C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

FRIDAY, THE 11TH DAY OF JANUARY 2019 / 21ST POUSHA, 1940

WP(C).No. 11335 of 2018

PETITIONER:

M/S SHEEN GOLDEN JEWELS (INDIA) PVT LTD
XXI/1016(2), COLLEGE ROAD, PATHANAMTHITTA,
REPRESENTED BY M.P.AHAMMED BASHEER, DIRECTOR.

BY ADVS.
SRI. VENKITARAMAN
SMT.SHOBA ANNAMMA EAPEN
SMT.T.ARCHANA
SRI.K.P.ABDUL AZEES

RESPONDENTS:

1 THE STATE TAX OFFICER(IB)-1,
INVESTIGATION BRANCH, STATE GOODS AND SERVICE TAX
DEPARTMENT, TAX TOWERS,
THIRUVANANTHAPURAM - 695 001.

2 THE STATE TAX OFFICER (INTELLIGENCE SQUAD NO.1)
STATE GOODS AND SERVICE TAX DEPARTMENT,
PATHANAMTHITTA - 689 645.

3 THE COMMISSIONER
STATE GOODS AND SERVICE TAX DEPARTMENT,
THIRUVANANTHAPURAM - 695 001.

4 SECRETARY
TAXES DEPARTMENT, GOVERNMENT OF KERALA, SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

5 CENTRAL BOARD OF EXCISE CUSTOMS
DEPARTMENT OF REVENUE, MINISTRY OF FINANCE,
GOVERNMENT OF INDIA, NEW DELHI - 110001.

BY ADVS.
SRI.K.K.RAVINDRANATH, ADDL.ADVOCATE GENERAL
GOVERNMENT PLEADER
SRI.K.K.RAVINDRANATH ADDL.ADVOCATE GENERAL

OTHER PRESENT:

ADDL. AG K.K. RAVINDRANATH.,
SPL. G.P. SRI. C.E. UNNIKRISHNAN.,
GP DR. THUSHARA JAMES.,
ADDL. SOLICITOR GENERAL SRI.K.M. NATRAJ.,
CGC., JAISHANKAR V. NAIR.,
SR. SC. SRI. SREELAL N. WARRIER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 11.01.2019, ALONG WITH WP(C).15523/2018, WP(C).15851/2018, WP(C).15879/2018, WP(C).15898/2018, WP(C).18326/2018, WP(C).25768/2018, WP(C).40543/2018, WP(C).40545/2018, WP(C).40561/2018, WP(C).40646/2018, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

[WP(C) 11335/2018 ,WP(C).15523/2018 ,WP(C).15851/2018 ,WP(C).15879/2018 ,WP(C).15898/2018 ,WP(C).18326/2018 ,WP(C).25768/2018 ,WP(C).40543/2018 ,WP(C).40545/2018 ,WP(C).40561/2018 ,WP(C).40646/2018]

Introduction:

The lure of lucre and the power of purse are too seductive to be resisted–be it for an individual, or an institution, or even a nation. Internationally, the rhetoric of freedom, fraternity, comity, and human rights apart, the nations are guided by naked economic compulsions. The latter part of the last century dedicated itself to dismantling walls around the nations; this century has begun, it seems, determined to raise a few. At the national level, this clamour for economic hegemony is felt acutely, at least, institutionally.

2. Granted, federalism is the pinnacle of a democracy's political maturity; sharing the power signifies its wisdom. But there, too, fiscal discipline demands a watertight division. Our Constitution has, as a case in point, kept the fiscal legislative powers in water-tight divisions –either in List I or in List II. None in List III. In a federal polity, good legislative fences make good political neighbours. A vigilant

policeman always guards a thief's virtue, anywhere; as the constitution prevents federal fiscal turf wars.

3. To be explicit, constitutionally, fiscal powers between the Centre and the States stand demarcated. The legislative scheme admits of almost no overlap between the respective domains. The Centre has the powers to levy a tax on the manufacture of goods (except alcoholic liquor for human consumption, opium, narcotics, and so on); the States, on the other hand, have the powers to levy a tax on the sale of goods. With inter-state sales, the Centre has the powers to levy a tax (the Central Sales Tax). But the tax is collected and retained entirely by the originating States. As for services, it is the Centre alone that is empowered to levy Service Tax.

4. Since the States had the legislative competence to impose a sales tax, under Entry 54, List II, indiscriminate tax rates were applied by the respective States resulting in tax wars, tax holidays, deferrals, incentives, and concessions. Each State started to offer attractive schemes to invite investments into its States. When the Central levies such as the Customs Duty and the Excise Duties remained the same throughout the Country, Sales Tax rates varied among States.

5. To avoid a lopsided or imbalanced growth, the Union Government took steps, beginning with constituting Empowered Committees, to usher in further tax reforms. Besides that, then the Sales Tax, in its original form, was invariably a single tax levy, imposed at the first stage of the sale. The subsequent resale and its value addition were not captured to tax. This and other shortcomings made the Sales Tax give way to the Value Added Tax; the sale at every stage till the point of consumption got taxed, and the taxes paid in the previous stages were subsumed as Input Tax Credit.

The Scope:

6. Earlier, as we have noted, the taxing powers of the Union and the States had been well-demarcated. Recently, with the 101st Constitutional Amendment, the Goods and Services Tax regime has been ushered in. The Constitutional Amendment Act (the "CA Act") has led to a federal fiscal experiment by engendering a host of enactments: the Central Goods and Services Tax Act, 2017; the Integrated Goods and Services Tax Act, 2017; the Union Territory Goods and Services Tax Act, 2017; the Goods and Services Tax (Compensation to States) Act, 2017; The "X" State Goods and

Services Act, 2017 (State specific).

7. For the first time, in the taxation sphere, both the Union and the States have come to enjoy simultaneous powers, thus putting paid to the repugnancy doctrine, at least, in particular areas of taxation. With the insertion, amendment, and deletion of a few constitutional provisions—particularly with the insertion of Article 246A of the Constitution and deletion of Entry 52 of List II in Seventh Schedule- there has been a realignment of legislative powers of the Union and the States. Now, Entry 54 stands modified. In its attenuated form, it denudes, according to the petitioners, from 16.09.2016, the State's legislative power to tax on those items now removed from that Entry. They insist that Section 19 of the CA Act allows "interim or temporary continuation" of all the Acts made earlier under the unamended Entry 54 only up to 16.09.2017. As a case in point, the petitioners assert that the Kerala Value Added Tax Act has become a dead letter from 16.09.2017.

8. Section 174 of the Kerala Goods and Services Act, 2017, is a saving provision brought about by the State Legislature to save the transactions under the State's various pre-GST enactments, including

the KVAT Act. About that provision, the petitioners, first, maintain that Section 19 of the CA Act has repealed all the State laws inconsistent with the GST Laws. And they also, second, insist that the States have been denuded of the legislative power to enact Section 174 because of the amendment to Entry 54 of List II.

9. So the question, the Core Question, as the petitioners put it, is does the State have the legislative competence to enact section 174 and save the past taxation events—comprising levy, assessment, and recovery—when Entry 54, List II, which is the field of legislation empowering the State, stood omitted permanently with effect from 16.09.2017? Of course, this core question engenders a few collateral questions. We will answer them all.

Facts:

WP (C) No.15879 of 2018:

10. The petitioner, a Private Limited Company, is a dealer under the Kerala Value Added Tax Act and Central Sales Tax Act. It has opted to pay the tax at the compounded rates under Section 8 of the KVAT Act. So for the assessment years (AY) 2010-2011 and 2011-2012 and thereafter, too, the petitioner filed returns in terms of the

compounding scheme–in Form 10DA.

11. But the Intelligence Officer (IB)-II, Thiruvananthapuram, issued to the petitioner notices under Sec 67 in the KVAT Act for the assessment years 2009-2010, 2010-2011 and 2011-2012. The grounds of the notices are not germane here, though the petitioner's objections to the notices are. Succinctly stated, the petitioner is accused of not maintaining the true and correct accounts, and that has led to evasion of tax. So the Intelligence Officer proposed penalty under Sec 67(1)(b) and (d) of the KVAT Act. The petitioner replied to the notices for AYs 2010-2011 and 2011-12 and produced material in defence. Yet the Intelligence Officer confirmed the proposal for imposing a penalty. Aggrieved, the petitioner challenged the penalty orders before this Court in W. P.(c) No.12648 of 2016. This Court admitted the Writ Petition and stayed the recovery of the penalty.

12. On parallel lines, the Assessing Authority sought the Deputy Commissioner's prior approval for cancelling the "compounding permission" granted to the petitioner, as mandated under the proviso to Section 8(f)(iv). After securing the permission under Section 8(f)(iv) of the KVAT Act, pending W.P. No.12648 of

2016, now the Assessment Officer, the 3rd Respondent, has issued a notice for a best-judgment assessment under Section 25, read with Section 42(3), of the KVAT Act. The notice concerns the AYs 2010-2011 and 2011-2012 and proposes to cancel the compounding under Section 8(1)(iv). To be explicit, the notice proposes to revise the compounded tax for 2010-11 and 2011-2012, based on the alleged escapement of tax for the previous year. The petitioner did reply to the notice. The notice, as the petitioner contends, is a composite one; it proposes to cancel the compounding, besides undertaking a best judgment assessment–simultaneously. The composite notice, the petitioner asserts, is a *fait accompli*.

13. So the petitioner has filed this writ petition questioning the notices under Section 25, read with Section 42(3) and Section 8(1)(iv), of the KVAT Act.

WP (C) No.11335 of 2018:

14. The Petitioner, a jeweler, is a dealer under the Kerala Value Added Tax Act. The State Tax Officer, the second respondent, inspected the petitioner's business premises in November 2012, seized some records, and, later, issued a notice. He directed the

petitioner to produce books of accounts. The petitioner, instead, asked for the return of the seized records. But they were not returned. So the petitioner filed WP (C) No.25376 of 2012. The Court stayed further proceedings.

15. When the stay was in force, in March 2013, the second respondent issued a penalty Notice under section 67 (1) of the KVAT Act, proposing to impose penalties of Rs.88,22,948/- and Rs.40,99,06,936/- for the years 2010-11 and 2011-12 respectively. Reminded of the Court's restraint order in WP (C) No.25376 of 2012, the second respondent recalled those notices. Finally, in June 2013, the WP (C) No.25376 of 2012 was disposed of. And as nothing was heard until 12.05.2016, the second respondent asked the petitioner to produce the books of accounts. The petitioner complied with that direction: it supplied the required information in May 2016 and October 2017. Then in December 2017, the second respondent issued a "common notice" proposing to impose penalties of over seven crores and eight crores for the years 2010-11 and 2011-12 respectively.

16. Eventually, in February 2018, the first respondent passed an

order under Section 67 (1) of the KVAT Act for AY 2010-11. He imposed a penalty of Rs.7,17,630/-. In March 2018, through another order, for the next assessment year, he imposed a penalty of Rs.8,12,56,734/-.

17. The petitioner challenges these orders as *ultra vires* of the authorities—constitutionally invalid.

WP (C) No.40646 of 2018:

18. The petitioner, a registered dealer under the KVAT Act, is a Government Electrical Contractor. He filed all returns and remitted tax under the KVAT Act for the AYs 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17. The Assessing Officer accepted all the returns filed and the tax paid, with no demur. So the assessments for the years are deemed to have been completed under Section 21 of the KVAT Act.

19. But, recently, on 23.11.2018, the Assessing Officer served on the petitioner the pre-assessment notices under Section 25(1) of the KVAT Act 2003, proposing to assess an alleged escapement of turnover for all the above years. So the petitioner challenges those notices on the premise that the Assessing Officer has no jurisdiction to invoke the KVAT Act, for it stood repealed with the 101st

Constitutional Amendment ("the CA Act").

WP (C) No. 40561 of 2018:

20. The petitioner, an assessee, claims to have been filing "proper returns" periodically, besides paying tax. But on 05.12.2018 he received a notice for AY 2012-13 under Section 25(1) of the KVAT Act 2003. The petitioner, in this writ petition, maintains that as per the Amendment Act, the provisions of the KVAT Act could be enforced for one year after the CA Act, but not "indefinitely without any limitation."

WP (C) No.40543 of 2018:

21. The Petitioner, a registered dealer under the erstwhile KVAT Act, claims to have filed all returns on time and paid the taxes due. But, later, the Assessing Officer reopened the petitioner's final assessments for 2012-13 and 2013-14, under Section 25 (1) of the KVAT Act by making huge additions.

22. The main reason for the Assessing Officer to resort to the best judgment assessment is that after his verifying the petitioner's sales and purchases through the KVATIS module, he found certain unaccounted transactions. The additional reason is that the

Intelligence Wing of the Department has imposed a penalty upon the Petitioner under Section 47 (6) of the KVAT Act for the offence of attempted evasion of tax while his transporting goods. So the petitioner has assailed the Assessment Orders as unconstitutional and without jurisdiction.

Submissions:

Petitioners':

23. In the past one year, a rash of writ petitions has been filed. Those writ petitions may count up to a few thousands. But only a handful of advocates–about half a dozen–argued; the rest adopted those arguments. Shri Abhishek Manu Singhvi, the learned Senior Counsel, instructed by Shri A. Kumar, the counsel on record, led the arguments. He was admirably complemented by Shri Venkataraman, another learned Senior Counsel, instructed by Shri K.P.Abdul Azees and Shri Akhil Suresh. Then they were ably supplemented by Sri K. S. Hariharan, Sri Sukumar Nainan Oomen, and a few more counsel, well-informed and determined to press forward their clients' cause.

24. All argued on the same theme–the constitutional validity of Section 174 of the KSGST Act. Then came the refutation, matching

the petitioners' counsel in erudition and expression, from Shri K.M. Nataraj, the learned Additional Solicitor General, instructed by Shri Jaishanker Nair, the learned Central Government Counsel; and Shri Ravindranath, the learned Additional Advocate General, assisted by Shri C.E. Unnikrishnan, the learned Senior Government Pleader and Dr. Thushara James, the learned Government Pleader.

25. If I list out, even encapsulate, each counsel's arguments, they run into pages, besides sounding repetitive. So for brevity's sake, I will set out their arguments compendiously and, to the extent possible, concisely, too. So the extracted arguments are party-specific, not counsel-specific.

The Summary of the Petitioners' Submissions:

About the 101st Constitution Amendment Act:

- On and from 16.09.2016, Article 246 yielded legislative ground to the newly engrafted Article 246A. Thus, Article 246 stood amended and modified in its operation. Consequently, a few items in both List I and List II suffered significant schematic changes. Article 246A, an enabling legislative provision, contains no concomitant schedule or iteration.
- Entry 54 of List II stands substituted by 16.09.2016; the Constitutional Amendment does not save it. So the pre-amended

Entry 54 of List II has ceased to exist. Instead, what reigns is the substituted Entry 54.

➢ Section 19 of the Amendment Act is the transitional provision, besides being the saving provision. Nothing from the pre-existing legislative regime saves itself from or transits across what is set out in Section 19—a sunset clause.

➢ First, Entry 54 abrogated, from 16.09.2016 the States have been denuded of the power of taxation. Second, the interim or transitional existence of the unamended Entry 54, if ever, could have survived only up to 16.09.2017, as per Section 19.

➢ Any judicial effort to save or resurrect the erstwhile Entry 54 beyond 16.09.2017 renders Section 19 of the Amendment Act otiose, meaningless, and insignificant.

➢ Section 19 of the Amendment Act itself provides for the repeal, for the savings, and for the consequences, too. So there remains no more power or authority to have a further repeal and saving, as provided—erroneously though—in Section 174 of the SGST Act. Pithily put, Section 174 of the SGST Act cannot travel beyond Section 19 of the Amendment Act.

➢ A law under Article 246A cannot be the source of power to save legislation under List II of Entry 54 at all.

Article 367 & General Clauses Act:

- Article 367, too, does not apply, as the constitutional command of repeal is explicit.
- Neither KSGST nor CGST provides for repeal or re-enactment.

- So, primarily, the General Clauses Act cannot resurrect or rescue the repealed enactments, even if its Sections 6 and Section 24 are invoked.
- The State stands protected for the Centre undertakes to reimburse its losses.
- The clear and unequivocal legislative intent of Section 19 of the Amendment Act is to stop the operation KVAT, 2003, from 16.09.2017.
- A Statutory saving-provision, such as Section 174 of KSGST, emanating from the State's legislative power, cannot nullify the constitutional mandate of Section 19 of the Amendment Act, emanating from the Parliament's constituent power.

Section 174 – Absence of Legislative Power:

➢ Article 367 does not apply because repealing enactment itself provides explicitly for transition and saving. In other words, only in the absence of the repeal or saving is the General Clauses Act attracted.

▪ Section 24 of the General Clauses Act saves the subordinate legislation and applies if there are repeals and re-enactments. Here neither is present. So machinery provisions are not saved. Then follows the well-accepted proposition: there is no tax without machinery provisions.

Respondents':

- By the CA Act, the Parliament never intended that dealers or assessees should escape the tax network, letting the society or

exchequer suffer.

❖ The Parliament has enacted the Goods and Services Tax (Compensation to States) Act, 2017, empowered by Section 18 of the Amendment Act, on the recommendation of the GST Council, though. This enactment is, however, does not derive its legitimacy from any legislative entry or field of legislation enumerated in the Central List.

❖ Similarly, Section 19 of the Amendment Act empowers the State Legislature to amend or repeal provisions of any existing law which are inconstant with the Constitution as amended by the amending Act.

❖ The *non-obstante* Clause in Section 19 mandates that such legislation can be made notwithstanding anything contained in the Amendment Act. So the Entry 54, as it originally stood before the Amendment Act, remains available for the State, under Article 246 of the Constitution.

❖ In the alternative, without Entry 54 as it originally stood, the newly introduced Article 246-A as per Section 2 of the Amending Act read with Section 19 of the amending Act, by itself gives power to the state legislature to enact the impugned provisions in the State GST Act.

❖ A transitional provision in a Constitution Amendment Act has a higher status and better legal impact than a transitional provision in ordinary legislation. So Section 19 of the CA Act, read with Article 246-A, without any doubt, empowers the State Legislature to enact

Section 174(b) and (c) of the KSGST Act, 2017.

❖ The Legislature does not derive its power to legislate from the Entries in the three lists of the 7th Schedule; therefore, the substitution of an entry in any List of the 7th Schedule does not affect the State's lawmaking power.

❖ The Amendment Act is only prospective, and the constitutional amendment does not in any way deal with the past transactions or any rights and liabilities accrued.

❖ The provisions contained in Sections 173 and 174 of the State Act are not inconsistent with the provisions contained in the Amendment Act.

On the General Clauses Act and Its Application:

▪ Every latter enactment which supersedes an earlier one or puts an end to a previous state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under the superseded enactment.

• This interpretative presumption could be negated only if there were sufficient indications express or implied in the later enactment designed to obliterate the earlier state of the law.

• If the legislative intent to supersede the earlier law is the basis upon which the doctrine of implied repeal is founded, there could be no incongruity in attributing to the later legislation the same intent which Section 6 presumes where the word 'repeal' is expressly used.

• Where an intention to effect repeal is attributed to a legislature, then the same would attract the incidence of the saving found in

Section 6 of the General Clauses Act.

- The power to make a law regarding a tax comprehends, within its power, how to levy that tax and determine the persons who are liable to pay such tax, the rate at which such tax is to be paid, and the event which will attract the liability regarding such tax.
- The liability to pay the tax was not dependent upon assessment or demand but was an obligation to pay the tax either annually, quarterly or monthly as the case may be.

DISCUSSION:

GST – Introduction:

26. In a federal constitutional set up, coordination rather than subordination as the guiding spirit, the States and the Union as the constituents have demarcated spheres of legislation and governance. With clearly delineated legislative fields, neither can trespass upon the other's legislative territory–the residuary powers lying with the Union, though. The division of powers is zealously guarded in no other sphere than fiscal. Taxation as the backbone of a welfare nation, which India is; the legislative fields are as distinct, yet interconnected, as the spinal segments do.

27. That said, 101st Constitutional Amendment is the epoch-making federal feat unparalleled in constitutional democracies–

almost. It is, I may say, a constitutional *coup de grâce* delivered against the fiscal confusion compounded by conflicting taxation regimes. This amendment, perhaps, marks the crest of cooperative federalism. It has created even a constitutional institution–GST Council.

28. As constitutional democracies have gained experience, Utopian vision of justice has given way to utilitarian view. Material comfort or upliftment has become the hallmark of good governance. So economic analysis of law substitutes the notion of simple justice with that of economic efficiency and wealth maximisation. True, nations like France successfully embraced GST regimes in the 1950s. Even federal polities like Canada replaced MST (Manufacturer's Sales Tax) with GST (Goods and Services Tax) in the 1980s. India joined the fiscal reform bandwagon a little late. Tentative it was to begin with, but determined it is in this new federal fiscal path.

29. To put the concept in perspective, GST is a single tax on the supply of goods and services, right from the manufacturer to the consumer. Credits of input taxes paid at each stage will be available in the later stage of value addition. This process makes GST a tax on

value addition at each stage. The consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages.

30. In other words, the focus was shifted from taxable event to destination-based taxation. It avoids the evil of cascading taxation or tax on tax trouble. So goes the motto: One Nation-One Market-One Tax.

31. A nascent enactment in a nebulous field of taxation will have many teething troubles. GST is no exception. In its path to perfection, GST has much dust to settle–legislatively and judicially. These are the days of confusion and cacophony: many views, many interpretations, and many jurisprudential mumblings.

GST: The Origins:

32. Before its advent as a revolutionary indirect tax regime, Goods and Services Tax (GST) had been on the parliamentary anvil for more than a decade. Its need as a harmonised indirect tax, encompassing all goods and services was documented as early as in 2004. That year the Task Force on Implementation of the Fiscal Responsibility and Budget Management in its Report stressed the

need. The first official announcement for a transition to GST, though, was made by the Government of India in 2006-07 (the Budget Speech). The Government's commitment stood reiterated in the Budget Speech of 2008-09, too. But the Government of India took the first step towards the transition to GST when it announced certain policy changes in the 2009-10 budget.

33. The next major landmark was the "First Discussion Paper on Goods and Services Tax in India" released by the Empowered Committee in November 2009. This was the first official document publicly delineating the contours of the proposed reform and nuances of the GST Model.[1]

34. The First Discussion Paper, in fact, explained the rationale for a constitutional amendment to introduce GST. It noted that while the Centre is empowered to tax services and goods up to the production stage, the States have the power to tax sale of goods. The States do not have the powers to levy a tax on the supply of services while the Centre does not have the power to levy a tax on the sale. Thus, it suggested for a constitutional amendment that would

[1] Tarun Jain's Goods and Services Tax, Constitutional Law & Policy, ST, EBC, Ed.2018, p.59 (e-book)

contain a mechanism for a harmonious structure of GST that would not affect the federal fabric.

35. Then, with the deliberations between the Centre and States, aided by the Empowered Committee, the constitutional amendment process to usher in GST began. It resulted in the "Constitution (One Hundred and Fifteenth Amendment) Bill, 2011" After that one got lapsed, came the 2014 Amendment Bill (as passed by Parliament). Passed on 8 September 2016, this Bill became "the Constitution (One Hundred and First Amendment) Act, 2016".

36. The GST Council, constituted in September 2016, is a constitutional institution comprising as its members the Finance Ministers of the Union and the States, including Union Territories with Legislatures. It has the authority "to recommend to the Union and the States on various facets of GST, including Model GST laws, principles to determine the place of supply, levy of the tax, design of GST, dispute settlement, special provisions for a special category of States, and so forth."[2]

37. Adopting the recommendation of the GST Council,

2[ii] Id., p.69 (e-book)

Parliament has enacted these pieces of legislation: (1) The Central Goods and Services Tax Act, 2017: it levies a tax on intra-State supplies of goods and services in all supplies within a State; (2) the Integrated Goods and Goods and Services Tax Act, 2017: it levies a tax on inter-State supplies of goods and services; (3) the Union Territory Goods and Services Tax Act, 2017: it levies a tax on intra-State supplies of goods and service.

38. Tarun Jain's *Goods and Services Tax,* already copiously quoted, observes that in constitutional terms, GST is unique because of these aspects of its design: 1. It provides for the concurrent exercise of taxing powers by the Centre and the States on the same subject—a unique and unprecedented measure. 2. Both the Centre and the States are to act in tandem based on the GST Council's recommendations.

Salient features of GST:

39. The salient features of GST are these[3]:

(i)GST applies on 'supply' of goods or services as against the present concept on the manufacture of goods, or on the sale of goods, or on the provision of services.

3[] http://gstcouncil.gov.in/brief-history-gst, accessed on 10th January 2019.

(ii) GST is based on the principle of destination-based consumption taxation as against the present principle of origin-based taxation.

(iii) It is a dual GST with the Centre and the States simultaneously levying a tax on a common base. GST to be levied by the Centre is called Central GST(CGST) and that to be levied by the States called State GST (SGST).

(iv) An Integrated GST (IGST) is levied on inter-state supply (including stock transfers) of goods or services. This shall be levied and collected by the Government of India, and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by Law on the recommendation of the GST Council.

(v) Import of goods or services is treated as inter-state supplies and is subject to IGST, besides the applicable customs duties.

(vi) CGST, SGST & IGST are levied at rates to be mutually agreed upon by the Centre and the States. The rates would be notified on the recommendation of the GST Council. To begin with, the GST Council has decided that GST would be levied at four rates viz. 5%, 12%, 18% and 28%. The schedule or list of items that would fall under each slab has been worked out. Besides these rates, a cess would be imposed on "demerit" goods to raise resources for compensating States as States may lose revenue owing to implementing GST.

(ix) GST will apply to all goods and services except Alcohol for

human consumption.

(x) GST on five specified petroleum products (Crude, Petrol, Diesel, ATF & Natural Gas) will be applicable from a date to be recommended by the GSTC.

(xi) Tobacco and tobacco products would be subject to GST. Besides, the Centre will have the power to levy Central Excise duty on these products.

(xii) A common threshold exemption would apply to both CGST and SGST. Taxpayers with an annual turnover not exceeding Rs.20 lakh (Rs.10 Lakh for special category States) would be exempted from GST. For small taxpayers with an aggregate turnover in a financial year up to 50 lakhs, a composition scheme is available. Under the scheme, a taxpayer shall pay tax as a percentage of his turnover in a State during the year without the benefit of Input Tax Credit. This scheme will be optional.

(xiii) The list of exempted goods and services would be kept to a minimum, and it would be harmonized for the Centre and the States and across States as far as possible.

(xiv) Exports would be zero-rated supplies. Thus, goods or services that are exported would not suffer input taxes or taxes on finished products.

(xv) The credit of CGST paid on inputs may be used only for paying CGST on the output, and the credit of SGST paid on inputs may be used only for paying SGST. Input Tax Credit

(ITC) of CGST cannot be used for payment of SGST and vice versa. In other words, the two streams of Input Tax Credit (ITC) cannot be cross-utilised, except in specified circumstances of inter-state supplies for payment of IGST.

(xvi) Accounts would be settled periodically between the Centre and the States to ensure that the credit of SGST used for payment of IGST is transferred by the Exporting State to the Centre. Similarly, IGST used for payment of SGST would be transferred by the Centre to the Importing State. Further, the SGST portion of IGST collected on B2C supplies would also be transferred by the Centre to the destination State. The transfer of funds would be carried out based on information contained in the returns filed by the taxpayers.

(xvii) The laws, regulations, and procedures for levy and collection of CGST and SGST would be harmonized to the extent possible.

40. GST replaces these taxes currently levied and collected by the Centre: (a) Central Excise Duty, (b) Duties of Excise (Medicinal and Toilet Preparations), (c) Additional Duties of Excise (Goods of Special Importance), (d) Additional Duties of Excise (Textiles and Textile Products), (e) Additional Duties of Customs (commonly known as CVD), (f) Special Additional Duty of Customs(SAD), (g) Service Tax, (h) Cesses and surcharges, in so far as they relate to the

supply of goods and services.

41. State taxes that get subsumed within the GST are: (a) State VAT, (b) Central Sales Tax, (c) Purchase Tax, (d) Luxury Tax, (e) Entry Tax (All forms), (f) Entertainment Tax and Amusement Tax (except those levied by the local bodies), (g) Tax on advertisements, (h) Tax on lotteries, betting and gambling, (i) State cesses and surcharges in so far as they relate to the supply of goods and services,

42. To have the whole GST system backed by a robust IT system, Parliament has set up the Goods and Services Tax Network (GSTN). It will provide front end services and will also develop back end IT modules for States who chose the same.

Constitutional Amendment Act, An Overview:

43. As we shall see, the CA Act inserts, repeals, and amends certain parts of the Constitution. Inserted are the Articles 246A, 269A, and 279A; repealed is the Article 268A; amended are Articles 248, 249, 250, 268, 269, 270, 271, 286, 366, and 279A. Besides that, the Sixth and the Seventh Schedules, too, have been amended.

44. Article 246A, inserted through Section 2 of the Amendment Act, is a marvel of the federal fiscal mechanism. By this Article, the

State Legislatures now have the power to make laws regarding GST tax imposed by the Union or by that State and to implement them in intra-state trade. The Centre, of course, continues to have exclusive power to make GST laws regarding inter-state trade. Both the Union and States in India now have simultaneous powers to make law on the goods and services.

45. Article 269A, inserted through Section 9 of the Act, deals with levy and collection of goods and services tax in the course of inter-State trade or commerce. That is, in case of inter-state trade, the amount collected by the Centre is to be apportioned between the Centre and the States as per the GST Council's recommendations. Under the GST, if the Centre collects the tax, it assigns State's share to the State concerned; on the other hand, if the State collects the tax, it assigns the Centre's share to the Centre. Those proceeds will not form a part of the Consolidated Fund of India, so it avoids having an Appropriation Bill passed every time a deposit is made.

46. And Article 279A provides for the constitution of a GST Council, besides prescribing its powers and positions. Earlier, Article 268A dealt with the service tax levied by Union and collected and

appropriated by the Union and States. Now, this Article stands repealed. As to the amended constitutional provisions, Article 248 confers residuary legislative powers on Parliament. Now this provision is subject to Article 246A of the Constitution. Article 249, amended through Section 4 of the Act, now stands changed so that if Rajya Sabha approves the resolution with $^{2}/_{3}^{rd}$ majority, Parliament will have powers to make necessary laws regarding GST, in the national interest. So has Article 250 been amended; Parliament will have powers to make laws on GST during the emergency period.

47. At a different plane are the other amendments. Article 268 has been amended so that excise duty on medicinal and toilet preparation are omitted from the State List and are subsumed in GST. And Article 269 would empower the Parliament to make GST related laws for inter-state trade or commerce. Article 270 now provides for collection and distribution of tax to be done according to Article 246A. Then, under Article 271, GST has been exempted from being part of the Consolidated Fund of India. The amended Article 286 includes the supply of goods and services under its ambit, rather than just sale or purchase of goods; Article 366 now includes

the definitions of Goods and Service Tax, Services and State. And finally, Article 279A has also been brought under the ambit of Article 368.[4]

48. As with the Schedules, the Sixth Schedule has been amended to give power to the District Councils to levy and collect taxes on entertainment and amusements. And the Seventh Schedule has also been amended. In the Union List, petroleum crude, high-speed diesel, motor spirit (petrol), natural gas, and aviation turbine fuel, tobacco and tobacco products have been removed from the ambit of GST and have been subjected to Union jurisdiction. Newspapers, advertisements, and Service Tax have been brought under GST (entries 84, 92, 92C). Similarly, in the State List, petroleum crude, high-speed diesel, motor spirit (commonly known as petrol), natural gas, aviation turbine fuel, and alcoholic liquor for the human consumption have been included, unless the sale is in the course of inter-State or International trade and commerce. Entry tax and Advertisement taxes have been removed. Taxes on entertainment are only to be included to the extent of that imposed by local bodies.

4[1] Examining the Effect of the Constitution (One Hundred and First Amendment) Act, 2016, on Federalism. *http://racolblegal.com/examining-the-effect-of-the-constitution-one-hundred-and-first-amendment-act-2016-on-federalism.* Accessed on 10th January 2019.

(entries 52, 54, 55, 62)[5]

49. To be explicit, in Article 366 of the Constitution, after clause (12), clause (12A) was inserted: "goods and services tax" means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption. After clause (26), clauses (26A) and (26B) were inserted: "Services" means anything other than goods; "State" with reference to Articles 246A, 268, 269, 269A and Article 279A includes a Union territory with Legislature.

50. Section 18 of the Amendment Act provides for compensation to States for loss of revenue because of the introduction of goods and services tax. Parliament shall, by law, on the recommendation of the GST Council, provide for compensation to the States for loss of revenue arising on account of implementation of the goods and services tax for five years.

51. The overarching provision for our discussion is Section 19 of the Amendment Act.

Section 19 - Transitional provisions:

> Notwithstanding anything in this Act, any provision of any law relating to tax on goods or services or on both in force in any State immediately before the commencement of this

[5] Id.

> Act, which is inconsistent with the provisions of the Constitution as amended by this Act shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until expiration of one year from such commencement, whichever is earlier.

52. Until the Constitution suffered its 101st Amendment–that is, The Constitution (One Hundred & First Amendment) Act, 2016– the Union and the State Governments have been collecting, as is relevant here, the indirect taxes under clearly demarcated legislative fields as shown in the Seventh Schedule. Then, there were 97 Entries in List-I, 66 in List-II, and 47 in List-III, not all those dealings with the Legislature's taxing power though. In List I, principal among the Entries concerning taxes are Articles 41, 42, 83, 84, 87 to 92, 92A, 92B, 92C, 97; and in List II are Entries 26, 45, 47 to 61 and 63.

53. The CA Act has brought drastic changes in the federal taxing powers of the State; it has introduced a couple of Articles, amended a few, and done away with a few more. At a glance we can appreciate the changes:

Before Amendment		After Amendment	Impact
246A	Not existing	Introduced	Special provision on goods and services tax conferring simultaneous legislative powers on both the Union and the States.
248	Residuary power	Amended	The Union's residuary legislative power is subjected to Article 246A.
249	Power of Parliament to legislate regarding a matter in the State List in the national interest	Amended	It gives power to the Parliament to enact any law applicable to states on the matters mentioned even in states list. GST, not mentioned in States list, is now explicitly mentioned.
250	Power of Parliament to legislate regarding any matter in the State List if a Proclamation of Emergency is in operation	Amended	It has a similar impact as does the amended Article 249
268	Duties levied by the Union but collected and appropriated by the States	Amended	Additional Duties of Excise (Medicinal and toilet preparations) stand subsumed into GST.
268A	Service tax levied by	Omitted	Service Tax has been

	Union and collected and appropriated by the Union and the States:		subsumed into GST. So Entry No. 92C of List-I too stands omitted.
269	Taxes levied and collected by the Union but assigned to the States	Amended	The arrangement under Article 269 is subjected to Article 269A, a new provision.
269A	Not existing	Inserted	Levy and collection of goods and services tax during inter-State trade or commerce. The power to levy and collect GST during inter-State trade or commerce is vested with the Government of India. The taxes so collected will be apportioned between the Union & the States in a manner prescribed.
270	Taxes levied and distributed between the Union and the States.	Amended	Now Article 268A and Entry No. 92C of List-I stand omitted; so service tax is subsumed under GST. So in Article 270, a reference to Article 268A has been omitted, and a new reference to Article 269A for levy of GST for Inter-state transactions has

			been introduced.
271	Surcharge on certain duties and taxes for purposes of the Union	Amended	Parliament's powers to levy an additional surcharge on Union taxes under Article 271 now stands amended: Parliament can levy no additional surcharge on GST.
279A	Not existing	Inserted	Provision for creating the GST Council, a constitutional body.
286	Restrictions on the imposition of tax on the sale or purchase of goods	Amended	First, the word "sales" is replaced with "supply", and the word "goods" is replaced with "goods or services or both" States cannot legislate on the supply of goods or services if such supply is outside their state or is in the course of import or export. Originally, States could not levy and collect tax on specific Inter-state transactions. With omitting Clause (3), now even inter-state transactions of that nature would attract GST.

366	Definitions	Inserted	Three definitions have been added to the Constitution: (12A) Goods and Services Tax; (26A) Services; and (26B) State.
368	Power of Parliament to amend the Constitution and procedure therefore	Amended	As regards provisions and laws regarding GST Council, Parliament has been vested with the power to amend the Constitution.
Sixth Schedule.	Provisions on the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura, and Mizoram 8. Powers to assess and collect land revenue and to impose taxes.	Amended	It concerns powers to assess and collect land revenue and to impose taxes in the Tribal Areas of a few States.
Seventh Schedule			
List I: Entry 84	Barring those excluded, the Union could levy excise duty on all other goods, including tobacco, manufactured or	Amended	Now excise duty is levied only on the enumerated items: (a) petroleum crude; (b) high-speed diesel;

	produced in India. The excluded ones are these: (a) alcoholic liquors for human consumption; (b) opium, Indian hemp, and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance in sub-paragraph (b).		(c) motor spirit (commonly known as petrol); (d) natural gas; (e) aviation turbine fuel; and (f) tobacco and tobacco products."
Entry 92	Taxes on the sale or purchase of newspapers and on advertisements published.	Omitted	Now, taxes on the sale or purchase of newspapers and on advertisements published therein have been subsumed into GST.
Entry 92C	Taxes on services.	Omitted	Service tax has also been subsumed into GST.
List II Entry 52	Taxes on the entry of goods into a local area for consumption, use or sale therein.	Omitted	Purchase tax, too, has been subsumed into GST.
Entry 54	Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I. (Entry 92A of List I	Amended	Now the taxes are confined to the sale of petroleum crude, high-speed diesel, motor spirit (petrol), natural gas, aviation turbine fuel, and alcoholic liquor for

	concerns inter-State trade or commerce.)		human consumption. But excluded is the sale in the course of inter-State trade or commerce. (Now the sale or purchase of goods stands subsumed by GST)
Entry 55	Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.	Omitted	Taxes on advertisements other than advertisements broadcast by radio or television has also been subsumed into GST.
Entry 62	Taxes on luxuries, including taxes on entertainments, amusements, betting, and gambling.	Amended	(a) Taxes on Luxury, betting, and gambling have been subsumed into GST. (b) Right to levy Tax on entertainments and amusements has been restricted to Panchayats, Municipalities, Regional Councils, and District Councils.

The State Enactments:

54. In the above background, the States have enacted the respective State Goods and Services Tax Acts. These laws, among other things, (i) carry out the transition to GST; (ii) provide for the levy of GST on intra-State supplies within the State; and also (iii) modify/repeal the earlier State enactments which have to be modified/repealed because of transition to GST. Notable is the repeal of the VAT/Entry Tax/Luxury Tax, and so on, which earlier provided for levy of these taxes within the States.[6]

Kerala Enactment:

55. Kerala Goods and Services Tax Act, 2017 (Act 20 of 2017) received the Governor's assent on the 16th day of September 2017. It provides for, as the preamble suggests, levy and collection of tax on intra-State supply of goods or services, or both by the State of Kerala. As it is in pari materia with the Central Goods and Services Tax Act, it needs no much elaboration, but for one provision: Section 174, the customary 'repeal and saving' provision.

174. Repeal and saving.– (1) Save as otherwise provided in this

6 " Tarun Jain's Goods and Services Tax, Constitutional Law & Policy, ST, EBC, Ed.2018, p.70 (e-book)

Act, on and from the date of commencement of this Act,–

(i) the Kerala Value Added Tax Act, 2003 (30 of 2004) except in respect of goods included in entry 54 of the State List of the Seventh schedule to the Constitution including the Goods to which the Kerala General Sales Tax Act, 1963 (15 of 1963) is applicable as per the provisions of the Kerala Value Added Tax Act, 2003 (30 of 2004);
(ii) the Kerala Tax on Entry of Goods into Local Areas Act, 1994 (15 of 1994);
(iii) the Kerala Tax on Luxuries Act, 1976 (32 of 1976); and
(iv) the Kerala Tax on Paper Lotteries Act, 2005 (20 of 2005) (hereinafter referred to as the repealed Acts) *are hereby repealed.*

(2) The repeal of the said Acts and the amendment of the Acts specified in section 173 ("such amendment" or "amended Act", as the case may be) to the extent mentioned in sub-section (1) or section 173 *shall not,–*
(a) revive anything not in force or existing at the time of such amendment or repeal; or
(b) affect the previous operation of the amended Acts or repealed Acts and orders or anything duly done or suffered thereunder; or
(c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Acts or repealed Acts or orders under such repealed or amended Acts:

Provided that any tax exemption granted as an incentive against investment through a notification shall not continue as privilege if the said notification is rescinded on or after the appointed day; or

(d) affect any tax, surcharge, penalty, fine, interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Acts or repealed Acts; or

(e) *affect any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed.*

(3) *The mention of the particular matters referred to in section 173 and sub-sections (1) and (2) shall not be held to prejudice or affect the general application of section 4 of the Interpretation and General Clauses Act, 1125 (Act VII of 1125) with regard to the effect of repeal.*

(4) The Kerala Goods and Services Tax Ordinance, 2017 (11 of 2017) is hereby repealed.

(5) Notwithstanding the repeal of the Kerala Goods and Services Tax Ordinance, 2017 (11 of 2017) anything done or any action taken under the said Ordinance, shall be deemed to have been done or taken under this Act.

(f) affect any proceedings including that relating to an appeal, revision, review or reference, instituted before, on or after the appointed day under the said amended Acts or repealed Acts and such proceedings shall be continued under the said amended Acts or repealed Acts as if this Act had not come into force and the said Acts had not been amended or repealed.

(italics supplied)

Constitutional Invalidity:

56. This Court is called upon to examine the constitutional validity of Section 174 of the KSGST Act. Its invalidity is set up in the face of Section 19 of the CA Act. The petitioners argue, among other things, the State has no legislative power to override Section 19 of the CA Act.

57. A statute may be unconstitutional if it is enacted in the absence of legislative competence, in violation of Fundamental Rights guaranteed to the citizens of India, or in contravention of other constitutional constraints. For the Constitution is the fundamental or basic law to which all the laws must conform. It is superior even to the will of the legislature. Dr. C. D. Jha in his illuminating *Judicial Review of Legislative Acts*[7] enumerates five forms of unconstitutionality:

(i) Legislative incompetence arising out of the distribution of powers;

(ii) a delegation of essential legislative functions by the Legislature to the Executive;

(iii) violation of the Fundamental Rights guaranteed in Part III of the Constitution;

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7 Lexis-Nexis, 2009 Ed., p.311

(iv) violation of other constitutional restrictions, prohibitions, and the limitations affecting legislative competence and jurisdiction, and

(v) infringement of the principles of natural justice.

While determining the constitutionality of a provision or an Act the Court looks at these aspects:

(a) has the Legislature been constitutionally empowered to pass the legislative Act?

(b) Has the legislative act got the territorial nexus?

(c) Are there any other connotational restrictions or limitations which put fetters on the power of the Legislature?[8]

58. In *State of Bihar v. Bihar Distillery Ltd,*[9] the Supreme Court has laid down certain principles on how to judge the constitutionality of an enactment: the Court should (a) try to sustain the validity of the impugned law to the extent possible. It can strike down the enactment only when it is impossible to sustain it; (b) should not approach the enactment with a view to picking holes or to ferreting out defects of drafting or for the language employed; (c) should consider that the Act made by the legislature represents the will of the people and that cannot be lightly interfered with; (d) can strike down the Act only when the unconstitutionality is plainly and

8[ll] Id. Pp.312, 313
9[ll] JT 1996 (10) SC 854

clearly established; (e) and may recognize the fundamental nature and importance of legislative process and accord due regard and deference to it.

59. Here, it is a plain case of legislative competence. Let us see how Section 174 of the KSGST Act fares vis-a-vis the Amendment Act in general and Section 19 of it in particular. As it is a matter of vires and legislative competence, we must trace the source of power.

How to judge the constitutionality of an enactment?

60. When faced with a challenge to interpret laws, Courts have to discharge a duty. The Judge cannot act, holds the Supreme Court in *Bhanumati v. State of UP*[10], like a phonographic recorder, but he must act as an interpreter of the social context articulated in the legal text. The Judge must be, in the words of Justice Krishna Iyer, "animated by a goal-oriented approach" because the judiciary is not a "mere umpire, as some assume, but an active catalyst in the Constitutional scheme". Then, referring to *Bihar Distillery Ltd.,* the Court invokes Lord Denning's observations in *Seaford Court Estates Ltd Vs. Asher*[11]*:* the job of a Judge in construing a statute must

10 AIR 2010 SC 3796
11 [1949 (2) KB 481]

proceed on the constructive task of finding the intention of Parliament and this must be done (a) not only from the language of the Statute but also (b) upon consideration of the social conditions which gave rise to it, (c) and also of the mischief to remedy which the statute was passed and, if necessary, (d) the Judge must supplement the written word to give 'force and life' to the intention of the legislature.

Constitution was prospective in its operation:

61. In *Keshavan Madhava Menon v. The State of Bombay*[12] the Supreme Court was concerned with the legality of the prosecution of the appellant for contravention of the Indian Press (Emergency Powers) Act, 1931. The offence had been committed before the Constitution came into force and prosecution launched earlier was pending after January 26, 1950. The enactment which created the offence was held to be void under Art. 19(1)(a) read with Art. 13, as contradicting one of the Fundamental Rights guaranteed by Part III of the Constitution. In the circumstances, the question was whether the prosecution could be continued after the enactment became void. The majority of the Court held that the Constitution was prospective

12 1951 CriLJ 680

in its operation and that Art. 13(1) would not affect the validity of these proceedings commenced under pre-Constitution laws which were valid up to the date of the Constitution coming into force. For to hold that the validity of these proceedings were affected would in effect be treating the Constitution as retrospective.

62. In *State of Orissa v. M.A. Tulloch and Co.*[13], after quoting *Keshavan Madhava Menon,* notes on the doctrine of repugnancy that the test of two enactments containing contradictory provisions is not, however, the only criterion of repugnancy. If a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overturned on the ground of repugnance.

63. Every statute is, according to *Kesavan v. State of Bombay*[14], *prima facie* prospective unless it is expressly or by necessary implications made to have retrospective operation. There is no reason why this rule of interpretation should not be applied for interpreting our Constitution, and a constitutional amendment, too.

13[ll] AIR 1964 SC 1284,
14[ll] AIR 1951 SC 128

Presumption in favour of constitutionality:

64. To reiterate the well-known judicial assertion, I may refer to the Supreme Court's observations in *Karnataka Bank Ltd v. State of A.P*[15]. The rules that guide the Constitutional Courts in discharging their solemn duty to declare laws passed by a legislature unconstitutional are well-known. There is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; 'to doubt the constitutionality of a law is to resolve it in favour of its validity. Where the validity of a statute is questioned, and there are two interpretations one of which would make the law valid and the other void, the former must be preferred and the validity of law upheld".

65. Even otherwise, the question of repugnancy would arise only when both the laws are enacted on the same entry, as is held in *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector*.[16]

Federal Features:

Article 246A - A Unique Federal Feat:

15 (2008) 2 SCC 254
16 (2007) 5 SCC 447

66. The first illustration to this effect is Article 246-A which makes a special provision for GST. By way of Article 246-A, the Constitution Amendment Act creates (a) a new legislative field conferring, (b) outside the three Lists of the Seventh Schedule, (c) concurrent powers to both Parliament and the State Legislatures to enact on the same subject matter at the same time. Thus, there is a fundamental change to the scheme of "legislative relations" between the Union and the States by the CA Act: Article 246-A.[17]

67. To exemplify, Article 246-A does change the legislative distribution of powers; however, it does not upset the delicate balance between the Union and the States. Instead, it carries out the function of cross-empowerment. On the one hand, it enables the Union, according to Tarun Jain, to legislate and collect taxes on certain subjects which hitherto remained within the exclusive fold of the States—such as the taxes on sale and purchase of goods, luxury taxes, advertisement taxes, and so on. While doing this, however, the Union has not lost the legislative rights it possessed by then—such as taxes on manufacturing, taxes on services, and so on, except that

17 [ii] Tarun Jain's Goods and Services Tax, Constitutional Law & Policy, ST, EBC, Ed.2018, pg.89-90 (e-book)

these taxes are subsumed in a larger legislative field (that is, GST) and would be levied under that caption. Further still, Article 246-A expands the legislative landscape of the States to bring within their fold the Westminster model of Governance which is the core principle governing the functioning of the Executive wing of the Union and of the States.

Entries in the Lists:

68. The power to legislate is engrafted under Article 246 of the Constitution, and the various entries for the three lists of the Seventh Schedule are the "fields of legislation". The different entries as legislative heads, points out the Supreme Court in *Bimolangshu Roy (Dead) v. State Assam*,[18] are designed to define and delimit the respective legislative areas of the Union and the State Legislatures. *Bimolangshu Roy* emphasises that "they neither impose any restrictions on the legislative power nor prescribe any duty for the exercise of the legislative power in any particular manner." In the context of that case, it holds that the language of the entries should be given the widest scope of which their meaning is fairly capable. Yet it also cautions that the rule of widest construction would not enable

18[] AIR 2017 SC 3552

the legislature to make a law relating to a matter which has no rational connection with the subject-matter of an entry.

69. When the *vires* of enactment are challenged, the court primarily presumes, notes *Bimolangshu Roy*, the constitutionality of the statute, by putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude. And for this, the substance of the legislation will have to be looked into. But it also cautions against the court's interpretative bending-over-backward attitude to extend the meaning of the words beyond their reasonable connotation, anxious to preserve the power of the legislature. The Court is no legislative or executive guardian angel; it is a constitutional sentinel. Period.

70. For our purpose, immensely important is the *Bimolangshu Roy's* observation that the authority to make law flows from various sources: (1) express text of the Constitution; (2) by implication from the scheme of the Constitution; and (3) as an incident of sovereignty. *Bimolangshu Roy*, in fact, invokes the doctrine of inherent powers. Thus, it felicitously observes:

> 21. The authority to make law flows not only from an express grant of power by the Constitution to a legislative

body but also by implications flowing from the context of the Constitution is well settled by the various decisions of the Supreme Court of America in the context of American Constitution. A principle which is too well settled in all the jurisdictions where a written Constitution exists. The US Supreme Court also recognised that the Congress would have the authority to legislate with reference to certain matters because such authority is inherent in the nature of the sovereignty. The doctrine of inherent powers was propounded by Justice Sutherland in the context of the role of the American Government in handling foreign affairs and the limitations thereon. In substance, the power to make the legislation flows from various sources: (1) express text of the Constitution; (2) by implication from the scheme of the Constitution; and (3) as an incident of sovereignty.

71. In *Synthetics and Chemicals Ltd. v. State of U.P.,*[19] the Supreme Court has held that the power to legislate does not flow from a single Article of the Constitution. To articulate this assertion and to elaborate on it, *Bimolangshu Roy* observes that besides the declaration in Article 246, there are various other Articles in the Constitution which confer authority on the Parliament or on a State legislature to legislate, under various circumstances. Illustratively, Article 3 authorises the Parliament to make a law either creating a new State or extinguishing an existing State. Such power is exclusively conferred on the

19[ll] *(1990) 1 SCC 109*

Parliament. As further instances of legislative repositories, *Bimolangshu Roy* enumerates Articles 2, 3, 11, 15(5), 22(7), 32(3), 33, 34, 59(3), 70, 71(3), 98(2) and 326.

72. Indeed the State legislatures are assigned only specified fields of legislation, the Residuary legislative powers lying with the Parliament. But taxing entries are distinct from the general entries, and List III contains no taxing entry. So comes a federal constitutional experiment in the fiscal field: the 101st Constitutional Amendment.

73. Article 246 generally stipulates the competence of the Parliament and the state legislatures on the various fields of legislation. Articles 249, 250 and 252 contain provisions which enable the Parliament to legislate regarding any matter enumerated in List II in the exigencies specified in those Articles. The Scheme of Entries, such as 52 and 54 and the corresponding Entries in the List-II, *Bimolangshu Roy* underlines, is nothing but another instance of special arrangement akin to the one made in Articles 249, 250 and 252. To conclude, *Bimolangshu Roy* reminds us that a great deal of

schematic examination of the entire Constitution is essential for us to interpret the scope of each Entry in the three Lists of the Seventh Schedule. And no Rule with a universal application on interpreting all entries in the 7th Schedule can be postulated.

74. If legislation purporting to be under a particular legislative entry is assailed for lack of legislative-competence, the State can seek to support it based on any other entry within the legislative competence of the legislature. It is unnecessary for the State, notes the Supreme Court in *Ujagar Prints v. Union of India*[20], to show that the legislature, in enacting the law, consciously applied its mind to the source of its own competence. Competence to legislate flows from Articles 245, 246 and the other Articles falling in Part XI of the Constitution. In defending the validity of a law questioned on the ground of legislative incompetence, the state can always show that the law was supported under any other entry within the competence of the legislature. Indeed, in supporting legislation, sustenance could be drawn from many entries. The legislation could be composite legislation drawing upon several

[20] AIR 1989 SC 516

entries such as 'rag-bag' legislation is particularly familiar in taxation.

75. In *State of AP v. National Thermal Power Corpn. Ltd.*, [21] the Supreme Court has observed that the power of the State Legislature to enact a law to levy tax by reference to List II of the Seventh Schedule has two limitations: one, arising out of the entry itself, and the other, flowing from the restriction embodied in the Constitution.

Temporary Statutes:

76. Statutes, as we know, are of two types: perpetual and temporary. By default, mostly the statutes are perpetual, and a very few are temporary. A temporary statute will have its duration specified or fixed. In other words, it ceases to exist by efflux of time; it has thus a shelf life, so to say. Of course, a statute can be transitory or transitional. One ends the legislative mandate by a particular date, and the other lets that mandate move from one state of affairs to another. But once a later statute repeals the earlier one, the one repealed cannot be treated as a temporary statute merely because it has a transitional

21[] AIR 2002 SC 1895

provision with a time-frame.

77. Often the legislature itself enacts a saving provision in the temporary Act, on the lines of Section 6 of the General Clauses Act, 1897. The usual presumption is that if such a saving provision is not present, then the proceedings began under the repealed Act *ipso facto* terminate as soon as the statute expires. Indeed, the expiry does not make the statutory dead for all purposes even in the absence of a saving clause. The nature of the right or obligation emanating from the temporary Act may determine whether that right or obligation is enduring. So held the Supreme Court in *State of Orissa v Bhupinder Kumar*[22].

78. A temporary statute can be repealed before its specified period. That said, I may add that merely because the statutory purpose is temporal, the very statute cannot be regarded as temporary unless the legislature has specified a fixed period for its duration. Indeed, unless it contains some special provision to the contrary; after a temporary Act has expired, no proceedings can be taken upon it, and it ceases to have any

22[ii] AIR 1962 S.C. 945

further effect.

79. The difference between the effect of the expiration of a temporary Act and the repeal of a perpetual Act is pointed out by Parke B. in *Steavenson v. Oliver*:[23] "There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed: but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of constructions." And Lord Abinger C.B., in a concurrent judgment, said: "It is by no means a consequence of an Act of Parliament expiring that rights acquired under it should likewise expire."

80. If an Act contains a proviso that it is to continue in force only for a certain specified time, it is, according to Craies[24], a temporary Act. According to the same learned author, Temporary Acts have these peculiarities:

Commencement: If an Act is in the first instance

23[ll] (1841) 151 E. R. 1024
24[ll] Craies On Legislation, Sweet & Maxwell, 2010, p.407

> temporary and is continued from time to time by subsequent Acts, it is considered as a statute passed in the session when it was first passed, and not as a statute passed in the session in which the Act which continues its operation was passed.
> *Expiration: As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it, and it ceases to have any further effect.*

81. Another celebrated commentary—G. P. Singh's *Principles of Statutory Interpretation*[25]—notes that a statute is either perpetual or temporary. It is perpetual when no time is fixed for its duration, and such a statute remains in force until its repeal, which may be express or implied. A perpetual statute is not perpetual in the sense it cannot be repealed; it is perpetual in the sense it is not abrogated by efflux of time or by non-user.

82. A statute, on the other hand, is temporary when its duration is only for a specified time, and such a statue expires on the expiry of the specified time unless it is repealed earlier. Simply because the purpose of a statute, as mentioned in its preamble, is temporary, the statute cannot be regarded as temporary when no fixed period is specified for its duration.

25[l] Lexis-Nexis, 14th Ed., Pp.717, 718

The duration of a temporary statue may be extended by a fresh statute or by power conferred under the original statute.

83. *G.P. Singh* also observes that when a temporary Act expires, section 6 of the General Clauses Act, 1879, which in terms is limited to repeals, has no application. The effect of expiry, therefore, depends upon the construction of the Act itself. The leading authority on the point, according to the learned author, is the dicta of Park B in *Steavenson.* G. P. Singh's view accords with Craies'.

84. I must acknowledge that the petitioners' counsel have laid much emphasis on the sunset clause and nuanced their arguments to drive home their contention that Section 19 is a sunset clause and, so, the General Clauses does not apply. So the concept of sunset, I reckon, needs more elaboration.

Sunset Clauses:

85. Sunset clauses are statutory provisions providing that a particular law will expire automatically on a particular date unless it is re-authorised by the legislature. The use of a sunset clause, observes A.E. Kouroutakis in *The Constitutional Value*

of Sunset Clauses: An historical and normative analysis[26], was expected to create an incentive for the periodic and comprehensive executive and legislative evaluation of agencies. Sunset clauses— as temporary laws—have the potential, from the perspective of separation of powers, to enhance the role of the legislature and support its monitoring task over the administration[27].

86. Sunset clauses have, A.E. Kouroutakis further observes, two major legal effects. First, unless re-authorised by the legislature, a sunset clause brings about the expiration of a law on a prescribed date. Expiration, as brought about by a sunset clause, differs from repeal. Second, if a clause prescribes that a statute should expire from a certain date, then it is reasonable to assume that it is not valid unless re-enacted. But in practice, there are exceptions in each instance. To begin with, the expiration, or 'sunset', of an act has the same consequences as if it were repealed. Yet, as Broom remarks, there is a difference between statutes which expire and statutes which are

26|| Taylor and Francis, 2016. Kindle edition., p.4, location 559
27|| Id. p.6, location 624

repealed. Although 'the latter become as if they had never existed (except so far as they relate to transactions already completed under them), yet, with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction'[28].

87. Indeed, there are many sunset clauses, such as the 'entire' sunset clause compared to the 'sectional'; the 'conditional' compared to the 'unconditional'; the 'direct' compared to the 'indirect'. Confining our discussion to the issue on hand, we may note that a sunset clause is direct when it prescribes the termination of the whole or part of the act which is embodied, while an indirect sunset clause refers to a different act. Here, I reckon, if we accept the petitioners' contention, then, Section 19 of the CA Act amounts to an indirect sunset clause–at best.

88. In this context, A.E. Kouroutakis observes that while a plethora of direct sunset clauses is recorded in the statute books, indirect sunset clauses are mainly recorded in constitutional documents. Therefore, the common utility of

28[i] Id. p.7, location 646-653

indirect sunset clauses is recorded in constitutional orders with codified constitutions and a hierarchy of norms. Sunset clauses do not obliterate legislation as if it never existed. That said, the legal effect of automatic expiration due to a sunset clause, emphasises the learned author, is not identical to the repeal of an act. Furthermore, "although the reasonable expectation is that an act will sunset after a certain period, in practice the construction of a clause, and therefore the expiration of an act, depends on various factors which influence its interpretation. These marginal differences make such clause a distinctive tool in the legislative drafting process."[29]

89. Under the heading "Rule of Law and Sunset Clauses", A.E. Kouroutakis observes there are two distinct categories of temporary laws in times of normality. First, laws adopted in times of crisis; their force is extended in times beyond the exigency. And second, laws enacted in times of normality. Considering Justice Holmes's dicta, Vermeule characterised the invalidation of legislation with sunset clauses before the expiry date as 'ex post sunsetting', in contrast to the 'ex ante

[29] Id. p.16, location 881

sunsetting' of legislation, which occurs when legislation sunsets due to the lapse of time.[30]

(a) Interim Constitutions:

90. In the constitutional context, affirmative action policies aim to regulate and correct a given deficiency; as soon as the deficiency is eliminated, such policies have no reason to stay in force. Thus a sunset clause is desirable to make them expire. Jackson, as quoted in *The Constitutional Value of Sunset Clauses*, discussing constitution making, explores the idea of 'transitional constitution making' by adding a sunset clause and points out that they [the transitional constitutions] may shed new light on the advantages and disadvantages of constitutional 'sunset' clauses–that is, requirement of reconsideration in plenary form after a set period of years, far enough into the future to allow time for developing some authoritative institutions of politics and governance.

91. There are several constitutional documents that are recorded as temporary. These constitutions are often categorised as transitional and are commonly created because

[30] Id. pp. 155-157, location 5578-5637

of a major national crisis: for example, after the War of American Independence, the Constitution of South Carolina and the Constitution of New Hampshire. In the more modern era, the preamble of the Constitution of the Republic of South Africa in 1993, described it as the 'Interim Constitution'. It has a two-year sunset clause.

(b) Sunset Clauses and Constitutional Design:

92. A.E. Kouroutakis, in the chapter named as above, quotes a very interesting stance Jefferson has taken. The third American President, regarded as the US progenitor of sunset laws, in the pre-constitutional days, was concerned with the perpetuity of the constitution. He suggested to Madison about sunsetting on any statute after nineteen years. According to him, "no society can make a perpetual constitution or even a perpetual law. The earth belongs always to the living generation. [...] Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right."[31]

(c) Pragmatic Injustice and Sunset Clauses:

31 Id. pp.163-164, location 5767-5792

93. Finally, we may consider the sunset clauses in the context of pragmatic injustice. Pragmatic injustice, according to Roscoe Pound[32], exists when the reality is far from the ideal, which is prescribed in the law books. Currently, although equality is the default rule and it is emphatically recognised in constitutional and international documents, the law in action is far from the ideal. So, the nations take recourse to affirmative action policies to regulate and correct a given deficiency. Once the deficiency is eliminated, the policies, introduced out of turn, have no reason to stay in force. Thus, a sunset clause is desirable to make them expire.

94. Indeed, sunset clauses have been frequently used in India in fiscal and tax laws. Tax holidays and exchange control regulations are the best examples. The Constitution itself provides for a 10-year sunset for reservations to Parliament and legislative assembly seats (Article 334).

95. Section 6 of the General Clauses Act will not apply to temporary statutes. For this proposition, the petitioners have

32[1] Law in books and law in action (1910) 44 American Law Review 12, as quoted by A. E. Kouroutakis, Page 161, location 5723

relied on *District Mining Officer v. Tata Iron and Steel Co.*[33], and *State of Punjab v. Mohar Singh*[34]. Section 6 of the General Clause Act, according to them, applies only to repeals and not to omissions. It is a well-settled principle that invocation of Section 6 of the General Clause Act is available only with repeal and not with omissions.

Transitional Provisions:

96. When one legislative system ends and another begins, it is commonly necessary to enact special rules for actual cases that straddle the transaction. Sometimes the old law is continued for transitional cases, and sometimes the new law is applied; in either event, modifications may be necessary. In other words, as Craies observes in his treatise *On Legislation,*[35] legislation does not necessarily have effect as law immediately after being passed or made. It may take effect under these circumstances: (1) immediately upon being passed or made; (2) at a point in the future that is specified upon the legislation being passed or made, or that can be determined under criteria

33 AIR 2001 SC 3134
34 AIR 1955 SC 84
35 Sweet & Maxwell, South Asian Ed. 2010, p.399

specified upon the legislation being passed or made; (3) only if some future event occurs (which may be a real-world event or an event such as making an order-designed to commence the legislation); (4) with retrospective effect from a past time; or (5) "not at a particular point in time, but in relation to things done or events occurring during a period specified upon the legislation being passed or made, with it being possible to specify either a single period for all purposes or different period for different purposes."

97. Transitional provisions, the learned author continues to observe, may be relatively unimportant, in that by definition they affect relatively few cases, but they are extremely complicated; and they can be important to the cases affected[36]. Thornton in his *Legislative Drafting*[37] acknowledges the difficulty in describing what constitutes a transitional provision. According to him, the function of a savings provision in the legislation is to preserve or 'save' a law, a right, a privilege, or an obligation otherwise repealed or ceaseed to

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36[] Id., 417

37[] Prof. Dr. Helen Xanthaki, Bloomsbury Professional, 5th Ed., 2013, p.473

have an effect.

98. The function of a transitional provision, Thornton[38] adds, is to make special provisions for applying legislation to the circumstances which exist when that legislation comes into force. Both terms are loosely used with overlapping meanings; there is little or no advantage in seeking to pursue a water-tight distinction between them. But the distinguishing criterion is the focus of the intent of the drafter: if time is the focus, then the drafter must title and express the provision as transitional; if the focus is on exception, then the drafter must title and express the provision as a saving. At the end of the day, the drafter's pen will identify the nature of the provisions, and there is a great benefit in doing so clearly and accurately. Lumping transitional and savings provisions in a single section is never a good idea.

99. The learned author finally notes that the necessity for savings and transitional provisions is a consequence of a change in the law, whether the change is caused by new statute law or by the repeal, repeal and substitution, or modification,

38[ll] Id. P.474

of existing statute law. Consideration of whether special savings or transitional provisions are necessary is an important part of every drafting exercise.

Saving Clause:

100. A saving clause is used to preserve what already exists; it cannot create new rights or obligations. Such a provision is of no application to transactions complete at the time the savings provision comes into force. A savings provision is frequently included in legislation to establish beyond doubt that the provisions of that legislation are to be construed as additional to and not in derogation of existing law. The possibility of repeal by implication is thus excluded. And the operation of the common law is saved.[39]

101. Thornton gives this as an example of transitional provision:

> In so far as an instrument made or having effect as if made, or any other thing done or having effect as if done, under any enactment repealed by this section, could have been made or done under a corresponding provision of this Act, it shall, if effective immediately before the coming into force of this Act, have effect subsequently as if it had

39[ll] Id. 479

been made or done under that corresponding provisions.

Saving Clause & Legal Proceedings Under an Expired Statute:

102. A question often arises, as it does here, about the legal proceedings about matters connected with a temporary Act: whether they can be continued or initiated after the Act has expired. The answer to such a question, *G. P. Singh* observes, again depends upon constructing the Act as a whole. The Legislature very often enacts in the temporary Act a saving provision similar in effect to section 6 of the general Clause Act, 1897.[40]

103. The question before the Supreme Court in *Tata Iron and Steel Co.* was whether because of the Validation Act the State could retain only the cess and taxes already collected before the date of validation or whether they also could collect the cess and taxes due till that date of validation. *Tata Iron and Steel* has held that the Validation Act did not enable the State to collect the cess and taxes not collected till the date of validation. One of the reasons it assigned was that the

40[1] Id., p.719

Validation Act contained no saving clause and section 6 of the General Clauses Act, too, would not affect a temporary statute. So there could be no recovery and collection of cess and taxes which may have become due but had not been collected till the date of validation.

104. That said, *Tata Iron and Steel* has gone on to observe that a temporary statute on its expiry is not dead for all purposes, even in the absence of a saving provision like section 6 of the General Clauses Act. The question is, as stressed earlier, essentially one of construction of the Act. The nature of the right and obligation resulting from the provisions of the temporary Act and their character may have to be regarded as determinative of whether the said right or obligation is enduring or not.

105. We have, first, considered what a temporary statute is, amply aided by *Craies's* and *G. P. Singh's* commentaries. The next question is, which is the temporary statute here? The Constitutional Amendment Act has affected a few central enactments, as well as a few state enactments. Then, can we call

them all –that is, the repealed ones or those getting repealed– temporary statutes? For "any provision of any law relating to tax on goods or services or on both" inconsistent with the Amendment Act cannot last beyond one year? Of course, before that one year, those inconsistent laws can be amended to render them compatible or altogether repealed. I am afraid the answer is a "No".

106. We will also examine a converse situation. Sometimes, a repealing statute, the latter one, can be a temporary one. Again, Section 6(a) of the General Clauses Act does not apply on the expiry of the "temporary" repealing statute; so held the Supreme Court in *Om Prakash v. State of U.P.*[41]. Then, can we call the Constitutional Amendment Act a temporary one? I am afraid this question, too, gets the same answer: No. Section 19 of the Amendment Act, at best, is a transitional provision.

107. Here the petitioners have argued that the enactments –Central or State–inconsistent with the Amendment Act have rendered themselves temporary statutes and perished on the

41[1] AIR 1957 SC 458

temporal altar of one year. If this logic is accepted, every succeeding act renders the previous act a temporary one, obliterates its impact beyond a specified date, and avoids Section 6 of the General Clauses Act from applying itself. One enactment will not, rather cannot, make another enactment a temporary one; the same enactment can, for various reasons, render itself a temporary one. So a later enactment, inconsistent with the previous one, repeals that previous one either expressly or impliedly. Now, it is time we examined what repeal is and how it affects these cases before us.

Repeal of Statutes:

108. We must acknowledge that a total repeal obliterates statutes, "except as to transactions past and closed." "When an Act of Parliament is repealed," said Lord Tenterden in *Surtees v. Ellison*, "it must be considered (except as to transactions past and closed) as if it had never existed. That is the general rule." Tindal C.J. stated the exception more widely. He said, "The effect of repealing a statute is to obliterate it as completely from the records of the Parliament as if it had never been

passed; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law.

109. To decide whether any particular transaction is affected by the repeal of an Act, it is necessary to ascertain whether the transaction in question was completed when the Act was repealed. Thus, if an Act gives a right to do anything, the thing to be done, if only commenced but not completed before the Act is repealed, must upon the repeal of the Act be left in *status quo*. So, under some statute, if a right becomes vested upon the completion of some certain transaction but not before, no right whatever will have been acquired if the statute in question is repealed before the transaction is completed.

110. Repeal of statute results in nullification of the subordinate legislation the repealed statute has engendered. That is, when a statute is repealed, any by-law or statutory instrument made under that statue ceases to be operative unless

there is a saving clause in the new statute preserving the old by-law or statutory instrument.

111. We may acknowledge there lies a difference between the repealing of an entire Act and that of, say, a single clause in an Act. A statute repealed, we must reckon as if it had never been enacted. Partial repeal, however, does not entail such drastic consequences as we would have on the total repeal. In fact, we need to look at the repealed portion of an Act to see what remains of the Act and what it means. For "an Act of Parliament, which at one time had one meaning, would by the repeal of some clause in it have some other meaning."

112. That said, we must also acknowledge that if a right has once been acquired under some statute, that right will not be taken away by the repeal of the statute under which it was acquired.

113. Therefore, more often than not, when an Act is repealed, a clause is expressly engrafted in the repealing Act that "this repeal shall not affect any right or liability acquired, accrued, or incurred." But the rule of law has been well

entrenched on this point; so such a clause is apparently unnecessary, and only inserted *ex abundanti cautela.*

114. Succinctly stated, repeal is not a matter of mere form but one of substance, depending upon the legislative intent. If the intention indicated expressly or by necessary implication in the subsequent statute was to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or pro tanto repeal. If the intention was merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to repeal. After referring to many standard commentaries on statutory interpretation, the Supreme Court in *Udai Singh Dagar v. Union of India,*[42] reemphasises that the principal object of a repealing and amending Act is to 'excise dead matter, prune off superfluities and reject clearly inconsistent enactments'.

Application of the General Clauses Act:

115. Ringing is the judicial assertion: it is emphatically

42[] (2007) 10 SCC 306

the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each. That is the assertion of Chief Justice Marshall in *Marbury v. Madison.* Again he famously declared in *McCulloch v. Maryland*, "we must never forget that it is a constitution we are expounding."

116. To begin with, generally, the predominant approach of the Indian Judiciary, according to M.P. Jain[43], was positivist; that is, to interpret the Constitution literally and to apply to it more or less the same restrictive canons of interpretation as are usually applied to interpreting ordinary statutes. To some extent, the Constitution itself incorporates the principle of statutory construction. Article 367 provides that the General Clauses Act, 1897, shall apply for interpreting the Constitution as it applies for interpreting legislative enactments. The courts have held that not only the 'general definitions' in the General Clauses Act, but also the "general rules of construction" in the Act, apply to the Constitution.

43[ll] Indian Constitutional Law, VII Ed., P.

117. The General Clauses Act can be amended by Parliament. Article 367 thus means that interpretation of many words and phrases used in the Constitution can be modified by Parliamentary legislation without amending the Constitution. From its initial days of literal, restrictive interpretation, the Constitutional Courts have shifted towards liberal, purposive interpretation. The liberal approach is designed to give a creative and purposive interpretation to the Constitution "with insight into social values, and with the suppleness of adaptation to changing needs."

118. Since the General Clause Act is an Act of Parliament, it is competent for Parliament to control or modify the view taken by the highest Court, by simply amending the General Clause Act. After observing thus, D. D. Basu[44] notes it is for this reason that judicial review cannot have that free play in India as in the USA. In India, the Constitution has to be interpreted, the learned author observes, like a statute. Indeed, he acknowledges that since 1973 the Supreme Court has been struggling to shatter the shackles of

44[II] Constitution of India, 9th Ed., Vol.14, pp.15360-01

statutory interpretation to jump into the freedom of 'purposive interpretation'. For this interpretative freedom, the Supreme Court has invoked the doctrine that the Constitution is a statute of a special kind—that is, to govern the country—and should therefore be liberally interpreted, having regard to its object.

119. The petitioners' counsel have quoted a profusion of precedents on the interpretative impact of General Clauses Act *vis-a-vis* the constitutional provisions. The Constitution (One Hundred and First Amendment) Act, 2016 could have adopted the language, they contend, similar to Section 174 KSGST Act, 2017, and Section 6 of the General Clauses Act. But it has deliberately and consciously not done so because it has not intended the KVAT Act to operate beyond 16.09.2017.

120. Section 6 of the General Clauses Act and Section 4 of the Kerala Interpretation and General Clauses Act are analogous. Here, as we consider the State enactments, Section 4 of the State Act may have to be considered. And it reads:

> 4. **Effect of repeal.** — Where any Act repeals any enactment hitherto made or hereafter to be made, then unless a

different intention appears, the repeal shall not –

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

121. Indeed, we can refer to the precedents on Section 6 of the General Clauses Act to appreciate how the repeal of an enactment affects the pending cases or proceedings under that repealed enactment. In *Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co.*,[45] the Supreme Court has observed that as a general rule, in view of Section 6, the repeal of a statute, which is not retrospective in operation, does not prima facie affect the pending proceedings which may be continued as if the repealed

45[11] (2001) 8 SCC 397

enactment were still in force. In other words, such repeal does not affect the pending cases which would continue to be concluded as if the enactment has not been repealed. In fact, when a *lis* commences, all rights and obligations of the parties get crystallised on that date. The mandate of Section 6 of the General Clauses Act is simply to leave the pending proceedings unaffected which commenced under the unrepealed provisions unless a contrary intention is expressed. Clause (c) of Section 6 refers to the words "any right, privilege, obligation ... acquired or accrued"; accordingly, the repealing statute would not affect those rights, privileges, obligations. *Ambalal Sarabhai Enterprises*, however, hastens to clarify that mere existence of a right not being "acquired" or "accrued" on the date of the repeal would not get the protection of Section 6 of the General Clauses Act.

122. The principle encapsulated, the effect of repeal without a saving clause and without Section 6 of the General Clauses Act applying is that the repealed provision is obliterated as completely from the records as if it had never

existed except for those actions which were commenced, prosecuted and concluded while it still existed in law. There is, indeed, no question of any principle in common law or otherwise applying on the lines incorporated in Section 6 of the General Clauses Act. So holds the Supreme Court in *Kolhapur Cane Sugar Works Ltd. v. Union Of India.*[46]

In Perspective:

123. Most cases concern the Kerala Value Added Tax Act (KVAT); so we will examine the chronology of statutory events in the backdrop of that Act. With effect from 01.04. 2005 came KVAT Act into force. Then, on 08.09.2016 the Constitution (One Hundred and First Amendment) Act, 2016 ("the CA Act") was enacted. But it came into effect only from 16.09.2016. Section 19 of the CA Act saved a host of statutes holding field by then; those enactments include the KVAT Act. And the saving was for one year: 16.09.2017.

124. On 22.06.2017, the State of Kerala issued the Kerala State Goods and Services Tax Ordinance; it has heralded the new State GST regime. On 16.09.2017 came the Kerala State

46[1] 1986 (24) ELT 205 Del.

Goods and Services Tax Act, 2017 ("KSGST Act"). It has replaced the KSGST Ordinance. On the same day, however, the saving period prescribed under Section 19 of the CA Act, too, ended.

125. But, as a way out, the KSGST Act has its own Saving Clause: Section 174. So we must examine the relative, sometimes overlapping concepts of transition and saving, besides those of repeal, sunset, amendment, omission, and substitution.

126. A bill may contain provisions that limit, modify, or destroy individual rights and privileges. Then, on the Bill's enforcement as an Act, the Legislature may desire to consider a saving clause, to protect those who have acted as per the law till then existing. The means for providing this protection is the saving clause. Black's Law Dictionary defines "Saving Clause" in a statute as an exception of a special thing out of the general things mentioned in that statute; it is ordinarily a restriction in a repealing act, which is intended to save rights, pending proceedings, penalties, and so on, from annihilation that

would result from an unrestricted repeal. In other words, "a saving clause is generally used in a repealing act to preserve rights and claims that would otherwise be lost."

127. Benion in his *Statutory Interpretation*[47] defines a saving as a provision "the intention of which narrows the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation". According to the learned author, a saving resembles a proviso, except that it has no particular form. A saving often begins with the words 'Nothing in this [Act shall ... .' A saving may be qualified or conditional. Indeed, a saving is taken not to be intended to confer any right which did not exist already.

128. The saving clause, according to Crawford[48], is used to exempt something from immediate interference or destruction. It is generally used in repealing statues to prevent them from affecting rights accrued, penalties incurred, duties imposed, or proceedings started under the statute sought to be repealed. Its position or verbal form is unimportant. But if it

47[ll] Benion on Statutory Interpretation, LexisNexis, 5th Ed., p.724
48[ll] Crawford's Statutory Construction, 1998 Ed., p.612-13

conflicts with the body of the statute of which it is a part, it is ineffective, or void. And whether the saving clause should receive a strict or liberal construction, is a matter upon which there seems to be some conflict of opinion. Perhaps the best rule would make, Crawford continues, the nature of constructing the saving clause depend upon the nature of the statute involved for example whether it was remedial, penal, or procedural.

129. If the saving clause is a general one, that is, applicable to all repealing acts, it is merely declaratory of a rule of construction, notes Crawford. But whether they are general or not, they are regarded as much a part of every repealing act as if written therein. Nevertheless, they are, Crawford stresses, subject to repeal by subsequent acts; that is, they will not save from repeal any provision whose repeal is clearly intended by the legislature by the later act. To hold otherwise would abridge or limit the legislative power of the various late legislatures, by the enactment of irrepealable legislation.

130. A saving, to me, is a device that preserves accrued,

acquired rights and incurred liabilities under a statute that no longer exists. If the new statute that repeals an old one contains no saving clause, General Clauses Act steps in; Section 6 plays the role of a protector of the rights and liabilities under the repealed act.

131. Here I must observe that Section 19 is not a saving clause; any saving clause starts to operate from the day the previous Act is dead. Here, the CA Act has allowed various enactments—those that contradict it—to coexist. Here, the repeal did not take place on 16.09.2016, when the CA Act came into force, but on 16.09.2017, when the one-year period ended. Saving Clause, in fact, if available, was needed from then on, not before. Indeed, Section 19 of the CA Act saves nothing beyond 16.09.2017.

132. Legislative power, to begin with, inheres in and vests with Parliament. If it is unitary, the division or demarcation of those powers does not arise; but in a federal polity, the Constitution usually demarcates the legislative boundaries. Thus, as to the division of legislative powers, Article 246 of our

Constitution holds the key.

Inherent Legislative Power:

133. Article 246 of the Constitution deals with the distribution of legislative powers. Under Clause (1) of that Article, Parliament has the exclusive power to make laws on any of the matters enumerated in List I (Union List) in the Seventh Schedule. Under Clause (2) both Parliament and the State Legislature have concurrent powers to make laws on any matter enumerated in List III (the Concurrent List) of the Seventh Schedule. But the State Legislature's power to legislate over the matters in the Concurrent List is subject to Parliament's power under the Union List. Then, of course, subject to Parliament's powers under List I and List III, the State Legislature has the exclusive power to make laws on any matter enumerated in List II (State List). Besides, under Article 245(4) of the Constitution, Parliament has the power on any matter for any part of the territory of India not included in a State.

134. The CA Act examined, we can notice that from

16.09.2016, Article 246 stood amended and modified in its operation; Article 246A was introduced. Section 2 of the CA Act signifies a drastic constitutional shift in the division of legislative powers: instead of division, it fosters amalgamation. Article 246A has no schedules.

135. And the scheme of the CA Act further examined, Entry 54 of List II stands substituted. So comes the assertion from the petitioners that Entry 54 abrogated (it is not, though), the States have been denuded of the power of taxation from 16.9.2016 on the items that stand deleted. For them, the interim or temporary continuation is only up to 16.09.2017, as per Section19 of the CA Act. They also argue that if the State wants to sustain "taxes under Entry 54, then there is no necessity to abrogate the erstwhile Entry 54 on 16.09.2016. Read otherwise, Section 19 would be rendered otiose, meaningless, and would have no significant purpose at all."

136. Unfortunately, the whole argument is sought to be erected on a slippery slope. There is no denudation of legislative power, no obliteration of Entry 54 of List II. An

entry's abrogation, as it were, would not *ipso facto* lead to the legislative denudation. I will elaborate on that, later.

137. Then follows from the petitioners the collateral attack: Section 173 is "merely a manifestation of the repeal of the laws under the Entries already occurred. It only excises and prunes out the dead matter." This assertion, too, must fail. The GST (Compensation to States) Act, recompenses the States; so, they argue, "no difficulty needs to be perceived by the State" on the financial front.

138. If we examine Section 173 of the KSGST Act, the State has amended a few taxing statutes that now stand affected by the CA Act. It has brought them in harmony with the Goods and Services Tax regime. On the other hand, Section 174 repealed and saved certain statutes. Let us see which have been amended and which repealed:

Amended U/S.173	Repealed through S.174
1. Kerala Value Added Tax Act, 2003	1. Kerala Value Added Tax Act, 2003
2. Kerala Finance Act, 2011	2. Kerala Tax on Entry of Goods into Local Areas Act, 1994
3. Kerala Finance Act, 2013	3. Kerala Tax on Luxuries Act, 1976
4. Kerala General Sales Tax Act, 1963	

5. Kerala Surcharge on Taxes Act, 1957 6. Kerala Panchayat Raj Act, 1994 7. Kerala Municipality Act, 1994	4. Kerala Tax on Paper Lotteries Act

139. We can see the KVAT Act, the focal enactment for our discussion, finds a place in the table on both sides: amendment and repeal. The same enactment could not have been amended and repealed simultaneously; if so it proves the idiom "have the cake and eat it too." We can either keep the cake or eat it; so is the case with the legislature: it can either amend an act or repeal it. For the amendment and repeal are mutually exclusive. Yet, paradoxical as it may sound, the distinction between amendment and repeal, notes Vepa P. Sarathi in his *Interpretation of Statutes*[49]

140. In fact, the KVAT Act stands repealed "except in respect of goods included in entry 54 of the State List of the Seventh Schedule to the Constitution, including the Goods to which the Kerala General Sales Tax Act, 1963" applies as per

[49] Eastern Book Company, 5th Ed., p.354

the KVAT Act.

141. Now, let us examine both Section 19 of the CA Act and Section 174 of the KSGST Act. Section 19 mandates that any inconsistent law relating to tax on goods and services in force in any State before 16.09.2016 (the commencement of the CA Act) shall continue to be in force "until amended or repealed by a competent Legislature or other competent authority". So the States were, first, required to amend the inconsistent laws to bring them in harmony with the CA Act. Otherwise, the States must repeal them. And they were given one year for achieving this. If the States do neither, those inconsistent acts stand repealed.

142. Here, the States acted; they amended a few inconsistent Acts. They also repealed a few more. As with the KVAT Act, the repeal, if it were, has not resulted in its abrogation or annihilation. So the operation of the so-called sunset clause (as provided in Section 19) has not denuded the State's power to enforce the KVAT Act in its amended form. The Act remained, with its remit reduced, though. Thus goes

out of reckoning the petitioners' another assertion: that with the repeal of the enactments, the procedural mechanism has disappeared. It has not. The prospectivity of the amendment undisputed, what remains to be examined is the State's power to save what had happened before the CA Act came into force or, more precisely, until one year after that Act came into force. Indeed, the CA Act allowed the State Acts in the same legislative field to coexist for one year: the window period.

143. So I must hold that Section 19 of the CA Act is—transitional as it may have been—a repealing clause simpliciter, not a saving clause. Nothing more. That job of saving is done by Section 174 of the KSGST Act. Well and truly. So the repeal has not, as Section 174 elaborates, affected "the previous operation of the amended Acts or repealed Acts and orders or anything duly done or suffered thereunder." In other words, the repeal has not affected "any right, privilege, obligation, or liability acquired, accrued or incurred under the amended Acts or repealed Acts or orders under such repealed or amended Acts." Nor has it affected "any tax, surcharge, penalty, fine,

interest as are due or may become due or any forfeiture or punishment incurred or inflicted in respect of any offence or violation committed against the provisions of the amended Acts or repealed Acts.

144. In other words, the repeal has not affected "any investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication, and any other legal proceedings or recovery arrears or remedy in respect of any such tax, surcharge, penalty, fine, interest, right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, inquiry, verification (including scrutiny and audit), assessment proceedings, adjudication and other legal proceedings or recovery of arrears or remedy may be instituted, continued or enforced, and any such tax, surcharge, penalty, fine, interest, forfeiture or punishment may be levied or imposed as if these Acts had not been so amended or repealed."

145. Collaterally it follows that all the judicial and quasi-judicial proceedings arising from the above contingencies, too,

stand saved.

146. Of course, in most cases, the question is, as the petitioners put it, whether Section 174 (2) (a) "revives" the KVAT Act, 2003 for the authorities to issue notices under that Act beyond 16.09.2017. The petitioners contend that revival presupposes the pre-existence of something valid. For them, the KVAT Act had ceased to operate completely on 16.09.2017. Legally it died that day, they assert. To support this contention, they have relied on *Ambalal Sarabhai Enterprises.*

147. *Ambalal Sarabhai Enterprises* examined, pending a tenancy dispute before a rent-control court, through amendment, its jurisdiction is taken away because of the changed threshold limit of the rent. Then, among other things, the Court had to answer these questions: (a) can a ground of eviction, say illegal subletting, be claimed by a landlord as a vested right? And (b) if "protection given to a tenant under the Rent Act is said to be not a vested right and if that protection is withdrawn, can a landlord claim any ground of eviction under the Rent Act to be his vested right?"

148. The Supreme Court, on facts, has first held that Section 6 of the General Clauses Act would apply. Second, as it is the landlord's accrued right, he can take advantage of sub-section (c) of Section 6. That sub-section, holds Ambalal Sarabhai Enterprises, refers to "any right", which need not be a vested right, but can be a mere accrued right. To be explicit, the words 'any right accrued' in Section 6(c) is wide enough to include landlord's right to evict a tenant in case proceeding was pending when repeal came in. I am afraid *Ambalal Sarabhai Enterprises* does not help the petitioners.

Statutory Changes: the Impact on Taxation–a Sovereign Power:

(a) Levy, Assessment, and Collection:

149. Time and again, Courts have held that tax imposition will encompass all the three elements: levy, assessment, and collection. A mere Legislation to tax cannot result in fructifying a tax imposition. In other words, for a tax to be imposed, it requires a taxable event to trigger the levy and a taxable person to discharge it.

150. Lord Dunedin pointed out in *Whitney v. Inland*

Revenue Commissioners[50] that there are three stages in the imposition of a tax: (1) there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. (2) Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularises the exact sum which a person liable has to pay. And (3) lastly comes the methods of recovery, if the person taxed does not voluntarily pay.

151. *Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors,*[51] approves of this view. Moreover, the Constitutional Bench endorses it in *Mathuram Agarwal v. State of MP*[52]. Section 17 of the CA Act has substituted Entry 54 with effect from16.09.2016, and Section 19, the petitioners argue, extended its transitional life by one year. That extended period ended on 15.09.2017. It is, therefore, mandatory for levy, assessment, and collection, the petitioners assert, to have been completed before 15.09.2017 for any VAT issues under the

50 [1926] A.C. 37
51 AIR 1985 SC 1041
52 (1999) 8 SCC 667

pre-GST regime in existence till 30.06.2017.

152. In *Somaiya Organics (India) Ltd. and Ors. vs. State of UP*[53], the case concerns U.P. Excise Act, 1910. The question to be considered was this: the vend fee, though levied under an appropriate state enactment, was not collected when that enactment was in force. It was prospectively declared ultra vires. Once the source of power disappeared, can the authorities collect the vend fee levied when the act was in force? The Supreme Court has held that the vend fee levied but not collected previously cannot be collected then.

153. In *Manattitillah Krishnan Thangal v. State of Kerala,*[54] this Court has held that the content of a valid law under Article 265 is that it should provide for the levy, assessment, and collection of tax. The words "levied or collected" in Article 265 are of comprehensive to include all the three stages in imposing a tax. The word 'levied" in Article 265 of the Constitution is therefore used to include the first two stages: the levy or the declaration of the liability and the

53 AIR 2001 SC 1723
54 AIR 1971 Ker 65 (FB)

assessment or the determination of the amount of the tax. The Full Bench relies on the dictum in *Raja Jagannath Baksh Singh v Sate of U.P.*[55].

> "If a taxing statute makes no specific provision about the machinery to recover tax and the procedure to make the assessment of the tax and leaves it entirely to the executive to devise such machinery as it thinks fit and to prescribe such procedure as appears to it to be fair, an occasion may arise for the Courts to consider whether the failure to provide for a machinery and to prescribe a procedure does not tend to make the imposition of the tax an unreasonable restriction within the meaning of Article 19(5). An imposition of tax which in the absence of prescribed machinery and the prescribed procedure would partake of the character of a purely administrative affair can, in a proper sense, be challenged as contravening Article 19(1) (f)."

154.In *Supreme-Court-Advocates-on-Record Association v. Union of India*[56], a Constitution Bench of the Supreme Court has held that the word substitution necessarily or always connotes two severable steps, that is to say, one of repeal and another of a fresh enactment even if it implies two steps. Indeed, the natural meaning of the word substitution is to indicate that the process cannot be split up into two pieces like this. If the process described as substitution fails, it is totally

55 || AIR 1962 SC 1563
56 || (2016) 5 SCC 1

ineffective to leave intact what was sought to be displaced. That seems to be the ordinary and natural meaning of the words shall be substituted.

155. On facts, the Court has held that there is no intention to repeal without a substitution was deducible. In other words, there could be no repeal if substitution failed. The two were part and parcel of a single indivisible process and not bits of a disjointed operation.

156. The Court also observes that repeal is not a matter of mere form but one of substance, depending upon the intention of the Legislature. If the intention, indicated expressly or by necessary implication in the subsequent statute, were to abrogate or wipe off the former enactment, wholly or in part, then it would be a case of total or *pro tanto* repeal. On the other hand, if the intention were merely to modify the former enactment by engrafting an exception or granting an exemption, or by super-adding conditions, or by restricting, intercepting or suspending its operation, such modification would not amount to repeal.

157. Because of Art. 265, if every tax has to be imposed by "law" it would appear, observes the Supreme Court in *Chhotabhai Jethabhai Patel & Co. v. Union of India*[57], to follow that it could only be imposed by a law which is valid. The law should be (1) within the legislative competence of the legislature; (2) the law should not be prohibited by any particular provision of the Constitution such as, for example, Arts. 276(2), 286 and so on; and (3) the law or its relevant portion should not be invalid under Art.13 being repugnant to those freedoms which are guaranteed by Part III of the Constitution.

158. In *Commissioner of Income Tax, Bhopal vs. Shelly Products*[58], the Tribunal nullified the assessment orders on the ground of jurisdiction. On facts, it was found that the authorities could not frame a fresh assessment. Then the question was whether the respondents could have the refund of income tax paid by them by way of advance tax and self-assessment tax. The Court, first, has held that liability to pay

57[ii] AIR 1962 SC 1006
58[ii] (2003)5SCC 461

income-tax does not depend on the assessment being made. As soon as the Finance Act prescribes the rate or rates for any assessment year, the liability to pay the tax arises. It has, then, observed that in the face of a nullified assessment if the assessing authority cannot make a fresh assessment in accordance with the law, it amounts to deemed acceptance of the assessee's return of income. In such a case, the assessing authority is denuded of its authority to verify the correctness and completeness of the return. Even if the tax paid is found to be less than that payable, no further demand can be made for recovery of the balance amount since a fresh assessment is barred.

159. To sum up, for any tax to be imposed, it requires a taxable event triggering the levy and a taxable person to discharge it. So the petitioners contend that the levy, assessment, and collection must have been completed before 15.09.2017 under any tax regime which has been "subsumed" by the GST regime. Then, the question is, have GST laws under the CA Act subsumed all the State tax enactments, which

earlier drew their legitimacy from the unamended Entry 54?

(b) Repeal and Omission:

160. Clause 17 of the Constitution (One Hundred and First Amendment) Act has omitted, the petitioners maintain, Entries 92, 92C of List I and Entries 52, 55of List II and substituted Entry 84 of List I and Entries 54 and 62 of List II.

161. In *Rayala Corporation (P) Ltd. and Ors., v. Director of Enforcement, New Delhi*[59], the Supreme Court has held that Section 6 only applies to repeals and not to omissions. Granted, *Rayala Corporation*, a Constitution Bench decision, has not elaborated on how "repeal" and "omission" differ, but it has, nevertheless, laid down the law that "repeal" differs from "omission" and Section 6 of the General Clauses Act would apply only for "repeal" and not "omissions". *Kolhapur Cane Sugar Works Ltd. v. Union of India*[60], another Constitution Bench decision, has followed *Rayala Corporation*. This decision, too, has elaborated on neither the semantic significance nor the supposedly distinct legal impact

59 (1969) 2 SCC 412
60 (2000) 2 SCC 536

of these two expressions.

162. But *Kolhapur Cane Sugar Works* stresses that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed. To this rule, an exception is engrafted by Section 6(1) of the General Clauses Act. If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position.

163. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. Sometimes, a particular provision in a statute may be omitted, and in its place another provision dealing with the same contingency is introduced. Moreover, that can be without a saving clause in favour of pending proceedings. Then, as can

reasonably be inferred, the legislative intention is that the pending proceedings shall not continue, but fresh proceedings for the same purpose may be initiated under the new provision.

164. Indeed, in *Shree Bhagwati Steel Rolling Mills v. CCE*[61], a two-Judge Bench though, has elaborated on not only on "deletion" and "omission" but also on "repeal". It has cited *Halsbury's Laws of England* the *Legal Thesaurus* (Deluxe Edition) by William C. Burton to unearth semantic distinctions, if any, of those expressions. Then, *Shree Bhagwati Steel Rolling Mills* has held that on a conjoint reading of the three expressions "delete", "omit", and "repeal", it becomes clear that "delete" and "omit" are used interchangeably, so that when the expression "repeal" refers to "delete" it would necessarily take within its ken an omission as well. It finds no substance in the argument that a "repeal" amounts to an obliteration from the very beginning, whereas an "omission" is only *in futuro*.

165. If the expression "delete" would amount, *Shree Bhagwati Steel Rolling Mills* further holds, to a "repeal", it is

61[ii] (2016) 3 SCC 643

clear that a conjoint reading of *Halsbury's Laws of England* and the *Legal Thesaurus* leads to the same result: an "omission", a form of repeal, is tantamount to a "deletion". Interpreting *Fibre Boards (P) Ltd. v. CIT*[62], in the statutory backdrop of Section 6-A of the General Clauses Act, *Shree Bhagwati Steel Rolling Mills* affirms that repeal would include repeal by way of an express omission. Indeed, it declares, after elaborating reasoning, that the observations in *Rayala Corporation* on "repeal" and "omission" are *obiter*.

166. The precedential force of all the decisions remains undisputed. That said, I must add, on facts, that the petitioners' contention that the State has lost legislative power to enact a saving clause—Section 174—in the KSGST Act does not stand the judicial gaze. That power preserved, the concept of repeal, the scope of Section 19 of the CA Act, and the relevance of Section 6 of the General Clauses Act or Section 4 of the Kerala Interpretation and General Clauses Act pale into insignificance, and any discussion, as we have already undertaken, turns out to be an academic exercise.

62 (2015) 10 SCC 333

Limitation:

167. The petitioners have argued that on the date when this first ever Show Cause Notice, dated 15.03.2018, under Section 8 (f) (iv), read with Section 25, of KVAT Act was issued, KSGST, 2017 had been in operation for almost six months. And the KVAT, 2003 stood expired.

168. The impugned Notices have been issued for the alleged assessment of the escaped turnover. Usually the notices, the petitioners have maintained, pertain to the AYs 2010-2011 and 2011-2012, but were issued in March 2018 and beyond. The time for an assessment under Section 25 is five years for the relevant assessment years; so the notices are barred by time. Section 42(3) of the KVAT Act, according to them, does not save the limitation under Section 25 of the Act. They have also contended that composite notices are illegal and impermissible.

169. To sustain their plea, the petitioners, among other things, have argued that on the assessees' filing the returns under Section 20, the assessment stands completed on "the self-assessment" basis, by the mandate of Section 21. Therefore, the

assessments are deemed to have been completed.

170. The authorities had done nothing, the petitioners have asserted, before the repeal or at any time after 16.09.2016, to assess the petitioners; no proceedings were initiated to claim that they "proceeded to determine" the turnover. Nor were any proceedings pending when the repeal was effected. Hence nothing remains saved. The mere right, they conclude, to conduct an assessment is not a vested or an accrued right. They have cited a few authorities to support these contentions.

171. To summarise, they have argued thus:

(a) The Constitution Amendment Act is in itself an amending act as well as a repealing enactment. Of that Act, Section 19 is the transitional provision, as also the saving one. But Article 367 does not apply because repealing enactment itself specifically provides for transition and savings. Only in the absence of the repeal or saving, is the General Clauses is attracted; here the General Clauses Act does not apply;

(b) Article 367 does not apply to constitutional amendments; the General Clauses Act is only for understanding and for interpreting words not defined and specifically available in the Constitution including

Article 366 (12);

(c) Specific repeal and saving under KSGST and also the application of the General Clauses Act as per S.174 (3) is self-contradicting. In any view, S.174 (2) and 174 (3) are by themselves self-contradicting;

(d) Section 24 of the General Clauses Act is the saving of subordinate legislation and applies when there are repeal and re-enactment. The present is not a case of repeal and re-enactment. So Section 24 is not attracted. In other words, machinery provisions are not saved. Then, there can be no tax without machinery provisions.

Fallacy:

172. Indeed, on most counts, the petitioners' assertions can be accepted. Done so, does that mean the adjudication results or stands resolved in their favour?

173. Section 6 of the General Clauses Act does not apply to sunset clauses or temporary statutes. Agreed. Repeal and Omission are different. They are not. Then, Section 6 applies only to repeal, but not to omission. *Shree Bhagwati Steel Rolling Mills* dispels this myth. Yet, even if we accept it to be so, still that does not alter the outcome in any way.

174. First, we must acknowledge one thing: none of the

provisions repealed through the CA Act is central legislation. Each one is state legislation. And the General Clauses Act does not apply to the State Legislation. But, perhaps, Section 4 of the Kerala Interpretation and General Clauses Act could be roped in, if ever we need anything to be saved under a repealed enactment. We can, however, also accept here that neither act needs to be invoked.

175. Though the General Clauses Act applies to repeals, it does not apply to repeals occasioned by a Constitutional Amendment. This proposition, too, needs no contradiction.

178. What does Section 19 of the CA Act do? It repeals or omits, for instance, a congeries of state statutes. And, indeed, the whole Amendment Act is prospective. So these repealed state acts failed to survive beyond the date mentioned in Section 19. They perished. First, prospectively, no State Legislature could trifle with the constitutional mandate under the Amendment Act. But, prospective as the Amendment Act is, could the State have saved the causes and the consequences flowing from the past enactments—enactments once legitimate

and living.

176. We have found that the General Clauses Act is unavailable; and that is unavailable on more than on ground: (a) Omission; (b) repeal by a Constitutional Act; (c) the alternative theory of sunset clause, if it were; (d) the inapplicability of the General Clauses Act to the State enactments.

177. We have noted that the States could do nothing to affect the Constitutional Act prospectively. But could it have done–as it has actually done–anything in its legislative scope only to save the events of taxation that emanated from the repealed statutes to run their full course and culminate?

178. No aid forthcoming from Section 6 of the General Clauses Act, there could be no saving or transition beyond, to repeat, the date mentioned in Section 19. To have a saving clause of its own, the State Government needed legislative power. Does it have the power?

179. The petitioners argue that the CA Act has disrupted the federal demarcations; the State's legislative fields under

Entry 54 of the Second Schedule have been truncated. Thus, the State has no longer the power to legislate on the files that have been taken away from it. Have the State's legislative power on the items once available for it under the Entry 52 taken away? We will see.

180. First, the State's legislative powers have not been taken away; they have been, on the contrary, constitutionally permitted to be shared with the Union Government. What is gone is the State's exclusivity. To the legislative fields of exclusivity and concurrency, what has been added is the simultaneity—novel as it may sound.

181. To encapsulate, I may observe that all the petitioners have advanced one common argument: the State has been denuded of its legislative power to enact Section 174 of the Kerala State Goods and Services Act, 2017. The obvious prop for this assertion comes from the 101st Constitutional Amendment—that is, the attenuated or modified Entry 54 of the List II, the State List.

182. All the petitioners contend that the KSGST Act

came into being because of the Constitutional Amendment. And that very Constitutional Amendment has put paid to many other enactments—for example, the Kerala Value Added Tax Act, 2003. So with the Entry 54 of List II unavailable for the State to incorporate Section 174 of the KSGST Act, the whole saving mechanism *vis-à-vis* transactions before 16.09.2017 crumbles.

183. I am afraid it is a fallacy on the petitioners' part to contend that the State lacks the legislative power to enact Section 174 of the KSGST Act. Article 246A is the special provision (if it can be called a provision) on the Goods and Services Tax. It empowers, as rightly contended by the learned Senior Counsel Shri Venkataraman, both the Union and the State, for the first time, to have simultaneous—not concurrent—powers to legislate on certain items. Indeed, concurrency yields to the doctrine of repugnancy, but simultaneous legislative power does not. That is, both the legislatures, say one from the Union and the other from the State, coexist—operate in the same sphere subject to other constitutional safeguards.

184. In *Synthetics and Chemicals Ltd.,* the Supreme Court has held that the power to legislate does not flow from a single Article of the Constitution. To articulate this assertion and to elaborate on it, *Bimolangshu Roy* observes that besides the declaration in Article 246, there are various other Articles in the Constitution which confer authority on the Parliament or on a State legislature to legislate, under various circumstances.

185. Indeed the State legislatures are assigned only specified fields of legislation, the residuary legislative powers lying with the Parliament. But taxing entries are distinct from the general entries. So comes a federal constitutional experiment in the fiscal field: the 101st Constitutional Amendment.

186. Article 246 generally stipulates the competence of the Parliament and the state legislatures on the various fields of legislation. But Articles 249, 250 and 252 contain provisions which enable the Parliament to legislate on any matter enumerated in List II in the exigencies specified in those

Articles. The Scheme of Entries, such as 52 and 54 and the corresponding Entries in the List-II, *Bimolangshu Roy* underlines, is nothing but another instance of special arrangement akin to the one made in Articles 249, 250 and 252. To conclude, *Bimolangshu Roy* reminds us that a great deal of schematic examination of the entire Constitution is essential for us to interpret each Entry in the three Lists of the Seventh Schedule. And no Rule with a universal application on interpreting all entries in the 7th Schedule can be postulated.

187. So I reject the petitioners' plea that the State lacks the vires to engraft Section 174 into Kerala State Goods and Services Act, 2017. I have already rejected as inapplicable the petitioners' other propositions: the survival of the sunset clause, the impact of a temporary statute, and inapplicability of Section 6 of the General Clause Act *vis-à-vis* a repealed enactment. They need neither repetition nor reiteration.

Result:

188. I find no merit in the writ petitions; accordingly, I dismiss all the writ petitions.

189. Yet I clarify: In all these writ petitions various issues arise—constitutionality is only one of them. Even a single issue has many shades of a challenge. I have touched none save the constitutional question. And I answered that in the negative. All other issues—including limitation—untouched. After all, the limitation is a mixed question of fact and law. I reckon, in that context, that the petitioners have efficacious alternative remedies under the relevant statutes.

190. Granted, the petitioners have *bona fide* pursued these writ petitions; so, now, in a few cases, the petitioners may face the question of limitation. To adjust equities, I observe that if any petitioner approaches a statutory authority on an issue arising out of a writ petition which now stands disposed of in this batch, the authority will exclude for limitation the period it has spent before this Court.

191. If any petitioner files a statutory appeal or takes out any other legally sustainable proceedings against the orders under challenge within 30 days after its receiving a copy of the judgment, the statutory authority will entertain the appeal or

the proceedings as having been filed in time. And to enable the petitioners to approach the appellate authorities, the Department will defer coercive steps by thirty days, from the date of their receiving a copy of the judgment. If the appeals involve limitation, the assessee concerned may place before the appellate authority all its defences, including the judgment of this Court in W.A.No.230 of 2017.

192. In the cases of mere notices which ought to be replied to, the petitioners will have 15 days to do so. The 15 days' time, too, must be reckoned from the day the petitioners received a copy of the judgment.

No order on costs.

Sd/-

DAMA SESHADRI NAIDU

JUDGE