BEFORE THE HON'BLE NATIONAL GREEN TRIBUNAL
PRINCIPAL BENCH, SITTING AT NEW DELHI
ORIGINAL APPLICATION NO. 142 OF 2022

IN THE MATTER OF:

JAYANT KUMAR. .....APPLICANT

VERSUS

MOEF & CC AND ORS. ....RESPONDENTS

I N D E X

THROUGH

Sharad

Utkarsh Sharma

SHARAD CHAUHAN & UTKARSH SHARMA
CHAMBER NO. 203, M.C SETALVAD CHAMBERS BLOCK,
SUPREME COURT OF INDIA-110001
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DATED: 10.09.2022

Original Application No. 142/2022- Jayant Kumar vs Ministry of Environment, Forest and Climate Change & Ors

Note on behalf of Respondent Nos. 5 and 6

1. The captioned matter [O.A. No. 142/2022] was listed for hearing before this Hon'ble Tribunal on 08.09.2022, when this Hon'ble Tribunal was pleased to hear the arguments advance on behalf of the parties and reserve its judgment in the matter. This Hon'ble Tribunal was further pleased to direct Respondent Nos. 5 and 6 to file a Short Note on the two aspects mentioned below:

(a) Whether the recommendations/opinion of the Committee, comprising of Regional Officer, UPPCB, Sonbhadra and Member, SEAC, contained in its Report submitted before this Hon'ble Tribunal in O.A. No. 474/2019 [Surendra Singh vs MoEF&CC & Ors] **[Annexure R-1 at Page 497 of the Reply dated 07.09.2022, filed on behalf of the Applicant to the Reply filed by Respondent No. 2 (SEIAA)]**, shall be applicable in the instant case?

(b) Whether the O.M. dated 12.12.2018 issued by MoEF&CC, by which the MoEF directed the regime of grant of Environmental Clearances under the EIA Notification, 2016, to be amended in accordance with the directions passed by this Hon'ble Tribunal in O.A. No. 186/2016 [Satendra Pandey vs MoEF&CC & Anr.], shall be applicable with retrospective effect?

2. This Note is being filed on behalf of Respondent Nos. 5 and 6 pursuant to the oral direction given by this Hon'ble Tribunal.

<u>Response to Query No. (a)</u>

3. It is respectfully submitted that Paragraph 8 of the Report dated 02.08.2019, submitted by the Committee comprising of the Regional Officer, UPPCB, Sonbhadra and Member, SEAC, before this Hon'ble Tribunal in O.A. No. 474/2019 [Surendra Singh vs MoEF & CC & Ors] is reflective only of the opinion of that particular Committee, as is clearly evident from the language contained in the said Paragraph.

4. The said opinion of the Committee did not culminate in any general binding direction being issued by either SEIAA or this Hon'ble Tribunal and it is manifestly clear from the Reply filed by Respondent No. 2 [SEIAA] in the instant case [O.A. No. 142/2022] that the Environmental Clearances granted in the instant case [on 23.10.2018] were never reopened or reappraised by SEIAA and have been treated as valid by all authorities at all times, thus leading to the inescapable conclusion that the opinion of the Committee in the Report filed in O.A. No. 474/2019 did not result in issuance of any binding direction, having the force of law, which was applied to all the EC's issued by DEIAA's all over the State of Uttar Pradesh during the period from 13.09.2018 to 12.12.2018.

5. The Committee, at the time of submitting its report in O.A. No. 474/2019 and giving its opinion in Paragraph 8 therein, was perhaps not mindful of the large-scale and long-term implications of the opinion being rendered by it. If the opinion

of the Committee was to be accepted and a corresponding general binding direction was to be issued by SEIAA or this Hon'ble Tribunal, then such a direction shall necessarily be applicable to and shall have to be issued **in respect of all the EC's granted by DEIAA's all over the country during the period from 13.09.2018 to 12.12.2018**, which number may be in thousands. That is the probable reason as to why the opinion of the Committee, submitted in O.A. No. 474/2019, was not given effect to by SEIAA, because of the same would have resulted in turning back the clock and opening a pandora's box. It is also pertinent to mention that at no point of time was any notice or correspondence received by Respondent Nos. 5 and 6 from SEIAA or any other authority, directing them to apply afresh before SEIAA for reappraisal, and their EC's continued to be treated as valid at all times.

6. It is respectfully submitted that the facts of the instant case, wherein the impugned EC's were granted four years back on 23.10.2018, do not merit the opinion of the Committee, submitted in O.A. No. 474/2019, to be made applicable in the instant case. The same shall amount to turning back the clock by four years, apart from unsettling the entire regime of grant of Environmental Clearances and causing huge amount of uncertainty and confusion in the industrial circles.

<u>Response to Query No. (b)</u>

7. The position of law is well settled that a law/notification/ OM/judgment cannot be given retrospective direction unless specifically indicated.

8. It is respectfully submitted that the judgment passed by this Hon'ble Tribunal on 13.09.2018 in O.A. No. 186/2016 [Satendra Pandey vs MoEF&CC & Anr.] did not merely declare the position of law as it always existed but through its directions, held that the EIA Notification, 2016 does not seem to be in consonance with the judgment passed by the Hon'ble Supreme Court in Deepak Kumar vs State of Haryana [(2012) 4 SCC 629] and hence this Hon'ble Tribunal directed MoEF to take appropriate steps to bring the procedure laid down in EIA Notification, 2016 [dated 15.01.2016] in conformity with the letter and spirit of the directions passed in the Deepak Kumar case.
9. It is pertinent to mention that by way of judgment dated 13.09.2018, this Hon'ble Tribunal neither quashed nor granted a stay on the operation of the EIA Notification dated 15.01.2016 and all over the country, DEIAA's continued to function and grant EC's in accordance with the old regime, till the time the OM dated 12.12.2018 was issued by MoEF, in compliance of judgment dated 13.09.2018 passed by this Hon'ble Tribunal. It was nowhere mentioned in O.M. dated 12.12.2018 that it shall have effect with retrospective/ backdated effect and hence there is absolutely no question of the EC's granted by DEIAA's all over the country, during the period from 13.09.2018 to 12.12.2018, such as those granted to Respondent Nos. 5 and 6 in the instant case, being brought into question, especially after the passage of four years since their grant.

10. Respondent Nos. 5 and 6 seek to rely on the following judgments in support of their submission that unless specifically indicated, an OM/Notification/judgment/statute cannot be made applicable with retrospective effect:

(a) Assistant Excise Commissioner, Kottayam & Ors vs Esthappan Cherian & Anr. [(2021) 10 SCC 210]

Relevant Paragraphs: 16, 17 and 22

(b) Commissioner of Income Tax (Central-I), New Delhi vs Vatika Township Private Limited [(2015) 1 SCC 1]

Relevant Paragraphs: 28 and 29

(c) Union of India & Anr. vs IndusInd Bank Limited & Anr. [(2016) 9 SCC 720]

Relevant Paragraphs: 18 to 24

(d) The Income Tax Officer, Alleppey vs M.C. Ponnoose & Ors Etc. [(1969) 2 SCC 351]

Relevant Paragraphs: 5

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(2021) 10 Supreme Court Cases 210

2J

(BEFORE L. NAGESWARA RAO AND S. RAVINDRA BHAT, JJ.)

ASSISTANT EXCISE COMMISSIONER,
KOTTAYAM AND OTHERS . . Appellants;

Versus

ESTHAPPAN CHERIAN AND ANOTHER . . Respondents.

Civil Appeal No. 5815 of 2009†, decided on September 6, 2021

A. **Entertainment, Amusement, Leisure and Sports — Liquor — Kerala Abkari Shops Departmental Management Rules, 1972 — R. 13 r/w R. 10 of 1974 Rules — R. 13 as amended, held, is prospective — Amount collected as departmental management fee to be given as credit towards dues from licensee — Cancellation of country liquor licence for not replenishing security in timely manner — Contracts entered into before amendment of R. 13 of 1972 Rules, which is prospective in nature — Therefore licensee, held, was liable to pay only actual loss suffered by Government, in realisation of rentals and excise duty — Hence, amounts calculated as departmental management fees had to be adjusted thereagainst**

— Licensee, a successful bidder for arrack shops for the year 1993-1994, had entered into an agreement with State — Alleging that licensee committed default in payment of bid amount, in not replenishing security in a timely manner, State issued a show-cause notice — Later, alleging that licensee failed to replenish security amount, licence was cancelled by an order of State — When State initiated recovery proceedings it did not give credit of amounts collected under head of department management fee, as was required under pre-existing R. 13 of 1972 Rules — Main contention was that amounts collected as departmental management fee were not adjustable — However in present case, contracts in question were entered into before amendment of R. 13 of 1972 Rules — Hence, they were not to be treated as those transactions for which amounts were non-adjustable

— There is no indication that amended R. 13 of 1972 Rules applied retrospectively — There is profusion of judicial authority on proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary — Another equally important principle applies, that in the absence of express statutory authorisation, delegated legislation in form of rules or regulations, cannot operate retrospectively — In these circumstances, amounts calculated by the State as departmental management fees for period in question, when it actually was in charge of vend, and carried out transactions, had to be adjusted — In other words, amounts collected could not be again recovered as department management

† Arising from the Judgment and Order in *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750 (Kerala High Court, Writ Appeal No. 1260 of 2002, dt. 6-6-2008)

fees — Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — R. 10 — Administrative Law — Subordinate/Delegated Legislation — Retrospective/ Retroactive Operation/Retrospectivity — Delegated legislation when may have retrospective operation — Principles reiterated

B. **Entertainment, Amusement, Leisure and Sports — Liquor — Trade, Sale, Supply and Taxation of Liquor — Kerala Abkari Shops Departmental Management Rules, 1972 — R. 13 r/w R. 10 of 1974 Rules — Cancellation of country liquor licence for not replenishing security in timely manner — Department management fee — Adjustment of amount in Amnesty Scheme introduced by State — Rejection of, by State on ground that department management fee could not be adjusted against arrears — Validity**

— Supreme Court had permitted to deposit 50% of amount payable to Government, in terms of a subsequent Amnesty Scheme, framed in 2011 — Upon payment of 50% of amount licensee permitted to deposit balance amount in two months — State directed to release property of licensees from attachment — Liquor — Trade, Sale, Supply and Taxation of Liquor — Kerala Abkari Shops (Disposal in Auction) Rules, 1974, R. 10

The licensee entered into an agreement with the State on 1-4-1993. Alleging that the licensee committed default in the payment of the bid amount, in not replenishing the security in a timely manner, the State issued a show-cause notice on 23-7-1993 eliciting a response as to why action should not be taken. Later, alleging that the licensee failed to replenish the security amount, the licence was cancelled by an Order dated 19-8-1993, of the State.

The licensee preferred a writ petition for a declaration that the cancellation of the licensee for sale of country liquor for the period 1-4-1993 to 31-3-1994 was illegal and void and that its liability with respect to Group-II arrack shops for the year 1993-1994 ended upon the cancellation taking place. It sought to limit its liability for the period April 1993 to 19-8-1994. The petition was dismissed by the Single Judge. Aggrieved with this, the licensee preferred an appeal to the Division Bench of the High Court. The Division Bench of the High Court by a short order, impugned in the present appeal, followed its previous decision and held that since the contracts were entered into before the amendment of Rule 13 of the Kerala Abkari Shops Departmental Management Rules, 1972, the licensee was liable to pay only the actual loss suffered by the Government, in realisation of rentals and excise duty.

Held :

There cannot be any dispute that contracts entered into before amendment of Rule 13 of 1972 Rules, as in this case, were not to be treated as those transactions for which amounts were non-adjustable. There is no indication that Rule 13 of the 1972 Rules applied retrospectively. (Paras 15 to 19)

Lucka v. *State of Kerala*, OP No. 8271 of 1994, Order dated 11-8-2000 (Ker), *approved*
State of Kerala v. *K.E. Bhaskaran*, 2008 SCC OnLine SC 1957, *referred to*

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Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. A rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. Further, in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively. (Paras 16 to 18)

CIT v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1; *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 (HL); *CIT* v. *M.C. Ponnoose*, (1969) 2 SCC 351; *Hukam Chand* v. *Union of India*, (1972) 2 SCC 601; *RTO* v. *Associated Transport Madras (P) Ltd.*, (1980) 4 SCC 597 : 1981 SCC (Tax) 9; *Federation of Indian Mineral Industries* v. *Union of India*, (2017) 16 SCC 186; *Union of India* v. *G.S. Chatha Rice Mills*, (2021) 2 SCC 209, *applied*

Phillips v. *Eyre*, (1870) LR 6 QB 1, *approved*

In these circumstances, the amounts calculated by the State as departmental management fees for the period September 1993 to March 1994, when it actually was in charge of the vend, and carried out transactions, had to be adjusted. In other words, the amounts collected could not be again recovered as department management fees. (Para 19)

An Amnesty Scheme was introduced by the State (by an Order dated 26-5-2008), in 2008. The respondent sought to deposit amounts in terms of the said scheme. However, the State rejected this request by its Letter dated 25-8-2008, contending that the department management fee could not be adjusted against arrears. Supreme Court permitted the respondent to deposit 50% of the amount it claimed as payable to the Government, in terms of a subsequent Amnesty Scheme, framed in 2011. By the Order dated 8-12-2008 Supreme Court clarified the previous Order dated 29-3-2011, regarding deposit of amounts under the Amnesty Scheme, and it was directed that the light of the fact that Amnesty Scheme was extended up to 31-3-2011, that the petitioner may deposit 50% of the amount due within one week from today, and the balance into monthly instalments in court. (Para 20)

Excise Commr. v. *Esthappan Cherian*, 2011 SCC OnLine SC 1584; *Excise Commr.* v. *Esthappan Cherian*, 2008 SCC OnLine SC 1958, *considered*

In view of the above the following direction is passed in the present case: upon payment of 50% of the amount i.e. 50% of Rs 40,51,288 within two months from today, the respondent's liabilities towards the arrears of dues for the liquor vend in issue which was cancelled by the appellant State's Order dated 30-9-1993 shall stand discharged. The State is hereby directed to release the respondent's property attached and sought to be sold, towards satisfaction of the above liability, upon receiving the said balance 50% of the amount within two months or latest within four weeks of receipt of the amount. (Para 24)

Esthappan Cherian v. *Excise Commr.*, 2008 SCC OnLine Ker 750, *affirmed with directions*

Esthappan Cherian v. *Excise Commr.*, OP No. 8318 of 1994, order dated 1-2-2002 (Ker), *reversed*

Excise Commr. v. *Esthappan Cherian*, 2014 SCC OnLine SC 1824, *referred to*

Appeal dismissed RM-D/67979/C

Chronological list of cases cited ***on page(s)***

1. (2021) 2 SCC 209, *Union of India* v. *G.S. Chatha Rice Mills* 219*e*
2. (2017) 16 SCC 186, *Federation of Indian Mineral Industries* v. *Union of India* 219*d-e*
3. (2015) 1 SCC 1, *CIT* v. *Vatika Township (P) Ltd.* 218*c*
4. 2014 SCC OnLine SC 1824, *Excise Commr.* v. *Esthappan Cherian* 215*g*
5. 2011 SCC OnLine SC 1584, *Excise Commr.* v. *Esthappan Cherian* 215*e-f*, 219*g*, 220*a*
6. 2008 SCC OnLine SC 1958, *Excise Commr.* v. *Esthappan Cherian* 215*f*, 220*a*
7. 2008 SCC OnLine SC 1957, *State of Kerala* v. *K.E. Bhaskaran* 220*d*
8. 2008 SCC OnLine Ker 750, *Esthappan Cherian* v. *Excise Commr.* 213*e-f*, 214*c-d*, 214*d-e*, 217*b-c*, 221*d*
9. OP No. 8318 of 1994, order dated 1-2-2002 (Ker), *Esthappan Cherian* v. *Excise Commr.* **(reversed)** 214*c*
10. OP No. 8271 of 1994, order dated 11-8-2000 (Ker), *Lucka* v. *State of Kerala* 214*c-d*, 214*f*, 215*e*, 217*b-c*, 217*c*, 218*a-b*, 219*e*, 220*c*, 220*d*
11. (1994) 1 AC 486 : (1994) 2 WLR 39 (HL), *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.* 218*f-g*
12. (1980) 4 SCC 597 : 1981 SCC (Tax) 9, *RTO* v. *Associated Transport Madras (P) Ltd.* 219*d-e*
13. (1972) 2 SCC 601, *Hukam Chand* v. *Union of India* 219*d-e*
14. (1969) 2 SCC 351, *CIT* v. *M.C. Ponnoose* 219*a-b*
15. (1870) LR 6 QB 1, *Phillips* v. *Eyre* 218*e-f*

The Judgment of the Court was delivered by

S. RAVINDRA BHAT, J.— The State of Kerala is aggrieved by the judgment of the Kerala High Court, which allowed[1] the respondent's (hereafter called "the licensee") writ petition whereby he claimed for an order quashing a demand in respect of a certain amount towards the balance sought to be recovered after a country liquor licence was cancelled.

2. The licensee was the successful bidder for arrack shops in the State of Kerala for the year 1993-1994; the bid amount it offered was Rs 60 lakhs. A permit for import of 13,00,920 litres of rectified spirit was awarded. The excise duty payable for the designated quantity, monthly was Rs 3,58,162. The licensee entered into an agreement with the State on 1-4-1993. Alleging that the licensee committed default in the payment of the bid amount, in not replenishing the security in a timely manner, the State issued a show-cause notice on 23-7-1993 eliciting a response as to why action should not be taken. Later, alleging that the licensee failed to replenish the security amount, the licence was cancelled by an Order dated 19-8-1993, of the State.

1 *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750

3. The licensed shops were put up for re-auction on seven different dates. However, the re-auction was unsuccessful as there were no bidders. As a consequence, the shops were managed by the Department of Excise in terms of the Kerala Abkari Shops Departmental Management Rules, 1972 (hereafter "the Management Rules"). A sum of Rs 14,94,570 was collected as departmental management fee and Rs 16,50,971 was collected as duty on rectified spirit for the period 13-9-1993 to 31-3-1994. The State argued that had the licensee continued operating the shop, it would have gained revenues to the tune of Rs 1,09,87,989. It accordingly demanded dues, from the licensee.

4. The licensee preferred a writ petition for a declaration that the cancellation of the licensee for sale of country liquor for the period 1-4-1993 to 31-3-1994 was illegal and void and that its liability with respect to Group-II arrack shops for the year 1993-1994 ended upon the cancellation taking place. It sought to limit its liability for the period April 1993 to 19-8-1994. The petition was dismissed[2] by the Single Judge. Aggrieved with this, the licensee preferred an appeal to the Division Bench. The Division Bench by a short order-impugned[1] in the present appeal-followed its previous decision[3] and held that since the contracts were entered into before the amendment of Rule 13, the licensee was liable to pay only the actual loss suffered by the Government, in realisation of rentals and excise duty. The Court directed the Government to issue fresh demands in accordance with the rules and agreements executed with the licensee covering only the actual loss.

5. It is argued on behalf of the State that there was no challenge to Rule 13 of the Management Rules, and as a result, the impugned order[1] was not justified in holding that the licensee was liable only for a limited period. Pointing to the language of Rule 13, it is submitted that with effect from 23-12-1993 an amendment was made in terms of which the question of adjustment of any liability did not arise. The learned counsel contrasted this with the pre-existing or old Rule 13, which permitted credit of departmental management fee and other amounts realised during the currency of the term of management by the State, as against the overall liability of the previous licensee.

6. It was submitted by the State that the Division Bench fell into error in relying upon its previous judgment[3] which had declared that licenses entered into prior to 23-12-1993 were not covered by the amendment. Urging that the decision of the State was based upon its policy not to give credit, the learned counsel highlighted that this was premised on its understanding of the statute. The learned counsel also submitted that it is only where resale licensees had entered the picture that the department management fee collected from the date of confirmation of the resale (of the vend or particular shop) could be given credit to reduce from resale purchases if the latter completed the security. However, the departmental management fee that could be given credit to the original contractor would be forfeited if he had not completed the security.

2 *Esthappan Cherian* v. *Excise Commr.*, OP No. 8318 of 1994, order dated 1-2-2002 (Ker)
1 *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750
3 *Lucka* v. *State of Kerala*, OP No. 8271 of 1994, order dated 11-8-2000 (Ker)

Relying upon this condition in the old Rule, the learned counsel sought to argue that in the present case, the licensee had in fact not replenished the security; the
a security that he originally deposited was adjusted towards the amounts due for the three months payable after the auction. Thus, in August, the security had not been replenished and in these circumstances, having regard to the express terminology of the old rule, there was no question of giving any credit to the licensee. It was argued that rather the entire liability sought to be recovered, was justifiably so. In the case of the licensee it worked out to over Rs 77,65,189
b with interest @ 18% p.a.

7. Mr Roy Abraham, learned counsel appearing for the licensee urged this Court not to interfere with the findings and order of the High Court. He relied upon the circumstance that the contract in the present case was entered into on 1-4-1993. It was submitted that, therefore, the question of the new rule (which
c came into force on 23-12-1993) applying to deny the adjustment of the amounts which were directly recovered by the Department as management fees from the overall liability, did not arise. It was emphasised that importantly, the rules were brought into force after the termination of the licence, which occurred on 19-8-1993. However, the rules were amended on 23-12-1993. Therefore, the amendments were inapplicable to a past event i.e. the respondent, whose licence
d had been terminated earlier. It was argued that even otherwise, the licensee cannot be made liable for non-payment of dues for the entire period, since the department itself ran the outlets and recovered departmental management fee as well as excise duties.

8. It was also argued that the Division Bench correctly relied on its previous ruling in *Lucka* v. *State of Kerala*[3] where the amended Rule 13 was held
e inapplicable to contracts awarded or entered into previously. It was also urged that the State had issued Amnesty Policies in 2008 and later in 2011. Despite the judgment of the High Court, the respondent's application for relief under the Amnesty Scheme of 2008 was rejected without rhyme or reason. It was also pointed out that this Court permitted[4] the respondent to deposit 50% of
f the admitted amount, under interim orders[5], in terms of the 2011 scheme. The learned counsel stated that such amounts were deposited but by then the State apparently had used its powers and taken over immovable property belonging to the respondent, which was put to auction to realise the arrears in terms of the demands, which had been quashed. The State itself bid Rs 1 and sought to appropriate the property. However, when the respondent applied for interim
g relief, this Court directed[6] the State to maintain status quo.

3 OP No. 8271 of 1994, order dated 11-8-2000 (Ker)
h 4 *Excise Commr.* v. *Esthappan Cherian*, 2011 SCC OnLine SC 1584
5 *Excise Commr.* v. *Esthappan Cherian*, 2008 SCC OnLine SC 1958
6 *Excise Commr.* v. *Esthappan Cherian*, 2014 SCC OnLine SC 1824

Analysis and Conclusions

9. The facts stated shows that the licensee was a successful bidder in an auction held by the State of Kerala and had deposited a security amount, to ensure the timely payment of the amounts (kist) due in terms of the contract entered into. Alleging that the licensee did not remit the kist due to the State in a timely manner, a show-cause notice was issued and eventually the licence was cancelled. Indisputably the licence entered into was effective for the period, commencing from 1-4-1993. The cancellation of licence occurred by an Order dated 19-8-1993. The State repeatedly put up the shops in question for auction-seven times, but was unsuccessful in securing the proper bids. Therefore, it had to manage the shops—which it did. The shops appear to have been re-auctioned subsequently and given out in the next financial year. For the period 13-9-1993 (when the State took over the possession) to 31-3-1994 the State collected Rs 14,94,570 as departmental management fee and Rs 16,59,771 as excise duty on rectified spirit. The State contended, that had the licensee continued, it would have obtained Rs 1,09,87,989.

10. The state's case is that the licensee had deposited Rs 18,00,000 as security and Rs 7,16,324 by way of excise duty and Rs 6,39,800 as kist dues for April (total amount of Rs 31,56,124). The relevant rule before its amendment, is extracted below:

> "**13.** ***Departmental management fee to be given credit of.***—The amount collected as departmental management fee may be given credit towards the dues from the original contractor provided he had completed the security and such credit shall be given only up to the date of confirmation of the resale, if any. In the case of resale purchasers, the departmental management fee collected from the date of confirmation of the resale may be given credit towards the dues from the resale purchaser, if he completes the security. The departmental management fee that may be given credit to the Original, contractor shall be forfeited if he had not completed the security. Similarly, the departmental management fee that may be given credit to the resale purchaser shall be forfeited if he fails to complete the security."

11. The rule was amended with effect from 23-12-1993. The amended Rule 13 is as under:

> "**13.** ***Departmental management fee to be given credit of.***—The departmental management fee collected from a shop while it was under departmental management due to default of payment of security, kist, excise duty, etc. shall be liable to forfeiture:
>
> Provided that where the licensee dies during the currency of a licence, the amount collected as departmental management fee may be credited towards his kist amount."

12. The petitioner deposited Rs 31,81,800 being 30% of the bid amount as security deposit in terms of Rule 10 of Chapter IV of Abkari (Disposal in Auction) Rules. This constituted the cash security for due performance of the conditions of the licence. The amount was to be credited towards kist dues for "*the last two or more instalments as the case may be of the contract unless previously appropriated under the rules as per Rule 5(19) of the Abkari Shops (Disposal in Auction) Rules*". There are 10 instalments of kist. Each kist fell due on the 10th day of each and every subsequent month. A period of 15 days is allowed, from 10th onwards as the grace period to remit the kist instalment under Rule 6(28) of the Abkari (Disposal in Auction) Rules. The petitioner was to pay seven instalments of kist up to 10-10-1992, leaving three instalments to be adjusted from security deposit, provided he had fulfilled all the conditions of the licence.

13. This court notices that the impugned judgment[1] relied on a previous Division Bench[3] ruling of the High Court, which dealt with the applicability of the amended Rule 13 to pre-existing contracts, and held that the condition of non-adjustability was inapplicable for contracts entered into, and vends auctioned, before it came into force. In that judgment, *Lucka* v. *State of Kerala*[3] the High Court had to deal with a similar situation i.e. the rules applicable in the event of cancellation of an excise liquor vend. The Court held that:

> "On combined reading of the provisions of the Act and the Rules, especially Section 8 of the Act and Rules 5, 10, 15 and 16 of the Abkari Shops Disposal Rules and Rule 13 of the Abkari Shops Departmental Management Rules, shows that due to the cancellation of the contract of the licensees any losses suffered by the revenue loss has to be reimbursed by the licensees. While calculating the loss amount obtained by the departmental management also should be taken into account and given credit as to that amount was received by the Government and only after deducting the same actual loss can be found out. The words "at the risk" shows that only the actual loss suffered can be recovered from the licensees. This is apart from imposing any damages by the Government, according to law or passing a discretionary or order by the Excise Commissioner regarding the future of departmental fee for valid reasons after issuing show-cause notice at the time when the licences were cancelled."

14. The Division Bench also held that:

> "With regard to Abkari contracts entered in 1992-93, there is not a question for dispute at all, as the contract period was over on 31-3-1993, before the amendment of rules and admittedly amended rules are not applicable and if no damages by way of kist ordered at the time of cancellation on the basis of amended Rule 13, no recovery steps can be issued with legal contracts and licensees for the Abkari year 1992-93. Other contracts and licence under question in these original petitions were also entered before the amendment of the rules with effect from 1-4-1993. The amendment of Rules 13 was made on in December 1993. Therefore, contracts, executed after the amendment of rules may be bound by it if the

1 *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750
3 *Lucka* v. *State of Kerala*, OP No. 8271 of 1994, order dated 11-8-2000 (Ker)

rules are valid. But contracts covered in these years were executed prior to the amendment of the above rule."

a **15.** In this case, it is evident that when the State initiated recovery proceedings it did not give credit of the amounts collected under the head of department management fee-as was required under pre-existing Rule 13. Its main contention before this Court is that amounts collected as departmental management fee were not adjustable. In view of the decision in *Lucka*[3], there cannot be any dispute that contracts entered into before amendment of Rule 13 —as in this case—were not to be treated as those transactions for which b amounts were non-adjustable. There is no indication that Rule 13 applied retrospectively.

16. There is profusion of judicial authority on the proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. In *CIT* v. *Vatika Township (P) Ltd.*[7] this Court, c speaking through a Constitution Bench, observed as follows: (SCC pp. 21-22, paras 28-29)

"*28.* Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea d behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have e been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in *Phillips* v. *Eyre*[8], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing f law.

29. The obvious basis of the principle against retrospectivity is the principle of "fairness", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*[9] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability g have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law

3 *Lucka* v. *State of Kerala*, OP No. 8271 of 1994, order dated 11-8-2000 (Ker)
7 (2015) 1 SCC 1 h
8 (1870) LR 6 QB 1
9 (1994) 1 AC 486 : (1994) 2 WLR 39 (HL)

available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

17. Another equally important principle applies: in the absence of express statutory authorisation, delegated legislation in the form of rules or regulations, cannot operate retrospectively. In *CIT* v. *M.C. Ponnoose*[10] this rule was spelt out in the following terms: (SCC p. 354, para 5)

"*5.* … The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."

18. The principle has been affirmed in many decisions such as *Hukam Chand* v. *Union of India*[11], *RTO* v. *Associated Transport Madras (P) Ltd.*[12]; *Federation of Indian Mineral Industries* v. *Union of India*[13] and recently, in *Union of India* v. *G.S. Chatha Rice Mills*[14].

19. The decision in *Lucka*[3], therefore, correctly stated the law. In these circumstances, the amounts calculated by the State as departmental management fees for the period September 1993 to March 1994, when it actually was in charge of the vend, and carried out transactions, had to be adjusted. In other words, the amounts collected could not be again recovered as department management fees. Likewise, it is not in dispute that during the same period, the State was able to collect revenue i.e. excise duty, as well of Rs 16 lakhs.

20. It appears that an Amnesty Scheme was introduced by the State (by an Order dated 26-5-2008), in 2008. The respondent sought to deposit amounts in terms of the said scheme. However, the State rejected this request by its Letter dated 25-8-2008, contending that the department management fee could not be adjusted against arrears. This court permitted[4] the respondent to deposit 50% of

10 (1969) 2 SCC 351 : (1970) 1 SCR 678
11 (1972) 2 SCC 601 : (1973) 1 SCR 896
12 (1980) 4 SCC 597 : 1981 SCC (Tax) 9
13 (2017) 16 SCC 186
14 (2021) 2 SCC 209
3 *Lucka* v. *State of Kerala*, OP No. 8271 of 1994, order dated 11-8-2000 (Ker)
4 *Excise Commr.* v. *Esthappan Cherian*, 2011 SCC OnLine SC 1584

the amount it claimed as payable to the Government, in terms of a subsequent Amnesty Scheme, framed in 2011. By the Order dated 8-12-2008[5] this Court clarified the previous Order dated 29-3-2011[4], regarding deposit of amounts under the Amnesty Scheme: (*Esthappan Cherian*[4], SCC OnLine SC para 2) a

> "2. We accordingly direct in the light of the fact that Amnesty Scheme has been extended up to 31-3-2011, that the petitioner may deposit 50% of the amount due within one week from today, and the balance amount in two monthly instalments in court."

b

21. According to the respondent, the reduced arrears are Rs 40,51,288 in terms of Amnesty Scheme issued on 26-5-2008. The licensee respondent had applied under the scheme; however, the appellant State refused to process it on the ground that since the licence was cancelled due to non-replenishment of security, the departmental management fee collected could not be adjusted.

c

22. This court had noticed that the Division Bench in *Lucka*[3], correctly reasoned that the amended Rule 13 was inapplicable to contracts previously awarded or entered into. The sequitur is that departmental management fee collected by the State, for the period the vend (or outlet) was in its direct management, could not be recovered again, and had to be adjusted. Apparently, the State had preferred appeals, by special leave from the common judgment in *Lucka*[3]. Those appeals were ultimately dismissed on 19-2-2008[15]. In these circumstances, and having regard to the principle that retrospectivity cannot be presumed, unless there is clear intention in the new rule or amendment, it is held that there is no infirmity with the judgment of the High Court. d

23. The findings and conclusions previously recorded would have been dispositive of the issues arising in this appeal. However, this Court is mindful of the fact that the respondent had succeeded before the High Court and was thus entitled to claim adjustment of the departmental management fees, for the period after its contract was terminated. The respondent was also entitled to claim relief under the Amnesty Scheme, which was denied to it despite having succeeded before the High Court. Eventually, when the Scheme was announced afresh in 2011, this Court permitted the respondent to deposit 50% of the admitted amount[16]. Having regard to the overall circumstances, it would be in the fitness of things if the respondent is permitted to deposit the balance — for which it is hereby granted two months to do so. This shall be considered as closure and discharge of this liability so far as payment of amounts under the contract cancelled on 13-9-1993, are concerned. Since the respondent had approached this Court complaining that the State had sought to auction his properties, a status quo order was made, binding the parties not to take fresh e f g

5 *Excise Commr.* v. *Esthappan Cherian*, 2008 SCC OnLine SC 1958
4 *Excise Commr.* v. *Esthappan Cherian*, 2011 SCC OnLine SC 1584
3 *Lucka* v. *State of Kerala*, OP No. 8271 of 1994, order dated 11-8-2000 (Ker)
15 *State of Kerala* v. *K.E. Bhaskaran*, 2008 SCC OnLine SC 1957
16 The admitted amount being Rs 40,51,288 h

steps. In view of the findings recorded, the State has to ensure that the property of the respondent is released from attachment and due possession is handed back to the latter within the same period of two months.

24. In the light of the above discussion, following directions are hereby given:

24.1. Upon payment of 50% of the amount i.e. 50% of Rs 40,51,288 within two months from today, the respondent's liabilities towards the arrears of dues for the liquor vend in issue which was cancelled by the appellant State's Order dated 30-9-1993 shall stand discharged.

24.2. The State is hereby directed to release the respondent's property attached and sought to be sold, towards satisfaction of the above liability, upon receiving the said balance 50% of the amount within two months or latest within four weeks of receipt of the amount.

24.3. The respondent shall not be liable to pay any interest for the upheld payment or for any other reason whatsoever, on the principal amount i.e. Rs 40,51,288. The State shall refrain from initiating any proceedings for its recovery towards arrears for the said period the contract was to be in operation i.e. 1993-1994.

25. The impugned judgment[1] is accordingly upheld. The appeal is dismissed but in terms of the directions contained in the preceding paragraph. The parties are left to bear their own costs.

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1 *Esthappan Cherian* v. *Excise Commr.*, 2008 SCC OnLine Ker 750

THE SUPREME COURT CASES

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(2015) 1 Supreme Court Cases 1

(BEFORE R.M. LODHA, C.J. AND JAGDISH SINGH KHEHAR, JASTI CHELAMESWAR, DR A.K. SIKRI AND ROHINTON FALI NARIMAN, JJ.)

COMMISSIONER OF INCOME TAX (CENTRAL)-I, NEW DELHI . . Appellant;

Versus

VATIKA TOWNSHIP PRIVATE LIMITED . . Respondent.

Civil Appeals No. 8750 of 2014† with Nos. 8752-56, 8758-60, 8762-70, 8772-77, 8779-80 of 2014 and 1160 of 2007, decided on September 15, 2014

A. **Income Tax Act, 1961 — S. 113 proviso (ins. w.e.f. 1-6-2002) — Prospective or clarificatory/curative/retrospective — Provision for levy of surcharge on tax on undisclosed income found during search and seizure for the block assessment period, introduced by insertion of proviso to S. 113 by Finance Act, 2002 — Nature of — Held, prospective in operation**

— The charge in respect of the surcharge created for the first time by insertion of the proviso to S. 113, is clearly a substantive provision and hence is to be construed as prospective in operation — The amendment neither purports to be merely clarificatory/retrospective nor is there any material to suggest that it was so intended by Parliament — Furthermore, an amendment made to a taxing statute can be said to be intended to remove "hardships" only of the assessee, not of the Department — On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the said proviso effective from 1-6-2002 — *Suresh N. Gupta*, (2008) 4 SCC 362, overruled — Hence, appeals of assessees allowed, deleting the surcharge levied by the assessing officer for block assessment pertaining to the period prior to 1-6-2002 — Constitution of India — Art. 271 — Interpretation of Statutes — External Aids — Notes on Clauses of a Bill — Relevance of

† Arising out of SLP (C) No. 540 of 2009. From the Judgment and Order dated 17-4-2007 of the High Court of Delhi at New Delhi in ITA No. 375 of 2007

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a

B. **Income Tax — Levy of tax — Essential prerequisites — Certainty as to rate of tax — Surcharge on tax on block assessment of undisclosed income — Levy of, by insertion of proviso to S. 113 of the Income Tax Act by Finance Act, 2002 — Prospective or retrospective/clarificatory — Determination of**

b

— Surcharge as per the existing provision was not leviable on block assessment qua undisclosed income prior to 1-6-2002 — Rate at which tax is to be imposed is an essential component of tax and where the rate is not stipulated or it cannot be applied with precision, it would be difficult to tax a person — In absence of certainty about the rate because of uncertainty about the date with reference to which the rate of surcharge is to be applied, held, it cannot be said that surcharge was leviable on block assessment qua undisclosed income with retrospective effect — Hence, proviso to S. 113 of IT Act not clarificatory/retrospective in nature — Income Tax Act, 1961 — S. 113 proviso (ins. w.e.f. 1-6-2002) — Not retrospective c

C. **Income Tax — CBDT/Notifications/Circulars/Instructions — Understanding of CBDT revealed thereby — Relevance — When binding on Revenue — Block assessment — Question of whether levy of surcharge on tax on undisclosed income found during search and seizure for the block assessment period, introduced by insertion of proviso to S. 113 by Finance Act, 2002 was prospective or clarificatory/retrospective — Clarification given by CBDT in its Circular dt. 27-8-2002, provided that said amendment along with amendments in S. 158-BE, was prospective i.e. it will take effect from 1-6-2002 — In view thereof, held, the understanding of CBDT itself regarding this provision clarifies the provision beyond any pale of doubt as to its prospective nature — Income Tax Act, 1961 — S. 113 proviso (ins. w.e.f. 1-6-2002) — CBDT Circular No. 8 of 2002 dt. 27-8-2002, "Finance Act, 2002 Explanatory Notes on Provision relating to Direct Taxes"** d e

Held :

The relevant provisions pertaining to the surcharge on block assessment are contained in Chapter XIV-B of the IT Act. The purpose of this Chapter is to lay down a special procedure for assessment of search cases with a view to combat tax evasion and also to expedite and simplify assessments in search cases. Insofar as rates of tax chargeable in case of block assessment is concerned, that is not provided in the Finance Acts. Pertinently, the provision to this effect has been made in the Income Tax Act itself and is contained in Section 113 of the IT Act. It is thus clear that though provision for surcharge under the Finance Acts has been in existence since 1995, insofar as levy of surcharge for block assessment is concerned, it was only introduced by insertion of aforesaid proviso to Section 113 of the IT Act. (Paras 11 to 17) f g

The choice of a particular date would have material bearing on the payment of surcharge. Not only is the surcharge different for different years, it varies according to the category of assessees and for some years, there is no surcharge at all. Rate at which tax, or for that matter surcharge is to be levied is an essential component of the tax regime. The rate at which the tax is to be imposed is an essential component of tax and where the rate is not stipulated or it cannot be h applied with precision, it would be difficult to tax a person. In absence of certainty about the rate because of uncertainty about the date with reference to which the rate of surcharge is to be applied, it cannot be said that surcharge as per the existing provision was leviable on block assessment qua undisclosed income. Therefore, it cannot be said that the proviso added to Section 113 of the IT Act defining the said date was only clarificatory in nature. (Para 39)

Govind Saran Ganga Saran v. *CST*, 1985 Supp SCC 205 : 1985 SCC (Tax) 447; *CIT* v. *B.C. Srinivasa Setty*, (1981) 2 SCC 460 : 1981 SCC (Tax) 119, *affirmed*

CIT v. *Suresh N. Gupta*, (2008) 4 SCC 362, *referred to*

Furthermore, considering the deliberations on this issue at the Conference of Chief Commissioners on the rate of surcharge applicable, it becomes clear that as per the provisions then enforced (i.e. prior to the insertion of the proviso concerned w.e.f. 1-6-2002), levy of surcharge in the block assessment on the undisclosed income was a difficult proposition. It is for this reason retrospective amendment to Section 113 was suggested. Notwithstanding the same, the legislature chose not to do so. Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof; and took note of the reasons which led to the insertion of the proviso, that the amendment is to operate prospectively. Contrary to the language used in the Finance Act, 2002 in respect of the other amendments, insofar as amendment to Section 113 is concerned, there is no language used which makes it clarificatory/retrospective. Rather, a specific stipulation is added making the provision effective from 1-6-2002. (Para 42)

Further, the understanding of CBDT itself regarding this provision makes the position clear. It is contained in CBDT Circular No. 8 of 2002 dated 27-8-2002, with the subject "Finance Act, 2002 — Explanatory Notes on Provision relating to Direct Taxes". This circular has been issued after the passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/retrospective in operation and which amendments are prospective. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158-BE, would be prospective i.e. it will take effect from 1-6-2002. (Para 43)

The Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in the second proviso to sub-section (3) of Section 2 of the Finance Act, 2003. Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove "hardships" only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1-6-2002. (Para 44)

a

Thus, it is held that the intention of the legislature was to make the proviso to Section 113 prospective in nature. This proviso cannot be treated as declaratory or curative in nature. (Paras 37, 45 and 46)

CIT v. *Vatika Township (P) Ltd.*, ITA No. 375 of 2007, order dated 17-4-2007 (Del), *affirmed*

CIT v. *Suresh N. Gupta*, (2008) 4 SCC 362; *CIT* v. *Rajiv Bhatara*, (2009) 13 SCC 315, *overruled* b

CIT v. *Vatika Township (P) Ltd.*, SLP (C) No. 540 of 2009, order dated 8-4-2010 (SC); *CIT* v. *Vatika Township (P) Ltd.*, SLP (C) No. ... of 2008 (CC No. 16923 of 2008), order dated 6-1-2009 (SC), *referred to*

D. **Income Tax Act, 1961 — Ch. XIV-B (Ss. 158-B to 158-BI) and Ss. 4, 5 and 113 — Block assessment introduced by Ch. XIV-B (ins. w.e.f. 1-7-1995) — Scheme of, explained in detail — Complete code in itself containing a self-contained machinery for assessment of undisclosed income** c

— Held, Ch. XIV-B comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes S. 156-BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in S. 113 of the Act — Essence of this new procedure is a separate single assessment of "undisclosed income", d detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the same period — Character and nature of "undisclosed income" referred to in Ch. XIV-B is quite distinct from "total income" referred to in S. 5 — When a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of S. 4 already on the statute book, this move of the e legislature has to be assigned some reason — Words and Phrases — "Undisclosed income" distinguished from "total income" (Paras 22 to 26)

E. **Interpretation of Statutes — Particular Statutes or Provisions — Taxing/Fiscal statutes — Generally — There cannot be imposition of any tax without the authority of law — Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms — Where provision is susceptible to two interpretations, the one which favours citizens, as against the Revenue, has to be preferred — Constitution of India, Arts. 265 and 14** f

F. **Interpretation of Statutes — Particular Statutes or Provisions — Taxing/Fiscal statutes — Interpretation of taxing provision — Intention of legislature to be ascertained**

G. **Interpretation of Statutes — Particular Statutes or Provisions — Taxing/Fiscal statutes — "Fairness" doctrine applicable to taxing statutes — Doctrines and Maxims — Fairness — Constitution of India, Arts. 14 and 265** g

H. **Interpretation of Statutes — Particular Statutes or Provisions — Taxing/Fiscal statutes — Strict construction — Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction and any ambiguity must be resolved against imposition of the tax — Income Tax Act, 1961, S. 113 proviso (ins. w.e.f. 1-6-2002)** h

a

I. **Statute Law — Retrospective operation — General rule — Held, unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation — It is based on the principle *lex prospicit, non respicit* (law looks forward not backward) — General Clauses Act, 1897 — S. 6 — Interpretation of Statutes — Presumptions in interpretation**

b

J. **Statute Law — Principle against retrospectivity — Based on principle of "*fairness*", which must be the basis of every legal rule — Constitution of India, Art. 14**

K. **Statute Law — Retrospective operation — Prospective or Retrospective — General rule of construing statutes to have prospective effect — Exceptions to — It does not apply to curative or clarificatory statutes — Held, unless the legislation is for the purpose of supplying an obvious omission in a former legislation or to explain a former legislation, legislations which modified accrued rights, impose obligations or new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect**

c

d

L. **Interpretation of Statutes — Retrospective/Retroactive operation/ Retrospectivity — Retrospective construction — Legislation conferring a benefit — Held, if a legislation confers a benefit on some person(s) but without inflicting a corresponding detriment on some other person(s) then it would warrant retrospective effect — This is exactly the justification to treat procedural provisions as retrospective — In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity**

e

M. **Interpretation of Statutes — Particular Statutes or Provisions — Taxing/Fiscal statutes — Strict construction — Provision for levy of surcharge introduced specifically to assess the undisclosed income, is not beneficial to the assessee but on the contrary is onerous to the assessee, therefore, held, normal rule of presumption is against retrospective operation — Income Tax Act, 1961, S. 113 proviso (ins. w.e.f. 1-6-2002)**

f

Held :

There cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the provision concerned of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours citizens, as against the Revenue, has to be preferred. This is a well-established principle of statutory interpretation, to help finding out as to whether particular category of assessee is to pay a particular tax or not. Tax laws are clearly in derogation of personal rights and property interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. No doubt, with the application of this principle, the courts make an endeavour to find out the intention of the legislature. At the same time, this very principle is based on the "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be

g

h

a levied to a particular class of persons or not, the citizen should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice — Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand. (Para 41)

b *Billings* v. *United States*, 58 L Ed 596 : 232 US 261 : 34 S Ct 421 (1914); *United States* v. *Merriam*, 68 L Ed 240 : 263 US 179 : 44 S Ct 69 (1923); *Partington* v. *Attorney General*, (1869) LR 4 HL 100, *relied on*

Eidman v. *Martinez*, 46 L Ed 697 : 184 US 578 (1902); *United States* v. *Wigglesworth*, 2 Story 369 (1842); *Mutual Benefit Life Insurance Co.* v. *Herold*, 198 Fed 199 (1912); *Herold* v. *Mutual Benefit Life Insurance Co.*, 201 Fed 918 (CCA 3d 1913); *Parkview Building & Loan Assn.* v. *Herold*, 203 Fed 876 (1913); *Mutual Trust Co.* v. *Miller*, 177 NY 51 : 69 NE 124 (1903); *Gould* v. *Gould*, 62 L Ed 211 : 245 US 151 (1917), *cited*

c Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. A retrospective legislation is contrary to the general principle that legislation by d which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law. The obvious basis of the principle against retrospectivity is the principle of "*fairness*", which must be the basis of every legal rule. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the e enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. (Paras 27 to 29)

For the sake of completeness, where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on f some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant g case, the proviso added to Section 113 of the IT Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, the normal rule of presumption is against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is h no more than a presumption, and thus could be displaced by outweighing factors. (Paras 30 and 31)

Phillips v. *Eyre*, (1870) LR 6 QB 1; *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL), *relied on*

Govt. of India v. *Indian Tobacco Assn.*, (2005) 7 SCC 396; *Vijay* v. *State of Maharashtra*, (2006) 6 SCC 289, *explained* and *distinguished on facts*

N. **Statute Law — Declaratory/Clarificatory Provision — Declaratory or clarificatory amendment — Operates retrospectively (Para 32)**

Keshavlal Jethalal Shah v. *Mohanlal Bhagwandas*, AIR 1968 SC 1336 : (1968) 3 SCR 623; *CIT* v. *Scindia Steam Navigation Co. Ltd.*, AIR 1961 SC 1633 : (1962) 1 SCR 788; *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, *relied on*

CED v. *M.A. Merchant*, 1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404; *Govind Das* v. *ITO*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133, *affirmed*

Principles of Statutory Interpretation, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012); W.F. Craies: *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971), *referred to*

B-D/53811/C

Advocates who appeared in this case :

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13. AIR 1968 SC 1336 : (1968) 3 SCR 623, *Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas* — 24*a*
14. AIR 1961 SC 1633 : (1962) 1 SCR 788, *CIT* v. *Scindia Steam Navigation Co. Ltd.* — 25*a*
15. AIR 1960 SC 12, *Central Bank of India* v. *Workmen* — 23*b-c*
16. 68 L Ed 240 : 263 US 179 : 44 S Ct 69 (1923), *United States* v. *Merriam* — 29*c-d*

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17.	62 L Ed 211 : 245 US 151 (1917), *Gould* v. *Gould*	29*e*
18.	58 L Ed 596 : 232 US 261 : 34 S Ct 421 (1914), *Billings* v. *United States*	29*a-b*
19.	203 Fed 876 (1913), *Parkview Building & Loan Assn.* v. *Herold*	29*c*
20.	201 Fed 918 (CCA 3d 1913), *Herold* v. *Mutual Benefit Life Insurance Co.*	29*c*
21.	198 Fed 199 (1912), *Mutual Benefit Life Insurance Co.* v. *Herold*	29*b-c*
22.	177 NY 51 : 69 NE 124 (1903), *Mutual Trust Co.* v. *Miller*	29*c*
23.	46 L Ed 697 : 184 US 578 (1902), *Eidman* v. *Martinez*	29*b-c*
24.	(1870) LR 6 QB 1, *Phillips* v. *Eyre*	21*h*
25.	(1869) LR 4 HL 100, *Partington* v. *Attorney General*	29*e*
26.	2 Story 369 (1842), *United States* v. *Wigglesworth*	29*b-c*

b

The Judgment of the Court was delivered by

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DR A.K. SIKRI, J.— Delay condoned. Leave granted in all these matters. In these batch of appeals, most of which are preferred by the Commissioner(s) of Income Tax (hereinafter referred to as "the Department"), with the exception of few appeals filed by the assessees, the question of law which has fallen for consideration is as to whether the proviso appended to Section 113 of the Income Tax Act (hereinafter referred to as "the Act") which was inserted in that section by the Finance Act, 2002 d is to operate prospectively or is clarificatory and curative in nature and, therefore, has retrospective operation.

The background facts

2. This question has been referred[1] to the Constitution Bench in the civil appeal arising out of SLP (C) No. 540 of 2009 and, therefore, to start with, we would be justified in referring to the facts of that case. In fact the answer e to the aforesaid question would lead to the sealing of the fate of all these appeals one way or the other.

3. The facts in this appeal, which need recapitulation, are that there was a search and seizure operation under Section 132 of the Act on the premises of the assessee on 10-2-2001. The notice under Section 158-BC of the Act was issued to the assessee on 18-6-2001 requiring him to file his return of income f for the block period ending 10-2-2000. In compliance, the assessee filed its return of income for the block period from 1-4-1989 to 10-2-2000. The block assessment in this case was completed under Section 158-BA on 28-2-2002 at a total undisclosed income of Rs 85,18,819. After sometime, the assessing officer, on verification of working of calculation of tax, observed that surcharge had not been levied on the tax imposed upon the assessee. This was treated as a mistake apparent on record by the assessing officer and g accordingly a rectification order was passed under Section 154 of the Act on 30-6-2003. This order under Section 154 of the Act, by which surcharge was levied by the assessing officer, was challenged in appeal by the assessee. The said order was cancelled by CIT (Appeals) I, New Delhi vide order dated 10-12-2003 on the ground that the levy of surcharge is a debatable issue and

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1 *CIT* v. *Vatika Township (P) Ltd.*, SLP (C) No. 540 of 2009, order dated 8-4-2010 (SC). *See* complete order extracted at para 10, infra.

therefore such an order could not be passed taking umbrage under Section 154 of the Act. The undisclosed income was revised under Sections 250/158-BC by the assessing officer vide order dated 9-9-2003 to Rs 10,90,000 to give effect to the above order of CIT (Appeals), and thereby removing the component of the surcharge.

4. As the Department wanted the surcharge to be levied, the Commissioner of Income Tax (Central I), New Delhi issued a notice under Section 263 of the Act to the assessee and sought to revise the order dated 9-9-2003 passed by the assessing officer by which he had given effect to the order of CIT (Appeals) and in the process did not charge any surcharge. In the opinion of CIT, this led to income having escaped the assessment. According to CIT, in view of the provisions of Section 113 of the Act as inserted by the Finance Act, 1995 and clarified by the Board Circular No. 717 dated 14-8-1995, surcharge was leviable on the income assessed. According to CIT the charging provision was Section 4 of the Act which was to be read with Section 113 of the Act that prescribes the rate and tax for search and seizure cases and rate of surcharge as specified in the Finance Act of the relevant year was to be applied. In this particular case the search and seizure operation took place on 14-7-1999 and treating this date as relevant, the Finance Act, 1999 was to be applied.

5. CIT, accordingly, cancelled the order dated 9-9-2003 not levying surcharge upon the assessee, as being erroneous and prejudicial to the interests of the Revenue. The assessing officer was directed by CIT to levy surcharge @ 10% and the amount of income tax computed and issue revised notice of demand. The order covered block period 1-4-1989 to 10-2-2000. This order of CIT under Section 263 of the Act was passed on 23-3-2004.

6. The assessee filed the appeal before the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") against the said order of CIT. The Tribunal vide its order dated 23-6-2006 allowed the appeal of the assessee. The Tribunal held that the insertion of the proviso to Section 113 of the Income Tax Act cannot be held to be declaratory or clarificatory in nature and was prospective in its operation. Against the order of the Tribunal dated 23-6-2006 the Revenue approached the High Court of Delhi by way of an appeal filed under Section 260-A of the Act for the block period 1-4-1989 to 10-2-2000. This appeal has been dismissed vide order dated 17-4-2007[2] by the High Court. It is this order of the High Court which is the subject-matter of the appeal in question.

7. It is clear from the aforesaid narration that the High Court has taken the view that the proviso inserted in Section 113 of the Act by the Finance Act, 2002 was prospective in nature and the surcharge as leviable under the aforesaid proviso could not be made applicable to the block assessment in question of an earlier period i.e. the period from 1-4-1989 to 10-2-2000 in the instant case.

2 *CIT* v. *Vatika Township (P) Ltd.*, ITA No. 375 of 2007, order dated 17-4-2007 (Del)

The reference order

8. It so happened that this very issue about the said proviso to Section 113 viz. whether it is clarificatory and curative in nature and, therefore, can be applied retrospectively or it is to take effect from the date i.e. 1-6-2002 when it was inserted by the Finance Act, 2002, attracted the attention of this Court and was considered by the Division Bench in *CIT* v. *Suresh N. Gupta*[3]. The Division Bench held that the said proviso is clarificatory in nature. When the instant appeal came up before another Division Bench on 6-1-2009[4] for hearing, the said Division Bench expressed its doubts about the correctness of the view taken in *Suresh N. Gupta*[3] and directed the Registry to place the matter before the Hon'ble the Chief Justice of India for constitution of a larger Bench.

9. We reproduce the order dated 6-1-2009[4] in its entirety as under:

"(BEFORE S.B. SINHA AND MUKUNDAKAM SHARMA, JJ.)

1. Delay condoned. The question which fell for consideration before the High Court was as to whether the proviso appended to Section 113 of the Income Tax Act is clarificatory and/or curative in nature. The said provision had come into force with effect from 1-6-2002. It reads as under:

> 'Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under Section 132 or the requisition is made under Section 132-A.'

2. In this case, the search and seizure took place on 6-10-2001. An order of block assessment in terms of Section 158-BC was made in respect of Assessment Years 1984 to 2003. The surcharge was levied on 30-6-2003.

3. In support of its contention that the said proviso was retrospective in nature, the learned Additional Solicitor General relies upon a Division Bench decision of this Court in *CIT* v. *Suresh N. Gupta*[3], wherein it has been held: (SCC p. 379, paras 37-38)

> '*37.* According to the assessee, prior to 1-6-2002, the position was ambiguous as it was not clear even to the Department as to which year's FA would be applicable. To clear this doubt precisely, the proviso has been inserted in Section 113 by which it is indicated that FA of the year in which the search was initiated would apply. Therefore, in our view, the said proviso was clarificatory in nature. In taxation, the legislation of the type indicated by the proviso has to be read strictly. There is no question of retrospective effect. The proviso only clarifies that out of the four dates, Parliament has opted for the date, namely, the year in which the search is initiated, which date

3 (2008) 4 SCC 362

4 *CIT* v. *Vatika Township (P) Ltd.*, SLP (C) No. ... of 2008 (CC No. 16923 of 2008), order dated 6-1-2009 (SC)

would be relevant for applicability of a particular FA. Therefore, we have to read the proviso as it stands.

38. There is one more reason for rejecting the above submission. Prior to 1-6-2002, in several cases, tax was prescribed sometimes in the 1961 Act and sometimes in FA and often in both. This made liability uncertain. In the present case, however, the rate of tax in case of block assessment at 60% was prescribed by Section 113 but the year of FA imposing surcharge was not stipulated. This resulted in the above four ambiguities. Therefore, clarification was needed. The proviso was curative in nature. Hence, the proviso inserted in Section 113 merely clarifies that out of the above four dates, the relevant date for applicability of FA would be the year in which the search stood initiated under Section 158-BC (sic 132).'

4. As the said proviso was introduced with effect from 1-6-2002 i.e. with prospective effect and by reason thereof, tax chargeable under Section 135 of the Income Tax Act is to be increased by surcharge levied by a Central Act, we are of the opinion that keeping in view the principles of law that the taxing statute should be construed strictly and a statute, ordinarily, should not be held to have any retrospective effect, it is necessary that the matter be considered by a larger Bench.

5. We, while issuing notice, direct the Registry to place the matter before the Hon'ble the Chief Justice for constitution of a larger Bench."

10. A three-Member Bench was constituted before which the matter came up for hearing on 8-4-2010. On that date, the said Bench passed the following order[1] :

"(BEFORE K.G. BALAKRISHNAN, C.J. AND DEEPAK VERMA AND B.S. CHAUHAN, JJ.)

1. Vide order dated 6-1-2009[4] the lead matter was referred to be listed before a larger Bench and consequently the matter, along with connected matters, was listed before a three-Judge Bench.

2. After having heard the learned counsel on both sides at length, looking to the important questions of law involved having wide ramifications and pendency of several matters on the same issue before several High Courts and Tribunals, we deem it appropriate to refer the matters for being placed before a five-Judge Bench. Matter be placed accordingly."

This is precisely raison d'être for hearing the matter by the present Constitution Bench. We may observe here that after the aforesaid reference, other connected appeals raising the identical issue have been tagged with direction to be heard along with this appeal.

1 *CIT* v. *Vatika Township (P) Ltd.*, SLP (C) No. 540 of 2009, order dated 8-4-2010 (SC)

4 *CIT* v. *Vatika Township (P) Ltd.*, SLP (C) No. ... of 2008 (CC No. 16923 of 2008), order dated 6-1-2009 (SC)

a

The statutory provisions

11. Before adverting to the submissions of the Department, as argued by Mr P.S. Narasimha, learned Additional Solicitor General and rebuttal thereto given by various counsel appearing for the assessees, we deem it apposite to take note of the relevant statutory provisions, having bearing over the matter, along with the proviso to Section 113, which is the bone of contention and b
the subject-matter of interpretation. As is well known, Section 4 of the Act is the charging section in the Act. It reads as under:

> "**4.** (1) ***Charge of income tax***.—(1) Where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the c
> levy of additional income tax) of, this Act in respect of the total income of the previous year of every person:
>
> Provided that where by virtue of any provision of this Act income tax is to be charged in respect of the income of a period other than the previous year, income tax shall be charged accordingly.
>
> (2) In respect of income chargeable under sub-section (1), income tax shall be deducted at the source or paid in advance, where it is so deductible d
> or payable under any provision of this Act."

Though, Section 4 of the Act is the charging section, it is well known that rate or rates at which the income tax is to be charged is specified each year by enacting a Finance Act at the time of presentation of the Annual Budget.

12. While Section 4 of the Act deals with the charge of income tax, Parliament also has the power to levy surcharge on income tax. Power to levy e
a surcharge is contained in Article 271 of the Constitution of India which read as under:

> "**271.** ***Surcharge on certain duties and taxes for purposes of the Union***.—Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred in those articles by a surcharge for purposes of the Union and the whole proceeds of any such f
> surcharge shall form part of the Consolidated Fund of India."

13. The surcharge on the income tax was introduced for the first time by the Finance Act, 1995 in Section 2(3) thereof. However, initially, this surcharge was levied only on the income of companies i.e. corporate entities incorporated under the Indian Companies Act by specified surcharge at the rate of 15% in the Finance Act, 1996, which was reduced to 7.50% in the Finance Act, 1997. In the next two Finance Acts i.e. 1998 and 1999, there g
was no surcharge levied even in the cases of companies. However, by the Finance Act, 2000, surcharge at a flat rate of 10% came to be levied in respect of individuals, HUF, BOI, AOP as well as cooperative societies, partnership firms, local authorities and also the companies. In subsequent years, the rates at which the surcharge is levied on the aforesaid entities are of varying nature. A tabulated form showing surcharge in respect of different h
category of assessees in different assessment years, levied under each Finance Act, shall be reproduced at the relevant stage.

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14. In the present case, since we are concerned with the surcharge on the block assessment, it also becomes imperative to take note of the relevant provisions pertaining to the block assessment. These provisions are contained in Chapter XIV-B. The purpose of this Chapter is to lay down a special procedure for assessment of search cases with a view to combat tax evasion
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and also to expedite and simplify assessments in search cases. We reproduce hereinbelow the provisions of Sections 158-B, 158-BA, 158-BB, 158-BC and 158-BH of that Chapter, which have bearing on the issue at hand:

"**158-B.** ***Definitions***.—In this Chapter, unless the context otherwise requires—

(*a*) '**block period**' means the period comprising previous years
c
relevant to six assessment years preceding the previous year in which the search was conducted under Section 132 or any requisition was made under Section 132-A and also includes the period up to the date of the commencement of such search or date of such requisition in the previous year in which the said search was conducted or requisition was made:

Provided that where the search is initiated or the requisition is made
d
before the 1st day of June, 2001, the provisions of this clause shall have effect as if for the words 'six assessment years', the words 'ten assessment years' had been substituted.

(*b*) '**undisclosed income**' includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such
e
money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property which has not been or would not have been disclosed for the purposes of this Act.

158-BA. ***Assessment of undisclosed income as a result of search***.—(1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995, a search is initiated under
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Section 132 or books of account, other documents or any assets are requisitioned under Section 132-A in the case of any person, then, *the assessing officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter*.

(2) *The total undisclosed income relating to the block period shall be charged to tax, at the rate specified in Section 113, as income of the block period irrespective of the previous year or years to which such income*
g
relates and irrespective of the fact whether regular assessment for any one or more of the relevant assessment years is pending or not.

Explanation.—For the removal of doubts, it is hereby declared that—

(*a*) the assessment made under this Chapter shall be in addition to the regular assessment in respect of each previous year included in the block period;

h
(*b*) the total undisclosed income relating to the block period shall not include the income assessed in any regular assessment as income of such block period;

a

(*c*) the income assessed in this Chapter shall not be included in the regular assessment of any previous year included in the block period.

(3) Where the assessee proves to the satisfaction of the assessing officer that any part of income referred to in sub-section (1) relates to an assessment year for which the previous year has not ended or the date of filing the return of income under sub-section (1) of Section 139 for any previous year has not expired, and such income or the transactions relating to such income are recorded on or before the date of the search or requisition in the books of account or other documents maintained in the normal course relating to such previous years, the said income shall not be included in the block period. b

158-BB. ***Computation of undisclosed income of the block period.***—(1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of Chapter IV, on the basis of evidence found as a result of search or requisition of books of account or documents and such other materials or information as are available with the assessing officer, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous years, determined— c

(*a*) where assessments under Section 143 or Section 144 or Section 147 have been concluded, on the basis of such assessments; d

(*b*) where returns of income have been filed under Section 139 or Section 147 but assessments have not been made till the date of search or requisition, on the basis of the income disclosed in such returns;

(*c*) where the due date for filing a return of income has expired but no return of income has been filed, as nil; e

(*d*) where the previous year has not ended or the date of filing the return of income under sub-section (1) of Section 139 has not expired, on the basis of entries relating to such income or transactions as recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous years;

(*e*) where any order of settlement has been made under sub-section (4) of Section 245-D, on the basis of such order; f

(*f*) where an assessment of undisclosed income had been made earlier under clause (*c*) of Section 158-BC, on the basis of such assessment.

Explanation.—For the purposes of determination of undisclosed income— g

(*a*) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set-off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section (2) of Section 32;

(*b*) of a firm, returned income and total income assessed for each of the previous years falling within the block period shall be the income determined before allowing deduction of salary, interest, commission, h a bonus or remuneration by whatever name called to any partner not being a working partner:

Provided that undisclosed income of the firm so determined shall not be chargeable to tax in the hands of the partners, whether on allocation or on account of enhancement;

b (*c*) assessment under Section 143 includes determination of income under sub-section (1) or sub-section (1-B) of Section 143.

(2) In computing the undisclosed income of the block period, the provisions of Sections 68, 69, 69-A, 69-B and 69-C shall, so far as may be, apply and references to 'financial year' in those sections shall be construed as references to the relevant previous year falling in the block period including the previous year ending with the date of search or of the c requisition.

(3) The burden of proving to the satisfaction of the assessing officer that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

(4) For the purpose of assessment under this Chapter, losses brought d forward from the previous year under Chapter VI or unabsorbed depreciation under sub-section (2) of Section 32 shall not be set off against the undisclosed income determined in the block assessment under this Chapter, but may be carried forward for being set off in the regular assessments.

158-BC. ***Procedure for block assessment***.—Where any search has been conducted under Section 132 or books of account, other documents or assets e are requisitioned under Section 132-A, in the case of any person, then—

(*a*) the assessing officer shall—

(*i*) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days;

f (*ii*) in respect of search initiated or books of account or other documents or any assets requisitioned on or after the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days but not more than forty-five days,

as may be specified in the notice a return in the prescribed form and g verified in the same manner as a return under clause (*i*) of sub-section (1) of Section 142, setting forth his total income including the undisclosed income for the block period:

Provided that no notice under Section 148 is required to be issued for the purpose of proceeding under this Chapter:

Provided further that a person who has furnished a return under this clause shall not be entitled to file a revised return;

h (*b*) the assessing officer shall proceed to determine the undisclosed income of the block period in the manner laid down in Section 158-BB and the provisions of Section 142, sub-sections (2) and (3) of Section 143 and Section 144 shall, so far as may be, apply;

(*c*) the assessing officer, on determination of the undisclosed income of the block period in accordance with this Chapter, shall pass an order of assessment and determine the tax payable by him on the basis of such assessment;

(*d*) the assets seized under Section 132 or requisitioned under Section 132-A shall be retained to the extent necessary and the provisions of Section 132-B shall apply subject to such modifications as may be necessary and the references to 'regular assessment' or 'reassessment' in Section 132-B shall be construed as reference to 'block assessment'.

* * *

158-BH. ***Application of other provisions of this Act***.—Save as otherwise provided in this Chapter, all other provisions of this Act shall apply to assessment made under this Chapter."

15. It would be of some significance to point out at this stage that insofar as rates of tax chargeable in case of block assessment is concerned, that is not provided in the Finance Act. Pertinently, the provision to this effect has been made in the Income Tax Act itself and is contained in Section 113 of the Act. This section, before insertion of proviso thereto, read as under:

"**113.** ***Tax in the case of block assessment of search cases***.—The total undisclosed income of the block period, determined under Section 158-BC, shall be chargeable to tax at the rate of sixty per cent."

16. The proviso to Section 113 was inserted by the Finance Act, 2002 with effect from June 2002 and is to the following effect:

"Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under Section 132 or the requisition is made under Section 132-A."

17. From the reading of the aforesaid statutory provisions in the abstract, particularly relating to surcharge, it is clear that though provision for surcharge under the Finance Act has been in existence since 1995, insofar as levy of surcharge for block assessment is concerned, it is introduced by insertion of aforesaid proviso to Section 113. It is in this background, the question has arisen as to whether this surcharge on block assessment has been levied for the first time by the aforesaid proviso coming into effect from 1-6-2002 or it is only clarificatory in nature because of the reason that the provision for surcharge was made in the Finance Act in the year 1995 and that covered surcharge on block assessment as well.

Judgment in Suresh N. Gupta[3]

18. As already noticed above, this very proviso to Section 113 of the Act came up for interpretation in *Suresh N. Gupta*[3] and the Division Bench of this Court took the view that this proviso is clarificatory in nature as it simply clarifies the date with reference to which the rate of surcharge is payable, namely, the surcharge levied by the Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated.

3 *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362

It would be advisable to take note of the reasons which prevailed with the Bench to come to the aforesaid conclusion, inasmuch as it is the ratio of this judgment which was doubted by the Bench making the reference to the larger Bench.

19. The Court in *Suresh N. Gupta*[3] formulated two points for consideration viz.: (SCC p. 366, para 4)

> (*1*) Whether on the facts and circumstances of this case, the Finance Act, 2001 was applicable to "block assessment" under Chapter XIV-B in respect of search carried out on 17-1-2001?
>
> (*2*) Whether the proviso inserted in Section 113 by the Finance Act, 2002, is clarificatory?

19.1. Dealing with the first question, the Court noted the contention of the assessee that Chapter XIV-B, which was inserted by the Finance Act, 1995 with effect from 1-7-1995 was a self-contained chapter as it lays down a special procedure for assessment of undisclosed income found during search for the "block period". It was argued by the assessee that this Chapter contains a charging section (Section 158-BA), a computation section (Section 158-BB), a procedural section for block assessment (Section 158-BC), limitation provision for completion of block assessment (Section 158-BE) and the provisions for imposition of interest and penalty (Section 158-BFA). It was also argued that the scheme of assessment of "undisclosed income" under Chapter XIV-B is different from the scheme of assessment of "total income" of any person in terms of Section 4(1) of the Act. In support of this argument, it was submitted that whereas Chapter XIV-B deals with assessment of "undisclosed income", Section 4 of the Act relates to the assessment of "total income". Moreover, "block period" mentioned in Chapter XIV-B was different from the assessment of income of the "previous year" under Section 4(1) of the Act. Even the rate of tax at which the "undisclosed income" is assessed is different inasmuch as it is 60% as specified in Section 158-BA(2) read with Section 113 of the Act, in contradistinction to the taxation of normal income which is at the rates specified in the relevant Finance Act. In a nutshell, it was argued that block assessment falls in Chapter XIV-B for which charging section was Section 158-BA and for assessment of block period, charging section was not Section 4(1) of the Act. On that basis, the assessee wanted the Court to hold that it was not open to the assessing officer to levy surcharge prior to 1-6-2002 i.e. before the insertion of the proviso to Section 113 of the Act.

19.2. This argument was rejected by the Court. The Bench took note of Article 271 of the Constitution along with Schedule VII List 1 Entry 82 to the Constitution of India and Section 4 of the Act which is the charging section. It held that the power to levy surcharge on income tax is traceable to Article 271 read with Entry 82 and not to Section 4 of the Act. The rate at which the charge on total income on the previous year is imposed is not laid down in the Income Tax Act but in the Finance Act indicated every year by

3 *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362

a Parliament to give effect to the financial proposals of the Central Government. It further held that since the Income Tax Act deals with tax on income and nothing else, nor with charge should be a legal charge under Section 4, it must be a tax on the income of the assessee. Therefore, Section 4(1) of the Act was the charging section and the rate of tax is prescribed under that very Act i.e. Section 113. As long as the charge is on b the "total income" of the previous year and so long as the rate relates to the subject-matter of the tax, there is nothing to prevent Parliament from fixing the date. What is to be seen is that the rate is applied to the "total income" and the tax which the assessee has to pay must be at the rate in respect of the *total income of the previous year*.

c **19.3.** The Bench was of the view that the concepts of "previous years" as well as "total income" in Chapter XIV-B were retained. Therefore Section 158-BB was to be read with Section 4 of the Act implying thereby that Section 4 remains the charging section. The procedure contained in Section 4 was not ruled out from block assessment procedure even in the case of assessment of block period. It was, nevertheless, an assessment on the total d income of the previous years falling within the block period including returned/assessed incomes as per regular returns and regular assessment. As a fortiori, the provisions of the relevant Finance Act have got to be read into the block assessment scheme under Chapter XIV-B, even prior to 1-6-2002. As a sequential, even without the proviso to Section 113, which was inserted by the Finance Act, 2002 with effect from 1-6-2002, the Finance Act, 2001, was applicable to block assessment under Chapter XIV-B and accordingly e surcharge was leviable.

19.4. Adverting to the second question formulated by the Bench, namely, whether insertion of the proviso in Section 113 by the Finance Act, 2002 was applicable to search of the earlier period as well i.e. up to 31-5-2002, the Court pointed out that in view of its answer to the first question, second question did not even require any examination. It, however, proceeded to f answer this question as well having regard to the submission of the assessee that before the said proviso, there was inconsistency with regard to levy of surcharge and the position was ambiguous as it was not clear even to the Department as to which year's Finance Act would be applicable. Brushing aside this argument, the Court held that to clear this very doubt precisely, the proviso had been inserted in Section 113 and therefore it was only g clarificatory in nature. The Court specifically noted that before the proviso was inserted, there were some doubts in the mind of the Department and the taxpayers, about the date with reference to which the rate at which surcharge is payable. The confusion was as to whether surcharge was leviable with reference to the rates provided for in the Finance Act of the year in which the search was initiated *or* the year in which the search was concluded *or* the h year in which block assessment proceedings under Section 158-BC were initiated *or* the year in which block assessment order was passed. The Court opined that the proviso only clarifies that out of the aforesaid four dates, Parliament has opted for the date in which the search is initiated, as the date relevant for applicability of a particular Finance Act.

20. Aforesaid were the reasons given in *Suresh N. Gupta*[3] to arrive at a conclusion that the proviso was clarificatory and/or curative in nature. It would be our duty to point out at this stage that another Division Bench in
b *CIT* v. *Rajiv Bhatara*[5] has followed the aforesaid judgment by giving the same reasons in support.

21. It is not necessary to take note of the arguments advanced by the learned ASG for the Department and various counsel who appeared for the assessees in these appeals in detail. The reason for making these remarks by us is that Mr Narasimha, learned ASG, had argued on the same lines which
c formed the basis of rendering the decision of the Division Bench in *Suresh N. Gupta*[3] that have already been summarised above. Of course, it was his incessant effort with all effervescence, to persuade this Court to accept the conclusion arrived at in the said judgment. The learned counsel for the assessees also emphasised those very submissions advanced in that case which did not find favour with the Division Bench. In addition, these counsel
d articulated some more arguments with all enthusiasm and temerity, reference to which would be made while giving our analysis to the various provisions leading up to the answer to the issue involved.

Scheme of Chapter XIV-B

22. Before we proceed to answer the question, it would be necessary to keep in mind the scheme of block assessment introduced in Chapter XIV-B
e to the Finance Act, 1995 w.e.f. 1-7-1995.

23. As already mentioned in brief by us, Chapter XIV-B of the Act which deals with block assessment lays down a special procedure for search cases. The main reason for adding these provisions in the Act was to curb tax evasion and expedite as well as simplify the assessments in such search cases:

f **23.1.** Undisclosed incomes have to be related in different years in which income was earned under block assessment. This is because in such cases, the "block period" is for previous years relevant to 10/6 assessment years and also the period of the current previous year up to the date of the search i.e. from 1-4-2000 to 17-1-2001, in this case. The essence of this new procedure, therefore, is a separate single assessment of the "undisclosed income",
g detected as a result of search and this separate assessment has to be in addition to the normal assessment covering the same period. Therefore, a separate return covering the years of the block period is a prerequisite for making block assessment. Under the said procedure, the Explanation is inserted in Section 158-BB, which is the computation section, explaining the method of computation of "undisclosed income" of the block period. It is now well accepted that this Chapter is a complete code in itself providing for
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3 *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362
5 (2009) 13 SCC 315 : (2009) 310 ITR 105

self-contained machinery for assessment of undisclosed income for the block period of 10 years or 6 years, as the case may be.

23.2. In case of regular assessments for which returns are filed on yearly basis, Section 4 of the Act is the charging section. However, at what rate the income is to be taxed is specified every year by Parliament in the Finance Act. In contradistinction, when it comes to payment of tax on the undisclosed income relating to the block period, the rate is specified in Section 113 of the Act. It remains static at 60% of the undisclosed income which is the categorical stipulation in Section 113 of the Act. Section 158-BA(2) of the Act clearly states that the total undisclosed income relating to the block period "shall be charged to tax" at the rates specified under Section 113 as income of the block period irrespective of previous year or years. Under Section 113 of the Act, the undisclosed income is chargeable to tax at the rate of 60%.

24. From the above, it becomes manifest that Chapter XIV-B comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes Section 156-BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in Section 113 of the Act. No doubt, Section 4 of the Act is also a charging section which is made applicable on "total income of previous year". As per Section 2(45), "total income" means the total amount of income referred to in Section 5, computed in the manner laid down in the Act. Section 5 of the Act enumerates the scope of total income and prescribes, inter alia, that it would include all income which is received or is deemed to be received in India in any previous year by or on behalf of a person who is a resident. No doubt, undisclosed income referred to in Chapter XIV-B is also an income which was received but not disclosed, therefore, in the first blush, the argument of the Department that undisclosed income referred to in Chapter XIV-B is also a part of total income and consequently Section 4 becomes the charging section in respect thereof as well. However, a little closer scrutiny leads us to conclude that that is not the position as per the scheme of Chapter XIV-B. In the first place, income referred to in Section 5 talks of total income of any "previous year". As per Section 2(34) of the Act, "previous year" means previous year as defined in Section 3. Section 3 lays down that previous year means "the financial year immediately preceding the assessment year". Undisclosed income referred to in Chapter XIV-B is not relatable to the previous year. On the contrary, it is for the block period which may be 6 years or 10 years, as the case may be.

25. Consequently, as already mentioned, while analysing the scheme of Chapter XIV-B, such chapter is a complete code in respect of assessments of "undisclosed income". Not only it defines what is undisclosed income, it also lays down the block period for which undisclosed income can be taxed. Further, it also lays down the procedure for taxing that income. It is very pertinent to note at this stage that for this purpose, specific provision in the form of Section 158-BA(2) is inserted making it a charging section. Thus, a diagnostic of Chapter XIV-B of the Act leads to irresistible conclusion that it contains all the provisions starting from charging section till the completion of assessment, by prescribing a special procedure in relation thereto, making it a complete code by itself. Looking at it from this angle, the character and nature of "undisclosed income" referred to in Chapter XIV-B becomes quite distinct from "total income" referred to in Section 5. It is of some significance to observe that when a separate charging section is introduced specifically, to assess the undisclosed income, notwithstanding a provision in the nature of Section 4 already on the statute book, this move of the legislature has to be assigned some reason, otherwise, there was no necessity to make a provision in the form of Section 158-BA(2). It could only be that for assessing undisclosed income, the charging provision is Section 158-BA(2) alone.

26. Notwithstanding the aforesaid position clarified by us, we are of the opinion that dehors this discussion, in any case, on the application of general principles concerning retrospectivity, the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. To make it clear, we need to understand the general principles concerning retrospectivity.

General principles concerning retrospectivity

27. A legislation, be it a statutory Act or a statutory rule or a statutory notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of "*interpretation of statutes*". Vis-à-vis ordinary prose, a legislation differs in its provenance, layout and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.

28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips* v. *Eyre*[6], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when

6 (1870) LR 6 QB 1

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introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "*fairness*", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*[7] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In *Govt. of India* v. *Indian Tobacco Assn.*[8], the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in *Vijay* v. *State of Maharashtra*[9]. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are (*sic* not) confronted with any such situation here.

31. In such cases, retrospectivity is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.

7 (1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)
8 (2005) 7 SCC 396
9 (2006) 6 SCC 289

Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by outweighing factors.

32. Let us sharpen the discussion a little more. We may note that under certain circumstances, a particular amendment can be treated as clarificatory or declaratory in nature. Such statutory provisions are labelled as "declaratory statutes". The circumstances under which provisions can be termed as "declaratory statutes" are explained by Justice G.P. Singh[10] in the following manner:

> "*Declaratory statutes*
>
> The presumption against retrospective operation is not applicable to declaratory statutes. As stated in CRAIES[†] and approved by the Supreme Court[††]: 'For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error, whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word "enacted".' But the use of the words 'it is declared' is not conclusive that the Act is declaratory for these words may, at times, be used to introduced new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

The above summing up is factually based on the judgments of this Court as well as English decisions.

10 *Principles of Statutory Interpretation*, (13th Edn., LexisNexis Butterworths Wadhwa, Nagpur, 2012)

† W.F. Craies, *Craies on Statute Law* (7th Edn., Sweet and Maxwell Ltd., 1971)

†† **Ed.**: The reference is to *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, para 29

33. A Constitution Bench of this Court in *Keshavlal Jethalal Shah* v. *Mohanlal Bhagwandas*[11], while considering the nature of amendment to Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act as amended by Gujarat Act 18 of 1965, observed as follows: (AIR p. 1339, para 8)

> "*8*. … The amending clause does not seek to explain any pre-existing legislation which was ambiguous or defective. The power of the High Court to entertain a petition for exercising revisional jurisdiction was before the amendment derived from Section 115 of the Code of Civil Procedure, and the legislature has by the amending Act not attempted to explain the meaning of that provision. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act."

34. It would also be pertinent to mention that assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective. (See *CED* v. *M.A. Merchant*[12].)

35. We would also like to reproduce hereunder the following observations made by this Court in *Govind Das* v. *ITO*[13], while holding Section 171(6) of the Income Tax Act to be prospective and inapplicable for any assessment year prior to 1-4-1962, the date on which the Income Tax Act came into force: (SCC p. 914, para 11)

> "*11*. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the *Laws of England* (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that
>
> > 'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. *If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only*.' "

(emphasis supplied)

11 AIR 1968 SC 1336 : (1968) 3 SCR 623
12 1989 Supp (1) SCC 499 : 1989 SCC (Tax) 404
13 (1976) 1 SCC 906 : 1976 SCC (Tax) 133

36. In *CIT* v. *Scindia Steam Navigation Co. Ltd.*[14], this Court held that as the liability to pay tax is computed according to the law in force at the beginning of the assessment year i.e. the first day of April, any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year.

Answer to the reference

37. When we examine the insertion of the proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as declaratory/statutory or curative in nature.

38. There are various reasons for coming to this conclusion which we enumerate hereinbelow.

Reasons in support

39. The first and foremost poser is as to whether it was possible to make the block assessment with the addition of levy of surcharge, in the absence of proviso to Section 113? In *Suresh N. Gupta*[3] itself, it was acknowledged and admitted that the position prior to the amendment of Section 113 of the Act whereby the proviso was added, whether surcharge was payable in respect of block assessment or not, was totally ambiguous and unclear. The Court pointed out that some assessing officers had taken the view that no surcharge is leviable. Others were at a loss to apply a particular rate of surcharge as they were not clear as to which Finance Act, prescribing such rates, was applicable. It is a matter of common knowledge and is also pointed out that the surcharge varies from year to year. However, the assessing officers were indeterminative about the date with reference to which rates provided for in the Finance Act were to be made applicable. They had four dates before them viz.: (*Suresh N. Gupta case*[3], SCC p. 379, para 35)

> (*i*) Whether surcharge was leviable with reference to the rates provided for in the Finance Act of the year in which the search was initiated; or
>
> (*ii*) the year in which the search was concluded; or
>
> (*iii*) the year in which the block assessment proceedings under Section 158-BC of the Act were initiated; or
>
> (*iv*) the year in which block assessment order was passed.

39.1. The position which prevailed before amending Section 113 of the Act was that some assessing officers were not levying any surcharge and others who had a view that surcharge is payable were adopting different dates for the application of a particular Finance Act, which resulted in different rates of surcharge in the assessment orders. In the absence of a specified date, it was not possible to levy surcharge and there could not have been an assessment without a particular rate of surcharge. As stated above, in *Suresh*

14 AIR 1961 SC 1633 : (1962) 1 SCR 788

3 *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362

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N. Gupta[3] itself, the Court has pointed out four different dates which were bothering the assessees as well as the Department. The choice of a particular date would have material bearing on the payment of surcharge. Not only the surcharge is different for different years, it varies according to the category of assessees and for some years, there is no surcharge at all. This can be seen from the following table prescribing surcharge for different assessment years: b

PART I

Finance Act	*Relevant section of the Finance Act*	*Para A*	*Para B*	*Para C*	*Para D*	*Para E*
		IND, HUF, BOI, AOP	Cooperative society	Firm	Local authority	Companies
1995	Section 2(3)	-	-	-	-	
1996	Section 2(3)	-	-	-	-	15%
1997	Section 2(3)	-	-	-	-	7.50%
1998	Section 2(3)	-	-	-	-	-
1999	Section 2(3)	-	-	-	-	-
2000	Section 2(3)	10%	10%	10%	10%	10%
2001	Section 2(3)	12% or 17%	12%	12%	12%	13%
2002	Section 2(3)	2%	2%	2%	2%	2%
2003	Section 2(3)	5%	5%	5%	5%	5%

c

d

e

39.2. The rate at which tax, or for that matter surcharge is to be levied is an essential component of the tax regime. In *Govind Saran Ganga Saran* v. *CST*[15], this Court, while explaining the conceptual meaning of a tax, delineated four components therein, as is clear from the following passage from the said judgment: (SCC pp. 209-10, para 6) f

"*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 g

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3 *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362
15 1985 Supp SCC 205 : 1985 SCC (Tax) 447 : (1985) 155 ITR 144

law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

It is clear from the above that the rate at which the tax is to be imposed is an essential component of tax and where the rate is not stipulated or it cannot be applied with precision, it would be difficult to tax a person. This very conceptualisation of tax was rephrased in *CIT* v. *B.C. Srinivasa Setty*[16], in the following manner: (SCC p. 465, para 10)

> "*10.* … The character of computation of provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section."

39.3. In absence of certainty about the rate, because of uncertainty about the date with reference to which the rate is to be applied, it cannot be said that surcharge as per the existing provision was leviable on block assessment qua undisclosed income. Therefore, it cannot be said that the proviso added to Section 113 defining the said date was only clarificatory in nature. From the aforesaid table showing the different rates of surcharge in different years, it would be clear that choice of date has to be formed as in some of the years, there would not be any surcharge at all.

40. Pertinently, the Department itself acknowledged and admitted this fact which is clear from the manner the issue was debated in a Conference of Chief Commissioners which was held sometime in the year 2001. In this Conference, some proposals relating to simplification and rationalisation of procedures and provisions were noted in respect of block assessment. The foofaraw made in the Conference by those who had to apply the provision, was not without substance because of the garboil* situation which this provision had created and is amply reflected in the proposals which were submitted in the following terms:

> "In the case of a block assessment, there are two problems in relation to the levy of surcharge. The first is that Section 113 does not mention a Central Act. In the absence of a reference to another Central Act in the charging section, it becomes difficult to justify levy of surcharge. Even if it is assumed that reference in the Finance Act to Section 113 is a sufficient authority to levy surcharge, the second problem is that the Finance Act levies surcharge on the amount of income tax on the income of a particular assessment year whereas in the block assessment tax is levied on the undisclosed income of the block period. Absence of a specific assessment year in the block assessment may render the levy suspect. Yet another problem is the rate of surcharge applicable. To illustrate, if the search took place on, say, 4-4-1996, whether the rate of surcharge is to be adopted as applicable to the assessment year

16 (1981) 2 SCC 460 : 1981 SCC (Tax) 119 : (1981) 128 ITR 294

* **Ed.**: From the French word gérable: meaning a confused disordered state; turmoil.

1996-1997 or the assessment year 1997-1998, the rate of surcharge being different for the two years? The provisions of Section 113 or the provisions of the Finance Act do not offer any guidance on the issue.

Suggestions

The foregoing problem indicates that levy of surcharge on undisclosed income is a matter of uncertainty and is prone to litigation. In the circumstances, it is suggested that Section 113 may be amended retrospectively in order to provide for levy of surcharge at the rate applicable to the assessment year relevant to the financial year in which the search was concluded."

The Chief Commissioners accepted the position, in no uncertain terms, that as per the language of Section 113, as it existed, it was difficult to justify levy of surcharge. It was also acknowledged that even if Section 113 empowered to levy surcharge, since block assessment tax is levied on the undisclosed income of the block period, absence of specific assessment year in the block assessment would render the levy suspect.

41. We would like to embark on a discussion on some basic and fundamental concepts, which would shed further light on the subject-matter:

41.1. No doubt, there is no scope for accepting the Libertarian theory which postulates among others, no taxation by the State as it amounts to violation of individual liberty and advocates minimal interference by the State. The Libertarianism propounded by the Austrian born economist philosopher Friedrich A. Hayek and American economist Milton Friedman stands emphatically rejected by all civilised and democratically governed States, in favour of a strongly conceptualised "welfare State". To attain a welfare State is our constitutional goal as well, enshrined as one of its basic feature, which runs through our Constitution. It is for this reason, specific provisions are made in the Constitution empowering the legislature to make laws for levy of taxes, including the income tax. The rationale behind collection of taxes is that revenue generated therefrom shall be spent by the Governments on various developmental and welfare schemes, among others.

41.2. At the same time, it is also mandated that there cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the provision concerned of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the interpretation which favours the subjects, as against the Revenue, has to be preferred. This is a well-established principle of statutory interpretation, to help finding out as to whether particular category of assessee is to pay a particular tax or not. No doubt, with the application of this principle, the courts make endeavour to find out the intention of the legislature. At the same time, this very principle is based on "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax. This principle also acts as a balancing factor between the two jurisprudential theories of justice — Libertarian theory on the one hand and Kantian theory along with Egalitarian theory propounded by John Rawls on the other hand.

41.3. Tax laws are clearly in derogation of personal rights and property
b interests and are, therefore, subject to strict construction, and any ambiguity must be resolved against imposition of the tax. In *Billings* v. *United States*[17], the Supreme Court clearly acknowledged this basic and long-standing rule of statutory construction: (L Ed p. 598)

> "Tax statutes … should be strictly construed; and if any ambiguity be found to exist, it must be resolved in favour of the citizen.
>
> c *Eidman* v. *Martinez*[18], L Ed p. 701 : US p. 583; *United States* v. *Wigglesworth*[19], Story p. 374 and *Mutual Benefit Life Insurance Co.* v. *Herold*[20], Fed p. 201, affirmed in *Herold* v. *Mutual Benefit Life Insurance Co.*[21]; *Parkview Building & Loan Assn.* v. *Herold*[22], Fed p. 880 and *Mutual Trust Co.* v. *Miller*[23], NY p. 57."

41.4. Again, in *United States* v. *Merriam*[24], the Supreme Court clearly stated at US pp. 187-88: (L Ed p. 244)

> d "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the
> e doubt must be resolved against the Government and in favour of the taxpayer. *Gould* v. *Gould*[25], L Ed p. 213 : US p. 153."

41.5. As Lord Cairns said many years ago in *Partington* v. *Attorney General*[26]: (LR p. 122)

> "… as I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law he must
> f be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

g 17 58 L Ed 596 : 232 US 261 at p. 265 : 34 S Ct 421 (1914)
18 46 L Ed 697 : 184 US 578 (1902)
19 2 Story 369 (1842)
20 198 Fed 199 (1912)
21 201 Fed 918 (CCA 3d 1913)
22 203 Fed 876 (1913)
h 23 177 NY 51 : 69 NE 124 (1903)
24 68 L Ed 240 : 263 US 179 : 44 S Ct 69 (1923)
25 62 L Ed 211 : 245 US 151 (1917)
26 (1869) LR 4 HL 100

42. There are some other circumstances which reflect the legislative intent. The problem which was highlighted in the Conference of Chief Commissioners on the rate of surcharge applicable, is noted above. In view of the aforesaid difficulties pointed out by the Chief Commissioners in their Conference, it becomes clear that as per the provisions then enforced, levy of surcharge in the block assessment on the undisclosed income was a difficult proposition. It is for this reason retrospective amendment to Section 113 was suggested. Notwithstanding the same, the legislature chose not to do so, as is clear from the discussion hereinafter:

42.1. "Notes on Clauses" appended to the Finance Bill, 2002 while proposing insertion of proviso categorically states that "this amendment will take effect from 1-6-2002". These become epigraphic* words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospective depicting clear intention of the legislature. It can be seen from the same Notes that a few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospective. For example, Clause 40 seeks to amend Section 92-F. Clause (*iii-a*) of Section 92-F is amended "so as to *clarify* that the activities mentioned in the said clause include the carrying out of any work in pursuance of a contract" (emphasis supplied). This amendment takes effect retrospectively from 1-4-2002. Various other amendments also take place retrospectively. The Notes on Clauses show that the legislature is fully aware of three concepts:

(*i*) prospective amendment with effect from a fixed date;

(*ii*) retrospective amendment with effect from a fixed anterior date; and

(*iii*) clarificatory amendments which are retrospective in nature.

42.2. Thus, it was a conscious decision of the legislature, even when the legislature knew the implication thereof and took note of the reasons which led to the insertion of the proviso that the amendment is to operate prospectively. The learned counsel appearing for the assessees sagaciously contrasted the aforesaid stipulation while effecting amendment in Section 113 of the Act, with various other provisions not only in the same Finance Act but Finance Acts pertaining to other years where the legislature specifically provided such amendment to be either retrospective or clarificatory. Insofar as amendment to Section 113 is concerned, there is no such language used and on the contrary, specific stipulation is added making the provision effective from 1-6-2002.

43. There is yet another very interesting piece of evidence that clarifies the provision beyond any pale of doubt viz. the understanding of CBDT itself regarding this provision. It is contained in CBDT Circular No. 8 of 2002 dated 27-8-2002, with the subject "Finance Act, 2002 — Explanatory Notes on Provision relating to Direct Taxes". This circular has been issued after the

* **Ed.**: As per the *Oxford Dictionary*, "epigraphic" here means: intending to suggest the theme or purpose of the amendment.

passing of the Finance Act, 2002, by which amendment to Section 113 was made. In this circular, various amendments to the Income Tax Act are discussed amply demonstrating as to which amendments are clarificatory/ retrospective in operation and which amendments are prospective. For example, Explanation to Section 158-BB is stated to be clarificatory in nature. Likewise, it is mentioned that amendments in Section 145 whereby provisions of that section are made applicable to block assessments is made clarificatory and would take effect retrospectively from 1st day of July, 1995. When it comes to amendment to Section 113 of the Act, this very circular provides that the said amendment along with amendments in Section 158-BE, would be prospective i.e. it will take effect from 1-6-2002.

44. The Finance Act, 2003, again makes the position clear that surcharge in respect of block assessment of undisclosed income was made prospective. Such a stipulation is contained in the second proviso to sub-section (3) of Section 2 of the Finance Act, 2003. This proviso reads as under:

> "Provided further that the amount of income tax computed in accordance with the provisions of Section 113 shall be increased by a surcharge for purposes of the Union as provided in Paras A, B, C, D or E, as the case may be, of Part III of the First Schedule of the Finance Act of the year in which the search is initiated under Section 132 or requisition is made under Section 132-A of the Income Tax Act:"

Addition of this proviso in the Finance Act, 2003 further makes it clear that such a provision was necessary to provide for surcharge in the cases of block assessments and thereby making it prospective in nature. The charge in respect of the surcharge, having been created for the first time by the insertion of the proviso to Section 113, is clearly a substantive provision and hence is to be construed prospective in operation. The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parliament. Furthermore, an amendment made to a taxing statute can be said to be intended to remove "hardships" only of the assessee, not of the Department. On the contrary, imposing a retrospective levy on the assessee would have caused undue hardship and for that reason Parliament specifically chose to make the proviso effective from 1-6-2002.

45. The aforesaid discursive of ours also makes it obvious that the conclusion of the Division Bench in *Suresh N. Gupta*[3] treating the proviso as clarificatory and giving it retrospective effect is not a correct conclusion. The said judgment is accordingly overruled.

46. As a result of the aforesaid discussion, the appeals filed by the Income Tax Department are hereby dismissed. The appeals of the assessees are allowed deleting the surcharge levied by the assessing officer for this block assessment pertaining to the period prior to 1-6-2002.

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3 *CIT* v. *Suresh N. Gupta*, (2008) 4 SCC 362

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(BEFORE CHOCKALINGAM NAGAPPAN AND ROHINTON FALI NARIMAN, JJ.)

UNION OF INDIA AND ANOTHER .. Appellants; a

Versus

INDUSIND BANK LIMITED AND ANOTHER .. Respondents.

Civil Appeals Nos. 9087-89 of 2016†, decided on September 15, 2016 b

A. **Contract and Specific Relief — Contract Act, 1872 — S. 28 (as it stood prior to its amendment in 1997 and finally after its amendment in 2013) and Ss. 128 & 129 — Bar under S. 28 as it stood prior to its amendment in 1997 — When attracted — Ingredients of bar under unamended S. 28, explained**

— *Assertion* of right and *enforcement* of right — Distinguished — Agreement restricting/limiting period within which right may be asserted, held, does not fall within umbrage of unamended S. 28 c

— Clause neither seeking to *absolutely* restrict enforcement of rights under the agreement, nor purporting to limit time within which such rights could be *enforced* — It only seeking to restrict period within which *assertion* of rights/claim or demand raised under the agreement was to be done, which, held, can be construed as a condition precedent for filing a suit, which assertion/claim/demand should have been raised within period agreed to by the parties — Hence, clauses concerned in present case, only restricting period within which rights under agreement could be asserted, held, not hit by bar under unamended S. 28 d

— Tentative view expressed also on how amended S. 28 might apply e

— Appellant invited applications for export of cotton and cotton waste — Four exporters applying for it and respondent Bank giving bank guarantee — As certain recoveries were to be made against exporters, appellant invoked bank guarantee issued by respondent Bank — Respondent Bank refused to honour bank guarantee as rights were not asserted/claimed within stipulated time specified under agreement f

— Held, bank guarantee between appellant and respondent Bank governed by unamended S. 28 — Clauses in bank guarantee did not prescribe period of limitation for enforcement of bank guarantee — These clauses merely required appellant to lodge claim within stipulated time so that subsequent suit to assert it rights can be filed within period of limitation — Hence, held, did not fall within umbrage of unamended S. 28 g

— Observed en passant (as issue did not arise), that stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability h

† Arising out of SLPs (C) Nos. 16166-68 of 2011. From the Judgment and Order dated 20-4-2011 in Appeals Nos. 258-60 of 2008, passed by the High Court of Judicature at Bombay

B. **Contract and Specific Relief — Contract Act, 1872 — S. 28 (as it stood before 1997) — Essential ingredients of — Held, essential ingredients are: (i) party should be restricted absolutely from enforcing its rights; (ii) such absolute restriction should be to approach, by way of legal proceeding, courts or tribunals; (iii) such absolute restriction may also relate to limiting of time within which party may thus enforce its rights before a court or tribunal**

C. **Contract and Specific Relief — Contract Act, 1872 — S. 28 (as amended in 1997) — Nature, and temporal operation of — Held, S. 28 is substantive law and operates prospectively — Language used in S. 28 does not make it operative retrospectively — As it is remedial in nature, it is neither clarificatory or declaratory — Interpretation of Statutes — Amendatory or Clarificatory — Determination of — Principles summarised**

D. **Jurisprudence — Rights — Assertion of right and enforcement of right — Distinguished — Agreement restricting/limiting period within which right may be asserted, held, does not fall within umbrage of unamended S. 28 of Contract Act, 1872 — Words and Phrases — "Assertion of right", "enforcement of right"**

The appellant is the Textile Commissioner, the Ministry of Textiles, Government of India. As per the memorandum issued by the appellant, the export of cotton and cotton waste was permitted only against an irrevocable letter of credit. The exporters were required to furnish bank guarantee in prescribed form at 10% of contract price and it was to be valid for 6 months with provision for claims for additional three months after the last date of shipment. The appellant invited application for export of cotton.

Accordingly, four sale contracts were executed between M/s Indocomex Fibres (P) Ltd., Singapore and four exporters. All four exporters submitted their application on 31-1-1996. On the same day bank i.e. 31-1-1996 guarantee was also executed. The exporters were issued allocation-cum-registration certificate. As the four exporters failed and neglected to furnish supporting documents regarding export of goods within stipulated time, the appellant called upon the exporters vide letter dated 3-1-1997 to submit necessary documents within 15 days from issue of the said letter but not later than 20-1-1997. It was also mentioned that if the exporters failed to furnish the required documents, then the bank guarantees would be invoked. The exporters did not submit the required documents within the stipulated period of time. Hence, the appellant vide letter dated 15-5-1997 invoked the bank guarantees.

The respondent Bank refused to pay under the said guarantees as, as per the terms thereof could have been invoked only up to 30-4-1997 but not later. To this refusal, the appellant invoked the 1997 Amendment made to Section 28 of the Contract Act, 1872 with effect from 8-1-1997 and contended that the respondent Bank was not absolved of its liability. Again the respondent bank refused to pay.

In the interim time, two of the exporters merged their companies. On 23-7-1998, the appellant called upon the exporters and the respondent Bank to pay the amount covered by the bank guarantee. As nothing materialised, the appellant filed three summary suits. After some proceedings, all the exporters remained ex parte and the suits were decreed against them after full-fledged trial. It was held that even if claim was not made within stipulated time, still the respondent Bank was not absolved of its liability as the amendment to Section 28 of the Contract Act was applicable. In appeal before the Division Bench, the applicability of the amended Section 28 was affirmed but the Division Bench reversed the decree on ground that the bank guarantees were not invoked within the time stipulated. Hence these appeals.

Dismissing the appeals, the Supreme Court

Held :

What emerges on a reading of the Law Commission Report together with the Statement of Objects and Reasons for the 1997 Amendment is that the 1997 Amendment does not purport to be either declaratory or clarificatory. It seeks to bring about a substantive change in the law by stating, for the first time, that even where an agreement extinguishes the rights or discharges the liability of any party to an agreement, so as to restrict such party from enforcing his rights on the expiry of a specified period, such agreement would become void to that extent. The 1997 Amendment therefore seeks to set aside the distinction made in the case law up to date between agreements which limit the time within which remedies can be availed and agreements which do away with the right altogether in so limiting the time. These are obviously substantive changes in the law which are remedial in nature and cannot have retrospective effect. (Para 18)

Section 28 of the Contract Act, 1872, being substantive law, operates prospectively, as retrospectivity is not clearly made out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, the 1997 Amendment by making certain agreements covered by Section 28(*b*) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, both the Single Judge and the Division Bench of the High Court were in error in holding that the amended Section 28 of the Contract Act would apply. (Para 24)

Sukhram Singh v. *Harbheji*, (1969) 1 SCC 609; *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*, (1995) 2 SCC 630; *Purbanchal Cables & Conductors (P) Ltd.* v. *Assam SEB*, (2012) 7 SCC 462 : (2012) 4 SCC (Civ) 245; *CIT* v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1; *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, *relied on*

Union of India v. *Bhagwati Cottons Ltd.*, 2008 SCC OnLine Bom 217 : (2008) 5 Bom CR 909; *Indusind Bank Ltd.* v. *Union of India*, 2011 SCC OnLine Bom 1972, *reversed*

Mithilesh Kumari v. *Prem Behari Khare*, (1989) 2 SCC 95, *held, overruled*

Union of India v. *Bhagwati Cottons Ltd.*, Appeal (OS) No. 1059 of 2002, decided on 20-1-2003 (as amended on 27-2-2003) (Bom); *Union of India* v. *Bhagwati Cotton Ltd.*, SLP (C) No. 13253 of 2003, order dated 14-8-2003 (SC), *referred to*

Hirabhai v. *Manufacturer's Life Insurance Co.*, (1912) 14 Bom LR 741 : 16 IC 1001; *Baroda Spg. and Wvg. Co. Ltd.* v. *Satyanarayana Marine and Fire Insurance Co. Ltd.*, 1913 SCC OnLine Bom 17 : ILR (1914) 38 Bom 344; *Main* v. *Stark*, (1890) LR 15 AC 384 (PC);

Phillips v. *Eyre*, (1870) LR 6 QB 1; *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*, (1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL), *cited*

Considering that the subject-matter of Section 28 of the Contract Act is "agreements", the unamended Section 28 of the Contract Act would be the law applicable as on 31-1-1996, which is the date of the agreement of bank guarantee. (Para 20)

Considering that the unamended Section 28 is to apply, it is important to advert to the said section and see what are its essential ingredients. First, a party should be restricted *absolutely* from enforcing his rights under or in respect of any contract. Secondly, such absolute restriction should be to approach, by way of a usual legal proceeding, the ordinary tribunals set up by the State. Thirdly, such absolute restriction may also relate to the limiting of time within which the party may *thus* enforce its rights. (Para 25)

A reading of the clauses in the bank guarantee makes it clear that neither clause purports to limit the time within which rights are to be enforced. In other words, neither clause purports to curtail the period of limitation within which a suit may be brought to enforce the bank guarantee. The restriction adverted to in the clauses of the guarantee envisages the need for the appellant to lodge a claim based on the guarantee, and that if this was done, a suit to invoke rights under the guarantee could be filed within the limitation period set out in the Limitation Act. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the appellant shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. Assertion of right is one thing than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. (Paras 28 to 30)

Food Corporation of India v. *New India Assurance Co. Ltd.*, (1994) 3 SCC 324, *applied*

National Insurance Co. Ltd. v. *Sujir Ganesh Nayak & Co.*, (1997) 4 SCC 366; *H.P. State Forest Co. Ltd.* v. *United India Insurance Co. Ltd.*, (2009) 2 SCC 252 : (2009) 1 SCC (Civ) 490, *followed*

Vulcan Insurance Co. Ltd. v. *Maharaj Singh*, (1976) 1 SCC 943, *cited*

Considering that the respondents' first argument has been accepted, it is not necessary to go into the finer details of the issue whether the clauses in the bank guarantee would be hit by Section 28(*b*) after the 1997 Amendment. It may only be noticed, in passing, that Parliament has to a large extent redressed any grievance that may arise qua bank guarantees in particular, by adding an Exception (*iii*) by an amendment made to Section 28 of the Contract Act in 2012 with effect from 18-1-2013. Since the matter is not in issue, suffice it to say that stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability. The appeals are, therefore, dismissed with no order as to costs. (Para 34) a

G-D/57539/CV

Advocates who appeared in this case :

A.K. Panda, Senior Advocate [R.K. Rathore, Vibhu Shankar Mishra, Ms Manita Verma, Ms Arunima Dwivedi, Ms Shruti Srivastav, Raj Bahadur Yadav and M.K. Maroria (for Shreekant N. Terdal), Advocates] for the Appellants; b

Dr A.M. Singhvi and Krishnan Venugopal, Senior Advocates (Pranab Kr. Mullick, Ms Soma Mullick, Sebat Kr. Devria, Amit Bhandar, Lalit Bhasin, Ms Nina Gupta, Mudit Sharma, P.V. Yogeswaran, Ms Ranu Puruhit and Ms Shase, Advocates) for the Respondents.

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6. SLP (C) No. 13253 of 2003, order dated 14-8-2003 (SC), *Union of India* v. *Bhagwati Cotton Ltd.* — 726*c*
7. Appeal (OS) No. 1059 of 2002, decided on 20-1-2003 (as amended on 27-2-2003) (Bom), *Union of India* v. *Bhagwati Cottons Ltd.* — 726*b-c*
8. (1997) 4 SCC 366, *National Insurance Co. Ltd.* v. *Sujir Ganesh Nayak & Co.* — 737*a*, 737*b*, 738*c*
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14. (1969) 1 SCC 609, *Sukhram Singh* v. *Harbheji* — 731*c-d*
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16. 1913 SCC OnLine Bom 17 : ILR (1914) 38 Bom 344, *Baroda Spg. and Wvg. Co. Ltd.* v. *Satyanarayana Marine and Fire Insurance Co. Ltd.* — 728*e* g
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18. (1890) LR 15 AC 384 (PC), *Main* v. *Stark* — 731*f*
19. (1870) LR 6 QB 1, *Phillips* v. *Eyre* — 734*f*

h

The Judgment of the Court was delivered by

ROHINTON FALI NARIMAN, J.— Leave granted. The present appeals by the Union of India raise an interesting question as to the applicability of the 1997 Amendment to Section 28 of the Contract Act, 1872. The facts of the three appeals are similar inasmuch as they concern four exporters who belong to what is known as the GPB Group of Companies.

2. By a memorandum dated 6-11-1995, issued by the Textile Commissioner under the Imports and Exports (Control) Act, 1947, terms and conditions for export of raw cotton and cotton waste for September 1995-August 1996 were laid down. The shipment was permitted only against an irrevocable letter of credit. The exporters were required to furnish a bank guarantee in the prescribed form @ 10% of the contract price. The bank guarantee was required to be kept valid up to 6 months with a provision for claims for an additional three months, after the last date of shipment. The allocation of quota was on the basis of the highest unit value realisation.

3. The Textile Commissioner invited applications vide Press Note and Memorandum, both dated 9-1-1996, for export of 10,000 bales of extra long staple cotton. It was mentioned in the Press Note and the Memorandum that the shipment period will be 180 days from the date of registration of quota or up to 31-8-1996, whichever is earlier.

4. Pursuant to this Press Note and Memorandum, four sale contracts were executed between M/s Indocomex Fibres (P) Ltd., Singapore and the four exporters, all in January 1996. On 31-1-1996, the four exporters made an application together with a bank guarantee of even date. In February, the exporters were permitted to export the total quantity of 9175 bales vide an Allocation-cum-Registration Certificate dated 6-2-1996 within a validity period of shipment up to 31-7-1996. It may be mentioned in passing that this date was extended as many as three times, the third extension being notified as up to 28-2-1997.

5. As the four exporters failed and neglected to furnish supporting documents regarding export of goods allocated to them within the stipulated period, the Textile Commissioner, by a letter dated 3-1-1997, called upon the exporters to submit the necessary documents within 15 days from the date of issue of this letter but not later than 20-1-1997, failing which the bank guarantees would be enforced. As the exporters failed and neglected to furnish these documents, the Textile Commissioner, vide letters dated 15-5-1997, invoked the bank guarantees. Vide letters of even date, the respondent Bank refused to pay under the said guarantees, stating that the same could be invoked only within the extended period of three months i.e. up to 30-4-1997, and not later. By a letter dated 27-8-1997/28-8-1997, the Textile Commissioner informed the respondent Bank that in light of the amendment to Section 28 of the Contract Act, which came into force on 8-1-1997, the Bank was not absolved of its obligation to make payment under the bank guarantee. To this, the Bank vide letter dated 19-9-1997, reiterated its earlier stand and stated that it was not liable to make payment under the bank guarantee after 30-4-1997.

It may be mentioned in passing that two of the aforesaid group companies, namely, GPB Fibres Ltd. and M/s Bhagwati Cotton Ltd. were amalgamated on 12-9-1997.

6. On 23-7-1998, the Textile Commissioner called upon both the exporters and the respondent Bank to pay the sums covered by the bank guarantee. As this letter evoked no response, three summary suits being Nos. 2959, 2963 and 2996 of 1999 were filed on 8-4-1999 by the Union of India and the Textile Commissioner against the exporters and the Bank in the High Court of Bombay. By order dated 4-12-2001, as amended on 22-1-2002, unconditional leave to defend the suits was granted to the Bank, and conditional leave to so defend the suits to the exporters upon depositing the amount of Rs 3,82,59,450 in the Court within 12 weeks from the date of the said order. On 20-1-2003/27-2-2003[1], the Division Bench dismissed the appeal filed by the Union of India on the ground that it was not maintainable under Clause 15 of the Letters Patent of the High Court. On 14-8-2003[2], an SLP filed by the Union of India met with the same fate.

7. All four exporters remained ex parte, as a result of which the suits came to be decreed ex parte against the said exporters on 29-11-2004.

8. On contest with the Bank, a learned Single Judge of the Bombay High Court on 22-2-2008[3], was of the view that as the bank guarantees in question were in force on 8-1-1997, when the amendment to Section 28 of the Contract Act took place, the amended Section 28 would apply to the facts of these cases. This being the case, the clause in the bank guarantees extinguishing rights and discharging the liability of the Bank if a claim were not to be made within three months of the date of expiry of the bank guarantee, was held to be void. Consequently, it was held that the invocation of the aforesaid bank guarantees, being without the aforesaid time constraint, was valid, and the said suits were, therefore, decreed in favour of the Union of India and against the Bank.

9. In an appeal against this judgment, by the impugned judgment dated 20-4-2011[4], a Division Bench of the Bombay High Court, while holding that the amended Section 28 would apply to the facts of these cases, came to the opposite conclusion by following certain judgments of this Court, and therefore, reversed the judgment of the learned Single Judge, holding that since the bank guarantees were not invoked within the time prescribed, the suits would have to be dismissed. The Union of India has filed the present appeals before us.

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1 *Union of India* v. *Bhagwati Cottons Ltd.*, Appeal (OS) No. 1059 of 2002, decided on 20-1-2003 (as amended on 27-2-2003) (Bom)

2 *Union of India* v. *Bhagwati Cotton Ltd.*, SLP (C) No. 13253 of 2003, order dated 14-8-2003 (SC), wherein it was directed:

"We see no reason to interfere. The special leave petitions are dismissed. However, we request the High Court to dispose of the suit as expeditiously as possible."

3 *Union of India* v. *Bhagwati Cottons Ltd.*, 2008 SCC OnLine Bom 217 : (2008) 5 Bom CR 909

4 *Indusind Bank Ltd.* v. *Union of India*, 2011 SCC OnLine Bom 1972

10. Shri A.K. Panda, learned Senior Advocate appearing on behalf of the Union of India, has stated that the Single Judge was correct in applying Section 28(*b*) as amended in 1997, and that the condition contained in the bank guarantee which restricted the period within which it could be invoked is, therefore, void. To buttress his submission, he cited, *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*[5]. According to the learned counsel, the Division Bench, having reiterated that the amended Section 28(*b*) would apply, was not correct in its conclusion that such clause in the bank guarantees would not be void. According to the learned counsel, the Supreme Court judgments relied upon were all pre-amendment, and could not therefore be relied upon to arrive at the opposite result from the learned Single Judge.

11. On the other hand, Dr A.M. Singhvi, learned Senior Advocate, and Shri Krishnan Venugopal, learned Senior Advocate, contended that both the Single Judge and the Division Bench were not correct in applying the amendment to Section 28. According to both the learned counsel, the bank guarantees themselves being dated 31-1-1996, would not be affected by an amendment made one year later i.e. on 8-1-1997. The relevant date and the relevant law applicable would be as on 31-1-1996, which would be the unamended Section 28. This being the case, according to them, a catena of judgments has held that if a clause in a contract does not restrict the limitation period within which one can approach a court, then it is perfectly valid and not hit by Section 28 (unamended). For this purpose, they cited several judgments before us. An alternative plea was also raised by them that, on the assumption that the amended Section 28 would apply, even then, regard being had to the limited object sought to be achieved by the amendment, which followed a Law Commission Report, it would be clear that even on application of Section 28(*b*), the aforesaid clause in the bank guarantees would not be hit. In particular, they argued that the revised Section 28 suggested by the Law Commission was not in fact enacted verbatim in Section 28(*b*), and that the crucial words "or on failure to make a claim" are missing in the amended Section 28. They also referred to a subsequent amendment of Section 28 in 2012, specifically dealing with bank guarantees, in the course of their arguments.

12. The primary contention with which we are faced is whether Section 28 applies in its original form or whether it applies after amendment in 1997. In order to answer this question, it is first necessary to set out Section 28 in its original form and Section 28 after amendment. The section reads as under:

12.1. Original section

> "**28.** ***Agreements in restraint of legal proceedings, void.***—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent."

5 (1995) 2 SCC 630

12.2. Amendment w.e.f. 8-1-1997

"**28.** ***Agreements in restraint of legal proceedings, void***.—*Every agreement*—

(*a*) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(*b*) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights,

is void to that extent." (emphasis supplied)

13. In order to answer this primary question, we have first to see whether the change made in Section 28 could be said to be clarificatory or declaratory of the law, and hence retrospective. It is common ground that the statute has not made the aforesaid amendment retrospective as it is to come into force only with effect from 8-1-1997.

14. The original section is of 1872 vintage. It remained in this incarnation for over 100 years and was the subject-matter of two Law Commission Reports. The 13th Report of the Law Commission of India, September 1958 examined the section and ultimately decided that it was not necessary to amend it, given the fact that there is a well-known distinction between agreements providing for relinquishment of rights as well as remedies as against agreements for relinquishing remedies only. This was reflected in Para 55 of the Report as follows:

"55. *Section 28*.—Decided cases reveal[5a] a divergence of opinion in relation to certain clauses of insurance policies with reference to the applicability of this section. On examination, it would appear that these cases do not really turn on the interpretation of the section, but hinge on the construction of the insurance policies in question. The principle itself is well recognised that an agreement providing for the relinquishment of rights and remedies is valid, but an agreement for relinquishment of remedies only falls within the mischief of Section 28. Thus, in our opinion, no change is called for by reason of the aforesaid conflict of judicial authority."

15. Several decades passed, until the Law Commission in its 97th Report of March 1984 suo motu decided that the section required amendment. An introduction to the Report stated the point for consideration thus:

"1.2. *Point for consideration*.—Under Section 28 of the Indian Contract Act, 1872—to state the point in brief—an agreement which limits

5a *Hirabhai* v. *Manufacturer's Life Insurance Co.*, (1912) 14 Bom LR 741 : 16 IC 1001. Cf. *Baroda Spg. and Wvg. Co. Ltd.* v. *Satyanarayana Marine and Fire Insurance Co. Ltd.*, 1913 SCC OnLine Bom 17 : ILR (1914) 38 Bom 344 at pp. 348-49.

the time within which a party to an agreement may enforce his rights under any contract by proceedings in a court of law is void to that extent. But the section does not invalidate an agreement in the nature of prescription, that is to say, an agreement which provides that, at the end of a specified period. If the rights thereunder are not enforced, the rights shall cease to exist. As will be explained in greater detail in later Chapters of this Report, this position creates serious anomalies and hardship, apart from leading to unnecessary litigation. Prima facie, it appeared to the Commission that the section stood in need of reform on this point. The arguments for and against amendment of the section will be set out later. For the present, it is sufficient to state that the problem is one of considerable practical importance as such stipulations are frequently found in agreements entered into in the course of business."

16. After going through the existing case law and finding that the existing case law resulted in economic injustice because of unequal bargaining power, the Law Commission decided to recommend a change in the section. This was done as follows:

"5.1. *Need for reform of the law*.—We now come to the changes that are needed in the present law. In our opinion, the present legal position as to prescriptive clauses in contracts cannot be defended as a matter of justice, logic, commonsense or convenience. When accepting such clauses, consumers either do not realise the possible adverse impact of such clauses, or are forced to agree because big corporations are not prepared to enter into contracts except on these onerous terms. "Take it or leave it all", is their general attitude, and because of their superior bargaining power, they naturally have the upper hand. We are not, at present, dealing with the much wider field of "standard form contracts" or "standard" terms. But confining ourselves to the narrow issue under discussion, it would appear that the present legal position is open to serious objection from the common man's point of view. Further, such clauses introduce an element of uncertainty in transactions which are entered into daily by hundreds of persons.

5.2. *Demerits of the present law*.—It is hardly necessary to repeat all that we have said in the preceding Chapters about the demerits of the present law. Briefly, one can say that the present law, which regards prescriptive clauses as valid while invalidating time-limit clauses which merely bar the remedy, suffers from the following principal defects:

(*a*) It causes serious hardship to those who are economically disadvantaged and is violative of economic justice.

(*b*) In particular, it harms the interests of the consumer, dealing with big corporations.

(*c*) It is illogical, being based on a distinction which treats the more severe flaw as valid, while invalidating a lesser one.

(*d*) It rests on a distinction too subtle and refined to admit of easy application in practice. It thus, throws a cloud on the rights of parties, who do not know with certainty where they stand, ultimately leading to avoidable litigation.

5.3. *Recommendation to amend Section 28, Contract Act*.—On a consideration of all aspects of the matter, we recommend that Section 28 of the Indian Contract Act, 1872 should be suitably amended so as to amend to render invalid contractual clauses which purport to extinguish, on the expiry of a specified term, right accruing from the contract. Here is a suggestion for re-drafting the main paragraph of Section 28.

Revised Section 28, main paragraph, Contract Act as recommended

28. Every agreement—

(*a*) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals, or

(*b*) which limits the time within which he may thus enforce his rights, or

(*c*) which extinguishes the rights of any party thereto under or in respect of any contract on the expiry of a specified period or on failure to make a claim or to institute a suit or other legal proceeding within a specified period, or

(*d*) *which discharges any party thereto from any liability under or in respect of any contract in the circumstances specified in clause (c), is void to that extent*." (emphasis in original)

17. A period of 13 years passed after which this Report was implemented. The Statement of Objects and Reasons of the Amendment reads as follows:

"**1.** The Law Commission of India has recommended in its 97th Report that Section 28 of the Indian Contract Act, 1872 may be amended so that the anomalous situation created by the existing section may be rectified. It has been held by the courts that the said Section 28 shall invalidate only a clause in any agreement which restricts any party thereto from enforcing his rights absolutely or which limits the time within which he may enforce his rights. The courts have, however, held that this section shall not come into operation when the contractual term spells out an extinction of the right of a party to sue or spells out the discharge of a party from all liability in respect of the claim. What is thus hit by Section 28 is an agreement relinquishing the remedy only i.e. where the time-limit specified in the agreement is shorter than the period of limitation provided by law. A distinction is assumed to exist between remedy and right and this distinction is the basis of the present position under which a clause barring a remedy is void, but a clause extinguishing the rights is valid. This approach may be sound in theory but, in practice, it causes serious hardship and might even be abused.

2. It is felt that Section 28 of the Indian Contract Act, 1872 should be amended as it harms the interests of the consumer dealing with big corporations and causes serious hardship to those who are economically disadvantaged.

a 3. The Bill seeks to achieve the above objects."

18. What emerges on a reading of the Law Commission Report together with the Statement of Objects and Reasons for the Amendment is that the Amendment does not purport to be either declaratory or clarificatory. It seeks to bring about a substantive change in the law by stating, for the first time, that even where an agreement extinguishes the rights or discharges the liability b of any party to an agreement, so as to restrict such party from enforcing his rights on the expiry of a specified period, such agreement would become void to that extent. The amendment therefore seeks to set aside the distinction made in the case law up to date between agreements which limit the time within which remedies can be availed and agreements which do away with the right altogether in so limiting the time. These are obviously substantive changes in c the law which are remedial in nature and cannot have retrospective effect.

19. In *Sukhram Singh* v. *Harbheji*[6] this Court held: (SCC pp. 614-15, para 12 : SCR pp. 758-59)

"*12.* Now a law is undoubtedly retrospective if the law says so expressly but it is not always necessary to say so expressly to make the d law retrospective. There are occasions when a law may be held to be retrospective in operation. Retrospection is not to be presumed for the presumption is the other way but many statutes have been regarded as retrospective without a declaration. Thus it is that remedial statutes are always regarded as prospective but declaratory statutes are considered retrospective. Similarly sometimes statutes have a retrospective effect e when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the context of connected provisions. It is always a question whether the legislature has sufficiently expressed itself. To find this one must look at the general scope and purview of the Act and the remedy the legislature intends to apply in the former state of the law and then determine what the legislature intended to do. This line f of investigation is, of course, only open if it is necessary. In the words of Lord Selborne in *Main* v. *Stark*[7], there might be something in the context of an Act or be collected from its language, which might give to words prima facie prospective a large operation. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the legislature."

g **20.** Considering that the subject-matter of Section 28 is "agreements", the unamended Section 28 would be the law applicable as on 31-1-1996, which is the date of the agreement of bank guarantee. It now remains for us to deal with the case law cited by both sides.

h 6 (1969) 1 SCC 609 : (1969) 3 SCR 752
7 (1890) LR 15 AC 384 at p. 388 (PC)

21. In *R. Rajagopal Reddy* v. *Padmini Chandrasekharan*[5] this Court was called upon to interpret the Benami Transactions (Prohibition) Act, 1988. A three-Judge Bench of this Court overruled *Mithilesh Kumari* v. *Prem Behari Khare*[8] in arriving at the conclusion that the 1988 Act was prospective and not retrospective. In so overruling the Division Bench judgment, this Court held that the Act is not expressly retrospective, so that an enquiry would lie as to whether it could be said to be clarificatory or declaratory. The language of Section 4(1) of the statute made it clear that it would apply to suits filed only after the 1988 Act came into force. Further, the Bench in *Padmini Chandrasekharan case*[5] went on to quote *Maxwell on the Interpretation of Statutes* as follows: (SCC p. 645, para 14)

> " 'Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it, 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary'."

It then went on to hold as follows: (SCC pp. 645-47, para 17)

> "*17.* As regards, reason 3, we are of the considered view that the Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of Section 3, the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benami transactions and destroys rights flowing from such transactions as existing earlier is really not a declaratory enactment. With respect, we disagree with the line of reasoning which commanded to the Division Bench. In this connection, we may refer to the following observations in *Principles of Statutory Interpretation*, 5th Edn., 1992, by Shri G.P. Singh, at p. 315 under the caption "Declaratory statutes":
>
> > 'The presumption against retrospective operation is not applicable to declaratory statutes. As stated in *Craies* and approved by the Supreme Court†:

5 (1995) 2 SCC 630
8 (1989) 2 SCC 95 : (1989) 1 SCR 621
† **Ed.**: The reference appears to be to *Central Bank of India* v. *Workmen*, AIR 1960 SC 12, p. 27, para 29.

"For modern purposes a declaratory Act may be defined as an Act to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what Parliament deems to have been a judicial error whether in the statement of the common law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the word "declared" as well as the word enacted."

But the use of the words "it is declared" is not conclusive that the Act is declaratory for these words may, at times be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective. In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is to explain an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language "shall be deemed always to have meant" is declaratory, and is in plain terms retrospective. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law when the Constitution came into force the amending Act also will be part of the existing law.

In *Mithilesh Kumari* v. *Prem Behari Khare*[8] Section 4 of the Benami Transactions (Prohibition) Act, 1988 was, it is submitted, wrongly held to be an Act declaratory in nature for it was not passed to clear any doubt existing as to the common law or the meaning or effect of any statute. The conclusion however, that Section 4 applied also to past benami transactions may be supportable on the language used in the section.' "

22. Similarly, in *Purbanchal Cables & Conductors (P) Ltd.* v. *Assam SEB*[9], this Court had to decide whether the Interest on Delayed Payments to Small-Scale and Ancillary Industrial Undertakings Act, 1993 could be said to be retrospective. After a review of various judgments of this Court, this Court held: (SCC p. 484, paras 51-52)

8 (1989) 2 SCC 95 : (1989) 1 SCR 621
9 (2012) 7 SCC 462 : (2012) 4 SCC (Civ) 245

"*51*. There is no doubt about the fact that the Act is a substantive law as vested rights of entitlement to a higher rate of interest in case of delayed payment accrues in favour of the supplier and a corresponding liability is imposed on the buyer. This Court, time and again, has observed that any substantive law shall operate prospectively unless retrospective operation is clearly made out in the language of the statute. Only a procedural or declaratory law operates retrospectively as there is no vested right in procedure.

52. In the absence of any express legislative intendment of the retrospective application of the Act, and by virtue of the fact that the Act creates a new liability of a high rate of interest against the buyer, the Act cannot be construed to have retrospective effect. Since the Act envisages that the supplier has an accrued right to claim a higher rate of interest in terms of the Act, the same can only be said to accrue for sale agreements after the date of commencement of the Act i.e. 23-9-1992 and not any time prior."

23. Similarly, in *CIT* v. *Vatika Township (P) Ltd.*[10] this Court held that the proviso to Section 113 of the Income Tax Act, 1961 was prospective and not retrospective. In so holding, the Constitution Bench adverted to certain general principles as under: (SCC pp. 21-22, paras 28-29)

"*28*. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips* v. *Eyre*[11], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of "*fairness*", which must be the basis of every legal rule as was observed in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd.*[12] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly

10 (2015) 1 SCC 1
11 (1870) LR 6 QB 1
12 (1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)

to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later." (emphasis in original)

24. On a conspectus of the aforesaid decisions, it becomes clear that Section 28, being substantive law, operates prospectively, as retrospectivity is not clearly made out by its language. Being remedial in nature, and not clarificatory or declaratory of the law, by making certain agreements covered by Section 28(*b*) void for the first time, it is clear that rights and liabilities that have already accrued as a result of agreements entered into between parties are sought to be taken away. This being the case, we are of the view that both the Single Judge[3] and the Division Bench[4] were in error in holding that the amended Section 28 would apply.

25. Considering that the unamended Section 28 is to apply, it is important to advert to the said section and see what are its essential ingredients. First, a party should be restricted *absolutely* from enforcing its rights under or in respect of any contract. Secondly, such absolute restriction should be to approach, by way of a usual legal proceeding, the ordinary tribunals set up by the State. Thirdly, such absolute restriction may also relate to the limiting of time within which the party may *thus* enforce its rights.

26. At this point, it is necessary to set out the exact clause in the bank guarantees in the facts of the present cases. One such clause reads as under:

> "… Unless a demand or claim under this guarantee is made against us within three months from the above date (i.e. on or before 30-4-1997), all your rights under the said guarantee shall be forfeited and we shall be relieved and discharged from all liabilities hereunder."

27. A similar clause contained in another bank guarantee reads thus:

> "… Provided however, unless a demand or claim under this guarantee is made on us in writing within 3 months from the date of expiry of this guarantee in respect of export of 416.500 MT 2450 bales of raw cotton, we shall be discharged from all liability under this guarantee thereafter."

28. A reading of the aforesaid clauses makes it clear that neither clause purports to limit the time within which rights are to be enforced. In other words, neither clause purports to curtail the period of limitation within which a suit may be brought to enforce the bank guarantee. This being the case, it is clear that this Court's judgment in *Food Corporation of India* v. *New India Assurance Co. Ltd.*[13] would apply on all fours to the facts of the present case.

3 *Union of India* v. *Bhagwati Cottons Ltd.*, 2008 SCC OnLine Bom 217 : (2008) 5 Bom CR 909
4 *Indusind Bank Ltd.* v. *Union of India*, 2011 SCC OnLine Bom 1972
13 (1994) 3 SCC 324

29. The judgment in *Food Corporation of India case*[13] of Venkatachala and Bharucha, JJ. set out the relevant clause in a fidelity insurance guarantee as follows: (SCC p. 336, para 12) a

> "*12. … 'however, that the Corporation shall have no rights under this bond after the expiry of (period) six months from the date of termination of the contract.*' " (emphasis in original)

On the facts in that case, the High Court had allowed the appeals of the insurance companies stating that the said clause did not entitle the Corporation b to file suits against insurance companies after the expiry of the six months' period from the date of termination of the respective contracts entered into. In setting aside the High Court judgment, this Court held that none of the clauses in the bond required that a suit should be instituted by the Corporation for enforcing its rights under the bond within a period of six months from the date of termination of the contract. The restriction adverted to in the clauses of the c bond envisaged the need for the Corporation to lodge a claim based on the bond, and that if this was done, a suit to invoke rights under the bond could be filed within the limitation period set out in the Limitation Act.

30. In a separate concurring judgment R.M. Sahai, J. after going into the case law in para 3 of his judgment, made an extremely perceptive observation. He stated that where the filing of the suit within limitation is made dependent d on any condition precedent, then such condition precedent not curtailing the limitation period within which a suit could be filed, would be valid and not hit by Section 28. In para 8 of the judgment in *Food Corporation of India case*[13], the learned Judge put it thus: (SCC p. 335)

> "*8.* … It does not directly or indirectly curtail the period of limitation e nor does it anywhere provide that the Corporation shall be precluded from filing suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount. Assertion of right is one thing f than enforcing it in a court of law. The agreement does not anywhere deal with enforcement of right in a court of law. It only deals with assertion of right. The assertion of right, therefore, was governed by the agreement and it is imperative as well that the party concerned must put the other side on notice by asserting the right within a particular time as provided in the agreement to enable the other side not only to comply with the demand g but also to put on guard that in case it is not complied it may have to face proceedings in the court of law. Since admittedly the Corporation did issue notice prior to expiry of six months from the termination of contract, it was in accordance with the Fidelity Insurance clause and, therefore, the suit filed by the appellant was within time."

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13 *Food Corporation of India* v. *New India Assurance Co. Ltd.*, (1994) 3 SCC 324

31. In *National Insurance Co. Ltd.* v. *Sujir Ganesh Nayak & Co.*[14] this Court had to decide whether Condition 19 of an insurance policy was hit by the unamended Section 28. Condition 19 reads as follows: (SCC p. 370, para 5)

> "*Condition 19.*—In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of loss or the damage unless the claim is the subject of pending action or arbitration."

32. After referring to the relevant case law and a detailed reference to the *Food Corpn.*[13] judgment, this Court held: (*Sujir Ganesh Nayak case*[14], SCC pp. 376-77, para 21)

> "*21.* Clause 19 in terms said that in no case would the insurer be liable for any loss or damage after the expiration of twelve months from the happening of loss or damage unless the claim is subject of any pending action or arbitration. Here the claim was not subject to any action or arbitration proceedings. The clause says that if the claim is not pressed within twelve months from the happening of any loss or damage, the Insurance Company shall cease to be liable. There is no dispute that no claim was made nor was any arbitration proceeding pending during the said period of twelve months. The clause therefore has the effect of extinguishing the right itself and consequently the liability also. Notice the facts of the present case. The Insurance Company was informed about the strike by the letter of 28-4-1977 and by letter dated 10-5-1977. The insured was informed that under the policy it had no liability. This was reiterated by letter dated 22-9-1977. Even so more than twelve months thereafter on 25-10-1978 the notice of demand was issued and the suit was filed on 2-6-1980. It is precisely to avoid such delays and to discourage such belated claims that such insurance policies contain a clause like Clause 19. That is for the reason that if the claims are preferred with promptitude they can be easily verified and settled but if it is the other way round, we do not think it would be possible for the insurer to verify the same since evidence may not be fully and completely available and memories may have faded. The forfeiture Clause 12 also provides that if the claim is made but rejected, an action or suit must be commenced within three months after such rejection; failing which all benefits under the policy would stand forfeited. So, looked at from any point of view, the suit appears to be filed after the right stood extinguished. That is the reason why in *Vulcan Insurance case*[15] while interpreting a clause couched in similar terms this Court said: (SCC p. 952, para 23)
>
> > '*23.* … It has been repeatedly held that such a clause is not hit by Section 28 of the Contract Act.…'

14 (1997) 4 SCC 366
13 *Food Corporation of India* v. *New India Assurance Co. Ltd.*, (1994) 3 SCC 324
15 *Vulcan Insurance Co. Ltd.* v. *Maharaj Singh*, (1976) 1 SCC 943

Even if the observations made are in the nature of obiter dicta we think they proceed on a correct reading of the clause."

33. In *H.P. State Forest Co. Ltd.* v. *United India Insurance Co. Ltd.*[16] this Court had to decide whether Clause 6(*ii*) of an insurance policy was hit by the unamended Section 28. This clause reads as follows: (SCC pp. 257-58, para 12)

> "6. (*ii*) In no case whatsoever shall the Company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration; it being expressly agreed and declared that if the Company shall declaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of the disclaimer have been made the subject-matter of a suit in a court of law then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

After a copious reference to *Food Corpn.*[13] and *Sujir Ganesh Nayak case*[14], this Court held that such clauses would not be hit by Section 28.

34. Considering that the respondents' first argument has been accepted by us, we do not think it necessary to go into the finer details of the second argument and as to whether the aforesaid clauses in the bank guarantee would be hit by Section 28(*b*) after the 1997 Amendment. It may only be noticed, in passing, that Parliament has to a large extent redressed any grievance that may arise qua bank guarantees in particular, by adding an Exception (*iii*) by an amendment made to Section 28 in 2012 with effect from 18-1-2013. Since we are not directly concerned with this amendment, suffice it to say that stipulations like the present would pass muster after 2013 if the specified period is not less than one year from the date of occurring or non-occurring of a specified event for extinguishment or discharge of a party from liability. The appeals are, therefore, dismissed with no order as to costs.

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16 (2009) 2 SCC 252 : (2009) 1 SCC (Civ) 490
13 *Food Corporation of India* v. *New India Assurance Co. Ltd.*, (1994) 3 SCC 324
14 *National Insurance Co. Ltd.* v. *Sujir Ganesh Nayak & Co.*, (1997) 4 SCC 366

7. Entry of goods within the local area for consumption, use or sale therein is made taxable by the State Legislature : authority to impose a general levy of tax on entry of goods into a local area is not conferred on the State Legislature by Item 52 of List II of Schedule VII of the Constitution. The Municipality derives its power to tax from the State Legislature and can obviously not have authority more extensive than the authority of the State Legislature. If the State Legislature is competent to levy a tax only on the entry of goods for consumption, use or sale into a local area, the Municipality cannot under a legislation enacted in exercise of the power conferred by Item 52, List II, have power to levy tax in respect of goods brought into the local area for purposes other than consumption, use or sale. The authority of the State Legislature itself being subject to a restriction in that behalf, Section 126 may reasonably be read as subject to the same limitations. When the power of the Legislature with limited authority is exercised in respect of a subject-matter, but words of wide and general import are used, it may reasonably be presumed that the Legislature was using the words in regard to that activity in respect of which it is competent to legislate and to no other ; and that the Legislature did not intend to transgress the limits imposed by the Constitution : see *In re Hindu Women's Rights to Property Act, 1937*.[1] To interpret the expression "brought into the city" used in Section 126(1) as meaning brought into the city for any purpose and without any limitations would, in our judgment, amount to attributing to the Legislature an intention to ignore the constitutional limitations. The expression "brought into the city" in Section 126 was therefore rightly interpreted by the High Court as meaning brought into the Municipal limits for purposes of consumption, use or sale and not for any other purpose.

8. While we agree with the ultimate conclusion of the High Court we may observe that we do not agree with the assumption made by the High Court that the entry of goods into the city may be only for the four purposes mentioned by the High Court, nor do we hold that the proviso exempts from taxation timber brought into the city in the course of transit even when it is not directly removed out of the city by rail, road or water. The proviso, in our judgment, has a limited operation. It merely provides that the Municipality shall not be entitled to levy a tax on timber brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water. But on that account we are unable to hold that the proviso is enacted with the object of bringing to tax all entry of timber which is not brought into the city in the course of transit to any place outside the city and directly removed out of the city by rail, road or water.

9. The appeals fail and are dismissed. There will be no order as to costs in these appeals.

1969 (2) Supreme Court Cases 351

(*From Kerala*)

[BEFORE J. C. SHAH, ACTING C. J. AND V. RAMASWAMI AND A. N. GROVER, JJ].

1. 1941 FCR 12.

THE INCOME TAX OFFICER, ALLEPPY .. Appellant ;

Versus

M. C. PONNOOSE AND OTHERS ETC.† .. Respondents.

Civil Appeal Nos. 942 and 943 of 1966, decided on 28th July, 1969

Income-tax Act, 1961 (No. 43 of 1961)—Section 2(44)—Finance Act, 1963—Section 4—Notification—Empowering Tahsildar to exercise powers of Tax Recovery Officer—Validity—Such notification whether can be given retrospective effect—Delegation of legislative powers.

A notification, dated August 14, 1963, which empowered the revenue officials including the Tahsildar to exercise the powers of a Tax Recovery Officer under the Income-tax Act, 1961, in respect of the arrears was given retrospective effect. The question was whether the State Government could invest the Tahsildar with such powers retrospectively. On a challenge being made to the validity of the notification, the High Court declared it invalid. The Income-tax Officer appealed to the Supreme Court with special leave.

Held, that the Parliament can delegate its legislative powers within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions make a rule, regulation or bye-law which can operate with retrospective effect. (Para 5)

Phillips v. *Eyre*, 40 Law J Rep (NS) QB 28 at p. 37 ; *Dr. Indramani Pyarelal Gupta* v. *W. R. Nathu*, (1963) 1 SCR 721 ; *Modi Food Products Ltd.* v. *Commissioner of Sales Tax*, AIR 1956 All 35 ; *India Sugar Refineries Ltd.* v. *State of Mysore*, AIR 1960 Mys 326 ; *General S. Shivdev Singh and Another* v. *State of Punjab*, 1959 PLR 514, *referred to.*

It can hardly be said that the impugned notification promulgates any rule, regulation or bye-law all of which have a definite signification. The exercise of power under Section 2(44)(*ii*) of the Act is more of an executive than a legislative *etc.* It is difficult to hold in the present case that the Taluka Tahsildar could be authorised by the impugned notification to exercise powers of a Tax Recovery Officer with effect from a date, prior to the date of the notification. (Para 6)

Strawboard Manufacturing Co. Ltd. v. *Gutta Mill Workers' Union*, 1953 SCR 439, *referred to.*

The only effect of the substitution by Section 4 of the Finance Act, 1963, "shall be and shall be deemed always to have been substituted" was to make the new definition a part of the Act from the date it was enacted. The legal fiction could not be extended beyond its legitimate field and the aforesaid words occurring in Section 4 of the Finance Act, 1963, could not be construed to embody conferment of a power for a retrospective authorisation by the State in the absence of any express provision in Section 2(44) of the Act itself. (Para 7)

B. S. Vadera etc. v. *Union of India and Others*, AIR 1969 SC 118, *distinguished.*

Appeal *dismissed.*

† Appeals by special leave from the judgment and order, dated June 18, 1965, of the Kerala High Court in Writ Appeals Nos. 139 and 140 of 1964.

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S. T. Desai, Senior Advocate (*M. C. Chacko* and *A. K. Verma*, Advocates and *J. B. Dadachanji* and *O. C. Mathur*, Advocates of Messrs. J. B. Dadachanji & Co. with him). — for Respondent No 1 (in C. A. No. 942/66).

A. G. Pudissery, Advocate — for Respondent Nos. 2 & 3 (in C. A. No. 942/66).

J. B. Dadachanji & Co., Advocate — for Respondent Nos. 1 & 2 (in C. A. No. 943/66).

A. G. Pudissery, Advocate — for Respondent Nos. 7 & 8 (in C. A. No. 943/66).

The Judgment of the Court was delivered by

GROVER, J.—These two appeals by special leave involve a common question relating to the validity of a notification issued by the Government of Kerala in August, 1963, empowering certain revenue officials including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer under the Income-tax Act, 1961, hereinafter called the Act. The notification was expressly stated to be effective from 1st April, 1962—a date prior to the date of the notification.

2. The facts in one of the appeals (C. A. No. 942/66), may be stated : One Kunchacko of Alleppey allowed the income-tax dues from him to fall into arrears. The Income-tax Officer took steps to recover the arrears through the Tahsildar. Certain shares standing in the name of the assessee were attached by the Tahsildar. The first respondent Ponnoose claimed to have obtained a decree for a certain sum against the assessee. He also got the shares standing in the name of the assessee attached in execution proceedings. Ponnoose filed a petition under Article 226 of the Constitution in the High Court of Kerala in which he challenged the action taken by the revenue officials including the Tahsildar for getting the shares, which had been attached, sold for satisfaction of the income-tax dues of the assessee.

3. The learned Single Judge held that the notification empowering the Tahsildar to exercise the powers of a Tax Recovery Officer under the Act with retrospective effect was invalid. Consequently the attachments made by the Tahsildar were quashed. This view was affirmed by a division bench in appeal.

4. The Act came into force on 1st April, 1962. Section 2(44) defined the expression 'Tax Recovery Officer' in the following terms :

> " 'Tax Recovery Officer' means—
> (*i*) a Collector ;
> (*ii*) an Additional Collector or any other officer authorised to exercise the powers of a Collector under any law relating to land revenue for the time being in force in a State ; or
> (*iii*) any Gazetted Officer of the Central or a State Government who may be authorised by the Central Government by notification in the Official *Gazette*, to exercise the powers of a Tax Recovery Officer."

Section 4 of the Finance Act, 1963, substituted a new definition for the original definition of Tax Recovery Officer. It was provided that the new definition "shall be and shall be deemed always to have been substituted". The new definition was as follows :

" 'Tax Recovery Officer' means—

(i) a Collector or an Additional Collector ;

(ii) any such officer empowered to effect recovery of arrears of land revenue or other public demand under any law relating to land revenue or other public demand for the time being in force in the State as may be authorised by the State Government, by general or special notification in the Official *Gazette*, to exercise the powers of a Tax Recovery Officer ;

(iii) any Gazetted Officer of the Central or a State Government who may be authorised by the Central Government, by general or special notification in the Official *Gazette*, to exercise the powers of a Tax Recovery Officer."

The impugned notification, dated, August 14, 1963, which was published in the Kerala *Gazette*, dated August 20, 1963, referred to the powers conferred by sub-clause (ii) of clause (44) of Section 2 of the Act, read with sub-rule (2) of Rule 7 of the Income-tax (Certificate Proceedings) Rules, 1962 and authorised the various revenue officials mentioned therein including the Taluka Tahsildar to exercise the powers of a Tax Recovery Officer under the Act in respect of the arrears *etc.* The concluding portion was, "This notification shall be deemed to have come into force on the first day of April, 1962". The Tahsildar had effected attachment of the shares subsequent to 1st April, 1962, but prior to August 14, 1963. In other words on the date on which he had effected attachment he was not a Tax Recovery Officer, but he got the powers of a Tax Recovery Officer by virtue of the notification, dated August 14, 1963. The short question for determination, therefore, was and is whether the State Government could invest the Tahsildar with the powers of a Tax Recovery Officer under the aforesaid provisions of the Act with effect from a date prior to the date of the notification, *i. e.* retroactively or retrospectively.

5. Now it is open to a sovereign Legislature to enact laws which have retrospective operation. Even when the Parliament enacts retrospective laws such laws are—in the words of Willes, J., in *Phillips* v. *Eyre*[1]—"no doubt *prima facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law." The courts will not, therefore, ascribe retrospectively to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the Legislature. The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the Legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the persons or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect ; (*see* Subha Rao, J., in *Dr. Indramani Pyarelal Gupta* v. *W. R. Nathu & Others*,[2] the majority not having expressed

1. 40 Law J Rep (NS) QB 28 at p. 37. 2. (1963) 1 SCR 721.

any different opinion on the point ; *Modi Food Products Ltd.* v. *Commissioner of Sales Tax U. P.*[3] ; *India Sugar Refineries Ltd.* v. *State of Mysore*[4] and *General S. Shivdev Singh and Another* v. *The State of Punjab and Others.*[5]

6. It can hardly be said that the impugned notification promulgates any rule, regulation or bye-law all of which have a definite signification. The exercise of the power under sub-clause (*ii*) of Clause (44) of Section 2 of the Act is more of an executive than a legislative act. It becomes, therefore, all the more necessary to consider how such an executive act which has retrospective operation can be valid in the absence of any power conferred by the aforesaid provision to so perform it as to give it retrospective operation. In *Strawboard Manufacturing Co. Ltd.* v. *Gutta Mill Workers' Union*[6] an industrial dispute had been referred by the Governor to the Labour Commissioner or a person nominated by him with the direction that the award should be submitted not later than April 5, 1950. The award, however, was made on April 13, 1950. On April 26, 1950, the Governor issued a notification extending the time up to April 30. It was held that in the absence of a provision authorising the State Government to extend from time to time the period within which the Tribunal or the adjudicator could pronounce the decision the State Government had no authority to extend the time and the award was, therefore, one made without jurisdiction and a nullity. This decision is quite apposite and it is difficult to hold in the present case that the Taluka Tehsildar could be authorised by the impugned notification to exercise powers of a Tax Recovery Officer with effect from a date prior to the date of the notification.

7. It may next be considered whether by saying that the new definition of "Tax Recovery Officer" substituted by Section 4 of the Finance Act, 1963, "shall be and shall be deemed always to have been substituted", it could be said that by necessary implication or intendment the State Government had been authorised to invest the officers mentioned in the notification with the powers of a Tax Recovery Officer with retrospective effect. The only effect of the substitution made by the Finance Act was to make the new definition a part of the Act from the date it was enacted. The legal fiction could not be extended beyond its legitimate field and the aforesaid words occurring in Section 4 of the Finance Act, 1963, could not be construed to embody conferment of a power for a retrospective authorisation by the State in the absence of any express provision in Section 2(44) of the Act itself. It may be noticed that in a recent decision of the Constitution Bench of this Court in *B. S. Vadera etc.* v. *Union of India & Others*[7] it has been observed with reference to rules framed under the proviso to Article 309 of the Constitution that these rules can be made with retrospective operation. This view was, however, expressed owing to the language employed in the proviso to Article 309 that "any rules so made shall have effect subject to the provisions of any such Act". As has been pointed out the clear and unambiguous expressions used in the Constitution, must be given their full and unrestricted meaning unless hedged in by any limitations. Moreover when the language employed in the main part of Article 309 is compared with that of the proviso it becomes clear that the power given to the Legislature for laying down the conditions is identical with the power given to the President or the Governor, as the case may be, in the matter of regulating the recruitment of Government servants and their conditions of service.

3. AIR (1956) All 35.
4. AIR (1960) Mysore 326.
5. 1959 PLR 514.
6. (1953) SCR 439.
7. AIR (1969) SC 118.

The Legislature, however, can regulate the recruitment and conditions of service for all times whereas the President and the Governor can do so only till a provision in that behalf is made by or under an Act of the appropriate Legislature. As the Legislature can legislate prospectively as well as retrospectively there can be hardly any justification for saying that the President or the Governor should not be able to make rules in the same manner so as to give them prospective as well as retrospective operation. For these reasons the ambit and content of the rule-making power under Article 309 can furnish no analogy or parallel to the present case. The High Court was consequently right in coming to the conclusion that the action taken by the Tahsildar in attaching the shares was unsustainable.

8. The appeals therefore fail and are dismissed with costs. One hearing fee.

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(*From Jammu and Kashmir*)

[BEFORE S. M. SIKRI, G. K. MITTER AND K. S. HEGDE, JJ.]

FAZAL HUSSAIN AND ARSHAD AHMAD† .. Petitioners;

Versus

THE STATE OF JAMMU AND KASHMIR .. Respondent.

Writ Petition No. 111 of 1969, decided on 29th July, 1969

Jammu and Kashmir Preventive Detention Act, 1964 (22 of 1964) Section 8—Proviso—Scope of—Time prescribed for communicating grounds of detention to detenue—Order that communication of grounds were against public interest served on detenue beyond time—Legality.

The petitioner, Arshad Ahmad, was detained under Section 3(1)(*a*)(*i*) of the Jammu and Kashmir Preventive Detention Act, 1964, under Order, dated 19-9-1967. No grounds of detention were served on him, but he was informed by an Order, dated 25-10-1967, that it would be against public interest to disclose the facts or the grounds of detention to him. The question was whether the detention was illegal when the time for serving the grounds of detention had expired.

Held, that there is no doubt that it is the duty of the detaining authority to communicate the grounds within ten days of the date of detention if the case does not fall within the proviso (to Section 8 of the Act). If the detaining authority neither communicates the grounds of detention nor informed the detenue under the proviso within ten days of the detention, the detention would become illegal and a subsequent order under the proviso would not have the effect of rendering the detention legal. We are here concerned with the liberty of a subject and we must adopt a construction which would not have the effect of enabling the executive to make an order under the proviso at any time after the lapse of ten days specified in Section 8. All the material is with the Government when it passes the order of detention and a period of ten days is ample for the Government to make up its mind whether the case falls within the proviso or not. (Paras 6 and 8)

Abdul Jabar Butt v. *State of Jammu and Kashmir*, 1957 SCR 51 at p. 59, *referred to.*

Detenue *released.*

† (Under Article 32 of the Constitution of India for a writ in the nature of *habeas corpus*).