

inclusive of supply of food came into effect only from 2nd February, 1983, or some day thereafter. In this connection it is relevant to note that

under clause (b) of sub-section (1) of section 6 of the Constitution (Forty-sixth Amendment) Act, 1982, every transaction by way of supply is

deemed to be a sale. If that is so, the amendment of the definition of ""sale"" in the Andhra Pradesh General Sales Tax Act with effect from 2nd

February, 1983, or some day thereafter will be of no consequence as all transactions by way of supply of food prior to 2nd February, 1983, are

deemed by virtue of the constitutional amendment, to be sales.

29. Apart from that, as we have already mentioned, the provisions of the Andhra Pradesh General Sales Tax Act prior to their amendment by Act

No. 18 of 1985 contained provisions levying tax on the sale of foodstuffs in the hotels, restaurants and eating houses. However, in view of the

judgment of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi, that the supply or service of foodstuffs in the

hotels, restaurants and eating houses will not come within the definition of ""sale"", it was held that tax could not be levied on such transactions. The

Parliament removed the basis of that judgment and nullified its effect by the Constitution (Forty-sixth Amendment) Act, 1982, by enlarging the

scope of the expressions ""tax on the sale or purchase of goods"" and ""sale"". It further validated all the past transactions of supply of food or drinks

in the hotels, restaurants and eating houses. When the validation of the past transactions of supply of food was held to be valid by reason of the

change in the law, it can as well be held that u/s 6 of the Constitution (Forty-sixth Amendment) Act and the provisions of the Andhra Pradesh

General Sales Tax Act prior to their amendment by Act No. 18 of 1985, the State Government can levy and collect tax in respect of those past

transactions, of course, subject to the exemption provided under sub-section (2) of section 6. Therefore, the assessing authorities can assess and

reassess the tax payable by a dealer running a restaurant or an eating house or a hotel on or after 7th September, 1978, and before 2nd February,

1983, and a dealer running an establishment not being a restaurant, eating house or hotel on or after 4th January, 1972, and before the 2nd

February, 1983.

30. It was, however, contended by the learned Advocate-General that in Hotel Dwaraka, Hyderabad Vs. The Union of India and Others, though

it was open to the petitioners to contend that there was no law in force in the State of Andhra Pradesh levying or purporting to levy tax on the sale

of food in the hotels, restaurants and eating houses prior to the Constitution (Forty-sixth Amendment) Act, 1982, no such contention was

advanced before this Court in that case and as such on the principle of constructive res judicata the petitioners were precluded from raising such a

plea now. We do not think that we should go into that question because some of the petitioners herein were not parties to the batch of writ

petitions disposed of by the decision in Hotel Dwaraka, Hyderabad Vs. The Union of India and Others, .

31. It was strenuously urged by the learned counsel for the petitioners that the burden placed on the dealer under sub-section (2) of section 6 of

the Constitution (Forty-sixth Amendment) Act, 1982, as well as sub-section (3) of section 38 of the Andhra Pradesh General Sales Tax

(Amendment) Act, 1985, that he did not collect the tax on the ground that no such tax could have been levied or collected at that time either from

1st January, 1972, or 7th September, 1978 as the case may be, was impossible of being discharged in view of its negative nature. According to

him, the only way the dealer could discharge that burden was by production of account books maintained in the course of his business and if the

amount books showed that he had not collected the tax during that period, it amounted to discharge of burden cast on him. The learned counsel

had drawn our attention to a final assessment order dated 3rd March, 1982 for the year 1977-78 passed by the Commercial Tax Officer against

M/s. Nadimane Hotels Private Limited in which it was stated that the amount books revealed that the dealer did not collect sales tax. Even then,

the authorities proceeded to assess the tax and pass a final order of assessment levying the tax. It was also stated by the learned counsel on the

basis of the averments made in the affidavits that the petitioners did not collect any tax on the foodstuffs supplied or served by them because on

such tax could have been levied or collected at that time in view of the decision of this Court in Durga Bhavan and Others Vs. The Deputy

Commercial Tax Officer, Anantapur and Another, . The learned counsel referred to the averments made in the counter-affidavit filed on behalf of

the respondents to show that they did not dispute the averments that the petitioners did not collect tax and that there was no categorical statement

in the counter that the petitioners collected the tax prior to 2nd February, 1983. It was further contended that as per the Andhra Pradesh Catering

Establishments (Fixation and Display of prices of foodstuffs) Order, 1978, the petitioners were prohibited from charging a price higher than the

price fixed under that Order and the price charged by them was not inclusive of sales tax. On the other hand it was submitted by the learned

Advocate-General that generally the hoteliers in the State were issuing consolidated bills to the customers without showing sales tax separately

even in respect of counter sales which were admittedly taxable. In the hotels and restaurants in the State two kinds of foodstuffs are served. They

are (1) items covered by the Andhra Pradesh Catering Establishments (Fixation and Display of prices of foodstuffs) Orders, 1978, and (2) items

not covered by that Order. Very few items are covered by the Control Order. According to the learned Advocate-General, the hoteliers were

generally issuing a consolidated bill for both the items covered by the Control Order and as well as those not covered by that Order without

showing the sales tax separately. It was stated that the operation of the Price Control Order was stayed from time to time, that is, from 12th

January, 1981, to 22nd August, 1983, from 15th June, 1984, to 7th December, 1984, and from 8th February, 1985, to 26th March, 1985. In

those circumstances, according to the learned Advocate-General the burden naturally lies on the petitioners to prove that they have not collected

sales tax. There is no dispute that the tax on the supply or service of foodstuffs in the hotels, restaurants and eating houses was levied and collected

till 9th September, 1980, on which date the decision in Durga Bhavan and Others Vs. The Deputy Commercial Tax Officer, Anantapur and

Another, was rendered, and even in respect of transactions such as counter sales the hoteliers were issuing consolidated bills to the customers

without showing sales tax separately. When consolidated bills were issued, the account books prepared on the basis of such bills will not be of any

help as the entries therein will not show that any sales tax was collected. In respect of counter sales also the bill books and account books were

stated to be containing no entries showing that any sales tax was collected but yet the hoteliers were praying tax on such transactions. In view of

the peculiar circumstances of the case, it is submitted by the learned Advocate-General that the initial burden lies upon the hoteliers to show that

they have not collected the tax. Placing reliance on the judgment of a Division Bench of the Madras High Court in Commissioner of Income Tax,

Madras Vs. P. Veeraswami Nainar Bus owner and the mill owner Ginjee and Others, it is submitted by the learned Advocate-General that the

benefit given to the assessee under sub-section (2) of section 6 of the Constitution (Forty-sixth Amendment) Act and sub-section (3) of section 38

of the Andhra Pradesh General Sales Tax (Amendment) Act (No. 18 of 1985) is in the nature of an exemption and there is nothing illegal or

improper in placing the burden on the person who claims the benefit of such exemption, in particular when the necessary materials and information

required for the purpose is within the exclusive knowledge of the assessee. That was a case where burden was placed on the person who wanted

to claim development rebate u/s 10(2)(vi)(b) of the Income Tax Act. The learned Judges held that when conditions were imposed for claiming

exemption by a person it was for that person to satisfy those conditions. In the instant case what is provided under sub-section (2) of section 6 of

the Constitution (Forty-sixth Amendment) Act and sub-section (3) of section 38 of the Andhra Pradesh General Sales Tax (Amendment) Act (No.

18 of 1985) is in the nature of an exemption and whether the tax was collected or not will be within the special knowledge of the assessee. In such

a case, it cannot be said that the burden has been wrongly placed on the assessee to prove that he did not collect the tax. As already stated, the

petitioners paid the tax on the food supplied in the hotels, restaurants and eating houses till September, 1980, when the decision in Durga Bhavan

and Others Vs. The Deputy Commercial Tax Officer, Anantapur and Another, was rendered. Against that decision, the State preferred an appeal

to the Supreme Court and the same is said to be pending. In the event of success of the State in that appeal, the hoteliers will be liable to pay the

tax. Normally they would not have taken the risk of not collecting the tax. Only where they had collected the tax prior to 2nd February, 1983, they

are made liable to pay. Where they show that they did not collect the tax because such tax could not have been levied and collected, they are

exempted from the liability. In such circumstances, we do not see any illegality or impropriety in casting the burden on the assessees. Pending W.P.

No. 11307 of 1983 and batch this court directed the petitioners to pay half of the tax, by its order dated 14th June, 1984, in W.P.M.P. No.

11545 of 1984 and they paid half of the tax payable by them.

32. The Commissioner of Commercial Taxes issued a circular dated 26th October, 1983, to all the concerned assessing authorities informing them

that by virtue of the Constitution (Forty-sixth Amendment) Act, 1982, the expression ""tax on the sale or purchase of goods"" which occurs in the

Constitution and also in any law passed or made or purporting to have been passed or made before the commencement of the Amendment Act

had been given an extended meaning to include supply by way of or as part of any service, etc., and the transactions of supply and the service of

food were deemed to be sales. The assessing authorities were therefore asked to take immediate steps to initiate final assessment proceedings for

the past years and provisional assessment for the year 1983-84. Accordingly they issued notices to the petitioners for payment of sales tax on the

supply of food and drinks to the customers. When the petitioners objected for the same, the sales tax authorities assessed the petitioners and they

were asked to pay tax with effect from 1978 onwards. These facts are referred to in the decision of this Court in Hotel Dwaraka, Hyderabad Vs.

The Union of India and Others, also. Under the Andhra Pradesh General Sales Tax Act, against an order of assessment right of appeal and a

further appeal and a right of revision are provided. As we have already stated, the burden cannot be said to have been wrongly placed on the

assessee, having regard to the facts and circumstances of the case. It will be for the authorities to decide in each case whether the burden has been

discharged or not and it will not be proper for this Court to lay down any principle as to how the burden has to be discharged or when the burden

can be said to have been discharged.

33. The other question that arises for consideration is whether the imposition of tax from 2nd February, 1983, the date on which the Constitution

(Forty-sixth Amendment) Act, 1982, came into force, to 10th April, 1985, the date on which the Andhra Pradesh General Sales Tax

(Amendment) Ordinance, 1985, was promulgated by the Governor, is legal and valid. In Hotel Dwaraka, Hyderabad Vs. The Union of India and

Others, this Court held that section 6 of the Constitution (Forty-sixth Amendment) Act, 1982, did not authorise the imposition of tax in future, that

is, from 2nd February, 1983, and that it was competent for the State Legislature to amend the provisions of the Andhra Pradesh General Sales

Tax Act providing for levy of tax on the supply of food by way of service, etc. Accordingly, the Governor first promulgated the Ordinance No. 2

of 1985 which was replaced by the subsequent Ordinance No. 9 of 1985. That Ordinance was ultimately replaced by the Andhra Pradesh

General Sales Tax (Amendment) Act, 1985, which received the assent of the Governor on 12th September, 1985, and was published in the

Andhra Pradesh Gazette on 13th September, 1985. Section 5C was inserted in the principal Act by section 6 of the Amendment Act and it was

given retrospective effect from 2nd February, 1983. This is a charging section making liable every dealer running any restaurant, eating house or

hotel and who supplies by way of or as part of any service, etc., any food or drink, to pay tax. The definition of ""dealer"" was also amended by the

Amendment Act with retrospective effect from 2nd February, 1983, as including any person who may in the course of business of running a

restaurant or an eating house or a hotel (by whatever name called) supply by way of or as part of any service or in any other manner whatsoever,

of goods, being food or any other article for human consumption or any drink (whether or not intoxicating). The definition of ""sale"" also had been

enlarged by the Amendment Act to include the supply by way of or as part of any service, etc., of food or any drink. Thus u/s 5C tax is leviable

from 2nd February, 1983, on a transaction of supply by way of service, etc., of food or drink in a hotel, restaurant or an eating house. The

contention of Sri Nariman, the learned counsel for the petitioners, is that the petitioners did not collect any tax from 2nd February, 1983, till 10th

April, 1985, and section 5C levying tax with effect from 2nd February, 1983, is illegal and invalid being violative of articles 19(1)(g), 21 and 300-

A of the Constitution of India. According to the learned counsel, the petitioners did not have the opportunity to pass on the liability to the

consumers and collect tax from them and if the petitioners are asked to pay the tax without collecting the same from the consumers, they will have

to sell their property to pay the amount which will result in crippling their business and throwing them out of it and such an arbitrary action is

violative of articles 14, 19(1)(g), 21 and 300-A of the Constitution of India. It is a settled principle of law that ""as to whether a law should be

enacted, imposing a sales tax or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter

of policy and does not affect the competence of the legislature"", as reiterated by the Supreme Court in Hoechst Pharmaceuticals Ltd. and Others

Vs. State of Bihar and Others, at 1047. Dealing with the contention whether retrospective imposition of tax violates the fundamental rights under

articles 14 and 19(1)(g) the Supreme Court observed in Empire Industries Limited and Others Vs. Union of India and Others, as under :

Imposition of tax by legislation makes the subjects pay taxes. It is well-recognised that tax may be imposed retrospectively. It is also well-settled

that that by itself would not be an unreasonable restriction on the right to carry on business. It was urged, however, that unreasonable restrictions

would be there because of the retrospectivity. The power of the Parliament to make retrospective legislation including fiscal legislation are well-

settled [see Krishnamurthi and Co. etc. Vs. State of Madras, . Such legislation per se is not unreasonable. There is no particular feature of this

legislation which can be said to create any unreasonable restriction upon the petitioners.

.....

It is necessary that the legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called

''small repairs''. Moreover the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature''s or

administrator''s action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive

curing of such a defect in the administration of government outweighs the individual''s interest in benefiting from the defect ..... The court has

been extremly reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of the paramount

governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather

a means of apportioning the costs of government among those who benefit from it.

The impugned legislation does not act harshly nor there is any scope for arbitrariness or discrimination.

34. In Rai Ramkrishna and Others Vs. The State of Bihar, the Constitution Bench of the Supreme Court considered the question as to under what

circumstances retrospective operation of a taxing statute can be held to impose a restriction which is unreasonable thus violative of the right

guaranteed under article 19(1)(g) of the Constitution of India. Repelling the contention that since the period covered by the retroactive operation of

the Act was between the 1st April, 1950, and 25th September, 1961, it should be held that the restrictions imposed by such retroactive operation

are unreasonable, the learned Judges pointed out in paras 17 and 18 at page 1675 as follows :

We do not think that such a mechanical test can be applied in determining the validity of the retrospective operation of the Act. It is conceivable

that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the

restrictions imposed by it may be open to serious challenge as unconstitutional; but the test of the length of time covered by the retrospective

operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively short

period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the

retrospective operation. On the other hand, we may get cases where the period covered by the retrospective operation of the statute, though long,

will not introduce any such infirmity. Take the case of a validating Act. If a statute passed by the legislature is challenged in proceedings before a

court and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long

period and the legislature may well decide to await the final decision in the said proceedings before it uses its legislative power to cure the alleged

infirmity in the earlier Act. In such a case, if after the final judicial verdict is pronounced in the matter the legislature passes a validating Act, it may

well cover a long period taken by the judicial proceedings in court and yet it would be inappropriate to hold that because the retrospective

operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered

by the retrospective operation cannot by itself be treated as a decisive test.

..... between 1950 and 1960 proceedings were pending in court in which this validity if the Act was being examined, and if a validating Act had to

be passed, the legislature cannot be blamed for having awaited the final decision of this court in the said proceedings. This, the period covered

between the institution of the said two suits and their final disposal by this court cannot be pressed into service for challenging the reasonableness of

the retrospective operation of the Act.

35. So also in Shiv Dutt Rai Fateh Chand and Others Vs. Union of India (UOI) and Another, the same view was reiterated in para 33 as follows :

In the instant case, the facts are one shade better. There is no dispute in this case about the validity of the tax payable under the Act during the

period between January 1, 1957, and the date of commencement of the amending Act. It has to be presumed that all the tax has been collected by

the dealers from their customers. There is also no dispute that the law required the dealers to pay the tax within the specified time. The dealers had

also the knowledge of the provisions relating to penalties in the general sales tax laws of their respective States. It was only owing to the deficiency

in the Act pointed out by this court in Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, the penalties became not payable. In this

situation, where the dealers have utilised the money which should have been paid to the Government and have committed default in performing

their duty, and Parliament calls upon them to pay penalties in accordance with the law as amended with retrospective effect, it cannot be said that

there has been any unreasonable restriction imposed on the rights guaranteed under article 19(1) (f) and (g) of the Constitution, even though the

period of retrospectivity is merely nineteen years. It is also pertinent to refer here to sub-section (3) of section 9 of the amending Act which

provides that the provisions contained in sub-section (2) thereof would not prevent a person from questioning the imposition or collection of any

penalty or any proceeding, act or thing in connection therewith or for claiming any refund in accordance with the Act as amended by the amending

Act read with sub-section (1) of section 9 of the amending Act. Explanation to sub-section (3) of section 9 of the amending Act also provides for

exclusion of the period February 27, 1975, i.e., the date on which the judgment in Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of

Maharashtra, was delivered up to the date of the commencement of the amending Act in computing the period of limitation for questioning any

order levying penalty. In those proceedings the authorities concerned are sure to consider all aspects of the case before passing order levying

penalties. The contention that the impugned provision is violative of article 19(1) (f) and (g) of the Constitution has, therefore, to be rejected.

36. In the instant case, the supply or service of food in hotels, restaurants and eating houses in the State of Andhra Pradesh was held to be not a

sale and as such not exigible to tax. It was so held by this Court in Durga Bhavan and Others Vs. The Deputy Commercial Tax Officer, Anantapur

and Another, on 19th September, 1980, having regard to the judgment of the Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt.

Governor of Delhi, . Till then, the hoteliers were paying the tax on such supply and service of food and drinks. Against that decision, an appeal was

preferred by the Sate in the Supreme Court and the matter is still pending. The Parliament passed the Constitution (Forty-sixth Amendment) Act,

1982, changing the law and removing the defect pointed pout by the Supreme Court. Pursuant to the said Validation Act, when the assessing

authorities issued notices to the petitioners to pay the tax and had taken steps to make final assessments for the past years and provisional

assessment for the year 1983-84, they questioned the same by filing writ petitions in this Court which were disposed of on 25th January, 1985,

holding that the Validation Act was legal and valid and all the past transactions were validated. However, it was held that section 6 of the

Amendment Act did not authorise imposition of tax in future, that is, from 2nd February, 1983. Thereafter, the Governor promulgated the

Ordinance No. 2 of 1985 on 10th April, 1985, amending the provisions of the Andhra Pradesh General Sales Tax Act levying tax on the supply of

food and drinks by way of service, etc., in the hotels, restaurants and eating houses in the State with effect from 2nd February, 1983. The

Ordinance was ultimately replaced by the Andhra Pradesh General Sales Tax (Amendment) Act (18 of 1985) which was published in the Gazette

on 13th September, 1986. There an be no dispute that the State Legislature is competent to make such law providing for levy of tax on the supply

of food by way of service, etc., after the enlargement of the meaning of the expression ""tax on the sale or purchase of goods"". Having regard to the

facts stated above, it cannot be said that the retrospective effect given to the provisions of the amending Act from the respective dates levying tax

on the supply of food and drinks by way of service, etc., is unreasonable or arbitrary. As stated above, in the counter-affidavit filed on behalf of

the respondents it was stated that the petitioner had collected the tax from 2nd February, 1983, and as a matter of fact they had paid half of the tax

pursuant to an order of this Court in June, 1984. Even otherwise, when there is valid law made by a competent legislature imposing tax with

retrospective effect, the petitioners are liable to pay such tax. For the reasons stated above we do not find force in the contention that the

retrospective imposition of tax on the supply of food and drinks by way of service in the hotels, restaurants and eating houses is unreasonable or

arbitrary offending articles 14, 19(1)(g), 21 and 300-A of the Constitution of India. It is equally incorrect to state, having regard to the provisions

of law referred to above that the tax is levied without authorities of law.

37. However, Sri Nariman, the learned counsel for the petitioners, had placed strong reliance on two judgments of the Supreme Court in Collector

of Customs and Central Exciseand Another Vs. Oriental Timber Industries, and Ram Chandra Kailash Kumar and Company and Others Vs. State

of U.P. and Another, . Collector of Customs and Central Exciseand Another Vs. Oriental Timber Industries, was a case where the respondent-

firm was a small-scale industry and carried on business in the manufacture of plywood circles. Prior to the impugned notification, the assessment of

excise duty was made on the plywood circles and not on plywood as and when the same came out of the press. It was only in the year 1967 the

excise authorities sought to change the mode of assessment because of audit objection. Aggrieved by that, the respondent-assessee approached

the High Court and he succeeded there. Thereafter the Collector of Customs and Central Excise preferred an appeal to the Supreme Court in

1971 and it was disposed of in the year 1985. While disposing of the appeal, the Supreme Court observed that though the appeal was to be

allowed, because of some peculiar facts and circumstances of this case that no assessment order were passed from 1971 to 1985 and that excess

amount which the Union of India was likely to recover from the respondent was not likely to be a very substantial sum and if the assessments were

made afresh, the small-scale industry of the respondent will be totally crippled. The learned counsel for the Union of India fairly agreed before the

Supreme Court that the notices shall be valid only prospectively but not retrospectively. The Supreme Court gave that direction in the

circumstances of the case and it cannot be taken that the same was enunciated as a principle of law.

38. In the other case Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, relied on by the learned counsel for

the petitioners, the Supreme Court categorically laid down that the State Legislature was competent to make retrospective amendment and that

retrospective imposition of a fee was valid. So enunciating the principle of law, the learned Judges held that it cannot be a rule of universal

application and in a given case and in a given situation the retrospective operation may be hit by article 19. But having regard to the facts and

circumstances of that case it was held that the retrospectivity of the law was not bad. In D. Cawasji and Co., Mysore Vs. State of Mysore and

Another, the enhancement of tax with retrospective effect was held to be unreasonable because it was enhanced from 6 per cent. to 40 per cent.

without any reasonable basis.

39. From the various decisions referred to above and the facts and circumstances of the instant cases it cannot be said that the levy and collection

of tax from the petitioners from 2nd February, 1983, or for the periods prior to that date mentioned in section 5D will in any way be unreasonable

or arbitrary. Therefore, we hold that section 6 of the constitution (Forty-sixth Amendment) Act, 1982, is constitutionally valid and sections 6 and

38 of the Andhra Pradesh General Sales Tax (Amendment) Act, 1985, do not in any way offend articles 14, 19 and 21 nor are they violative of

articles 11, 265 and 300-A.

40. For the reasons stated above, the writ petitions fail and they are accordingly dismissed. But in the circumstance there shall be no order as to

costs. Advocate''s fee Rs. 150 each.

41. Immediately after the judgment was delivered, the counsel for the petitioners made an oral request for leave to a appeal to the Supreme Court.

We do not find any substantial question of law of general importance or any question of law which requires to be decided by the Supreme Court

involved in these cases. Hence, leave declined. Writ petitions dismissed.