Reserved

HIGH COURT OF UTTARAKHAND AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

AND

HON'BLE SRI JUSTICE RAVINDRA MAITHANI

Special Appeal No. 149 of 2021

T.H.D.C. India Ltd. through its CMD

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Sanjay Jain, Senior Counsel assisted by Mr. Shobhit Saharia, Mr. Padmesh Mishra, Ms. Tanya Aggarwal, Ms. Harshita Sukhija and Mr. Nishank Tripathi, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 131 of 2021

N.H.P.C. Ltd. through its Senior Manager (Elec.)

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Arijit Prasad, Senior Advocate assisted by Mr. Alok Mahra, Advocate for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 134 of 2021

M/s Jaiprakash Power Ventures Limited

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Alok Mahra, Advocate for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 136 of 2021

Alaknanda Hydro Power Company Ltd.

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Saurabh Kirpal, Mr. Meenal Garg, Mr. Kartik Nayar and Mr. Dharmendra Barthwal, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 137 of 2021

Alaknanda Hydro Power Company Ltd.

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Saurabh Kirpal, Mr. Meenal Garg, Mr. Kartik Nayar and Mr. Dharmendra Barthwal, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 139 of 2021

M/s Swasti Power Pvt. Limited

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. D.S. Patni, Senior Advocate assisted by Mr. Siddhant Manral, Advocate for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 140 of 2021

Alaknanda Hydro Power Company Ltd.

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Saurabh Kirpal, Mr. Meenal Garg, Mr. Kartik Nayar and Mr. Dharmendra Barthwal, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 141 of 2021

Alaknanda Hydro Power Company Ltd.

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Saurabh Kirpal, Mr. Meenal Garg, Mr. Kartik Nayar and Mr. Dharmendra Barthwal, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 142 of 2021

M/s Swasti Power Pvt. Limited

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. D.S. Patni, Senior Advocate assisted by Mr. Siddhant Manral, Advocate for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 143 of 2021

Alaknanda Hydro Power Company Ltd

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Saurabh Kirpal, Mr. Meenal Garg, Mr. Kartik Nayar and Mr. Dharmendra Barthwal, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 363 of 2021

Bhilangana Hydro Power Ltd.

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. Sujit Ghosh, Mr. Nishant Kumar and Mr. Rohit Arora, Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Special Appeal No. 367 of 2021

Uttar Pradesh Power Corporation Limited

.....Appellant

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the appellant: Mr. U.K. Uniyal, Senior Advocate assisted by Mr. Sitesh Mukherjee, Mr. Abhishek Kumar and Mr. Nived V.V.N., Advocates for the appellant.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

Writ Petition (M/S) No. 1739 of 2021

Renew Jal Urja Private Limited

.....Petitioner

Versus

State of Uttarakhand and others

.....Respondents

Counsel for the petitioner : Mr. Amar Dave, Mr. Ankur Saigal, Mr. Vikas Bahuguna and Ms. Kamakshi Sehgal, Advocates for the petitioner.

Counsel for the respondents : Mr. Dinesh Dwivedi, Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates and Mr. B.S. Parihar, Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, Standing Counsel for the Union of India.

JUDGMENT

Per: Hon'ble Ravindra Maithani, J.

The constitutional validity of the Uttarakhand Water Tax on Electricity Generation Act, 2012 ("the Act") is under challenge in all these matters. Except Writ Petition (M/S) No. 1739 of 2021, Renew Jal Urja Private Limited v. State of Uttarakhand and others, all the special appeals arise from a common judgment and order dated 12.02.2021, passed by the learned Single Judge, in the writ petitions filed by the appellants [except appellant in SPA No. 367 of 2021 i.e. the Uttar Pradesh Power Corporation Limited; this entity was respondent no. 7 in WP (M/S) No. 123 of 2017] challenging the validity of the Act. By the impugned judgment and order dated 12.02.2021, the learned Single Judge has upheld the constitutionality of the Act.

FACTS

2. The appellants/petitioner ("hereinafter referred to as "the appellants")are power generating companies engaged in the production of electricity by using the river water. They own, operate and maintain these hydropower projects. These appellants entered into agreements with the Government of Uttarakhand on various dates. The projects are running successfully. By the Act, tax has been imposed on "**drawal of water for electricity generation**". In order to better appreciate the case, the relevant details of each project are given as hereunder:-

(i) **SPA No. 149 of 2021, THDC India Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 187 of 2016)**:

(a) Name of the project: Tehri Dam & Hydroelectric Project (Tehri Dam Project); Koteshwar Hydroelectric Project (KHEP) and other projects

(b) The river/source at which the said power project is constructed: Bhagirathi River

(c) Capacity :

Tehri Dam Project:	1000 MW
Tehri PSP:	1000MW
KHEP:	400 MW

(d) Date of Restated Implementation Agreement: **No IA or RIA**

(e) Year of commencement of the Power Project:

(i)	Tehri Dam Project	-	2006
(ii)	KHEP	-	2011

(ii) **SPA No. 131 of 2021, M/s National Hydro Power Corporation v. State of Uttarakhand and others (arises out of WPMS No. 272 of 2016)**:

(a) Name of the project: Dhauliganga Hydropower Project &Tanakpur Hydro Power Project

(b) The river/source at which the said power project is constructed: Dhauliganga/Sharda River

(c) Capacity :

Tanakpur Hydro Power Project:	120 MW
Dhauliganga Hydropower Project:	280 MW

(d) Date of Power Purchase Agreement: 30.04.2014

(e) Year of commencement of the Power Project: 2005

(iii) **SPA No. 134 of 2021, M/s Jaiprakash Power Venture Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 123 of 2017)**:

(a) Name of the project: Vishnuprayag Hydroelectric Project

(b) The river/source at which the said power project is constructed: Alaknanda River

(c) Capacity : 400 MW

(d) Date of Implementation Agreement: 22.03.2003

(e) Year of commencement of the Power Project: 2006

(iv) **SPA No. 136 of 2021, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 1500 of 2016)**:

(a) Name of the project: Srinagar Hydroelectric Project

(b) The river/source at which the said power project is constructed: Alaknanda River

(c) Capacity : 330 MW

(d) Date of Implementation Agreement: 19.08.1998

(e) Date of Restated Implementation Agreement: 10.02.2006

(f) Year of commencement of the Power Project: 2015

(v) **SPA No. 137 of 2021, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 279 of 2020)**:

(a) Name of the project: Srinagar Hydroelectric Project

(b) The river/source at which the said power project is constructed: Alaknanda River

(c) Capacity : 330 MW

(d) Date of implementation Agreement: 28.08.1998

(e) Date of Restated Implementation Agreement: 10.02.2006

(f) Year of commencement of the Power Project: 2015

(vi) **SPA No. 139 of 2021, M/s Swasti Power Pvt. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 641 of 2017)**:

(a) Name of the project: Bhilangana Hydro Power Project

(b) The river/source at which the

said power project is constructed: Bhilangana River

(c) Capacity : 22.5 MW

(d) Date of Implementation Agreement: 16.10.2003

(e) Year of commencement of the Power Project: 2009

(vii) **SPA No. 140 of 2021, Alaknanda Hydro Power Company Ltd. (AHPCL) v. State of Uttarakhand and others(arises out of WPMS No. 631 of 2017)**:

(a) Name of the project: Srinagar Hydro Electric Project.

(b) The river/source at which the said power project is constructed: Alaknanda River

(c) Capacity : 330 MW

(d) Initial implementation (IA) agreement entered between Duncans North Hydro Power Company Limited (Duncans) (Now known as Alaknanda Hydro Power Company Ltd.) on: 28.09.1998

(e) Date of Restated Implementation Agreement (RIA) between AHPCL, Govt. of UP and Uttarakhand: 10.02.2006

(f) Year of commencement of the Power Project: 2015

(viii) **SPA No. 141 of 2021, M/s Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 2396 of 2019)**:

(f) Name of the project: Srinagar Hydroelectric Project

(a) The river/source at which the said power project is constructed: Alaknanda River

(b) Capacity : 330 MW

(c) Date of Implementation Agreement: 19.08.1998

(d) Date of Restated Implementation Agreement: 10.02.2006

(e) Year of commencement of the Power Project: 2015

(ix) **SPA No. 142 of 2021, M/s Swasti Power Pvt. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 2074 of 2016)**:

(a) Name of the project: Bhilangana Hydro Power Project

(b) The river/source at which the

said power project is constructed: Bhilangana River

(c) Capacity : 22.5 MW

(d) Date of Implementation Agreement: 16.10.2003

(e) Year of commencement of the Power Project: 2009

(x) **SPA No. 143 of 2021, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 3603 of 2019)**:

(a) Name of the project: Srinagar Hydroelectric Project

(b) The river/source at which the

said power project is constructed: Alaknanda River

(c) Capacity : 330 MW

(d) Date of Implementation Agreement: 19.08.1998

(e) Date of Restated Implementation Agreement: 10.02.2006

(f) Year of commencement of the Power Project: 2015

(xi) **SPA No. 363 of 2021, M/s Bhilangana Hydro Power Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 3084 of 2016)**:

(a) Name of the project: Bhilangana Hydro Power Project

(b) The river/source at which the

said power project is constructed: Bhilangana River

(c) Capacity : 24 MW

(d) Date of Implementation Agreement: 25.01.2007

(e) Year of commencement of the Power Project: 2011

(xii) **SPA No. 367 of 2021,Uttar Pradesh Power Corporation Limited v. State of Uttarakhand and others (arises out of WPMS No. 123 of 2017)**:

(a) Name of the project: Vishnuprayag Hydroelectric Project

(b) The river/source at which the

said power project is constructed: AlaknandaRiver

(c) Capacity : 400 MW

(d) Date of Restated Implementation Agreement: 22.03.2003

(e) Year of commencement of the Power Project: 2006

(xiii) **WPMS No. 1739 of 2021, Renew Jal Urja Private Limited v. State of Uttarakhand and others** :

(a) Name of the project: Singoli Bhatwari Hydro Power Project

(b) The river/source at which the said power project is constructed: Mandakini River

(c) Capacity : 99 MW

(d) Date of Implementation Agreement: 26.11.2009

(e) Year of commencement of the Power Project: 2020

3. The grounds on which the constitutional validity of the Act has been challenged, are enumerated in para three of the impugned judgment as follows:-

> "(i) The enactment, promulgation and notification of the said Act being in violation of the provisions of Articles 200, 246, 248, 256, 285, 288(2) and 300A of the Constitution of India.
> (ii) The enactment, promulgation and notification of the said Act being in violation of the provision of Entry 97 of List I of the Seventh Schedule of the Constitution of India.
> (iii) The enactment, promulgation and notification of the said Act being in violation of the provisions of Entry 17 of List II of the Seventh Schedule of the Constitution of India.
> (iv) The consideration of and the assent given for the enactment and the notification of the said Act being in violation of Article 200 and 288(2) of the Constitution of India having been accorded the consent by the Governor of the State of Uttarakhand, without obtaining the consent of the President of India.
> (v) The fixation of the rates of water tax in terms of the provisions of Chapter 5 of the said Act by means of a notification issued by respondent no. 1 to 5 being in violation of Article 288(2) of the Constitution of India as that the said Act was promulgated without obtaining consent from the President of India, in violation of mandatory provisions under the Article 288(2) of the Constitution of India, wherein it is obligatory on part of the State Legislature, in case of fixation of any rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained

to the making of any such rule or order. The rates of Water Tax having not received the previous consent of the President.

(vi) The enactment, promulgation and notification of the said Act imposing Water Tax violating the fundamental rights of the petitioner of carry on its trade and business under Article 19(1)(g) of the Constitution of India.

(vii) The enactment, promulgation and notification of the said Act, being arbitrary, manifesting arbitrariness in State action and being exercise of the colourable powers of the respondent State of Uttarakhand, thus violating the fundamental rights of the petitioner under Articles 14 and 19(1)(g) of the Constitution of India."

4. In Writ Petition (M/S) No. 1739 of 2021, the challenge to the Act is made, *inter alia,* on the following grounds:

(i) That the Act is *ultra vires* to Article 14, 19(1)(g), 246, 248, 265 and 300A of the Constitution.

(ii) The State legislature lacks competence to legislate the Act.

(iii) There is no taxing Entry in the State List, which may allow the State Legislature to levy the water tax on electricity generation.

(iv) The field of legislation is available to the Parliament under Entry ("E") 97, List ("L") I of the VIIth Schedule ("S") of the Constitution.

(v) The Act could not have been enacted under E 17, L II of S VII, which is a general entry and not a taxing entry.

(vi) Power to tax cannot be derived from a general legislative entry.

(vii) The tax in question cannot derive its competence from E 48 and E 49 of L II, which relate to land. Such tax can be imposed on the twin test, namely, (i) that such tax is directly imposed on lands and buildings and (ii) that it bears a definite relation to it.

(viii) In the instant case, the tax in question is not directly imposed on the land, hence, the Act could not be enacted under E 48 and 49 of L II.

(ix) The State Legislature is also not competent to legislate the Act under E 45, L II. It only relates to land revenue i.e. a share of the sovereign from the produce of the land.

(x) The imposition of tax by the State Government is violative of Article 300A of the Constitution.

(xi) The Act levies tax on generation of electricity which is merely named as water tax. The State Legislature is not competent to enact on the subject. It falls within the Union List.

5. The Union of India has filed counter affidavit in SPA No. 149 of 2021 and has questioned the competence of State Legislature in enacting the Act. A few paragraphs of the counter affidavit need reproduction. They are as follows:-

> "4. That the powers to levy taxes/duties are specifically stated in the VII Schedule. List- II of the VII Schedule lists the powers of levying of taxes/duties by the States in entries-45 to 63. No taxes/duties which have not been specifically mentioned in this list can be levied by the State Governments under any guise whatsoever – as Residuary powers are with the Central Government.
>
> 5. That State Legislature under the List II of the Seventh Schedule of the Constitution of India, does not have the Legislative power or the Constitutional mandate to make or promulgate any law pertaining to imposition of tax on the water drawn by any law pertaining to imposition of tax on the water drawn by any person much less for non-consumptive usage of water drawn for generation of electricity.
>
> 6. That Article 248 of the Constitution of India, 1950, states as under:-
>
> "248. Residuary power of Legislation
>
> (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List of State List.
>
> (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."
>
> A reading of the above Article manifests, that the Constitution of India envisaged that in respect of any matter which is not enumerated in the State List, the Parliament has the exclusive

power to make any laws in respect of the said matter. The same includes the power of imposing a tax not mentioned in the State List or in the concurrent List. This ground is further cemented by the provisions of entry 97 List I (Union List) Schedule VII – "Any other matter not enumerated in List II or List III including any tax not mentioned either of those Lists).

7. That no item provided either in the State List or the Concurrent List, is pertaining to taxation or taxes on usage of water or otherwise, therefore the State Government of Uttarakhand does not have the Legislative competence or mandate to make or frame any laws pertaining to imposition of taxes on the water drawn for the purposes of generation of electricity in the State of Uttarakhand. Hence the provisions of Chapters 3 to 5 seeking to levy and impose Water Tax on generation of electricity are unconstitutional. Hence enactment of the said Act and its consequent promulgation and notification is contrary to the provisions of Article 245, 246 and 286 of the Constitution of India, besides other Articles of the Constitution of India mentioned first hereinabove.

8. That the State of Uttarakhand has imposed taxes/duties on generation of electricity under the guise of levying a cess on the use of water for generating electricity. However, though the State may call it a water Tax/cess, it is actually a tax on the generation of electricity – the tax is to be collected ultimately from the consumers of electricity who may happen to be residents in other State.

15. That Hydro Power Projects do not consume water to produce electricity. Electricity is generated by directing the flow of water through a turbine which generates electricity – on the same principle as electricity from wind projects where wind is utilized to turn the turbine to produce electricity. Therefore, there is no rationale for levy of 'water cess' or "air cess".

22. That Ld. Single bench failed to appreciate that the Height of the Head is directly proportional to the number of units of Electricity generated, since higher the Head, more the units of Electricity generated. If that be so, the tax levied by the State, in PITH & SUBSTANCE, is a tax on Generation of Electricity and not on Use of Water as sought to be made out. Hence, it is clearly beyond the legislative competence of the State.

23. That Ld. Single bench failed to appreciate that even though the nomenclature used to name a levy is not determinative of the real character or nature of the levy, going by the above, the present, in pith and substance, is clearly a

> tax on generation of electricity, even though it is called a tax on use of water, in the absence of any other indicator, confines within the measure of tax and determine the nature of the tax itself. Thus, the levy under the Act is on non-consumptive use of water for the purpose of generation of electricity. In other words, Entry 45 of List II pertains to land revenue and Entry 49 pertains to tax on land and buildings and both cannot be used for the purpose of deriving legitimacy by the State to impose a tax on non-consumptive use of water."

6. In order to systematic understanding of the arguments and deliberations, this Court is going to formulate questions that arise in these matters and thereafter deliberate and decide them. Arguments have been made by many counsel[1]appeared for the parties. Many of the arguments, despite being careful, were overlapping and repetitive, in essence. Therefore, this Court instead of indicating separate arguments advanced by each of the counsel, proposes to collate the arguments under various heads and discuss them at appropriate place.

KEY CHALLENGES

7. The Act has been challenged on various grounds. The main grounds for challenge are as follows:-

(i) The central theme of the Act is that the tax is levied on generation of electricity. It is on electricity generation. It is not a water tax.

(ii) The State Legislature is not competent to legislate the Act.

(iii) In the Act, there is no taxing provision. Tax has been imposed by a notification dated 07.11.2015 by the Secretary to the Government of Uttarakhand. It is an executive act. It is not a tax levied by a statute. The act of levying of tax is an excessive delegation by the

[1] Mr. Sanjay Jain, Senior Advocate, Mr. Saurabh Kirpal, Senior Advocate, Mr. Arijit Prasad, Senior Advocate, Mr. U.K. Uniyal, Senior Advocate, Mr. D.S. Patni, Senior Advocate, Mr. Amar Dave, Advocate and Mr. Rajesh Sharma, Advocate.

State Legislature. The principle of promissory estoppel would apply in the instant case, therefore, the State would be stopped to charge such a tax.

CONSTITUTIONAL PROVISIONS

8. During the course of arguments, various constitutional provisions have been referred to by the learned counsel for the parties. Some of the provisions may be quoted at this stage so as to better appreciate the arguments. Part XI of the Constitution deals with relations between the Union and the States. Chapter I of it is with regard to legislative relations. The power of legislation has been given mainly under Article 245 and 246 of the Constitution. They read as follows:-

> "**245. Extent of laws made by Parliament and by the Legislatures of States**.—(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
>
> (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

> "**246. Subject-matter of laws made by Parliament and by the Legislatures of States**.—(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
>
> (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
>
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part

thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

9. Reference has also been made to Articles 246A, 248, 265 and 366 (28) of the Constitution. They read as follows:-

"**246A. Special provision with respect to goods and services tax**.—(1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."

"**248. Residuary powers of legislation**.—(1) Subject to article 246A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

"**265. Taxes not to be imposed save by authority of law**.—No tax shall be levied or collected except by authority of law."

"**366. Definitions**.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say-

.....

.....

.....

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;"

10. Article 246 of the Constitution confers the competence on the Parliament and the State Legislatures to make laws. The fields on which the Parliament and the State Legislatures may enact laws have been separately given under the three Lists given in VIIth Schedule. The VIIth Schedule of the Constitution defines the field of legislation. Various entries of List I and List II of VIIth Schedule have been referred to during the course of arguments. A few of them needs mention at this stage.

"Seventh Schedule

List I - Union List

Entry 56 : Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

Entry 97: Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

Seventh Schedule

List II - State List

Entry 17 : Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water

storage and water power subject to the provisions of entry 56 of List I.

Entry 18: Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

Entry 45: Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

Entry 49: Taxes on lands and buildings.

Entry 50: Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

Entry 53: Taxes on the consumption or sale of electricity.

Entry 66: Fees in respect of any of the matters in this List, but not including fees taken in any court."

11. The instant matter requires interpretation of constitutional provisions and scope of various entries of the VIIth Schedule. Therefore, on behalf of both the parties, reference has been made to the principles governing the interpretation of the Constitution. It would be apt to begin with the arguments made on interpretation of the Constitution.

INTERPRETATION OF THE CONSTITUTION

12. Learned counsel appearing for the appellants would submit that in order to enable the State Legislature to levy any tax, the field of legislation should be explicitly defined in view of Articles 246 & 248(2) of the Constitution. The taxing entry should be distinct. Learned counsel would also raise the following points on this aspect:-

(i) Initially, State took shelter under E 17 L II of S VII as a source of legislation, but it has further been expanded and

now support of E 45, 49, 50, L II of S VII have been collectively taken by the State as a source for enacting the Act.

(ii) While examining the validity of enactment, verbal Gymnastics should be avoided.

(iii) The field of Legislation is given under S VII in three lists. The entries in these lists are under two categories – (i) General Entries and (ii) Taxing Entries.

(iv) In S VII, L 1 of the Constitution of India, E 1 to 81 are General Entries whereas E 82 to 92 are Taxing Entries. Similarly, in L II of S VII, E 1 to 44 are General Entries and E 45 to 66 are Taxing Entries.

(v) E 17 L II of S VII is not a taxing entry. It is a regulatory entry, which is subject to the provision of E 56 of L I.

(vi) Even if the Governor accords its assent, it cannot validate any enactment unless State has legislative competence to enact such law.

(vii) Article 265 of the Constitution categorically mandates that no tax shall be levied or collected except by the authority of law. In the instant case, State had no authority for enacting the Act.

(viii) In case there is no distinct and explicit taxing Entry, the residuary power of legislation lies with the Union in view of E 97 L I of S VII.

(ix) The Constitution has opted to treat water as separate from land, minerals, even forests therefore, by way of interpretation, we cannot read into an entry, which is not clearly provided.

(x) It is not permissible for the courts to nullify, destroy or distort the reasonably clear meaning of any part of the Constitution. There is no room for pedantic hair-splitting in the selection of words.

13. In support of his contention, on behalf of the appellants, reliance has been placed on the principle of law as laid down in the cases of M.P.V. Sundaramier[2], Hoechst Pharmaceuticals Ltd.[3], Kesoram Industries[4], Jalkal Vibhag[5], Godfrey Philips India Ltd.[6], M.P. Cement Manufacturers' Association[7], India Cement Ltd.[8], Kartar Singh[9], Harbhajan Singh Dhillon[10], Rajendra Diwan[11], State of Karnataka[12], Association of Natural Gas[13] and State of Meghalaya[14].

14. On the other hand, learned Counsel appearing for the State of Uttarakhand would submit that while interpreting a statute, there shall be presumption of validity of a statute made by the State Legislature. The Courts will presume every state of affairs that help in sustaining the statute. He would submit the following points on this aspect:-

(i) No provision of the constitutional statute should be read in isolation. It has to be construed as a whole with each part throwing light on the meaning of the other. The literal or textual interpretation has to give way to liberal, purposive, pragmatic and value oriented contextual interpretation.

(ii) A liberal construction should be put upon the statutory provision so as to uphold them.

(iii) A statute is designed to be workable and the interpretation should be so made so as to secure the

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[2]M.P.V. Sundararamier and Co. v. State of A.P. and others, AIR 1958 SC 468
[3] Hoechst Pharmaceuticals Ltd. and others v. State of Bihar and others, (1983) 4 SCC 45
[4]State of W.B. v. Kesoram Industries Ltd. and others, (2004) 10 SCC 201
[5]Jalkal Vibhag Nagar Nigam v. Pradeshiya Industrial and Investment Corpn., 2021 SCC OnLine SC 960
[6]Godfrey Philips India Ltd. and another v. State of U.P., (2005) 2 SCC 515
[7]M.P. Cement Manufacturers' Association v. State of M.P. and others, (2004) 2 SCC 249
[8]India Cement Ltd. and others v. State of Tamil Nadu and others, (1990) 1 SCC 12
[9] Kartar Singh v. State of Punjab, (1994) 3 SCC 569
[10]Union of India v. Harbhajan Singh Dhillon, (1971) 2 SCC 779
[11]Rajendra Diwan v. Pradeep Kumar Ranibala and another, (2019) 20 SCC 143
[12]State of Karnataka v. Union of India and others, (1977) 4 SCC 608
[13]Association of Natural Gas v. Union of India, (2004) 4 SCC 489
[14]State of Karnataka v. State of Meghalaya, (2023) 4 SCC 416

object. It should not be so interpreted so as to nullify other provisions.

(iv) Words used in the Constitution that confer legislative power must receive most liberal construction and if they are words of wide amplitude, they must be interpreted widely.

(v) Parliamentary legislation has supremacy under Article 246(1) and (2). While maintaining such supremacy, the federalistic feature has to be respected. The power of the State in the matter of legislation cannot be whittled down.

(vi) Our Constitution is federal and therefore an interpretation that preserves and promotes the federal structure rather than diluting it, should be adopted.

(vii) In order to interpret the Constitution, keeping in view its volume, one method that may be adopted would be to use the Constitution as composed of constitutional topographical space. Within such topographical space, it may be expected that each provision is intimately related to, assigning meaning from and transforming the meaning of other provisions of that topographical space.

15. In support of his contentions, learned Counsel has placed reliance on the principle of law as laid down in the cases of Bihar Distillery Ltd.[15]; East India Cotton Mfg. Co. Ltd.[16]; New Delhi

[15]State of Bihar and others v. Bihar Distillery Ltd. and others, (1997) 2 SCC 453
[16]Assessing Authority-cum-Excise and Taxation Officer, Gurgaon and another v. East India Cotton Mft. Co. Ltd., Faridabad, (1981) 3 SCC 531

Municipal Committee[17]; State of Karnataka[18]; Deepal Girishbhai Soni[19]; State (NCT of Delhi)[20]; Hindustan Bulk Carriers[21]; GVK Industries Ltd.[22]; Indian Aluminium Co.[23]; ITC Ltd.[24]; Kesoram Industries[25], Ahmedabad Municipal Corporation[26]; Jindal Stainless Limited[27] and M. Hakeem[28].

16. The Constitution of any nation reflects the expression of the masses in general. The Indian Constitution is not an exception to it. It is a product of long drawn freedom struggle. It is a result of politics. Not politics of power, but perhaps politics of participation of each individual in the nation building. It is a document for creation of the future of the nation. It is a document so sacrosanct so as to ensure governance of a nation. It is supreme law. Statutes are different than the constitutional law. Statutes are made by the organ created by the Constitution. Each and every statute must be in conformity with the Constitution, which is the highest law.

17. Insofar as the Indian Constitution is concerned, a heterogeneous society was to be woven with a common thread. Diversities were immense. Geographical and demographic set ups were different in abundance. The Preamble of the Constitution sets out the task ahead. Justice, liberty and freedom were to be ensured. The question is – should the Constitution be interpreted keeping in view the thought process of its maker?

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[17]New Delhi Municipal Committee v. Life Insurance Corporation of India, (1977) 4 SCC 84
[18]*Supra* note 12
[19]Deepal Girishbhai Soni and others v. United India Insurance Co. Ltd., (2004) 5 SCC 385
[20]State (NCT of Delhi) v. Union of India and another, (2018) 8 SCC 501
[21]Commissioner of Income Tax v. Hindustan Bulk Carriers,(2003) 3 SCC 57
[22]GVK Industries Ltd. and another v. Income Tax Officer and another, (2011) 4 SCC 36
[23]Indian Aluminium Co. and others v. State of Kerala and others, (1996) 7 SCC 637
[24]ITC Ltd. v. Agricultural Produce Market Committee and others, (2002) 9 SCC 232
[25]*Supra* note 4
[26]Ahmedabad Municipal Corporation v. GTL Infrastructure Limited and others, (2017) 3 SCC 545
[27]Jindal Stainless Limited and another v. State of Haryana and others, (2017) 12 SCC 1
[28]Project Director, National Highways No. 45 E and 220 National Highways Authority of India v. M. Hakeem and another, (2021) 9 SCC 1

18. In the case of Supreme Court Advocates on Record Association[29], the Hon'ble Supreme Court observed that the Constitution should not be confined only to the interpretation which the framers, with the conditions and outlook of their time would have placed upon them. In paras 16 and 17, the Hon'ble Supreme Court observed as hereunder:-

> "**16.** The proposition that the provisions of the Constitution must be confined only to the interpretation which the Framers, with the conditions and outlook of their time would have placed upon them is not acceptable and is liable to be rejected for more than one reason — firstly, some of the current issues could not have been foreseen; secondly, others would not have been discussed and thirdly, still others may be left over as controversial issues, i.e. termed as deferred issues with conflicting intentions. Beyond these reasons, it is not easy or possible to decipher as to what were the factors that influenced the mind of the Framers at the time of framing the Constitution when it is juxtaposed to the present time. The inevitable truth is that law is not static and immutable but ever increasingly dynamic and grows with the ongoing passage of time.
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> **17.** So it falls upon the superior courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without sacrificing its essential features and basic principles which lie at the root of Indian democracy. However, in this process, our main objective should be to make the Constitution quite understandable by stripping away the mystique and enigma that permeates and surrounds it and by clearly focussing on the reality of the working of the constitutional system and scheme so as to make the justice delivery system more effective and resilient. Although frequent overruling of decisions will make the law uncertain and later decisions unpredictable and this Court would not normally like to reopen the issues which are concluded, it is by now well settled by a line of judicial pronouncements that it is emphatically the province and essential duty of the superior courts to reew or reconsider their earlier decisions, if so warranted under compelling circumstances and even to overrule any questionable decision, either fully or partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas, principles and perception grown

[29]Supreme Court Advocates on Record Association and another v. Union of India, (1993) 4 SCC 441

along with the passage of time. This power squarely and directly falls within the rubric of judicial review or reconsideration."

19. The Constitution is an organic document. It has to serve the society for eternity. The limit and scope of the Constitution has been interpreted in the case of Burah[30], the Hon'ble High Court had observed that "**The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions**."

20. The role of constitutional courts in the matter of interpretation of Constitution has been discussed by the Federal Court of India in Re: The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, (XIV of 1938)[31]. The Hon'ble Court observed that a Constitution must be construed keeping in view that it is a living and organic document. It was observed that "**A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat***. (It is better that it should live, than it should perish.)"

[30]The Empress v. Burah and Another [(1878) 5 I.A. 178]
[31]AIR 1939 FC 1

21. In the case of Ashok Kumar Gupta[32], the Hon'ble Court observed as hereunder:-

> "**51.** Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally. The judicial function of the Court, thereby, is to build up, by judicial statesmanship and judicial review, smooth social change under rule of law with a continuity of the past to meet the dominant needs and aspirations of the present. This Court, as sentinel on the qui vive, has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Part III and Part IV — a truism meaningful and a living reality to all sections of the society as a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is an armour to realise distributive justice. Keeping the above perspective in the backdrop of our consideration, let us broach whether the rights of the employees belonging to the general (*sic* reserved) category are violative of Article 14; inconsistent with and derogatory to the right to equality and are void ab initio."

22. In the case of Special Reference No. 01 of 2002[33], the Hon'ble Supreme Court discussed the concept while interpreting the Constitution. The Hon'ble Court observed "**A constitutional court like this Court is a nice balance of jurisdiction and it declares the law as contained in the Constitution but in doing so it rightly reflects**

[32]Ashok Kumar Gupta and another v. State of U.P. and others, (1997) 5 SCC 201
[33](2002) 8 SCC 237

that the Constitution is a living and organic thing which of all instruments has the greatest claim to be construed broadly and liberally"……. "**In the interpretation of a constitutional document words are but the framework of concepts and concepts may change more than words themselves. The significance of the change of the concepts themselves is vital and the constitutional issues are not solved by a mere appeal to the meaning of words without an acceptance of the line of their growth. It is aptly said that the intention of the Constitution is rather to outline principles than to engrave details**".

23. The rule of *contemporanea expositio*may not be applicable in the matter of interpretation of Constitution. In the case of Jamshed N. Guzdar[34], the Hon'ble Supreme Court observed that "**We are afraid, when it comes to interpretation of the Constitution, it is not permissible to place reliance on *contemporanea expositio* to the extent urged. Interpretation of the Constitution is the sole prerogative of the constitutional courts and the stand taken by the executive in a particular case cannot determine the true interpretation of the Constitution**".

24. The needs of changing times and responsiveness have to be reflected while interpreting the Constitution. In the case of Navtej Singh Johar[35], the Hon'ble Supreme Court on that aspect held that "**A democratic Constitution like ours is an organic and breathing document with senses which are very much alive to its surroundings, for it has been created in such a manner that it can adapt to the needs and developments taking place in the society**.". The Hon'ble Supreme Court also referred to a case law in Saurabh Chaudri[36], wherein the Hon'ble Supreme Court has observed that "….**Our Constitution is organic in nature. Being a living organ, it is**

[34]Jamshed N. Guzdar v. State of Maharashtra and others, (2005) 2 SCC 591
[35]Navtej Singh Johar and others v. Union of India, (2018) 10 SCC 1
[36]Saurabh Chaudri v. Union of India, (2003) 11 SCC 146

ongoing and with the passage of time, law must change. Horizons of constitutional law are expanding." In para 95 of the judgment, the Hon'ble Supreme Court further outlined the role of the Constitutional Courts in interpreting the Constitution, particularly in realising the evolving nature of this living document. The Hon'ble Supreme Court observed as hereunder:-

> "**95.** Thus, we are required to keep in view the dynamic concepts inherent in the Constitution that have the potential to enable and urge the constitutional courts to beam with expansionism that really grows to adapt to the ever-changing circumstances without losing the identity of the Constitution. The idea of identity of the individual and the constitutional legitimacy behind the same is of immense significance. Therefore, in this context, the duty of the constitutional courts gets accentuated. We emphasise on the role of the constitutional courts in realising the evolving nature of this living instrument. Through its dynamic and purposive interpretative approach, the judiciary must strive to breathe life into the Constitution and not render the document a collection of mere dead letters. The following observations made in *Ashok Kumar Gupta* v. *State of U.P.* [*Ashok Kumar Gupta* v. *State of U.P.*, (1997) 5 SCC 201 : 1997 SCC (L&S) 1299] further throw light on this role of the courts : (SCC p. 244, para 51)
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> > "*51.* Therefore, it is but the duty of the Court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language or the words contained in the living and organic Constitution, broadly and liberally."

REGULATORY AND TAXING ENTRIES

25. The scheme of Entries in VIIth Schedule of the Constitution has a pattern. The entries are under two categories, namely, regulatory entries and taxing entries. In the case of M.P.V. Sundararamier[37], the Hon'ble Supreme Court on this aspect, held as follows:-

> "**51.** In List I, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. **An examination of these two groups of Entries**

[37] *Supra* note 2

shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, Entry 22 in List I is "Railways", and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights". If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers". If these expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for example, is "Land" and Entry 45 is "Land revenue". Entry 23 is "Regulation of mines" and Entry 50 is "Taxes on mineral rights". The above analysis — and it is not exhaustive of the Entries in the Lists — leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, clauses (1) and (2) and of Entry 97 in List I of the Constitution. Construing Entry 42 in the light of the above scheme, it is difficult to resist the conclusion that the power of Parliament to legislate on inter-State trade and commerce under Entry 42 does not include a power to impose a tax on sales in the course of such trade and commerce."

(emphasis supplied)

26. The principle that Taxing Entries and Regulatory Entries are separate has further been reiterated by the Hon'ble Supreme Court

in the cases of Hoechst Pharmaceuticals Ltd.[38], Kesoram Industries[39], Jalkal Vibhag[40], Jindal Stainless Ltd.[41]and Synthetics and Chemicals Ltd.[42].

TAX UNDER AUTHORITY OF LAW

27. The tax may not be levied unless it was so authorized by law. Article 265 of the Constitution unequivocally sets out the principle that "**no tax shall be levied or collected except by authority of law**." In the case of State of Meghalaya[43], the Hon'ble Supreme Court observed that "**there is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpretated by expanding its width as to include therein the power to tax, by implication or by necessary inference**". The Hon'ble Supreme Court categorically held that "**the power to tax is not an incidental power. Although legislative power includes incidental and subsidiary power under a particular Entry dealing with a particular subject, the power to impose a tax is not such a power which could be implied under our Constitution**."

28. In the case of Kesoram Industries[44], in para 104, the Hon'ble Supreme Court observed that " **There is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpreted by expanding its width as to include therein the power to tax by implication or by necessary inference.**"

29. Overlapping between two Entries in the VII[th] Schedule should be avoided. In the case of Godfrey Philips India Ltd.[45],the Hon'ble Supreme Court held that "**taxing entries must be construed**

[38]*Supra* note 3
[39]*Supra* note 4
[40]*Supra* note 5
[41]*Supra* note 27
[42]Synthetics and Chemicals Ltd. v. State of U.P. and others (1990) 1 SCC 109
[43]*Supra* note 14
[44]*Supra* note 4
[45]*Supra* note 6

with clarity and precision so as to maintain such exclusivity, and a construction of a taxation entry which may lead to overlapping must be eschewed. If the taxing power is within a particular legislative field, it would follow that other fields in the legislative lists must be construed to exclude this field so that there is no possibility of legislative trespass".

PRESUMPTION OF VALIDITY

30. There is always a presumption of validity in favour of the Statute. When it comes to interpretation of validity of a statute, the Court should lean in favour of a statute. In the case of Bihar Distillery[46],the Hon'ble Supreme Court observed that "**The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of the attempt to sustain the validity/constitutionality of the enactment.**" The Hon'ble Supreme Court observed that "**The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible.**" This principle has been followed by the Hon'ble Supreme Court in the case of M.P. Cement Manufacturers' Association[47].Although in the case of M.P. Cement Manufacturers' Association[48], the Hon'ble Supreme Court also cautioned that this does not mean that in this process of leaning, the court must perform **"verbal gymnastics to overcome a patent lack of legislative competence.**"

WIDE INTERPRETATION

31. The Constitution of a country governs every organisation of it. It is cumulative aspiration of the masses, as stated hereinbefore.

[46] *Supra* note 15
[47] *Supra* note 7
[48] *Ibid*

It cannot be interpreted in a very pedantic manner or in a narrow sense. It has to be grown with the passage of time. In the case of State of Karnataka[49],the Hon'ble Supreme Court observed that "**a broad and liberal construction in keeping with the purposes of a Constitution must be given preference over adherence to too literal an interpretation**". The Hon'ble Supreme Court further observed "**In particular, the plenitude of power to legislate, indicated by a legislative entry, has to be given as wide and liberal an interpretation as is reasonably possible**".

32. The Constitutional provision should be given wide interpretation. It has further been reiterated in the cases of State of Meghalaya[50], India Cement Ltd.[51],Kartar Singh[52], Jalkal Vibhag[53]Rajendra Diwan[54], State (N.C.T. of Delhi)[55], M/s Ujagar Prints[56], Indian Aluminium Company[57].

33. In the case of Association of Natural Gas[58],the Hon'ble Supreme Court held that "**The rules relating to distribution of powers are to be gathered from the various provisions contained in Part XI and the legislative heads mentioned in the three lists of the Schedule. The legislative power of both Union and State Legislatures are given in precise terms. Entries in the lists are themselves not powers of legislation, but fields of legislation. However, an Entry in one list cannot be so interpreted as to make it cancel or obliterate another entry or make another entry meaningless**".

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[49]*Supra* note 12
[50]*Supra* note 14
[51]*Supra* note 8
[52]*Supra* note 9
[53]*Supra* note 5
[54]*Supra* note 11
[55]*Supra* note 20
[56]M/s Ujagar Prints v. Union of India, (1985) 3 SCC 314
[57]*Supra* note 23
[58]*Supra* note 13

34. In the case of State of Karnataka[59],the Hon'ble Supreme Court also cautioned the courts that the judicial interpretation should not render any provision redundant. The Hon'ble Supreme Court observed that "**The dynamic needs of the nation, which a Constitution must fulfil, leave no room for merely pedantic hairsplitting play with words or semantic quibblings. This, however, does not mean that the Courts, acting under the guise of a judicial power, which certainly extends to even making the Constitution, in the sense that they may supplement it in those parts of it where the letter of the Constitution is silent or may leave room for its development by either ordinary legislation or judicial interpretation, can actually nullify, defeat, or distort the reasonably clear meaning of any part of the Constitution in order to give expression to some theories of their own about the broad or basic scheme of the Constitution**".

35. The Hon'ble Supreme Court has laid down various rules for interpretation of a statue or the Constitution. Some of them are cited as hereunder:-

(i) It is well settled rule of interpretation that no word or Section shall be construed in isolation, but that the statute should be read as a whole, each part throwing light on the meaning of others. (East India Cotton Manufacturing Co. Ltd.[60],New Delhi Municipal Committee[61], Deepal Girishbhai Soni[62], Hindustan Bulk Carriers and GVK Industries[63].

(ii) The judiciary must interpret the Constitution having regard to sprit and further by adopting a method of purposive interpretation. (ITC Ltd. Case[64]).

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[59]*Supra* note 12
[60]*Supra* note 16
[61]*Supra* note 17
[62]*Supra* note 19
[63]*Supra* note 21 and 22, respectively
[64]*Supra* note 24

(iii) In interpreting the provision of the Constitution, particularly the legislative Entry, a broad, liberal and extensive interpretation is to be preferred has a meaning, which is always inclusive. (Ahmedabad Municipal Corpn.[65])

(iv) Being a living and dynamic document, the Constitution ought to receive an equally dynamic and pragmatic interpretation that harmonizes and balances competing aims and objectives and promotes attainment of national goals and objectives.(Jindal Stainless[66]).

(v) "it is a constitution we are expounding" – and the Constitution is a living document governing the lives of millions of people, which is required to be interpreted in a flexible evolutionary manner to provide for the demands and compulsions of changing times and needs. (M. Hakeem[67]).

36. If a subject does not fall in any of the Entries in Schedule VII, in such a situation, E 97 of L I empowers the Parliament to legislate on it, including power to taxation. On this aspect in the case of H.S. Dhillon[68],the Hon'ble Supreme Court discussed as hereunder:-

> "**21.** It seems to us that the function of Article 246(1), read with Entries 1-96, List I, is to give positive power to Parliament to legislate in respect of these entries. Object is not to debar Parliament from legislating on a matter, even if other provisions of the Constitution enable it to do so. Accordingly we do not interpret the words "any other matter" occurring in Entry 97, List I, to mean a topic mentioned by way of exclusion. These words really refer to the matters contained in each of the Entries 1 to 96. The words "any other matter" had to be used because Entry 97, List I follows Entries 1-96, List I. It is true that the field of legislation is demarcated by Entries 1-96, List I, but demarcation does not mean that if Entry 97,

[65] *Supra* note 26
[66] *Supra* note 27
[67] *Supra* note 28
[68] *Supra* note10

> List I confers additional powers, we should refuse to give effect to it. **At any rate, whatever doubt there may be on the interpretation of Entry 97, List I is removed by the wide terms of Article 248. It is framed in the widest possible terms. On its terms the only question to be asked is: Is the matter sought to be legislated or included in List II or in List III or is the tax sought to be levied mentioned in List II or in List III: No question has to be asked about List I. If the answer is in the negative then it follows that Parliament has power to make laws with respect to that matter or tax.**"
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> (emphasis supplied)

LEGISLATIVE COMPETENCE

37. At the very outset, it may be stated that there is no dispute between the parties that the State Legislature is not competent to impose tax on electricity generation. On behalf of the appellants, reference has been made to the case of Bharti Airtel Ltd.[69] In this case, the Hon'ble Gauhati High Court while referring to earlier judgments on the subject held that the State Legislature has no competence to tax on generation of electricity. In the instant case, according to the State, the tax is on "drawal of water" and not on generation of electricity. Whereas, it is the case of the appellants that the tax in the instant case is on generation of electricity. This aspect will be examined in the later part of the judgment.

38. Learned counsel for the appellants would submit that the State Legislature is not competent to enact the Act. It is argued that in order to impose the tax, there should be specific taxing entry, but as such, there is no such entry in L-II or L-III of S-VII. It is argued that in the impugned judgment, in addition to E17 of L-II, other entries have been referred to so as to validate the Act. But, it is argued that E17 of L-II is not a taxing entry. It is a general entry. Therefore, the Act

[69] Bharti Airtel Ltd. V. State of Assam and Ors. (2017) 1 Gau LR 256

cannot be enacted at the strength of E17. On behalf of the appellants, the following submissions have also been made:-

(i) The impugned judgment does not give any reasoning as to how the Act can be traced to E45 and E49 of L-II. Therefore, in the absence of any reasoning on this aspect, the judgment is not sustainable.

(ii) Water cannot be treated as mineral. In the impugned judgment, the learned Single Judge has wrongly relied on the principles of law, as laid down in the case of Ichchapur[70]. It is argued that in the case of Ichchapur[71], the word "Mineral" was interpreted in the context of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 ("the 1962 Act"). No universal declaration was made in the case of Ichchapur[72] that water in all situations may be termed as Mineral.

(iii) A judgment has to be read under the factual context, in which it is delivered. In support of his contention, learned counsel placed reliance on the principles of law, as laid down in the cases of Commissioner of Income Tax[73] and Ashwani Kumar Singh[74].

39. In the case of Commissioner of Income Tax[75], the Hon'ble Supreme Court, inter alia, held that, **" It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context**

[70]Ichchapur Industrial Cooperative Society Ltd. v. Competent Authority, Oil and Natural Gas Commission and Another, (1997) 2 SCC 42
[71]*Ibid*
[72]*Ibid*
[73]Commissioner of Income Tax v. Sun Engineering Works (P) Ltd. (1992) 4 SCC 363
[74]Ashwani Kumar Singh v. U.P. Public Service Commission and Others, (2003) 11 SCC 584
[75]*Supra* note 73

of the question under consideration and treat it to be the complete 'law' declared by this Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before this Court. A decision of this Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the courts must carefully try to ascertain the true principle laid down by the decision of this Court and not to pick out words or sentences from the judgment, divorced from the context of the questions under consideration by this Court, to support their reasonings."

40. In the case of Ashwani Kumar[76] also, the Hon'ble Supreme Court reiterated the principles and held that, **"Observations of courts are not to be read as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes."**

41. Learned counsel for the Union of India would submit that the State Legislature is not competent to enact the Act. He would submit that the State has no competence to impose tax on generation of electricity; State has termed it as water tax, but in essence, it is a tax on generation of electricity. It is argued that Article 288 also prohibits imposition of such tax; such tax may only be imposed by the Union Legislature. He would also submit that, in fact, the Ministry of Power, Government of India has made a communication to all the Chief Secretaries of the State Governments and Union Territories on 25.04.2023 informing

[76] *Supra* note 74

that tax on generation of electricity is illegal and unconstitutional.

42. The communication made by the Director, Ministry of Power, Government of India dated 25.04.2023 addressed to the Chief Secretaries of the State Governments/UTs has been rendered at the time of hearing. It reads as follows:-

> "**File No. 15/27/2023-Hydel-II (MoP)**
> **Government of India**
> **Ministry of Power**
>
> **Shram Shakti Bhawan, Rafi Marg,**
> **New Delhi, Dated 25th April, 2023**
>
> **To**
>
> **The Chief Secretaries – All the State Governments & UTs**
>
> **Subject: Imposition of Water Tax/Cess by various State Government on HEPs – reg**
>
> Sir,
>
> It has come to the notice of the Government of India (GoI) that some State Governments have imposed taxes/duties on generation of electricity. This is illegal and unconstitutional. Any tax/duty on generation of electricity, which encompasses all types of generation viz. Thermal, Hydro, Wind, Solar, Nuclear, etc. is illegal and unconstitutional. The Constitutional provisions are as follows:
>
> (i) The powers to levy taxes / duties are specifically stated in the VII Schedule. List – II of the VII Schedule lists the power of levying of taxes / duties by the State in entries-45 to 63. No taxes /duties which have not been specifically mentioned in this list can be levied by the State Governments under any guise whatsoever – as Residuary powers are with the Central Government.
>
> (ii) Entry-53 of List-II (State List) authorizes the State to put taxes on consumption or sale of electricity in its jurisdiction. This does not include the power to impose any tax or duty on the generation of electricity. This is because electricity generated within the territory of one State may be consumed in other States and no

State has the power to levy taxes/duties on residents of other States.

(iii) Some States have imposed taxes / duties on generation of electricity under the guise of levying a cess on the use of water for generating electricity. However, though the State may call it a water cess, it is actually a tax on the generation of electricity – the tax is to be collected from the consumer of electricity who may happen to be residents of other State.

(iv) Article – 286 of the Constitution explicitly prohibits States from imposing any taxes / duties on supply of goods or services or on both where the supply takes place outside the State.

(v) Article-287 and 288 prohibit the imposition of taxes on consumption or sale of electricity consumed by the Central Government or sold to the Central Government for consumption by the Government or its agencies.

(vi) As per Entry-56 of the Union List of the Constitution of India, regulations of issues related to Inter-State Rivers come under the purview of the Centre. Most of the Hydro-Electric Plants in the States are located / proposed to be developed on Inter-State Rivers. Any imposition of tax on the non-consumptive use of water of these rivers for electricity generation is in violation of provisions of the Constitution of India.

(vii) Hydro Power Projects do not consume water to produce electricity. Electricity is generated by directing the flow of water through a turbine which generates electricity – on the same principle as electricity from wind projects where wind is utilized to turn the turbine to produce electricity. Therefore, there is no rationale for levy of “water cess” or “air cess”.

(viii) The levy of water cess is against the provisions of the Constitution. Entry-17 of List-II, does not authorize the State to levy any tax or duty on water.

2. In light of the above constitutional provisions, no taxes/duties may be levied by any State under any guise on generation of electricity and if any

> taxes/duties have been so levied, it may be promptly withdrawn.
>
> This has the approval of the Hon'ble Union Minister of Power and New & Renewable Energy."

43. Learned Counsel for the State would submit that a communication from the Ministry of Power, Government of India may not guide the State Legislature in the matter of making laws. It is argued that the State Legislature is competent to impose the water tax under the Act.

44. Learned Counsel for the State would further submit that State Legislature is competent to enact the Act under E45, E49 and E50 of LII of SVII. He would submit that if the tax can reasonably be held to be within taxing entry, that is enough. The tax can have reasonable nexus and no more.

45. In support of his contention, learned Counsel for the State would refer to the principles of law, as laid down in the case of Goodricke Group Ltd.[77].

46. In the case of GoodrickeGroup Ltd.[78], the Hon'ble Supreme Court referred to the judgment in the case of Ajoy Kumar Mukherjee[79] and observed that, **"if a tax can reasonably be held to be a tax on land it will come within Entry 49."**

47. The impugned judgment has been challenged on multiple grounds. It has been argued that in the impugned judgment, at one place, the Court has observed that the general entry and taxing entry are separate in Schedule VII, but at some

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[77] Goodricke Group Limited and others v. State of West Bengal and others, (1995) supp. 1 707
[78] *Ibid*
[79] Ajoy Kumar Mukherjee Vs. Local Board of Barpeta, AIR 1965 SC1561

other place, in the same impugned judgment, the Act has been validated at the strength of E 17 L II of S VII.

48. It is true that in the impugned judgment, it has been observed that "**a tax cannot be levied under a general entry**" (para 26, line 6). In para 56 of the impugned judgment, it has also been observed that "**It is to be borne in mind that tax is a separate matter from general regulatory entries. Regulatory entries are not for taxation**". But, it is also equally true that in contrast to these observations, which have been made in para 26 and 56 of the impugned judgment, the impugned judgment also validates the Act at the strength of E 17 L II of S VII (Para 75 of the impugned judgment at page 62 (internal)*:

49. As observed hereinbefore, the law is well-settled that the Regulatory Entries and Taxing Entries are separate. The Act may not be validated at the strength of any Regulatory Entry. To that extent, the observation that has been made in the impugned judgment, with regard to validation of the Act under E 17 L II of S VII may not be upheld.

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* "A plain reading of Article 200 of the Constitution would depict that as the matter relates to Entry 17 of List II under which States are empowered to make laws, thus after the approval of Bill by the State legislature, the Hon'ble Governor has accorded assent to the aforesaid Bill using the discretionary powers under this Article."

50. The taxing Entry should be clear and distinct and tax cannot be imposed by implication. There is nothing like an implied power to tax. The impugned judgment at various places derives the competence of the State Legislature on the basis of implication**.

51. The Court now proceeds to examine the competence of State Legislature in enacting the Act. First of all, it will be examined as to whether the Act can be enacted under E49 L-II of S-VII.

ENTRY 49 OF LIST II

52. E49 L-II of S-VII is as follows:-

"49. Taxes on lands and buildings."

53. Learned Counsel for the State would submit that the word "land" in E18 L II of S VII is restrictive entry qualified by the phrase "that is to say". It makes it limited and exhaustive. On the other hand, the word "land" in E49 is unlimited, and, therefore, it has to be read widely and liberally. He would submit that the water would directly or indirectly reasonably fall under it being part of the land. He would also raise the following points in his submission:-

(i) Tax to be on land need not be directly on land and that it does not cease to be tax on land in the absence of direct nexus.

** In para 41 of the impugned judgment, the Court records that since Entry 54 of List I of the Seventh Schedule to the Constitution is a regulatory entry and not a taxing entry, therefore, the said entry cannot restrict the power of the State to tax "land or mineral" under Entries 49 and 50 of List II. But, by reading entries in List I of S II, the competence of State Legislature may not be derived to impose tax. Similarly, in para 76, the Court has observed in the impugned judgment that "**there is no prohibition in the Constitution that the State legislature cannot enact any law for imposition of tax on water.....No fault can be attached to the Act in question.**" The competence of Legislature in enacting any statute can be derived by positive competence of a Legislature. By indicative implication, Legislature's competence may not be derived.

(ii) The words "on use of water supply on land or building" is tax on land.

(iii) The water tax in the instant case is on the use of water on "land" to generate electricity, and, therefore, falls reasonably as a tax on land.

54. In support of his contention, learned Counsel for the State has placed reliance on the principles of law, as laid down in the cases of M/s Pyare Lal Malhotra[80]; Bombay Tyre International Ltd.[81]; Castrol India Ltd.[82]; The Electric Telegraph Company[83]; Kandukuri Balasurya Prasadha Rao[84]; Province of Madras[85]; Cinderella Rockerfellas Limited[86]; Raza Buland Sugar Co. Ltd.[87]; Anant Mills Co. Ltd.[88]; K.S. Ardhnareeswarar Gounder[89]; Kendriya Nagrik Samiti[90] and State of Kansas[91].

55. Learned counsel for the appellants would submit that E49 LII of SVII has nothing to do with the water tax. The State Legislature has no competence to enact water tax under this entry. It is the case of the appellants that E49 LII of SVII is property centric. The tax under E49 LII is not a personal tax, but a tax on property and there is no connection to land or building, so far as the Act is concerned.

56. In support of this argument, on behalf of the appellants, reliance has been placed on the principles of law, as

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[80]M/s State of Tamil Nadu v. M/s Pyare Lal Malhotra and others, (1976) 1 SCC 834
[81]Union of India and others v. Bombay Tyre International Ltd. and others, (1984) 1 SCC 467
[82]Castrol India Ltd. v. Commissioner of Central Excise, Calcultta-1, (2005) 3 SCC 30
[83]The Electric Telegraph Company v. Overseers of Salford, 25 (1855) 11 ES 181
[84]Kandukuri Bala Surya Prasadha Row and Anr. v. The Secretary of State of India in Council, AIR 1917 PC 42
[85]Province of Madras, Represented by the Collector of Trichinopoly v. The Lady of Dolours Convent, Trichinopoly, Represented by the Mother Superior and Two Others, AIR 1942 Mad 719
[86] Cinderella Rockerfellas Limited v. Peter James Rudd, (2003) EWCA Civ. 529
[87]Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, AIR 1962 All 83
[88] Anant Mills Co. Ltd. v. State of Gujarat and Others, (1975) 2 SCC 175
[89]K.S. Ardhnareeswarar Gounder v. Tahsildar, Bhavani and Others, AIR 1976 Mad 318
[90]Kendriya Nagrik Samiti, Kanpur and Others v. Jal Sansthan, Kanpur and Others, AIR 1982 All 406
[91]State of Kansas v. State of Colorado *et al.,* 2006 US 46

laid down in the cases of Jalkal Vibhag[92], Kerala State Beverages Manufacturing and Marketing Corporation Limited[93] and D.H. Nazareth[94].

57. In order to examine the competence of State Legislature under E49 LII of SVII, as argued on behalf of the State, it has to be seen as to whether water is part of land so as to empower the State Legislature to enact the Act under E49. The second part of analysis would be as to whether the tax is on the use of water on land to generate electricity. In other words, what is to be seen is as to whether water is included in the word "land" so as to empower State Legislature to impose the tax under E49 and/or whether the tax is on the use of water on land (the electric generation plant affixed to land, therefore forms land).

58. E18 L II of S VII is with regard to land, but it is qualified with the phrase "that is to say". This entry is as follows:-

> "18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization."

59. It is being argued that the word land, as used in E18 LII of SVII is restrictive, as enumerated in E18, but the word "land" in E49 is not such restrictive.

60. In the cases of M/s Pyare Lal Malhotra[95], Bombay Tyre[96] and Castrol India Ltd.[97], the Hon'ble Supreme Court interpreted the phrase "that is to say".

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[92] *Supra* note 5
[93] Kerala State Beverages Manufacturing and Marketing Corporation Limited v. Assistant Commissioner of Income Tax Circle, (2022) 4 SCC 240
[94] Second Gift Tax Officer v. D.H. Nazareth, (1970) 1 SCC 749

61. In the case of M/s Pyare LalMalhotra[98], the Hon'ble Supreme Court while referring to the dictionary meaning of the phrase "that is to say", held that **"the expression "that is to say" is employed to make clear and fix the meaning of what is to be explained or defined. Such words are not used, as a rule, to amplify a meaning while removing a possible doubt for which purpose the word "includes" is generally employed."** Referring to the judgment in the case of Megh Raj[99], the Hon'ble Supreme Court observed that, "**We think that the precise meaning of the word "that is to say" must vary with the context."** These principles have been reiterated in the case of Castrol India[100].

62. In the case of Bombay Tyre[101], the Hon'ble Supreme Court observed that, "**the phrase "that is to say", says Stroud's Judicial Dictionary (Fourth Edn., Vol. 5, p. 2753) is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it", and reference has been made to Stuckeley v. Butler [Hob 171] and Harrington v. Pole [Dy 77b, p 1, 38] .**

63. Admittedly, in E18 LII of SVII, the word "land" is qualified with the phrase "that is to say", on the other hand, in E49 LII of SVII, there is no such restrictions on the words lands

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[95] *Supra* note 80
[96] *Supra* note 81
[97] *Supra* note 82
[98] *Supra* note 80
[99] Megh Raj Vs. Allah Rakhia, AIR 1947 PC 72
[100] *Supra* note 82
[101] *Supra* note 81

and buildings. The question is as to whether the word land, as used in E49 of LII includes water in it?

64. In the case of the Electric Telegraph[102], the Electric Telegraph Company had laid a line as follows. In the open parts of the railways, wooden posts or standards, of an average diameter of 7 inches were firmly fixed by being let into the ground of the railways, at intervals of about 30 yards apart and from post to post continuous wires of telegraph wires were hung or suspended at the top; but along the raise viaduct, the wires were connected together in a long wooden box or cover, which were fixed to the parapet of the via duct in one continuous length, by means of iron old pasts driven into the joints of brick work forming the parapet, with the exception of 188 yards at that end of the railways in the respondents township. The telegraph was placed entirely upon the property belonging to the railway company. The telegraph company was not owner or occupier of the property. The question was as to whether the telegraph company is liable to be rated? In that context, it was held that "**land extends upwards as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of land**". It was observed that the telegraph company had the exclusive occupation of the soil, when not interfered with by the railways.

65. In the same case, an observation of Lord Coke has been referred to as follows., "**and lastly, Earth has in law a great extent upwards, not only of water, as hath been said, but all other things even up to heaven, and for *eujus est sulum, ejus est usque ad colum***".

[102] *Supra* note 83

66. The observation has been made with regard to the liability of the telegraph company while laying the electric telegraph line. The observation that has been made in the case of the Electric Telegraph Company[103] cannot support the case of the State that the word land, as used in E49, includes water.

67. In the case of Anant Mills Company[104], the question was with regard to assessment of property tax of large premises like textile mills and factories. The property tax, in that context, comprises (a) water tax, (b) conservancy tax, and (c) a general tax. It was argued in that case that the State Legislature has no competence under E49 LII of SVII to enact a law for levying tax in respect of area occupied by the underground supply lines. It was argued that the word land denotes the surface of land and not the underground strata. The Hon'ble Supreme Court did not accept this argument and observed the word land includes not only the face of the Earth, but everything under or over it, and has in its legal significance an indefinite extent upwards and downwards giving rise to the maxim *eujus est sulum, ejus est usque ad colum*".

68. In the case of Anant Mills[105], the Hon'ble Supreme Court has, in fact, referred to the judgment in the case of the Electric Telegraph Company[106]. The similar principle has further been followed in the case of Ahmadabad Municipal Corporation[107].

69. In the case of Kandukuri Balasurya Prasadha Rao[108],the issue involved was with regard to right to take water. Certain water cesses were imposed under the Madras Act (7 of

[103] *Supra* note 83
[104] *Supra* note 88
[105] *Supra* note 88
[106] *Supra* note 83
[107] *Supra* note 26
[108] *Supra* note 84

1865) as amended in the year 1900. The question was with regard to the right of the Government to levy these cesses. Under the provisions, by which cess was imposed, there were two provisos. The first for the protection of zamindars, inamdars, or any other description of land holder not holding under Ryotwari settlement. Under the first proviso, where a Zamindar, inamdar or other land holder not holding under Ryotwari settlement is, by virtue of engagement with the government, entitle to irrigation, free of separate charge, no cess was to be imposed for that water supply to the extent of this right and no more. An observation was made in this judgment that, "**The cess under the Act is leviable on the land which is irrigated. It is therefore in the nature of a land tax, and by sec. 2 is recoverable in the same manner as arrears of land revenue.**" Under those circumstances, the Court, in the case of Kandukuri Balasurya Prasadha Rao[109] held that the appellants were not liable to pay cess.

70. In the case of Kandukuri Balasurya Prasadha Rao[110], the aspect was different. It was related to the rights of the appellants of that case, to have free water *qua* the cess. The Court has not ruled that the water is land. Although, as stated, an observation has been made, in that case, that cess was leviable on the land, which is irrigated, hence, a land tax.

71. In the case of Lady of Dolours Convent[111]also, the issue was with regard to irrigation cess and the question was, can it be assessed on the lands, which are held free from land tax under the agreement. In that case also, an observation has been made that a charge for water supplied for the purpose of cultivation is a charge on the land.

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[109] *Supra* note 84
[110] *Ibid*
[111] *Supra* note 85

72. In the case of K.S. Ardanareeswara Gounder[112],local cess surcharge was levied under Section 116 of the Tamil Nadu Panchayats Act, 1958. It was challenged on the ground that no tax can be levied on the water supplied by the Government and that only a fee can be levied under E66 of L-II. In the case of K.S. Ardanareeswara Gounder[113], the principles of law, as laid down in the case of Lady of Dolours Convent[114]been referred to. The Court noted that, **"The term 'land revenue' has been defined under the Explanation to include water cess for purpose of Ss. 115 and 116. Under S. 115, the levy is only on land, but the measure of tax is based on the land revenue payable on it. "** While referring to the definition of the meaning of the term of land revenue, as defined under the Act, the Court observed that, **"Even assuming that water cess is not land tax as alleged by the petitioner, it is still a revenue due on the land, and, therefore, it has to be taken as land revenue."**

73. The interpretation that has been made in the case of K.S. Ardanareeswara Gounder[115],is under the provisions of the Act in question, wherein, the term land revenue included cess. No general principle, as such, has been laid down in that case.

74. In the case of Raza Buland Sugar Co. Ltd.[116],a municipal board decided to impose water tax on the annual values of the land and building. It was challenged, inter alia, on the ground that the imposition of tax was beyond the competence of the board. The Court held that, in fact, it was not a tax on water, instead, it was a tax on land and building because it provided that tax shall not be imposed on land

[112]*Supra* note 89
[113]*Ibid*
[114]*Supra* note 85
[115]*Supra* note 89
[116]*Supra* note 87

exclusively used for agricultural purposes. If the water tax was not at all on the land or building, it was held that it was unnecessary to provide for exemption of agricultural land from the tax.

75. In the case of Kendriya Nagrik Samiti[117], also, challenge was made to water tax and sewage tax under the U.P. Water Supply and Sewage Act 1975. The challenge was made on the ground of legislative competence. It was argued that with regard to water, there is only one Entry 17 in LII, but it is not an entry relating to tax and under the Residuary Entry 66, only fee can be levied and no tax can be imposed. The Court held that, in fact, the subject matter of water tax was not water. The water tax, as also sewage tax, is levied in the assessed annual value of the premises. It is in reality a tax on land and building, though called water tax. The Court had followed the principles of law, as laid down in the case of Raza Buland Sugar Co. Ltd.[118]

76. In the case of Union of State of Kansas[119], the issue was with regard to the right to regulate the flow of water by way of Regulations. In that context, the Court referred to the earlier judgment, wherein it was observed "**the right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris,* of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it, as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made**

[117] *Supra* note 90
[118] *Supra* note 87
[119] *Supra* note 91

than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down".

77. In the case of Cinderella Rockerfellas Limited[120], the question was with regard to rate of hereditament. It was rateable in view of Section 64(1) of the Local Government Finance Act, 1988 ("the 1988 Act"). The definition of hereditament was given under Section 115(1) of the General Rate Act, 1967. In view of Section 64(4) of the 1988 Act, a hereditament may consist of lands also. Land as such was not defined under the 1988 Act, but by virtue of Section 5 of the First Schedule to the Interpretation Act, 1978, the land in an Act of Parliament passed after 1978 includes land covered by water. In this judgment, this proposition was upheld that "**the expression "land" is wide enough to include water lying on the surface of the earth, so that the lake in the present case is capable of being part of the hereditament, if it satisfies the other tests of rateability.....**".

78. This Court will deal in quite detail about the nature of the tax under the Act, but, it may be noted that in this case also, this Court did not held that the word land, as used in E49 of LII includes water.

79. It has been the case of the appellants that the impugned tax cannot be enacted under E49 of L II. It has been argued that the tax under E49 of LII is property centric. Reliance has been made to the judgment in the case of Jalkal Vibhag[121].

80. In Para 44 of the judgment in the case of Jalkal Vibhag[122],the Hon'ble Supreme Court referred to the judgment

[120] *Supra* note 86
[121] *Supra* note 5
[122] *Ibid*

in the case of H.S. Dhillon[123]and quoted with approval as follows:-

> "74. The requisites of a tax under Entry 49, List II, may be summarised thus:
>
> (1) It must be a tax on units, that is lands and buildings separately as units.
>
> (2) The tax cannot be a tax on totality, i.e., it is not a composite tax on the value of all lands and buildings.
>
> (3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns or occupies it or two or more persons own or occupy it."

81. In the case of Kerala State Beverages[124], reference is made to the judgment in the case of Jalkal Vibhag[125] in respect of "fee" and "tax".

82. In the case of D.H. Nazareth[126], the High Court of Mysore had observed that Parliament had no power to legislate with regard to taxes on gift of land and buildings. While allowing the appeals, the Hon'ble Supreme Court discussed the concept of "Pith and Substance" of an Act and held as follows:-

> **"9.** The Constitution divides the topics of legislation into three broad categories: (*a*) entries enabling laws to be made, (*b*) entries enabling taxes to be imposed, and (*c*) entries enabling fees and stamp duties to be collected. It is not intended that every entry gives a right to levy a tax. The taxes are separately mentioned and in fact contain the whole of the power of taxation. Unless a tax is specifically mentioned it cannot be imposed except by Parliament in the exercise of its residuary powers already mentioned. Therefore, Entry 18 of the State List does not confer additional power of taxation. At the most fees can be levied in respect of the items mentioned in that entry, vide Entry 66 of the same list. Nor is it possible to read a clear

[123]*Supra* note 10
[124]*Supra* note 93
[125]*Supra* note 5
[126]*Supra* note 94

> cut division of agricultural land in favour of the States although the intention is to put land in most of its aspects in the State List. But, however, vide that entry, it cannot still authorise a tax not expressly mentioned. Therefore, either the pith and substance of the Gift Tax Act falls within Entry 49 of State List or it does not. If it does, then Parliament will have no power to levy the tax even under the residuary powers. If it does not, then Parliament must undoubtedly possess that power under Article 248 and Entry 97 of the Union List.
>
> **10.** The pith and substance of Gift Tax Act is to place the tax on the gift of property which may include land and buildings. It is not a tax imposed directly upon lands and buildings but is a tax upon the value of the total gifts made in an year which is above the exempted limit. There is no tax upon lands or buildings as units of taxation. Indeed the lands and buildings are valued to find out the total amount of the gift and what is taxed is the gift. The value of the lands and buildings is only the measure of the value of the gift. A gift tax is thus not a tax on lands and buildings as such (which is a tax resting upon general ownership of lands and buildings) but is a levy upon a particular use, which is transmission of title by gift. The two are not the same thing and the incidence of the tax is not the same. Since Entry 49 of the State List contemplates a tax directly levied by reason of the general ownership of lands and buildings, it cannot include the gift tax as levied by Parliament. There being no other entry which covers a gift tax, the residuary powers of Parliament could be exercised to enact a law. The appeals must, therefore, be allowed but there shall be no order about costs throughout. The Appeal 666 of 1967, however, abates as the sole respondent died."

83. An entry in SVII has to be given widest amplitude. This is the rule of interpretation of the Constitution. But, at the same time, the entry should not be extended to the extent that it may change the entire scheme of field of legislation, as given under three Lists of S VII. If we look at LII of SVII alone, land and water have distinctly been used. E 17 L II of S-VII deals with water, whereas, E18 L II of S VII deals with land. These both entries are qualified with the phrase, "that is to say". Land and water have been distinctly used in S VII. If for the sake of argument it is accepted that everything above and below land

shall include in the word land, then there would have been no necessity to distinctly use the word water under E17 of L II, and there would have been no need to use the words gas and gas works under E25 of L II. Therefore, I am of the view that the word land in E49 of L II may not be given such an interpretation so as to include the word water in it. It cannot be said that because the word land in E49 L II of S VII includes water, therefore, State can legislate the Act.

84. There is another aspect of the matter. It has been argued on behalf of the State that the impugned tax is on the use of water on land to generate electricity. Therefore, falls reasonably as a tax on land.

85. In fact, it has been argued by learned Counsel for the State that the water that is drawn from the sourcefalls on the land or on generator attached to the land to generate electricity. Therefore, in pith and substance, the tax is in respect of water/land and to put it distinctly, it is the tax on drawal and use of water on land. **This requires little more deliberations while exploring the nature of the impugned tax.** It will be discussed at a later stage of the judgment.

ENTRY 45 OF LIST II

86. E45 L-II of S-VII reads as follows:-

> "45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues."

87. It has been argued on behalf of the State that the State Legislature is competent to enact the Act under E 45 of L II. It is argued that the tax that has been imposed under the Act, may also be termed as land revenue. In support of his contentions learned Counsel has placed reliance on the principle of law as laid down in the cases of R.S. Rekhchand[127], and K.S. Ardanareeswara Gounder[128].

88. In the case of R.S. Rekhchand,[129]the Hon'ble Supreme Court posed a question in para 78 of the judgment as follows:-

> "whether the appellant has a natural right to use water from the flowing river and whether the water used by it is exigible to land cess?"

89. In the case of R.S. Rekhchand[130], State Legislature levied cess on use of flowing water from a river under the Maharashtra Land Revenue Code 1966. The challenge was made on the ground that the Government is devoid of power to levy tax on the use of water. Referring to the judgment in the cases of Lady of Dolours Convent[131],Kandukuri Balasurya Prasadha Rao[132]and Raza Buland Sugar Co. Ltd.[133],the Court held that, **"the legislative Entry 45 of List II of the Seventh Schedule of the Constitution brings within the ambit power of the legislature under Article 246 to levy cess on use of the water even from flowing river. Therefore, Section 70 of the Code**

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[127] R.S. Rekhchand Mohota Spinning and Weaving Mills Ltd. Vs. State of Maharashtra, (1997) 6 SCC 12
[128] *Supra* note 89
[129] *Supra* note 127
[130] *Supra* note 127
[131] *Supra* note 85
[132] *Supra* note 84
[133] *Supra* note 87

comes within Entry 45 of List II of the Seventh Schedule to the Constitution."

90. While deciding the R.S. Rekhchand[134],the Hon'ble Supreme Court has taken note of Section 20 & 70 of the Maharshtra Land Revenue Code, 1966 and observed that "**It is seen that Section 20 of the Code clearly includes flowing water, as investing title thereof in the State as integral part of the land. The definition of "land" includes the right to the water flowing therefrom as in the definition in the Transfer of Property Act**".

91. In the case of R.S. Rekhchand[135], the Hon'ble Supreme Court did not rule that land would include water for the purpose of E 45 of L II. It cannot be said that the word land in E 45 of L II include water, therefore the State can legislate the Act. E 45 of L II does not give competence to the State Legislature to enact the Act.

92. Another related question to it is as to whether the use of water on land or on the generator attached to the land to generate electricity may be said to be land revenue under E 45 of L II. In fact, this discussion may not be complete untilthe "pith and substance" or "true nature and character" of the Act is ascertained. Therefore, the discussion will be further made, while discussing the "pith and substance" of the Act.

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[134] *Supra* note 127
[135] *Ibid*

ENTRY 50 OF LIST II

93. Learned Counsel for the State would submit that State Legislature is competent to impose the tax under E50 of LII. He would refer to thejudgment in the Ichchapur case[136] to argue that in the case of Ichchapur[137], the Hon'ble Supreme Court has categorically held that even the chemical composition of water makes it mineral and it has been held that water is mineral. Therefore, the Act gets validity by virtue of E50 LII of SVII.

94. Entry 50, L II of S VII is as follows:-

> "50. Taxes on mineral rights subject to nay limitations imposed by Parliament by law relating to mineral development."

95. On the other hand, learned counsel for the appellants would submit that E 50 L II of S VII deals with tax on mineral rights subject to any implication relating to mineral development. Scheme of the Act reflects that the tax is imposed on "drawal of water" for the purposes of electricity generation. The tax is on the water itself. It has nothing to do with the mineral rights, which means it is a tax on mineral itself. The following points have also been raised on this aspect by the learned counsel for the appellants:-

(i) Assuming but not accepting that water itself is a mineral for the purposes of E 50 of L II, it has nothing to do with the mineral rights.

(ii) Even otherwise E 50 L II of S VII is subject to any limitation imposed by Parliament by law relating to mineral development. Therefore, in view of the Mines and Minerals (Development and Regulation)

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[136] *Supra* note 70
[137] *Ibid*

Act, 1957 ("MMDR Act"), the imposition of tax on mineral rights is already under purview of the MMDR Act.

(iii) In L I and L II of S VII, water and minerals have been separately used. Therefore, no extraneous tools of interpretation can be applied to get the Parliamentary intent. Non-corresponding Entry of E 17 in taxing Entries is not accidental but a definite intent of the Constitution to use the actual corresponding E 17 beyond the legislative competence of the State legislature.

(iv) Water is not a mineral; both are separate.

(v) E 25 L II of S VII relates to gas and gas works, but it is not mineral. The Constitution has made categorical difference between water and mineral.

(vi) The mines and mineral cannot be read together. If water is read in E 50 L II of S VII then there is no corresponding regulatory entry in L II of S VII. The regulatory entry of the subject is in E 56 L I ofS VII. If water is read under E 50 L II of S VII, it would be in violation to the Constitution. Water would fall under E 97 L I of S VII which is a residuary entry.

(vii) If E 50 L II of S VII includes water, it would make Article 288 (2) redundant, which requires that the Legislature may by law impose any tax in respect of water or electricity, etc. only after President has assented to it. Therefore, it is argued that E 50 L II of S VII is not related to water.

(viii) Every tax entry relates to a general entry. For example, E 50 L II of S VII relates to E 23 of it; E 45 L II of S VII relates to E 18 of it. But, E 17 L II

of S VII does not relate to any taxation entry. Tax on water cannot be levied by the State.

96. The learned counsel for the appellants would also submit that the judgment in the case of Ichchapur[138] has been passed under the provisions of the 1962 Act and in the context of the 1962 Act, the Court had held that water is mineral. It has no universal declaration that water is mineral, therefore, cannot be taxed by the State Legislature under E50 LII of SVII.

97. In the case of Ichchapur[139], the Oil and Natural Gas Commission (ONGC) had notified certain land under Section 3(2) of the 1962 Act and laid pipelines for transporting petroleum from one place or another. Since the gas processing plant of ONGC could not run smoothly due to paucity of water, ONGC decided to draw water from alternative source through their own pipelines, which they thought they would lay down underneath the land, of which the right of user, had already vested in them. Accordingly, a notice was issued for laying the pipeline for carrying water. The owners of the land objected to it on the ground that the proposed lines were not being laid for transporting petroleum or any other mineral, but for transporting water, which was not permissible under the 1962 Act. In the 1962 Act, the definition of Minerals is given under Section 2(ba). According to it, **"Minerals have the meaning assigned to them in the Mines Act 1952, and include mineral oils and stowing sand but do not include petroleum**."

[138] *Supra* note 70
[139] *Ibid*

98. The Hon'ble Supreme Court discussed the provisions of the 1962 Act as well as the definition of mineral under that Act. After discussing the law on the subject, the Hon'ble Supreme Court observed in Para 28 as hereunder:-

> "**28.** If the question is examined in this background, it would be noticed that the definition of "mineral" which has been bodily lifted from the Mines Act, 1952 and has been placed in the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 was deliberately introduced by Amending Act No. 13 of 1977 so that while carrying petroleum through the pipelines, any other minerals may also be carried through it. If, therefore, water is treated as a "mineral" it would be permissible for the ONGC to carry it through any other pipeline without any further notification or declaration under Section 3 or 6 of the Act. This interpretation which is in consonance with the scientific definition of a "mineral", serves the purpose of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. The contention of the learned counsel for the appellant that "water" should be understood in the same sense in which it is understood by a common man cannot, therefore, be accepted. This Act is an Act of Parliament intended to deal with the particular technology and the commodities involved therein. **We are, therefore, of the view that in this Act, "water" has been used in both the senses, namely, that (i) it is a mineral; and (ii) the most common, readily and freely available substance on earth**."
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> (emphasis supplied)

99. The above observation of the Hon'ble Supreme Court makes it abundantly clear that the Hon'ble Supreme Court construed the word water as mineral in view of the provisions of 1962 Act. A universal declaration has not been made that water is mineral. Therefore, it cannot be said that the State can impose tax on water under E50 of LII.

100. On behalf of the appellants, it is also argued that E 50 of L II empowers the State Government to impose tax on mineral rights and not on mineral. It is argued that if for the sake of argument water may be read as mineral for the purposes

of E 50 of L II, even then State Government cannot impose tax on it because tax may be imposed under E 50 of L II on mineral rights and not on minerals. In support of this contention, reliance is placed on the judgment in the case of Hingir Rampur Coal Co. Ltd.[140] In the case of Hingir Rampur Coal Co. Ltd.[141], Hon'ble Mr. Justice K.N. Wanchoo in the dissenting opinion held that "**Therefore, taxes on mineral rights must be different from duties of excise which are taxes on minerals produced. The difference can be understood if one sees that before minerals are extracted and become liable to duties of excise somebody has got to work the mines. The usual method of working them is for the owner of the mine to grant mining leases to those who have got the capital to work the mines. There should therefore be no difficulty in holding that taxes on mineral rights are taxes on the right to extract minerals and not taxes on the minerals actually extracted. Thus tax on mineral rights would be confined, for example, to taxes on leases of mineral rights and on premium or royalty for that. Taxes on such premium and royalty would be taxes on mineral rights while taxes on the minerals actually extracted would be duties of excise. It is said that there may be cases where the owner himself extracts minerals and does not give any right of extraction to somebody else and that in such cases in the absence of mining leases or sub-leases there would be no way of levying tax on mineral rights. It is enough to say that these cases also, rare though they are, present no difficulty. ..... There can be no doubt**

[140] Hingir Rampur Coal Co. Ltd. V. State of Orissa, AIR 1961 SC 459
[141] *Ibid*

therefore that taxes on mineral rights are taxes of this nature and not taxes on minerals actually produced. Therefore the present cess is not a tax on mineral rights; it is a tax on the minerals actually produced and can be no different in pith and substance from a tax on goods produced which comes under Item 84 of List I, as duty of excise. The present levy therefore under Section 4 of the Act cannot be justified as a tax on mineral rights".It has been reiterated in the case of India Cement[142].

101. It has already been held that water is not included in mineralfor the purposes of E 50 of L II. Further, E 50 of L II relates to mineral rights and not to mineral. Therefore, the State Legislature cannot impose water tax under E 50 L II of S VII.

102. It has also been argued on behalf of the appellants that reliance on the judgment in the case of Ichchapur[143] has wrongly been made in the impugned judgment.

103. Paragraphs 42, 43 and 44 of the impugned judgment deal with the arguments on behalf of the State with regard to applicability of Entries 48 and 49 in enacting the Act. In para 42 of the impugned judgment, while arguing on this aspect, reference has been made to the case of Ichchapur[144]. In para 43 of the impugned judgment, the principles of law as laid down in the case of Ichchapur[145] has been quoted. Thereafter the impugned judgment, in para 44, records that "**In view of the above proposition of law it an (*sic :* can) safely be presumed**

[142] *Supra* note 8
[143] *Supra* note 70
[144] *Supra* note 70
[145] *Supra* note 70

that as "water" is covered under the definition of mineral, therefore, the State can derive legislative competence to levy tax on water from Entry 49 of List II of the Seventh Schedule to the Constitution of India".

104. On behalf of the State, reliance has been placed on the case of Ichchapur[146] to argue that water is also a mineral in view of the law laid down in the case of Ichchapur[147], therefore, State Legislature is competent to tax on water.

105. The reliance in the case of Ichchapur[148] has been made *qua* E 50 L II of S VII. This reliance is not from E 49 L II of S VII. It has already been held that in the case of Ichchapur[149], the Court has not laid down the law that in all contingencies water is a mineral. Therefore, the observation that has been made in the impugned judgment, on the competence of the State Legislature to enact the Act under E 49 L II of S VII may also not be upheld.

ARTICLE 288

106. Learned counsel for the appellants would submit that the State Legislature cannot enact the Act under Article 288 of the Constitution. Article 288 of the Constitution relates to inter-State rivers. Bhagirathi is not an inter-State river, it is an intra-State river. A law under Article 288 of the Constitution can be made by the State Legislature only with the consent of the President. In the instant case, such consent has not been

[146] *Supra* note 70
[147] *Ibid*
[148] *ibid*
[149] *ibid*

accorded. Learned counsel would also raise the following points on this aspect.

(i) Article 288 cannot be stretched out of proportion to usurp Union's residuary taxation power under Article 248 read with E 97 L I *qua* water tax because taxation entries ought to be construed with clarity and precision so as to maintain exclusive demarcation between the Union and the State.

(ii) In order to construe Union's power to impose tax, the only question that is to be asked is whether the tax sought to be imposed is mentioned under L II or L III. If the answer is negative, then only the Union has power to legislate on the subject. There is no entry under L II or L III, which confers the subject of water taxation on State. Therefore, the subject vests with the Union.

(iii) Article 288 does not confer any power to impose taxes by the State Legislation, which is otherwise not provided in the State List and that the power under Article 288 is only limited power to lift the prohibition to tax the exempted entities and to bring them within the framework of taxation, subject to the State law getting Presidential assent.

(iv) Article 288 applies only to such entities, which are clearly defined under this Article.

(v) The domain of Article 288 cannot be extended beyond the exempted entities clearly and exhaustively defined in Article 288 itself and the applicability of Article 288 cannot be extended to any other entity merely because the heading of Article 288 uses the expression "in certain cases."

(vi) The expression "in certain cases" limits the applicability of Article 288 to the extent mentioned in Article 288(1).

(vii) Article 288 contains a constitutional limitation on the power of State insofar as imposition of a tax in respect of water or electricity, etc. is concerned.

107. In support of this contention, reliance has been placed on Chhotabhai Jethabhai Patel[150]; Ravindra[151]; Agra Brick Kiln Owners Assn.[152]; National Thermal Power Corpn. Ltd.[153] and Jindal Stainless Limited[154].

108. In the case of Chhotabhai Jethabhai Patel[155], the Hon'ble Supreme Court discussed the aspect of taxation in para 31 of the judgment and observed that "**Before adverting to the decisions on which reliance was placed for this position two things might be pointed out : (1) that Article 265 merely enacts that all taxation — the imposition, levy and**

[150]Chhotabhai Jethabhai Patel & Co. v. Union of India, AIR 1962 SC 1006
[151]Central Bank of India v. Ravindra and others, (2002) 1 SCC 367
[152]Mahapalika of the City of Agra v. Agra Brick Kiln Owners Assn. and another, (1976) 3 SCC 42
[153]State of A.P. v. National Thermal Power Corpn. Ltd., (2002) 5 SCC 203
[154]*Supra* note 27
[155]*Supra* note 150

collection shall be by law; and (2) that the Article beyond excluding purely executive action does not by itself lay down any criterion for determining the validity of such a law to justify any contention that the criteria laid down exclude others to be found elsewhere in the Constitution for laws in general".

109. Clause (2) of Article 288 of the Constitution permits the State Legislature to impose such tax as is mentioned in Clause (1) of it. The words "such tax" have been argued on behalf of the appellants. In the case of Ravindra[156], in para 43, the Hon'ble Supreme Court discussed the meaning of word "such" from dictionaries and observed that "***Webster*** **defines "such" as "having the particular quality or character specified; certain; representing the object as already particularised in terms which are not mentioned". In New Webster's Dictionary and Thesaurus, meaning of "such" is given as "of a kind previously or about to be mentioned or implied; of the same quality as something just mentioned (used to avoid the repetition of one word twice in a sentence); of a degree or quantity stated or implicit; the same as something just mentioned (used to avoid repetition of one word twice in a sentence); that part of something just stated or about to be stated". Thus, generally speaking, the use of the word "such" as an adjective prefixed to a noun is indicative of the draftsman's intention that he is assigning the same meaning or characteristic to the noun as has been previously indicated or that he is referring to something which has been said before**".

[156]*Supra* note 151

110. In the case of Agra Brick Kiln[157]also, under a statutory provision, the meaning of words "such tax" has been interpreted. In para 9 of the judgment, the Hon'ble Supreme Court observed that "**It is plain that "such tax" in this proviso, relates to any tax under Section 172 and saves all species or classes of taxes and does not merely preserve the quantum or rate of such tax.It is typology, not the amount that is saved**".

111. In the case of National Thermal Power Corporation[158], the Hon'ble Supreme Court discussed the scope of Article 288 of the Constitution. In para 33 of the Judgment, the Hon'ble Supreme Court observed as follows:-

> "**33.** On behalf of the States of A.P. and M.P., it was submitted that the subject of electricity has been specifically dealt with by Articles 287 and 288 of the Constitution and by implication the articles, other than Articles 287 and 288, should be read as not dealing with electricity. This submission is stated only to be rejected. These articles make some provisions for electricity and water or electricity in the special context dealt with by those articles and do not exclude applicability of other articles where electricity has been dealt with as goods."

112. The interpretation of Article 288 of the Constitution has further been made by the Hon'ble Supreme Court in the case of and Jindal Stainless[159] as follows:-

> "25.6. Article 287 places a constitutional limitation on the State's legislative power to enact laws insofar as imposition of tax on consumption or sale of electricity consumed by the Government of India or sold to the Government of India for consumption by the Government or for consumption of the

[157] *Supra* note 152
[158] *Supra* note 153
[159] *Supra* note 27

> construction, maintenance or operation of any railway by the Government of India or a rail company, etc. Similarly, Article 288 contains a constitutional limitation on the power of the State insofar as imposition of a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament is concerned."

113. While arguing on the competence of State Legislature under Article 288 of the Constitution, Mr. Arijit Prasad, would submit that Article 288 does not give independent legislative power to impose tax for generation of electricity. He would submit that Article 288 has to be read harmoniously with Article 245 and 246. If the State cannot show legislative competence under L II, it cannot fill that lacuna by referring to Article 288. In support of his contention, learned counsel has placed reliance on the principle of law as laid down in the case of National Thermal Power Corpn. Ltd.[160].

114. Arguments made in a particular appeal have been noted at this stage because there is a contradictory argument on this point made by Mr. Saurabh Kirpal. Learned counsel would submit that Article 288 (1) is a saving clause, whereas under Article 288(2), the State has been enabled to legislate so as to impose any such tax as mentioned in clause (1), subject to certain conditions as laid down under Article 288(2). This Court would refer to those arguments at a later stage.

115. Learned Counsel for the State would submit that Article 288 of the Constitution admits the existence of power in the State to impose a tax "in respect of water". If Entries 45 – 63

[160] *Supra* note 153

of L II do not recognize the competence of the State to impose tax "in respect of water" or consumption or use of water drawn then there would have been no occasion to grant an exemption from it under Article 288. Learned Counsel would also raise the following points in his submission:-

(i) Article 288 also grants exemptions from tax in "certain cases", but the petitioners/appellants do not fall in any of the categories of those "certain cases" as referred to in Article 288.

(ii) The tax on "consumption or sale of electricity" is within the State jurisdiction under E 53 of L II. Therefore, there was a need for exemption under Article 287. Similarly, learned counsel would submit that, in continuation, Article 288 grants exemption from State Taxation "in respect of water or electricity in certain cases".

(iii) Word "consumption" is very wide and also includes non-consumption use.

(iv) Article 288(2) recognizes power in the State to impose any such tax in respect of water or electricity. The words "such tax" implies tax "in respect of water" as in Article 288(1).

(v) If Entries 45-63 of L III do not authorize the State to impose tax "in respect of water" on consumption or use of water drawn then why grant exemption from it under Article 288(1) & (2) to certain entities created by an Act of Parliament.

(vi) The assent of the President is needed only when such tax is imposed on an authority established by law for the specified activities. The appellants are not such authorities.

116. In support of his contentions, learned Counsel has referred to the principles of law as laid down in the cases of Burmah Shell[161]; Delhi Electric Supply undertaking[162]; V.M. Salgaoncar[163]; Damodar Valley Corporation[164]; Southern Petrochemical Industries Co. Ltd.[165]; Chunilal Rameshwar Lal[166] and Vijay Chand Jain[167].

117. In the case of Delhi Electric Supply Undertaking[168], water was used for cooling the turbines and other equipments in thermal generating industries. The Hon'ble Supreme Court upheld the conclusion of the appellate authority, which had held that "**supply of water was measured by the meters which were installed at the entry of the factory. On that basis the water which entered the factory was taken to be consumed**.

118. Reference has also been made to Major Law Lexicon Vol. III of P. Ramnath Ayyar, in which while referring to the case

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[161] Burmah Shell Oil Storage and Distributing Co. of India Ltd., Belgaum v. Belgaum Borough Municipality Belgaum, AIR 1963 SC 906
[162] Delhi Electric Supply Undertaking v. Central Board for the Prevention and Control and Control of Water of Pollution and another; 1995 Supp (3) SCC 385
[163] Union of India and another v. V.M. Salgaoncar and Bros. (P) Ltd. and others; (1998) 4 SCC 263
[164] Damodar Valley Corporation v. State of Bihar and others, (1976) 3 SCC 710
[165] Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & Etio and others, (2007) 5 SCC 447
[166] Commissioner of Income-Tax, Bihar & Orissa, Patna v. Chunilal Rameshwar Lal, AIR 1968 Pat 364
[167] Union of India and another v. Vijay Chand Jain, (1977) 2 SCC 405
[168] *Supra* note 162

of Burmah Shell[169], it is observed that for consumption it is not necessary that the community must be destroyed or used.

119. In the case of Burmah Shell[170], the Hon'ble Supreme Court, *inter alia,* observed that "**so long as the goods have been brought into the local area for consumption in that sense, no matter by whom, they satisfy the requirements of the Boroughs Act and octroi is payable. Added to the word "consumption" is the word "use" also.**"

120. In the case of V.M. Salgaoncar[171], the Hon'ble Supreme Court interpreted the word "consumption" and observed "**The word "consumption" may involve in the narrow sense using the article to such an extent as to reach the stage of its non-existence. But the word "consumption" in fiscal law need not be confined to such a narrow meaning. It has a wider meaning in which any sort of utilization of the commodity would as well amount to consumption of the article, albeit that article retaining (sic retains) its identity even after its use**."

121. In the case of Damodar Valley Corporation[172], a question was raised with regard to immunity from payment of tax under Article 288 of the Constitution of India. In that case a levy of duty on the sales and consumption of electrical energy in the State of Bihar was imposed by way of an amendment in the Bihar Electricity Duty Act, 1948, but the Amendment Act had

[169] *Supra* note 161
[170] *Ibid*
[171] *Supra* note 163
[172] *Supra* note 164

not received the assent of the President before its publication. The Hon'ble Supreme Court observed as hereunder:-

> "**9.** What is required by clause (2) of Article 288 is that the law made by the State Legislature for imposing, or authorising the imposition of tax mentioned in clause (1) shall have effect only if after having been reserved for the consideration of the President it receives his assent. Another requirement of that clause is that if such law provides for the fixation of the rates and other incidents of such tax by means of Rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such Rule or order. It is, however, not the effect of that clause that even if the abovementioned two requirements are satisfied, the provisions which merely deal with the mode and manner of the payment of the aforesaid tax should also receive the assent of the President and that in the absence of such assent, the provisions dealing with the incidence of tax, which have received the assent of the President, would remain unenforceable."

122. In the case of Southern Petrochemical Industries Co. Ltd.[173], the Hon'ble Supreme Court referred to the principle of law as laid down in the case of Damodar Valley Corporation[174].

123. In the case of Chunilal Rameshwarlal[175], the Hon'ble Supreme Court observed that "**the expression "in respect of" is of wider connotation than the word "in" or "on"."**In the case of Vijay Chand Jain[176]also, the Hon'ble Supreme Court observed that "**The words "in respect of" admit of a wide connotation**."

124. The question is as to whether competence of the State Legislature may be derived from Article 288 of the Constitution? Essentially, what is being argued on behalf of the State is that

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[173] *Supra* note 165
[174] *Supra* note 164
[175] *Supra* note 166
[176] *Supra* note 167

Article 288 gives exemption from taxation by State in respect of water and electricity, therefore, it pre-supposes the power to legislate by the State Legislature.

125. A few principles of interpretation need reiteration. They are that power to tax may not be inferred; it cannot implied; it has to be distinct, clear. It is also settled law that while interpreting any Entry, wide interpretation should be given, but in any case, there should be a legislative entry enabling the Legislature, either Union or the State to enact a particular Act.

126. Article 288 of the Constitution reads as follows:-

> **"288. Exemption from taxation by States in respect of water or electricity in certain cases**.—
>
> (1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.
>
> Explanation.—The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.
>
> (2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order."

127. The Constitution should be interpreted in a dynamic manner; it is living organ. In the case of GVK Industries[177],the Hon'ble Supreme Court also referred to the techniques of interpretation by using the words "topographical space". The Hon'ble Court observed as hereunder :-

> **"38.** Our Constitution is both long and also an intricate matrix of meanings, purposes and structures. It is only by locating a particular constitutional provision under consideration within that constitutional matrix could one hope to be able to discern its true meaning, purport and ambit. As Prof. Laurence Tribe points out:
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> "To understand the Constitution as a legal text, it is essential to recognize the ... sort of text it is: a *constitutive* text that purports, in the name of the people..., to bring into being a number of distinct but inter-related institutions and practices, at once legal and political, and to define the rules governing those institutions and practices." (See *Reflections on Free-Form Method in Constitutional Interpretation*. [108 Harv L Rev 1221, 1235 (1995)])
>
> **39.** It has been repeatedly appreciated by this Court that our Constitution is one of the most carefully drafted ones, where every situation conceivable, within the vast experience, expertise and knowledge of our framers, was considered, deliberated upon, and appropriate features and text chosen to enable the organs of the State in discharging their roles. While indeed dynamic interpretation is necessary, if the meaning necessary to fit the changed circumstances could be found in the text itself, we would always be better served by treading a path as close as possible to the text, by gathering the plain ordinary meaning, and by sweeping our vision and comprehension across the entire document to see whether that meaning is validated by the constitutional values and scheme."

128. Further in the case of GVK Industries[178], the Hon'ble Supreme Court observed that "**However, it can also be appreciated that given the complexity and the length of our Constitution, the above task would be gargantuan. One method that may be adopted would be to view the**

[177] *Supra* note 22
[178] *Ibid*

Constitution as composed of constitutional topological spaces."

129. Learned Counsel for the State would submit that Article 288 of the Constitution finds place under Part XII of the Constitution, which deals with "Finance, Property, Contracts and Suits". Under Chapter I, under sub-heading "Miscellaneous Financial Provision", Article 288 is amongst the provisions relating to exemptions. It is argued that Article 288 has to be read in the light of its topographical space in the Constitution.

130. In Part XII, Chapter I, under the Miscellaneous Financial Provisions of the Constitution, there are provisions from Articles 282 to 290-A. These are miscellaneous provisions. In order to appreciate the arguments, the exemption clause may require a little more scrutiny.

131. Article 285 relates to exemption of property of the Union from State taxation; Article 287 relates to exemption from taxes on electricity; Article 289 relates to exemption of property and income of a State from Union taxation. E 53 L II of S VII deals with taxes on consumption or sale of electricity, but Article 287 is an exemption to it. Article 289 in general terms exempts the property and income of a State from Union taxation. In between, Article 288 deals with exemption from taxation by States in respect of water or electricity in certain cases. It is true that Article 288 is between such two Articles, which really deal with exemptions.

132. It is settled law that the Head Note of an Article may not be the sole factor for determining the true intent and character and pith and substance of an Article. Clause (1) of Article 288 of the Constitution, in fact, is a saving clause. Any State law in force immediately before commencement of the Constitution, which imposes tax as specified in the sub clause may not be applicable unless the President may by an order otherwise provides. It clearly means that if there existed any State law immediately before commencement of the Constitution, which imposes and authorizes the imposition of tax in respect of water and electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley, such law shall not come into force unless the President by order otherwise provides. It is not an exemption clause as such. Clause (1) of Article 288 does not pre-suppose that the State Legislature has legislative competence to make law with regard to inter-State river or river-valley or with regard to electricity or water. It makes provision for law in force on that subject, which were applicable just before commencement of the Constitution.

133. Clause (2) of Article 288 is definitely an enabling provision. It empowers the State Legislature to impose or authorize the imposition of any such tax as mentioned in Clause (1) of Article 288 but it is subject to various conditions, one of which is that such law shall have any effect only if it has been reserved for consideration of the President and has received the consent.

134. The argument is that since Article 288 of the Constitution provides for exemption, it may be inferred that there is legislative competence on the subject to make law with the State Legislature.

135. The law is well-settled that the legislative competence may not be implied or inferred to.

136. In the instant case, the Act has not been reserved for consideration of the President and it has not received the assent of the President. Even otherwise, Article 288 relates to various entities as specified in Clause (1) of Article 288 of the Constitution. The appellants or any of them do not fall in that category of entities as specified under Article 288(1) of the Constitution.

137. It cannot also be said that the State's power to impose tax has been restricted under Article 288 with regard to certain entities, therefore, with regard to other entities the State Legislature is competent to legislate. As stated, legislative competence should be clear, precise and distinct.

138. Clause (1) of Article 288 is a saving clause. The first two lines before the word "but" appearing in the second line of Clause (2) of Article 288 enables the State Legislature to levy such tax as mentioned in Clause (1) of Article 288, but subject to conditions which are enumerated after the word "but" appearing in line 2 of Clause (2). In view thereof, it cannot be said that the State Legislature may enact the Act under Article 288.

139. In the impugned judgment, it has been concluded that the argument regarding violation of Articles 200 and 288 of the Constitution by the State are misconceived. While referring such finding, in para 75 of the impugned judgment, it is recorded that "**The bill passed by the State legislature under Entry 17 of List II has been accorded assent by the Hon'ble Governor of Uttarakhand under Article 200 of the Constitution before the bill took the shape of an Act. Furthermore, Article 163(2) of the Constitution stipulates – if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought to or ought not have acted in his discretion**". In para 75 of the impugned judgment, it has also been recorded that "**So far as another contention of learned Senior Counsel appearing for the petitioner THDC that in view of provision contained in Article 288(2) of the Constitution of India the legislature of a State can impose any such tax only if the law has received the assent of the President of India is concerned, it is apparent that the Act is not in violation of Article 288(2) of the Constitution, rather the same is in conformity with the provisions contained under Entry 17 of List II of the Seventh Schedule to the Constitution of India**".

140. Merely because an Act gets approval of the Governor, it cannot be said that the competence of the State Legislature in

enacting such Act may not be questioned. The law is well-settled that under certain parameters, an Act may be questioned *qua* the competence of the legislature in enacting such Act. This Court has already held that merely by reading Article 288, which admittedly does not apply in the instant case, the State Legislature may not derive competence to enact the Act. Therefore, this Court is of the view that the observations that have been made on this aspect in the impugned judgment, as quoted hereinbefore, may also not be upheld.

NATURE OF TAX

141. Learned counsel for the appellants would submit that the tax imposed by the Act is on electricity generation. The central theme of the Act is that tax is levied on "generation of electricity". The incident is water drawn for electricity generation. What the State could not have done directly, it tried to do indirectly. It is argued that in order to levy such tax, there should have been a separate entry on "drawal of water for electricity generation".

142. Learned counsel for the appellants would also submit that while interpreting the different entries, in S-VII, it is the duty of the Court to find out its true intent and purpose.

143. In support of his contention, learned counsel placed reliance on the principle of law as laid down in the cases of India Cement Ltd.[179]; Kartar Singh[180]; State of Meghalaya[181],

[179] *Supra* note 8
[180] *Supra* note 9
[181] *Supra* note 14

Association of Natural Gas[182];Bill to Amend Section 20 of the Sea Customs Act[183]; Govind Saran Ganga Saran[184], Godfrey Phillips India Ltd.[185], M.P. Cement Manufacturers' Association[186],Federation of Hotel and Restaurant Association[187], Drive-in Enterprises[188], Prafulla Kumar Mukherjee[189], Raza Buland Sugar Co. Ltd.[190], K.C. Gajapati Narayan Deo[191], R.M.D.C. (Mysore) (P) Ltd.[192] and Hari Krishna Bhargav[193].

144. Learned Counsel for the State would submit that the incident of tax in the Act is the drawal of water for use in electricity generation only. He would submit that it is a tax clearly "in respect of water", precisely on "drawal and use of water to commercially generate electricity" i.e. the nature of this tax. He would also submit that there is an inherent connect between land and water. Water flows on the land and is attached to the earth. In the instant case, it is argued that the water falls on the land or on the generator attached to the land to generate electricity, therefore, in pith and substance, the tax is in respect of water/land or it is a tax on drawal or use of water for generation of electricity.

145. In support of his contention, learned Counsel has placed reliance on the judgments in the case of Indian

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[182] *Supra* note 13
[183] Bill to Amend Section 20 of the Sea Customs Act, 1878, (1963) 3 SCR 787
[184] Govind Saran Ganga Saran v. Commissioner of Sales Tax and Others, 1985 Supp SCC 205
[185] *Supra* note 6
[186] *Supra* note 7
[187] Federation of Hotel and Restaurant Association v. Union of India, (1989) 3 SCC 634
[188] State of Karnataka v. Drive-in Enterprises, (2001) 4 SCC 60
[189] Prafulla Kumar Mukherjee v. Bank of Commerce, AIR 1947 PC 60
[190] *Supra* note 87
[191] K.C. Gajapati Narayan Deo v. State of Orissa, (1953) 2 SCC 178
[192] R.M.D.C. (Mysore) (P) Ltd. v. State of Mysore, AIR 1962 SC 594
[193] Hari Krishna Bhargav v. Union of India, AIR 1966 SC 619

Aluminium Co.[194],Municipal Council, Kota[195] and TVS Motor Company Ltd.[196]

146. In fact, in the case of TVS Motor Company Limited[197], the Hon'ble Supreme Court has followed the principle of law as laid down in the case of Govind Saran Ganga Saran[198].

147. What is the true nature and character of the Act? Such question generally arises when legislative competence is challenged. The concept is not new. The question is, is it really a tax on drawal of water for electricity generation only? Or is it a tax on electricity generation?

148. Long back, in the case of Russel[199], an Act of Parliament of Canada was challenged on the ground of legislative competence. While making the discussion, it was observed that, **"the true nature and character of the legislature in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs."**In the case of Barger[200], the High Court of Australia referred to the earlier judgments and observed that, **"in considering the validity of laws of this kind, we must look at the substance and not the form. If the statute is good in substance, the Court will regard the substance and hold the law to be valid, whatever the form may be."**

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[194]*Supra* note 23
[195]Municipal Council, Kota v. Delhi Cloth and General Mills Co., (2001) 2 SCR 287
[196]TVS Motor Company Limited v. The State of Tamil Nadu and others, AIR 2018 SC 5624
[197]*Ibid*
[198]*Supra* note 184
[199] Charles Russel Vs. The Queen (New Brunswick), (1882) UKPC 33
[200] R. v. Barger, 1908 HCA 4

149. In the case of Muttuswami Goundan[201], the Hon'ble Federal Court observed that "**Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance", or its "true nature and character", for the purpose of determining whether it is legislation with respect to matters in this list or in that**:"

150. The case of Prafulla Kumar Mukherjee[202]is another case in which the test of pith and substance has been applied while examining the legislative competence. It would be apt to discuss the facts of this case in a little detail. The validity of Bengal Money Landers Act 1941 was in question, which had limited the amount recoverable by money lenders on his loans or principal and interests and prohibited the payment of sums larger than those permitted by the Act. The matter pertaining to cheques, bills of exchange, promissory notes and "other like instruments" was in the list of Federal Legislature in the Government of India Act, 1935, under E38. E27 in the Provincial Legislative List was with regard to "to make laws with respect to **"trade and commerce within the Province.....; money lending and money lenders."** The Federal Court had held that in so far as the Act effected promissory notes, it trespassed into the federal legislature field and was therefore *ultra vires*.

151. Finally, the privy council held that the transactions in questions are in pith and substance money lending transactions. It was observed that, "**To take a promissory note as security**

[201]A.L.S.P.P.L. Subrahmanyan Chettiar Vs. Muttuswami Goundan, Advocate-General of Madras, Intervener, AIR 1941 FC 47
[202]*Supra* note 189

for a loan is the common practice of money lenders, and if a legislature cannot limit the liability of a borrower in respect of a promissory note given by him it cannot in any real sense deal with money lending……. In truth, however, the substance is money lending and the promissory note is but the instrument for securing the loan."

152. The similar principles have been followed in the cases of India Cement Ltd.[203], Kartar Singh[204],Federation of Hotel[205], State of Meghalaya[206],Association of Natural Gas[207]and Raza Buland Sugar Co. Ltd.[208]

153. In the case of M.P. Cement Manufacturers' Association[209], the Hon'ble Supreme Court referred to the judgment in the case of Mathuram Agrawal[210], wherein it was held that "**The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language**".

154. In the case of Drive-in Enterprises[211],the facts were as follows:- A drive-in-theatre is a cinema with an open air theatre into which admissions were given to persons desiring to watch film while sitting in their vehicle taken inside the theatre.

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[203] *Supra* note 8
[204] *Supra* note 9
[205] *Supra* note 187
[206] *Supra* note 14
[207] *Supra* note 13
[208] *Supra* note 87
[209] *Supra* note 7
[210] Mathuram Agrawal v. State of M.P.,(1999) 8 SCC 667
[211] *Supra* note 188

Rs. three were for auditorium and an additional ticket of Rs. two was to be charged from the persons, who wanted to view the film from their vehicle. The State, in addition to charging entertainment tax on the persons being entertained, levied entertainment tax on admission of cars inside the theatre. It was challenged. Various factors were considered by the Hon'ble Supreme Court in the case. The Hon'ble Supreme Court also observed that the nomenclature of levy is not conclusive for determining its true character. It was held that, **"The real nature and character of the impugned levy is not on the admission of cars or motor vehicles, but the levy is on the person entertained who takes the car inside the theatre and watches the film while sitting in his car. We are, therefore, of the view that in pith and substance the levy is on the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading "admission of vehicle" is a levy on entertainment and not on admission of vehicle inside the drive-in-theatre. ."**

155. In the case of Gajapati Narayan Deo[212], the Hon'ble Supreme Court observed as hereunder:-

> "**11.** It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power [Cooley, *Constitutional Limitations*, Vol. 1, 379.] . A distinction,

[212] *Supra* note 191

> however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. As was said by Duff, J. in *Attorney General for Ontario* v. *Reciprocal Insurers* [*Attorney General for Ontario* v. *Reciprocal Insurers*, 1924 AC 328 at p. 337 (PC)] : (AC p. 337)
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> "... where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

156. The Hon'ble Supreme Court further observed that "**it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation**". This principle has also been followed in the cases of R.M.D.C. (Mysore) (P) Ltd.[213]and Hari Krishna Bhargav[214].

157. In the instant case also, the pith and substance of the Act is to be determined. Its true nature and character is to be

[213]*Supra* note 192
[214]*Supra* note 193

ascertained. On behalf of the appellants, it is argued that that the character of the imposition known by its nature, it is the first of the component of a tax. Thereafter, the clear indication of the person, on whom the levy is imposed and who is obliged to pay the tax; the rate and the measure of the tax are its other components. It is also argued that generally tax is composed of two elements, namely, person, thing or activity on which the tax is imposed and incident of the tax. It is the case of the appellants that in the instant case, though tax is termed as on drawal of water for generation of electricity, but, in essence, the incident is generation of electricity. Therefore, in pith and substance, this is a tax on electricity generation.

158. In support of his contention, reference has been made to the judgment in the case of Govind Saran GangaSaran[215], Godfrey Phillips[216]and Bill to Amend Section 20 of Sea Customs Act, 1878[217].

159. In the case of Govind Saran Ganga Saran[218],in Para 6, the Hon'ble Supreme Court observed as hereunder:-

> "6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in

[215] *Supra* note 184
[216] *Supra* note 6
[217] *Supra* note 183
[218] *Supra* note 184

> the legislative scheme defining any of those components of the levy will be fatal to its validity."

160. In the case of Godfrey Phillips[219], in Para 47, the Hon'ble Supreme Court observed that, **"Classically, a tax is seen as composed of two elements : the person, thing or activity on which the tax is imposed and the incidence of tax."** The Hon'ble Supreme Court further observed that, **"Under the three lists of the Seventh Schedule to the Indian Constitution a taxation entry in a legislative list may be with respect to an object or an event or may be with respect to both..... Hence, where the entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative head. "**

161. In the case of Sea Customs Act[220], the Hon'ble Supreme Court observed that, **"duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast Sales Tax which is also imposed with reference to goods sold, where the taxable event is the act of sale."**

162. In the case of Indian Aluminium Co.[221], the Hon'ble Supreme Court held that, "**when legislative competence is challenged the controversy must be resolved as far as possible in favour of the legislative body putting the most**

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[219] *Supra* note 6
[220] *Supra* note 183
[221] *Supra* note 23

liberal construction." It was held that the Court, in such situation is required to look at the substance of the legislation. In the case of Municipal Council, Kota[222], also, the Hon'ble Supreme Court discussed the principle of true nature test and held that nomenclature used or chosen to christen the levy is not much relevant to determine the real factor or nature of the levy. What really has to be seen is the pith and substance or the real nature and character of the levy.

163. In order to ascertain the true nature and character or pith and substance of the Act, it would be apt to look at the provisions of the Act.

164. The Act is named as the Uttarakhand Water Tax on Electricity Generation Act, 2012. It is "to levy water tax on electricity generation in State of Uttarakhand." A few Sections of the Act are as follows:-

> **"2. Definition.** - In these rules, unless there is anything repugnant in the subject or context:-
>
> (a) .....
>
> (b) .....
>
> [(2)(B) .....
>
> (c) .....
>
> (d) .....
>
> (e) .....
>
> (f) "User" means any person, group of persons, local body, Government Department, company, corporation, society etc. drawing water or any other authority authorized under chapter - II of the Act to avail the facility to draw water from any source for generation of electricity;

[222] *Supra* note 195

(g) "Water" means natural resource flowing in any river, stream, tributary, canal, nallah or any other natural course of water or stipulated upon the surface of any land like, pond, lagoon, swamp, spring;

(h) "Water Source" means a river and its tributes, stream, nallah, canal, spring, pond, lake, water course or any other source from which water is drawn to generate electricity;

(i) "Water Tax" means the rate levied or charged for **water drawn for generation of electricity and fixed under this Act**.

3. General. - For the purpose of this Act, every water source in the State is, and shall remain, the property of the Government and any proprietary ownership, or any riparian or usage right, on such wale; resources vested in any individual, group of individuals or any other body, corporation, company, society or community shall, from the date of commencement of the Act, be deemed to have been terminated and vested with the Government. However, for rivers of interstate nature and rivers under the ambit of international treaties, the ownership right of Uttarakhand Government shall be limited to non-consumptive use of water.

(2) No person, group of persons, Government department, local authority, corporation, company, society or any other body **shall draw water from any source for electricity generation** except in accordance with the provisions of the Act.

4. Installation of Scheme for usage of water. - No person, group of persons, Government department local authority, corporation, company society or any other body, by whatever name called (hereinafter in this Chapter will be called the "user"), **shall install a Scheme requiring usage of water (non consumptive use) of any water source for generating electricity except** without being registered under the Commission in accordance with the provisions provided hereinafter in this Chapter.

5. Submission of Sanctioned Scheme for usage of water by the user. - Any user intending to install a Scheme requiring usage of water (non consumptive use) **for the purpose of generation of electricity shall** submit Detailed Project Report of the scheme, .duly sanctioned by authority competent to do so in this behalf to the Commission accompanied by such fee and charges as may be fixed by the Commission for registration.

12. Duties obligations and responsibilities of the Registered user. - (1) The registered user shall be **liable to pay water tax for the water drawn for electricity generation** as per the provisions of the Act.

(2) Where any user has constructed a Hydropower scheme, for purpose of generation of electricity, prior to the commencement of the Act, such user shall, within a period of six month from the date of commencement of the Act, apply for registration under the Act and the Commission shall pass an order to register the user within a period of six months from the date of receipt of application in accordance with the provisions of the Act.

14. Assessment of water drawn by user. - (1) The Commission shall install or cause to be installed flow measuring device within, the premises of Scheme or at such other place where the Commission deems fit for purposes of measuring the **water drawn for electricity generation** or may adopt any indirect method for assessment of water drawn by the user.

(2) .....

17. Fixation of water tax. - The user shall be liable to pay the Water Tax under the Act at such rates as the Government may by notification fix in this behalf.

(2) The State Government may review increase, decrease or vary the rates of the Water tax fixed under this section from time to time in the manner it deems fit.

19. Procedure for assessment. - (1) The assessment of water drawn by the user for electricity generation and computation of water tax there of shall be carried out by the Commission."

165. If the name, *per se*, is looked at, according to the Act, it is water tax on electricity generation. The question is, is it tax on drawal of water for generation of electricity, as argued by learned Counsel for the State, or as to whether in "pith and substance", it is tax on generation of electricity.

166. In the case of M.P. Cement Manufacturers' Association[223], the Hon'ble Supreme Court has categorically held that the intention of the legislature in a taxing statute is gathered from the language of the provision, particularly when the language is plain and unambiguous. The language of the Act makes it abundantly clear that it is a tax on electricity generation. It is settled law that mere nomenclature may not be the sole factor for determining the true nature of the Act; nomenclature alone may not be a determining factor to ascertain "pith and substance" of an Act while examining the legislative competence. It is also settled legal position that measure of tax is not sole factor to determine the nature of tax. The fixation of tax may be done under Section 17 of the Act. It may be done on such rate, as the Government by notification may fix on this behalf. The fixation has been done by way of notification dated 07.11.2015. It reads as follows:-

"Uttarakhand Government

Irrigation Section -2

No. 2883/II-2015/01 (50)/2011

Dehradun : Dated 7 November, 2015

Notification

Governor, Uttarakhand by using his power on Power Generation in Uttarakhand, as per Section 17 (1) of Water Cess Act, 2012 (Uttarakhand Act No. 09 No. 2013) has readily acknowledge to impose water cess on the hydel projects which are established in Uttarakhand State except 5 MW or below capacity projects from the date of publication of this Notification which is as follows:

Sl. No.	Head available for power generation	Prescribed water tax
1.	Upto 30.00 M	02 paisa/CUM
2.	31.00 to 60.00 M	05 paisa/CUM
3.	61.00 to 90.00 M	07 paisa/CUM
4.	90.00 and above	10 paisa/CUM

[223] *Supra* note 7

2. The above Water Cess will be effective for upcoming three year from the date of implementation."

NAME OF THE ACT

167. The name of the Act is not sole factor to determine the pith and substance of the Act,the contents; true nature and character of the Act or its "pith and substance" has to be seen.

168. The name of the Act suggests that it is a tax on electricity generation. It reads as "the Uttarakhand **Water Tax** on **Electricity Generation** Act, 2012". Now the question is whether the true nature and character of the Act is different than what is suggested by its name?

TAXABLE EVENT

169. The components, which entered into the concept of tax is elaborated in the case of Govind Saran Ganga Sharan[224] and TVS Motor Company Limited[225]that the first amongst them is "the character of the imposition known by its nature, which prescribes the "taxable event attracting the levy".

170. In the case of Godfrey Phillips India Ltd.[226]also this has been held by the Hon'ble Supreme Court that in addition to the person, thing or activity on which the tax is imposed, the incident of tax is another component of it.

171. In the instant case, it has to be seen as to what is the taxable event. On behalf of the State, it is argued

[224] *Supra* note 184
[225] *Supra* note *196*
[226] *Supra* note 6

that it is the drawal of water, whereas on behalf of the appellants, it is being argued that it is not merely on drawal of water but drawal of water for electricity generation.

172. Tax by the Act is imposed on a user, who is defined under Section 2(f) of the Act. There is a restraining Section also under the Act, which makes provision for its functioning or its necessary compliance.

173. Section 2 (f) of the Act has already been quoted hereinbefore. According to it, user means a person, who draws water from any source for generation of electricity. It means, mere drawal of water does not make a person liable to pay tax under the Act. A user is under liability to pay the tax only if he draws water from any source for generation of electricity.

174. It has further been clarified by Section 3(2) of the Act. It has also been quoted hereinbefore. It poses a restriction that no person, group of person, etc. shall draw water from any source for electricity generation except in accordance with the provisions of the Act.

175. Tax is imposed under Section 17 of the Act. It is on the user. As stated, user is a person, who draws water for generation of electricity. Therefore, the taxable event in the Scheme of the Act is not mere drawal of water. It is drawal of water for generation of electricity. If merely water is drawn from any source, the Act does not impose any tax. But, if drawal of water is for generation of electricity, it is taxable event.

MEASURE OF TAX

176. On behalf of the State, it is argued that the tax is not imposed on electricity units generated. Instead, it is measured by the volume of the water used for the purpose. On behalf of the appellants, it is argued that by virtue of the notification dated 07.11.2015, for different heights, different rates of water tax are imposed. It suggests that it is a tax on generation of electricity.

177. The settled law need not be reiterated that nature of tax and its measure are quite distinct. The measure of tax *per se* does not ascertain the nature of tax. The similar principle would definitely apply in the instant case also.

178. The measure of tax definitely is as per cubic meter water used but it depends on the height available for power generation. Higher the height, more is the tax per cubic meter water. Had it been tax on mere drawal of water, there would have been no necessity to correspond the use of water with the height available for power generation. While examining the taxable event and the person i.e. the user, who is liable to pay the tax under the Act, it has already been held that mere drawal of water is not taxable. Only such drawal of water is taxable, which is drawn for generation of electricity.

179. The name of the Act, the taxable event, the user and the measure of the tax all suggest that definitely the tax in the instant case is on electricity generation. The measure of the tax is though on volume of water used, but the rate increases with the height of the head. The form, in which the measurement is

clothed, is definitely an exercise of colourable legislation. But, what the notification dated07.11.2015 had tried to hide is visible with more flash of lights. The measurement of tax also confirms that it is tax on electricity generation. Therefore, this Court concludes that in pith and substance, it is tax on generation of electricity. It is not on use of water on land. It is on use of water for generation of electricity.

180. On behalf of the State, it is argued that the State Legislature is competent to legislate the Act under E 45 and 49 of L II of S VII. It was argued that the water drawn from the source falls on the land or on generator attached to the land to generate electricity, therefore, in pith and substance, the tax is in respect of water/land and it is a tax on drawal and use of water on land. In connection with E 45, it was argued that since the water falls on land or on the generator attached to land to generate electricity, it is land revenue.

181. While making discussion on these two arguments, this Court had then observed that it is a question related to pith and substance and true nature and character of the Act. Now, this Court has held that in the instant case, the water drawn from the source though falls on generator attached to land, but it is not use of water on land and it is also not land revenue for the simple reason because it is not only fall of water on land, but it is use of water for electricity generation that makes a taxable event. The pith and substance of the Act is water tax for generation of electricity. Therefore, the State Legislature is not competent to levy the tax under E 45 and 49 L II of S VII.

EXCESSIVE LEGISLATION -PROMISSORY ESTOPPEL

182. The tax has also been challenged on the ground that it is bad due to excessive delegation and by the doctrine of promissory estoppel. Learned counsel for the appellants would submit that in the Act, there is no taxing provision; tax has been imposed by a notification dated 07.11.2015 by the State Government. Learned counsel for the appellants would also raise the following points in their submissions:-

(i) Levy of tax by notification is not a legislative act. It is an executive act. As per the notification, if the head of water fall is higher, the amount of tax levied is also higher. It makes the intention to enact the Act much clear. The notification dated 07.11.2015 is fraud on power.

(ii) The appellants under an agreement raised the project. A promise was made by the State to the petitioners that the State will not charge on water used for the project and in lieu thereof the appellants had agreed to give 12% of the electricity to the State. It is a sovereign guarantee. The State is under a contractual obligation. The State cannot go beyond it.

(iii) By a notification dated 07.11.2015 issued under the Act, tax has been imposed. It is not a tax levied by a statute, but a tax levied by a statutory notification, which is an excessive delegation by the State Legislature. In this case, the doctrine of promissory estoppel would

apply, thereby the State would be stopped to charge such a tax.

(iv) The incident of tax is a notification. It is the delegation of an unlimited power.

(v) The fixation of water rates is arbitrary, as there is no nexus with incidence of tax. The incidence of tax has co-relation with the height from which the water falls. The greater the height, the greater the amount of tax, which is arbitrary.

(vi) Notification dated 07.11.2015 is not reasonable. It hits Wednesbury's Principle of reasonableness.

(vii) In the impugned judgment, it has wrongly been held that promissory estoppel would not apply in such case.

(viii) 12% of the deliverable energy is to be provided to the State free of cost.

(ix) There is no overriding public interest in favour of the State of Uttarakhand to resile from its promise made under the agreement.

183. In support of these arguments, reliance has been made on the principle of law as laid down in the cases of Devi Dass Gopal Krishnan[227]; Veega Holidays[228]; Motilal Padampat[229]; Chattanatha Karyalar[230] andShanmuga Oil Mills[231].

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[227] Devi Dass Gopal Krishnan, etc. v. State of Punjab and others, AIR 1967 SC 1895
[228] Veega Holidays & Parks Pvt. Ltd. v. Kunnathunadu Grama Panchayat and others, AIR 2004 Kerala 168
[229] Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and others, (1979) 2 SCC 409
[230] Chattanatha Karayalar v. State of Madras, 1964 SCC OnLine Mad 292
[231] State of Madras v. Shanmuga Oil Mills, Erode, 1962 SCC OnLine Mad 40

184. Learned Counsel for the State would submit that the tax is validly imposed; the delegation for fixing rates under the Act is not excessive delegation; Section 17 and 18 of the Act do not confer an unguided or unlimited discretion to fix the rate for drawal and usage of water; the "Policy for Harnessing Renewable Energy Sources in Uttarakhand with Private Sector/Community Participation" dated 29.01.2008 broadly classifies the Renewal Energy ("RE") Sources into two categories i.e. Upto 25 MW and other RE projects; it also classifies Hydroprojects, Further classification has been made as Micro Projects with capacity upto 100 KW, Mini Projects with capacity above 100 KW and upto 5 MW and Small Projects with capacity above 5 MW and upto 25 MW. He would also raise the following points in his submissions:-

(i) The provisions of the Act, in fact, are manifestation of the public policy, therefore, there is enough regulatory policy for balancing "rates on tax" with the objective of preserving and conserving the State's most valuable property.

(ii) The essential legislative function has not been delegated. The Act provides the policy and only leaving it to the executive to fix the tax at such rates. The words "such rates" are dynamic words used to enable the Government to meet different situation.

(iii) Power to fix rates, etc. may be delegated to the State Government.

(iv) The tax on drawal of water has been imposed under a Policy, which has a larger public interest of promoting, preserving and conserving water in public interest.

(v) The purpose of the Act coupled with the policy background, which is binding on the State, offers enough guidance. The power is not unlimited unless State intends to spell doom for its Policy and waste the private investments in the State.

(vi) Even if a maximum tax is not prescribed under the Act, it also does not make the delegation invalid. Section 17 and 45 of the Act prescribe the guidance for fixing the rates. Mere absence of maximum rate is of no consequence as it hardly provides guidance for rate fixation.

(vii) There are four categories of user of water i.e. micro, mini, small and those beyond 25 MW. All the four categories use different quantity of water based on the height of the water head from where the water falls. The result would depend upon the height of water heads. It has to be measured and evaluated and the Government has the experts and the data, therefore, discretion has been given to fix different rates for different category of user.

(viii) No one has questioned the reasonableness of the rates fixed for the different categories created under policies of 2003 and 2008 and

therefore the argument with regard to excessive delegation has no force at all.

(ix) The tax also includes price for parting of privilege by the owner Government. This is not a usual tax but it also includes return for the consideration for parting with property. The property has to be assessed and valued before any rate can be fixed. The quantity of water used would also be relevant. All these value assessments can best be made by the Government and not the legislature.

(x) It is not a case of promissory estoppel.

(xi) There is no concept of sovereign guarantee in the Constitution. There is no sovereign in the democracy and rule of law is supreme, which is governed by the written Constitution.

(xii) The Restated Implementation Agreement filed in SPA No. 137 of 2017, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others does not prohibit the State Legislature from levying a tax on drawal of water for generation of electricity.

(xiii) If the State Government has entered into an agreement, it does not bar the Legislature from imposing tax.

185. In support of his submissions, learned Counsel for the State has placed reliance on the principles of law, as laid

down in the cases of Quarry Owners' Association[232], Pandit Banarsi Das Bhanot[233], Municipal Corporation of Delhi[234], M/s Hiralal Rattanlal[235], Sita Ram Bishambhar Dayal[236], Sashi Prasad Barooah[237], M.K. Papiah[238], Liberty Cinema[239], Ashok Leyland Ltd.[240], Devi Dass Gopal Krishnan[241], Keshavlal Khemchand[242], TVS Motor Company[243] and Gwalior Rayon[244].

186. Essentially, two points have been raised on behalf of the appellants, namely, (i) the tax has been imposed by a statutory notification purportedly having been issued under Section 17 of the Act, which delegates the power to impose tax on the Executive, without any guidance. Therefore, Section 17 of the Act is bad because it is vitiated by excessive delegation; and (ii) demand of tax is bad. State had already promised that no tax would be imposed on use of water and based on that promise, the projects have been established. Therefore, now the tax cannot be demanded. It is bad because of the doctrine of promissory estoppel. Two concepts are to be discussed, i.e. excessive delegation of legislative power and doctrine of promissory estoppel.

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[232]Quarry Owners' Association v. State of Bihar and Others, (2000) 8 SCC 655
[233]Pandit Banarsi Das Bhanot and Others v. State of Madhya Pradesh and Others, AIR 1958 SC 909
[234]Municipal Corporation of Delhi v. Birla Cotton, Spinning and Weaving Mills, Delhi and Another, AIR 1968 SC 1232
[235]M/s Hiralal Rattanlal Etc. Etc. v. State of U.P. and Another Etc. Etc.,(1973) 1 SCC 216
[236]Sita Ram Bishambhar Dayal and Others v. State of U.P., (1972) 4 SCC 485
[237]Sashi Prasad Barooah v. Agricultural Income Tax Officer and Others, (1977) 1 SCC 867
[238]M.K. Papiah and Sons v. Excise Commissioner and Another, (1975) 1 SCC 492
[239]Corporation of Calcutta and Another v. Liberty Cinema, AIR 1965 SC 1107
[240]Ashok Leyland Ltd. v. State of T.N. and Another, (2004) 3 SCC 1
[241]*Supra* note 227
[242]Keshavlal Khemchand and Sons Private Limited and Others v. Union of India and Others, (2015) 4 SCC 770
[243]*Supra* note 196
[244]Gwalior Rayon Silk Mfg. (WVG.) Co. Ltd. Vs. Asstt. Commissioner of Sales Tax and Others, (1974) 4 SCC 98

EXCESSIVE DELEGATION

187. Essentially, the legislature is entrusted with the task of making laws, but, with the growing activities of the State or penetration of State activities in almost every sphere of life, it has been an accepted phenomenon that certain acts under the statute are delegated to the executive so that the statute may become operational. The minor details are left to be worked out by the Executive, which, at times, may require collection of data, studies, etc.

188. In the case of Pandit Banarsi Das[245], the issue relating to delegation was discussed. In the case of Pandit Banarsi Das[246], the provisions of the Central Provinces and Berar Sales Act 21 of 1947 ("the 1947 Act") found discussion. Section 6 of the 1947 Act is as follows:-

> "6. (1) No tax shall be payable under this Act on the sale of goods specified in the second column of Schedule II, subject to the conditions and exceptions, if any, set out in the corresponding entry in the third column thereof.
>
> (2) The State Government may, after giving by notification not less than one month's notice of their intention so to do, by a notification after the expiry of the period of notice mentioned in the first notification amend either Schedule, and thereupon such Schedule shall be deemed to be amended accordingly."

189. In Schedule of the 1947 Act, as originally enacted at item 33, the entry was "Goods sold to or by the State Government". Subsequently, it was amended by the State Government under Section 6(2) of the 1947 Act with the words "Goods sold by the State Government". The appellants in that case, who were earlier exempted in respect of the goods sold to the government, was kept out from that ambit of exemption. A

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[245] *Supra* note 233
[246] *Ibid*

challenge was made on the ground that it was not open to the government in exercise of the authority delegated to it, under Section 6(2) of the 1947 Act to modify or alter what the legislature had enacted. The Hon'ble Supreme Court discussed the law on the subject. In Para 6(2), the Hon'ble Supreme Court observed as hereunder:-

> "(2) We have next to consider the contention that the notification dated September 18, 1950, is bad as constituting an unconstitutional delegationof legislative power. In the view which we have expressed above that there is in a works contract no sale of materials as such, it might seem academic to enter into a discussion of this question; but as there may be building contracts in which it is possible to spell out agreements for the sale of materials as distinct from contracts for work and labour, it becomes necessary to express our decision thereon. Mr Chatterjee appearing for the appellant in Civil Appeal No. 253 of 1955 contends that the notification in question is ultra vires, because it is a matter of policy whether exemption should be granted under the Act or not, and a decision on that question must be taken only by the legislature, and cannot be left to the determination of an outside authority. While a power to execute a law, it was argued, could be delegated to the executive, the power to make it must be exercised by the legislature itself, and reliance was placed on the observations in Hampton JR & Co. v. United States, 276 US 394 : 72 L. Ed. 624 at 629, Panama Refining Co. v. Ryan, 293 US 388 : 79 L. Ed. 446 at 458, and Schechter v. United States, 295 US 495 : 79 L.Ed. 1570, as supporting this position. It was also contended that the grant of a power to an outside authority to repeal or modify a provision in a statute passed by the legislature was unconstitutional, and that, in consequence, the impugned notification was bad in that, in reversal of the policy laid down by the legislature in Act 16 of 1949 that sales to Government should be excluded from the operation of the Act, it withdrew the exemption which had been granted thereunder. And the observations in In re The Delhi Laws Act, 1912 etc., 1951 SCC 568 : (1951) SCR 747 at 787, 982, 984, and the decision in Rajnarain Singh v. Chairman, Patna Administration Committee, Patna [(1955) 1 SCR 290] were strongly relied on as establishing this contention. Mr N.C. Chatterjee particularly relied on the following observations of Bose, J., at p. 301 in Rajnarain Singh case:

> "In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above; it cannot include a change of policy."

190. It may be noted that in the case of Pandit Banarsi Das[247], the Hon'ble Supreme Court also discussed the principles of law, as laid down in the case of Powell[248], in which case, the power to impose tax was conferred on a Governor. When it was challenged, the Privy Council held that, "**The legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him**."

191. In the case of Powell[249], when the issue of excessive delegation was discussed, the control of legislature was considered one of the factors in support of such delegation.

192. In the case of Liberty Cinema[250], license fee under the Calcutta Municipal Act, 1951, was enhanced based on a resolution of the Corporation and fee was to be assessed at rates prescribed per show according to the sanctioned sitting capacity of the Cinema House. In that case, the Hon'ble Supreme Court observed that, "**the fixing of a rate of tax was not of the essence of legislative power, that the fixing of rates might be left to a non-legislative body and that when it was so left to such a body, the Legislature must provide guidance for such fixation.**"

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[247] *Supra* note 233
[248] Powell v. Appollo Candle Company Limited, (1885) 10 AC 282
[249] *Ibid*
[250] *Supra* note 239

193. The principles of law, as laid down in the case of Liberty Cinema[251], have further been referred to in the case of Devi Dass[252]. In the case of Devi Dass[253], the statutory provisions and its amendment were related to East Punjab General Sales Tax Act, 1948; a challenge was made to that Act on the ground that it conferred essentially legislative power on the provincial Government. In para 8, 9 & 10 of the judgment, the provisions of the Act and the issue has been discussed as follows:-

> "8. We shall now proceed to consider the points seriatim. The provisions relevant to the first two points read thus:
>
> "East Punjab General Sales Tax Act, 1948 Act 46 of 1948
>
> 5. Subject to the provisions of this Act, there shall be levied on the taxable turnover every year of a dealer a tax at such rates as the Provincial Government may by notification direct.
>
> East Punjab General Sales Tax (Second Amendment) Act, 1952 Act 19 of 1952.
>
> 2. Amendment of Section 5 of Punjab Act 46 of 1948.— In sub-section (1) of Section 5 of the East Punjab General Sales Tax Act, 1948, after the word "rates" the following words shall be inserted and shall be deemed always to have been so inserted, namely, 'not exceeding two pice in a rupee."
>
> The High Court of Punjab held that Section 5 of the Act was void as it gave an unlimited power to the executive to levy sales tax at a rate which it thought fit. But it held that the amendment of Section 5 by the Punjab Act 19 of 1952 cured the defect in the said Act and had the effect of giving a new life to it.
>
> 9. The first question, therefore, is whether Section 5 of the East Punjab General Sales Tax Act, 1948 (46 of 1948), as it originally stood, was void, and the second question is, if the said section was void, whether the amendment could give life to it.
>
> 10. The law on the subject is fairly well settled, though difficulties are met in its application to each case. In Corporation of Calcutta v. Liberty Cinema [(1965) 2 SCR 477] on which Mr Ganapati Iyer relied relates to a levy imposed on cinema houses under the Calcutta Municipal Act (33 of 1951). There, the majority held that the levy therein was a tax, that the fixing of a rate of tax was not of the essence of legislative power, that the fixing of rates might be left to a non-legislative body and that when it was so left to such a body, the Legislature must provide guidance for such fixation. The

[251] *Supra* note 239
[252] *Supra* note 227
[253] *Ibid*

majority held in that case that such a guidance was found in the monetary needs of the Municipality for discharging the functions entrusted to it under the Act. Sarkar J, speaking for the majority said thus:

> "It (the Municipal Corporation) has to perform various statutory functions. It is often given power to decide when and in what manner the functions are to be performed. For all this it needs money and its needs will vary from time to time, with the prevailing exigencies. Its power to collect tax, however, is necessarily limited by the expenses required to discharge those functions. It has, therefore, where rates have not been specified in the statute, to fix such rates as may be necessary to meet its needs. That, we think, would be sufficient guidance to make the exercise of its power to fix the rates valid."

If this decision is an authority for the position that the Legislature can delegate its power to a statutory authority to levy taxes and fix the rates in regard thereto, it is equally an authority for the position that the said statute to be valid must give a guidance to the said authority for fixing the said rates and that guidance cannot be judged by sterotyped rules but would depend upon the provisions of a particular Act. To that extent this judgment is binding on us. But we cannot go further and hold, as the learned counsel for the respondents asked us to do, that whenever a statute defines, the purpose or purposes for which a statutory authority constituted and empowers it to levy a tax that statute necessarily contains a guidance to fix the rates; it depends upon the provisions of each statute."

194. In the case of Municipal Corporation of Delhi[254], the principles of law, as laid down in the cases of Pandit Banarsi Das[255] and Devi Dass[256] have been followed. And after reviewing the law on the subject, the Hon'ble Supreme Court observed that, **"A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative**

[254] *Supra* note 234
[255] *Supra* note 233
[256] *Supra* note 227

policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. .....Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."

195. In the case of Sita Ram[257], Hiralal Rattanlal[258], M.K. Papiah[259], Sashi Prasad [260]and Gwalior Rayon[261] also, the earlier judgments on the subject were discussed.

196. In the cases of Sita Ram[262] and Hiralal Rattanlal[263], the Hon'ble Supreme Court also laid emphasis on the body on which the power has been so delegated. In the case of Sita Ram[264], in Para 5 of the judgment, the Hon'ble Supreme Court observed that, **" In a Cabinet form of Government, the Executive is expected to reflect the views of the legislatures. In fact of most matters it gives the lead to the Legislature. "**

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[257] *Supra* note 236
[258] *Supra* note 235
[259] *Supra* note 238
[260] *Supra* note 237
[261] *Supra* note 244
[262] *Supra* note 236
[263] *Supra* note 235
[264] *Supra* note 236

197. In the case of Hiralal Rattanlal[265], the Hon'ble Supreme Court observed that, **"it has given power to the executive, a high authority and which is presumed to command the majority support in the Legislature, to select for special treatment dealings in certain class of goods. "**

198. In the case of M.K. Papiah[266], the provisions of Mysore Excise Act, 1965 ("1965 Act"), and particularly, Section 22 of it was discussed, which provided for levy of excise duty at such rate or rates as the Government may prescribe. The rates were so prescribed. It was challenged on the ground that Section 22 of the 1965 Act delegates the power to fix the rates of excise duty to the government by making rules and since no guidance has been furnished to the Government by the 1965 Act for fixing the rate, there was abdication of essential legislative functions. Under 1965 Act, rule making power was given under Section 71 of it. Sub-section (4) of Section 71 of the 1965 Act provides as follows:-

> "Every rule made under this section shall be laid as soon as may be after it is made, before each House of the State Legislature while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule (it?) shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

[265] *Supra* note 235
[266] *Supra* note 238

199. In the case of M.K. Papiah[267], the principles, which were discussed in the case of Powell[268] have further been discussed, i.e. legislative control over delegated legislation. It was observed that, "**the rules that were to be made under Section 71(4) of the 1965 Act were to be laid before State Legislature**". The Hon'ble Supreme Court discussed the English law on the subject and in Para 24, it was observed that, **"the power to fix the rate of excise duty conferred on the government by Section 22 of the Act is valid. "** In fact, the question of legislative control, while determining the contours of excessive delegation has also been discussed in the case of Kerala State Electricity Board[269].

200. On the question of legislative control, in the case of Kerala State Electricity Board[270], the Hon'ble Supreme Court observed that the rules were made beyond the power conferred. It cannot be held valid merely on the ground that these rules are subject to modification or annulment. In the case of Kerala State Electricity Board[271], the Hon'ble Supreme Court observed that, **"We are, therefore, of opinion that the correct view is that notwithstanding the subordinate legislation being laid on the table of the House of Parliament or the State Legislature and being subject to such modification, annulment or amendment as they may make, the subordinate legislation cannot be said to be valid unless it is within the scope of the Rule-making power provided in the statute."**

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[267] *Supra* note 238
[268] *Supra* note 248
[269] Kerala State Electricity Board v. Indian Aluminium Co, Ltd. and connected matters, (1976) 1 SCC 466
[270] *Ibid*
[271] *Ibid*

201. In the case of Gwalior Rayon[272], the Hon'ble Supreme Court, in that case found that **"In this connection we are of the view that a clear legislative policy can be found in the provisions of Section 8(2)(b) of the Act."** In Para 4 of the judgment, the Hon'ble Supreme Court further discussed the Policy laid down in the Act involved in the case. The Hon'ble Supreme Court further, in para 12 of the judgment observed that, **"It would appear from the above that the view taken by this Court in a long chain of authorities is that the Legislature in conferring power upon another authority to make subordinate or ancillary legislation must lay down policy, principle or standard for the guidance of the authority concerned".**

202. In the case of Gwalior Rayon[273], the Hon'ble Supreme Court did not approve the argument that if the legislator can repeal an enactment, it retains enough control over the authority making the subordinate legislation and, as such, it is not necessary for the Legislature to lay down legislative policy, standard or guidelines in the statute. In Para 26 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> **"26.** We are also unable to subscribe to the view that if the Legislature can repeal an enactment, as it normally can, it retains enough control over the authority making the subordinate legislation and, as such, it is not necessary for the Legislature to lay down legislative policy, standard or guidelines in the statute. The acceptance of this view would lead to startling results. Supposing the Parliament tomorrow enacts that as the crime situation in the country has deteriorated, criminal law to be enforced in the country from a particular date would be such as is framed by an officer mentioned in the enactment. Can it be said that there has been no excessive delegation of legislative power even though the Parliament omits to lay down in the statute any guideline or legislative policy for the making of

[272] *Supra* note 244
[273] *Ibid*

> such criminal law? The vice of such an enactment cannot, in our opinion, be ignored or lost sight of on the ground that if the Parliament does not approve the law made by the officer concerned, it can repeal the enactment by which that officer was authorised to make the law."

203. It may be noted that in the case of M.K. Papiah[274], the question of legislative control was considered as a determining factor in assessing the excessiveness of delegated legislation. In fact, the issue was slightly different in the case of M.K. Papiah[275]. There, the rules were to be formulated and to be placed before State legislature. It was not mere legislative control, but something beyond that.

204. In the case of Ashok Leyland[276], the Hon'ble Supreme Court discussed the expression "for the purpose of this Act" and held that "this expression would ordinarily mean "for the purpose of all the provisions of the Act."

205. In the case of Keshavlal Khemchand[277], the Hon'ble Supreme Court summarised the law as follows:-

> "51. An examination of the above authorities, in our view leads to the following inferences:
>
> 51.1. The proposition that essential legislative functions cannot be delegated does not appear to be such a clearly settled proposition and requires a further examination which exercise is not undertaken by the counsel appearing in the matter. We leave it open for debate in a more appropriate case on a future date. For the present, we confine to the examination of the question:
>
> 'Whether defining every expression used in an enactment is an essential legislative function or not?'
>
> 51.2. All the judgments examined above recognise that there is a need for some amount of delegated legislation in the modern world.
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> 51.3. If the parent enactment enunciates the legislative policy with sufficient clarity, delegation of the power to make subordinate

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[274] *Supra* note 238
[275] *Ibid*
[276] *Supra* note 240
[277] *Supra* note 242

> legislation to carry out the purpose of the parent enactment is permissible.
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> 51.4. Whether the policy of the legislature is sufficiently clear to guide the delegate depends upon the scheme and the provisions of the parent Act.
>
> 51.5. The nature of the body to whom the power is delegated is also a relevant factor in determining "whether there is sufficient guidance in the matter of delegation"."

206. In the case of Veega Holidays[278], the appellant company therein was running an "amusement park". A demand for entertainment tax was made from the appellant company in that case. The contention of the appellant company was that the tax was not legally leviable. The case related to the Kerala Local Authorities Entertainment Act, 1961 relating to imposition and collection of taxes on amusement and other entertainments in the State of Kerala. This Act was amended in the year 1975. According to the definition of "entertainment", it included exhibition performance, amusement, game, etc. Section 3 of it empowered the local authority to levy a tax. Pursuant to it, the Panchayat concerned had promulgated bylaws and made a specific provision to fix the rate of tax. The exhibitions were brought under the umbrella of levy of entertainment tax. When the levy of tax was challenged, initially the challenge was not upheld. In intra-Court appeal, the Court quoted as follows:-

> "36. In view of the above, it is held that:—
>
> 1. The provisions of a taxing statute have to be strictly construed. A person cannot be taxed unless the provision clearly provides for it. The words of the statute have to be given their true and natural meaning. The Authority cannot add to the words. It cannot impose a levy by reading an implication into the plain words of the provision. There is no room for intendment. The words of the statute cannot be strained. Strict letter of law has to be seen.

[278] *Supra* note 228

> 2. Entertainment is an expression of very wide amplitude. A Court entertains a petition. A hotel entertains a guest. A banquet, a sumptuous feast, is an entertainment of eating and drinking. Section 2(4) really takes within its ambit different kinds of entertainment viz. exhibition, performance, amusement, game, sport or race.
>
> 3. Section 3 contains only an enabling provision. It embodies a 'permissive power'. It does not impose a mandatory duty on the 'authority' to charge tax on every form of entertainment at a specific rate. The Local Authority can impose Tax by a Resolution or by framing a Bye-law. The Statute gives the local Authority an option. It may levy tax or it may not. It can also choose the items to be subjected to the levy.
>
> 4. Even the respondent-panchayat had interpreted Section 3 as an enabling provision. It had framed Bye-laws under Section 12. Under the Bye-law, only 'exhibitions', which had an element of entertainment, were subjected to the levy of tax. Other activities were not brought within the mischief of the Bye-law.
>
> 5. In view of the above conclusions we find that the learned single Judge had erred in taking the view that Section 3 was a charging Section and that the Panchayat was entitled to recover the tax from the appellants."

207. In the case of TVS Motor[279], validity of certain provisions of Tamil, T.N. Value Added Tax Act, 2006 were put to challenge. In that case, the principles of law, as laid down in the case of Govind Saran Ganga Saran[280] were referred to.

208. The law has been well settled on the question of excessive delegated legislation in the decisions that have been cited hereinabove and in many other cases, which have not been cited. Delegation is necessity of time due to complexity of life and situations. A naked delegation of power to the executive by the legislation is not acceptable. There should be guidelines to the Executive while making the delegations. Preamble of an Act, statement of objects and reasons of the Act may also be

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[279] *Supra* note 196
[280] *Supra* note 184

considered to be the guidelines. In the case of M.K. Papiah[281] the preamble of the Act involved, in that case, referred to the policy of the Act, which had twin policies, namely, to raise revenue and to discourage consumption of liquor by making the price of liquor sufficiently high.

209. In the case of M.K. Papiah[282], while observing that preamble of an Act may give guidance for fixing the rates, the Hon'ble Supreme Court has also observed that, **"The legislative control over delegated legislation may take many forms."**

210. Similarly, in the case of Quarry Owners' Association[283], the Hon'ble Supreme Court observed that the preamble, statement of objects and reasons, and various other provisions may lay down the policy and fixation of rate may be correlated with the purpose of the Act. In Para 38 of the judgment, the Hon'ble Supreme Court observed as follows:-

> **"38.** This case clearly lays down that fixation of the policy under an Act, in the matter of taxation is itself a guidance to a delegatee, which is also to be found in the present case, when its Preamble, Statement of Objects and Reasons and various other provisions clearly lay down the policy when it refers the same to be for the development and regulation of mines and minerals. The fixation of rate thus has to correlate with the purpose of the Act and not beyond it."

211. In the case of Chattanatha Karyalar[284], the Hon'ble Madras High Court interpreted the scope of delegation by the Legislature to the executive. The Hon'ble Court observed "**But this is not to say that the Legislature cannot delegate its powers at all. Before it can validly do so, it must indicate its**

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[281] *Supra* note 238
[282] *Ibid*
[283] *Supra* note 232
[284] *Supra* note 230

policy, the principles and limits subject to which alone it can ask the Executive to carry out its purpose by making appropriate rules. Any delegation by the Legislature of its power in disregard of these requisites will be in excess of its competence and will be invalid."

212. In the case of Shanmuga Oil Mills[285], the Hon'ble Madras High Court discussed the scope of delegated legislation while tracing its origin. The Hon'ble Court quoted with approval from the judgment in the case of Field and Co.[286] as follows:-

> "The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legislation must depend, which cannot be known to the law making power, and, must therefore be subject of enquiry and determination outside the hall of Legislature".

213. In the case of Shanmuoga Oil Mills[287], the Hon'ble Court further observed as hereunder:-

> "But the discretion should not be so wide that it is impossible to discern its limits. There must instead be definite boundaries within which the powers of the administrative authority are exercisable. Delegation should cot be so indefinite as to amount to an abdication of the legislative function."

214. The Hon'ble Madras High Court also cautioned that "**in our view and so far as we can ascertain from the authorities, this does not detract even by a jot from the valid and binding principle that the limits to a delegated power, particularly one like a taxing power, must be**

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[285] *Supra* note 231
[286] Field and Co. v. Clark, (1892) 143 US 649
[287] *Supra* note 231

generally discernible, even if not in minute particulars, in the act of delegation itself. Where this is not the case, the delegation would appear to be plainly unconstitutional since the Legislature is abdicating an essential function. Since this tax would not be included in the Consolidated Fund of the State, the argument applies with greater force to the present facts".

215. Learned Counsel for the State would submit that notification dated 07.11.2015, has been issued for fixing "such rates" under Section 17 of the Act and such rate is the rate, which is envisaged under the provisions of the Act. He would submit that the State of Uttarakhand has also laid down the policy for harnessing renewable energy sources, etc. in the year 2008, which categorises hydro-power projects also under different categories and the rates have been fixed accordingly.

216. It is not the case of collecting fees by the municipality. The tax that has been imposed is termed as water tax on electricity generation. Various provisions of the Act have already been quoted hereinbefore. It is water tax on electricity generation. The name, *per se*, does not suggest anything. Tax is imposed on user, who is defined under Section 2(f) of the Act; it is he, who draws water from any source for generation of electricity. Water Tax has been defined under Section 2(i) of the Act, which means the rate levied or the charge for water drawn for generation of electricity. Section 17 of the Act reads as follows:-

> **"17. Fixation of water tax. -** The user shall be liable to pay the Water Tax under the Act at such rates as the Government may by notification fix in this behalf.

> (2) The State Government may review increase, decrease or vary the rates of the Water tax fixed under this section from time to time in the manner it deems fit."

217. A bare perusal of Section 17 of the Act makes it abundantly clear that it delegates the power to impose tax on the Government at such rate, as the Government may, by notification, fix on this behalf "such rates", as used under Section 17 of the Act, in no manner, is co-related with any policy guideline of the Act. "Such rates" relates to rates that may be fixed by the government. But, how to fix it?

218. Is the tax imposed just to generate revenue? If so, does it mean that the rates should increase with the increasing volume of water? And if it is so, the notification does not suggest so because, according to the notification, the same amount of water may be taxed differently based on height of the head. If the tax is to be collected commensurate with the generation of electricity, as the Act suggests, and as this Court has held that in "pith and substance", the tax is on generation of electricity, in that eventuality, the tax should have been imposed corresponding to the units of electricity generated, but it is not so.

219. Even if the State of Uttarakhand had formulated any Energy Policy in 2008, it cannot be taken as guidelines for imposing tax under Section17 of the Act, because the policy or guidelines is not included in the Act. Any extraneous material may definitely be foreign for imposing the tax. Anything beyond

the provisions of the Act may not form guidelines to the Government for fixing rate.

220. If the policy of the Act is to collect revenue on drawl of power, then another question arises as to why no tax has been imposed on the hydro power projects, which are up to 5MW? Why the hydro power project generating electricity upto 5MW have been exempted? There is nothing in the policy of 2008 as well as in the Act exempting such group of users.

221. In fact, the reading of the Act, as a whole, does not give any guidelines for imposing tax under Section 17 of the Act. The delegation of imposing tax on the Executive by Section 17 of the Act is without any guidelines. It is naked delegation of power to the State Authority. It is excessive delegation. Therefore, for this reason alone, Section 17 of the Act is void.

PROMISSORY ESTOPPEL

222. It is the case of the appellants that the projects were established under an agreement with the State of Uttarakhand, under which 12 per cent of electricity is to be given to the State of Uttarakhand free of cost. Based on such assurance, the projects were established, and the State had promised not to impose any tax. Therefore, now, State cannot impose any tax. They are stopped from doing so with the help of doctrine of Promissory Estoppel. In Special Appeal No.137 of 2021, which arises out from WP (M/S) No. 279 of 2020, the Restated Implementation Agreement ("RIA") was executed between AHPCL,

Government of U.P. and Uttarakhand on 10.02.2006. The two clauses of it are important to be quoted. They are clause 4.0, which relates to grant of rights to the company and clauses 13.0 and 13.1, which deal with water use rights. They are as follows:-

> **"4.0 Grant of Rights to the Company**:- the GOU and GOUP hereby agree, within their respective purviews, to grant to the Company the right to establish, own, operate and maintain the Project and to generate and sell electricity from the Project for an initial period of thirty (30) years from the Date of Commercial Operation of the last Unit to enter operation, which period may be extended for a further period of twenty (20) years on such terms and conditions as may be mutually agree to between parties concerned. After the expiry of the period (s) or on the termination of the RIA or any other circumstances leading to withdrawing of the Company from developing/operating the Project, Government of Uttaranchal shall have the first option to purchase all the assets and works of the Company/UPPCL. In case of dispute in the matter between the GOUP?GOU/UPPCL, the matter shall be referred to Ministry of Power, GOI and the decision of GOI shall be final and binding on the GOUP/GOU/UPPCL. In the case of dispute between the Company and the other Party(ies), the matter shall be referred to arbitration in accordance with paragraph 24 of RIA.
>
> 13.0 Water Use Rights
>
> 13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this Restated implementation Agreement (RIA)."

223. The question is as to whether the clause 13.1, as quoted hereinabove, stops the State of Uttarakhand to demand water tax from the appellants?

224. The law on promissory estoppel has been summed up quite in detail by the Hon'ble Supreme Court in the case of M/s Motilal Padampat[288]. The Hon'ble Supreme Court traced the history of promissory estoppel in this law right from the judgment in the case of Hughes[289]. The Hon'ble Supreme Court has observed that, "**the basis of this doctrine is the inter position of equity. Equity has always, true to fall, stepped in to mitigate the rigors of State law.**" The Hon'ble Supreme Court also considered that initially, the words "promissory estoppels", "equitable estoppels", "quasi estoppels" and "new estoppels" were evolved to avoid injustice; the relationship between the parties was found to be one of the essential factors to attract the doctrine of promissory estoppel. The law, which subsequently evolved that contract between the parties was not necessary, but mere pre-existing relationship was enough to evoke the principles of promissory estoppel. It was also observed that initially promissory estoppel could only be a shield and not a sword and its evolution has also been discussed. The Hon'ble Supreme Court also discussed the American judgments and the defence of the government that it was executive necessity; the question of representation; change of position, etc.

225. In the case of M/s Motilal Padampat[290], the State of U.P. had once decided to give exemption from sale tax for a period of three years to all new industrial units, but, subsequently, the Government had rescinded the decision of allowing concession. In a challenge to such rescission, on the

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[288] *Supra* note 229
[289] Hughes Vs. Metropolitan Railways Company, (1877) 2 AC 439
[290] *Supra* note 229

question of executive necessity, the Hon'ble Supreme Court observed:-

> **"19.** When we turn to the Indian law on the subject it is heartening to find that in India not only has the doctrine of promissory estoppel been adopted in its fullness but it has been recognized as affording a cause of action to the person to whom the promise is made. The requirement of consideration has not been allowed to stand in the way of enforcement of such promise. The doctrine of promissory estoppel has also been applied against the Government and the defence based on executive necessity has been categorically negatived. It is remarkable that as far back as 1880, long before the doctrine of promissory estoppel was formulated by Denning, J., in England, a Division Bench of two English Judges in the Calcutta High Court applied the doctrine of promissory estoppel and recognised a cause of action founded upon it in the Ganges Manufacturing Co. v. Sourujmull, (1880) ILR 5 Cal 669 : 5 CLR 533. The doctrine of promissory estoppel was also applied against the Government in a case subsequently decided by the Bombay High Court in Municipal Corporation of Bombay v. Secretary of State, (1905) ILR 29 Bom 580 : 7 Bom LR 27.".

226. In Para 24 of the judgment, the Hon'ble Supreme Court further observed that, **"The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no**

exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned : the former is equally bound as the latter".

227. Reference may be made to the judgment in the case of Kasinka Trading[291]. In that case, under the Customs Act, 1962, a notification was issued in public interest giving exemption to certain articles up to 31.03.1981. This notification was issued on 15.03.1979. In fact, it was so issued under Section 25 of the Customs Act 1962. But, before expiry of the time fixed in the notification, i.e. 31.03.1981, the withdrawal notification dated 16.10.1980 was issued. It was challenged invoking the doctrine of promissory estoppel on the ground that the central government could not have withdrawn the exemption notification before 31.03.1981, because relying on the exemption notification, the appellants had placed orders for the imports of PVC resin on the understanding that the PVC resin was totally exempted from customs duty. The Hon'ble Supreme Court discussed the law on the point. In Para 13, the Hon'ble Supreme Court observed as hereunder:-

> "**13.** The ambit, scope and amplitude of the doctrine of promissory estoppel has been evolved in this country over the last quarter of a century through successive decisions of this Court starting with Union of India v. Indo-Afghan Agencies Ltd., (1968) 2 SCR 366 : AIR 1968 SC 718. Reference in this connection may be made with advantage to Century Spg. & Mfg. Co. Ltd. v. Ulhasnagar Municipal Council, (1970) 1 SCC 582 : (1970) 3 SCR 854; Motilal Padampat Sugar Mills Co. Ltd. v. State of U.P.(1979) 2 SCC 409 : 1979 SCC (Tax) 144 : (1979) 2 SCR 641; Jit Ram Shiv Kumar v. State of Haryana (1981) 1 SCC 11 : (1980) 3 SCR 689; Union of India v. Godfrey Philips India Ltd.(1985) 4 SCC 369 : 1986 SCC (Tax) 11; Indian Express

[291]Kasinka Trading and Another v. Union of India and Another, (1995) 1 SCC 274

> Newspapers (Bom) (P) Ltd. v. Union of India (1985) 1 SCC 641 : 1985 SCC (Tax) 121; Pournami Oil Mills v. State of Kerala, 1986 Supp SCC 728 : 1987 SCC (Tax) 134; Shri Bakul Oil Industries v. State of Gujarat, (1987) 1 SCC 31 : 1987 SCC (Tax) 74 : (1987) 1 SCR 185; Asstt. CCT v. Dharmendra Trading Co., (1988) 3 SCC 570 : 1988 SCC (Tax) 432; Amrit Banaspati Co. Ltd. v. State of Punjab, (1992) 2 SCC 411 and Union of India v. Hindustan Development Corpn., (1993) 3 SCC 499 : JT (1993) 3 SC 15 In Godfrey Philips India Ltd., (1985) 4 SCC 369 : 1986 SCC (Tax) 11 this Court opined: (SCC p. 388, para 13)
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> "We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it."

228. Referring to the various factors involved by invoking the principles of promissory estoppel, the Hon'ble Supreme Court observed, **" Notification No. 66 of 1979 in our opinion, was not designed or issued to induce the appellants to import PVC resin. Admittedly, the said notification was not even intended as an incentive for import. The notification on the plain language of it was conceived and issued on the Central Government "being satisfied that it is necessary in the public interest so to do". Strictly speaking, therefore, the notification cannot be said to have extended any 'representation' much less a 'promise' to a party getting the benefit of it to enable it to invoke the doctrine of promissory estoppel against the State. It would bear repetition that in order to invoke the doctrine of promissory estoppel, it is**

necessary that the promise which is sought to be enforced must be shown to be an unequivocal promise to the other party intended to create a legal relationship and that it was acted upon as such by the party to whom the same was made. A notification issued under Section 25 of the Act cannot be said to be holding out of any such unequivocal promise by the Government". The Hon'ble Supreme Court held that in that case, the doctrine of promissory estoppel had no application.

229. In the case of Manuelsons Hotels[292], the principles have been further discussed by the Hon'ble Supreme Court while referring to a judgment of Australian High Court. The Hon'ble Supreme Court quoted with approval in Para 19 as follows:-

> **"19.** In fact, we must never forget that the doctrine of promissory estoppel is a doctrine whose foundation is that an unconscionable departure by one party from the subject-matter of an assumption which may be of fact or law, present or future, and which has been adopted by the other party as the basis of some course of conduct, act or omission, should not be allowed to pass muster. And the relief to be given in cases involving the doctrine of promissory estoppels contains a degree of flexibility which would ultimately render justice to the aggrieved party. The entire basis of this doctrine has been well put in a judgment of the Australian High Court in *Commonwealth of Australia v. Verwayen*, (1990) 170 CLR 394 (Aust)] , by Deane, J. in the following words:
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> "1. While the ordinary operation of estoppel by conduct is between parties to litigation, it is a doctrine of substantive law, the factual ingredients of which fall to be pleaded and resolved like other factual issues in a case. The persons who may be bound by or who may take the benefit of such an estoppel extend beyond the immediate parties to it, to their privies, whether by blood, by estate or by contract. That being so, an estoppel by conduct can be the origin of primary rights of property and of contract.
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> 2. *The central principle of the doctrine is that the law will not permit an unconscionable—or, more accurately, unconscientious—departure by one party from the subject-*

[292]Manuelsons Hotels Private Limited Vs. State of Kerala and Others, (2016) 6 SCC 766

matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation.

3. Since an estoppel will not arise unless the party claiming the benefit of it has adopted the assumption as the basis of action or inaction and thereby placed himself in a position of significant disadvantage if departure from the assumption be permitted, the resolution of an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of that party.

4. The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party in all the circumstances. That party must have played such a part in the adoption of, or persistence in, the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it. The cases indicate four main, but not exhaustive, categories in which an affirmative answer to that question may be justified, namely, where that party:

(a) has induced the assumption by express or implied representation;

(b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption;

(c) has exercised against the other party rights which would exist only if the assumption were correct;

(d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.

Ultimately, however, the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain by acting upon the assumption if departure from the assumed state of affairs were permitted. In cases falling within Category (a), a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption. Particularly in cases falling within Category (b), actual belief in the correctness of the fact or state of affairs assumed may not be necessary. Obviously, the facts of a particular case may be such that it falls within more than one of the above categories.

> 5. *The assumption may be of fact or law, present or future. That is to say, it may be about the present or future existence of a fact or state of affairs (including the state of the law or the existence of a legal right, interest or relationship or the content of future conduct*).
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> 6. The doctrine should be seen as a unified one which operates consistently in both law and equity. In that regard, "equitable estoppel" should not be seen as a separate or distinct doctrine which operates only in equity or as restricted to certain defined categories (e.g. acquiescence, encouragement, promissory estoppel or proprietary estoppel).
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> 7. Estoppel by conduct does not of itself constitute an independent cause of action. The assumed fact or state of affairs (which one party is estopped from denying) may be relied upon defensively or it may be used aggressively as the factual foundation of an action arising under ordinary principles with the entitlement to ultimate relief being determined on the basis of the existence of that fact or state of affairs. *In some cases, the estoppel may operate to fashion an assumed state of affairs which will found relief (under ordinary principles) which gives effect to the assumption itself (e.g. where the defendant in an action for a declaration of trust is estopped from denying the existence of the trust*).
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> 8. *The recognition of estoppel by conduct as a doctrine operating consistently in law and equity and the prevalence of equity in a Judicature Act system combine to give the whole doctrine* a degree of flexibility which it might lack if it were an exclusively common law doctrine. In particular, the prima facie entitlement to relief based upon the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party. In such a case, relief framed on the basis of the assumed state of affairs represents the outer limits within which the relief appropriate to do justice between the parties should be framed."

230. In the instant case, initial Implementation Agreement, Restated Implementation Agreement or Power Purchase Agreements, as the case may be, were entered between the appellants and the State Government. There has been a contract between them. The State Government had made representation. The representation was that 12 per cent of deliverable energy will

be given to the State Government by the appellants and the State Government shall not levy any water tax. The appellants acted upon the representation that was made by the State Government. The appellants established and started operating the projects.

231. It would be apt to reproduce the clauses in the agreement in each case, which prescribes for term of the agreement, the exemption clause. It is as follows:-

(i) **SPA No. 149 of 2021, THDC India Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 187 of 2016)**:

Implementation Agreement or revised Implementation Agreement or Restated Implementation Agreement not filed.

In Ground Z of the Special Appeal, it is recorded that 12% free supply of electricity is being given as royalty in lieu of use of natural resources.

(ii) **SPA No. 131 of 2021, M/s National Hydro Power Corporation v. State of Uttarakhand and others (arises out of WPMS No. 272 of 2016)**:

Implementation Agreement or revised Implementation Agreement or Restated Implementation Agreement not filed.

A communication dated 01.11.1990 of the Ministry of Energy, Government of India has been filed as Annexure 11 to the writ petition, which provides that 12% of power from the energy generated would be supplied free of cost to the concerned State.

Annexure 20, a communication dated 13.01.2016, is a communication of the appellant post demand of water tax by which it was informed that since the appellant had been giving 12% electricity free of cost, additional water tax may not be imposed on them.

In Ground AA and BB of the appeal, the appellant also refers that 12% of the power generated is being given to the State of Uttarakhand as per power sharing formula of the Central Government.

(iii) SPA No. 134 of 2021, M/s Jaiprakash Power Venture Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 123 of 2017):

Term :

AND WHEREAS the parties to the Agreement had agreed that the Erstwhile Company shall establish, operate and maintain the project at its cost for an initial period of thirty years from the date of commissioning of the project, extendable for a further period of twenty years, on such terms and conditions as may be mutually settled.

Exemption Clause:

Clause 25(a)

The Government of Uttar Pradesh, Government of Uttaranchal, Uttar Pradesh Power Corporation and the Company hereto recognize that :

Vishnuprayag Hydro Electric Project being a run of the river scheme, shall utilize the flowing water of the river to generate electricity. Such right to utilize water available upstream of the Project are granted by Government of Uttaranchal for non-consumptive use only without charging any royalty, duty, cess or levy of the kind of such use of water.

Clause 38. The Govt. of Uttaranchal shall not impose any new taxes, duties, levies or charges of any kind on the electricity generated by this project during the term of this Amended Implementation Agreement.

(iv) SPA No. 136 of 2021, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 1500 of 2016):

Term :

7.1 Term. This Agreement shall become effective upon execution and delivery by the Parties and shall remain valid for an initial period of thirty years from the Commercial Operations Date of

the last Unit to enter operation, which period shall automatically be extended for a further period of twenty (20) years upon the extension of the PPA the "Term").

Exemption Clause:

Clause 13.0 Water Use Rights

13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this Restated implementation Agreement (RIA)

18.4 Payment of Water Use Charge – The Parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA.

(v) SPA No. 137 of 2021, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 279 of 2020):

Term:

7.1 Term: This Agreement shall become effective upon execution and delivery by the Parties and shall remain valid for the period mentioned in Article 4.00 above.

(Article 4.0 establishes the relationship with regard to the project from an initial period of thirty (30) years from the Commercial Operations Date of the last Unit to enter operation, which period shall automatically be extended for a further period of twenty (20) years upon the extension of the PPA (the "Term").

Exemption Clause:

Clause 13.0 Water Use Rights

13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA

and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this Restated implementation Agreement (RIA)

18.4 Payment of Water Use Charge – The Parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA.

(vi) SPA No. 139 of 2021, M/s Swasti Power Pvt. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 641 of 2017):

Term:

2.2 Agreement Period

The Agreement shall remain in force up to a period of forty (40) years from the Effective Date (Agreement Period), unless terminated earlier in accordance with the provisions of this Agreement.

Exemption Clause:

Clause 5.2.10 Levies, Taxes and Charges

No entry tax will be levied by the Government on the power generation, transmission equipment and building material for the project.

(vii) SPA No. 140 of 2021, Alaknanda Hydro Power Company Ltd. (AHPCL) v. State of Uttarakhand and others(arises out of WPMS No. 631 of 2017):

Term:

AND WHEREAS the parties thereto had agreed that the Company shall establish, own, operate and maintain the project at its own cost for an initial period of thirty (30) years from the date of Commercial Operation of the last Unit. This period is extendable for a further period of twenty (20) years, on such terms and conditions as may be mutually agreed to between the parties concerned.

Exemption Clause:

Clause 13.0 Water Use Rights

13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for

such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this Restated implementation Agreement (RIA)

18.4 Payment of Water Use Charge – The Parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA.

(viii) SPA No. 141 of 2021, M/s Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 2396 of 2019):

Term:

7.1 Term: This Agreement shall become effective upon execution and delivery by the Parties and shall remain valid for the period mentioned in Article 4.00 above.

(Article 4.0 establishes the relationship with regard to the project from an initial period of thirty (30) years from the Commercial Operations Date of the last Unit to enter operation, which period shall automatically be extended for a further period of twenty (20) years upon the extension of the PPA (the "Term")

Exemption Clause:

Clause 13.0 Water Use Rights

13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this Restated implementation Agreement (RIA)

18.4 Payment of Water Use Charge – The Parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA.

(ix) SPA No. 142 of 2021, M/s Swasti Power Pvt. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 2074 of 2016):

Term:

2.2 Agreement Period

The Agreement shall remain in force up to a period of forty (40) years from the Effective Date (Agreement Period), unless terminated earlier in accordance with the provisions of this Agreement.

Exemption Clause:

Clause 5.2.10 Levies, Taxes and Charges

No entry tax will be levied by the Government on the power generation, transmission equipment and building material for the project.

(x) SPA No. 143 of 2021, Alaknanda Hydro Power Co. Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 3603 of 2019):

Term:

7.1 Term: This Agreement shall become effective upon execution and delivery by the Parties and shall remain valid for the period mentioned in Article 4.00 above.

(Article 4.0 establishes the relationship with regard to the project from an initial period of thirty (30) years from the Commercial Operations Date of the last Unit to enter operation, which period shall automatically be extended for a further period of twenty (20) years upon the extension of the PPA (the "Term")

Exemption Clause:

13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which

now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this Restated implementation Agreement (RIA)

18.4 Payment of Water Use Charge – The Parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA.

(xi) SPA No. 363 of 2021, M/s Bhilangana Hydro Power Ltd. v. State of Uttarakhand and others (arises out of WPMS No. 3084 of 2016):

Term:

2.2 Agreement Period

The Agreement shall remain in force up to a period of forty (40) years from the Effective Date (Agreement Period), unless terminated earlier in accordance with the provisions of this Agreement.

Exemption Clause:

5.2.10 Levies, Taxes and Charges

No entry tax will be levied by the Government on the power generation, transmission equipment and building material for the project.

(xii) SPA No. 367 of 2021, Uttar Pradesh Power Corporation Limited v. State of Uttarakhand and others (arises out of WPMS No. 123 of 2017):

Term:

AND WHEREAS the parties to the Agreement had agreed that the Erstwhile Company shall establish, operate and maintain the project at its cost for an initial period of thirty years from the date of commissioning of the project, extendable for a further period of twenty years, on such terms and conditions as may be mutually settled/

Exemption Clause:

Clause 25(a)

The Government of Uttar Pradesh, Government of Uttaranchal, Uttar Pradesh Power Corporation and the Company hereto recognize that :

Vishnuprayag Hydro Electric Project being a run of the river scheme, shall utilize the flowing water of the river to generate electricity. Such right to utilize water available upstream of the Project are granted by

Government of Uttaranchal for non-consumptive use only without charging any royalty, duty, cess or levy of the kind of such use of water.

Clause 38. The Govt. of Uttaranchal shall not impose any new taxes, duties, levies or charges of any kind on the electricity generated by this project during the term of this Amended Implementation Agreement.

(xiii) WPMS No. 1739 of 2021, Renew Jal Urja Private Limited v. State of Uttarakhand and others :

Term:

2.2 Agreement Period
The agreement shall remain in force up to a period of forty five (45) years from the Date of issue of "Letter of Award" for the project unless terminated earlier in accordance with the provisions of this Agreement.

Exemption Clause:

5.2.10 Levies, Taxes and Charges

No entry tax will be levied by the Government on the power generation, transmission equipment and building material for the Project.

232. The exemption clause in the agreement entered into between the State Government and the appellants reveals that there are two kind of exemption clause. Firstly, the exemption clause, which is in Special Appeal No. 137 of 2021 (arising out of WP (M/S) No. 279 of 2020), which *inter alia,* provides that the Government of Uttarakhand shall not impose any taxes, duties, levies or charges, of any kind on electricity generated by the Project during the term of the agreement. Second kind of exemption clause may be found as entered into between the parties in SPA No. 139 of 2021 (Arising out of WP (M/S) No. 641 of 2017), which reads as "**No entry tax will be levied by the Government on the power generation, transmission equipment and building material for the project".**

233. Admittedly, all the appellants under the agreement are giving 12 per cent of the electricity, free of cost to the State of Uttarakhand.

234. It has been argued on behalf of the State of Uttarakhand that the RIA filed in SPA No. 137 of 2021 does not prohibit the State Legislature from levying a tax. Clause 13.0 of the RIA entered into between the parties in SPA No. 137 of 2021, as quoted hereinabove, categorically reveals that by it the Government of Uttarakhand had promised not to impose any taxes, duties, levies or charges of any kind on electricity generated by the project during the term of existence of the RIA.

235. It has already been held under the Heading of Excessive Delegation that by virtue of Section 17 of the Act, the delegation of imposing tax on the executive is without any guidelines. Therefore, Section 17 of the Act is *void.* The tax has been imposed by a Notification dated 07.11.2015. It is an executive act. In view of it, if clause 13 of the RIA entered into between the parties in SPA No. 137 of 2021 is read, it proves in abundance that, in fact, the State had promised and represented the appellant in that case that no tax shall be levied on electricity generation. Any departure from this promise may be termed as unconscionable departure.

236. Instant is not a case that any policy decision was taken by the State Government pursuant to which the appellants did establish their power projects. Instead, as stated, in the instant case, the State Government had entered into agreements

with the appellants. There have been contractual relationship between the appellants and the State Government. Now, suddenly, the State Government may not be permitted to make a departure from the stand, which it had taken while entering into an agreement with the appellants. The demand notices of the tax, as made by the State Government, pursuant to the Notification dated 07.11.2015 are definitely a departure to the promise that was made by the State Government, while entering into an agreement with the appellants. This is unconscionable departure. It is a case in which the doctrine of promissory estoppel applies.

237. Since the State of Uttarakhand is bound to exempt the appellants from payment of any water tax for the period for which the agreement is in force, during that period, no demand of water tax could be made. It is barred by the doctrine of promissory estoppel.

238. During the period, the agreement between the appellants and the State of Uttarakhand is in existence, the appellants are not liable to pay any tax demanded by the State Government pursuant to the Notification dated 07.11.2015.

239. In the impugned judgment, in paragraphs 69 and 70, observation has been made with regard to applicability of promissory estoppel. In para 70, the impugned judgment records

that "**the doctrine of estoppel is not available against the government in exercise of legislative, sovereign or executive power"**. In view of the settled legal position, this observation may not be termed as in consonance with law. Therefore, that finding may also not be upheld.

TAX OR FEE

240. Is it a tax or can it be upheld as a fee?

241. The learned Counsel appearing for the State would submit that the State is the owner of all its resources. Water sources are vested in the State; they are Government property, therefore, the tax as imposed may also be validated as a fee because there is no generic difference between tax and fee. He would submit the following arguments in his submission:-

(i) Levy or impost can be justified either as tax or a fee or as both because there is no generic difference between tax and fee. There is no principle that a law has to relate only to one Entry or a source. A law can be made by the State simultaneously utilizing more than one legislative Entries. A tax law can, likewise, also be justified on the basis of more than one Entry including a non-taxing Entry, or a general Entry.

(ii) Water and the water sources are vested in the State. They are Government property. When water is allowed to be drawn by the user from the water source, it is a kind of privilege given

to use Government property and in the instant case, it is for earning profits by generating electricity. Therefore, a charge upon user can always be imposed, which can be justified by conjoint reading of E 17 and E 66 of L II. The State can levy a reasonable fee or charge for parting with this privilege.

242. In support of his contention, learned Counsel has placed reliance on the principles of law as laid down in the cases of Sheopat Rai[293], R.C. Jain[294], Krishi Upaj Mandi Samiti[295], Mcdowell and Company Limited[296], P.R. Srirumulu[297], Har Shankar[298], Devans Modern Breweries Ltd.[299]

243. In the case of Sheopat Rai[300], the Hon'ble Supreme Court discussed the concept of fee, cess, duty and tax and observed as hereunder:-

> **"28.** ..... Thus, neither the 'licence fee' nor 'fixed fee' realisable from a private party for granting the privilege or right to sell or vend foreign liquor to such party can fall within the ambit of the subject 'fee' in the entry to List II of the Seventh Schedule to the Constitution. Then, the 'licence fee' or the 'fixed fee' under consideration, cannot be regarded as 'tax' since the characteristics of tax, namely, its levy being compulsive in nature, its burden being common, it being payable according to the varying abilities of the person to be charged, are wholly absent in both of them. As 'duty' or 'cess' stand on the same footing as 'tax', the 'licence fee' or 'fixed fee' under consideration, cannot be regarded either as 'duty' or 'cess'. ..... The observations of Chandrachud, J. (as he then

[293] State of U.P. and others v. Sheopat Rai and others, 1994 Supp (1) SCC 8
[294] Union of India and others v. R.C. Jain and others, (1981) 2 SCC 308
[295] Krishi Upaj Mandi Samiti and others v. Orient Paper & Industries Ltd., (1995) 1 SCC 655
[296] Commissioner of Income Tax, Udaipur, Rajasthan v. Mcdowell and Company Limited, (2009) 10 SCC 755
[297] Secretary to Government of Madras and another v. P.R. Srirumulu and another, (1966) 1 SCC 345
[298] Har Shankar and others v. Dy. Excise and Taxation Commr. and others, (1975) 1 SCC 73
[299] State of Punjab and another v. Devans Modern Breweries Ltd. And another, (2004) 11 SCC 26
[300] *Supra* note 293

was), who rendered the judgment on behalf of the Constitution Bench of this Court in *Har Shankar case* [(1975) 1 SCC 737 : AIR 1975 SC 1121] which fully support our view of what is 'licence fee' and what is 'fixed fee' under the U.P. Excise Law, depict the correct legal position, thus : (SCC pp. 759-60, para 56)

> "The distinction which the Constitution makes for legislative purposes between a 'tax' and a 'fee' and the characteristics of these two as also of 'excise duty' are well known. 'A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered'. A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a *quid pro quo* [AIR 1954 SC 282 : 1954 SCR 1005] ....."

244. In the case of R.C. Jain[301], the Hon'ble Supreme Court, *inter alia,* observed that "**taxation is to be understood not in any fine and narrow sense as to include only those compulsory exactions of money imposed for public purpose and requiring no consideration to sustain it, but in a broad generic sense as to also include fees levied essentially for services rendered**."

245. In the case of Mcdowell[302], the Hon'ble Supreme Court further discussed the concept of tax, duty, cess and fee and observed as hereunder:-

> **"22.** Under Article 366(28) "Taxation" has been defined to include the imposition of any tax or impost whether general or local or special and tax shall be construed accordingly. "Impost" means compulsory levy. The well-known and well-settled characteristic of "tax" in its wider sense includes all imposts. Imposts in the context have following characteristics:
>
> (*i*) The power to tax is an incident of sovereignty.

[301] *Supra* note 294
[302] *Supra* note 296

(*ii*) "Law" in the context of Article 265 means an Act of legislature and cannot comprise an executive order or rule without express statutory authority.

(*iii*) The term "tax" under Article 265 read with Article 366(28) includes imposts of every kind viz. tax, duty, cess or fees.

(*iv*) As an incident of sovereignty and in the nature of compulsory exaction, a liability founded on principle of contract cannot be a "tax" in its technical sense as an impost, general, local or special."

246. In the case of Krishi Upaj Mandi Samiti[303], the Hon'ble Supreme Court observed as hereunder:-

> **"9.** ..... The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of the common burden while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions but in a fee it is some special benefit which the individual receives. The special benefit accruing to the individual is the reason for payment in the case of fees. In the case of a tax, the particular advantage if it exists at all, is an incidental result of State action. A fee is a sort of return or consideration for services rendered and hence it is primarily necessary that the levy of fee should on the face of the legislative provision be correlated to the expenses incurred by Government in rendering the services...."

247. In the case of P.R. Sriramulu[304]also, the Hon'ble Supreme Court discussed the concept of fee and tax and followed the earlier principles of law on the subject.

248. In the case of Har Shankar[305], the Hon'ble Supreme Court further discussed the concept of tax and fee and observed that **""A tax is a compulsory exaction of money by public**

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[303]*Supra* note 295
[304]*Supra* note 297
[305]*Supra* note 298

authority for public purposes enforceable by law and is not a payment for services rendered"..... A fee is a charge for special services rendered to individuals by some governmental agency and such a charge has an element in it of a quid pro quo".

249. In the case of Devans Modern Breweries[306], the State Legislature had imposed tax on import of potable liquor manufactured in the State. It was put to challenge, *inter alia,* on the ground that the State Legislature had no power to levy such tax. The Hon'ble Supreme Court in that case followed the principle of law as laid down in the case of Har Shankar[307] and Sheopat Rai[308] with regard to the rights of State in this regard as well as the concept of licence fee.

250. On the other hand, learned counsel for the appellants would submit that on ownership, tax or fee cannot be levied. For share in the property, royalty is taken, which the appellants have already paid. Learned counsel for the appellants would submit that tax is a compulsory exposition, whereas in the matter of fee, there is an element of *quid pro quo.* A statute imposing tax cannot be read down as a statute imposing fee; however, blurred the line between tax and fee may be, it is argued that, still the element of *quid pro quo* remains in the matter of imposition of a fee.

251. Learned counsel for the appellants would submit that the Act cannot be upheld holding that let it be treated as a statute imposing fee. The concepts of fee, cess, tax and royalty

[306] *Supra* note 299
[307] *Supra* note 298
[308] *Supra* note 293

are different. In support of their contention, learned counsel have placed reliance on the principle of law as laid down in the cases of D.K. Trivedi[309]; Inderjeet Singh Sial[310]; Indsil Hydropower and Manganese Limited[311]; Jindal Stainless Ltd.[312] Jalkal Vibhag[313]; Kerala State Beverages[314]; Mohd. Yasin[315]; State of Meghalaya[316]; Southern Pharmaceuticals and Chemicals[317];Kewal Krishan Puri[318]; Hingir Rampur Coal Ltd.[319]; Subramaniyan Swami[320]; Om Prakash Agarwal[321] andDevan Chand Builders & Contractors[322].

252. Taxation as stated has been defined under Article 366(28) of the Constitution, which includes imposition of any tax or impost, whether general or local or special and tax shall be construed accordingly.

253. Royalty, tax or fee acts under different sphere. In the case of D.K. Trivedi[323], the Hon'ble Supreme Court in respect of mining lease defined as to what the royalty is? The Hon'ble Supreme Court observed as hereunder:-

> "**39.** In a mining lease the consideration usually moving from the lessee to the lessor is the rent for the area leased (often called surface rent), dead rent and royalty. Since the mining lease confers upon the lessee the right not merely to enjoy the property as under an ordinary lease but also to extract minerals from the land and to appropriate them for his own use or benefit, in addition to the usual rent for the area

[309]D.K. Trivedi and sons and others v. State of Gujarat, 1986 Supp SCC 20
[310]Inderjeet Singh Sial and another v. Karam Chand Thapar and others; (1995) 6 SCC 166
[311]Indsil Hydropower and Manganese Limited v. State of Kerala and others, (2021) 10 SCC 165
[312]*Supra* note 27
[313]*Supra* note 5
[314]*Supra* note 93
[315]Municipal Corporation of Delhi and others v. Mohd. Yasin, (1983) 3 SCC 229
[316]*Supra* note 14
[317]Southern Pharmaceuticals and Chemicals, Trichur and others v. State of Kerala and others, (1981) 4 SCC 391
[318]Kewal Krishan Puri and another v. State of Punjab and another, (1980) 1 SCC 416
[319]*Supra* note 140
[320]Subramaniyan Swami and others v. Raju through Member, Juvenile Justice Board and another, (2014) 8 SCC 390
[321]Om Prakash Agarwal and others v. Giri Raj Kishori and others, (1986) 1 SCC 722
[322]Devan Chand Builders & Contractors v. Union of India, (2012) 1 SCC 101
[323]*Supra* note 309

> demised, the lessee is required to pay a certain amount in respect of the minerals extracted proportionate to the quantity so extracted. Such payment is called "royalty". It may, however, be that the mine is not worked properly so as not to yield enough return to the lessor in the shape of royalty. In order to ensure for the lessor a regular income, whether the mine is worked or not, a fixed amount is provided to be paid to him by the lessee. This is called "dead rent.""

254. In the case of Inderjeet Singh Sial[324], the Hon'ble Supreme Court very clearly observed that "**In its primary and natural sense 'royalty', in the legal world, is known as the equivalent or translation of jura regalia or jura regia. Royal rights and prerogatives of a sovereign are covered thereunder. In its secondary sense the word 'royalty' would signify, as in mining leases, that part of the reddendum, variable though, payable in cash or kind, for rights and privileges obtained. It is found in the clause of the deed by which the grantor reserves something to himself out of that which he grants**".

255. Similarly in the case of Indsil Hydropower and Manganese Limited[325], the Hon'ble Supreme Court defined the expression "royalty" as follows:-

> "**56.** Thus, the expression "*royalty*" has consistently been construed to be compensation paid for rights and privileges enjoyed by the *grantee* and normally has its genesis in the agreement entered into between the *grantor* and the *grantee*. As against tax which is imposed under a statutory power without reference to any special benefit to be conferred on the payer of the tax, the royalty would be in terms of the agreement between the parties and normally has direct relationship with the benefit or privilege conferred upon the *grantee*."

[324] *Supra* note 310
[325] *Supra* note 311

256. Distinction between royalty and tax is quite remarkable. On the one hand, tax is imposed under statutory power without reference to any special benefit, on the other hand, royalty has been construed to compensation paid for rights and privileges enjoyed by the grantee.

257. The argument advanced on behalf of the State is that the Act may be validated terming it as imposing fee instead of tax. This argument has been made on the ground that after all all the water sources are Government property and if the appellants use the water for electricity generation, imposition of fee is valid. This arguments goes against the term of the royalty as such. The compensation for rights and privileges in the instant case, use of water, is royalty. It cannot be termed as fee. Fee has different connotation, as has been held in various cases as cited on behalf of the State and as quoted hereinbefore. It has essentially an element of *quid pro quo.*

258. The difference between tax and fee has been very substantially expressed by the Hon'ble Supreme Court in the case of Lakshmindra Thirtha Swamiar[326], In para 47 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> "**47.** As regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person has got to pay if he wants certain services from the Government; but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees, but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is

[326]Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar, AIR 1954 SC 282

> not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees. It is difficult, we think, to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all persons within a State. The house tax has to be paid only by those who own houses, the land tax by those who possess lands, municipal taxes or rates will fall on those who have properties within a municipality. Persons, who do not have houses, lands or properties within municipalities, would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is the choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all. Compulsion lies in the fact that payment is enforceable by law against a man in spite of his unwillingness or want of consent; and this element is present in taxes as well as in fees. Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice, but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest [Vide *Findlay Shirras on Science of Public Finance*, Vol. I, p. 202] . Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action [Vide *Seligman's Essays on Taxation*, p. 408] .”

259. This principle has further been followed in the case of Mohd. Yasin[327], Jindal Stainless Ltd.[328], Jalkal Vibhag[329], Kewal Krishan Puri[330], Hingir Rampur Coal Ltd.[331], Om Prakash

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[327] *Supra* note 315
[328] *Supra* note 27
[329] *Supra* note 5
[330] *Supra* note 318
[331] *Supra* note 140

Agarwal[332], Devan Chand Builders & Contractors[333] and Southern Pharmaceuticals & Chemicals[334].

260. In the case of Jalkal Vibhag[335], the Hon'ble Supreme Court observed in para 60 of the judgment that "**In view of this consistent line of authority, it emerges that the practical and even constitutional, distinction between a tax and fee has been weathered down. As in the case of a tax, a fee may also involve a compulsory exaction. A fee may involve an element of compulsion and its proceeds may form a part of the Consolidated Fund. Similarly, the element of a quid pro quo is not necessarily absent in the case of every tax**".

261. In the case of Kerala State Beverages[336], the Hon'ble Supreme Court in para 41 observed that the case of Jalkal Vibhag[337], in fact, maintains and does not take away the basic constitutional distinction between fee and tax.

262. In the case of State of Meghalaya[338], the Hon'ble Supreme Court, in para 153, observed that "**The distinction between the power to levy fees and the power to levy a tax is well known ....**".

263. In the case of Subramanian Swami[339], the Hon'ble Supreme Court discussed the provision of reading down the provision of a statute. It was held that such reading down the

[332] *Supra* note 321
[333] *Supra* note 322
[334] *Supra* note 317
[335] *Supra* note 5
[336] *Supra* note 93
[337] *Supra* note 5
[338] *Supra* note 14
[339] *Supra* note 320

provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous. In para 61 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

> **"61.** Reading down the provisions of a statute cannot be resorted to when the meaning thereof is plain and unambiguous and the legislative intent is clear. The fundamental principle of the "reading down" doctrine can be summarised as follows. Courts must read the legislation literally in the first instance. If on such reading and understanding the vice of unconstitutionality is attracted, the courts must explore whether there has been an unintended legislative omission. If such an intendment can be reasonably implied without undertaking what, unmistakably, would be a legislative exercise, the Act may be read down to save it from unconstitutionality. The above is a fairly well-established and well-accepted principle of interpretation which having been reiterated by this Court time and again would obviate the necessity of any recall of the huge number of precedents available except, perhaps, the view of Sawant, J. (majority view) in *DTC* v. *Mazdoor Congress* [1991 Supp (1) SCC 600 : 1991 SCC (L&S) 1213] which succinctly sums up the position is, therefore, extracted below: (SCC pp. 728-29, para 255)
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> > "*255*. It is thus clear that the doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. It is an extension of the principle that when two interpretations are possible—one rendering it constitutional and the other making it unconstitutional, the former should be preferred. The unconstitutionality may spring from either the incompetence of the legislature to enact the statute or from its violation of any of the provisions of the Constitution. The second situation which summons its aid is where the provisions of the statute are vague and ambiguous and it is possible to gather the intentions of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made. However, when the provision is cast in a definite and unambiguous language and its intention is clear, it is not permissible either to mend or bend it even if such recasting is in accord with good reason and conscience. In such circumstances, it is not possible for the court to remake the statute. Its only duty is to strike it down and leave it to the legislature if it so desires, to amend it. What is further, if the remaking of the statute by the courts is to lead to its distortion that course is to be scrupulously avoided. One of the situations further where the doctrine can never be called into play is

where the statute requires extensive additions and deletions. Not only is it no part of the court's duty to undertake such exercise, but it is beyond its jurisdiction to do so."

264. In the case of Ind-Swift Laboratories Ltd.[340], the Hon'ble Supreme Court discussed the scope of reading down a provision of statute. The Hon'ble Court observed that "**A statutory provision is generally read down in order to save the said provision from being declared unconstitutional or illegal**". The law has further been discussed by the Hon'ble Supreme Court as follows:-

"19. This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. In this connection we may appropriately refer to the decision of this Court in Calcutta Gujarati Education Society v. Calcutta Municipal Corpn. [(2003) 10 SCC 533] in which reference was made at SCC para 35 to the following observations of this Court in B.R. Enterprises v. State of U.P. [(1999) 9 SCC 700] : (SCC pp. 764-66, para 81)

"81. ... It is also well settled that first attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal or fiscal, etc. Cumulatively it is to subserve the object of the legislation. The old golden rule is of respecting the wisdom of the legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track

[340]Union of India and others v. Ind-Swift Laboratories Ltd., (2011) 4 SCC 635

> and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the Preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated. ... This principle of reading down, however, will not be available where the plain and literal meaning from a bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised or unbridled power."

265. On behalf of the appellants, it has also been argued that fee is collected for a purpose; for services rendered. In the instant case, it is not even shown as to where the fee is to be collected, how it has to be utilized? Even the Act uses the words fee and tax separately.

266. State, in fact, has made an attempt to validate the Act by arguing that it may be validated treating it a statute imposing a fee. Despite less distinction between tax and fee, still fee has an element of *quid pro quo;* some services rendered reasonably may be connected with the fee imposed. It may be specific services or services rendered in general. Even if it is shown that the fee imposed is related to some services rendered to the

grantee, the Court may, in view of the settled legal position, not evaluate the genuineness for imposing such fee in terms of calculating the expenses that may be incurred in providing the services and/or the amount that may be collected.

267. In the instant case, the Act simplicitor imposes water tax on electricity generation. It does not speak of any fund where the tax may be deposited. The Act does not speak of any services in lieu whereof the tax is imposed. In fact, the Act uses the word fee, as well. According to Section 5 of the Act, while submitting a detailed project report, the user has to pay such fee or charges as may be fixed by the Commission for registration. Similarly, under Section 7 of the Act, for registration also, fee is to be paid. In fact, Section 7(b) of the Act uses both words i.e. fee and water tax. Section 7 of the Act reads as follows.

> "**7. Information to the User Prohibition on.** - After the scheme is accepted by the Commission under section 6, the Commission shall register the scheme and inform the user to -
>
> (a) Execute an agreement in such a form and manner with the Commission as may be prescribed; and
>
> (b) Pay such fee and water Tax as fixed under chapter 4 of this Act."

268. A Commission is established under the Act. Section 13 of the Act makes it obligatory for the user to pay such fee and the charges, as the Commission may fix for undertaking service activities. Section 13 reads as follows:-

> "**13. Control and safety provisions.** - (1) The Commission may, by notice in writing given to the user require him to :-
>
> (a) Cause periodic inspection carried out by an expert, to the satisfaction of the Commission and in accordance with the procedure and at such intervals, as the Commission may specify, for the Scheme;
>
> (2) The user shall pay such fee and such other charges as the State Water Commission may fix in this behalf, to the State Water Commission for under taking the following activities :-

(a) Periodical inspection of the scheme by the Commission or any other officer or expert empowered in the behalf;

(b) Any other activity performed or caused to be performed by the Commission under this section in relation to the scheme of the user."

269. A bare reading of Section 13 of the Act makes it abundantly clear that a fee under sub-section (2) of it, is to be paid by the user in respect of the activities as enumerated under sub-section (2) of Section 13. It is not tax, it is fee. The Commission is established under section 20 of the Act. As stated, the Commission may charge fee and other charges for certain activities, which are also specified. How this amount of fee or charges shall be utilized? How will it be maintained? Section 37 of the Act makes provision with regard to the fund named as Commission Fund. It shall consist of grants and loans, fees, etc. and the fund would be utilized for the activities as specified under sub-section (2) of Section 37. Section 37 of the Act reads as follows:-

"**37.** (1) There shall be a fund constituted to be called the Commission fund and that shall be credited thereto, -

(a) any grants and loans made to the Commission by the Government;

(b) all fees received by the Commission under the Act;

(c) all sums received by the Commission from such other sources as may be decided upon by the Government.

(2) The Government may prescribe the manner of utilizing the fund for meeting the expenses."

270. The tax that has been imposed under the Act is not part of the fund constituted under Section 37 of the Act. The tax that has been imposed by the Act has no co-relation with any service rendered to the user. The Act imposes a tax.

271. This Court can by no stretch of imagination read the tax as fee in the Act. The tax, as imposed under the Act has no attribute of fee. It is simplicitor a tax, which this Court has held the State Legislature is not competent to impose.

272. As held in the case of Subramanian Swami[341], the reading down or recasting the statute can be applied in limited situations, namely, (i) for saving a statute for being struck down on account of interpretation and (ii) situation which summons its aid is where the provisions of the statute are vague and ambiguous. In the instant case, both these situations do not apply. This Court has already held that the State Legislature has no competence to impose the tax. The nature of tax that has been imposed, as held, has no attribute of fee. There is no question of any interpretation of any clause of the Act. The Act is not ambiguous while imposing tax. It is clear and in unequivocal terms imposes tax.

273. This Court cannot remake or recast the statute. This Court cannot read the Act as one imposing fee. Therefore, it cannot be said that the Act may be validated as reading the tax as fee.

CONCLUSION IN NUTSHELL

274. To sum up, the conclusions in nutshell are as follows:-

[341] *Supra* note 320

274.1 The "true nature and character" or "pith and substance" of the Act is that it levied tax on the generation of electricity.

274.2 The State Legislature is not competent to legislate the Act. Therefore, the Act is *ultra vires* the Constitution.

274.3 Section 17 of the Act makes excessive delegation of power for fixing rates by the State Government. It delegates such power without any policy guidelines. It is a naked delegation. Therefore, Section 17 of the Act is *void.*

274.4 The demand of tax made pursuant to the Notification dated 07.11.2015 is barred by the doctrine of promissory estoppel.

274.5 This Court cannot remake or recast the statute. The Act imposes tax, which the State Legislature is not competent to enact.

274.6 The Act cannot be read as the one imposing fee.

275. In view of the foregoing conclusion, all the Special Appeals and the Writ Petitions deserve to be allowed. The Act is to be struck down.

276. All the Special Appeals are allowed. Consequently, all the Writ Petitions are allowed.

277. The impugned judgment dated 12.02.2021 is set aside.

278. The Uttarakhand Water Tax on Electricity Generation Act, 2012 is struck down as *ultra vires* the Constitution.

(Ravindra Maithani, J.)
25.10.2023

Avneet/

Reserved

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

THE HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

AND

THE HON'BLE SRI JUSTICE RAVINDRA MAITHANI

SPECIAL APPEAL NO. 149 OF 2021

THDC India Ltd. .....Appellant.

Versus

State of Uttarakhand & others ....Respondents.

With

SPECIAL APPEAL NO. 131 OF 2021

NHPC Ltd. .....Appellant.

Versus

State of Uttarakhand & others ....Respondents.

With

SPECIAL APPEAL NO. 134 OF 2021

M/s Jaiprakash Power Ventures Ltd. .....Appellant.

Versus

State of Uttarakhand & others ....Respondents.

With

SPECIAL APPEAL NO. 136 OF 2021

Alaknanda Hydro Power Company Ltd. .....Appellant.

Versus

State of Uttarakhand & others ....Respondents.

With

SPECIAL APPEAL NO. 137 OF 2021

Alaknanda Hydro Power Company Ltd. .....Appellant.

Versus

State of Uttarakhand & others ....Respondents.

With

SPECIAL APPEAL NO. 139 OF 2021

M/s Swasti Power Pvt. Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

SPECIAL APPEAL NO. 140 OF 2021

Alaknanda Hydro Power Company Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

SPECIAL APPEAL NO. 141 OF 2021

Alaknanda Hydro Power Company Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

SPECIAL APPEAL NO. 142 OF 2021

M/s Swasti Power Pvt. Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

SPECIAL APPEAL NO. 143 OF 2021

Alaknanda Hydro Power Company Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

SPECIAL APPEAL NO. 363 OF 2021

Bhilangana Hydro Power Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

SPECIAL APPEAL NO. 367 OF 2021

Uttar Pradesh Power Corporation Ltd. …..Appellant.

Versus

State of Uttarakhand & others ….Respondents.

With

WRIT PETITION (M/S) NO. 1739 OF 2021

Renew Jal Urja Pvt. Ltd. …..Petitioner.

Versus

State of Uttarakhand & others ….Respondents.

Mr. Sanjay Jain, learned Senior Counsel assisted by Mr. Shobhit Saharia, Mr. Padmesh Mishra, Ms. Tanya Aggarwal, Ms. Harshita Sukhija and Mr. Nishank Tripathi, learned counsels for THDC.

Mr. Saurabh Kirpal, learned Senior Counsel assisted by Mr. Meenal Garg, Mr. Kartik Nayar and Mr. Dharmendra Barthwal, learned counsels for Alaknanda Hydropower Company Ltd.

Mr. Dinesh Dwivedi, learned Senior Counsel assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, learned counsels and Mr. B.S. Parihar, learned Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, learned Standing Counsel for the Union of India.

Mr. Arijit Prasad, learned Senior Counsel assisted by Mr. Alok Mahra, learned counsel for NHPC Ltd.

Mr. Amar Dave, Mr. Ankur Saigal, Mr. Vikas Bahuguna and Ms. Kamakshi Sehgal, learned counsels for Renew Jal Urja Pvt. Ltd.

Mr. U.K. Uniyal, learned Senior Counsel assisted by Mr. Sitesh Mukherjee, Mr. Abhishek Kumar and Mr. Nived V.V.N., learned counsels for UPPCL.

Mr. D.S. Patni, learned Senior Counsel assisted by Mr. Siddhant Manral, learned counsel for M/s Swasti Power Pvt. Ltd.

Mr. Alok Mahra, learned counsel for M/s Jaiprakash Power Ventures Ltd.

Mr. Sujit Ghosh, Mr. Nishant Kumar and Mr. Rohit Arora, learned counsels for the appellant in SPA No.363 of 2021.

Mr. Aditya Singh, learned Additional Chief Standing Counsel for the State of U.P./ respondent in SPA No.146 of 2021.

Judgment Reserved on: 28.08.2023

Judgment Delivered on: 25.10.2023

The Court made the following:

JUDGMENT:(per Hon'ble The Chief Justice Sri Vipin Sanghi)

I have perused the judgment prepared by Brother Ravindra Maithani, J. With due respect to him, I do not agree with the findings returned by him on the aspects taken note

of hereinafter, and I am, therefore, penning down my own findings with my reasons therefor, on the issues dealt with hereinafter. Since Brother Maithani, J. has elaborately discussed various general legal aspects with the relevant case laws, with regard to the interpretation of the Constitution- particularly, the relevant entries in the three lists of the Seventh Schedule to the Constitution of India, and there possibly cannot be any quarrel with the legal propositions already well established by a catena of decisions of the Supreme Court, for the sake of brevity, I am not dwelling upon the same. However, I do not agree with the application of these principles, to the extent as elaborated below. The submissions of learned Senior Counsels, and other counsels advanced before us have also been noticed by Brother Maithani, J. in his detailed judgment, and I am not reproducing them in detail in this judgment, for the sake of brevity.

2. Brother Maithani, J. has discussed the submissions advanced on behalf of the State by Mr. Dinesh Dwivedi, learned Senior Counsel, that the impugned legislation, i.e. the Uttarakhand Water Tax on Electricity Generation Act, 2012 *(for short 'the Act')* has been framed by the State Legislature in exercise of its legislative power conferred by Article 246(3), read with Entries 45, 49 and 50 in List II of the Seventh Schedule. Brother Maithani, J. has concluded that the

legislative fields of taxation contained in Entry 45, 49 and 50 of List II cannot be invoked to save the Act.

3. With due respect to my Brother Maithani, J., I disagree with the said findings returned by him.

4. At the outset, I may begin by taking note of the well-settled principles of statutory interpretation, which are invoked while examining the validity of a statute.

5. In ***State of Maharashtra vs. Bharat Shanti Lal Shah & others, (2008) 13 SCC 5***, the Supreme Court held that it is a cardinal rule of interpretation that there shall always be a presumption of constitutionality in favour of a statute, and while construing such statute, every legally permissible effort should be made to keep the statute within the competence of the State Legislature. The Supreme Court relied upon various earlier decisions in support of this proposition, namely ***M/S Burrakur Coal Co. Ltd. vs. Union of India and Others, AIR 1961 SC 954; CST vs. Radhakrishan and Others, (1979) 2 SCC 249, and; Greater Bombay Coop. Bank Ltd. vs. United Yarn Tex (P) Ltd. and Others, (2007) 6 SCC 236***.

6. The principles culled out from these decisions are, *inter alia*, that while considering the validity of a law, the Court will not consider itself restricted to the pleadings of the State, and would be free to satisfy itself whether under any

provision of the Constitution, the law can be sustained; presumption is always in favour of the constitutionality, and the burden is upon the person who attacks it to show that there has been transgression of constitutional principles, and; the Court may take into consideration matters of common knowledge, reports, Preamble, history of the times, object of the legislation, and all other facts which are relevant, and that it must always be presumed that the legislature understands and correctly appreciates the need of its own people.

7. In ***Bharat Shanti Lal Shah*** (supra), the Supreme Court cites ***State of Bihar and Others vs. Bihar Distillery Ltd. and Others, (1997) 2 SCC 453***, wherein the nature of approach, which the Court should adopt while examining the constitutional validity of a provision, was set out. The approach of the Court, while examining a challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The Court should try to sustain it's validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The Court should not approach the enactment with a view to pick holes, or to search for defects of drafting, much less inexactitude of language employed. Such defects of drafting should be ironed out as part of the attempt to sustain the validity/ constitutionality of the enactment. The

unconstitutionality must be plainly and clearly established before an enactment is declared as *void*. The same approach holds good while ascertaining the intent and purpose of an enactment, or its scope and application.

8. Since it is for the State to defend the challenge to the Act, and to establish the Legislative field/ Entry of List II, under which the impugned Act can be said to fall, I may take note of the submissions of Mr. Dwivedi and the judgments relied upon by him, in support of his submissions.

Discussion regarding Entry 49, List II of the Seventh Schedule

9. Mr. Dwivedi, firstly, relies on the legislative field/ entry 'land' for the purpose of taxation, contained in Entry 49 of List II of the Seventh Schedule. He submits that the same is broad enough to include the water flowing over the land in the form of a river.

10. Entry 49 of List II of the Seventh Schedule to the Constitution reads as follows:-

"49. Taxes on lands and buildings".

11. Mr. Dwivedi has referred to several decisions of the pre-constitution era, wherein the Courts have expounded on the meaning of the word 'land', as jurisprudentially understood. I may take notice of each of them.

12. The first decision referred by Mr. Dwivedi in this regard is ***The Electric Telegraph Company vs. The***

Overseers of the Poor of the Township of Salford, (1855) 11 EX 181. In this case, the appellants had been subjected to a tax for, and in respect of, the telegraph wires and posts, which were affixed on land. The appellants had constructed, fixed, and laid down, along the lines of, *inter alia*, the London and North Western Railway Company, the posts, fastenings, wires, and apparatus for making and working their electric telegraph. The question which arose for consideration was whether the appellants were liable to be subject to land tax. It was argued on behalf of the appellants, that they are not liable to pay the tax in respect of the land on which they had fixed their poles to carry their electric telegraph lines. Their submission was that they are not occupiers of the land within the meaning of the statute. No one could be taxed under the Statute, in respect of the occupation of the land, unless he had the exclusive occupation. The land vested solely in the Railway Company, and the appellants had merely been given the liberty of fixing their posts on it. In an earlier decision, namely, ***In Rex vs. The Chelsea Waterworks Company, (5 B & Ad. 156)***, the Company was held to be liable to pay the tax for the occupation of land below the surface of the soil by the pipes they laid. Pollock C. B. answered the question against the appellants- assessee. He held that the land extends upwards, as well as downwards, and whether the wires and posts are fixed above or below the surface, they occupy a portion of

land. The argument that the telegraph lines/ wires passed over the land, and not on the land, or under the land, was rejected. Alderson, B. concurred with the said view. He noticed the earlier decision in ***Rex vs. The Corporation of Bath (14 East, 609)***. In that case, the question was, whether the corporation was liable to be rated/ taxed for reservoirs which, by means of aquaducts and pipes laid underground, supplied the city of Bath with water. The argument was that it was only an easement right (over the land where the reservoir was created), that the corporation enjoyed, and the corporation had no other use of soil. The Court held in ***The Corporation of Bath*** (supra), that the corporation were occupiers of the reservoir, and that such reservoir and the water kept therein fell within the legal description of land. Therefore, the appellants were liable to be taxed as occupiers of the land. Alderson, B. held that there was no reasonable distinction between the electric fluid passing through pipes in the air; under water, or; in the soil. All the surface upwards and downwards is land. Under the said law, tax was liable to be paid by *"every occupier of land"*. The same was the view expressed by Platt, B., as also Martin, B.

13. Martin, B. refers to the opinion of Lord Coke, in ***Co. Latt. 4 a.,*** where he observes *"And lastly,* ***the earth has in law a great extent upwards, not only of water****, as hath*

been said, but of air, and all other things even up to heaven, for cujus est solum, ejus est usque ad coelum".

(emphasis supplied)

14. The aforesaid judgment shows that in English law, everything standing (affixed or fastened), or flowing below or above the land, was considered as land itself. Pertinently, this decision specifically referred to the English judgment in ***The Corporation of Bath*** (supra), wherein the precise issue was whether the reservoir containing water was liable to be taxed as land. That question was decided, holding the reservoir to be land.

15. The next decision relief upon by Mr. Dwivedi, is in the case of ***Kandukuri Balasurya Prasadha Row & another vs. The Secretary of State of India in Council, AIR 1917 PC 42***. I am not dealing with this judgment in detail, since the Privy Council observed that Cess under the Act, namely, Madras Act VII of 1865, as amended by Madras Act V of 1900, was leviable on land which is irrigated and, therefore, the water cess imposed on the water drawn for purpose of irrigation of agricultural lands, was in the nature of land tax. This case did not deal with the issue, whether the flowing water on land- in the shape of a river/ stream, constitutes the land over which it was flowing.

16. The next decision relied upon by Mr. Dwivedi is in the case of ***The Province of Madras vs. The Lady of Dolours Convent, Trichinopoly, AIR 1942 Mad. 719; 1943 ILR Mad. 34***. I find that this decision relies on the decision of the Privy Council in ***Kandukuri Balasurya Prasadha Row*** (supra), and this decision also proceeds on the basis that water cess levied under the Madras Irrigation Cess Act, 1865, was a cess leviable on land which is irrigated and, therefore, is in the nature of land tax. For the same reason, this decision, like the decision in ***Kandukuri Balasurya Prasadha Row*** (supra), does not advance the case of the State.

17. It, therefore, appears to me that the consistent jurisprudential view taken by the English Courts, since pre-constitution times, has been that water standing or flowing over land forms part of the land itself. This view is founded upon an even more fundamental jurisprudential view, that earth, in law, has a great extent upwards and below; not only water- as has been said, but even air, and all other things even upto heaven, form part of the land.

18. I may now take notice of the Indian case laws, post the enforcement of our Constitution.

19. Mr. Dwivedi has placed reliance in the judgment of the Supreme Court, in ***Western India Theatres Ltd. v.***

Municipal Corporation of the City of Poona [1959 Supp 2 SCR 71 : AIR 1959 SC 586. The appellant had challenged the authority of the Municipal Corporation to levy and impose tax on the owners and lessee of cinema house of Rs.2.00/- per day, as license fee. Section 59 of the Bombay District Municipal Act, 1901 empowered the Municipality constituted under the said Act, *inter alia*, to impose under Section 59(b)(xi), *"Any other tax to the nature and object of which the approval of the Governor-in-Council shall have been obtained prior to the selection contemplated in sub-clause (i) and clause (a) of Section 60".*

20. In Paragraph No.6 of the judgment, the Supreme Court dwelled on the power of the Municipality to levy a tax by resort to the aforesaid clause. In that context, the Supreme Court observed that the Municipality could not impose any tax, for example, income tax, which the provincial legislature could not itself impose. The Supreme Court observed that Section 59 authorizes the Municipality to impose the taxes therein mentioned *"for the purposes of this Act".* By way of illustration, the Supreme Court noticed some of the duties which the Municipality is obliged to discharge, for example, to arrange for supply of drinking water. In that context, the Supreme Court observed that it may legitimately charge a water rate, i.e. a water tax.

21. This judgment, in my view, does not answer the question with which we are concerned and, therefore, this judgment is of no avail to the State.

22. Mr. Dwivedi has placed reliance upon the judgment of the Allahabad High Court, in ***Raza Buland Sugar Co. Ltd. vs. Municipal Board, Rampur, 1961 SCC OnLine All 58: AIR 1962 All 83***. In this case, the Municipal Board of Rampur imposed water tax on the annual value of lands and buildings within the limits of the Municipality, as provided in Section 128(1)(x) of the U.P. Municipalities Act. The petitioner challenged the imposition of water tax before the Allahabad High Court, by challenging the competence of the Board to levy water tax. Other grounds were also raised, with which we are not concerned. The Allahabad High Court noticed that Section 128 of the Act under consideration provided that, subject to any general rules or special orders of the State Government in that behalf, a Board may impose in the whole, or any part of a municipality, the taxes enumerated in the said section. Water tax on the annual value of buildings, or lands, or of both, is mentioned in Clause (x) of the section. Thus, the power to impose water tax was delegated on the Municipality by the State Government by means of the legislation in question. It was argued on behalf of the petitioner that water tax is not mentioned, either in List II, or in List III of the Seventh Schedule to the Constitution.

Therefore, it was beyond the legislative competence of the State to provide for imposition of water tax. The Allahabad High Court noticed Entry 49 in List II, which provides for *"taxes on lands and buildings"*. The Allahabad High Court observed in Paragraph No.9, that it was obvious that the subject matter of water tax is not water. Though it is called water tax, it is not levied on its production. The Court held that water tax under the Municipalities Act is, in reality, a tax on lands and buildings. The challenge to the enactment was, therefore, turned down.

23. I am of the view that this judgment does not specifically deal with the pointed issue: Whether a flowing river, on land, is land, and therefore, water flowing in the river, is land.

24. Reliance has also been placed by Mr. Dwivedi on ***Nizam Sugar Factory vs. City Municipality, Bodhan & another, 1964 SCC OnLine AP 68; AIR 1965 AP 91***. However, this decision does not appear to be apposite for the reason that, in that case, the levy of water tax by the City Municipal Committee, Bodhan was assailed by the petitioner on the ground that it was a fee, and not a tax, and since no supply was being made to the petitioner, the levy was devoid of *quid pro quo*, and was bad. This submission of the petitioner was rejected by the Court, which held that water tax was a tax, and not a fee.

25. In ***Anant Mills Co. Ltd. vs. State of Gujarat & others, (1975) 2 SCC 175***, a four Judge Bench of the Supreme Court examined the constitutional validity of different provisions of the Bombay Provincial Municipal Corporation Act, 1976. It was argued on behalf of the petitioner that the State Legislature has no competence to enact the law, under Entry 49 of List II in the Seventh Schedule, for levy the tax in respect of any area occupied by underground supply lines. It was argued that the word 'land' denotes the surface of the land, and not the underground strata. The Supreme Court rejected this submission and held that Entry 49 of List II contemplates the levy of tax on lands and buildings, or both, as a unit. Such tax is directly imposed on lands and buildings, and bears a definite relation to it. The Supreme Court construed the word 'land', and observed that the word 'land' includes not only the face of the earth, but everything under or over it, and has in its legal signification an indefinite extent upward and downward, giving rise to the maxim, *Cujus est solum ejus est usque ad coelum*. According to *Broom's Legal Maxims,* 10th Ed., p. 259, not only has "land" in its legal signification an indefinite extent upwards, but in law it extends also downwards, so that whatever is in a direct line between the surface and the centre of the earth, by the common law, belongs to the owner of the surface. That is, not merely the surface, but all the land down to the

centre of the earth, and up to the heavens, is land, and hence the word "land" which is *nomen generalissimum*, includes, not only the face of the earth, but everything under it, or over it.

26. The aforesaid observation of the Supreme Court has not been made in the context of any statutory definition of the word 'land'. The said observation is a general observation on the jurisprudential meaning of "land", and the Supreme Court has explained as to what the word 'land' means, and how it is generally understood in law. This judgment, therefore, clearly supports the submission of the State that water tax is a tax on land over which the water stands or flows- the authority to levy which is derived by the State Legislature under Article 246(3) read with Entry 49 of List II of the Seventh Schedule to the Constitution.

27. Mr. Dwivedi has also placed reliance on ***Kendriya Nagrik Samiti, Kanpur vs. Jal Sansthan, Kanpur And Ors., 1982 SCC OnLine All 559; AIR 1982 All 406***. In this case, the petitioner had raised a challenge to the imposition of water tax and sewerage tax by the Jal Sansthan, under Section 52 of the U.P. Water Supply and Sewerage Act, 1975. The submission of the petitioner and the finding thereon is recorded in Paragraph No.3 of the judgment, which reads as follows:-

> *"3. Learned counsel for the petitioners contended that Section 52 of the Act which empowered a Jal Sansthan to levy*

water tax and sewerage tax, was ultra vires on the ground of legislative competence. It was urged that no tax can be levied or collected except by authority of law as provided by Article 265 of the Constitution and since the taxes in question do not fall within the legislative field of any of the items in List II of the Seventh Schedule, they are invalid. According to the learned counsel Entry No.17, which is the only head under which the State legislature is competent to legislate on the subject of water supply etc., is not an entry relating to tax and under the residuary Entry 66 only fee can be levied and no tax. ***This argument ignores Entry 49 which empowers the State legislature to impose 'taxes on lands and buildings'. The subject matter of water tax is not water. Under Section 52 of the Act water tax as also sewerage tax is levied on the assessed annual value of the premises. It is in reality a tax on land and buildings though called water tax.*** *This matter came up for consideration before this Court in* ***Raza Buland Sugar Co. Ltd v. Municipal Board, Rampur (AIR 1962 All 83)****. Dealing with Section 128(1)(x) of the U.P. Municipalities Act, which empowers a municipality to impose 'a water tax on the annual value of buildings or lands or of both', a Bench of this Court held that water tax is in substance a tax on lands and buildings. The same reasoning applies to sewerage tax. The case was taken up in appeal to the Supreme Court* ***(Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur, AIR 196 SC 895)*** *but the decision of this Court that water tax is covered by Entry 49 was not challenged in appeal before the Supreme Court. The same view was taken in* ***Nizam Sugar Factory Ltd. v. City Municipality (AIR 1965 AP 91)****".*

(emphasis supplied)

28. This decision also holds that the subject matter of water tax is not water, and the argument of the petitioner that there is no legislative field whereunder the State legislature could enact a law, levying water tax, was held to ignore Entry 49 of List II.

29. In ***Goodricke Group Ltd. & others vs. State of W.B. & others, 1995 Supp (1) SCC 707***, the Supreme Court, in Paragraph No.30, explained the earlier observation of the Supreme Court in ***Sudhir Chandra Nawn vs. WTO, (1969) 1 SCR 108; AIR 1969 SC 59***, and went on to observe as follows:-

> *"From the above observations, in our opinion, it cannot be inferred that the position of law regarding Entry 49 of List II is different from the law obtaining under other entries in the Seventh Schedule. It cannot be. The proposition that the several entries in the Seventh Schedule are merely legislative heads and must be liberally construed applies to all the entries including Entry 49 of List II. The above observations in* ***Nawn*** *(supra) and other cases were made merely with a view to emphasise the distinction between one tax and the other. The said expression was used to point out that the particular enactment is in truth not relatable to Entry 49, List II but to the entries in List I. In that connection, it was pointed out that the tax in question before them was not a tax directly upon the land and building but a tax upon the wealth of an individual or upon the transaction of gift, as the case may be. It is relevant to note that in* ***Ajoy Kumar Mukherjee vs. Local Board of Barpeta, AIR 1965 SC 1561****, the Constitution Bench has stressed this very aspect when it stated:* ***"It is well-settled that the entries in the three legislative lists have to be interpreted in their widest amplitude and, therefore, if a tax can reasonably be held to be a tax on land it will come within Entry 49."*** *The question of direct or reasonable connection arises only where one has to find out whether a particular enactment is within the competence of the legislature which enacted it. Applying the doctrine of pith and substance, the court has to determine and answer the question. There may be competing entries in List I and List II, their content may look somewhat similar but yet the question has to be answered with the aid of the said doctrine. The said observation, which is also*

> *repeated in **India Cement** (supra), means that levy should not be an indirect levy on land like the one in **India Cement** but it cannot be understood to say that levy on land quantified on the basis of its yield cannot be treated as a direct levy upon the land. There is no basis, therefore, for saying that the impugned cess is not a tax upon the land directly. As repeatedly pointed out above, the mere fact that it is measured with reference to the yield of the land does not make it any the less a tax upon the land directly."*
>
> (emphasis supplied)

30. Mr. Dwivedi has placed reliance on ***State of W.B. v. Kesoram Industries Ltd. & others, (2004) 10 SCC 201***. Lahoti, J. (as His Lordship then was), in his exhaustive judgment has dealt with several aspects, including the meaning of 'land'- as used in Entry 49 of List II of the Constitution. I may quote the relevant extract from the said judgment on the aforesaid aspect.

> *"39. The word 'land', as used in Entry 49 in List II, came up for the consideration of this Court in **Anant Mills Co. Ltd v. State of Gujarat, (1975) 2 SCC 175**. It was held that **the word 'land' cannot be assigned a narrow meaning so as to confine it to the surface of the earth. It includes all strata above and below. In other words, the word 'land' includes not only the surface of the earth but everything under or over it, as has in its legal significance an indefinite extent upward and downward**. The four- Judge Bench upheld the validity of the law levying tax in respect of area occupied by underground lines by reference to Entry 49 in List II, holding it to be a tax on land only.*
>
> *40. **Ample authority is available for the concept that under Entry 49 in List II the land remains a land without regard to the use to which it is being subjected. It is open for the legislature to ignore the nature of the user and tax the land**. At the same time **it is***

also permissible to identify, for the purpose of classification, the land by reference to its user*. While taxing the land* ***it is open for the legislature to consider the land which*** *produces a particular growth or* ***is useful for a particular utility and to classify it separately and tax the same. Different pieces of land*** *identically situated otherwise, but being subjected to different uses,* ***or having different potential, are capable of being classified separately without incurring the wrath of Article 14 of the Constitution.*** *The Constitution Bench in* ***Kunnathat Thathunni Moopil Nair v. State of Kerala, AIR 1961 SC 552****, held that the land on which a forest stands is not to be excluded necessarily from Entry 49. The erstwhile Entry 19 of List II applied to "forest".* ***Their Lordships held that the use of the word "forest" in Entry 19 could not be pressed into service to cut down the plain meaning of the word "land" in Entry 49. It was permissible to tax the land on which a forest stands by reference to Entry 49.*** *In* ***Ajoy Kumar Mukherjee v. Local Board of Barpeta, AIR 1965 SC 1561****, the appellant, a landholder, held a hatt (or market) on his land. The Local Board asked the appellant to take out a licence and pay Rs. 600, later Rs. 700, by way of licence fee for holding the market. It was urged that the impost was unconstitutional, inter alia, on the ground that the tax was actually imposed on the market, which infringed Article 14 of the Constitution, and also because the State Legislature had no legislative competence to tax a market. The Local Board relied on Entry 49 in List II.* ***The appellant urged that Entries 45 to 63 which deal with taxes do not contemplate a tax on markets. Repelling the plea, the Constitution Bench held that the tax was on the land though the charges arise only when the land is used for a market. The tax remained a tax on land in spite of the imposition being dependent upon the user of the land as a market.*** *The tax was an annual tax as contrasted to a tax for each day on which the market was held. The owner or occupier of the land was responsible for payment of tax on an annual basis. The amount of tax depended upon the area of the land on which the market was held and the importance of the market. Thus, the tax was*

held to be a tax on land, though the incidence depended upon the use of the land as a market.

41. In ***Vivian Joseph Ferreira v. Municipal Corpn. of Greater Bombay, (1972) 1 SCC 70****, the tax was confined to the residential tenanted buildings. The classification was held to be valid. In* ***Govt. of A.P. v. Hindustan Machine Tools Ltd., (1975) 2 SCC 274****, house tax was levied on the buildings. The new definition of "house" included "a factory". However, the house tax was levied only on the building occupied by the factory and not on the machinery and furniture. The State Legislature claimed competence to do so under Entry 49 List II. The power to tax a building, exercisable without reference to the use to which the building is put, was held to be valid.* ***In the opinion of the Court, it was irrelevant that the building was occupied by a factory which could not conduct its activities without the machinery and furniture.***

*42. Once it is held that the land or building is available to be taxed, it does not matter to what use the land is being subjected though the nature of the user may enable land of one particular user being classified separately from the land being subjected to another kind of user. The tax would remain a tax on land****. It cannot be urged that what is being taxed is not the land but the nature of its user****. So also it is permissible to adopt myriad forms and methods of valuation for the purpose of quantifying the tax.*

43. ……

44. ***In Asstt. Commr. of Urban Land Tax v. Buckingham and Carnatic Co. Ltd., (1969) 2 SCC 55,*** *for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, namely: (i) that such tax is directly imposed on lands and buildings, and (ii) that it bears a definite relation to it. Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the incidence of tax. Merely, on account of such methodology having been adopted, the State Legislature cannot be accused of having encroached upon Entry 86, 87 or*

88 of List I. Entry 86 in List I proceeds on the principle of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land, was held to be intra vires the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in ***Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, (1969) 2 SCC 283****, where the submission that the levy was not a rate on lands and buildings as appropriately understood but rather a tax on capital value, was discarded".*

31. I may also notice the observations made by the Supreme Court in Paragraph 50 of the said judgment. The same reads as follows:-

"50. Yet another angle which the Constitutional Courts would advisedly do better to keep in view while dealing with a tax legislation, in the light of the purported conflict between the powers of the Union and the State to legislate, which was stated forcefully and which was logically based on an analytical examination of the constitutional scheme by Jeevan Reddy, J. in ***S.R. Bommai v. Union of India, (1994) 3 SCC 1****, may be touched. Our Constitution has a federal structure. Several provisions of the Constitution unmistakably show that the Founding Fathers intended to create a strong Centre. The historical background relevant at the time of the framing of the Constitution warranted a strong Centre naturally and necessarily. This bias of the framers towards the Centre is found reflected in the distribution of legislative heads between the Centre and the States. More important heads of legislation are placed in List I. In the Concurrent List the parliamentary enactment is given primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. The*

residuary power to legislate is with the Centre. By the Forty-second Amendment a few of the entries in List II were omitted or transferred to other lists. Articles 249 to 252 further demonstrate the primacy of Parliament, allowing it liberty to encroach on the field meant exclusively for the State legislation though subject to certain conditions being satisfied. ***In the matter of finances, the States appear to have been placed in a less favourable position****. True, the Centre has been given more powers but the same is accompanied by certain additional responsibilities as well. The Constitution is an organic living document. Its outlook and expression as perceived and expressed by the interpreters of the Constitution must be dynamic and keep pace with the changing times.* ***Though the basics and fundamentals of the Constitution remain unalterable, the interpretation of the flexible provisions of the Constitution can be accompanied by dynamism and lean, in case of conflict, in favour of the weaker or the one who is more needy. Several taxes are collected by the Centre and allocation of revenue is made to States from time to time. The Centre consuming the lion's share of revenue has attracted a good amount of criticism at the hands of the States and financial experts. The interpretation of entries can afford to strike a balance, or at least try to remove imbalance, so far as it can. Any conscious whittling down of the powers of the State can be guarded against by the courts****.*

> *"Let it be said that the federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle - the outcome of our own historical process and a recognition of the ground realities." (SCC p. 217, para 276)*

Quoting from Setalvad, M.C.: Tagore Law Lectures, "Union and State Relations under the Indian Constitution" (Eastern Law House, Calcutta, 1974), Jeevan Reddy, J. observed: (SCC p. 217, para 276)

> *"It is enough to note that our Constitution has certainly a bias towards Centre vis-à-vis the States...* ***It is equally necessary to emphasise that courts should be careful not to upset the delicately***

crafted constitutional scheme by a process of interpretation". (emphasis supplied)

32. The aforesaid judgment, in my view, squarely supports the case of the State. As already held in ***Anant Mills Co. Ltd.*** (supra), and noticed in ***Kesoram Industries Ltd.*** (supra) also, 'land' cannot be assigned a narrow meaning so as to confine it to the surface of the earth. It includes all strata, above and below. In its legal significance, land has an indefinite extent upward and downward. Land remains land irrespective of its usage. The nature of land may be ignored, and land may be subjected to tax. It is also permissible to classify land according to its user. It is open to the legislature to consider the land which is useful for a particular utility and classify separately and tax it. Different pieces of land, having different potential are capable of being classified separately and taxed. Merely because "forest" is a separate Entry 19 in List II, (before the 42nd Amendment), it does not mean that it ceases to be land under Entry 49 of List II. Merely because a market is run on the land, it does not mean that tax on land tantamounts to tax on markets. The power to tax a building, without reference to its user was valid. Actual user of the building for the specified use was not necessary. Each one of the principles- which have been highlighted by me, are relevant and attracted in this case. There is no reason, therefore, in my view to not construe water flowing on land, in the form of a river/ stream, as land.

33. As noticed above, the Supreme Court has observed in Paragraph No.40, aforesaid, that it is permissible to identify, for the purpose of classification the land by reference to its user. While taxing the land, it is open for the legislature to consider the land, which produces a particular growth, or is useful for a particular utility, and to classify it separately, and tax the same. Different pieces of land identically situated otherwise, but being subjected to different uses, or having different potential, are capable of being classified separately without incurring the wrath of Article 14 of the Constitution. Thus, in my view, the State while levying a tax on water, which is a part and parcel of land- can identify the particular users of water, which may be taxed, while not taxing other uses of water. For example, the State can take a policy decision not to tax usage of water for purpose of agriculture, while it may decide to tax the use of water, consumptive, or non-consumptive (even non-consumptive water is consumptive, see ***Burmah Shell Oil Storage & Distributing Co. India Ltd. vs. The Belgaum Borough Municipality, AIR 1963 SC 906; Union of India vs. V.M. Salgaonkar & Bros. (P.) Ltd and others, 1998 (4) SCC 263***), for other purposes, such as, for generation of hydro-electricity; for use in a washery; or, for use in any other industry etc. The real question is whether the State legislature has the legislative competence to tax water. If it

has the legislative competence to levy a tax land, since water forms a part and parcel of land- which could be taxed, under Entry 49, the State Legislature must be held to have the legislative competence to tax water. It does not matter, as to what kind of user of water is being subjected to tax. All users may be taxed, or only some specified users may be taxed.

34. The observation made in Paragraph No.50 in ***Kesoram Industries*** (supra) may now be elaborated.

35. Article 1 of the Constitution of India states that India, i.e. Bharat, shall be a Union of States. Under the Constitutional scheme, India, i.e. Bharat, is a quasi-federation. As noticed by the Supreme Court in Paragraph No.50, quoted hereinabove, the Founding Fathers intended to create a strong centre within the federal structure. More important heads of legislation are placed in List I. Even in respect of matter covered by the Concurrent List, the Parliamentary enactment is given supremacy, irrespective of the fact, whether such an enactment is earlier, or later in point of time to a State enactment on the same subject-matter. The residuary power to legislate is with the Centre. The Centre derives the lion's share of revenue. In the matter of finances, the States appear to have been placed in a less favourable position. The States have, however, under List II, been given exclusive legislative power in respect of matter, which exclusively concern the State. Generally speaking, the

States have been given the right to impose tax and levy fee in respect of matters, which squarely fall within the boundaries of the State. The landmass of the State is the primary asset of any State. That landmass carries within its bosoms, natural resources, such as mountains, rivers, lakes, minerals, and the like. Article 246(3), empowered the legislature of the State to exclusively legislate on the entries found in List II, including for the purpose of taxation. So, if the legislature of a State enacts a law for taxation in respect of an asset or thing which squarely falls within the boundary of the State, and the subject matter of tax is not expressly placed beyond the domain of the State Legislature- by virtue of a specific entry in List I, and, the tax can be reasonably tethered to an Entry in List II, in my view, it would be improper for the Court to conclude that the State Legislature does not have the legislative competence to enact the taxation law.

36. Pertinently, there is no specific entry in List I, or even in List III, which empowers the Parliament to legislate a taxing statute in respect of water, which is an asset of the State when it flows on the land of the State. Reliance placed by the appellants-writ petitioners on Entry 97 of List I, is an argument of desperation. That residual entry would be invoked, if the subject matter of the legislation under consideration, cannot be traced to one of the other entries in

either of the three lists- by giving a meaning and broad interpretation to the entries.

37. In ***Ahmedabad Municipal Corporation vs. GTL Infrastructure Ltd. & others, (2017) 3 SCC 545***, the respondents had challenged the constitutional validity of Section 145-A of the Gujarat Provincial Municipal Corporation Act, 1949, as being beyond the legislative competence of the State legislature. The Gujarat High Court struck down the said provision, and on that basis, interdicted the levy of property tax on 'mobile towers'. The High Court, however, took the view that the cabin in a 'mobile tower', in which BTS system is located, would be a building and, therefore, exigible to tax under the Gujarat Act. Cross-appeals were preferred by the State and the Cellular operators- original writ petitioners, before the Supreme Court. The Supreme Court, in its decision, observed in Paragraph Nos.19 and 20 as follows:-

> *"19. The fields of taxation on which the Union Parliament and State Legislatures are competent to enact legislations to meet the constitutional mandate under Article 265 of the Constitution are clearly indicated in the respective Lists. While there can be no encroachment either way, it is possible that in a given situation though there may be some similarity between the taxes levied by a Central and a State enactment, both can coexist having regard to the subject of the levy. A tax on income derived from land and a tax on the land itself wherein the income or earning therefrom forms the basis of the rates of the levy of tax is one such example.* ***The above has been illustrated only to answer the arguments advanced before us on view expressed, in the order under challenge, by the High Court that even***

if it is assumed that the cellular operators are right in contending that mobile towers are covered by the field "telegraphs" (List I Entry 31), it cannot be said that if mobile towers can come within the fold of List II Entry 49, such a legislation would be legislatively incompetent*.*

20. The constitutional scheme with respect to financial relations between the Union and the State is dealt with by Part XII of the Constitution. The scheme discernible contemplates an equitable distribution of revenues between the Centre and the States. Though the Union and each of the federating units have their respective consolidated funds, the financial arrangements and adjustments that are to be found in the different provisions of Part XII of the Constitution would indicate an attempt at equitable distribution of revenues between the Union and the federating units even though such revenue may be derived from taxes and duties imposed by the Union and collected by it or through the agencies of the States. A perusal of the legislative entries relating to taxes imposable by the Central and the State Legislatures do indicate that the larger share of the revenue goes to the Union because of the very nature of the taxes leviable by the Union Parliament which would stand credited to the consolidated fund of the Union. The allocation of revenue heads/taxation power in the States certainly shows a disequilibrium which, however, is sought to be balanced by the constitutional scheme aforementioned, namely, equitable distribution of revenues between the Union and the States even though such revenues may be derived from taxes and duties imposed by the Union and collected by it. This aspect of the constitutional scheme which has been echoed in para 50 of the decision in ***State of W.B. v. Kesoram Industries Ltd., (2004) 10 SCC 201****, has to be kept in mind as the discussions unfold."* (emphasis supplied)

38. The aforesaid observations of the Supreme Court, echo the view taken in Paragraph No.50 of ***Kesoram***

Industries Ltd. (supra), which has been taken note of hereinabove.

39. The Supreme Court then proceeded to analyze the meaning of expression 'land' and 'buildings', as contained in Entry 49 of List II of the Seventh Schedule. The relevant extract from Paragraph No.22 of the judgment, dealing with the expression 'land' reads as follows:-

> "***Land***
>
> ***Stroud's Judicial Dictionary (5th Edn.)*** *defines that "land", or "lands" not only means the surface of the ground, but also everything (except gold or silver mines) on or over or under it, for Cujus est solum ejus est usque ad coelum et ad inferos* ***(Co. Litt. 4 a; Touch. 91; 2 Bl. Com. 18: Lord Coke calls the earth "the suburbs of heaven")****.*
>
> ***Black's Law Dictionary (7th Edn.)*** *defines that "land" means an immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it. The lexicographer further observes.*
>
> > *"In its legal significance, "land" is not restricted to the earth's surface, but extends below and above the surface.* ***Nor is it confined to solids, but may encompass within its bounds such things as gases and liquids****. A definition of "land" along the lines of "a mass of physical matter occupying space" also is not sufficient, for an owner of land may remove part or all of that physical matter, as nevertheless retain as part of his "land" the space that remains.* ***Ultimately, as a juristic concept, "land" is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to the earth's surface****. "Land" is not the fixed contents of that space, although, as we shall see, the owner of that space may well own those fixed contents.*

> *Land is immovable, as distinct from chattels, which are movable, it is also, in its legal significance, indestructible. The contents of the space may be physically severed, destroyed or consumed, but the space itself, and so the "land", remains immutable." Peter Butt,* ***Land Law 9*** *(2nd Edn., 1988).*
>
> ***P. Ramanatha Aiyar's Law Lexicon (2nd Edn.)*** *observes that the word* ***'land' is a comprehensive term, including standing trees, buildings, fences, stones, and waters, as well as the earth we stand on****. Standing trees must be regarded as part and parcel of the land in which they are rooted and from which they draw their support. The word 'land', in the ordinary legal sense, comprehends everything of a fixed and permanent nature and therefore embraces growing trees.* ***(Collector of Bareilly v. Sultan Ahmad Khan, AIR 1926 All 689; 1926 SCC OnLine All 425.)***"
>
> (emphasis supplied)

40. The Supreme Court takes note of the cardinal principle of interpretation of a legislative entry in any of the Lists of the Seventh Schedule to the Constitution, which is to treat the words and expressions therein as inclusive in meaning, and give the same all possible flexibility instead of restricting such meaning to the perceptions contemporaneous with the times when the Constitution was framed. The Supreme Court held that the Constitution is an organic document, and it has to be allowed a natural growth by such a process of interpretation. Interpretation of a legislative entry has to grow and keep up with the pace of times.

41. Paragraph No.28 of the judgment appeals to my sense of understanding of the constitutional framework. The same reads as follows:-

> *"28. The discussions that had preceded on the financial relations between the Union and the States would suggest a constitutional scheme wherein the federating States of the Indian Union are not destined to remain financially weak despite a situation where the Union undoubtedly has the upper hand by an allocation of the more lucrative subjects of taxation under the Seventh Schedule.* ***Constitutionality of the Gujarat At, in the above light, must be answered in favour of the State".*** (emphasis supplied)

42. The Supreme Court concluded in Paragraph No.32, to hold that if the definition of 'land' and 'building' contained in the Gujarat Act is to be understood, we do not find any reason as to why- though in common parlance and in everyday life, a mobile tower is certainly not a building, it would also cease to be a building for the purpose of List II Entry 49, so as to deny the State Legislature the power to levy a tax thereon. Such a law can trace its source to the provisions of Entry 49 of List II of the Seventh Schedule to the Constitution. Consequently, the judgment of the Gujarat High Court was reversed by the Supreme Court.

43. Mr. Dwivedi has also relied upon an English judgment in ***Cinderella Rockerfellas Ltd. vs. Peter James Rudd (Valuation Officer), [2003] EWCA Civ 529***. In this case, the challenge was to the taxation of a floating vessel which had been moored permanently. The argument that it was a chattel and a vessel, was rejected since it was moored. It was also argued that the vessel was floating on water, and was not on land. This argument was rejected. The Court

referred to the judgment in ***Thomas vs. Witney Aquatic Co. Ltd., [1972] RA 31***. In this case, the club house was floating on the surface of the lake. It was argued that the lake was not an adequate description of the land beneath the water. It was held that the club house was enjoyed with the lake, and so with the land beneath the lake, and was therefore part of the rateable hereditament. Reference was also made to the judgment of Lord Russell of Killowen in ***Westminster City Council vs. Southern Railway Co [1956] AC 511 at 529***, wherein he observed that *"subject to special enactments, people are treated as occupiers of land, land being understood as including not only the surface of the earth but all strata above and below. The occupier, not the land, is rateable; but the occupier is rateable in respect of the land which he occupies".* The Court also referred to the observations made by the Lands Tribunal in ***Thomas vs. Witney Aquatic Co. Ltd.*** (supra), which reads ***"the expression 'land' is in my opinion wide enough to include water lying on the surface of the earth, so that the lake in the present case is capable of being part of the hereditament, if it satisfies the other tests of rateability, and in those circumstances I consider that the word 'lake' would be a proper description of that part of the hereditament"***. The Court also takes note of the decision in ***Field Place Caravan Park vs. Harding, [1966]***

2 QB 484, 497–498. The following paragraphs were extracted from ***Field Place Caravan Park*** (supra):-

> *"25. Applying this principle, therefore, whether the vessel is rateable depends on whether it is placed on a piece of land and enjoyed with it in such circumstances and with such a degree of permanence that the chattel with the land can together be regarded as one unit of occupation. "Enjoyed with" the land means no more than that the chattel, although not forming part of the realty, must have some real connection with the land on which it rests (see Ryan Industrial Fuels Ltd v Morgan (VO)).*
>
> *26. The fact that the vessel is floating does not in my judgment prevent it from forming part of a hereditament. Solicitor for the respondent company accepts that this is so and does not suggest that the Tribunal was wrong in the Yard Arm Club case in treating the Hispaniola as part of a hereditament extending upwards from the bed of the river. The crucial point, on his argument, is that the vessel here is not attached fore and aft to dolphins and to anchors in the bed of the river but is secured to moorings on the dock side. This distinction does not seem to me to be significant.*
>
> *27. The relevant circumstances are in my judgment these. Although it is a vessel, the essential function of the Lotus is to remain stationary and attached to the dock side to provide a static, landbased facility as a restaurant. Apart from the fact that it floats, it is not designed for movement and has no means of propulsion. It has in fact remained stationary for over six years with the exception of the occasions, twice a year for a few hours, when it is towed across the dock for maintenance purposes. It enjoys all main services. Its presence excludes the potential use for a similar purpose by anyone else of the dock bed beneath it or the dock side alongside it. It is enjoyed with the dock bed and the dock side in that it is supported by the dock bed in conjunction with the water above it and it is secured to moorings on the dockside.*
>
> *28. In these circumstances, I am satisfied that the valuation officer is correct in identifying as a rateable hereditament the dock bed, floating restaurant and its moorings.* ***Physically the hereditament consists in my***

> ***view of the dock bed immediately beneath the vessel, the space above it that is filled with water, the vessel itself and its moorings on the dockside.*** *The fact that there is water immediately beneath the vessel is only of relevance, it seems to me, to the extent that the vessel could become more mobile if it were not secured … The occupation of the respondent company fulfils all the ingredients of rateable occupation.* ***Actual use is made of the dock bed for the support of the vessel through the medium of the water above it****; the occupation is plainly of benefit to respondent company; in view of the fact that the vessel is continuously secured in position (apart from a few hours when it is moved for maintenance) and has remained in the same position for a number of years, the occupation is undoubtedly permanent; and in my judgment, it is also exclusive. The harbour authority can no doubt be said to use all the dock bed and the space above it, including the area beneath the vessel, in that it controls the volume of water within the dock, but this does not interfere with the use that the respondent company makes of the dock bed, which is exclusive for their purposes, and, in my view is plainly paramount."* (emphasis supplied)

44. I may now notice the judgments relied upon by the appellants- writ petitioners, in support of their submission that flowing water in a river cannot be construed as 'land' within the meaning of Entry 49 of List II of the Seventh Schedule to the Constitution.

45. Since, in my view, the impugned legislation imposing tax on drawl of water for electricity generation, derives its legitimacy from, *inter alia*, Entry 49 of List II of the Seventh Schedule to the Constitution, the judgment in ***The Second Gift Tax Officer, Mangalore etc. vs. D.H. Nazareth etc., 1970 (1) SCC 749***, is of no relevance.

46. Reliance has been placed by the appellants- writ petitioners on ***Union of India vs. Shri Harbhajan Singh Dhillon, 1971 (2) SCC 779***. The Constitution Bench of the Supreme Court was dealing with the appeal from the judgment of the Punjab & Haryana High Court, which struck down Section 24 of the Finance Act, 1969, as being beyond the legislative competence of the Parliament. The High Court issued a direction to the effect that the Wealth Tax Act, as amended by Finance Act, 1969, in so far as it includes the capital value of the agricultural land for the purposes of computing net wealth, was ultra vires the Constitution of India. The Supreme Court allowed the appeal preferred by the Union of India, and reversed the judgment of the Punjab & Haryana High Court. The majority opinion was authored by Sikri, J. (as His Lordship then was). Specific reliance has been placed on Paragraph Nos.74, 75 and 76 of the judgment, which read as follows:-

> *"74. The requisites of a tax under Entry 49, List II, may be summarized thus:*
>
> *(1) It must be a tax on units, that is lands and buildings separately as units.*
>
> *(2) The tax cannot be a tax on totality, i.e., it is not a composite tax on the value of all lands and buildings.*
>
> *(3) The tax is not concerned with the division of interest in the building or land. In other words, it is not concerned whether one person owns or occupies it or two or more persons own or occupy it.*
>
> *75. In short, the tax under Entry 49, List II, is not a personal tax but a tax on property.*

> *76. It seems to us that this Court definitely held and we agree with the conclusion that the nature of the wealth tax imposed under the Wealth Tax Act, as originally stood, was different from that of a tax under Entry 49, List II, and it did not fall under this entry".*

47. I fail to understand the purpose of reliance on the said judgment by the appellants-writ petitioners. In my view, the same has no relevance, so far as the present controversy is concerned. In the present case, we are dealing with a issue, whether the water flowing in a river on land, could be construed as forming part of land within the meaning of that expression, as used in Entry 49 of List II of the Seventh Schedule.

48. Reliance placed by the appellants-writ petitioners on ***State of Bihar & others vs. Indian Aluminium Company & others, (1997) 8 SCC 360***, is of no avail. This was a case where the Supreme Court held that the tax had been sought to be levied by the State legislature on the absence of land, i.e. the void created due to mining in various area, and not on land. Once again, I do not see any significance of this judgment to determine the issues which arise before us.

49. The appellants-writ petitioners have also placed reliance on ***Jalkal Vibhag Nagar Nigam & others vs. Pradeshiya Industrial and Investment Corporation & another, 2021 SCC OnLine SC 960***. In this case, the

Supreme Court was dealing with an appeal preferred against the judgment rendered by the Division Bench of the Allahabad High Court, whereby the Allahabad High Court, by placing reliance on the judgment of the Supreme Court, in ***Union of India & others vs. State of U.P. & others, (2007) 11 SCC 324***, held that the appellant- Nigam, could not have levied water and sewerage tax under the provisions of the Uttar Pradesh Water Supply and Sewerage Act, 1975. The Supreme Court, firstly, noticed that there was absolutely no discussion on the merits in the judgment of the High Court. The appellant- Nigam contended that the imposition of water and sewerage tax fell within the ambit of Section 52(1)(a) of the aforesaid Act. On the other hand, it was argued by the learned Additional Solicitor General, on behalf of the respondent- Pradeshiya Industrial & Investment Corporation, that the levy of water tax under Section 52(1)(a) is not a tax on 'lands and buildings', within the meaning of Entry 49 of List II to the Seventh Schedule to the Constitution. After noticing a host of earlier decisions, including some of which have been taken note of by me hereinabove, the Supreme Court concluded in Paragraph No.48 that there can be no manner of doubt that the levy which is imposed under Section 52, is a tax on lands and buildings situated within the area of the Jal Sansthan. The tax is imposed on premises, which fall within the territorial area of the Jal Sansthan. The expression 'premises' is defined to

mean land and building. The tax is on lands and buildings. The sentence *'Nor does the fact that the law enables the Jal Sansthan to levy the tax render it a tax on water'*, in this judgment, in my view, cannot be read to mean that the State legislature has no power to levy a tax on usage of water, which forms part of the land.

50. Pertinently, the submission of Ms. Divan that the levy under Section 52 is in consonance with Entry 17 of List II, instead of Entry 49 of List II, was rejected by the Supreme Court in Paragraph No.51 of the said judgment.

51. In Paragraph No.53, the Supreme Court re-emphasizes that the levy under Section 52 falls squarely within the ambit of Entry 49 of List II, as it is in the nature of a tax, and not a fee. Thus, the applicability of Entry 17, which is a non-taxing entry, does not arise in this case. This judgment, therefore, does not advance the submission of the appellants- writ petitioners.

52. Reliance placed by the appellants- writ petitioners on ***Kerala State Beverages Manufacturing & Marketing Corporation Ltd. vs. Assistant Commissioner of Income Tax Circle (1), (2022) 4 SCC 240***, and in particular, Paragraph No.41, is also of no avail.

53. In the light of the aforesaid discussion, I am of the clear view that water flowing in a river on land is land itself,

and the State legislature has the power to tax land under Entry 49 of List II of the Seventh Schedule and, therefore, the State legislature has the competence to enact the impugned Act to levy tax on water, which is used (though the user is non-consumptive) for the purpose of electricity generation.

54. My aforesaid view is fortified by the observations made by the Supreme Court in ***Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector & ETIO, (2007) 5 SCC 447***.

Discussion regarding Entry 50 of List II of the Seventh Schedule

55. Mr. Dwivedi has also contended that jurisprudentially water is also considered as a 'mineral' and, therefore, water could also be taxed by resort to Entry 50 of List II of the Seventh Schedule, which reads *"Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development".*

56. Mr. Dwivedi has submitted that no limitation has been imposed by the Parliament by law, relating to mineral development so far as the taxation on mineral right is concerned. He submits that the right given to the appellants-writ petitioners to use water for the purpose of generation of electricity, though non-consumptively, is a mineral right, and

therefore, the State legislature has the competence to enact the Act in question.

57. In support of his submission that water is a mineral, Mr. Dwivedi has placed reliance on ***Ichchapur Industrial Co-operative Society Ltd. vs. The Competent Authority, Oil and Natural Gas Commission & another, 1997 (2) SCC 42***. The issue considered by the Supreme Court, in this decision, was *'whether water is a mineral within the meaning of Mines Act, 1952, read with Section 2(ba) of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962'*. The appellant was the owner of the land, wherein respondent no.2- ONGC had acquired the right to lay pipelines for transporting petroleum from one place to another under the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. The ONGC, accordingly, laid down the pipelines in the land of the appellant from Utran Terminal to Kribhco Terminal. In order to run the gas processing plant effectively and efficiently, water is a commodity which is vitally required. To meet its water requirements, the ONGC lay down another pipeline underneath the land- of which they had a right of user. This was challenged by the appellant contending that ONGC did not have the right to lay pipelines for carrying water. Before the Supreme Court, the respondents raised an additional ground to defend their action, that water- for which the

pipelines had been laid, is a mineral, and since mineral could validly be carried through pipelines, water could also be carried or transported through them. The issue whether water is a mineral, was not decided by the High Court. The Supreme Court, however, examined the same. The Supreme Court noticed the definition of the word 'mineral', as defined in Section 2(ba) of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962, which defines 'mineral' as having the meaning assigned to it in the Mines Act, 1952, and include mineral oils and stowing sand but do not include petroleum. The discussion found in this judgment on the aforesaid aspects reads as follows:-

> *"17. In view of the availability of right to lay down pipelines for transporting a "mineral" after the amendment of the Act, the respondents can legally lay down the pipelines through the land in question for carrying and transporting "water" provided "water" is a "mineral".*
>
> *18. The definition of "minerals" which we have already quoted above would indicate that the meaning given to it in the Mines Act, 1952 is to apply here also on the basis of classic principle of Legislation by Reference or Incorporation which is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. The provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it.*
>
> *19. On this principle, the definition of "minerals" as set out in the Mines Act, 1952 shall be deemed to have been bodily lifted and incorporated into this Act. We have, therefore, to look to that Act to find out the true meaning of the word "minerals" which is defined in Section 2(jj) as under:*

"2. (jj) 'minerals' means all substances which can be obtained from the earth by mining, digging, drilling, dredging, hydraulicking, quarrying or by any other operation and includes mineral oils (which in turn include natural gas and petroleum)."

20. The definition would indicate that "minerals" are substances which can be obtained from the earth by employing different technical devices indicated in the definition, namely, "mining, digging, drilling, dredging, hydraulicking, quarrying". These words are followed by the words "by any other operation". On account of the vicinity of these words with the previous words, namely, mining, digging, drilling, etc., they have to be understood in the same sense and, therefore, if "minerals" are obtained from earth "by any other operation" such operation should be an operation akin to the device or operation involved in mining, digging, drilling etc. Another significant feature of the definition is the use of words "substances which can be obtained from the earth" which indicate that the "minerals" need not necessarily be embedded in the earth or lie deep beneath the surface of the earth. They may be available either on the surface of the earth or down below. If the "mineral" is available on the surface, the operation which would obviously be employed would be dredging, quarrying or hydraulicking or any other similar operation. The definition, therefore, is very wide in terms but in spite of its wide connotation, every substance which can be obtained from earth would not be a "mineral".

21. The learned counsel for the appellant contended that we should not enter into the exercise of analysing the definition of "mineral" to find out whether "water" would fall within that definition or not, as the only meaning which can be assigned to "water" is the common meaning as understood by a common man who does not treat "water" as a mineral, but treats it as the most common commodity available free of cost like "fresh air" and other gifts of nature which are available in plenty to all living beings, including human beings

on the surface of the earth. We are not prepared to accept this contention.

22. Water undoubtedly covers more than seventy per cent of the earth's surface. It fills the oceans, rivers and lakes and is in the ground and in the air we breathe. In fact, "water" is everywhere. Without "water", there can be no life. Great civilisations have risen where water supplies were plentiful. They have fallen when these supplies failed. In the ***World Book Encyclopaedia, Vol.21****, it is further stated about 'water' as under:*

> *"People have worshipped rain gods and prayed for rain. Often, when rains have failed to come, crops have withered and starvation has spread across a land. Sometimes the rains have fallen too heavily and too suddenly. The rivers have overflowed their banks, drowning everything and everyone in their paths.*
>
> *Today, more than ever, water is both slave and master to people. We use water in our homes for cleaning, cooking, bathing and carrying away wastes. We use water to irrigate dry farmlands so we can grow more food. Our factories use more water than any other mineral. We use the water in rushing rivers and thundering waterfalls to produce electricity.*
>
> *Our demand for water is constantly increasing. Every year, there are more people in the world. Factories turn out more and more products and need more and more water. We live in a world of water. But almost all of it about 97 per cent is in the oceans. This water is too salty to be used for drinking, farming and about 3 per cent of the world's water is not easily available to people because it is locked in icecaps and other glaciers. By the year 2000, the world demand for fresh water may be double what it was in the 1980's. But there will still be enough to meet people's needs.*
>
> *There is as much water on earth today as there ever was - or ever will be."*
>
> *In the book titled* ***Earth*** *by Frank Press of the Massachusetts Institute of Technology and Raymond Siever of Harvard University, it is stated:*

> *"Water dissolves minerals during weathering, then carries the dissolved material away into the ground or into rivers, most of which ultimately empty into the ocean. The movement of the Earth's waters from one place to another and the dissolved loads carried by them are parts of a continuous overall pattern: hydrologic cycle. Groundwater accumulates by infiltration of water into soils and bedrock and reappears at the surface in springs and stream beds. Groundwater levels, and thus water infiltration and the rate of loss by springs, streams, and pumping from wells. The evolution of surface waters and the ocean are related to the escape of from the interior."*

On account of its abundance, the common man does not think that "water" could also be treated or utilised as a mineral.

23. ***But there are subterranean waters which lie wholly beneath the surface of the earth and which either ooze or seep through the surface strata without pursuing any defined course or channel (percolating waters) or flow in a permanent and regular but invisible course, or lie under the earth in a more or less immovable body, as a subterranean lake. This water can be obtained only by the process of "drilling" which, according to Chambers Dictionary, also includes "boring".***

24. Now, if it is a substance which can be obtained from the earth by the process of drilling, it would immediately fall within the definition of "mineral" set out and placed in this Act. Even otherwise, Rutley's Elements of Mineralogy, 26th Edn., brought out by H.H. Read, F.R.S., Professor Emeritus of Geology in the Imperial College of Science and Technology and the University of London, "mineral" is defined as under:

> ***"A mineral is a substance having a definite chemical composition and atomic structure and formed by the inorganic processes of nature."***

25. On the basis of this definition, Rutley says:

"Again, water, snow and ice come within the definition since they are naturally occurring homogeneous inorganic substances of a definite chemical composition."

26. We have, however, taken the aid of Rutley's book only to indicate that in Mineralogy, water is treated, on account of its chemical composition, as a mineral. If, therefore, it falls within the definition of "mineral" as set out in this Act, it should not surprise anyone, not even the common man, as it is a substance which can also be obtained by a process of drilling and notwithstanding that it is available in plenty and everywhere, it is to be treated more valuable than any other "mineral"*.*

27. ……..

28. If the question is examined in this background, it would be noticed that the definition of "mineral" which has been bodily lifted from the Mines Act, 1952 and has been placed in the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 was deliberately introduced by Amending Act No. 13 of 1977 so that while carrying c petroleum through the pipelines, any other minerals may also be carried through it. If, therefore, water is treated as a "mineral" it would be permissible for the ONGC to carry it through any other pipeline without any further notification or declaration under Section 3 or 6 of the Act. This interpretation which is in consonance with the scientific definition of a "mineral", serves the purpose of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. ***The contention of the learned counsel for the appellant that "water" should be understood in the same sense in which it is understood by a common man cannot, therefore, be accepted****. This Act is an Act of Parliament intended to deal with the particular technology and the commodities involved therein.* ***We are, therefore, of the view that in this Act, "water" has been used in both the senses, namely, that (i) it is a mineral; and (ii) the most common, readily and freely available substance on earth****."* (emphasis supplied)

58. The above discussion shows that water is considered to be a mineral since it has the qualities- which a mineral has, namely, it has the chemical composition, and it can be obtained by the process of drilling and boring into the earth.

59. The argument of learned counsels for the appellants- writ petitioner, to discount this judgment, is that the Supreme Court was interpreting the meaning of the word 'mineral' in the context of the definition of 'mineral' contained in Section 2(ba) of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. However, I do not find any merit in this submission, for the reason that the discussion extracted hereinabove, is a general discussion on the issue, as to whether 'water' is a 'mineral'. The Supreme Court has, in depth, examined the generally understood meaning of the word 'mineral'.

60. At this stage, I may also take note of the observations made by the Constitution Bench of the Supreme Court in ***India Cement Ltd. & others vs. State of Tamil Nadu & others, (1990) 1 SCC 12***, on the manner in which interpretation of the Constitutional provisions should be undertaken. Paragraph Nos.16 to 18 thereof reads as follows:-

> *"16. Courts of law are enjoined to gather the meaning of the Constitution from the language used and although one*

should interpret the words of the Constitution on the same principles of interpretation as one applies to an ordinary law but these very principles of interpretation compel one to take into account the nature and scope of the Act which requires interpretation. It has to be remembered that it is a Constitution that requires interpretation. Constitution is the mechanism under which the laws are to be made and not merely an Act which declares what the law is to be. See the observations of Justice Higgins in the Attorney General for the ***State of New South Wales v. Brewery Employees' Union of New South Wales, (1908) 6 CLR 469, 611-12****.*

17. ***In Re C.P. and Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938, AIR 1939 FC 1****, Gwyer, C.J. of the Federal Court of India relied on the observations of Lord Wright in* ***James v. Commonwealth of Australia, 1936 AC 578*** *and observed that* ***Constitution must not be construed in any narrow or pedantic sense, and that construction most beneficial to the widest possible amplitude of its powers, must be adopted****. The learned Chief Justice emphasised that a* ***broad and liberal spirit should inspire those whose duty it is to interpret the Constitution****, but they are not free to stretch or pervert the language of the enactment in the interest of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors.* ***A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of a country is a living and organic thing, which of all instruments has the greatest claim to be construed ut res magis valeat quam pereat - 'It is better that it should live than that it should perish'****.*

18. Certain rules have been evolved in this regard, and it is well settled now that the various entries in the three lists are not powers but fields of legislation. The power to legislate is given by Article 246 and other articles of the Constitution. See the observations of this Court in ***Calcutta Gas Co. v. State of West Bengal, AIR 1962 SC 1044****. The entries in the three lists of the Seventh Schedule to the Constitution, are legislative heads or fields of legislation. These demarcate*

the area over which appropriate legislature can operate. ***It is well settled that widest amplitude should be given to the language of these entries, but some of these entries in different lists or in the same list may overlap and sometimes may also appear to be in direct conflict with each other****. Then, it is the duty of the court to find out its true intent and purpose and to examine a particular legislation in its pith and substance to determine whether it fits in one or the other of the lists. See the observations of this Court in* ***H.R. Banthia v. Union of India, (1969) 2 SCC 166, 174*** *and* ***Union of India v. H.S. Dhillon, (1971) 2 SCC 779, 792****. The lists are designed to define and delimit the respective areas of respective competence of the Union and the States. These neither impose any implied restriction on the legislative power conferred by Article 246 of the Constitution, nor prescribe any duty to exercise that legislative power in any particular manner. Hence,* ***the language of the entries should be given widest scope, to find out which of the meaning is fairly capable because these set up machinery of the government. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it. In interpreting an entry it would not be reasonable to import any limitation by comparing or contrasting that entry with any other one in the same list****. It is in this background that one has to examine the present controversy."*

(emphasis supplied)

61. The appellants- writ petitioners have placed reliance on the judgment of the Supreme Court, in ***The Hingir-Rampur Coal Co. Ltd. and others vs. The State of Orissa & others, AIR 1961 SC 459***. The said judgment has no relevance to the issue presently under discussion, namely, whether water is a mineral for the purpose of Entry 50 of List II of the Seventh Schedule.

62. I am, therefore, of the considered view that 'water' is a mineral and, consequently, 'water rights' are referable to Entry 50 of List II of the Seventh Schedule, and the State legislature, therefore, had the competence to enact the Act in question, to levy water tax, since there is no declaration made by the Parliament by law, relating to mineral development which, in this case, translates to water development.

63. The appellants- writ petitioners have relied upon Entries 54 and 56 of List I in support of their submission, which read as follows:-

> *"54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.*
>
> *56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest".*

64. However, they have failed to point out any law made by Parliament under Entry 54, in relation to regulation and development of water, by which, the Union has taken control of the same in public interest. Similarly, no law has been framed by the Parliament under Entry 56 of List I of the Seventh Schedule, which could be said to come in the way of the State legislature to frame the Act in question.

Discussion regarding Entry 45 of List II of the Seventh Schedule

65. I may now move on to discuss the issue whether water tax could also be considered to be 'land revenue' under Entry 45 of List II of the Seventh Schedule.

66. Entry 45 of List II of the Seventh Schedule reads as follows:-

> *"45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues".*

67. The submission of Mr. Dwivedi is that, since water forms part of land, tax on water is also covered by 'land revenue' under Entry 45 of List II of the Seventh Schedule.

68. In view of the fact that water is jurisprudentially covered by the expression 'land', in my view, it follows, *inter alia*, that tax on water would qualify as land revenue.

69. In ***Goodrickes Group Ltd.*** (supra), the Supreme Court adopted the same lines of reasoning in Paragraph No.37, which reads as follows:-

> *"37. In view of our finding that the impugned cesses are clearly relatable to Entry 49 of List II, it is really unnecessary to deal at length with the alternative submission of Shri Shanti Bhushan, learned counsel for the State of West Bengal that the impugned levy can also be sustained with reference to Entry 45 of List II, i.e., as land revenue. Learned counsel submits that there can be more than one law levying land revenue and all of them will be relatable to Entry 45. He submits that the impugned levy can be treated as additional*

land revenue. Counsel gives instances of more than one Act levying excise duty on manufacture and production of goods. He relies upon the following observations of Mukharji, J. in ***India Cement*** *(supra): (SCC p. 24, para 21).*

> *"It is, however, clear that over a period of centuries, land revenue in India has acquired a connotative meaning of share in the produce of land which the king or the Government is entitled to receive."*

The force of the submission cannot be denied. The presumption in favour of constitutionality obliges the court to sustain an enactment, if necessary, by relating it to an entry other than the one relied upon by the Government, if that can be reasonably done. Moreover, as pointed out by this Court in ***Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd., (1983) 1 SCC 147****, it is the function and power of the court to interpret an enactment. It is equally the function and power of the judiciary to say to which entry does an enactment relate. The opinion of the Government in this behalf is but an opinion and no more."*

70. In ***R.K. Rekchand Mohota Spinning & Weaving Mills Ltd. vs. State of Maharashtra, (1997) 6 SCC 12***, the issue raised was *'whether the State legislature has the power to levy rates of cess on use of flowing water from river "Wana"*. The Supreme Court traced the legislative competence of the State legislature to Entry 45 of List II of the Seventh Schedule. While doing so, the Supreme Court held that land includes flowing river water. In Paragraph No.12 of the judgment, after analysing several earlier decisions, the Supreme Court held *"thus, we hold that the legislative Entry 45 of List II of the Seventh Schedule of the Constitution brings within the ambit power of the legislature under Article 246 to levy cess on use of the water even from*

flowing river. Therefore, Section 70 of the Code comes within Entry 45 of List II of the Seventh Schedule to the Constitution".

71. I am, therefore, satisfied that water tax, as imposed by the impugned enactment, qualifies as 'land revenue', which the State legislature is empowered to impose by reference to Entry 45 of List II of the Seventh Schedule.

72. In my view, to construe either of the Entries 45, 49 or 50 narrowly, so as to exclude the right of the State legislature to impose a tax on the use of its natural resource, i.e. water, which jurisprudentially has been recognized for a very long time- even before the enforcement of the constitution, as land, would be to unfairly deprive the States to their right to generate revenue, which they are entitled to by virtue of Entries 45, 49 and 50 of List II of the Seventh Schedule to the Constitution of India.

73. I may also refer to the judgment rendered by the Madras High Court, in ***K.S. Ardanareeswar Gounder vs. Tehsildar, Bhavani & another, AIR 1976 Mad. 380***, wherein Madras High Court held that the word 'revenue' is of wider connotation than the word 'tax'. Even assuming that water cess is not a tax, it is still revenue due on the land and, therefore, it has to be taken as land revenue.

Scope, meaning and relevance of Article 288 of the Constitution of India for the present discussion

74. Mr. Dwivedi has also pressed into service Article 288 of the Constitution of India. I may set out the said Article, which reads as follows:-

> ***"288. Exemption from taxation by States in respect of water or electricity in certain cases.-****(1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.*
>
> *Explanation.—The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.*
>
> *(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order."*

75. In ***Damodar Valley Corporation vs. State of Bihar & others, (1976) 3 SCC 710***, the Supreme Court considered Article 288 of the Constitution, while dealing with the claim of the Damodar Valley Corporation- a statutory

corporation created by the Parliament, that it was not liable to pay electricity duty under the Bihar Electricity Duty Act, 1948, as amended by Bihar Electricity Duty (Amendment) Act, 1963. The Supreme Court observed as follows:-

> *"5. Article 288 grants* ***exemption from tax under any law of a State in respect of any water or electricity*** *stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley, except in certain cases…….*
>
> *9. What is required by clause (2) of Article 288 is that* ***the law made by the State legislature for imposing, or authorising the imposition of tax*** *mentioned in clause (1) shall have effect only if after having been reserved for the consideration of the President it receives his assent……"*
>
> (emphasis supplied)

76. In ***Southern Petrochemical Industries Co. Ltd.*** (supra), the Supreme Court observed as follows:-

> *"63. It is no doubt true that Section 18 of the 1962 Act as also Section 21 of the 2003 Act provided that they would be subject to the provisions of Article 288 of the Constitution of India.* ***It deals with exemption from taxation by States in respect of water or electricity in certain cases. Clause (2) of the said article mandates that when a State makes a law for imposition of tax and if any such law provides for fixation of the rates and other incidents of tax, the assent of the President would be required.***
>
> ***64. A plain reading of clause (2) of Article 288 of the Constitution of India raises no doubt that the application thereof was meant to be only in respect of the river valley authorities like Damodar Valley Corporation constituted in the year 1948 by the Damodar Valley Corporation Act, 1948"****.*
>
> (emphasis supplied)

77. It has been argued on behalf of the appellants- writ petitioners, that the meaning of Article 288, as projected by Mr. Dwivedi, is incorrect.

78. Brother Maithani, J. has noticed the submissions of either side relating to Article 288 of the Constitution of India, and therefore, I do not propose to reproduce them in my opinion. I may straightaway proceed to analyse the said Article, and pen down my own understanding thereof.

79. Sub-article (1) of Article 288 clearly relates to laws which were in force immediately before the commencement of the Constitution. It applies to a situation where a pre-constitution law imposed, or authorized imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold *by* *any authority established by any existing law, or any law made by the Parliament for regulating, or developing any inter-State river or river valley*. For the sake of brevity, in this discussion, the authority- which the underlined words describe and refer to, is referred as "a statutory authority". Article 288(1) states that such an existing law shall not impose, or authorize the imposition of a tax- of the kind specified in Article 288(1), on a Statutory Authority. However, it also empowers the President to issue an order to withdraw, limit, or condition the said exemption from tax. The purport and purpose of Article 288(1), to my

understanding, is to firstly grant a blanket exemption to a statutory authority from taxation- of the kind specified in sub-article (1) of Article 288, and, secondly, to authorize the President to lift, modify or condition the exemption by an order. In my view, Article 288, by itself, is not a source of legislative power in the State legislature, to frame a legislation on the subject of tax in respect of water, or electricity. In fact, Article 288, which falls in Part- XII of the Constitution, dealing with *"finance, property, contracts and suits"*, seeks to impose a limitation on the taxing power of the State, which it otherwise would have. The constitution framers cannot be attributed a blunder of this grave proportion- that they granted an exemption from taxation by the States, when no power of taxation is vested in the States, in the first place.

80. Pertinently, the bold words of Article 288 read as **"Exemption from taxation by States in respect of water or electricity in certain cases"**. The Explanation to Article 288(1) explains the meaning of the words *"law of a State in force"*, used in Article 288(1), to include a law of a State passed or made before the commencement of the Constitution, and not previously repealed, notwithstanding that it, or parts of it, may not be then in operation either at all, or in particular areas. Article 288(1), therefore, is a clear

recognition and acknowledgement of the legislative power of the State to legislate in respect of, *inter alia*, tax on water.

81. Article 288(2) deals with the post constitution enforcement times. It also recognises the legislative power of the State to impose, or authorise the imposition of any tax, as is mentioned in sub-clause (1), by law. The words *"any such tax, as is mentioned in clause (1)"* refer to a *"tax in respect of any water or electricity stored, generated, consumed, distributed, or sold"* by any Statutory Authority. The said sub-article places no limitation or restriction on the power of the State legislature to frame a law imposing tax on water or electricity, which is stored, generated, consumed, distributed, or sold by Statutory Authority. But such a law shall not have effect *qua* a Statutory Authority, unless it has been reserved for the consideration of the President, and it has received his assent. Paragraph 64 of the ***Southern Petrochemical Industries Co. Ltd.*** (supra) extracted above leaves no manner of doubt, that prior consent of the President would be necessary in respect of a Taxation Law on water, framed by the State legislature, only when such law seeks to impose a tax on the statutory authority as defined by me above. Any such law would come into full force, and effect, when framed by the State, in respect of all other entities, i.e. other than the statutory authorities, who are

sought to be taxed, without there being any requirement of any prior consent of the President.

82. On the overall reading of Article 288 of the Constitution, it is clear to me that the exemption from taxation, as specified in the said Article, granted to a Statutory Authority, may be altered by the President, by issuing an order- in respect of a pre-constitution law, or granting his assent- in respect of a post-constitution law, framed by the State legislature. Pertinently, Article 288(2) talks of Presidential assent, to a legislative Act of the State legislature. This requirement of prior assent cannot be read or understood as lack of legislative competence in the State legislature to frame a law on, *inter alia*, water tax on a statutory authority (as defined). If the submission of the appellants- writ petitioners founded upon the requirement of Presidential assent were to be accepted, then it could also be argued that even in respect of items/entries in List-I of the Seventh Schedule to the Constitution, the State legislature may make a law, with Presidential assent. That cannot be done.

83. Article 288, in my view is, therefore, a clear recognition and acknowledgement of the fact that the State legislatures have the legislative competence to frame a law, *inter alia*, in relation to taxation of water. There is no question of reading into Article 288 the legislative power of

the State legislature to frame a law, *inter alia*, on water tax. The legislative power of the State legislature is derived from Article 246(3), read with Entries in List II and List III of the Seventh Schedule to the Constitution.

84. The exemption from taxation that Article 288 speaks of, is only in respect of statutory corporations, which exist or are created by law for regulating or developing any inter- State river or river valley- which I have called Statutory Authority for the sake of brevity and clarity of understanding. The President may not issue an order- lifting, limiting or conditioning the exemption, or withhold his assent to applicability of a taxation law in respect of the matter specified in Article 288(1), only in so far as they concern such statutory authorities. In so far as the taxation law framed by the State Legislature on the subjects specified by Article 288(1) is concerned, it comes into force when it is enacted and enforced in respect of all other entities, i.e. other than the statutory authorities above referred to.

85. Article 288 has been relied upon by Mr. Dwivedi not to derive a source of legislative power in the State legislature from it. It has been relied upon only to buttress the argument that the legislative power- in respect of taxation of water, can legitimately be found in entries 45, 49 and 50 of List- II of the Seventh Schedule, and even the framers of the Constitution were conscious of this. This is evident from the

fact that that Article 88 expressly recognizes that power of the State legislature. There would, otherwise, be no purpose of talking about an exemption, if the legislative power to frame a law on water tax did not vest in the State legislature in the first place. Any other interpretation would render Article 288 redundant, and such an interpretation has to be eschewed. Thus, the power of the State legislature to frame and enforce a law, *inter alia*, taxing water (i.e. its storage, generation, consumption, distribution or sale), is unfettered, except in so far as it relates to statutory authorities, which exist or are created for regulating or developing any inter-State river or river valley.

86. I agree with the finding returned by my learned Brother Maithani, J. that *"Any State law in force immediately before commencement of the Constitution, which imposes tax as specified in the sub clause may not be applicable unless the President may by an order otherwise provides. It clearly means that if there existed any State law immediately before commencement of the Constitution, which imposes and authorizes the imposition of tax in respect of water and electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river- valley, such law shall not come into force unless the President by order otherwise provides".*

Nature of the impugned Water Tax

87. The next issue that arises for consideration is with regard to the nature of tax, i.e. what is the *"pith and substance"* of the levy in question.

88. To examine this aspect, I may notice the relevant provisions of the impugned Act. The name of the Act is *"The Uttarakhand Water Tax on Electricity Generation Act, 2012"*. Section 2 is the definition clause. It states that "In these rules*, unless there is anything repugnant in the subject or context……".* There is an obvious error in drafting, inasmuch, as, the opening words of Section 2 use the words *"In these rules"*, whereas, the same should read *"In this Act"*. Clause (c) defines 'electricity' to mean *"electrical energy generated* ***by way of water drawn from any water source flowing within the territory of the State****"* (emphasis supplied). In the context, the expression 'user' is defined in Section 2(f) to mean *"any person, group of persons, local body, Government Department, company, corporation, society etc.* ***drawing water*** *or any other authority authorized under chapter- II of the Act* ***to avail the facility to draw water from any source for generation of electricity"*** (emphasis supplied). Section 2(g) defines 'water' to mean *"natural resource flowing in any river, stream, tributary, canal, nallah or any other natural course of water or stipulated upon the surface of any*

land like, pond, lagoon, swamp, spring". Section 2(h) defines 'water source' to mean *"a river and its tributaries, stream, nallah, canal, spring, pond, lake, water course or any other source* ***from which water is drawn*** *to generate electricity"*. Section 2(i) defines 'water tax' to mean ***"the rate levied or charged for water drawn*** *for generation of electricity and fixed under this Act* (emphasis supplied)".

89. Section 3 of the Act states that, for the purpose of this Act, *"every water source in the State is, and shall remain, the property of the Government and any proprietary ownership, or any riparian or usage right, on such water resources vested in any individual, group of individuals or any other body, corporation, company, society or community shall, from the date of commencement of the Act, be deemed to have been terminated and vested with the Government. However, for rivers of interstate nature and rivers under the ambit of international treaties, the ownership right of Uttarakhand Government shall be limited to non-consumptive use of water"*. Section 3(2) states that *"no person, group of persons, Government department, local authority, corporation, company, society or any other body* ***shall draw water from any source*** *for electricity generation except in accordance with the provisions of the Act* (emphasis supplied)."

90. Chapter-3 deals with *"usage of water installation of hydroelectric generating unit"*. Sections 4, 10 and 12 are also relevant, and read as follows:-

> ***"Section 4 Installation of Scheme for Usage of water"-*** *No person, group of persons, Government department, local authority, corporation, company society or any other body, by whatever name called "hereinafter in this Chapter will be called the 'user'", shall install* ***a Scheme requiring usage of water (non consumptive use) of any water source*** *for generating electricity except without being registered under the Commission in accordance with the provisions provided hereinafter in this Chapter.*
>
> (emphasis supplied)
>
> ***Section 10 Grant of Registration Certificate:-*** *An user* ***intending to use water (non consumptive use)*** *for generation of electricity shall be issued a registration certificate after the execution of an agreement between the user and the Commission under the Act.* (emphasis supplied)
>
> ***Section 12 Duties, obligations and responsibilities of the Registered User:-*** *(1)* ***The registered user shall be liable to pay water tax for the water drawn*** *for electricity generation as per the provisions of the Act.*
>
> *(2) Where any user has constructed a Hydropower scheme, for purpose of generation of electricity, prior to the commencement of the Act, such user shall, within a period of six month from the date of commencement of the Act, apply for registration under the Act and the Commission shall pass an order to register the user within a period of six months from the date of receipt of application in accordance with the provisions of the Act.*
>
> *(3) If the user as mentioned in sub-section (2) fails to apply or register within time stipulated therein, the Commission shall forthwith impose suitable penalty which may be enhanced in case of prolonged default.*
>
> *(4) Every registered user shall be under an obligation to ensure the safety of the life and property of inhabitants of the area under the operation of the scheme.* (emphasis supplied)

(5) Every registered user shall be bound to allow the authority or any other officer authorized by authority to have access at any time to the scheme for their satisfaction".

91. The assessment of water drawn by the user is provided for in Section 14, which reads as follows:-

"14. (1) The Commission shall install or cause to be installed flow measuring device within the premises of Scheme or at such other place where the Commission deems fit ***for purposes of measuring the water drawn for electricity generation*** *or may adopt any indirect method for assessment of water drawn by the user.*

(2) The Commission may either install or, require a user to install a flow measuring device as per the specifications approved by the Commission at his premises or at his location or at such other place as the Commission may direct and thereafter adjust the expenditure incurred by such user on such installation towards the water Tax payable by the user".

(emphasis supplied)

92. Section 17 is the charging section, and it reads as follows:-

*"**17. Fixation of water Tax:-** (1) The user shall be liable to pay the Water Tax under the Act at such rates as the Government may by notification fix in this behalf.*

(2) The State Government may review, increase, decrease or vary the rates of the Water Tax fixed under this section from time to time in the manner it deems fit".

93. According to the appellants- writ petitioners, the repeated use of the words *"for generation of electricity"*, or *"on electricity generation"*, and the like, in the aforesaid provisions of the Act, show that by the impugned Act, the State is seeking to tax generation of electricity, which is beyond the legislative competence of the State. To examine

the issue, as to what is the pith and substance of the impugned Act, I may notice some of the judgment of the Supreme Court, which dwell on the principles of interpretation and tests to be applied.

94. In ***Indian Aluminium Co. & others vs. State of Kerala & others, (1996) 7 SCC 637***, the Supreme Court observed as follows:-

> *"20. When the vires of an enactment is challenged, it is very difficult to ascertain the limits of the legislative power. Therefore,* ***the controversy must be resolved as far as possible, in favour of the legislative body putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude. The court is required to look at the substance of the legislation****. It is an equally settled law that in order to determine whether a tax statute is within the competence of the legislature, it is necessary to determine the nature of the tax and whether the legislature had power to enact such a law.* ***The primary guidance for this purpose is to be gathered from the charging section. It is the substance of the impost and not the form that determines the nature of the tax.***
>
> *21. In* ***Distt. Board v. Damodar Datt, AIR 1944 ALL 223(2)****, the Allahabad High Court, while considering the constitutionality of Professions Tax Limitation Act, 1941 and Section 2 thereof, had held* ***that the name given to a tax did not matter. What had to be considered was the pith and substance of it.*** *The High Court had held that in pith and substance the impugned tax was one which attracted the provisions of Section 2 of that Act. That ratio was upheld by this Court in* ***Pandit Ram Narain v. State of U.P., AIR 1957 SC 18****, and it was held that* ***the title of the Act and the words used therein were not conclusive but the pith and substance of the statute needed to be looked into.***

> *22. The doctrine of pith and substance, though applied in determining the true character of the statutes under List III (Concurrent List) of the respective legislative topics of the State legislature and Parliament, it was extended for consideration of the true character of the legislation even under the same legislative list.* ***In all cases, therefore, the name given by the legislature in the impugned enactment is not conclusive on the question of its competence to make it. It is the pith and substance of the legislation which decides the matter which needs to be decided with reference to the provisions of the statute itself.***
>
> *23. In* ***Chaturbhai M. Patel v. Union of India, AIR 1960 SC 424****, another Constitution Bench had held that in every case where the legislative competence of the legislature in regard to a particular enactment was challenged with reference to the entries in the various lists,* ***it was necessary to examine the pith and substance of the Act and if the matter came substantially within an item in the Central List, it could not be deemed to come within an entry in the Provincial List."*** (emphasis supplied)

95. In ***Union of India & others vs. Bombay Tyre International Ltd., (1984) 1 SCC 467***, the Supreme Court observed that a distinction has to be drawn between the nature of tax, and the point at which it is calculated. In this regard, reference was made to the ***Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, AIR 1939 FC 1, 6***, and ***Kesoram Industries Ltd.*** [(supra), Paragraph No.33].

96. In ***Municipal Council, Kota, Rajasthan vs. Delhi Cloth & General Mills Co. Ltd., Delhi & others, (2001) 3 SCC 654***, the Supreme Court observed as follows:-

> *"16. Whenever a challenge is made to the levy of tax, its validity may have to be mainly determined with reference to the legislative competence or power to levy the same and in adjudging this issue* ***the nature and character of the tax has to be inevitably determined at the threshold.*** *It is equally axiomatic that once the legislature concerned has been held to possess the power to levy the tax, the motive with which the tax is imposed becomes immaterial and irrelevant and the fact that a wrong reason for exercising the power has also been given would not in any manner derogate from the validity of the tax……*
>
> *18. We affirm the statement of law thus made above to be correct and* ***in our view it is not the nomenclature used or chosen to christen the levy that is really relevant or determinative of the real character or the nature of the levy, for the purpose of adjudging a challenge to the competency or the power and authority to legislate or impose a levy. What really has to be seen is the pith and substance or the real nature and character of the levy which has to be adjudged , with reference to the charge, viz., the taxable event and the incidence of the levy……."*** (emphasis supplied)

97. In ***Kartar Singh vs. State of Punjab, (1994) 3 SCC 569***, the Supreme Court, in effect, observed in Paragraph No.67 that in order to ascertain the pith and substance of the enactment, the preamble, the Statement of Objects and Reasons, the legal significance and the intendment of the provisions of the Act, its scope and the nexus with the object that the Act seeks to sub-serve must be objectively examined in the background of the totality of the facts.

98. Having noticed the aforesaid legal principles, which apply to determine the nature of levy under the enactment, I may proceed to examine this issue.

99. The preamble of the Act states that it is an Act *"**to levy water tax** on electricity generation in the State of Uttarakhand"* (emphasis supplied). The appellants- writ petitioners emphasis the words *"on electricity generation"*, to claim it is a tax on electricity generation. I cannot agree with this submission. In my view, the emphasis is on drawl of water. As I have already observed earlier, the issue that primarily arises for determination is, whether the State legislature has the competence to enact a law, providing for taxation on use or consumption of water. If the State legislature has such competence, it can, as a matter of State Policy, decide to tax a particular usage or consumption of water, while not taxing other kinds of consumption of water. For taxing a particular usage or consumption or usage of water, it is open to the State legislature to frame a specific law for that purpose.

100. Merely because the State has framed a law to impose a tax on usage or consumption of water for a particular purpose, or activity, it cannot be said that the State is subjecting the activity, or thing- for which the water is used or consumed, to tax. For example, if water- which is used or consumed for agriculture is taxed, in my view, it would not

tantamount to imposition of a tax, either on the produce of agriculture, or on the income generated through agriculture, or on the activity of agriculture.

101. Similarly, if water were to be used or consumed in any particular industry, it would not tantamount to taxation by the State of that particular industry, or production of goods, or services, by that industry.

102. The charging Section, as noticed, is Section 17, which states that the user shall be liable to pay the tax under the Act at such rates fixed by the Government by notification. *"Water Tax"* means the rate levied or charged *"for water drawn"* for generation of electricity, and fixed under this Act. Section 12(1) states that *"**The registered user shall be liable to pay water tax for the water drawn** for electricity generation……."* (emphasis supplied). Section 14 is pertinent, and states that the Commission shall install, or cause to be installed flow measuring device within the premises of the Scheme, or at such other place, where the Commission deems fit *"**for purposes of measuring the water drawn** for electricity generation, or may adopt any indirect method **for assessment of water drawn by the user**"* (emphasis supplied). Therefore, the incidence of taxation, is the drawl of water.

103. Merely because the drawl of water is for a specific purpose of generation of hydro-electricity, it does not follow that the taxing event becomes the generation of electricity. Before hitting the turbine in a hydro-electric plant, water stands drawn in the channel/ pipeline, which directs the water to hit the blades of the turbines. At the point of drawl, the flow measuring device is installed, which measures the amount of water which if flowing into the turbine. Once the water is drawn from the river/ stream for the purpose of generation of electricity into the dedicated channel/ pipeline, it immediately becomes liable to be taxed. Water, which is drawn for the purpose of generation of electricity may, in a given case, not be profitably utilized, or may not be as profitably utilized, as it could be. For example, water which is drawn for the purpose of generation of electricity, may fall on a turbine which is defective/ non- functional, or which is not as efficient, as it could be. In that situation, the electricity may either not be generated at all- though the water stands drawn for the purpose of generation of electricity, or may not be generated to the extent of its full capacity. In my view, that would not impact the liability to tax. The levy is on the water drawn, and not on the electricity generated. There is no provision in the Act, which fastens the liability on the user, only upon generation of electricity, and the liability is not related to the quantum of electricity generated. It is on drawl of water for the purpose of generation of electricity, whether

or not, electricity is generated, and irrespective of the quantum of electricity generated.

104. There is no force in the submission of learned counsels for the appellants- writ petitioners, that because the Act repeatedly uses the words *"for generation of electricity"*, or *"on electricity generation"*, or the like, the levy is on generation of electricity. Obviously, since the Act has been specifically enacted for the purpose of taxing water, which is drawn, consumed or used for generation of electricity, use of such words and expression, is inevitable.

105. It was argued by learned counsels for the appellants- writ petitioners that the slabs of the rates of water tax show that the purpose was to tax the generation of electricity. Water falling from a greater height (head) is subjected to higher rate of tax, than water falling from a lesser height (head). In this regard, attention is drawn to the notification dated 07.11.2015, which reads as follows:-

> *"The Governor, Uttarakhand, in exercise of his power conferred under Section 17(1) of the Uttarakhand Water Tax on Electricity Generation, 2012 (Uttarakhand Act No.09 of 2013) is pleased to accord his approval for imposition of prescribed water tax on the hydro power projects of five MW and less capacity situated in the State of Uttarakhand from the date of publication of this notification.*

	Head available for power generation	*Prescribed water tax*
1.	*Upto 30.00 meters*	*02 paise per cubic meter*
2.	*Upto 31.00 to 60.00 meters*	*05 paise per cubic meter*

3.	*Upto 61.00 meters to 90.00 meters*	*07 paise per cubic meter*
4.	*More than 90 meters*	*10 paise per cubic meter*

2. The aforesaid water tax will remain effective for the next three years from the date of its implementation."

106. I do not find any merit in this submission, for the reason, that the State appears to have calibrated the tax keeping in view the potentiality of the water which is drawn for the purpose of generation of electricity. The generation of hydroelectricity involves conversion of kinetic energy into electric energy. The greater the fall (head), from which the water falls on the turbine, the greater the momentum in it. It is that momentum/ kinetic energy which, when falls on the blades of the turbine, causes turbine to rotate. With the rotation of turbine, the electro-magnetic effect causes the generation of electricity. Thus, it is not merely the quantum the water drawn, which the State seeks to take into account while taxing the rate of levy, but also the potentiality in, and the usability of the water- which is drawn for the purpose of generation of electricity, which is factored into the tax. Thus, I conclude that the impugned tax is a tax on water drawn for purpose of generation of electricity, and is not a tax on electricity generated in its pith and substance.

107. I, therefore, hold that the nature of impugned tax, in pith and substance, is a tax on drawl/ use/ consumption of water for electricity generation, and not a tax on electricity

generation, as contended by learned counsels for the appellants- writ petitioners.

Whether the State has made a promise to the appellants- writ petitioners, not to levy a tax in the nature of water tax, and if made, whether such a promise binds the State legislature

108. I now move on to consider the plea of the appellants- writ petitioners that the impugned tax cannot be levied on the ground that the respondent- State is promissorily estopped from levying the same in the light of the agreements entered into by the State with the appellants- writ petitioners. It is the case of each of the appellants- writ petitioners that, under their respective agreements, the respondent- State has already been adequately compensated for grant of the opportunity to the appellants- writ petitioners- generation units to setup their units, by providing free electricity to the State. In most of these cases, 12% of the electricity generated is provided to the State free of charge under the Restated Implementation Agreement *(RIA)*, entered into with the appellants- writ petitioners.

109. It is argued that the act of issuance of the notification under Section 17 of the Act, is that of the Executive, i.e. State Government, and not that of the State legislature. Even if the legislature could not be bound by promissory estoppel, in framing the impugned Act, the State was certainly bound by the said principle, it having agreed to

receive free electricity by way of royalty for the rights/ licenses granted to the appellants- writ petitioners for establishing their hydroelectric plants/ units, and drawing water for running the same.

110. Reliance has been placed by the appellants- writ petitioners on the cases of ***Devi Dass Gopal Krishnan, etc vs. State of Punjab & others, AIR 1967 SC 1895***; ***Veega Holidays & Parks Pvt. Ltd. vs. Kunnathunadu Grama Panchayat & others, AIR 2004 Kerala 168***; ***M/s Motilal Padampat Sugar Mills Co. Ltd. vs. State of Uttar Pradesh & others, (1979) 2 SCC 409***; ***Chattanatha Karayalar vs. State of Madras, 1964 SCC OnLine Mad 292,*** *and;* ***State of Madras vs. Shanmuga Oil Mills, Erode, 1962 SCC OnLine Mad 40***.

111. I have considered the aforesaid submissions, and I do not find any merit in the submissions of the appellants- writ petitioners. Firstly, it is well- settled that there is no estoppel against the law. The competence and the power of the State legislature to enact legislation, including for the purpose of taxation, cannot be interdicted on the plea of promissory estoppel. The agreements were entered into between the appellants- writ petitioners with the State Government, i.e. the executive limb, and not with the State legislature.

112. Moreover, the water tax imposed under the impugned legislation is a tax, and not an additional royalty which is sought to be extracted, in consideration of the rights granted to the appellants- writ petitioners under their respective contracts. The tax, which is sought to be levied is, therefore, not an additional consideration under the contracts. The water tax is an indirect tax, which would go into the input costs of the appellants- writ petitioners, and if they so choose, they can pass it on to their customers of electricity.

113. So far as the submission with regard to the issuance of the notification by the State- under Section 17, is concerned, in my view, when the State Government issues the notification, fixing the rates at which the water tax may be charged, it is only acting as a delegate of the State legislature, and the act of fixing the rates under the notification is a piece of delegated legislation. Since it is a legislative function which the Government performs while issuing the notification, there can be no estoppel against the same.

114. The submission, premised on "promissory estoppel", to my mind, is a red herring, since I find that there is no assurance given by the State in its agreements with the appellants- writ petitioners, that the State legislature would not, in future, levy any tax in the nature of water tax, in the

agreements. Since the RIA are similar, I may refer to the agreement entered into between the State and M/s L & T Uttaranchal Hydro power Ltd.- which has been filed in Writ Petition (M/S) No.1739 of 2021. The said agreement, in clause 5.2.10 states that *"No entry tax will be levied by the Government on the power generation, transmission equipment and building material for the Project"*. It is not the case of the appellants- writ petitioners, that the tax in question, is in the nature of an entry tax. Clause 8.2 of the same agreement contains the undertakings of the Government. These undertakings read as follows:-

> ***"8.2 Undertakings of the Government***
>
> *The government hereby covenants to and agrees with the Company to:*
>
> *(a) Provide such assistance and support as the Company may reasonably require in identifying and preparing the applications for Governmental Authorizations and in interfacing with Governmental Authorities in connect with obtaining the same for the construction, completion and operation of the project;*
>
> *(b) Provide adequate construction power subject to availability, to the project work site at the cost of the Company. The Government shall not be liable to pay any damages/ compensation to the Company in the event of non-supply of construction power beyond UPCL's control;*
>
> *(c) Provide assistance to make all arrangements to evacuate power beyond interconnection point;*
>
> *(d) Make arrangements for establishing (by themselves/ other agencies) suitable transmission system for transmission of power beyond the interconnection point not later than the scheduled COD; and*

(e) Work with an co-operate in good faith with the Company with respect to all the company's obligations and rights hereunder".

115. The aforesaid undertakings of the Government nowhere state that the Government shall not levy a tax in the nature of water tax at any point of time in the future.

116. Mr. Kirpal has drawn our attention to clauses 13.1, 17.1, and 18.4 of the RIA entered into by the Alaknanda Hydropower Company Ltd. with the State Government (in Writ Petition M/S No.279 of 2020).

117. Clause 17.1 merely states that *"the Government shall be entitled to 12% of the Saleable Energy from the Project free of cost"*. This is the consideration payable to the Government for the rights granted under the aforesaid agreement in favour of the grantee, i.e. Alaknanda Hydropower Co. Ltd.

118. Clauses 13.1 and 18.4 read as follows:-

"13.1** The GOU hereby grants to the Company the right, **free of any and all charges** during the Term of utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environmental clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. **GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this

Project during the term of this Restated Implementation Agreement (RIA).

18.4 *Payment of Water Use Charge- The Parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA".*

(emphasis supplied)

119. The aforesaid clauses show that the Government has granted to Alaknanda Hydropower Co. Ltd. the right to utilize the water of Alaknanda River for the project, and to generate electric energy free of any and all charges. Pertinently, under Clause 13.1, the Government of Uttarakhand undertook not to impose *"any taxes, duties, levies or charge of any kind* ***on electricity generated by this project during the term of this RIA"*** (emphasis supplied). Therefore, assuming that the Government of Uttarakhand, or the State legislature, were bound by the said term of the agreement, or by the principles of promissory estoppel, all that they were prohibited from doing, was to levy a tax on the electricity generated by the project.

120. I have already held that the water tax levied under the impugned Act is a tax on water drawn, and not a tax on the electricity generated. Therefore, in my view, with the enactment of the impugned Act, there is no breach of Clause 13.1 of the agreement entered into between the appellant-Alaknanda Hydropower Co. Ltd, and the Government of Uttarakhand.

121. Clause 18.4 merely states that *"the Company shall have no payment liability for use of water. Government of Uttarakhand will not charge for the use of water under this RIA at any time during the tenure of the RIA"*. The charge sought to be levied under the Act is a tax on usage of water, which is land. It is not a charge, in the nature of royalty, for the use of water. It is a tax on the use of water. The two are different. A charge would be arrived at with the agreement of the parties, and it would be a matter of negotiation between the parties. "Charge" would be the consideration for permission to use the water for electricity generation. That "charge" already stands stipulated in the agreement on 12% of the electricity generated, free of cost. However, so far as the tax is concerned, the same is a statutory levy and the incidence of tax is the drawl of water for electricity generation. The tax is not consideration under the contract, it is an exaction.

122. Since there is no promise discernable from RIA entered into between the State and the appellants- writ petitioners, in my view, there is no question of there being any estoppel against the said on the basis of a promise.

Excessive Delegation of Statutory Power by the State legislature on the State Government under Section 17 of the Act

123. I may now deal with the issue of excessive delegation of legislative power upon the Executive under the impugned Act.

124. The submission of the appellants- writ petitioners is that the power to fix the rates under Section 17 is an essential legislative function. That legislative power/ function has been delegated upon the Executive Government by Section 17 of the Act. It is argued that this delegation is without any guidance or limitation on the exercise of power to fix the rates. The submission is that, absence of any guidance makes this power arbitrary, and that it tantamounts to excessive delegation of an essential legislative function, which is not permissible. It is argued that the power under Section 17, conferred upon the State- to prescribe the rates, in unlimited and unregulated discretion, and that the delegation of discretion is unfair and arbitrary.

125. The respondent- State has defended its power to prescribe the rates and determine the class of entities which may be subjected to water tax, and by arguing that the impugned Act, including Section 17 thereof, were framed in the background of the States policy to develop and exploit its hydropower potential in the State, and to harness the same

properly. It is argued that the State of Uttarakhand evolved a policy for developing large, medium, small, mini and micro power generating stations. The idea was to exploit the renewable energy sources by creating conditions conducive to private sector participation. This was essential for the socio-economic development of State by promotion of industrial activity and tap the employment potential, by increasing private consumption of electricity, at reasonable rates. With these objectives, the State evolved a policy on 29.01.2008. Prior to this, there existed a policy with similar objectives, framed in the year 2003. Under the 2003 Policy, the generating units were exempted from taxation for a period of ten years only. Under the Policy framed in the year 2008, no such exemption was continued. Both these policies were primarily for units generating upto 25 MW. The State argued that with the evolution of the projects, it was felt that the State could generate revenue, to meet the needs of the State. The exemption granted in the year 2003 Policy was done away with. The ten years holiday from taxation, granted under the 2003 Policy, expired in 2013. In the light of the said background, the State enacted the impugned Act on 25.01.2013. However, the rates were notified under Section 17 of the Act by the State Government over two years later, on 07.11.2015.

126. It is argued by Mr. Dwivedi that the tax on drawl/ usage of water for electricity generation is an important supplemental revenue source for the State. The State Government is interested, not only in generating additional revenue, but ensuring supply of cheap electricity to the consumers, as well as for industrialization activities, which itself creates employment potential. These considerations, by themselves as a guideline, and places limitation on the exercise of the power vested by Section 17 of the Act to fix rates. Therefore, it cannot be said that the power conferred on the State Government to fix the rates under Section 17 is without limitation, or unregulated. The aforesaid considerations weigh heavily on the State, when it fixes the rates under Section 17 of the Act.

127. Mr. Dwivedi has argued that it is not unconstitutional for the State legislature to leave it to the executive to determine the working details relating to selection of persons on whom tax is to be levied, and the rates at which tax is to be charged in respect of different classes of goods and persons, or to exempt particular classes of persons, things or events from taxation.

128. In support of his aforesaid submissions, Mr. Dwivedi has placed reliance on the following decisions:-

(1) Pandit Banarsi Das Bhanot vs. State of M.P., AIR 1958 SC 909.

(2) The Corporation of Calcutta and another vs. Liberty Cinema; AIR 1965 SC 1107

(3) M/s Devi Das Gopal Krishnan, etc. vs. State of Punjab & others; AIR 1967 SC 1895

(4) Municipal Corporation of Delhi vs. Birla Cotton Spinning & Weaving Mills, Delhi & others; AIR 1968 SC 1232.

(5) M/s Sita Ram Bishambhar Dayal & others vs. State of U.P.; (1972) 1 SCC 485.

(6) M/s Hiralal Rattanlal etc. etc. vs. State of U.P. & another etc. etc.; (1973) 1 SCC 216.

(7) Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. vs. The Asstt. Commissioner of Sales Tax & others (1974) 4 SCC 98

(8) M.K. Papiah & Sons vs. The Excise Commissioner & another; (1975) 1 SCC 492

(9) Sashi Prasad Barooah vs. The Agricultural Income Tax Officer & others; (1977) 1 SCC 867.

(10) Quarry Owners' Association vs. State of Bihar & others; (2000) 8 SCC 655

(11) Keshavlal Khemchand and Sons Pvt. Ltd. & others vs. Union of India & others; (2015) 4 SCC 770

129. ***Pandit Banarsi Das Bhanot*** (supra), is a Constitution Bench judgment consisting of five learned Judge of the Supreme Court. The majority judgment was delivered by Mr. Justice T.L. Venkatarama Aiyar. Mr. Justice Vivian Bose, delivered his separate opinion agreeing with the majority view, while reserving his view on the opinion about the validity of the power of the State Government by Section 6(2) of the Central Province and Berar Sales Act, 1947, to amend the Schedule in the way in which it had been amended, in the case in hand. The appeal was directed

against the judgment of the High Court of Nagpur, before which Court, the appellants had challenged the validity of certain provisions of the Central Provinces and Berar Sales Act No.21 of 1947. Section 6 of the said Act, which fell for consideration, reads as follows:-

> *"6(1) No tax shall be payable under this Act on the sale of goods specified in the second column of Schedule II, subject to the conditions and exceptions, if any, set out in the corresponding entry in the third column thereof.*
>
> *(2) The State Government may, after giving by notification not less than one month's notice of their intention so to do, by a notification after the expiry of the period of notice mentioned in the first notification amend either Schedule, and thereupon such Schedule shall be deemed to be amended accordingly".*

130. It would, therefore, be seen that Section 6(2) empowered the State to amend Schedule II, which contained the goods specified, which were exempted from taxation. The State Government had issued a notification on 18.09.1950, amending Item 33 in Schedule II by substituting, for the words *"goods sold to or by the State Government"*, the words *"goods sold by the State Government"*. The resultant position was that the appellant before the Supreme Court, who were entitled to exemption under the said Act, in respect of goods sold to the Government, could no longer claim the exemption by reason of the notification issued under the Act. The ground of attack was that it was not open to the State Government, in exercise of the authority delegated to it under Section 6(2) of the Act, to modify or alter what the legislature had

enacted. Two contentions were raised before the Supreme Court, namely, (1) that the Provisional Legislature has no authority in exercise of its power under Entry 48 to impose a tax on the supply of materials in works contracts, as such supply cannot be said to be a sale of those material within that Entry;' and (2) that the notification dated 18.09.1950, is bad as being an unconstitutional delegation of legislative authority.

131. We are concerned with the second issue. On the second issue, the Supreme Court examined a host of decisions relied upon before it on either side. The Supreme Court extracted the following paragraph from ***Rajnarain Singh vs. Patna, Administration Committee, Patna, AIR 1954 SC 569; 1955 (1) SCR 290***:-

> *"In our opinion, the majority view was that an executive authority can be authorized to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above; it cannot include a change of policy."*

132. The Supreme Court proceeded to consider whether the impugned notification could be said to be related to an essential feature of law, and whether it involved any change of policy. In this context, the Supreme Court observed as follows:-

> *"On these observations, the point for determination is whether the impugned notification relates to what may be aid*

to be an essential feature of the law, and whether it involves any change of policy. ***Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like****".* (emphasis supplied)

133. The Supreme Court, in support of the aforesaid finding, went on to notice the ***Powell vs. Appollo Candle Company Limited, (1885) 10 AC 282***; ***Syed Mohamed & Co. vs. The State of Madras, AIR 1953 Mad 105***; ***Hampton Jr. & Co. vs. United States, (1928) 276 US 394***. In Paragraph No.11, the Supreme Court observed as follows:-

"11. The contention of the appellant that the notification in question is ultra vires must, in our opinion, fail on another ground. The basis assumption on which the argument of the appellant proceeds is that the power to amend the schedule conferred on the Government under Section 6(2) is wholly independent of the grant of exemption under Section 6(1) of the Act, and that, in consequence, while an exemption under Section 6(1) would stand, an amendment thereof by a notification under Section 6(2) might be bad. But that, in our opinion, is not the correct interpretation of the section. ***The two sub-sections together form integral parts of a single enactment, the object of which is to grant exemption from taxation in respect of such goods and to such extent as may from time to time be determined by the State Government.*** *Section 6(1), therefore, cannot have an operation independent of Section 6(2), and an exemption granted thereunder is conditional and subject to any modification that might be issued under Section 6(2). In this view, the impugned notification is intra vires and not open to challenge".* (emphasis supplied)

134. The next decision relevant to the issue is ***The Corporation of Calcutta & another vs. Liberty Cinema, AIR 1965 SC 1107***. This is also a decision of a constitution bench of the Supreme Court consisting of five learned judges. The majority opinion is that of A.K. Sarkar, J. (for himself, Raghubar Dayal, and Mudholkar, JJ.). The challenge in this case was to the judgment of the Calcutta High Court, which had found in favour of the respondent, in respect of the challenge to a resolution passed by the Corporation of Calcutta, changing the basis for assessment of license fee. Under the new method for assessment of rates, the fee was assessed at rates prescribed per show, according to the sanctioned seating capacity of the cinema houses. The respondent moved to the High Court of Calcutta to assail the resolution. The writ petition was allowed by the learned Single Judge, and the order was affirmed by the Division Bench. One of the issues which arose for consideration before the Supreme Court was, whether the power vested in the Corporation to amend the rate of taxation by notification tantamounted to excessive delegation by the legislature. The Supreme Court noticed the earlier judgment in ***Rajnarain Singh*** (supra). The Supreme Court noticed the submission of the Corporation in Paragraph 23 of the judgment, which reads as follows:-

> *"The Act was a statute imposing taxes for revenue purposes. This case would appear to be express authority for*

the proposition that fixation of rates of taxes may be legitimately left by a statute to a non-legislative authority, for we see no distinction in principle between delegation of power to fix rates of taxes to be charged on different classes of goods and power to fix rates simpliciter, if power to fix rates in some cases can be delegated then equally the power to fix rates generally can be delegated. No doubt ***Pandit Benarsi Das's*** *case, 1959 SCR 427: (AIR 1958 SC 909) was not concerned with fixation of rates of taxes; it was a case where the question was on what subject matter, and therefore on what persons, the tax could be imposed. Between the two we are unable to distinguish in principle, as to which is of the essence of legislation; if the power to decide who is to pay the tax is not an essential part of legislation, neither would the power to decide the rate of tax be so. Therefore, we think that apart from the express observation made, this case on principle supports the contention that fixing of the rate of a tax is not of the essence of legislative power".*

135. In Paragraph No.26, the Supreme Court also considered the issue whether the legislature could have been said to have provided guidance to the Corporation to fix the rates of tax. In this regard, the Supreme Court observed as follows:-

"26. No doubt when the power to fix rates of taxes is left to another body, the legislature must provide guidance for such fixation. The question then is, was such guidance provided in the Act? We first wish to observe that ***the validity of the guidance cannot be tested by a rigid uniform rule; that must depend on the object of the Act giving power to fix the rate****. It is said that the delegation of power to fix rates of taxes authorised for meeting the needs of the delegate to be valid, must provide the maximum rate that can be fixed, or lay down rules indicating that maximum. We are unable to see how the specification of the maximum rate supplies any guidance as to how the amount of the tax which no doubt has to be below the maximum, is to be fixed.*

Provision for such maximum only sets out a limit of the rate to be imposed and a limit is only a limit and not a guidance.

27. ***It seems to us that there are various decisions of this Court which support the proposition that for a statutory provision for raising revenue for the purposes of the delegates, as the section now under consideration is, the needs of the taxing body for carrying out its functions under the statute for which alone the taxing power was conferred on it, may afford sufficient guidance to make the power to fix the rate of tax valid. We proceed now to refer to these cases****.*

28.Western India Theatres Ltd. v. Municipal Corporation of the City of Poona [(1959) Supp 2 SCR 71] was concerned with a statute under which the respondent Corporation had been set up and which gave that Corporation power to levy "any other tax". It was contended that such a power amounted to abdication of legislative function as there was no guidance provided. This contention was rejected. One of the grounds for this view was that the statute authorised the municipality to impose taxes therein mentioned for the purposes of the Act and that this furnished sufficient guidance for the imposition of the tax. Again, no doubt, this was not a case dealing with rates of taxes, but if a power on the Corporation to impose any tax it liked subject to the guidance mentioned was valid, that would include in it the power to fix the rates of the tax, subject of course to the same guidance. Such a power has to be held to be good. It is true, as was pointed out by learned advocate for the respondent, that other grounds were mentioned in support of the view taken in the Western India Theatres case [(1959) Supp 2 SCR 71] but that surely is irrelevant, for it cannot make the ground of the decision there which we have earlier set out devoid of all force.

29. Then there is Vasantlal Maganbhal Sanjanwala v. State of Bombay [(1961) 1 SCR 341] . The provision of the statute there attacked gave the Government power to fix a lower rate of maximum rent payable by the tenants. The validity of this provision was upheld on the ground that the material provisions of the Act including its preamble were intended to give relief to tenants by fixing the maximum rent payable by them. It was in the light of this policy of the Act that the validity of the impugned provision was really upheld.

30. The last case which we wish to notice in this connection is the Union of India v. Bhana Mal Gulzari Mal [(1960) 2 SCR 627] . Section 3 of the Essential Supplies (Temporary Powers) Act, 1946 came up for consideration there. That section gave power to the Government to make necessary orders for maintaining or increasing supplies of any essential commodities or for securing their equitable distribution and availability at fair prices. In Harishankar Bagla v. State of Madhya Pradesh [(1955) 1 SCR 380] the validity of the delegation of power contained in that section had been upheld as it laid down the policy as to how that power was to be exercised by the delegate, that is, the Government. ***In Bhana Mal Gulzari Mal case [(1960) 2 SCR 627] the validity of an order made under Section 3 reducing the price at which steel could be sold was challenged. This challenge was rejected on the ground that the order fixing the price carried out the legislative object prescribed in Section 3. It was observed at p. 638, "It is not difficult to appreciate how and why the Legislature must have thought that it would be inexpedient either to define or describe in detail all the relevant factors which have to be considered in fixing the fair price of an essential commodity from time to time. In prescribing a schedule of maximum prices the Controller has to take into account the position in respect of production of the commodities in question, the demand for the said commodities, the availability of the said commodities from foreign sources and the anticipated increase or decrease in the said supply or demand. Foreign prices for the said commodities may also be not irrelevant. Having regard to the fact that the decision about the maximum prices in respect of iron and steel would depend on a rational evaluation from time to time of all these varied factors the Legislature may well have thought that this problem should be left to be tackled by the delegate with enough freedom, the policy of the Legislature having been clearly indicated by Section 3 in that behalf". Again it was said at p. 640, "In deciding the nature and extent of the guidance which should be given to the delegate Legislature must inevitably take into account the special features of the object which it intends to achieve by a particular statute …. Having regard to the***

nature of the problem which the Legislature wanted to attack it may have come to the conclusion that it would be inexpedient to limit the discretion of the delegate in fixing the maximum prices by reference to any basic price”.

31. ***The portion in the judgment in Bhana Mal Gulzari Mal [(1960) 2 SCR 627] case quoted in the preceding paragraph will show that the validity of the guidance required to make delegation of power good cannot be judged by a stereo-typed rule. With respect, we entirely agree with this view****. The guidance furnished must be held to be good if it leads to the achievement of the object of the statute which delegated the power. The validity of the power to fix rates of taxes delegated to the Corporation by Section 548 of the Act must be judged by the same standard. Now there is no dispute that all taxes, including the one under this section, can be collected and used by the Corporation only for discharging its functions under the Act. The Corporation, subject to certain controls with which we are not concerned, is an autonomous body. It has to perform various statutory functions. It is often given power to decide when and in what manner the functions are to be performed. For all this it needs money and it needs will vary from time to time with the prevailing exigencies. Its power to collect tax, however, is necessarily limited by the expenses required to discharge those functions. It has, therefore, where rates have not been specified in the statute, to fix such rates as may be necessary to meet its needs. That, we think, would be sufficient guidance to make the exercise of its power to fix the rates valid. The case is as if the statute had required the Corporation to perform duties A, B & C and given power to levy taxes to meet the costs to be incurred for the discharge of these duties and then said that, “provided, however, that the rates of the taxes shall be such as would bring into the Corporation's hands the amount necessary to defray the costs of discharging the duties”. We should suppose, this would have been a valid guidance. We think the Act in the present case impliedly provides the same guidance: see Section 127(3) & (4). It would be impracticable to insist on a more rigid guidance. In the case of a self-governing body with taxing powers, a large amount of flexibility in the guidance to be provided for the exercise of that power must exist. It is hardly necessary to point out that, as in*

> *the cases under Essential Supplies (Temporary Powers) Act, 1946, so in the case of a big municipality like that of Calcutta, its needs would depend on various and changing circumstances.* ***There are epidemics, influx of refugees, labour strikes, new amenities to be provided for, such as hospitals, schools—and various other such things may be mentioned,—which make it necessary for a colossal municipal Corporation like that of Calcutta to have a large amount of flexibility in its taxing powers. These considerations lead us to the view that Section 548 is valid legislation. There is sufficient guidance in the Act as to how the rate of the levy is to be fixed.***"
>
> (emphasis supplied)

136. The next judgment cited on the point is that of ***M/s Devi Das Gopal Krishnan etc. vs. State of Punjab & others, AIR 1967 SC 1895***. This judgment is also of a constitution bench of five learned judges of the Supreme Court. In this case, Section 5 of the Punjab General Sales Tax Act, 1948- before its amendment, provided that *"Subject to the provisions of this Act, there shall be levied on the taxable turnover every year of a dealer a tax at such rates as the Provincial Government may by notification direct".* By Amendment Act No.19 of 1952, the rate of tax could not exceed two pice in a rupee, i.e. 2%. The Punjab & Haryana High Court held Section 5 of the Act, as originally framed, to be *void* as it gave an unlimited power to the Executive to levy sales tax at the rate which it though fit. At the same time, the amendment to Section 5 of the Punjab Act No.19 of 1952 was held to have cured the defect in the said Act, and had the effect of giving life to it. Before the Supreme Court, to defend the original Section 5 of the Act, the State relied upon the

judgment of the Supreme Court in ***Liberty Cinema*** (supra). The Supreme Court rejected the said reliance by holding that the decision in ***Liberty Cinema*** (supra) should be confined only to the provisions of the Calcutta Municipal Act wherein the Court had found existence of sufficient guidance for the executive to exercise its power to frame delegated legislation. It was held that the provisions of the Sales Tax Act, including the preamble, do not disclose any policy or guidance for the State, for fixing the rates, and that the general constitutional power to impose tax has no relevance for discovering the statutory policy under a particular Act.

137. By a same logic, in my view, the judgment in ***M/s Devi Das*** (supra) cannot be pressed into service by the appellants- writ petitioners, as in that case, the Supreme Court was concerned with the provisions of the East Punjab General Sales Tax Act (46 of 1948), with which, I am not concerned. For the aforesaid reason, I am not persuaded to hold that the delegation on the State under the impugned Act, is that of an essential legislative function, or that it is unguided. Having said this, no doubt, I will independently examine whether there is sufficient guidance to be found for the State Government to fix the rates of water tax under Section 17 of the impugned Act.

138. Pertinently, the Supreme Court in ***M/s Devi Das*** (supra) has not disturbed the earlier laid down legal principles

in ***Liberty Cinema*** (supra), and earlier decisions which hold that so long as the delegation is not in respect of an essential legislative function, i.e. a matter of policy, the same cannot be assailed, and the guideline for the executive to fix, *inter alia,* the rate of tax can be gathered from the object of the Act, in the other provisions of the Act. That being the position, I am of the view that the judgment in ***M/s Devi Das*** (supra) does not come to the aid of the appellants- writ petitioners.

139. I may now notice the judgment of the constitution bench of the Supreme Court in ***The Municipal Corporation of Delhi vs. Birla Cotton, Spinning and Weaving Mills, Delhi & another, AIR 1968 SC 1232***. This is a seven judge bench decision of the Supreme Court. Shah and Vaidialingam, JJ. dissented from the majority view. C.J. K.N. Wanchoo authored the judgment on his behalf and on behalf of Shelat, J. There were two other concurring opinions of Hidayatullah and Ramaswami, JJ, and Sikri, J. In this case, Section 150 of the Delhi Municipal Corporation Act was challenged on the ground that it suffered from the vice of excessive delegation. Section 150(1) of the Delhi Municipal Act provided that *"maximum rate of tax to be levied in the case of optional taxes will be specified by a resolution of the Corporation."* After the maximum rate has, thus, been specified, the resolution has to be submitted to the Central Government for

sanction under Section 150(2), and if sanctioned by the Government, the rate comes into force on or from such date as may be specified in the order of sanction. Under sub-section (3) of Section 150, the Corporation then passes another resolution determining the actual rates at which the tax is levied, and the tax comes into force thereafter. On 09.02.1959, the Corporation forwarded a resolution, which, instead of specifying the maximum rates, specified the rates, which it desired to enforce from the ensuing year. The Central Government sanctioned the tax on consumption or sale of electricity w.e.f. 01.07.1959. While doing so, the Central Government modified the proposed rates. Consequently, the Corporation imposed tax on consumption or sale of electricity. When the tax was imposed, the same was challenged by the respondent- writ petitioner before the High Court. The writ petition was dismissed by the learned Single Judge. An intra-court appeal was, however, allowed. On 03.12.1966, the Parliament passed the Delhi Municipal Corporation (Validation of Electricity Tax) Act, No.35 of 1966, purporting to validate the levy of electricity tax from 01.07.1959 to 31.03.1966. The Corporation than passed another resolution on 17.02.1965, in pursuance of Section 150(1), and provided the maximum rates for the levy of tax on consumption or sale of electricity. The resolution was submitted to the Government, which sanctioned the same. Thereafter, the Corporation passed the second resolution under Section 150(3) of the Act,

resolving that the maximum rates should be adopted as the actual rates for the levy of tax. Two writ petitions were preferred by the respondents, challenging the levy of tax by resolutions dated 17.02.1965 and 27.12.1965. The second petition challenged the *vires* of the Validation Act.

140. We are concerned with the issue of excessive delegation. On the said issue, the High Court held that Section 150 suffered from the *vice* of excessive delegation of legislative power, and held same to be *ultra vires*.

141. In the aforesaid background, the Municipal Corporation preferred appeals before the Supreme Court. By overwhelming majority, the judgment of the High Court was reversed and the Supreme Court held that the delegation under Section 150 on the Corporation was not excessive, as there was sufficient guideline provided by the Act.

142. What, therefore, emerges from this decision is that one would have to look at the provisions of the Act to see whether there is sufficient guideline available in the Act so as to save the delegation contained in Section 17 of the Act from the vice of excessive delegation.

143. The next decision in this line is that of ***M/s Sita Ram Bishambar Dayal & others vs. State of U.P., (1972) 4 SCC 485***. This is a two judge bench decision. The Supreme Court reiterated the same principles as have already

been noticed. The provision in question was Section 3(D)(1) of the U.P. Sales Tax Act, 1948, which reads as follows:-

> *"Except as provided in sub-section (2), there shall be levied and paid, for each assessment year or part thereof, a tax on the turnover, to be determined in such manner as may be prescribed, of first purchases made by a dealer or through a dealer, acting as a purchasing agent in respect of such goods or class of goods, and at such rates, not exceeding two paisa per rupee in the case of food-grains, including cereals and pulses, and five paisa per rupee in the case of other goods and with effect from such date, as may, from time to time, be notified by the State Government in this behalf.*
> *Explanation.- In the case of a purchase made by a registered dealer through the agency of a licensed dealer, the registered dealer shall be deemed to be the first purchaser, and in every other case of a first purchase, made through the agency of a dealer, the dealer who is the agent shall be deemed to be the first purchaser".*

144. The Supreme Court while negating the challenge to the said provision on the ground of excessive delegation, held as follows:-

> *"5.* ***It is true that the power to fix the rate of a tax is a legislative power but if the Legislature lays down the legislative policy and provides the necessary guidelines, that power can be delegated to the executive.*** *Though a tax is levied primarily for the purposes of gathering revenue, in selecting the objects to be taxed and in determining the rate of tax, various economic and social aspects such as the availability of the goods, administrative convenience, the extent of evasion, the impact of tax levied on the various sections of the society etc. have to be considered.* ***In a modern society taxation is an instrument of planning. It can be used to achieve the economic and social goals of the State. For that reason the power to tax must be a flexible power. It must be capable of being modulated to meet the exigencies of***

the situation. *In a Cabinet form of Government, the Executive is expected to reflect the views of the legislatures. In fact of most matters it gives the lead to the Legislature.* ***However much one might deplore the "New Despotism" of the Executive, the very complexity of the modern society and the demand it makes on its Government have set on motion forces which have made it absolutely necessary for the Legislatures to entrust more and more powers to the executive.*** *Text book doctrines evolved in the 19th century have become out of date. Present position as regards delegation of legislative power may not be ideal, but in the absence of any better alternative, there is no escape from it. The Legislatures have neither the time, nor the required detailed information nor even the mobility to deal in detail with the innumerable problems arising time and again. In certain matters they can only lay down the policy and guidelines in as clear a manner as possible.*

6. In State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [AIR 1958 SC 560] this Court observed:

> ***"Now, the authorities are clear that it is not unconstitutional for the Legislature to leave it to the Executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be levied, the rate at which it is to be charged in respect of different classes of goods and the like."***

7. It was not contended before us that the power delegated to the Executive to select the goods on which the purchase tax is to be levied was an excessive delegation nor was it contended that the power granted to the Executive to determine the rate of tax by itself amounts to an excessive delegation. All that was said was that in empowering the Government to levy tax on goods other than foodgrains at a rate not exceeding five paise in a rupee, the Legislature parted with one of its essential legislative functions, as the power given to the Executive is an unduly wide one. We are unable to accede to this contention. ***Whether a power delegated by the Legislature to the Executive has exceeded the permissible limits in a given case***

> ***depends on its facts and circumstances. That question does not admit of any general rule. It depends upon the nature of the power delegated and the purposes intended to be achieved.*** *Taking into consideration the legislative practice in this country and the rate of tax levied or leviable under the various sales tax laws in force in this country, it cannot be said that the power delegated to the Executive is excessive. In Devi Dass Gopal Krishnan v. State of Punjab [AIR 1967 SCJ 1895 : (1967) 3 SCR 557 : 20 STC 430] this Court ruled that it is open to the Legislature to delegate the power of fixing the rate of purchase tax or sales tax if the Legislature prescribes a reasonable upper limit.*
>
> *8. We are unable to accept the contention of Mr Goyal, learned Counsel for the appellant, that the maximum rate fixed under Section 3-D is unreasonably high. At any rate there is no material before us on the basis of which we can come to that conclusion"*. (emphasis supplied)

145. The next judgment on the subject is ***M/s Hiralal Rattanlal Etc. Etc. vs. State of U.P. & another etc. etc., (1973) 1 SCC 216***. In this case, the question raised was whether the Government was competent to levy Sales Tax on the purchases made by the appellant of split or processed food grains and dal under the provisions of the United Provinces Sales Tax Act, 1948, as amended by the Uttar Pradesh Sales Tax (Amendment and Validation) Act, 1970. The Supreme Court observed in Paragraph No.31 of this judgment as follows:-

> *"31. The only remaining contention is that the delegation made to the executive under Section 3-D is an excessive delegation. It is true that the Legislature cannot delegate its legislative functions to any other body. But subject to that qualification, it is permissible for the legislature to delegate the power to select the persons on*

> *whom the tax is to be levied or the goods or the transactions on which the tax is to be levied. In the Act, under Section 3 the Legislature has sought to impose multi-point tax on all sales and purchases.* ***After having done that it has given power to the executive, a high authority and which is presumed to command the majority support in the Legislature, to select for special treatment dealings in certain class of goods. In the very nature of things, it is impossible for the Legislature to enumerate goods, dealings in which sales tax or purchase tax should be imposed. It is also impossible for the Legislature to select the goods which should be subjected to a single-point sales or purchase tax. Before making such selections several aspects such as the impact of the levy on the society, economic consequences and the administrative convenience will have to be considered. These factors may change from time to time. Hence in the very nature of things, these details have got to be left to the executive.****"* (emphasis supplied)

146. Thus, the same principle, as has already been noticed of hereinabove, was noticed by the Supreme Court in this judgment as well. The Supreme Court rejected the challenge to the delegation of legislative function under Section 3-D of the Act in question.

147. I may now take notice of the judgment of the Supreme Court in ***Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. vs. The Asstt. Commissioner of Sales Tax & others, (1974) 4 SCC 98***. The question raised was, whether Section 8(2)(b) of the Central Sales Tax Act, 1956 suffers from the vice of excessive delegation. This question arose in the context that the Parliament had not fixed the rate of tax

itself, and had adopted the rate applicable to the sale or purchase of goods in the particular State. It was argued that it was an abdication of legislative function by the Parliament. The majority of three learned judges rejected the challenge. It was held that a clear legislative policy could be found in the provisions of Section 8(2)(b) of the Act. The Court, *inter alia*, held as follows:-

> *"In this connection we are of the view that a clear legislative policy can be found in the provisions of Section 8(2)(b) of the Act. The policy of the law in this respect is that in case the rate of local sales tax be less than 10 per cent, in such an event the dealer, if the case does not fall within Section 8(1) of the Act, should pay central sales tax at the rate of 10 per cent. If, however, the rate of local sales tax for the goods concerned be more than 10 per cent, in that event the policy is that the rate of the central sales tax shall also be the same as that of the local sales tax for the said goods.* ***The object of law thus is that the rate of the central sales tax shall in no event be less than the rate of local sales tax for the goods in question though it may exceed the local rate in case that rate be less than 10 per cent****……****The object of the law apparently is to deter inter-State sales to unregistered dealers as such inter-State sales would facilitate evasion of tax. It is also not possible to fix the maximum rate under Section 8()2(b) because the rate of local sales tax varies from State to State. The rate of local sales tax can also be changed by the State Legislatures from time to time.*** *It is not within the competence of the Parliament to fix the maximum rate of local sales tax. The fixation of the rate of local sales tax is essentially a matter for the State Legislatures and the Parliament does not have any control in the matter. The Parliament has therefore necessarily, if it wants to prevent evasion of payment of central sales tax, to tax the rate of such tax with that of local sales tax, in case the rate of local sales tax exceeds a particular limit.*

> *5. The adoption of the rate of local sales tax for the purpose of the central sales tax as applicable in a particular State does not show that the Parliament has in any way abdicated its legislative function. Where a law of Parliament provides that the rate of central sales tax should be 10 per cent or that of the local sales tax, whichever be higher, a definite legislative policy can be discerned in such a law, the policy being that the rate of central sales tax should in no event will less than the rate of local sales tax. In such a case, it is, as already stated above, not possible to mention the precise figure of the maximum rate of central sales tax in the law made by the Parliament because such a rate is linked with the rate of local sales tax which is prescribed by the State Legislatures. The Parliament in making such a law cannot be said to have indulged in self-effacement. On the contrary, the Parliament by making such a law effectuates its legislative policy, according to which the rate of central sales tax should in certain contingencies be not less than the rate of the local sales tax in the appropriate State. A law made by Parliament containing the above provision cannot be said to be suffering from the vice of excessive delegation of legislative function. On the contrary, the above law incorporates within itself the necessary provisions to carry out the objective of the Legislature, namely, to prevent evasion of payment of central sales tax and to plug possible loopholes".*
>
> (emphasis supplied)

148. The next judgment on the subject is ***M.K. Papiah & Sons vs. The Excise Commissioner & another, (1975) 1 SCC 492***. In this case, the Supreme Court held, while dealing with a challenge to the power to levy excise duty at such rates determined by the executive, that legislative control over delegated legislation may take many forms. In that case, Section 71(4) was held to provide a sufficient check by requiring that the rules framed be approved by the

State legislature. The State legislature had the power to annul the rules subsequently, and this was held to be a sufficient control over delegated legislation.

149. I may also notice the judgment of the Supreme Court in ***Sashi Prasad Barooah vs. The Agricultural Income Tax Officer & others, (1977) 1 SCC 867***. This is a two judge bench decision. In this case, it was held by the Supreme Court that the power to determine details relating to the working of taxation laws can be delegated to the rule-making authority. Reliance was placed on ***Pandit Banarasi Das Bhanot*** (supra).

150. In ***Quarry Owners' Association vs. State of Bihar & others, (2000) 8 SCC 655***, the two judge bench of the Supreme Court repelled the challenge to the enhancement of rate of royalty for minor mineral by the State in excess of the maximum prescribed in Schedule II Item 54, by holding that the guidelines for the taxation of rates are available in various provisions of the Act, the Preamble, and the Statement of Objects and Reasons. In Paragraph No.36, the Supreme Court, *inter alia*, observed as follows:-

> *"36.* ***We have to keep in mind, in the present case, delegation of power is on the State Government which is the highest executive in the State, which is responsible to the State Legislature. In a parliamentary democracy every act of the State Government is accountable to its people through the State Legislature which itself is an additional factor which keeps the***

State Government under check not to act arbitrarily or unreasonably*. When a policy is clearly laid down in a statute with reference to the minor minerals with the main object under the Act being for its conservation and development, coupled with various other provisions to the Act guiding it, checking it and controlling it, then how could such delegation be said to be unbridled? With reference to Municipal Corpn. of Delhi v. Birla Cotton, Spg. and Wvg. Mills [AIR 1968 SC 1232 : (1968) 3 SCR 251] the question of delegation of power to the Municipal Corporation and the State Government was considered which in Avinder Singh v. State of Punjab [(1979) 1 SCC 137] was referred and relied on as under: (SCC pp. 151-52, paras 22-23)*

> *"22. In Municipal Corpn. of Delhi case [AIR 1968 SC 1232 : (1968) 3 SCR 251] the proposition that where the power conferred on the corporation was not unguided, although widely worded, it could not be said to amount to excessive delegation, was upheld. Delegation coupled with a policy direction is good. Counsel emphasised that the Court had made a significant distinction between the local body with limited functions like a municipality and Government:*
>
> > *'The needs of the State are unlimited and the purposes for which the State exists are also unlimited. The result of making delegation of a tax like sales tax to the State Government means a power to fix the tax without any limit even if the needs and purposes of the State are to be taken into account. On the other hand, in the case of a municipality, however large may be the amount required by it for its purposes it cannot be unlimited, for the amount that a municipality can spend is limited by the purposes for which it is created. A municipality cannot spend anything for any purposes other than those specified in the Act which creates it. Therefore in the case of a municipal body, however large may be its needs, there is a limit to those needs in view of the provisions of the Act creating it. In such circumstances there is a clear distinction between*

delegating a power to fix rates of tax, like the sales tax, to the State Government and delegating a power to fix certain local taxes for local needs to a municipal body.'

***

23. ***It is too late in the day to contend that the jurisprudence of delegation of legislative power does not sanction parting with the power to fix the rate of taxation, given indication of the legislative policy with sufficient clarity. In the case of a body like a municipality with functions which are limited and the requisite resources also limited, the guideline contained in the expression 'for the purposes of the Act' is sufficient, although in the case of the State or Central Government a mere indication that taxation may be raised for the purposes of the State may be giving a carte blanche containing no indicium of policy or purposeful limitation.***"

(emphasis supplied)

151. Lastly, I may now refer to the judgment of the Supreme Court in ***Keshavlal Khemchand & Sons Pvt. Ltd. others vs. Union of India & others, (2015) 4 SCC 770***. The issue raised in this case was whether defining the conditions, subject to which creditor could classify an account as NPA, is a part of an essential legislative function, which could not be delegated to regulatory bodies, and the said delegation amounts to excessive delegation of legislative function. The Supreme Court negated this contention, and held as follows:-

"51. An examination of the above authorities, in our view leads to the following inferences:

51.1. The proposition that essential legislative functions cannot be delegated does not appear to be such a clearly settled

proposition and requires a further examination which exercise is not undertaken by the counsel appearing in the matter. We leave it open for debate in a more appropriate case on a future date. For the present, we confine to the examination of the question:

'Whether defining every expression used in an enactment is an essential legislative function or not?'

51.2. ***All the judgments examined above recognise that there is a need for some amount of delegated legislation in the modern world.***

51.3. ***If the parent enactment enunciates the legislative policy with sufficient clarity, delegation of the power to make subordinate legislation to carry out the purpose of the parent enactment is permissible.***

51.4. Whether the policy of the legislature is sufficiently clear to guide the delegate depends upon the scheme and the provisions of the parent Act.

51.5. ***The nature of the body to whom the power is delegated is also a relevant factor in determining "whether there is sufficient guidance in the matter of delegation".***

52. Whether defining every word employed in a statute is really necessary and whether it is a part of the essential legislative function was never the subject-matter of debate in any of these cases.

53. We are of the firm opinion that it is not necessary that the legislature should define every expression it employs in a statute. If such a process is insisted upon, legislative activity and consequentially governance comes to a standstill. It has been the practice of the legislative bodies following the British parliamentary practice to define certain words employed in any given statute for a proper appreciation of or the understanding of the scheme and purport of the Act. But if a statute does not contain the definition of a particular expression employed in it, it becomes the duty of the courts to expound the meaning of the undefined expressions in accordance with the well-established rules of statutory interpretation.

*54****. Therefore, in our opinion, the function of prescribing the norms for classifying a borrower's account***

as an NPA is not an essential legislative function. The laying down of such norms requires a constant and close monitoring of the financial system demanding considerable amount of expertise in the areas of public finance, banking, etc., and the norms may require a periodic revision. All that activity involves too much of detail and promptitude of action. *The crux of the impugned Act is the prescription that a secured creditor could take steps contemplated under Section 13(4) on the "default" ["2. (1)(j) 'default' means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor;"] of the borrower. The expression "default" is clearly defined under the Act. Even if the Act were not to be on the statute book, under the existing law a creditor could initiate legal action for the recovery of the amounts due from the borrower, the moment there is a breach of the terms of the contract under which the loan or advance is granted. The stipulation under the Act of classifying the account of the borrower as NPA as a condition precedent for enforcing the security interest is an additional obligation imposed by the Act on the creditor. In our opinion, the borrower cannot be heard to complain that defining of the conditions subject to which the creditor could classify the account as NPA, is part of the essential legislative function. If Parliament did not choose to define the expression "NPA" at all, the court would be bound to interpret that expression as long as that expression occurs in Section 13(2). In such a situation, the courts would have resorted to the following principles of interpretation:*

(i) as to how that expression is understood in the commercial world, and

(ii) to the existing practice, if any, of either the particular creditor or creditors as a class generally.

If Parliament chose to define a particular expression by providing that the expression shall have the same meaning as is assigned to such an expression by a body which is an expert in the field covered by the statute and more familiar with the subject-matter of the legislation, in our opinion, the same does not amount to any delegation of the legislative powers.

Parliament is only stipulating that the expression "NPA" must be understood by all the creditors in the same sense in which such expression is understood by the expert body i.e. RBI or other Regulators which are in turn subject to the supervision of RBI. Therefore, the submission that the amendment of the definition of the expression "non-performing asset" under Section 2(1)(o) is bad on account of excessive delegation of essential legislative function, in our view, is untenable and is required to be rejected." (emphasis supplied)

152. Mr. Kirpal has placed reliance on ***State of Madras, represented by the Secretary to the Government of Madras, Food and Agriculture Department, Fort St. George, Madras vs. Shanmuga Oil Mills, Erode, 1962 SCC OnLine Mad 40***; ***Chattanatha Karayalar vs. State of Madras, 1964 SCC OnLine Mad 292***.

153. In my view, these judgments are not necessary to be examined in the light of the consistent principles laid down by the Supreme Court, notice whereof has already been taken above, in detail.

154. Mr. Kirpal has also placed reliance on a seven judge bench decision of the Supreme Court in ***In Re: Delhi Laws Act, 1951 SCC OnLine SC 45***, and reliance has been placed particularly in Paragraph No.351, which reads as follows:-

"351. A fair and close reading and analysis of all these decisions of the Privy Council, the judgments of the Supreme Courts of Canada and Australia without stretching and straining the words and expressions used therein lead me to the conclusion that while a legislature, as a part of its legislative functions, can confer powers to make rules and regulations for carrying the enactment into operation and

effect, and while a legislature has power to lay down the policy and principles providing the rule of conduct, and while it may further provide that on certain data or facts being found and ascertained by an executive authority, the operation of the Act can be extended to certain areas or may be brought into force on such determination which is described as conditional legislation, the power to delegate legislative functions generally is not warranted under the Constitution of India at any stage. In cases of emergency, like war where a large latitude has to be necessarily left in the matter of enforcing regulations to the executive, the scope of the power to make regulations is very wide, but even in those cases the suggestion that there was delegation of "legislative functions" has been repudiated. Similarly, varying according to the necessities of the case and the nature of the legislation, the doctrine of conditional legislation or subsidiary legislation or ancillary legislation is equally upheld under all the Constitutions. In my opinion, therefore, the contention urged by the learned Attorney General that legislative power carries with it a general power to delegate legislative functions, so that the legislature may not define its policy at all and may lay down no rule of conduct but that whole thing may be left either to the executive authority or administrative or other body, is unsound and not supported by the authorities on which he relies. I do not think that apart from the sovereign character of the British Parliament which is established as a matter of convention and whose powers are also therefore absolute and unlimited, in any legislature of any other country such general powers of delegation as claimed by the Attorney General for a legislature, have been recognised or permitted."

155. I have already noticed the series of judgments rendered by the Supreme Court, including by a seven judge bench in ***The Municipal Corporation of Delhi*** (supra), which lay down the principle with regard to the delegated legislation and the tests which have to be applied to

determine whether the delegation of an essential function, and whether the same is excessive, or not. The fundamental principles which emerge from the judgments examined hereinbefore, is that if there is sufficient guideline contained in the law, than the delegate legislative power to fix the tax rates or subject of tax would not be struck down. It has also emerged from the later decisions of the Supreme Court, that in the modern day context, the executive/ government has to be vested with greater power to frame delegated legislation with the changing times and complexities.

156. Coming back to the impugned enactment, for the purpose of examining whether the delegation contained in Section 17 is excessive or not, I may, firstly, notice that the Act purports to impose tax on drawl of water for the purpose of generating electricity. Section 7 of the Act states that after the scheme for generation of hydroelectric power is accepted by the Commission, established under the Act, the Commission shall register the scheme and inform the user to execute an agreement in such a form and manner with the Commission as may be prescribed; and, pay such fee and water tax as fixed under chapter 4 of the said Act. Under Section 13, the Commission is empowered to carry out periodic inspection by an expert, to the satisfaction of the Commission and in accordance with the procedure and at such intervals, as the Commission may specify, for the

Scheme. The Commission is established under Section 20 of the Act, knows as the State Commission for Water Tax on Electricity Generation. Under Section 26 of the Act, the Commission is mandated to discharge the functions, which include *"(b) Adjudicate upon the disputes regarding Water Tax"*. Section 27 empowers the Commission with powers of Civil Court under the Code of Civil Procedure, in respect of matters such as summoning and enforcing the attendance of any witness and examining him on oath; discovery and production of any document or other material object capable of being produced as evidence; receiving of evidence on affidavits; requisition of any public record; issuing commission for examination of witnesses; reviewing its decisions, directions and orders, and; any other matter which may be prescribed. The Commission has the power to issue interim order in any proceedings, and it may authorize any person, as it may deem fit, to represent the interest of the registered users in the proceedings before it. All proceedings before the Commission shall be deemed to be judicial proceedings within the meaning of Sections 193, 219 and 228 of the Indian Penal Code and the Commission shall be deemed to be a civil court for the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedures, 1973.

157. The above provisions of the Act, to my mind, not only provide sufficient guideline to enable the State to fix the

rates of water tax by issuance of a notification, but also enable an aggrieved party to raise all disputes relating to water tax before the Commission. Firstly, the State, which is exercising the delegated legislative power, is a responsible and democratically elected State Government. The State has to generate revenue to meet its needs to fulfil its mandatory obligations of managing the affairs in the State. The data collected by the Commission, *inter alia*, by resort to Section 13 of the Act, enables the Commission to have an overall view of the prevailing situation with regard to the costs incurred by the users/ licensees, and the electricity generated by them, by using resources of the State, namely, the water, for the purpose of generation of hydropower/ hydroelectricity.

158. Section 26(b) of the Act empower the Commission to adjudicate upon disputes relating water tax, and the proceedings before the Commission are in the nature of civil proceedings. The Commission is vested with powers of a Civil Court, and therefore, can examine the grievance which the users may raise with regard to the rate of tax, fixed by the Government under Section 17 of the Act.

159. The rate of tax also has a co-relation to the amount of water that is available to be drawn for purpose of generation of electricity. This is bound to fluctuate from season to season, and year to year, depending on rainfall and temperature variation. All these factors make it necessary for

the State to have the flexibility to change the rates etc. from time to time on short notice. The rates fixed under Section 17 are not invariable. They can be altered by the State Government from time to time.

160. Last, but not the least in the eventuality of the State Government fixing the rates by way of notification, which the State legislature may disapprove of, can always be recalled, or modified by the State legislature itself, by amending the provisions of the Act, including Section 17.

161. Pertinently, it is not the case of the appellants- writ petitioners that the rates fixed by the State, as taken note of hereinabove, are excessive or prohibitive. While fixing the rates, the State is bound to take into consideration the financial viability of any such move, since users have to sell the electricity generated by them, in competition with other electricity producers in and out of the State, by adoption of the same or different technologies, such as thermal power, wind power, nuclear power etc.

162. It is obvious that the State Government cannot impose water tax in a manner, such that the cost of generation, including water tax, becomes un-remunerative for the users to be able to sell their electricity power generated by them over the grid, due to competition. These factors, by

themselves, provide a guideline, and put to restriction on the exercise of power of delegated legislation of the State.

163. For the aforesaid reasons, I reject the challenge to the power conferred on the State under Section 17 of the Act, to fix the rates of water tax by a notification, on the ground of excessive delegation of legislative function.

164. The State Government has also sought to justify the levy of tax by resort to Entry 47 of List III of the Seventh Schedule to the Constitution, which enables the State to levy a fee in respect of any of the matters specified in the said list.

165. I have read the view of my learned Brother Maithani, J. on this issue, and I agree with him that the impugned levy cannot be justified as a fee.

166. In the light of the aforesaid discussion, I hold that the Uttarakhand Water Tax on Electricity Generation Act, 2012, is valid. I hold that the said Act has been enacted by the State legislature of the State of Uttarakhand in exercise of its legislative power under Article 246(3) read with Entries 45, 49 and 50 of List II of the Seventh Schedule to the Constitution of India. I also hold that the said Act, in pith and substance, is an Act to levy tax on drawl of water for purposes of generation of electricity, and is not a tax on generation of electricity by the users of water. I also hold that the State is not estopped promissorily, or otherwise, from

enacting the impugned Act. I also hold that there is no excessive delegation of legislative function by the State legislature in authorizing the State to fix the rates of water tax under Section 17 of the Act.

167. I, therefore, uphold the conclusion drawn by the learned Single Judge in the impugned judgment, though for my own view and reasons, stated hereinabove.

168. For the aforesaid reasons, I dismiss the present special appeals and the writ petition.

169. The parties are left to bear their respective costs.

(VIPIN SANGHI, C.J.)

Dated: 25th October, 2023
NISHANT