AVINDER SINGH ETC.

v.

STATE OF PUNJAB & ANR. ETC.

September 19, 1978

[V. R. KRISHNA IYER AND D. A. DESAI, JJ.]

Constitution of India—Articles 14, 265—*Vice of excessive delegation—Absence of guidelines—What can be delegated—Imposing flat rate of taxation—Choice of classification in taxing statute.*

Punjab Municipalities Act, 1976—*Sec.* 90 *Punjab Municipal Act,* 1911—*Sec.* 62*A—Double taxation if prohibited by Art.* 265.

The Municipalities of Punjab are governed by two enactments. The numerous little ones are statutory bodies created and controlled by the Punjab Municipal Act, 1911 and few large ones by the Punjab Municipal Corporation Act, 1976. For the purpose of the present petitions the provisions run on identical terms. The State of Punjab in April, 1977 required the various municipal bodies in the State to impose tax on the sale of Indian made foreign liquor @ Re. 1/- per bottle w.e.f. 20-5-1977. The Municipal authorities having failed to take action pursuant to the directive the State of Punjab directly issued a notification under sec. 90(5) of the Punjab Municipal Corporation Act, 1976 and similar provision of the Municipal Act, 1911.

The petitioner challenged the constitutional validity of the said statutes and levy on the following grounds :

1. Section 90(2)(b) of the Act suffers from the vice of excessive delegation or legislative abdication.

2. There are no guidelines for the exercise of the wide fiscal power of the Corporation or Government which make it too unreasonable to be salvaged by Art. 19(5) and too arbitrary to be equal under Art. 14.

3. The Order imposing the tax itself is vitiated because :

(a) It seeks to impose the tax which is already imposed and, therefore, violates section 90(4);

(b) There is double taxation;

(c) It levies too heavy taxation;

(d) Picking out from the broad spectrum of luxury goods or intoxicants the Indian made foreign liquor amounts to discrimination;

(e) No opportunity of being heard was given;

(f) Unequals are being treated equally by imposing Re. 1/- per bottle irrespective of the type of liquer taxed, price of the liquor and alcoholic content.

Dismissing the appeal.

HELD : (1) There is nothing in Art. 265 of the Constitution prohibiting double taxation. [850 D]

A *Cantonment Board Poona* v. *Western India Theatres Ltd.*, AIR 1954 Bom. 261 approved.

(b) The plea that flat rate of Re. 1/- per bottle be it on brandy or other stronger beverage or be it Rs. 50/- or Rs. 500/- per bottle cannot be seriously pressed. In the field of taxation many complex factors enter the fixation and flexibility is necessary for the taxing authority. [850E-F]

B

Moopil Nair (K.T.) v. *State of Kerala*, [1961] 3 SCR 77; *East India Tobacco Co.* v. *State of A.P.*, [1963] 1 SCR 404 at 406; *A. Hajee Abdul Shakoor & Co.* v. *State of Madras*, [1964] 8 SCR 217 at 230 referred to.

(2) If the Municipal body proposed to impose a tax it is required to offer an opportunity to the residents of area. No such procedural fetter is to be found C under sec. 90(5) if the levy is imposed by the State Government. It is impossible for the Court to imply invitation of objections. 'No taxation without representation' is not applicable to a Government controlled by an elected legislature exercising its power of taxation. [852B, C, D]

(3) Sec. 90(4) talks of tax not already imposed. The Sales Tax imposed by the state legislature under the Punjab General Sales Tax Act 1948 is no bar to the present levy. Section 90 deals with the levy of taxes for Municipal Corpora- D tion. The injunction is confined to repetition of the taxes which the Municipality has already imposed. If the Corporation has not already imposed the tax, the embargo is absent. It is of no moment that some other body, including the State Legislature has already entered the field. The question is has the Municipal Committee or Corporation under this Act already exacted a similar tax? [852F, H, 853BC]

E (4) The Founding Document of the nation has created the three great instrumentalities and entrusted them with certain basic powers—legislative, judicative and executive. Abdication of these powers by the concerned instrumentalities, amounts to betrayal of the constitution and it is intolerable in law. The legislature cannot delegate the essential legislative functions. The legislature is responsible to the people and its representative, the delegate may not be and this is why excessive delegation have been frowned upon by constitutional F law. However, the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies difficulties and the need for flexibility is such that our legislature may not get off to a start if they must directly and comprehensively handle legislative business in all their plentitude and particularisation. Delegation of some part of legislative power becomes a compulsive necessity for viability. Of course, every delegate is subject to the authority and control of the principal and exercise of delegated power can always be directed G or cancelled by the Principal. Therefore, even if there be delegation, parliamentary control over delegated legislation should be a living continuity as a constitutional necessity. [853GH, 854A, B, C, D, E]

Devi Das Gopal Krishnan & Ors. v. *State of Punjab & Ors.*, [1967] 3 SCR 557 at 565; *P. N. Kaushal etc.* v. *v. Union of India & Ors.* [1979] 1 SCR 122; *Corp. of Calcutta & Anr.* v. *Liberty Cinema*, [1963] 2 SCR 477 referred to.

H The taxes levied under the Act can be utilised only for the purpose of the Act. There is a clear purpose contained in the provisions about the purpose and limit of the tax. What is needed for the purpose of the Act by way of financial resources may be levied by the Corporation. Beyond that not. Moreover the

items on which taxes may be imposed are also specified. Thus the legislature has fixed the purpose of the taxation, objects of the taxation and limits of the taxation. [856A-B] A

It is too late in the day to contend that the jurisprudence of delegation of legislative power does not sanction parting with the power to fix the rate of taxation, given indication of the legislative policy with sufficient clarity. [860 B] B

When the Government is imposing taxes for the Municipality the Government is bound to know what ought to have been done by the Municipality. The whole scheme of the statute shows that Government has an important role to play in the running of the municipalities. The financial control over the corporation is with the State Government. [865E]

As between the two interpretations that which sustains the validity of law must be preferred. [864E] C

M. K. Papiah & Sons v. *The Excise Commr. & Anr.*, [1975] 3 SCR 607; *Sita Ram Bishambhar Dayal* v. *State of U.P.*, [1972] 2 SCR 141 referred to.

ORIGINAL JURISDICTION : Writ Petitions Nos. 4038, 4147, 4148, 4149, 4150, 4202, 4204, 4207, 4213, 4215, 4222, 4224, 4227, 4232, 4236, 4246, 4249, 4251, 4259, 4311, 4343 & 4347 of 1978. D

(Under Article 32 of the Constitution).

V. M. Tarkunde, P. H. Parekh, C. B. Singh and *Mukul Mudgar* for the Petitioners in W.P. Nos. 4038 and 4244/78.

Yogeshwar Prasad, Mrs. Rani Chhabra and Miss M. Bāli for the Petitioners in W.P. Nos. 4147-4150, 4207, 4232 and 4343/78. E

B. R. Kapur and *S. K. Sabharwal* for the Petitioners in W.P. Nos. 4213, 4215, 4246, 4249, 4311, 4224 and 4227/78.

O. P. Sharma for the Petitioners in W.P. Nos. 4222, 4259/78.

Pramod Swarup for the Petitioner in W.P. 4347/78. F

Shreepal Singh for the Petitioner in W.P. 4236/78.

M. P. Jha for the Petitioner in W.P. 4251/78.

M. C. Bhandare (In W.P. 4204 and 4227/78 only) *Mrs. S. Bhandare, A. N. Karkhanis* and *Miss Malini Poduval* for R. 3 (In W.P. 4204, 4227/78) and for R. 3 in 4215 and for R. 3-4 in 4249/78. G

G. L. Sanghi (In W.P. 4038/78 only) *S. K. Mehta, K. R. Nagaraja, P. N. Puri* and *G. Lal* for Municipality (rr) in W.P. 4038, 4207, 4215, 4249, 4227.

Hardev Singh and *R. S. Sodhi* for the State of Punjab in (W.P. 4038/78). H

Bishamber Lal for the State of Punjab in (W. P. 4147/78).

A *Naunit Lal* for Municipal Committee (R.6) in W.P. 4249 and for r. 4 in 4227/78.

The Judgment of the Court was delivered by

KRISHNA IYER, J.—This heavy bunch of writ petitions impeaching
B the validity of a tax on foreign liquor raises a few familiar legal riddles. A rupee per bottle sold within every municipal town or city is the impugned levy, meant, according to the Punjab Government, to serve the twin purposes of replenishing the resources of municipal bodies reduced by house tax exemptions and of weaning drinkers from overly consuming foreign liquor as a prohibitionist gesture. To pick
C the pocket of every spirituous bibber of the higher brackets by a tiny tax may be but a feeble homage to Art. 47 of the Constitution, and to finance welfare projects with this tainted tax may be queer Gandhiana. The will to enforce 'dry' sobriety in society and to abolish massive human squalour by fleecing the fat few, is made of sterner stuff, maybe. But matters of means and ends, of policy and morality, are largely for
D the legislature and validity is the province of the court. We let slip the observation only because, from a certain angle, these dual grounds make odd companions and add to the credibility gap, although our focus is solely on the legality of the levy.

It is better to begin with the story of the tax under challenge. The
E petitioners are all licensees to trade in foreign liquor including Indian made foreign liquor. They are either wholesalers or retailers and pay excise duty and other fees and taxes including sales tax under the general sales tax law which imposes a levy of 10 per cent, on sales of foreign liquor. There are also octroi levies of 10 per cent, and educational tax of 2 per cent, and these add up to a considerable burden;
F but the commodity taxed is foreign liquor, Indian made or other, whose consumer usually belongs to the well to do sectors.

The municipalities of Punjab are governed by two enactments. The numerous little ones are statutory bodies created and controlled by the Punjab Municipal Act, 1911 and the few large ones by the Punjab
G Municipal Corporation Act, 1976 (the Act, for brevity, hereafter). For our purposes, the provisions run on identical terms and so we will take up the latter statute which compresses into one section a plurality of sections in the former, and set out the common scheme to study the critical issues raised. Arguments have been addressed only on this basis.

H The immediate facts which have launched the litigative rocket need to be narrated now to get a hang of the core questions in their correct perspective. The State of Punjab, in April 1977, under its statutory

power [s. 90(4)] required the various municipal bodies in the State to impose a tax on the sale *et al,* of foreign liquor at the rate of Re. 1/- per bottle with effect from May 20, 1977. The municipal authorities having tarried too long or totally failed to take action pursuant to this directive, the State directly entered the fiscal arena and issued a Notification under s. 90(5) dated May 31, 1977, which reads thus :

> "Whereas the Government of Punjab, in exercise of the powers conferred by sub-section (4) of section 90 of the Punjab Municipal Corporation Act, 1063-A-PSLG-77/12170, dated 11th April, 1977, required of the Municipal Corporation of Ludhiana in Punjab to impose tax on the sale of "Indian made Foreign Liquor" at the rate of rupee one per bottle, by the 20th May, 1977.
>
> 2. And Whereas, the Municipal Corporation of Ludhiana has failed to carry out the aforesaid order of the Punjab Government within the stipulated period.
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> 3. Now, therefore, in exercise of the powers conferred by sub-section (5) of section 90 of the Punjab Municipal Corporation Act, 1976, the President of India is pleased to impose/modify the tax on the sale of "Indian made Foreign Liquor" within the Municipal Corporation of Ludhiana at the rate of rupee one per bottle. The tax shall come into force with effect from 1st June, 1977.
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> L. S. BINDRA
> Joint Secretary to Govt. Punjab
> Local Government Department"

This notification, issued under s. 90(5) read with s. 90(2)(b) of the Act, was later modified marginally but survives substantially. The petitioners (licensees) challenge its *vires* both as contrary to the statutory provision (s. 90) and as violative of the Constitution. The triple shapes of the fatal constitutional pathology are that (a) s. 90 (2)(b) of the Act suffers from the vice of excessive delegation or legislative abdication; (b) there are no guidelines for the exercise of the vagariously wide fiscal power of the corporation or Government which make it too unreasonable to be salvaged by Art. 19(5) and too arbitrary to be 'equal' under Art. 14; and (c) the order itself is vitiated by multiple infirmities. The principal invalidatory charge, based on the Act, is that s. 90(4) interdicts any tax *'already imposed'*. The present tax is on sales and there is, under the general sales tax law, *already* a like levy on sales of foreign liquor in the State, and so the second fiscal venture is beyond Government's power. We have to consider these grounds of attack on the notification which are the emphatic submissions of

A Shri Tarkunde who led the arguments. There are more subsidiary submissions urged by other counsel on a lower key, though, but we have to deal with them too in due course. Briefly, they are (a) that in picking out for taxation, from the broad spectrum of luxury goods or intoxicants, foreign liquor alone, discrimination has been practised, B (b) that even assuming that Government can exercise the power of the municipal body, it may not do so without adhering to the procedural fairness implied in the Explanation to s. 90(2) applicable to municipal bodies and (c) that unequals are being treated equally because the tax of Re. 1/- bottle at a flat rate disregards germane considerations like the price of the liquor or the degree of alcoholic C content. A feeble plea that the tax is bad because of the vice of double taxation and is unreasonable because there are heavy prior levies was also voiced. Some of these contentions hardly merit consideration, but have been mentioned out of courtesy to counsel. The last one, for instance, deserves the least attention. There is nothing in Art. 265 of the Constitution from which one can spin out the consti- D tutional vice called double taxation. (Bad economics may be good law and vice versa). Dealing with a somewhat similar argument, the Bombay High Court gave short shrift to it in *Western India Theatres*(1). Some undeserving contentions die hard, rather survive after death. The only epitaph we may inscribe is : Rest in peace and don't be re-born ! If on the same subject-matter the legislature chooses to E levy tax twice over there is no inherent invalidity in the fiscal adventure save where other prohibitions exist.

Likewise, the plea that a flat rate of Re. 1/- per bottle, be it brandy or other stronger beverage or be it Rs. 50/- or Rs. 500/- per bottle, cannot be seriously pressed. In the field of taxation many complex F factors enter the fixation and flexibility is necessary for the taxing authority to make a reasonably good job of it. *Moopil Nair's case*(2) does not discredit as unconstitutional anathema all flat rates of taxation. Maybe, in marginal cases where the virtual impact of irrationally uniform impost on the same subject is glaringly discriminatory, expropriatory and beyond legislative competence, different considerations may G arise; but to condemn into invalidity a tax because it is levied at a conveniently flat rate having regard to the commodity or service which has a high range of prices and the minimal effect on the overall price, its easy means of collection and a variety of other pragmatic variables, is an absurdity, especially because in fiscal matters large liberality must be extended to the Government having regard to the plurality of criteria

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(1) *Cantonment Board Poona* v. *Western India Theatres Ltd.*, A. I. R. 1954 Bom. 261.

(2) *Moopil Nair (K. T.)* v. *State of Kerala* [1961] 3 S. C. R. 77.

which have to go into the fiscal success of the measure. Of course, despite this forensic generosity, if there is patent discrimination in the sense of treating dissimilar things similarly or *vice-versa,* the court may treat the tax as suspect and scrutinise its vires more closely. In the present case, intoxicating liquids falling in the well-known category of foreign liquors form one class and a flat minimal rate of Re. 1/- per bottle has no constitutional stigma of inequality. It is so easy to conceive of innumerable taxes imposed in this manner in the daily governance of the country that illustrations are unnnecessary. As excisable articles go, foreign liquor is a distinct category and absence of micro-classification within the broad genus does not attract the argument of inequality. Likewise, picking and choosing within limits is inevitable in taxation. The correct law is found in *East India Tobacco* Co.(1)

> "It is not in dispute that taxation laws must also pass the test of Art 14. That has been laid down recently by this Court *in Moopil Nair* v. *The State of Kerala.* But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Art. 14. The following statement of the law in Willis on "Constitutional Law" page 587, would correctly represent the position with reference to taxing statutes under our Constitution :—
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> > "A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably.....The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation."

(See also *Abdul Shakoor & Co.* case)(2). The foreign liquor levy does not fail on this score.

Shri Yogeshwar Prasad urged that s. 90(2) obligated the municipal body to offer an opportunity to the residents of the city to file objections to the tax proposed and consider them before finalising

(1) [1963] (1) S. C. R. 404 at 409.
(2) [1964] (8) S. C. R. 217 at 230.

A the impost. This fair procedure must attach to the exercise of the power even under s. 90(5); and since that has not been done the impugned notification must fail. It is clear from s. 90 that the scheme is that if the municipal corporation wishes to impose a tax under s. 90(2) it must go through the due process indicated in the Proviso and secure Government's approval. But if Government is to B exercise its power under s. 90(5) no such procedural fetter is found in the Section. Maybe, that power is different from procedure for its exercise; but unless the statute insists, it is impossible for the court to imply invitation of objections and consideration thereof from the residents. For this simple reason, there is no merit in the submission. C Whether the failure to hear before fixing a tax has a lethal effect upon the fiscal power of the Government under s. 90(5) also is of little moment although urged by the same counsel. May be, it is desirable that the State acquaints itself with the actual sentiments of the denizens of the local area before imposing tax on them. But it is not inherent in the constitutional requirements for the exercise of the State's power D of taxation that objections should be called for and considered. 'No taxation without representation' is a slogan with a different dimension and has nothing to do with a levy by a government controlled by an elected legislature exercising its power of taxation. We are unable to accede to the contention that representations from the residents not having been invited the taxation notification is bad in law. What is E wholesome is different from what is imperative.

Indeed, we are left with the two major arguments addressed by Shri Tarkunde and echoed or endorsed by other counsel. Even here, we may dispose of the submission based on the wording in s. 90(4), namely, that taxing power under section can be exercised in respect F of a particular impost only if that species of tax is "not already imposed".

The power under s. 90(4) is permissible only if the tax is new and *not already imposed.* The petitioner's argument is that the tax is on sales and is clearly a sales tax. There is already a sales tax G on foreign liquor at the rate of 10 per cent, under the Punjab General Sales Tax Act, 1948. So the present rupee tax is a second round in breach of the forbiddance in s. 90(4). Simple enough, if the expression 'not already imposed' in s. 90(4) is a ban on further tax whatever the statute; but if the taboo is not on the typology of the tax but limited to the specific statute the contention is specious. And H it takes little reflection to hold the latter to correct view. We must remember the statutory setting and the placement of the provision. S. 90 occurs in Chaper VIII headed 'Taxation'. That Section prim-

arily empowers municipal corporations to levy taxes. S. 90(1) specifies a number of items many of which are taxed also at State level, e.g. lands, vehicles. S. 90(2) is so widely worded that many taxes covered by it would already have been occupied field at the State or even Central level. The municipal body may not have any index of taxes already imposed by other bodies and they are many. S. 90 would then be a precarious power, often an exercise in futility and frequently a litigative trap. No. That is not the meaning of the prohibition 'not already imposed'. The Government exercises the power of the corporation under s. 90(5) and cannot enter what is forbidden ground for the latter. And what is forbidden is that the municipal body shall not repeat the same tax, if it has imposed that tax earlier under that Act. The injunction is plain and is confined to repetition of those taxes which the *municipality* has already imposed. If the Corporation has not already imposed the tax proposed, the embargo is absent. It is of no moment that some other body, including the State Legislature, has already entered the field. The question is : has the municipal committee or corporation, under this Act, already exacted a similar tax? If it has, the second exercise is anathema. Nobody has a case that the corporation has earlier taxed foreign liquor under this Act. Therefore, the submission has no substance and we reject it.

The sole surviving ground of invalidation pressed by the petitioners which deserves serious examination is what we have outlined right at the outset, viz., that on the face of s. 90(2), (3), (4) and (5) read together, unconstitutionality is writ large, in the sense of naked and uncanalised power with every essential legislative function surrendered to the humour and hubris of the State Executive.

If this charge be true the consequence is in no doubt. The vice of unreasonableness and arbitrariness are manifestations of the same vice as has been pointed out in *P. N. Kaushal etc.*(1).

An examination of excessive delegation of legislative power takes us to the scheme of the Act and insight into the dynamics of municipal administration. Certain fundamentals must be remembered in this context and then the text of the provision understood in the constitutional perspective. The Founding Document of the nation has created the three great instrumentalities and entrusted them with certain basic powers—legislative, judicative and executive. Abdication of these powers by the concerned instrumentalities, it is axiomatic, amounts to betrayal of the Constitution itself and it is intolerable in law. This means that the legislature cannot self-efface its

(1) *P. N. Kaushal etc.* v. *Union of India & Ors.* [1979] 1 SCR 122.

personality and make over, in terms plenary, the essential legislative functions. The legislature is responsible and responsive to the people and its representatives, the delegate may not be and that is why excessive delegation and legislative *hara kiri* have been frowned upon by constitutional law. This is a trite proposition but the complexities of modern administration are so bafflingly intricate and bristle with details, urgencies, difficulties and need for flexibility that our massive legislatures may not get off to a start if they must directly and comprehensively handle legislative business in all their plenitude, proliferation and particularisation. Delegation of some part of legislative power becomes a compulsive necessity for viability. If the 500-odd parliamentarians are to focus on every minuscule of legislative detail leaving nothing to subordinate agencies the annual output may be both unsatisfactory and negligible. The Law-making is not a turnkey project, ready-made in all detail and once this situation is grasped the dynamics of delegation easily follow. Thus, we reach the second constitutional rule that the essentials of legislative functions shall not be delegated but the inessentials, however numerous and significant they be, may well be made over to appropriate agencies. Of course, every delegate is subject to the authority and control of the principal and exercise of delegated power can always be directed, corrected or cancelled by the principal. Therefore, the third principle that emerges is that even if there be delegation, parliamentary control over delegated legislation should be a living continuity as a constitutional necessity. Within these triple principles, Operation Delegation is at once expedient, exigent and even essential if the legislative process is not to get stuck up or bogged down or come to a grinding halt with a few complicated bills. It is apt to excerpt here an oft-quoted observation from *Vasantlal Maganbhai Sanjanwala* affirmed in *Devi Das Gopal Krishnan & Ors*(1) :

> "The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An over

(1) *Devi Das Gopal Krishnan & Ors.* v. *State of Punjab & Ors.* [1967] 1 S. C. R. 557 at 565.

burdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

Such being the basics, accepted by precedential profusion of this Court, we have to examine whether any essential legislative function has been transplanted into the hands of Government or corporation by the Act, whether the delegation itself is an entrustment of overbroad power, so unguided that the delegate may run amok and do what is arbitrary, unreasonable and violative of Articles 14 and 19 of the Constitution. Taxation is exaction and even expropriation and, therefore, the right to property is in peril when a fiscal measure is afoot. Article 10 comes into play when law is made for purposes of taxation and that law must comply with Part III. Arbitrariness must be excluded in the law, for, if power is arbitrary it is potential inequality and Art. 14 is fatally allergic to inequality before the law.

These generalities take us to the particularities of the present case. Shri Tarkunde turned the forensic fusillade on the total absence of guidance and regulation anywhere in the statute, expressly or implicitly, and on a true construction, according to him, a blanket power has been vested by s. 90 on the corporation and, indubitably, on the Government.

The jurisprudence of delegation of legislative power, as earlier mentioned, has been the subject matter of this Court's pronouncements. In the absence of the rate of taxation being indicated by the Legislature, Shri Tarkunde and other counsel appearing on either side drew our attention to *Liberty Cinema*,(1) the land-mark case on the point. The later decisions have affirmed the principle in *Liberty Cinema*. But

(1) *Corporation of Calcutta and Anr.* v. *Liberty Cinema* [1963] 2 S. C. R. 477.

A before we enter into a fuller discussion we may concretize the specific contention urged by counsel for the petitioners. Section 90(1) sets out certain items for taxation by the corporation. The taxes so levied are to be utilised *for the purposes of the Act*. Therefore, there is a clear directive contained in the provision about the purpose and limit of the tax. What is needed for the purposes of the Act by way of
B financial resources may be levied by the corporation. Beyond that, no. If the corporation has a fancy for spending money on purposes unconnected with the Act and seeks to levy a tax for the fulfilment of such extra-statutory objects the mis-adventure must fail. Moreover, the items on which taxes may be imposed are also specified. Thus, the
C legislature has fixed the purpose of the taxation, the objects of the taxation and the limits of the taxation. In short, s. 90(1) is a text-book illustration of valid delegation by the legislature.

The offending area is approached as we move down to sub-section (2)(b) which enables the corporation "to levy any other tax which the State Legislature has power to impose under the Constitution".
D The fiscal area is obviously specious and so the question directly arises whether this over-broad provision accords with or exceeds the principles of delegation. Sub-section (3) leaves the rates of levy to be specified by the Government and the legislature, argue petitioners' counsel, has given no indication of the minima or the maxima of such rates. Can such non-fixation of at least the maximum rate of taxation be upheld
E or does it enable the delegate to usurp the essential functions of the legislature? When we proceed further to sub-section (5), the Government is clothed with the power to notify the tax which the corporation shall levy and, in exercising this power, not even the wholesome obligation of receiving representations and considering objections, contained in the Proviso to s. 90(2), is present. Can such untrammelled
F power, liberated from local pressures and intimate appreciation of municipal needs, be sanctioned as within the deligible ambit? These are the substantial grounds of attack which we have to consider presently.

Back to the *Liberty Cinema* case (supra), Sarkar, J. who spoke
G for the majority overruled the contention that the levy in question was a fee and held that it was a tax and addressed himself to the question of excessive delegation of legislative functions to the municipal corporation "because it left it entirely to the latter to fix the amount of the tax and provided no guidance for that purpose".

While what constitutes an essential feature cannot be delineated in
H detail it certainly cannot include a change of policy. The legislature is the master of legislative policy and if the delegate is free to switch policy it may be usurpation of legislative power itself. So we have

to investigate whether the policy of legislation has been indicated sufficiently or even change of policy has been left to the sweet will and pleasure of the delegate in this case. A

We are clearly of the view that there is fixation of the policy of the legislation in the matter of taxation, as a close study of s. 90 reveals; and exceeding that policy will invalidate the action of the delegate. B What is that policy ? The levy of the taxes shall be only *for the purposes of the Act.* Diversion for other purposes is illegal. Exactions beyond the requirements for the fulfilment of the purposes of the Act are also invalid. Like in s. 90(1), s. 90(2) also contains the words of limitation '*for the purposes of this Act*' and that limiting factor governs sub-sections (3), (4) and (5). Sub-section (3) vests nothing new C beyond sub-sections (1) and (2). Sub-section (4) does not authorise the government to direct the corporation to impose any tax falling outside sub-section (1) or sub-section (2). Sub-section (5) also is subject to a similar circumscription because the Government cannot issue an order to impose a tax outside the limitation of sub-section (1) or sub-section (2). Thus, the impugned provision contains a severe D restriction that the taxation leviable by the corporation, or by the Government acting for the corporation, shall be geared wholly to the goals of the Act. The fiscal policy of s. 90 is manifest. No tax under guise of s. 90(2)(b) can be charged if the purposes of the Act do not require or sanction it. The expression "purposes of this Act" is pregnant with meaning. It sets a ceiling on the total quantum that may be E collected. It canalises the objects for which the fiscal levies may be spent. It brings into focus the functions, obligatory or optional, of the municipal bodies and the raising of resources necessary for discharging those functions—nothing more, nothing else.

In *Liberty Cinema* (supra) it was contended that the rate of tax F was an essential feature of legislation and if the power to fix it were abandoned it amounted to abdication of legislative power. After an exhaustive examination of the judgments of this Court, Sarkar, J. reached the conclusion that there was clear authority "that the fixing of rates may be left to the non-legislative body". The matter does not G end here, since the delegate may under guise of this freedom tyrannise and exact exorbitant sums which the legislature would hardly have intended. If this possibility exists and there is no guideline given to the non-legislative body in the matter of fixation of rates, the result may be a frustration of the legislative object itself. For this reason, the Court in the *Liberty Cinema* (supra) case observed as axiomatic : H

> "No doubt when the power to fix rates of taxes is left to another body, the legislature must provide guidance for such

A fixation. The question then is, was such guidance provided in the Act ? We first wish to observe that the validity of the guidance cannot be tested by a rigid uniform rule; that must depend on the object of the Act giving power to fix the rate. It is said that the delegation of power to fix the rates of B taxes authorised for meeting the needs of the delegate to be valid, must provide the maximum rate that can be fixed, or lay down rules indicating that maximum. We are unable to see how the specification of the maximum rate supplies any guidance as to how the amount of the tax which no doubt has to be below the maximum, is to be fixed. Provision for C such maximum only sets out a limit of the rate to be imposed and a limit is only a limit and not a guidance.

It seems to us that there are various decisions of this Court which support the proposition that for a statutory provision for raising revenue for the purposes of the delegate, as the section now under consideration is, the needs of the taxing D body for carrying out its functions under the statute for which alone the taxing power was conferred on it, may afford sufficient guidance to make the power to fix the rate of tax valid."

(Pp. 493-494)

In the *Western India Theatres* case (supra) the power given to the E corporation (of the city of Poona), in terms very wide, to levy "any other tax" came to be considered from the point of view of abdication of legislative function. The negation of this argument was based on the key words of limitation contained therein, namely, "for the purposes of the Act" and it was held "that this permits sufficient guidance for the imposition of the tax."

F In *Devi Das Gopal Krishnan & Ors.* (supra) this Court again considered a similar contention. The crucial passage in the judgment of Sarkar, J. was there extracted with approval by Subba Rao, C.J. :

"It (the Municipal Corporation) has to perform various statutory functions. It is often given power to decide when G and in what manner the functions are to performed. For all this it needs money and its needs will vary from time to time, with the prevailing exigencies. Its power to collect tax, however, is necessarily limited by the expenses required to discharge those functions. It has, therefore, where rates have not been specified in the statute, to fix such rates as may be H necessary to meet its needs. That, we think, would be sufficient guidance to make the exercise of its power to fix the rates valid." (Pp. 562-563)

In the *Municipal Corporation of Delhi*(1) case, the proposition that where the power conferred on the corporation was not unguided, although widely worded, it could not be said to amount to excessive delegation, was upheld. Delegation coupled with a policy direction is good. Counsel emphasised that the court had made a significant distinction between the local body with limited functions like a municipality and Government :

> "The needs of the State are unlimited and the purposes for which the State exists are also unlimited. The result of making delegation of a tax like sales tax to the State Government means a power to fix the tax without any limit even if the needs and purposes of the State are to be taken into account. On the other hand, in the case of a municipality, however large may be the amount required by it for its purposes it cannot be unlimited, for the amount that a municipallity can spend is limited by the purposes for which it is created. A municipality cannot spend anything for any purposes other than those specified in the Act which creates it. Therefore in the case of a municipal body, however large may be its needs, there is a limit to those needs in view of the provisions of the Act creating it. In such circumstances there is a clear distinction between delegating a power to fix rates of tax, like the sales tax, to the State Government and delegating a power to fix certain local taxes for local needs to a municipal body.
>
> A review of these authorities therefore leads to the conclusion that so far as this Court is concerned the principle is well established that essential legislative function consists of the determination of the legislative policy and its formulation as a binding rule of conduct and cannot be delegated by the legislature. Nor is there any unlimited right of delegation inherent in the legislative power itself. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. Where the legislative policy is enunciated with sufficient clearness or a standard is laid down, the courts should not interfere. . What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the parti-

(1) *Municipal Corporation of Delhi* v. *Birla Cotton, Spinning and Weaving Mills, Delhi & Anr.* [1968] 3 S. C. R: 251 at 268-270.

A cular Act with which the Court has to deal including its preamable. Further it appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."

B ".....

It is too late in the day to contend that the jurisprudence of delegation of legislative power does not sanction parting with the power to fix the rate of taxation, given indication of the legislative policy with sufficient clarity. In the case of a body like a municipality with functions which are limited and the requisite resources also limited, the guideline contained in the expression "for the purposes of the Act" is sufficient, although in the case of the State or Central Government a mere indication that taxation may be raised for the purposes of the State may be giving a *carte blanche* containing no indicium of policy or purposeful limitation. In a welfare State allowing in privations, the total financial needs may take us to astronomical figures. Obviously that will be no guideline and so must be bad in law. Something more precise is necessary; some policy orientation must be particularised Shri Tarkunde relied on this differentiation in attacking s. 90(6) of the Act. He argued that had the municipal corporation done the job there would have been some guidance from the section. But when the Government did it, it did not have any such restraint and could, therefore, run berserk. We do not appreciate this contention as we will explain at a later stage. Suffice it to say that flexibility in the form the legislative guidance may take, is to be expected. Wanchoo, C.J. explained :

"It will depend upon the circumstances of each statute under consideration; in some cases guidance in broad general terms may be enough; in other cases more detailed guidance may be necessary. As we are concerned in the present case with the field of taxation, let us look at the nature of guidance necessary in this field. The guidance may take the form of providing maximum rate of tax upto which a local body may be given the discretion to make its choice, or it may take the form of providing for consultation with the people of the local area and then fixing the rates after such consultation. It may also take the form of subjecting the rate to be fixed by the local body to the approval of Government which acts as a watch-dog on the actions of the local body in this matter on behalf of the legislature. There may be other ways in which guidance may

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be provided. But the purpose of guidance, whatsoever may be the manner thereof, is to see that the local body fixes a reasonable rate of taxation for the local area concerned. So long as the legislature has made provision to achieve that reasonable rates of taxation are fixed by local bodies, whatever may be the method employed for this purpose— provided it is effective, it may be said that there is guidance for the purpose of fixation of rates of taxation. The reasonableness of rates may be ensured by fixing a maximum beyond which the local bodies may not go. It may be ensured by providing safeguards laying down the procedure for consulting the wishes of the local inhabitants. It may consist in the supervision by Government of the rate of taxation by local bodies. So long as the law has provided a method by which the local body can be controlled and there is provision to see that reasonable rates are fixed, it can be said that there is guidance in the matter of fixing rates for local taxation. As we have already said there is pre-eminently a case for delegating the fixation of rates of tax to the local body and so long as the legislature has provided a method for seeing that rates fixed are reasonable, be it in one form or another, it may be said that there is guidance for fixing rates of taxation and the power assigned to the local body for fixing the rates is not uncontrolled and uncanalised. It is on the basis of these principles that we have to consider the Act with which we are concerned.

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C

D

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(pp. 269-270)

In the *Municipal Corporation of Delhi* (supra) case it was significantly observed :

F

"According to our history also there is a wide area of delegation in the matter of imposition of taxes to local bodies subject to controls and safeguards of various kinds which partake of the nature of guidance in the matter of fixing rates for local taxation. It is in this hostorical background that we have to examine the provisions of the Act impugned before us."

G

(p. 271)

Both the sides relied on certain important criteria contained in the judgment of Wanchoo, C.J., especially because it is a Bench of seven Judges and the ratio therein laid down has considerable authority and binds us. Dealing with municipal bodies and the nature and

H

content in that Municipal Act, the court observed what is instructive for us in the present case :

> "This is in our opinion a great check on the elected councillors acting unreasonably and fixing unreasonable rates of taxation. This is a democratic method of bringing to book the elected representatives who act unreasonably in such matters. It is however urged that s. 490 of the Act provides for the supersession of the Corporation in case it is not competent to perform or persistently makes default in the performance of duties imposed upon it by or under the Act or any other law or exceeds or abuses its power. In such a case the elected body may be superseded and all powers and duties conferred and imposed upon the Corporation shall be exercised and performed by such officer or authority as the Central Government may provide in this behalf. It is urged that when this happens the power of taxation goes in the hands of some officer or authority appointed by Government who is not accountable to the local electorate and who may exercise all the powers of taxation conferred on the elected Corporation by the Act. . . ."

> "Another guide or control on the limit of taxation is to be found in the purposes of the Act. The Corporation has been assigned certain obligatory functions which it must perform and for which it must find money by taxation. It has also been assigned certain discretionary functions. If it undertakes any of them it must find money. Even though the money that has to be found may be large, it is not, as we have already indicated, unlimited for it must be only for the discharge of functions whether obligatory or optional assigned to the Corporation. The limit to which the Corporation can tax is therefore circumscribed by the need to finance the functions, obligatory or optional which it has to or may undertake to perform. It will not be open to the Corporation by the use of taxing power to collect more than it needs for the functions it performs. . . ."

> "Another limit and guideline is provided by the necessity of adopting budget estimates each year as laid down in s. 109 of the Act. That section provides for division of the budget of the Corporation into four parts i.e. general, electricity supply, transport, water and sewage disposal. The budget will show the revenue and expenditure and those

must balance so that the limit of taxation cannot exceed the needs of the Corporation as shown in the budget to be prepared under the provisions of the Act. These four budgets are prepared by four Standing Committees of the Corporation and are presented to the Corporation where they are adopted after debate by the elected representatives of the local area. Preparation of budget estimates and their approval by the Corporation is therefore another limit and guideline within which the power of taxation has to be exercised. Even though the needs may be large, we have already indicated that they cannot be unlimited in the case of the Corporation, for its functions both obligatory and optional are well defined under the Act. Here again there is a limit to which the taxing power of the Corporation can be exercised in the matter of optional taxes as well, even though there is no maximum fixed as such in the Act."

(Pp. 271-273)

In the present case it was the State Government, not the municipal corporation, which fixed the rate; but the Government did only what the Corporation ought to have done. It acted for the purposes of the corporation's finances and functions and not to replenish its own coffers. In the *Municipal Corporation of Ahmedabad Ctiy,*(1) a further point fell for consideration which has some relevance to the present set of arguments. Shri Tarkunde submitted that even if the provision requiring the sanction of the Government for the rate fixed by the corporation were a guideline and a control indicative of a legislative policy, that was absent in the impugned levy since the Government directly acted. Shelat, J. negatived a kindred submission :

"...It is impossible to say that when a provision requiring sanction of the Government to the maximum rate fixed by the Corporation is absent, the rest of the factors which exist in the Act lose their efficacy and cease to be guidelines. Furthermore, if the Corporation were to misuse the flexibility of the power given to it in fixing the rates, the State legislature can at any moment withdraw that flexibility by fixing the maximum limit up to which the Corporation can tax. Indeed, the State Legislature has now done so by s. 4 of Gujarat Act, 8 of 1968. In view of the decisions cited above it is not possible for us to agree with counsel's contention

(1) *Gulabchand Bapalal Modi* v. *Municipal Corporation of Ahmedabad City* [1971] 3 S. C. R. 942.

A that the Act confers on the Corporation such arbitrary and uncontrolled power as to render such conferment an excessive delegation."(1)

We have no hesitation in holding that the law is well-settled and none of the canons governing delegation of legislative power have been B breached in the present case.

We will explain a little more in detail, with specific reference to the scheme of the Act, why we hold that the tax is valid and does not suffer from the infirmity of excessive delegation.

C The thrust of Shri Tarkunde's argument is that even if, in the light of *Liberty Cinema* (supra) and later rulings, guidelines are found in s. 90(2) of the Act, the notified impost being by the State Government did not have the benefit of such guidelines. The local body knew precisely the local needs and the cost of such local services. Likewise, the local councillors would be responsive and to local lobbies D and be restrained from reckless taxes. None of these controls were operational when Government acted or directed. Moreover, the absence of the wholesome obligation to receive and pay regard to objections [Proviso to s. 90(2)] removed the procedural check envisaged by the Legislature. These criticisms highlight the role of Government in the setting of s. 90(5) and its competence to be E acquainted with the needs of municipal denizens, the finances of the local body and the like.

It must be remembered that as between two interpretations that which sustains the validity of the law must be preferred. A close look at the schematic provisions and administrative realities is very revealF ing. Is Government innocent of the total needs of municipal bodies and indifferent to the legitimate pressures of its denizens ?

An overview of local self-government may set the perspective. The statutory pattern of municipal government is substantially the same all over the country. The relevant legislation fabricates these local G bodies, invests them with corporate personality, breathes life into them, charges them with welfare functions, some obligatory, some optional, regulates their composition through elected representatives, provides for their finances by fees and taxes and heavily controls their self-government status through a Department of the State Government in various ways, including direction and correction, sanction and H supersession. Consequentially the law clothes the State Government with considerable powers over almost every aspect of municipal work-

(1) Ibid p. 954.

ing Local self-government, realistically speaking, is a simulacrum of Art. 40 and democratically speaking, a half-hearted euphemism, for in substance, these elected species are talking phantoms with a hierarchy of State officials hobbling their locomotion. Their exercises are strictly overseen by the State Government, their resources are precariously dependent on the grace of the latter and their, functions are fulfilled through a chief executive appointed by the State Government. Floor-level democracy in India is a devalued rupee, Art. 40 and the evocative opening words of the Constitution, notwithstanding. Grassroots never sprout until decentralisation becomes a fighting creed, not a pious chant. What happens to Panchayats applies to municipalities.

This description has critical relevance to the cases on hand because one of the propositions underlying the major arguments advanced before us is that while municipal bodies know their needs and respond to local pressures and tailor their taxes accordingly, the distant State Government is neither aware nor responsive and the impugned tax measure is bad because the pragmatic and policy guidelines of (a) the local people's welfare requirements *vis-a-vis* available municipal finances, and (b) people's pressurising proximacy and municipality's correctional reaction to undue tax burdens are absent when the power is exercised by a remote control board niched in the State Secretariat. But if the picture is of a powerless talking shop of elected councillors passing resolutions but all the do's and don'ts, sanctions and approvals, countermands and even supersession of the Council itself reside in the State Government, the effective voice, the meaningful responses, the appreciation of budgetary needs and gaps and need for grants and a host of other responsibilities can be traced to the Government. Such is the backdrop to the discussion of the issues raised.

Now let us scan the Act from this angle. Corporations are created for the purposes of carrying out the provisions of the Act and they are charged with municipal administration (see s. 4). So, corporations cannot do anything beyond the purposes set out in the statutory provisions. This itself is a statutory restriction on action. The composition of the body corporate is by periodically elected councillors (see s. 5) and this feature ensures responsive action. The powers necessary for municipal government are spelt out as also the obligatory and discretionary functions (see Chapter III).

Now come certain other aspects of local self-government. The entire executive power of the corporation vests in the Commissioner who is appointed by Government. This means that the Corporation Council takes a back seat in the municipal administration see ss. 47,

52 *et al.* Section 54 brings the Government into the expenditure picture. The municipal staff also is, in a way, under Government control (s. 71).

Money shall be spent by the municipality only according to budget provisions and budget estimates shall be submitted to Government for approval which has the power to modify them. Thus, the financial control over the corporation by Government is a statutory fact.

Now we may consider the mode of raising tax revenue. Any non-traditional tax (i.e. which falls under s. 90(2) of the Act) has to be with the prior approval of Government. Indeed, affirmative direction to impose taxes may be issued by the Government to the local body and if the addressee is indifferent the Government itself may impose the tax and the corporation shall levy such tax. Sub-section (6) enables Government to make other tax payments to municipal bodies. Municipal borrowings require government sanction, municipal accounts shall be audited by government auditors. Chapter XXII provides for further government control upto even supersession of the corporation itself. Even the resolutions of corporations may be suspended by Government and its proceedings annulled or modified. There is a whole army of governmental minions in the department of local self-government to sit upon, check, oversee and control municipal doings that the elective element becomes a decorative parlour.

This conspectus of provisions brings into bold relief the anaemic nature of municipal autonomy. Full-blooded units of self-government, reflecting full faith in decentralised democracy uninhibited by a hierarchy of bureaucrats is the vision of Art. 40. While the Gandhian goal is of a shining crescent on a starry sky the sorry reality is that our municipalities *vis-a-vis* government are wan like a fullmoon at midday.

This study of the statutory scheme shows that, in large measure, municipal councils reign, municipal commissioners rule; local self-government is an experiment in directed democracy by the bureaucracy, Art. 40, notwithstanding. State Governments master-mind municipal administration in broad policies and even in smaller details and legally can suspend resolutions and supersede the organ itself. Municipal legislation sanctions this Operation Mask. If pluralism and decentralisation are to strengthen our democracy more authority and autonomy, at least experimentally, must be vested in local bodies. Today, prompt elections when periods expire are rare; councillors exist, debate, resolve, but power eludes them. Even so, municipal *maya* also counts ceremonially and otherwise.

To set the record straight, we must state that many municipal bodies do exercise their limited powers properly and serve the public without nagging interference by Government officials. Municipalities are realities, often precarious, though. A

This statutorily sanctified comprehensive oversight by Government weaken the assumption of Shri Tarkunde that State Governments know little of the needs and respond remotely to the pressures of the locality and that the guidelines stressed in the rulings cited above vanish when Government directly operates under s. 90(5). The finances, budgetary estimates and many aspects of the affairs of each municipal body, reach the Government, channelled through its minions, and, by force of statute, are approved, sanctioned, modified or reversed by the State Secretariat. So, there is not much force in the submission that under s. 90(5) governmental action may be a blind man's buff, not intelligent appreciation. B C

Secondly, under s. 90(5) Government acts to augment municipal revenues and so will, understandably, inform itself of the needs of the corporation and, on fiscal economics, 'of what the traffic will bear'. The statutory strategy also ensures this. First, a directive is given, obviously after considering relevant matters. Only if indifference or intractability is displayed, the fiscal sword of s. 90(5) is unsheathed. D

Moreover, there is overall control by the legislature, sometimes, ineffective, sometimes meaningful. It is familiar knowledge that there are a number of institutionalised means by which the legislature exercises supervision and control over municipal matters. Broadly speaking, they are : (a) through inter-relations, (b) by discussions and debates, (c) by approval or otherwise of rules and orders, and (d) by financial control when the budget is presented. A study of the legislative proceedings in the various States of the country brings out many of these means of control (see Indian Administrative System, edited by Ramesh K. Arora & Co. Chapter 17). In a sense, the general municipal administration comes under fire in the House on many occasions, including during the debate on the Governor's Address. Financial control and supervision by the legislators come up when budget proposals which contain allocation for municipal administration are presented to the House and at the time of the Appropriations Bill. Moreover, the Public Accounts Committee, the Estimates Committee and like other bodies also make functional probes into municipal administration—fiscal and other. There may be a big gap between the power of control and its actual exercise but it is also a fact that in a general way the political echelons in Government and the bureaucracy in turn are influenced in their policies by the criticisms E F G H

A of the municipal administration on the floor of the House and through other representations. We cannot, therefore, dismiss the legal position that there is control by the Legislature over Government in its supervision of municipal administration therefore, delegated legislation cannot be said to be uncontrolled or unchecked by the delegator.

B

This discussion is of critical importance in view of the argument put forward by Shri Tarkunde that when Government exercises power under s. 90(6) it is a law unto itself, unbridled and uncontrolled by the Legislature. We may now refer to a few decisions which have
C been brought to our notice by counsel appearing for the municipal bodies and the State of Punjab to make out that the needs of municipalities and the pressures of local people are within the ken of the State Government and they also respond like municipal bodies and guide themselves in the manner corporations do. More importantly, excessive delegation stands negatived because of legislative control over
D Government. Even in the *Liberty Cinema case,* (supra) the control by Government over the municipal administration was relied upon as a policy guideline and it is an *a fortiori* case if the Government itself takes action, responsible and responsive as it is to the elected representatives of the House.

E

Great stress was laid on *Papiah's case*(1) which dealt with subordinate legislation elaborately and upheld the validity of a provision where, superficially viewed, too wide a power had been delegated. Mathew, J. speaking for the court, gave considerable latitude to the Legislature in delegating its power and referred to many prior rulings. He quotes
F Subba Rao, C.J. to say :

> "An over-burdened Legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; It may declare its policy
G in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it, without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part
H is beyond the permissible limits of delegation."(2)

(1) [1975] 3 S. C. R. 607.

(2) Ibid. 611.

Nevertheless, this observation was neutralised by another made by Hegde, J. in *Bishambhar Dayal*(1) :

> "However much one might deplore the 'New Despotism' of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely necessary for the Legislatures to entrust more and more powers to the executive. Text book doctrines evolved in the 19th Century become out of date."

Mathew, J. proceeded to cover English cases and reached the conclusion :

> "The legislature may also retain its control over its delegate by exercising its power of repeal. This was the basis on which the Privy Council in *Cobb & Co.* v. *Kropp*(2) upheld the validity of delegation of the power to fix rates to the Commissioner Transport in that case."
>
> (P. 613)

The learned Judge quoted the Privy Council(3) which held that the Legislature was entitled to use any agent or machinery that it considered for carrying out the object and the purposes of the Acts and to use the Commissioner for Transport as its instrument to fix and recover the licence and permit fees, provided it preserved its own capacity intact and retained perfect control over him; that as it could at any time repeal the legislation and withdraw such authority and discretion as it had vested in him, it had not assigned, transferred or abrogated its sovereign power to levy taxes, nor had it renounced or abdicated its responsibilities in favour of a newly created legislative authority and that, accordingly, the two Acts were valid, Lord Morris of Borth-y-Gest said :

> "What they (the legislature) created by the passing of the Transport Acts could not reasonably be described as a new legislative power or separate legislative body armed with general legislative authority (see *R. v. Burah,* 1978) 3 A.C. 889). Nor did the Queensland Legislature 'create and endow' with its own capacity a new legislative power not created by the Act to which it owes its own existence (see In re *the Initiative and Referendum Act* (1919) A.C. 945 at 946)."

(1) *Sita Ram Bishambhar Dayal* v. *State of U. P.* [1972] 2 S. C. R. 141.

(2) [1967] 1 A. C. 141 (P. C.).

(3) [1975] 3 S. C. R. 614.

A The point to be emphasised—and this is rather crucial—is the statement of their Lordships that the legislature preserved its capacity intact and retained perfect control over the Commissioner for Transport inasmuch as it could at any time repeal the legislation and withdraw the authority and discretion it had vested in him, and, therefore, the legislature did not abdicate its functions.

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The proposition so stated is very wide and sweeping. By that standard, there is nothing unconstitutional about s. 90(5) of the Act.

In the course of the argument certain observations of this Court were read to the effect that there was always a check by the courts on C unconstitutional misuse of delegated power and that, in itself without more, was good enough to make the delegation good. So stated, the proposition may be perhaps too wide to be valid; for any naked delegation may then be sustained by stating that the court is there as the watch-dog. We do not have to go that far in the present case and so we make no final pronouncement on this extension of delega- D tions jurisprudence.

We must state, while concluding that Punjab & Haryana High Court has overruled similar contentions on grounds which have our approval [see AIR 1977 P&H 297 and 74 PLR (1972) P 149].

E

We are conscious that constitutional legitimation of unlimited power of delegation to the Executive by the Legislature may, on critical occasions, be subversive of responsible government and erosive of democratic order. That peril prompts us to hint at certain portents to our parliamentary system, not because they are likely new but because so- F ciety may have to pay the price some day.

As a back-drop to this train of thoughts a few statements from a working paper presented by Prof. Upendra Baxi of the Delhi University at a recent seminar may be excerpted :

G

> "...law making remains the, more or less, exclusive prerogative of a small cross-section of elites. This necessarily affects both the quality of the law made as well its special communication, acceptance and effectivity. It also reinforces the highly centralised system of power. It is time H that we considered the desirability and feasibility of building into the law-making processes a substantial amount of public participation."

"People's participation in the enforcement and implementation of the law is also not actively sought, sponsored or structured by the State....Equally now is the idea that there should be a "social audit" of major legislations by the beneficiaries or, more generally, the consumers of legal justice."

"...The situation in regard to delegated legislation the volume of which is immensely greater than that of usual legislation, is even more alarming. The Indian Parliament enacted from the period 1973 to 1977 a total of 302 laws; as against this the total number of statutory orders and rules passed in the same period was approximately 25,414. Corresponding figures for States and union territories are not just available but the number of rules issued under the delegated legislation powers may well be astronomical....."

Plenary powers of law-making are entrusted to elected representatives. But the political government instructed by the bureaucracy, by and large, gets bills through with the aid of the three-line whip. Even otherwise, legislators are some times innocent of legal skills; and complex legislations call for considerable information and instruction. The law-making sequence leaves much to subordinate legislation which, in practical terms, means surrender to the surrogate, viz., the bureaucracy which occupies commanding heights within the Secretariat. The technocracy and the bureaucracy which mostly draft subordinate legislation are perhaps well-meaning and well-informed but insulated from parliamentary audit, isolated from popular pressure and paper-logged most of the time. And units of local self-government are reduced to a para-babel mechanisms, what with a pyramid of officialdom above them. The core of Shri Tarkunde's argument, even though rejected in legal terms by force of precedents, has a realistic touch to the effect that municipal administration in the matter of taxation, if taken over by Government as under s. 90(5) of the Act, becomes administration by the barrel of the Secretariat pen. The doctrine of delegation, in its extreme positions, is fraught with democracy by proxy of a coterie, of which the nation, in its naivete, may not be fully cognizant.

Therefore, the system of law-making and performance auditing needs careful, yet radical, re-structuring, if participative, pluralist Government by the People is not to be jettisoned. We have laid down the law and obeyed the precedents but felt it necessary to lay bare briefly the political portents implicit in the extent law, for action by the national leadership betimes. Who owns and operates India, that is Bharat ? That disturbing interrogation becomes deeply relevant

A as we debate and decide the jurisprudence of delegation of power and vicarious exercise and so we have pardonably ventured to make heuristic hints and to project new perspectives.

The journey's end is in sight. The discussion has come to a close. The notification suffers from no infirmity. The writ petitions stand B dismissed. Costs one set. (to the state)

P.H.P. *Petitions dismissed.*