A R. S. JOSHI, S.T.O. GUJARAT ETC. ETC.

v.

AJIT MILLS LTD., AHMEDABAD & ANR. ETC. ETC.

August 31, 1977

[M. H. BEG, C.J., Y. V. CHANDRACHUD, P. N. BHAGWATI, V. R. B KRISHNA IYER, N. L. UNTWALIA, S. MURTAZA FAZAL ALI AND P. S. KAILASAM, JJ.]

Bombay Sales Tax Act, 1959—Ss. 37, 46, 63 validity of—Act prohibited collection of any sum not payable by way of sales tax or in excess of tax payable—Amounts so collected forfeited—Forfeiture, if within the legislative competence of the State Legislature.

C *Constitution of India, 1950—Entries 54 and 64—List II—Constitutional validity of an enactment—Rests for determination of—Forfeiture, if a penalty.*

Words and phrases—"Colourable"; "forfeiture"; "collected"; "shall be forfeited"—Meaning of.

Section 46(1) of the Bombay Sales Tax Act, 1959 (as applicable to the State of Gujarat) enacts that no person shall collect any sum by way of tax in respect of sale of any goods on which by virtue of s. 5 no tax is payable. D Sub-section (2) provides that no person, who is not a registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other person and no registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of the Act.

Section 63(1)(h) provides that whoever contravenes any of the provisions of s. 46 shall, on conviction be punished with simple imprisonment or with E fine or with both. Section 37(1) which deals with imposition of penalty departmentally for contravention of s. 46 provides in cl. (a) that if any person, not being a dealer liable to pay tax under the Act collects any sum by way of tax in excess of the tax payable by him or otherwise collects tax in contravention of the provisions of s. 46 he shall be liable to pay, in addition to any tax for which he may be liable, a penalty as prescribed in cl. (i). Clause (i) states that where there has been a contravention referred to in cl. (a) a *penalty* of an amount not exceeding two thousand rupees....and in *addition any sum collected by the person by way of tax in contravention of* F *s. 46 shall be forfeited to the State Government.*

The respondents, who were registered dealers of sales tax, collected from various customers amounts *qua* sales tax prohibited by s. 46 of the Act. Acting on the prohibition plus penalty contained in s. 46 read with s. 37(1) of the Act the Sales Tax officers imposed penalties and forfeited the sums collected in contravention of s. 46 (less amounts refunded).

G The High Court struck down the last limb of the forfeiture provision contained in s. 37(1)(a) as being unconstitutional on the ground that it was not competent for the State Legislature to forfeit to the public exchequer punitively, under entry 54 read with entry 64 of List II, sums collected by dealers by way of sales tax which was not exigible under the Act. (The High Court of Bombay took an opposite view while other High Courts ranged themselves on one side or the other of the controversy).

H Allowing the appeals

HELD : *Per* Beg C.J., Chandrachud, Bhagwati, Krishna Iyer, Untwalia, Murtaza Fazal Ali, JJ.

The punitive impost in s. 37(1)(a) is legitimate and valid. [349 D]

The High Court was wrong in denouncing the impugned legislation as exceeding legislative competence or as a colourable device or as supplementary, not complementary. [348 F] A

1. (a) The true key to constitutional construction is to view the equity of the statute and sense the social mission of the law, language permitting, against the triune facets of justice highlighted in the Preamble to the Paramount Parchment, read with a spacious signification of the listed entries concerned. A law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs. [348 H] B

(b) The professed object of the law being clear, the motive of the legislature is irrelevant to castigate an Act as a colourable device. The interdict on public mischief and the insurance of consumer interests against likely, albeit, unwitting or *ex abundanti cautela* excesses in the working of a statute are not merely an ancillary power but a necessary obligation of a social welfare state. One potent prohibitory process for this consummation is to penalise the trader by casting a no-fault or absolute liability to 'cough up' to the state the total unjust takings snapped up and retained by him by way of tax, where tax is not so due from him. [348 D-E] C

(c) In a developing country, with the mass of the people illiterate and below the poverty line, and most of the commodities concerned constitute their daily requirements, there is sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses integrally connected with the taxing provisions, cannot be viewed as a mere device or wanting in incidentality. [355 H] D

(d) The legal test that divides the constitutional from the unconstitutional is that if all that the legislation means to do is to take over, whatever the verbal veils worn, the collections which were *ex-hypothesi* not sales tax but were illegal additives as if sales tax were due, then such an expropriation of the expropriators is beyond entry 54 and, therefore, *ultra vires*. On the other hand, all real punitive measures, including the dissuasive penalty of confiscating the excess collections, are valid, being within the range of ancillary powers of the legislature competent to exact a sales tax levy. [349 B-C] E

2. (a) "Colourable" is not 'tainted with bad faith or evil motive"; it is not pejorative or crooked. Conceptually 'colourability' is bound up with incompetency 'Colour' according to Black's Legal Dictionary, is 'an appearance, semblance or *simulacrum*, as distinguished from that which s real, ...a deceptive appearance..... a lack of reality'. A thing is colourable which is, in appearance only not in reality, what it purports to be. In Indian terms, it is *maya*. In the jurisprudence of power, colourable exercise of or fraud on legislative power or fraud on the Constitution are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck or it, and then it is colourable legislation. [349 F] F

(b) If the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. If a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature it can be struck down as colourable even if the motive were most commendable. [349 H] G

(c) If the questions : what is the pith and substance of the Act; does it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary power implied in that Entry, can the legislation be read down reasonably to bring it within the legislature's constitutional powers ? can be answered affirmatively, the law is valid. Malice or motive is beside the point and it is not permissible to suggest parliamentary incompetence on the score of *mala fides*. [356 A] H

3. Having regard to the object of s. 37 read with s. 46, forfeiture has a punitive impact. [350 F]

A (a) If forfeiture is punitive in infliction, it falls within implied powers. If it is an act of mere transference of money from the dealer to the State, then it falls outside the legislative entry. [350 E]

(b) Black's Legal Dictionary states that 'to forfeit' is 'to lose, or lose the right to, by some '*error, fault, offence or crime*', 'to incur a penalty'. 'Forfeiture', as judicially annotated is 'a punishment annexed by law to some illegal act or negligence....', 'something imposed as a punishment for an offence or delinquency.' The word, in this sense, is frequently associated with the word B 'penalty'. [350 G]

State of Maryland v. *The Baltimore & Ohio RR Co.*—(11 Led. 714, 722) and *Bankara Municipality* v. *Lalji Raja & Sons*: (AIR 1953 SC 248, 250) referred to.

(c) The word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction. [351E-F]

C (d) In the instant case the fact that there was arithmetical identity between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a transference of funds. If this view be correct—it must be held that it is so—the legislature, by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers. The Criminal Procedure Code, Customs & Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of D penalty. [351 F-G]

(e) The contention that s. 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty. The notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by *mens rea* should be rejected. The classical view that 'no *mens rea*, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and E departmental penalties, have created severe punishments even where the offences have been defined to exclude *mens rea*. [352 A]

4. (a) The decision in *Abdul Quader* demarcates the constitutional watershed between merely laying hands upon collections by way of tax by traders although they are not exigible from traders and the policing by penalizing, including forfeiting illegal exactions of the working of a taxing statute and inhibiting injury to the public. The ratio in *Abdul Quader* lies in the sentence: F "it does not provide for a penalty (for) collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation." In other words, had there been a penalty, including forfeiture, coupled with a prohibition against collecting any amount wrongly by way of tax from purchasers, it 'may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation.' [354 D-E, A]

G (b) Although in *Orient Paper Mills* this Court held that if competence to legislate for granting refund of sales-tax improperly collected be granted, there is no reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales tax or otherwise, in *Ashoka Marketing* it was held that the taking over of sums collected by dealers from the public under guise of tax solely with a view to return them to the buyers so deprived was not 'necessarily incidental' to 'tax on the sale and purchase of goods'. [355 F-G]

Abdul Quader [1964] 6 S.C.R. 867, approved.

H *Ashoka Marketing* [1970] 3 S.C.R. 455, not approved:

Orient Paper Mills [1962] 1 S.C.R. 549, referred to.

Forfeiture in s. 37(1) is competent legislation. [357 F]

5. (a) The word "forfeit" in the inartistically worded section is plainly punitive, not nakedly confiscatory. The marginal note to s. 37(1) treats the forfeit also as a penalty. When it says that the wrongful collections shall be forfeited it means what it says. Forfeiture being penal, it must bear the same sense here too. [357 D] A

(b) The spirit of the provision contained in s. 37(1) lends force to the construction that "collected" occurring in the expression "any sum collected by the person shall be forfeited" means 'collected and kept as his' by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return it if eventually it was not taxable, it was not *collected*. The word 'collected' does not cover amounts gathered tentatively to be given back if found non-exigible from the dealer. [358 E] B

(c) The meaning of the expression "shall be forfeited" should be limited to "shall be liable to be forfeited". Section 37 itself contains a clear clue indicative of the sense in which 'shall be forfeited' has been used. Section 37(2) directs the Commissioner to issue notice to the assessee to show cause why a penalty, with or without forfeiture, should not be imposed on him. Such a notice, with specific reference to forfeiture, points to an option in the Commissioner to forfeit or not to forfeit or partly to forfeit. This is made plainer in s. 37(3) which reads : "The Commissioner shall, thereupon, hold an enquiry and shall make such order as he thinks fit". This order embraces penalty and forfeiture. Therefore the Commissioner is vested with a discretion to forfeit the whole or any lesser sum or none at all. [359 B-C] C

Attorney General v. *Parsons* [1956] A.C. 421, referred to. D

(d) The forfeiture should operate only to the extent and not in excess of, the total collections *less* what has been returned to the purchasers. Moreover, it is fair and reasonable for the Commissioner to consider any undertaking given by the dealer that he will return the amounts collected from purchasers to them. [359 E]

(e) Section 37(4) properly read forbids penalty plus prosecution but permits forfeiture plus prosecution. The word "penalty" in its limited sense in s. 37(1) and s. 37(4) does not include forfeiture which is a different punitive category. Forfeiture is a penalty, in its generic sense, but *not* a penalty in the specific signification in s. 37(1) and (4). [360 A] E

Kailasam, J. (concurring)

Section 37(1) is within the legislative competence of the State Legislature. [373 D]

1. (a) The principle in construing words conferring legislative power is that the most liberal construction should be put on the words so that they may have effect in their widest amplitude. None of the items in the List is to be read in a narrow, restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the legislative ambit of the entry as ancillary or incidental. It is also permissible to levy penalties for attempted evasion of taxes or default in the payment of taxes properly levied. [362 E-F] F G

(b) The plea of a device or colourable legislation would be irrelevant if the legislature is competent to enact a particular law. In other words, if the legislature is competent to pass a particular law the motive which impelled it to act is not relevant. [371 E]

(c) If what is levied is a penalty for the proper enforcement of the taxing legislation it will be valid; if on the other hand, it is a device to collect the amount unauthorisedly collected, it will be invalid. [371 E] H

2. (a) In *Abdul Quadar's* case this Court held that in regard to sums collected by a dealer by way of tax, which are not in fact exigible as tax, the

A State legislature cannot direct them to be paid over to the Government because the ambit of ancillary or incidental power does not permit the State Legislature to provide that the amount which is not exigible as tax under the law shall be paid over to the Government as if it were a tax. [370 E-F]

(b) In *Orient Paper Mills'* case this Court held that the Legislature was competent to grant refund of a tax unauthorisedly collected and paid to the Government, to a person from whom the dealer had realised the amount. This view had been approved by this Court both in *Abdul Quadar's* case as B well as in *Ashoka Marketing* case. In *Ashoka Marketing* case, however, this Court held that *Orient Paper Mills'* case does not support the plea that the State Legislature is competent to legislate for demanding payment to the State or retaining by the State of the amount recovered by a registered dealer, which were not due as sales tax. These cases, as also the decision of this Court in *Kanti Lal Babulal*, clearly laid down that it is competent for the State Legislature to provide for a penalty for collecting any amount wrongly by way of tax, if it is levied, for the purpose of carrying C out the objects of taxing legislation. [370 F-G]

R. Abul Quader and Co. v. *Sales Tax Officer, Hyderabad.* [1964] 6 S.C.R. 867, followed.

Orient Paper Mills Ltd. v. *The State of Orissa & Ors.* [1962] 1 S.C.R. 549, *Ashoka Marketing Ltd.* v. *State of Bihar & anr.* [1970] 3 S.C.R. 455, and *Kanti Lal Babulal* v. *H. C. Patel* [1968] 1 S.C.R. 735, referred to.

D 3. The assessee's contention that forfeiture is not a penalty cannot be accepted. [372 C]

(a) Forfeiture is one form of penalty. Forfeiture of property is one of the punishments provided for in the Indian Penal Code. For contravention of the sales tax law the section provides two forms of punishment : levy of penalty and forfeiture. Therefore, the use of the word "forfeiture" as distinct from penalty will not make forfeiture any the less a penalty. [372 C]

E

(b) A combined reading of s. 37 and s. 55 (which deals with appeals) makes it clear that it is not obligatory on the part of Commissioner to direct that the entire amount collected by way of tax in contravention of the provisions of the Act be forfeited. Nor again, is it obligatory on the authorities to levy a penalty which is identically the same as the amount unauthorisedly collected. The amount to be forfeited will have to be determined taking into account all the relevant circumstances. Therefore, the contention that the forfeiture is only a device for recovering the unauthorised collection has no F force. [372 F-G]

(c) The plea that penalty should be confined only to wilful acts of omission and commission in contravention of the provisions of an enactment cannot be accepted because penal consequences can be visited on acts which are committed with or without a guilty mind. For the proper enforcement of various provisions of law it is common knowledge that absolute liabilty is imposed and acts without *mens rea* are made punishable. [372 H]

G

(d) Further, Courts cannot declare that an Act is beyond the legislative competence of the State Legislature on the ground that, while under the Act the amounts erroneously or innocently collected by the assessees were forfeited, an obligation remained with the assessees to refund the amounts to the persons from whom they were collected. The mere fact that in some cases dealers were prejudiced would not affect the validity of the legislation. [373 B-C]

H (e) Section 46(2) is not unconstiutional. For the enforcement of sales tax law such a provision is absolutely necessary, for, without such prohibition unauthorised collection of tax can never be checked. Sales tax law will have to demarcate articles on which tax can be collected and prohibit collection of tax in any manner not authorised by law. [373 E-F]

4. The plea as to contravention of art. 14 has no force. No arbitrary or uncanalised power has been given to the authorities. While the proceedings are in the nature of penalty and forfeiture under s. 37, it is punishment by criminal prosecution under s. 63(1)(h). Section 37 makes it clear that when proceedings are taken under that section, no prosecution can be instituted under s. 63(1)(H) on the same facts. [374 A] A

5. The plea based on infringement of art. 19(1)(f) must also fail. [374 C]

The plea which was available in *Kantilal Babulal's* case, namely, that the forfeiture was enforced without prior enquiry and for that reason the section was invalid, is not available in this case because s. 37(3) prescribes the procedure which makes it obligatory on the part of the Commissioner to give notice of show cause against levy of penalty or forfeiture. Further, under this Act, there are provisions for appeal and revision against the Commissioner's orders. [374 B] B

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 533 and 1004 of 1975. C

From the Judgment and Order dated 16-8-73 of the Gujarat High Court in S.C.A. Nos. 421 and 508 of 1971 and

CIVIL APPEALS NOS. 1410 *and* 1671—1685/75

From the Judgment and Order dated 16-8-73 of the Gujarat High Court in SCA No. 400, 377 and 1220/70 and 30, 129, 155, 184, 362, 363, 391, 406, 822, 823 and 1764/71 and 234 and 449/72. D

S. T. Desai and *R. M. Mehta, M. N. Shroff* and *Miss Radha Rangaswami* for the Appellants in CAs. 533, 1004, and 1410 and 1671—1685/75.

F. S. Nariman, M. N. Shroff and *Miss Radha Rangaswami* for the Intervener (State of Maharashtra) in CA No. 1410/75. E

Kanishkar H. Kaji, Mrs. S. Bhandare, M. S. Narasimhan, A. K. Mathur, A. K. Sharma, and *Miss Nalini Paduval* for Respondent in CA 1671/75.

K. J. John for Respondents in CA 1685/75. F

B. Sen (CA 533/75) *I. N. Shroff* for Respondent No. 1 in CA 533 and RR in C.As. 1677-78, 1680 and 1682-1683/75.

The following Judgments of the Court were delivered :

KRISHNA IYER, J. This bunch of appeals brought by the State of Gujarat by certificate has a pan-Indian impact, as the sale-tax project which has been struck down by the High Court may adversely affect cousin provisions in like statutes in the rest of the country. Contradictory verdicts on the constitutionality of a certain pattern of sales-tax legislation, calculated to counter consumer victimisation by dealers, have been rendered by different High Courts and what complicates the issue is that reasonings in the prior rulings of this Court on the topic have been pressed into service by both sides. This slippery legal situation makes it necessitous for the Constitution Bench of this Court (numerically expanded, almost to breaking point, by the recent 42nd G H

A Constitution Amendment) to declare the law with relative certitude, reviewing, in the process, its previous pronouncements and over-ruling, if required, the view of one High Court or the other so that the correct position may finally be re-stated. The certainty of the law is the safety of the citizen and, having regard to the history of judicial conflict reflected in the rulings we will presently unravel, an authoritative decision is overdue.

B

A prefatory caveat. When examining a legislation from the angle of its *vires*, the Court has to be resilient, not rigid, forward-looking, not static, liberal, not verbal —in interpreting the organic law of the nation. We must also remember the constitutional proposition enunciated by the U.S. Supreme Court in *Munn* v. *Illinois*(1) viz 'that courts do not substitute their social and economic beliefs for C the judgment of legislative bodies'. Moreover, while trespasses will not be forgiven, a presumption of constitutionality must colour judicial construction. These factors, recognised by our Court, are essential to the *modus vivendi* between the judicial and legislative branches of the State, both working beneath the canopy of the Constitution.

The meat of the matter—rather, the core of the dispute—ignoring, D for the moment, minor variations among the several appeals which we may relegate for separate treatment—is as to whether it is permissible for the State Legislature to enact, having regard to the triple Lists of the Seventh Schedule and Articles 14 and 19, that sums collected by dealers by way of sales tax but are not exigible under the State law—and, indeed, prohibited by it—shall be forfeited to the public exchequer punitively under Entry 54 read with Entry 64 of List II. The E Gujarat State whose law, in this behalf, was held *ultra vires* by the High Court, has, in its appeal by certificate, raised this issue squarely and argued for an answer affirmatively. The law we are concerned with is the Bombay Sales Tax Act, 1959 (Bombay Act LI of 1959) (for short, the Act) applicable during the relevant period to the Gujarat State, although the State of Maharashtra itself has since modified the law, as pointed out by Shri Nariman, who intervened on behalf of that F State, to supplement and substantiate the validity of the legislation.

The statutory provisions which have succumbed to unconstitutionality (as expounded by the High Court) are ss. 37(1) and 46 of the Act. The High Court of Maharashtra, however, has taken a diametrically opposite view and other High Courts have ranged themselves on one side or the other in this controversy, while dealing with more or less similar statutes. We confine our judgment to the Act G that is before us and do not go into the validity of the other statutes which have been incidentally referred to in court. The point involved is so critical, yet delicate, that, that even short but significant variations in the scheme of the statute may well spell a result which is opposite.

We will now proceed to project preliminarily the factual-legal setting in order to appreciate whether the legicidal blow delivered by the H High Court is merited or not. Fortunately, the facts are few and

(1) (1876) 94 U.S. 113 (quoted in *Labor Board v. Jones and Laughlin*, 301 U.S. 1, 33-34—Corwin, Constitution of the U.S.A., Introduction, p. xxxi).

not in dispute and lend themselves to sharp focus on the legal screen. The respondent, a registered dealer under the Act, was, by implication of the provisions, eligible to pass on sales-tax leviable from him to the purchaser but several commodities, especially the necessaries of life, were not liable to tax (s. 5). Other situations of non-exigibility also exist. Yet several dealers showed a tendency, under the guise of sales tax levy, to collect from buyers such tax even in regard to tax-free items or sums in excess of the tax payable by them or where the dealers were not even assessable. The likelihood of such abuse of the sales-tax law induced the legislature to protect the public from this burden by enacting a prohibition under s. 46 against such collection from customers. A mere prohibitory provision may remain a 'pious wish', unless, to make it effective, the statute puts teeth into it. Section 37(1)(a) and s. 63(1)(h) are the claws of s. 46 which go into action, departmentally or criminally, when there is violation. Even here we may read s. 46 (1) and (2) :

> "46(1) No person shall collect any sum by way of tax in respect of sale of any goods on which by virtue of section 5 no tax is payable.
>
> (2) No person, who is not a Registered dealer and liable to pay tax in respect of any sale or purchase, shall collect on the sale of any goods any sum by way of tax from any other person and no Registered dealer shall collect any amount by way of tax in excess of the amount of tax payable by him under the provisions of this Act.

Although there is no specific provision enabling the dealer to pass on the tax to the customer, there is a necessary implication in s. 46 authorising such recovery, it being optional for him to do so or not. The primary liability to pay the tax is on the dealer but it is a well-established trade practice which has received express or implied legislative cognisance, that the dealer is not prohibited from passing on the tax to the other party to the sale. Such a usage is implicit in s. 46 of the Act although what is explicit in the provision is that nothing shall be collected by way of tax in respect of sale of any goods exempted under s. 5 and no registered dealer shall exact by way of tax any sum exceeding what is payable under the Act. Of course one who is not a registered dealer, cannot collect any sum by way of tax from any other person. In short, there is a triple taboo writ into s. 46. This prohibitory project is made operational, as stated earlier, by two other provisions one sounding in criminal and the other in departmental proceedings.

Section 63(1)(h) makes it an offence to contravene the provisions of s. 46 (read above) and imposes, on conviction, a punishment of simple imprisonment (upto 6 months) with or without fine (upto Rs. 2,000/-). We may excerpt s. 63(1)(h) since that may have to be referred to later :

> "63(1)(h)
>
> Whoever contravenes any of the provisions of section 46, shall on conviction, be punished with simple imprisonment

A which may extend to six months or with fine not exceeding two thousand rupees, or with both; and when the offence is a continuing one, with a daily fine not exceeding one hundred rupees during the period of continuance of the offence."

Section 37(1) relates to imposition of penalty departmentally for contravention of s. 46. It reads :

B "37(1)(a)

If any person, not being a dealer liable to pay tax under this Act, collects any sum by way of tax in excess of the tax payable by him, or otherwise collects tax in contravention of the provisions of section 46, he shall be liable to pay, in addition to any tax for which he may be liable, a penalty as

C follows :

(i) where there has been a contravention referred to in clause (a), a *penalty* of an amount not exceeding two thousand rupees;....and, in *addition*,.... *any sum collected by the person by way of tax in contravention of section* 46 *shall be forfeited to the State Government.*" (emphasis

D supplied).

The provisions impugned are ss. 46 and 37(1) (especially the underscored part) and the grounds urged to make out unconstitutionality are dealt with below.

It is fair to state that Shri Kaji and Shri B. Sen, appearing for two separate dealers, did dispel the impression that the Trade was often

E to blame for abuse and did make out that in many cases the Revenue drove the dealers to collect, by way of tax, sums from the customers since the law was uncertain and was often overzealously interpreted against the assessees by the Caesarist officials of the department. For instance, the assessing authority construed the entries in the Act habitually against the assessees or wriggled out of legal and constitutional bans compelling them to go up in litigation to the High Court and the

F Supreme Court and win their point only to find that, after all the expense and delay and strenuous endeavour to establish that the tax was not exigible, the department quietly resorted to the forfeiture provision. 'Heads I win, tails you lose'—was the comfortable position of the Revenue, thanks to the draconic attitude of the tax collectors to view with hostility any legitimate claim for exemption. The purchasing public eventually suffered, as the merchants were not eager

G for phyrric victories by litigating for tax exemption.

Shri Kaji mentioned, for instance, the case of works contracts, forward contracts, hire-purchase agreements, compulsory transfers, casual sales, artistic works and the like where the persistence of the department drove dealers to achieve victorious futilities, for, at the end of the litigation, they did succeed in law but lost in fact, the money

H being claimed back under s. 37(1)(a) by the Commissioner.

Shri B. Sen, appearing for the respondent in Civil Appeal No. 533 of 1975 had a more sorrowful tale to tell. The honest dealer made

a return of the total sums collected by him on the turnover and it was discovered by the sales tax officer that certain items were not taxable and, therefore, refund was due. He directed refund and followed it up with an ironic post-script, as it were, forfeiting that amount under s. 37(1)(a) of the Act. Certainly, these illustrations do emphasize that the scope of s. 37(1)(a) is not restricted to sums collected along with the price by dealers by way of tax with a touch of turpitude but also innocently on the strength of the actual or anticipated (albeit) erroneous view of the tax officers themselves. Certainly, the fiscal minions of Government, if they blatantly misuse power and overtax to bring discredit to a benignant State, must be publicly punished since respect for the law is not a one-way street. We will bear this in mind when discussing the *vires* of the challenged provisions, although even here we must mention that a large number of dealers for whom the legislation is made apparently envisage guilty levies under the guise of sales tax. A law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs. In any view, the fact is not disputed that the dealers against whom s. 46 and s. 37(1)(a) have been applied have collected sums by way of tax which are not exigible as tax. The respondents have all collected from their customers amounts *qua* sales tax which come within the coils of s. 46. The tax officials discovered this deviance and, acting on the prohibition plus penalty contained in s. 46 read with s. 37(1), imposed penalties and forfeited the sum collected by the persons by way of tax in contravention of s. 46 less amounts shown to have been refunded to the customers as wrong levy of sales tax. The last limb of forfeiture, sustainable if s. 37(1) were *intra vires in toto,* has been invalidated by the High Court; and the aggrieved State, bewailing the huge financial implications of this holding and urging that the morality and competency of the impugned provision is unassailable, has appealed. We may also state that Shri S. T. Desai has assured the Court that the conscionable stand of the State is—and they will abide by this assurance—that if the dealer repays to the purchaser the forfeiture will not apply to such sums.

The trinity of points in controversy turns on (a) legislative competency; (b) contravention of Art. 19; and (c) breach of processual equality guarnateed under Art. 14. The pivotal problem is one of legislative competency. The other two, if good, are sufficient to void the provisions under challenge but have been feebly put forward, counsel being perhaps aware of the bleak prospects.

He who runs and reads gets the facts without difficulty since the Revenue has done nothing more than forfeit the sums recovered from customers by dealers in the teeth of s. 46, less refunded sums, if any. Even so, the State, under our constitutional scheme, has limited legislative powers restricted to List II and List III of the Seventh Schedule. If s. 37(1)(a) spills over the Entries in List II (Entries 54 and 64) and cannot be salvaged under the doctrine of ancillary powers, the law must be bad, morality notwithstanding. The State has no divine right to rob the robber. The money, if illegally gathered either by mistake or by mendacity, must go back to whom it belongs, and not to the State. Nor is there any legislative entry which arms the State to

A sweep all illegal levies connected with sales from the merchant community into its coffers. This is the kernel of the submission which has appealed to the High Court. The counter-argument which has been urged by Shri S. T. Desai, for the State, reinforced by added glosses by Shri Nariman, is that the State has the right not merely to impose tax on sales but to ensure that the sales tax law is not misused by the commercial community to fob off pseudo-fiscal burden upon the con-
B sumer community. It is elementary economic theory that while the legal burden of sales tax falls upon the dealer, the fiscal impact is eventually on the consumer. A Welfare State, with its logos and legend as social justice, has a sacred duty while it exercises its power of taxation to police the operation of the law in such manner as to protect the public from any extra burden thrown on it by merchants under cover of the statute.

C

Bearing in mind the quintessential aspects of the rival contentions, let us stop and take stock. The facts of the case are plain. The professed object of the law is clear. The motive of the legislature is irrelevant to castigate an Act as a colourable device. The interdict on public mischief and the insurance of consumer interests against likely, albeit, unwitting or *'ex abundanti cautela'* excesses in the
D working of a statute are not merely an ancillary power but surely a necessary obligation of a social welfare state. One potent prohibitory process for this consummation is to penalize the trader by casting a no-fault or absolute liability to 'cough up' to the State the total 'unjust' takings snapped up and retained by him 'by way of tax' where tax is not so due from him, apart from other punitive impositions to deter and to sober the merchants whose arts of dealing with customers
E may include 'many a little makes a mickle'. If these steps in reasoning have the necessary nexus with the power to tax under Entry 54 List II, it passes one's comprehension how the impugned legislation can be denounced as exceeding legislative competence or as a 'colourable device' or as 'supplementary, not complementary'. But this is precisely what the High Court has done, calling to its aid passages culled from the rulings of this Court and curiously distinguishing an
F earlier Division Bench decision of that very Court a procedure which, moderately expressed, does not accord with comity, discipline and the rule of law. The puzzle is how minds trained to objectify law can reach fiercely opposing conclusions.

Expressions like 'colourable device' and 'supplementary and not complementary' have a tendency to mislead. Logomachy is a tricky
G legal trade; semantic nicety is a slippery mariner's compass for courts and the three great instrumentalities have, ultimately, to render account to the justice-constituency of the nation. The true diagnosis of interpretative crises is as much the perplexity of deciphering the boundaries of constitutional power as attitudinal ambivalence and economic predilections of those who sit to scan the symbols and translate their import. Shakespeare unconsciously haunts the halls of justice : 'Thy
H wish was father, Harry, to that thought' (Henry IV, Scene 5). In our view, the true key to constitutional construction is to view the equity of the statute and sense the social mission of the law, language permitting, against the triune facets of justice high-lighted in the Preamble

to the Paramount Parchment, read with a spacious signification of the listed entries concerned. If then we feed this programme into the judicial cerebration with the presumption of constitutionality superadded, the result tells us whether the measure is *ultra vires* or not. The doctrine of ancillary and incidental powers is also embraced within this scheme of interpretation. A

An overview of the relevant string of rulings of this Court may now be undertaken. The basic ratio, if we may condense the legal test that divides the constitutional from the unconstitutional, is that if all that the legislation means to do is to take over, whatever the verbal veils worn, the collections which were *ex hypothesi not* sales tax but were illegal additives as if sales tax were due, charged along with the price by the dealer, then such an expropriation of the expropriators (putting it in a morally favourable, though exaggerated, light for the State) is beyond Entry 54 and therefore *ultra vires*. On the other hand, all real punitive measures, including the dissuasive penalty of confiscating the excess collections, are valid, being within the range of ancillary powers of the legislature competent to exact a sales tax levy. The punitive impost in s. 37 (1) (a) is therefore legitimate and valid. If we accept this test, the appeals must succeed, so far as this point is concerned. B C D

Before scanning the decisions to discover the principle laid down therein, we may dispose of the contention which has appealed to the High Court based on 'colourable device'. Certainly, this a malignant expression and when flung with fatal effect at a representative instrumentality like the Legislature, deserves serious reflection. If, forgetting comity, the Legislative wing charges the Judicative wing with 'colourable' judgments, it will be intolerably subversive of the rule of law. Therefore, we too must restrain ourselves from making this charge except in absolutely plain cases and pause to understand the import of the doctrine of colourable exercise of public power, especially legislative power. In this branch of law, 'colourable' is not tainted with bad faith or evil motive'; it is not pejorative or crooked. Conceptually, 'colourability' is bound up with incompetency. 'Colour', according to Black's Legal Dictionary, is 'an appearance, semblance or *simulacrum,* as distinguished from that which is real... a deceptive appearance ... a lack of reality'. A thing is colourable which is, in appearance only and not in reality, what it purports to be. In Indian terms, it is *maya.* In the jurisprudence of power, colourable exercise of or fraud on legislative power or, more frightfully, fraud on the Constitution, are expressions which merely mean that the legislature is incompetent to enact a particular law, although the label of competency is stuck on it, and then it is colourable legislation. It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation, apparently enacted under one Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable. In other words, the letter of the law notwithstanding, what is the pith and substance of the Act? Does E F G H

A it fall within any entry assigned to that legislature in pith and substance, or as covered by the ancillary powers implied in that Entry? Can the legislation be read down reasonably to bring it within the legislature's constitutional powers? If these questions can be answered affirmatively, the law is valid. Malice or motive is beside the point, and it is not permissible to suggest parliamentary incompetence on the score of *mala fides*.

B

So much is well-established law. Therefore, if the dealers in the appeals before us charge the enactment with the vice of colourability, they must make out that in pith and substance the impugned legislation does not fall within Entry 54 read with Entry 64 of List II, that it is not embraced even by the expansive connotation of ancillary powers and that it is not possible to save the law even by reading down some C of the wide expressions used. In the present case, the narrow issue is as to whether the forfeiture clause in s. 37(1) is bad because of the besetting sin of colourability. If it is a punitive measure to protect public interest in the enforcement of the fiscal legislation, it falls squarely within the area of implied powers. Therefore, the finer point stressed by Shri Kaji is that the expression 'forfeiture' is a ritualistic recital to cover up a secret design to snatch from the traders sums D which cannot be reached at except by the device of forfeiture. In frank fact, it is not a measure of penalty but an oblique methodology to do an illegitimate thing which is beyond the legislature's legitimate reach. We have, therefore, to examine this short point in the light of the decisions of this Court.

Coming to 'forfeiture', what is the true character of a 'forfeiture'? E Is it punitive in infliction, or merely another form of exaction of money by one from another? If it is penal, it falls within implied powers. If it is an act of mere transference of money from the dealer to the State, then it falls outside the legislative entry. Such is the essence of the decisions which we will presently consider. There was a contention that the expression 'forfeiture' did not denote a penalty. This, perhaps, may have to be decided in the specific setting F of a statute. But, speaking generally, and having in mind the object of s. 37 read with s. 46, we are inclined to the view that forfeiture has a punitive impact. Black's Legal Dictionary states that 'to forfeit' is 'to lose, or lose the right to, by some *error, fault, offence or crime*', 'to incur a penalty.' 'Forfeiture', as judicially annotated, is 'a punishment annexed by law to some illegal act or negligence....', 'something imposed as a punishment for an offence or delinquency.' The G word, in this sense, is frequently associated with the word 'penalty', According to Black's Legal Dictionary.

> "The terms 'fine', 'forfeiture', and 'penalty', are often used loosely, and even confusedly; but when a discrimination is made, the word 'penalty' is found to be generic in its character, including both fine and forfeiture. A 'fine' is a H pecuniary penalty, and is commonly (perhaps always) to be collected by suit in some form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property."

More explicitly, the U. S. Supreme Court has explained the concept of 'forfeiture' in the context of statutory construction. Chief Justice Taney, in the *State of Maryland* v. *The Baltimore & Ohio RR Co.*(1) observed :

> "And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined, upon the party by law; and such, very clearly, is the meaning of the word in the act in question."

The same connotation has been imparted by our Court too. A Bench has held : (2)

> "According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture."

This word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction. The fact that there is arithmetical identity, assuming it to be so, between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a transference of funds. If this view be correct, and we hold so, the legislature, by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers. The Criminal Procedure Code, Customs & Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of penalty. When discussing the rulings of this Court we will explore whether this true nature of 'forfeiture' is contradicted by anything we can find in ss. 37(1), 46 or 63. Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no-fault liability but must be preceded by *mens rea*. The classical view that 'no *mens rea*, no crime' has long ago been eroded and several laws in India and

(1) 11 Led. 714, 722.

(2) *Bankura Municipality* v. *Lalji Raja and Sons* : A.I.R. 1953 S.C. 248, 250.

A abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude *mens rea*. Therefore, the contention that s. 37 (1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.

We shall now turn to the plethora of precedents which have accumulated over the years dealing with sales tax legislations from different States, the patterns varying in structure, although the financial impact on the dealers is the same. The landmark case is *Abdul Quader*(1), although *Ashoka Marketing Co.*(2) and *Annapoorna Biscuit Mfg. Co.*(3), among others are also pertinent decisions. While there are earlier decisions, we may as well start off with *Abdul Quader*(1). There, the appellant dealer collected sales tax from the purchasers of betel leaves but did not pay the amount so collected to the government. When the tax authorities directed the appellant to pay the said amounts into the treasury, he filed a writ petition questioning the validity of s.11(2) of the Hyderabad General Sales Tax Act, 1950 which was the authority relied on by the government to make the direction. The problems and the answer thereto were squarely stated by Shri Justice Wanchoo, speaking for the Court. We may except that portion which formulates the question and furnishes the answer.

> "The first question therefore that falls for consideration is whether it was open to the State legislature under its powers under Entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it was not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision however is attempted to be justified on the ground that though it may not be open to a State legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in

(1) [1964] 6 S.C.R. 867.
(2) [1970] 3 S.C.R. 455.
(3) [1973] 3 S.C.R. 987.

the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which, in the present case, is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected—may be wrongly—by way of tax is not exigible under law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what s. 11(2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in s. 11(2) cannot be made under entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry." (pp. 872-873).

The Court proceeded to refer to an attempt made to justify the provision as providing for a penalty, but found nothing in the text to justify the impugned sub-section (2) of s. 11, as a penalty for breach of any prohibition under the Act. On the other hand, in the setting of the statute, the Court came to the contrary conclusion :

"Section 11(2) in our opinion has nothing to do with penalties and cannot be justified as a penalty on the dealer. Actually s. 20 makes provision in cl. (b) for penalty in the case of breach of s. 11(1) and makes the person committing a breach of that provision liable, on conviction by a Magistrate of the first class, to a fine..... In this connection we may refer to cl. (c) of s. 20 which provides that any person who fails to pay the amounts specified in sub-section (2) of section 11 within the prescribed time' shall, on a conviction by a Magistrate, be liable to fine. It is remarkable that this provision makes the person punishable for his failure to pay the amount which is not authorised as a tax at all under the law, to Government. *It*

A *does not provide for a penalty* (sic) *collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation.* If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the B amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 54 of List II, nor can the State legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly."

C (p. 874) (underscoring ours)

The crucial ratio lies in the underscored passage. Had there been a penalty, including forfeiture, coupled with a prohibition against collecting any amount wrongly by way of tax from purchasers, it 'may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. In a sense, *Abdul Quader* (supra) D demarcates the constitutional watershed between merely laying hands upon collections by way of tax by traders although they are not exigible from traders (a provision for which the State is underpowered by Entry 54 of List II even expanding it by the doctrine of implied powers) and the policing by penalizing, including forfeiting illegal exactions, the working of a taxing statute and inhibiting E injury to the public.

We may now pass on to *Ashoka Marketing Co.* (supra) where this Court had to consider a slightly different provision from what fell for decision in *Abdul Quader* (supra). In the latter, the provision directed that every person who had collected any amount by way of tax otherwise than in accordance with the provisions of the Act should pay over to the government....the amount so collected by F him .....This was a naked seizure of money collected by the dealer there being no prohibition and no penalty and no obligation for the government to return such sums to the purchasers from whom they were taken. In *Ashoka Marketing Co.* (supra) the provision in s. 20A went further. While the illegal collections were to be made over to the Government treasury it was further provided that such amounts shall be held by the State Government in trust for the person from G whom it was realized by the dealer and the dealer himself on depositing these sums into Government treasury shall be discharged from his obligation to return the sums to the purchasers. There was an incidental direction that, on a claim being made by aggrieved buyers, these driblets shall be refunded. The scheme of cl. (8) of s. 20A made it clear that the legislation was in public interest, that while suits against dealers to recover paltry sums by a large number of H customers would lead to endless and expensive litigation, a simpler process of returning those sums on application by the relevant purchasers would protect the common buyer while depriving the dealers of their unjust gains. It was manifestly a consumer protection

measure, as we see it. Shah, J. speaking for the Court, held that this *pro bono publico* purpose did not dissolve the constitutional disability and ruled : A

> "The State Legislature may under entry 54 List II, be competent to enact a law in respect of matters necessarily incidental to 'tax on sale and purchase of goods'. But a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State cannot, in our judgment, be regarded as necessarily incidental to levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provision of the Constitution by clothing the claims in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect." (p. 463-464) B C

This decision has been followed by a smaller Bench in *Annapoorna* (supra) with no additional reasons adduced. D

In *Ashoka* (supra) the Bench did not follow *Orient Paper Mills*(1) where fairly similar provisions were attacked, but repulsed by this Court with the observation :

> "The Legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or ancillary matter of granting refund of tax improperly or illegally collected, and the competence of the Legislature in this behalf is not canvassed by counsel for the assessees. If competence to legislate for granting refund of sales-tax improperly collected be granted, is there any reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has actually realized the amounts by way of sales-tax or otherwise? We see none." (p. 461 : Ashoka) E F

Despite this holding in *Orient*(1) the Court—a larger Bench—held that the taking over of sums collected by dealers from the public under guise of tax solely with a view to return them to the buyers so deprived was not 'necessarily incidental' to 'tax on the sale and purchase of goods'. We respectfully disagree. G

In a developing country, with the mass of the people illiterate and below the poverty line, and most of the commodities concerned constitute their daily requirements, we see sufficient nexus between the power to tax and the incidental power to protect purchasers from being subjected to an unlawful burden. Social justice clauses, integrally connected with the taxing provisions, cannot be viewed as H

(1) [1962] 1 S.C.R. 549.

A a mere device or wanting in incidentality. Nor are we impressed with the contention turning on the dealer being an agent (or not) of the State *vis a vis* sales tax; and why should the State suspect when it obligates itself to return the moneys to the purchasers ? We do not think it is more feasible for ordinary buyers to recover from the common run of dealers small sums than from government. We expect a sensitive government not to bluff but to hand back. So, we largely B disagree with *Ashoka*(supra) while we generally agree with *Abdul Quader*(supra). We must mention that the question as to whether an amount which is illegally collected as sales tax can be forfeited did not arise for consideration in *Ashoka* (supra).

We may conclude with the thought that Parliament and the State Legislatures will make haste to inaugurate viable public interest liti- C gation procedures cutting costs and delays. After all, the reality of rights is their actual enjoyment by the citizen and not a theoretical set of magnificient grants. 'An acre in Middlesex', said Macaulay, 'is better than a principality in Utopia'. Added Prof. Schwartz : 'A legal system that works to serve the community is better than the academic conceptions of a bevy of Platonic guardians unresponsive to public needs'.(1) D

A march past the other decisions of this Court having some relevance to the point at issue is at this stage useful. *Kantilal Babulal*(2) dealt with a provision substantially similar to the one that falls for consideration in the present case. After laying down a prohibition against collection by dealers from purchasers of amounts by way of E sales tax 'unless he is a registered dealer and is liable to pay tax himself', Section 12A of the concerned Act (Bombay Sales Tax Act V of 1946) provided that collections contrary to the provision shall be forfeited to the State Government.

The Revenue urged that s. 12A(4), which dealt with 'forfeiture' F was a penal provision incidental to the power to tax sales. The Court expressly declined to investigate whether the provision was penal at all. However, it was assumed that a penal provision was within the legislative competence of the State Legislature and the entire discussion, and therefore the sole ratio, turned on the alleged violation of Art. 19(1)(f). It was held that Art. 19 was violated because, in the Court's view the forfeiture clause was silent as to the G machinery and procedure to be followed in determining the question as to whether there had been a contravention of s. 12A(1) and (2) and, if so, to what extent. Processual reasonableness being absent Art. 19(1)(f) stood contravened. In short, the whole decision focussed on the procedural portion of the law being repugnant to Art. 19(1)(f) read with Art. 19(5). It did not engage in a consideration of legislative competence.

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(1) Bernard Schwartz; The Law in America; p. 7 : American Heritage-Bicentennial Series.

(2) [1968] 1 S.C.R. 785.

Aside from this case, the other rulings of this Court like *Manek-lal*(1), *George Ooakes*(2), *Jhaveri*(3) and *Abdulla*(4) have only a peripheral relevancy. While we have listened, persued and reflected over these citations, we have screened them from specific reference in this judgment since these decisions were cited by counsel merely to drive home the significance of some stray thought expressed in these judgments having but marginal meaningfulness. A

Skilful submissions were made on the construction of the text of s. 37(1) of the Act to convince us that the sub-section itself made a distinction between penalty and forfeiture, suggesting that forfeiture was not regarded as a penalty. Side references to a few other sections were made to reinforce this thesis. The identity of the forfeit and the illegal collection was also urged by the assessee as a tell-tale circumstance to contend that it could not be a penalty. Moreover, the express penalty in s. 37(1)(a) had a ceiling while the additive forfeit was unlimited. A penny worth of penalty and a pound worth of forfeiture proved that the statute itself meant the latter to be not a penalty. From a verbal, syntactic and structural angle there is something to be said for this submission. But the heart of the matter is that the forfeit in the inartistically worded section is plainly punitive, not nakedly confiscatory. B C D

The marginal note which, in ambiguous situations, may shed some light, treats the forfeit also as a penalty. Secondly, the words of a statute are purposeful symbols to be decoded straight-forwardly, not by unveiling the words behind the words. And so, when s. 37(1) expressly says that the wrongful collections shall be forfeited it means what it says. Forfeiture being penal, terminologically, it must bear the same sense here too. Moreover, so far as the Act of 1959 is concerned, there is no case of outwitting any anterior judicial verdict. The fact that *mens rea* is excluded and the penal forfeiture can be enormous are germane to legislative policy, not for judicial compassion. A limited penalty, without forfeiture, may prove illusory where the illegal collections run into millions. The inevitable conclusion is that the forfeiture in s. 37(1) is competent legislation. E F

Before we move on to a consideration of the fragile charges of flouting Arts. 19(1)(f) and 14, we may state that Shri Nariman's invitation to take a new look at the problem need not be considered in the view we take. The Maharashtra State, for whom he appears, is the intervener and the Maharashtra legislation has a better sense of equity, the dealer being absolved from purchasers' claims and Government squarely undertaking to repay them. We expect Guiarat to legislate not merely to forfeit but also to be fair to the dealer and buyer. The possible consequences of inaction, which we are not examining, will not be lost on that State, we hope. G

(1) [1967] 3 S.C.R. 65.
(2) [1962] 2 S.C.R. 570.
(3) [1973] 2 S.C.R. 691.
(4) [1971] 2 S.C.R. 817.

A The challenge based on Art. 14 is met by this Court's ruling in *Maganlal Chhaganlal*(1). The High Court has found no merit in it either, although, as will be presently seen, we have to read s. 37(1) in such manner as to pare down the gaping disparity in impact between s. 37(1) and s. 64(1)(h). Article 19(1)(f) also cannot avail, in view of *Kantilal* (supra) where the only infirmity found by this Court was procedural. This shortfall has been made good in the present B Act and the High Court itself has rejected the plea as not pressed.

Shri Kaji has urged that the dealers will, under the scheme of the Act, have the worst of both the worlds and that is unreasonable. The State forfeits the whole illegal (often erroneous) collections and the purchasers can demand back the very same sums. There is injustice here. Without holding that Art. 19(5) is violated, we think C the ends of justice can be met by reading down the forfeiture clause interpretatively.

Section 37(1) does say that 'any sum collected by the person by way of tax.....*shall* be forfeited.....'.. Literally read, the whole sum goes to the State. Let us suppose the dealer has returned the whole or part of the collections to the customers. Should the whole amount, regardless of such repayment, be forfeited ? We think not. D

Section 37(1) uses the expressions, in relation to forfeiture, 'any sum collected by the person....shall be forfeited.' What does 'collected' mean here ? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that 'collected' means 'collected and kept as his' by the trader. If the dealer E merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return it if eventually it was not taxable, it was not *collected.* 'Collected', in an Australian Customs Tariff Act, was held by Griffith C. J., not 'to include money deposited under an agreement that if it was not legally payable it will be returned', (Words & Phrases, p.274). We therefore semanticise 'collected' not to cover amounts gathered tentatively to be given F back if found non-exigible from the dealer.

The expression 'forfeiture' may now be examined. For one thing, there is authority to hold that 'shall be forfeited' means 'liable to be forfeited', depending on the setting and the sense of the statute. Lord Porter, in *Attorney General* v. *Parsons*(2) observed, in the context of language suggestive of automatic forfeiture, negativing such inference :

G "The strength of the opposite opinion rests upon the fact that 'forfeiture' in section 1(1) must, on the construction which I have adopted, mean 'liable to forfeiture', whereas, as my noble and learned friend Lord Morton of Henryton points out in his opinion, which I have had an opportunity of reading, it bears the meaning of 'forfeited' and not liable to 'forfeiture' in sub-section (2)(iv). This is true, but the collec- H tion is different. Admittedly the word 'forfeited' may bear

(1) [1975] 1 S.C.R. 1.
(1) [1956] A.C. 421.

the meaning 'liable to forfeiture' at the will of the person to whom the right of forfeiture is given and does not, in every case, imply automatic forfeiture." (p. 443) A

Lord Cohen, in the same judgment, considered it appropriate to read 'forfeiture' as meaning 'liable to be forfeited'. Although there was a conflict of opinion on this point, it is sufficient to state that such a construction is tenable. Moreover, s. 37 itself contains a clear B clue indicative of the sense in which 'shall be forfeited' has been used. Section 37(2) directs the Commissioner to issue notice to the assessee to show cause why a penalty, with or without forfeiture, should not be imposed on him. Such notice, with specific reference to forfeiture, points to an option in the Commissioner to forfeit or not to forfeit or partly to forfeit. This is made plainer in s.37(3) which reads : 'The Commissioner shall, thereupon, hold an enquiry and shall make such C order as he thinks fit.' This order embraces penalty and foreiture. Therefore the Commissioner is vested with a discretion to forfeit the whole or any lesser sum or none at all. W limit the sense of 'shall be forfeited' as meaning 'shall be liable to be forfeited.'

This signification of 'forfeiture' as 'liability to forfeiture' saves the equity of the statute. The Commissioner must have regard to all the D circumstances of the case, including the fact that amounts illegally collected have been returned to the purchasers to whom they belong before passing the final order. We are clear in our minds that the forfeiture should operate only to the extent, and not in excess of, the total collections *less* what has been returned to the purchasers. We may go a step further to hold that it is fair and reasonable for the Commissioner to consider any undertaking given by the dealer that he will return the E amounts collected from purchasers to them. The humanism of a provision may bear upon its constitutionalism. Counsel have argued, is it not unreasonable to forfeit huge sums and still to expose the dealer to several actions ? Is it not discriminatory to make the departmental punishment disproportionately onerous *vis a vis* criminal inflictions under s. 64(1)(h) ? Blessed are they who are prosecuted, for the criminal law is benign ! These possibilities only underscore the neces- F sity, even on conviction, of deprivation of illicit collections as on departmental penalty imposts, coupled with discharge for dealers *pro-tanto* plus inexpensive and prompt return of sums to purchasers by rough and ready verifications followed by money order remittances. While we uphold the legislation, we suggest such salvationary modifications, if constitutionality is to be impregnable. There is no last word in constitutional law. G

For the nonce, we are satisfied that these speculative interrogations do not destabilize the constitutional position. Moreover, our construction obligates the State not to forfeit sums already returned, undertaken to be returned and the like. Our direction that the State shall disgorge the sums by some easy process, back to the buyers helps the dealer against claims from the former. H

The apparent apprehension that the financial burden of forfeiture can be avoided if the dealer is prosecuted is also not correct. The cri-

A minal court can punish only to the extent specified in s. 64(1). Section 37(4), properly read, forbids penalty plus prosecution, but permits forfeiture plus prosecution. The word 'penalty' in its limited sense in s. 37(1) and s.37(4) does not include forfeiture which is a different punitive category. Forfeiture is a penalty, in its generic sense, but *not a penalty in the specific signification in* s.37(1) and (4). After all, the functionary is exercising quasi-judicial powers and not insisting B on maximum exactions. Every consideration which is just and relevant must enter his verdict lest the order itself be vitiated for being unreasonable or perverse exercise of discretion. The fulfilment of the undertaking must be ensured by necessary guarantees so that the dealer may not play a double grame and the purchaser stands betrayed. We are not giving any hidebound prescriptions but stating guidelines for taxing authorities who exercise these quasi-judicial powers. There is C a tendency for valiant tax executives clothed with judicial powers to remember their former capacity at the expense of the latter. In a Welfare State and in appreciation of the nature of the judicial process, such an attitude, motivated by various reasons, cannot be commended. The penalty for deviance from these norms is the peril to the order passed. The effect of *mala fides* on exercise of administrative power is well-established.

D

In strict legality, once the money is forfeited to the State, there is no obligation to make it over to the purchaser, but in the welfare orientation of our State and certain constitutional emanations we leave unexplored, such an obligation should be voluntarily undertaken.

A fairly exhauative survey of case-law has been made, consuming E considerable industry of counsel and presenting a sky-view and ground-view of judicial mentation in this branch of sales-tax law, bedrocked on constitutional law. While we are edified by the immense project undertaken, in these crowded days of explosive docket backlog, the fine art of miniaturization, without traumatization, may well be a creative Darwinan mutation in forensic submissions for the survival of the great judicial institution. Moreover, *small* can be *beautiful*, both in F judgments and arguments. But we must append our appreciation of the thoroughness, thoughtfulness, perspicacity and persuasiveness of Sarvashri Kaji, B. Sen, S. T. Desai and F. S. Nariman (for the intervener), the plurality of counsel presenting each a separate facet geared to the same goal of enlightening the Court.

For the reasons set out above we allow the appeals, but, in the G circumstances, without costs.

It was submitted by the learned counsel at the time of the conclusion of the arguments that some of the appeals raise points unconnected with constitutionality but turning on facts and legislative construction. Separate directions will be issued in regard to such appeals.

H KAILASAM, J. Civil Appeals Nos. 1410 and 1671-85 of 1976 are by Certificate and the rest are by special leave granted by this Court. The State of Maharashtra is the intervener in Civil Appeal No. 1410 of 1976.

While I agree with the conclusion reached by V. R. Krishna Iyer J. that the appeals should be allowed, I would confine my discussion to the points that arise for decision in the appeals.

The main question that was raised before the High Court was whether sections 37(1)(a) and 46(2) of the Bombay Sales Tax Act, 1959 are beyond the legislative power conferred by Entry 54, List II, Schedule VII of the Constitution. The court held that the impugned sections are beyond the power of the State legislature and therefore *ultra vires*. Aggrieved by the decision the State has preferred these appeals.

Section 37(1)(a) and (b) runs as follows :—

"37. (1) If any person—

(a) (i) not being a dealer liable to pay tax under this Act, collects any sum by way of tax, or

(ii) being a registered dealer, collects any amount by way of tax in excess of the tax payable by him, or

(ii-a) being a registered dealer, collects any amount by way of additional tax in contravention of the provisions of sub-section (2) of section 15A-I, or

(iii) otherwise collects tax in contravention of the provisions of section 46, or

(b) being a dealer liable to pay tax under this Act, or being a dealer who was required to do so by the Commissioner by a notice served on him fails in contravention of sub-section (1) of section 43 to keep a true account of the value of the goods purchased or sold by him, or fails when directed so to do under that section to keep any account or record in accordance with the direction,—

he shall be liable to pay in addition to any tax for which he may be liable, a penalty of an amount as follows :—

(i) Where there has been a contravention referred to in clause (a) (i) or (iii), a penalty of an amount not exceeding two thousand rupees or double the sum collected by way of tax—whichever is less.

(ii) Where there has been a contravention referred to in clause (a)(ii) or (ii-a) or clause (b), a penalty of an amount not exceeding two thousand rupees, and in addition, any sum collected by the person by way of tax in contravention of sub-section (2) of section 15A-I or section 46 shall be forfeited to the State Government. When any order of forfeiture is made, the Commissioner shall publish or cause to be published a

A

notice thereof for the information of the persons concerned giving such details and in such manner as may be prescribed."

Section 46(1) prohibits collection of tax in certain cases by providing that no person shall collect any sum by way of tax in respect of sales B of any goods on which by virtue of section 5 no tax is payable. Sub-section (2) which is held to be *ultra vires* runs,

"46(2) No person, who is not a Registered dealer and liable to pay tax in respect of any sale or purchase shall collect on the sale of any goods any sum by way of tax from any other person and no Registered dealer shall collect any amount by way of tax in excess of the amount of tax payable C by him under the provisions of this Act;

Provided that, this sub-section shall not apply where a person is required to collect such amount of the tax separately in order to comply with the conditions and restrictions imposed on him under the provisions of any law for the time being in force."

D

Entry 54, List II, which is relied on by the State as conferring power to enact the impugned sections is :—

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I."

E The principle in construing words conferring legislative power is that the most liberal construction should be put on the words so that they may have effect in their widest amplitude. None of the items in the List is to be read in a narrow restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the legislative F ambit of the Entry as ancillary or incidental. It is also permissible to levy penalties for attempted evasion of taxes or default in the payment of taxes properly levied.

It has been held that the State legislature under its powers under Entry 54, List II, cannot make a provision to the effect that the money collected by way of tax even though it is not due as a tax under the G Act shall be made over to the Government. The legislature may provide for a penalty for collecting any amount wrongly by way of tax from purchasers, as being for the purpose of carrying out the objects of taxing legislation.

The impugned section 37(1)(a) imposes a penalty for contravening certain provisions. It provides that if a person not being a dealer H liable to pay tax collects any sum by way of tax, or being a Registered dealer collects any amount by way of tax in excess of the tax payable by him, or being a registered dealer, collects any amount by way of additional tax in contravention of the provisions of sub-section (2) of

section 15A-I, or otherwise collects tax in contravention of the provisions of section 46, he shall be liable to pay in addition to any tax for which he may be liable, a penalty. The penalty that is imposed is (1) a penalty of an amount not exceeding two thousand rupees or double the sum collected by way of tax whichever is less; (2) in certain other cases a penalty not exceeding two thousand rupees, and in addition, any sum collected by the person by way of tax in contravention of sub-section (2) of section 15A-I or section 46 shall be forfeited to the State Government. The rest of the section prescribes the procedure for levy of penalty or forfeiture. It is thus provided that a contravention would incur levy of a penalty of an amount not exceeding two thousand rupees in addition to the sum collected by way of tax being forfeited to the State Government. If the forfeiture is levied for the purpose of enforcement of the enactment, it would be valid but if the forfeiture is for the purpose of collecting the amount which is wrongly collected by the assessee, the use of the word "forfeiture" would be merely a device to get at the sum which had been collected in contravention of the provisions of the Act, and beyond the power of the State legislature as the intention of the State is to secure the sum which has been collected by the assessee which is not exigible as a tax.

While the contention of the State is that it is within the competence of the State legislature under List II, Enry 54, to impose any penalty including forfeiture of the sum unauthorisedly collected by the assessee for the purpose of proper enforcement of the Act, the contention on behalf of the assessee is that the forfeiture of the amount is a device by the State to secure the amount unauthorisedly collected by the assessees, though the amount so collected is not exigible as tax.

The decisions of this Court bearing on the point may now be examined. The earliest case is the *Orient Paper Mills Ltd.* v. *The State of Orissa and Others.*(1). The dealers in the case were assessed to and paid tax on the turnover which included sales outside the State of Orissa, but after the decision of this Court in *State of Bombay* v. *The United Motors (India) Ltd.*,(2) they applied under section 14 of the Act for refund of tax paid on the ground that sales outside the State were not taxable under clause (1)(a) of Art. 286 of the Constitution read with the Explanation. Refund was refused by the Sales Tax Authorities and the assessees moved the High Court which ordered the refund of the tax paid for certain periods. The Orissa Sales Tax Act was amended in 1958 with retrospective effect incorporating section 14-A which provided that refund could be claimed only by way of sales-tax or otherwise. The effect of this amendment was that the dealer could not claim the refund of tax paid on sales outside the State but only the person from whom the dealer had realised the amount.

Section 14-A of the Orissa Sales Tax (Amendment) Act, 1958, provides thus :

"Notwithstanding anything contained in this Act where any amount is either deposited by any person under sub-

(1) [1962] 1 S.C.R. 549.
(2) [1953] S.C.R. 1069.

A section (3) of section 9B or paid as tax by a dealer and where such amount or any part thereof is not payable by such person or dealer, a refund of such amount or any part thereof can be claimed only by the person from whom such person or dealer has actually realised such amounts whether by way of sales-tax or otherwise and the period of limitation provided in the proviso to s. 14 shall apply to
B the aforesaid claims."

The Court held that the legislature was competent to legislate for granting refund of sales tax improperly collected; there is no reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has realised the amount as sales-tax or otherwise. Dealing with the power of the State under
C Entry 54, List II, it held : "The Legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or ancillary matter of granting refund of tax improperly or illegally collected, and the competence of the Legislature in this behalf is not canvassed by counsel for the assessees." It was further held that if the Legislature was competent to legislate for granting refund of the sales tax improperly collected, there is no reason why the power to
D declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales-tax or otherwise, should be excluded. It was thus found that the State legislature is competent in granting refund of tax unauthorisedly collected and to declare that refund is claimable only by the person from whom the dealer realised the amount. In fact the competence to legislate for granting the refund of the sales-tax improperly
E collected was not questioned. This decision did not consider the question whether a direction by the Government directing the assessee to pay the amount to the Government is within legislative competence.

This question came up for decision in *R. Abdul Quader and Co.* vs. *Sales Tax Officer, Hyderabad.*(1). The assessee collected sales
F tax from the purchasers of betel leaves in connection with the sales made by it. But it did not pay the amount collected to the Government. The Government directed the assessee to pay the amount to the Government and it thereupon filed a writ petition in the High Court questioning the validity of section 11(2) of the Hyderabad General Sales Tax Act, -1950. The contention of the assessee before
G the High Court was that section 11(1) of the Act which authorised the Government to recover a tax collected without the authority of law was beyond the competence of the State legislature because a tax collected without the authority of law would not be a tax levied under the law and it would therefore not be open to the State to collect any such amount under the authority of a law enacted under Entry-54 of List II of the VII Schedule to the Constitution. While the
H High Court held that Section 11(2) was good as an ancillary provision with regard to the collection of sales or purchase tax, this Court reversed the decision and held that it cannot be said that the State

(1) [1964] 6 S.C.R. 867.

legislature was directly legislating for the imposition of sales or purchase tax under Entry 54, List II, when it made the provisions of section 11(2) for on the face of the provisions the amount, though collected by way of tax, was not exigible as tax under the law. Section 11(2) of the Act provides—

> "Notwithstanding to the contrary contained in any order of an officer or tribunal or judgment, decree or order of a Court, every person who has collected or collects on or before 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this Act shall pay over to the Government within such time and in such manner as may be prescribed the amount so collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

Under section 11(2) any person who has collected any amount by way of tax otherwise than in accordance with the provisions of the Act, shall pay over to the Government in the manner prescribed. This Court held that as the sums collected by way of tax are not in fact tax exigible under the Act, it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II. As what was collected was not tax exigible under the Act, though collected as a tax, this Court held that the amount collected cannot be recovered as tax. The position is explained thus :—

> "We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected—may be wrongly—by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax."

Referring to the *Orient Paper Mills Ltd.* vs *The State of Orissa and Others,*(1) the Court held that the decision had no application to the facts of the case before them on the ground that the matter dealt with the question of refund and observed that "it cannot be doubted that refund of the tax collected is always a matter covered by incidental and ancillary powers relating to levy and collection of tax".

An attempt to justify the provisions of section 11(2) on the ground that it was by way of penalty was not accepted as in the opinion of the Court section 11(2) cannot be justified as a provision for levying a tax or as incidental or ancillary provision relating to the collection of tax. But the Court added that the provision did not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. The decision therefore is not only an authority for the propositions that unless the money collected is due as a tax, the State cannot by law make it recoverable because it has been wrongly collected by the dealer

(1) [1962] 1 S.C.R. 549.

A but also declares that State Government may provide for a penalty for collecting the amount wrongly as the levy would have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. If what is levied under section 37(1)(a) of the Bombay Sales Tax Act, 1959, with which we are concerned, is a penalty for the proper enforcement of the taxing legislation it will be valid while if it is a devise to collect the amount unauthorisedly collected without B the levy being a penalty it will not be competent.

The next important decision which is strongly relied upon on behalf of the assessee is the case of *Ashoka Marketing Ltd.* vs. *State of Bihar and Anr.*,(1) The Sales Tax authorities included an amount representing Railway freight in the assessee's sales of cement. The Appellate authority set aside the orders directing the inclusion of the Railway C freight in the turnover. The excess tax paid was not refunded but an amendment to the Bihar Sales Tax Act was made by introduction of section 20-A(3) which called upon the assessee to show cause why an amount representing Sales Tax on the railway freight which became refundable under the orders of assessment, be not forfeited. The provisions of section 20-A were challenged. They are—

> "(1) No person who is not a registered dealer shall D collect from any person any amount, by whatever name or description it may be called, towards or purporting to be tax on sale of goods.
>
> (2) No registered dealer shall collect from any person any such amount, except in a case in which and to the extent to which such dealer is liable to pay tax under this Act.
>
> E (3)(a) Notwithstanding anything to the contrary contained in any law or contract or any judgment, decree or order of any Tribunal, Court or authority, if the prescribed authority has reason to believe that any dealer has or had, at any time, whether before or after the commencement of this Act, collected any such amount, in a case in which or to an extent to which the said dealer was or is F not liable to pay such amount, it shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a time and place to be specified therein either to attend in person or through authorised representative to show cause why he should not deposit into the Government treasury the amount so collected by him.
>
> (b) x x x x x
>
> G (4) Where any amount so collected by the dealer and deposited by him into the Government Treasury has already been refunded to the dealer in pursuance of or as a result of any judgment, decree or order of any Tribunal, Court or authority, but the dealer has not refunded the amount to the person from whom he had collected it, the prescribed H authority shall, notwithstanding such refund to the dealer, proceed to take action in accordance with the provisions of sub-section (3) for securing deposit of such amount.

(1) [1970] 3 S.C.R. 455.

(5) Where any such amount has not been refunded to the dealer before the commencement of this Act but a refund has been directed by a Court, Tribunal or authority, the amount shall, notwithstanding such direction, be deemed to be a deposit made in pursuance of an order under sub-section (3). A

(6) x x x x x x B

(7) Notwithstanding anything to the contrary in any law or contract, when any amount is deposited by a dealer in compliance with an order under sub-section (3) or sub-section (4) or is deemed, under sub-section (5), to have and so deposited, such deposit shall constitute a good and complete discharge of the liability of the dealer in respect of such amount to the person from whom it was collected. C

(8) The person from whom the dealer has collected the amount deposited in pursuance of an order under sub-section (3) or sub-section (4) or deemed, under sub-section (5), to have been so deposited shall be entitled to apply to the prescribed authority in the prescribed manner for refund of the amount to him and the said authority shall allow the refund if it is satisfied that the claim is in order : D

Provided that no such refund shall be allowed unless the application is made before the expiry of the period within which the applicant could have claimed the amount from the dealer by a civil suit had his liability not been discharged in accordance with the provisions of sub-section (7) : E

Provided further that no claim for such refund shall be rejected without giving the applicant a reasonable opportunity of being heard."

This Court held that sub-sections (3), (4) and (5) of section 20-A are *ultra vires* of the State legislature and as a corollary sub-sections (6) and (7) must also be deemed invalid. On behalf of the State E of Bihar it was contended that the legislation is not for levy or collection of an amount as tax which the State is not competent to levy or collect, but for compelling a registered dealer to pay over the amount collected on behalf of the State as tax so that it may be made available to a person from whom it was unlawfully recovered. While distinguishing *Abdul Quader's* case on the ground that levy is not for collection of an amount as tax which the State is not competent G to levy or collect it relied strongly on the *Orient Paper Mills'* case. Justice Shah speaking for the Court held that *Orient Paper Mills'* case had no bearing on the question whether the State was competent to enact section 21 of the Bihar Sales Tax Act as the case does not support the plea that the State legislature is competent to legislate for demanding payment or for retaining amounts recovered by a registered dealer but which are not due as sales tax to the State. In H the *Orient Paper Mills'* case tax was collected on sales outside the State of Orissa and when refund was demanded by the assessees in

consequence of the decision in *State of Bombay* v. *United Motors (India)* Ltd. (supra) which held that sales outside the State concerned were not taxable the legislature intervened providing that the refund could be claimed only by a person from whom the dealer had realised the amount by way of sales tax. In *Ashoka Marketing* case tax on the amount representing railway freight was collected and when such levy was set aside the legislature intervened treating the sales tax collected on the Railway freight as deposit. Section 20-A (7) of the Bihar Sales Tax Act, 1959, in the *Ashoka Marketing* case provided that the deposit by the assessee shall constitute a good and complete discharge of the liability of the dealer in respect of such amount to the person from whom such amount was collected, Sub-section (8) provided that the person from whom the dealer had collected the amount shall be entitled to apply for refund of the amount to him. In *Ashoka Marketing* case by the amendment the amount of tax on railway freight which was collected by the Revenue was sought to be retained by treating the amount as deposit and in the event of the deposit having been returned to recover it. Though the show cause notice called upon the dealer as to why the amount in deposit should not be forfeited, the provisions of the section proceed on the basis that the amount would be treated as deposit. It was held that a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax to the State cannot be regarded as incidental to Entry 54, List II. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect.

A case which deals with the power of forfeiture is *Kanti Lal Babulal* v. *H. C. Patel.*(1) As the sale by the registered dealers outside the State of Bombay were not exigible to tax, the assessees were directed to refund amounts collected from their purchasers in respect of these sales by way of tax failing which it was directed that the amounts would be forfeited under section 12A(4) of the Bombay Sales Tax Act, 1946. The assessees filed a writ petition in the High Court restraining the authorities from taking action under section 12A(4). The High Court dismissed the petition. The Supreme Court held that section 12A(4) of the Bombay Sales Tax Act was void being violative of Article 19(1)(f) of the Constitution. Section 12-A(4) which is the relevant provision reads as follows.—

> (4) If any person collects any amount by way of tax in contravention of the provisions of sub-section (1) or (2) or if any registered dealer collects any amount by way of tax in excess of the amount payable by him under this Act, the amounts so collected shall, without prejudice to any prosecution that may be instituted against such person or dealer for an offence under this Act be forfeited to the State Government and such person or dealer, as the case may be, shall

(1) [1968] 1 S.C.R. 735.

within the prescribed period, pay such amount into a Government treasury and in default of such payment, the amount shall be recovered as an arrear of land revenue."

Sub-section (4) provides for forfeiture to the State of any amount collected by the dealer by way of tax in excess of the amount payable by him under the Act. It was contended by the Revenue that section 12A(4) is a penal provision as it provides for the imposition of a penalty on those who contravene section 12A(1) and (2) and that such a power was incidental to the power to tax sales and as such valid. A decision of the Gujarat High Court in *Ram Gopal* v. *Sales Tax Officer, Surat and Another* (16 S.T.C. 1005) was relied on. The Gujarat High Court upheld the validity of section 12A (4). In *Kanti Lal Babulal's* case this Court observed :

"We shall not go into the question whether from the language of the impugned provision it is possible to hold that it is a penal provision. For our present purpose we shall assume it to be so. We shall also assume that the legislature had legislative competence to enact that provision. But the question is whether it is violative of Art. 19(1)(f) which guarantees the freedom to hold property."

It was held that the Act is silent as to the machinery and procedure to be followed in determining the question as to whether there has been a contravention of sections 12A(1) and (2), and if so, to what extent. As the section did not provide for any inquiry as to the disputed question, the forfeiture under section 12A(4) *prima facie* infringed Article 19(1)(f). The decision proceeded on the assumption that the legislature had competence to enact a provision for forfeiture and that the provision is penal in nature. The decision therefore cannot be taken as an authority for the proposition that a provision for levy of a penalty by way of forfeiture is beyond the legislative competence of the State. A sentence in the course of the judgment that "if that decision (16 S.T.C. 1005) lays down the law correctly, then the appellants are out of court. But we think that the said decision cannot be sustained" cannot be understood as having laid down that a provision levying penalty is not within the competence of the State legislature. In 16 S.T.C. 1005 the Bench of the Gujarat High Court held that section 12A(4) of the Bombay Sales Tax Act, 1946 was clearly a provision providing for penalty if any person collects any amount by way of tax in contravention of the provisions of sub-section (1) or (2) of section 12A and therefore it was a valid exercise of incidental or ancillary power of legislation. The Bench followed its earlier decision in *Kantilal Babulal's* case reported in 16 S.T.C. 973 an appeal against which was allowed by the Supreme Court(1) on the ground that it contravened Art. 19(1)(f). This decision cannot be understood as having held that a levy of a penalty for contravention of the provisions of Sales Tax Act is beyond the legislative competence of the State.

(1) Supra.

A

State of U.P. Anr. v. *Annapurna Biscuit Mfg. Co.*,(1) is a decision by a Bench of two Judges of the Supreme Court. In this case the validity of section 29A of the U.P. Sales Tax Act, 1948 was challenged. Section 29A runs as follows :—

"Refund in special cases.

B

Notwithstanding anything contained in this Act or in any other law for the time being in force or in any judgment decree or order of any court, where any amount is either deposited or paid by any dealer or other person under sub-section (4) or sub-section (5) of section 8-A, such amount or any part thereof shall on a claim being made in that behalf in such form and within such period as may be prescribed, be refunded to the person from whom such dealer or the person had actually realised such amount or part, and to no other person."

C

Following the decision in *Abdul Quader's* case and *Ashoka Marketing* case this Court rejected the contention that the impugned section was covered by Entry 54 in List II. Section 29A(1) directs that a dealer shall deposit the entire amount (which is not exigible as tax) realised into the Government Treasury. The validity of the provision was not upheld in view of the decision in *Abdul Quader's* case This case does not advance the matter any further.

D

At this stage it will be useful to summarise the law declared by the decisions cited above. In *Abdul Quader's* case it was held that in regard to sums collected by the dealer by way of tax which are not in fact exigible as tax, the State legislature cannot direct these amounts to be paid over to the Government. The reason given is that the ambit of ancillary or incidental power does not permit the State Legislature to provide that the amount which is not exigible as tax under the law shall be paid over to the Government as if it were a tax. The *Orient Paper Mills'* case held that the legislature was competent to grant refund of a tax unauthorisedly collected and in the hands of the Government to a person from whom the dealer had realised the amount. So far as the right to grant refund is concerned the decision in this case has been approved both in *Abdul Quader's* case and in *Ashoka Marketing* case. In *Abdul Quader's* case it was observed that it cannot be doubted that refund of tax collected is always a matter covered by incidental and ancillary powers relating to levy or collection of tax. In *Ashoka Marketing* case also the principle that the State can provide for refund was not doubted. In *Ashoka Marketing* case on a consideration of the *Orient Paper Mills'* case it was held that that case does not support the plea that the State legislature is competent to legislate for demanding payment or retaining the amounts recovered by a registered dealer which were not due as sales tax to the State. These 3 cases relate to (1) direction to the assessee to deposit the amount unauthorisedly collected, (2) an attempt by the State to demand and retain the amount unauthorisedly collected, and (3) the right to direct the refund of the amounts

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(1) [1973] 3 S.C.R. 987.

collected from the assessee. The question as to whether the amounts thus unauthorisedly collected can be forfeited is not considered in any of these cases. An attempt was made by the assessees to derive support from *Ashoka Marketing* case that it related to a notice issued by the Assistant Commissioner to the assessees under section 20-A(3) of the Bihar Sales Tax Act requiring them to show cause why the sales-tax on the railway freight which had become refundable should not be forfeited. Though the notice uses the words "forfeit" the provision of section 20-A(3) only mentions that the amounts collected may be required to be deposited in the Government treasury. For deciding the question at issue it is unnecessary to consider the submission made on behalf of counsel that the reasoning in *Orient Paper Mills* and *Ashoka Marketing* cases is not consistent. In *Abdul Quader's* case the Court clearly laid down that it is competent for the State legislature to provide for a penalty for collecting any amount wrongly by way of tax for the purpose of carrying out the objects of taxing legislation. In *Kanti Lal Babulal's* case this Court proceeded on the basis that the provision was penal in nature and that the legislature was competent to enact that provision though the section was struck down as violative of Article 19(1)(f) of the Constitution. On a scrutiny of all the decisions it is clear that legislature has power to levy a penalty for the proper enforcement of the taxing statute.

The controversy therefore centres mainly on the question whether the provision as to the forfeiture in the impugned section is a penalty or whether it is merely a device to collect the amount unauthorisedly realised by the dealer. The plea of a device or colourable legislation would be irrelevant if the legislature is competent to enact a particular law. The question is one of competence of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law the motive which impelled it to act is not relevant. After the decision in *Abdul Quader's* case where it was pointed out that it was competent for the legislature to provide penalties for the contravention of the provisions of the Act for its better enforcement, the provision in an enactment levying such a penalty cannot be challenged.

Mr. Kaji, the learned counsel appearing for some of the assessees, submitted that forfeiture under section 37 is not penalty because penalties by express words are provided by clause (1) as well as by section 63 and forfeiture is mentioned as an addition to penalty. Sub-section (2) mentions forfeiture separately and independently of penalty. Sub-section (4) refers only to penalty. To examine this question it is necessary to refer to certain provisions of the Act. Section 46 imposes prohibition against collection of tax in certain cases. Section 46(1) prohibits any person whether dealer or not from collecting any sum by way of tax in respect of sales on which by virtue of section 5 no tax is payable. If however any person collects any sum by way of tax on sales by him of such goods he is by operation of section 37(1) liable to pay penalty and also penalty by way of forfeiture. This punitive measure affects all persons who sell non-taxable goods.

A In section 37(1)(b)(ii) in addition to penalty not exceeding rupees two thousand, the sum collected by way of tax is directed to be forfeited to the State Government. The words "penalty" and "forfeiture" according to the learned counsel are different in their application and in the present case foreiture relates to the amount which is the same as has been unauthorisedly collected and therefore it is only a device by the State to recover the amount so collected. The B section proceeds to lay down the procedure for effecting the forfeiture by requiring the Commission to publish a notice, hear the parties as to why penalty or forfeiture or both as prescribed should not be imposed and make such order as he thinks fit. A distinction between penalty and forfeiture is maintained. I am unable to accept the plea that forfeiture is not a penalty. Forfeiture is one form of penalty and forfeiture is maintained. I am unable to accept the C for in the Indian Penal Code. For contravention of the Sales Tax law the section provides two forms of punishment, levy of penalty and forfeiture, and use of the word "forfeiture" as distinct from penalty will not make it any the less a penalty. Section 37(1)(b)(ii) provides that the sum collected by the person by way of tax in contravention shall be forfeited to the State Government Sub-section (2) provides for an inquiry after giving an opportunity to the assessee D to show cause. Sub-section (3) enables the Commissioner to hold an inquiry and make such order as he thinks fit. The discretion on the Commissioner "to make such order as he thinks fit" would imply that he has power to direct the forfeiture of the entire sum collected by a person by way of tax in contravention of the provision or confine it to a portion of the amount so collected or not to forfeit at all if the circumstances so warrant. Section 55 provides for appeals. E Section 55(6) provides that every appellate authority shall have power to confirm, reduce, enhance or annul the assessment or set aside the assessment and in an appeal against order importing a penalty the appellate authority may confirm or caucel such order or vary it so as neither to enhance or to reduce the penalty. In any other case, the appellate authority may confirm or cancel such order or vary it so as just and proper. Similar powers are conferred on revisional author- F rity. These provisions would indicate that it is not obligatory on the Commissioner to direct that the entire amount collected by way of tax in contravention of the provisions of the Act to be forfeited. It is not obligatory on the authorities to levy a penalty which is identically the same amount as the amount unauthorisedly collected, as the amount to be forfeited will have to be determined taking into account all the relevant circumstances. We reject the contention of Mr. Kaji G that the levy of the forfeiture in the sub-section is only a device for recovering the amount inauthorisedly collected. We agree with the Bombay High Court that the contention of Mr. Kaji that ferfeiture is not a penalty cannot be accepted.

Mr. Kaji next submitted that forfeiture if it is to be penalty would be confined to acts where there is a guilty mind. In other words H he submitted that the penalty would be confined only to wilful acts of omission and commission in contravention of the provisions of the enactment. This plea cannot be accepted as penal consequences can be visited on acts which are committed with or without a guilty mind.

For proper enforcement of various provisions of law it is common knowledge that absolute liability is mposed and acts without *mens rea* are made punishable. A

Mr. Kaji as well as Mr. B. Sen, learned counsel for some of the assessees further brought to our noticed cases in which by the application of the provisions of the Sales Tax enactment considerable hardship and injustice has been caused to the dealers. It was submitted B that where the assessee innocently collected amounts on the impression that tax was leviable, the amounts so collected were forfeited while his obligation to the purchasers to refund the amounts continued. If the assessee by a mistake failed to collect tax, from the purchasers, tax was levied and collected from the assessee making him suffer in any event. When after a costly litigation, the assessee suceeded in establishing that sales tax cannot be collected on the railway freight C on cement bags or inter-State sales, the Government promptly forfeited such amounts. I agree these are instances of hardship to the assessees and deserve Government's attention. But for that reason the Courts cannot say that the act is beyond the legislative competence. The fact that in some cases the dealers are prejudiced would not affect the validity of the legislation which is the question we are called upon to decide. On a careful consideration of the points D raised, I am satisfied that the provisions of section 37(1) are within the competence of the State legislature.

I am unable to agree with the conclusion of the High Court that section 46(2) which prohibits any person who is not a registered dealer and liable to pay tax in respect of any sale or purchase, from collecting on the sale of any goods any sum by way of tax and any E registered dealer from collecting any amount by way of tax in excess of the amount of tax payable by him under the provisions of the Act is violative of the Constitution. I see no unconstitutionality in such a provision. For enforcement of sales tax law, the provision is absolutely necessary for without such prohibition unauthorised collection of tax can never be checked. The sales tax law will have to demarcate the articles on which tax can be collected and prohibit F collection of tax in any manner not authorised by law.

Lastly, it was contended that the provisions contravene Articles 14 and 19(1)(f) of the Constitution. The High Court held that the provisions do not contravene either of the two Articles. The submission is that the authority concerned is given a discretion either to proceed under section 37 or under section 63(1) and as the Act provides no guidelines as to how this discretion is to be exercised, an G arbitrary or uncanalised power has been conferred on the authority to determine the question as to under which of the two provisions he would take action. Under section 37 the levy of penalty and forfeiture is provided for while under section 63(1)(h) the person becomes liable to be criminally prosecuted for contravening the provisions of section 46 without reasonable excuse. In my view there is no arbitrary or uncanalised power given to the authority. H While the proceedings are in the nature of a penalty and forfeiture under section 37, it is, punishment by criminal prosecution under section 63(1)(h). Section 37(4) provides : "No prosecution for an

A offence under this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section". As I have construed the word "penalty" to include "forfeiture" also, the section is clear that when proceedings are taken up under section 37, no prosecution can be instituted under section 63(1)(h) on the same facts. The plea as to contravention of Art. 14 has therefore to fail. Equally untenable is the plea that the provisions contravene Article B 19(1) (f). In Kantilal Babulal's case the Supreme Court held that section 12-A(4) is not valid as forfeiture cannot be enforced without proper inquiry. That plea is no more available for section 37(3) prescribes the procedure which makes it obligatory on the part of the Commissioner to give notice to enable the assessee to show cause against levy of penalty or forfeiture. Further, there are provisions for appeal and revision against any order made by the Commissioner. C The plea based on Art. 19(1)(f) has to fail.

It was submitted by the learned counsel for the assessees that apart from the question of legislative competence and the challenge based on Articles 14 and 19(1) (f) certain questions of facts arise and they will have to be dealt with by the High Court. On asertainment of such cases a direction will issue to the High Court to decide D those cases on merits .

P.B.R. *Appeals allowed.*