IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P.(T) No. 7806 of 2011

Tata Motors Ltd, Jamshedpur, East Singhbhum. ….. … Petitioner

Versus

1. The State of Jharkhand, through the Secretary-cum-Commissioner of Commercial Taxes, Jharkhand, Ranchi.
2. The Secretary-cum-Commissioner of Commercial Taxes, Jharkhand, Ranchi.
3. Deputy Commissioner of Commercial Taxes, Jamshedpur Circle, Jamshedpur, East Singhbhum. ….. Respondents

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For the Petitioner-Company : M/s Sumeet Gadodia, Shilip Sandil & Ranjeet Kushwaha, Advocates

For the Respondent-State : M/s Atanu Banerjee, S.C.-III. Miss Piyushita Meha Tudu & Miss Pooja Kumari, A.Cs. to S.C.-III.

CORAM : HON'BLE MR. JUSTICE H. C. MISHRA
: HON'BLE MR. JUSTICE DEEPAK ROSHAN

C.A.V. on 04.03.2020. **Pronounced on 19.03.2020**

H.C. Mishra, J.:- Heard learned counsel for the petitioner Company and learned counsel for the State.

2. In the present writ application, the challenge is to the *vires* of Section 9 (5) of the Jharkhand Value Added Tax Act, 2005, (hereinafter referred to as 'JVAT Act'), which was subsequently brought, by way of amendment, made in the year 2011. Retrospective effect given to this provision with effect from 1.4.2010, is also under challenge in the present writ application.

3. The petitioner Company is the manufacturer and seller of heavy and medium commercial vehicles and its spare parts and accessories. The Company is registered, under the provisions of 'JVAT Act' and is, admittedly, liable to pay VAT on its turnover. The Company, in normal course of its business, allowed trade discounts, both in form of free supply of goods as well as providing cash incentives, or reduction in price to its purchasers, which is a target based discount, i.e., such discounts and incentives are allowed only upon achieving a particular target of sale and, accordingly, such incentives and discounts are normally accounted for at

the end of the financial year. Similarly, the petitioner Company also received trade discounts and incentives in respect of the raw materials, purchased by it, in the similar manner.

4. Admittedly, prior to bringing in Section 9(5) in the Statute Book, the petitioner Company was not liable to pay any VAT on the trade discounts / incentives, but pursuant to bringing in Section 9(5) in JVAT Act, the petitioner has become liable to pay the tax on the said trade discounts and incentives as well. In the present writ application, the levy of VAT on such trade discounts / incentives in any particular assessment order, is not under challenge, but the petitioner Company has challenged the amendment in the JVAT Act, being *ultra vires* and unconstitutional, stating that the assessment orders after the year 2011, are under challenge and pending before the appellate / revisional authorities, and these appeals / revisions shall be dependent upon the result of this writ application, as the appellate / revisional authorities cannot look into the challenge to the *vires* of the JVAT Act.

5. Section 9 of the JVAT Act speaks of levy of tax on sale and determination of taxable turnover. Thus, it is not in dispute that the VAT is chargeable on the transactions, which come within the meaning of the sale, defined in the Sale of Goods Act, 1930, or under Article 366(29-A) of the Constitution of India. By bringing sub-Section (5) of Section 9 in the JVAT Act, by the Jharkhand Value Added Tax (Amendment) Ordinance, 2011, what has been purported to be done, is that the trade discounts / incentives, which earlier, were not being treated as sales either under the Sale of Goods Act, or under Article 366(29-A) of the Constitution of India, and thus were not taxable under the JVAT Act, were brought within the purview of sale by a deeming fiction, stating that such trade discounts / incentives shall be deemed to be sale by the dealer.

6. In order to appreciate the questions raised in this writ application, it would be appropriate to go through Section 9(5) of the JVAT Act, as also to go through the definitions of "Sale", "Purchase", “Sale price” as given in the JVAT Act, as also the definition of "Sale and agreement to sell" as given in Section-4 of the Sale of Goods Act, and the definition of "Tax on the sale or purchase of goods", defined under Article-366(29A) of the Constitution of India.

7. Section 9(5) of the JVAT Act reads as follows:-

> *"**9. Levy if Tax on Sale and Determination of Taxable Turnover. -***
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> *(5) Notwithstanding anything contained in this Act where a registered dealer allows any trade discount or incentive whether in terms of quantity in goods or otherwise in relation to any sale effected by him, the quantity so allowed as trade discount or incentive, **shall be deemed to be a sale by the dealer**, who allows such trade discount or incentive and **a purchase by the dealer who receives such trade discount or incentive** and such sale shall form part of the sale in relation to which such trade discount or incentive is allowed."*
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> (Emphasis is ours).

The terms "Sale", "purchase" and "Sale price" are defined under Sections 2(xlvii) and 2(xlviii) of the JVAT Act, relevant portions of which read as follows:-

> *"(xlvii) "Sale" with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or deferred payment or other valuable consideration but does not include a mortgage or hypothecation of or a charge or pledge on goods, and the words "sell", "buy" and "purchase", with all their grammatical variations and cognate expressions, shall be construed accordingly and includes -*
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> *(a) transfer of property in any goods, otherwise than in pursuance of a contract;*
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> *(b) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;*
>
> *(c) delivery of goods on hire purchase or any other system of payment by installments;*
>
> *(d) a transfer of the right to use any goods for any purpose, whether or not for specified period, for cash, deferred payment or any other valuable consideration;*
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> *(e) supply of goods made by a society, trust, club or association, whether incorporated or not, to its members or otherwise;*
>
> *(f) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is made or given for cash, deferred payment or other valuable consideration;*
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> *(g) a sale within the State includes a sale determined to be inside the State in accordance with the principles*

formulated in Section 4 of the Central Sales Tax Act, 1956;

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply, and all grammatical variations and cognate expression shall be construed accordingly;

and 'purchase' means such acquisition of property in goods or purchase of those goods by the person to whom such transfer, delivery or supply is made.

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(xlviii) "Sale Price" means the amount payable to a dealer as valuable consideration in respect of the sale or supply of goods, and shall not include tax paid or payable under this Act, by a person in respect of such sales.

Explanation I – ----------.

Explanation II – ----------.

Explanation III – Sale price shall not include the cash discount, if shown separately; and allowed by the dealer in the ordinary course of trade practice. It shall also not include the cost for transport of the goods from the seller to the buyer, provided such cost is separately charged to the buyer.

Explanation IV – ----------."

The Sale of Goods Act, 1930 defines "Sale and agreement to sell" in Section-4 of the Act as follows:-

"4. Sale and agreement to sell.—*(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.*

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

Article 366(29A) of the Constitution of India defines "tax on the sale or purchase of goods" as follows:-

"(29A) "tax on the sale or purchase of goods" includes—

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

8. Learned counsel for the petitioner Company, challenging the legislative competence of the State Legislature, in bringing Section 9(5) in the JVAT Act, has submitted that under Entry 54 of List-II of Seventh Schedule of the Constitution of India, the State Legislature is empowered to make law, for levying taxes on the sale or purchase of goods, other than newspapers, subject to the provisions of Entry 92 A of List I, but the State Legislature is not empowered to make any addition in the list of taxable sales or purchase as given under Article 366(29A) of the Constitution of India, so as to treat any transaction as sale or purchase by a deeming fiction, which actually was not a sale or purchase. Learned counsel has submitted that in this connection law is well settled by the Hon'ble Apex Court, in **State of Madras Vs. Gannon Dunkerley & Co., (Madras) Ltd.**, reported in *AIR 1958 SC 560*, wherein where, an enactment made by the State of Madras was challenged, as it expanded the definition of sale given in Section 2(h) of the Madras General Sales Tax Act, 1939, to include "a transfer of property in goods involved in execution of the works contract", which by that time was not a sale within the meaning "sale of goods" as defined in Entry-48, List-II of the Seventh Schedule to the Government of India Act, 1935. The question before the Hon'ble Apex

Court was whether the said provision of the Madras General Sales Tax Act was *ultra vires,* in so far as it sought to impose a tax on the supply of materials, in execution of the works contract, treating it as a sale of goods by the contractor. The Hon'ble Apex Court held that the answer to the question depended on the meanings of the words "sale of goods" in Entry-48, List-II of Schedule-VII to the Government of India Act, 1935, as it then existed.

9. The law laid down by the Hon'ble Apex Court in the said case has been beautifully explained in a subsequent decision by the Hon'ble Apex Court in **State of Rajasthan and Anr. Vs. Rajasthan Chemists Association**, reported in *(2006) 6 SCC 773,* in the following terms:-

> *"14. State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. is another decision which needs to be noted. A Constitution Bench of this Court considered the construction of Entry 48 in List II of the Seventh Schedule of the 1935 Act. "Taxes on the sale of goods" is in pari materia with Entry 54 in List II of Schedule VII of the Constitution. The case arose under the Madras General Sales Tax Act, 1939 as amended by the Madras General Sales Tax (Amendment) Act, 1947. The definition of "sale" in Section 2(h) was enlarged so as to include "a transfer of property in goods involved in execution of the works contract". By creating a legal fiction, it was deemed that in execution of a work, property in the goods involved in the works contract is transferred as goods so as to include value (not the price) of such goods as part of taxable turnover.*
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> *15. After referring to the definition of the expression "sale of goods" from the times of Roman law and the law in England, this Court (at SCR pp. 396-97) culled out and approved the following principle stated in Benjamin's book Sale of Goods:*
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> *"Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements viz.*
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> *(1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised."*
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> *16. On the aforesaid premises, the Court on considering the Indian law and after referring to Section 77 of the Contract Act (before enactment of the Sale of Goods Act), defining sale as originally enacted in it, and the provisions of the Sales Act reached the following conclusions about price as an essential element: (Gannon Dunkerley case, SCR p. 398)*

"[T]hat it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale."

17. The following conclusions were arrived at approving the view in Budh Prakash case: (Gannon Dunkerley case, SCR pp. 407-08 & 413)

"A power to enact a law with respect to tax on sale of goods under Entry 48 must, to be intra vires, be one relating in fact to sale of goods, and accordingly, the Provincial Legislature cannot, in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales.

... 'sale' in Entry 48 must be construed as having the same meaning which it has in the Sale of Goods Act, 1930.

... It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter."

18. Summing up the conclusions it was held: (Gannon Dunkerley case, SCR p. 425)

"[T]he expression 'sale of goods' in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement."

19. The State Legislature does not have legislative competence to give the expression "sale of goods" extended meaning and to enlarge its legislative field to cover those transactions for taxing which do not properly conform to the elements of sale of goods within the Sales Act. Tax on value of the material used in construction of building was held to be ultra vires." (Emphasis supplied).

Placing reliance on **Gannon Dunkerley's** case *(supra),* the Hon'ble Apex Court has laid down the law as follows in **Rajasthan Chemists Association's** case *(supra)*:-

"28. The question of tax on sale of goods may be examined in the said background. The subject of tax being sale, measure of tax for the purpose of quantification must retain nexus with "sale" which is the subject of tax. As noticed above, tax on sale of goods, is tax on the vendor in respect of his sales and is substantially a tax on sale price. The vendor or buyer cannot be taxed dehors the subject of tax, that is, sale by the vendor or purchase by the buyer. The four essential ingredients of any transaction of sale of goods include the price of the goods sold, therefore, in any taxing event of sale, which become the subject-matter of tax price component of such sale, is an

essential part of the taxing event. Therefore, the question does arise whether a particular taxing event of sale could be subjected to tax at the prescribed rate to be measured with such price which is not the component of the transaction of sale, which has attracted the sales tax.

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41. These cases give a clear picture that Entry 54 in List II of the Seventh Schedule empowers the State Legislature to impose and collect taxes on sale of goods. The measure to which tax rate is to be applied must have a nexus to taxable event of sale and not divorced from it.

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44. In the context of the meaning assigned to the expression "sale of goods" or price or consideration element of such "sale of goods" as taxable event, the conclusion that can fairly be reached is that for the taxing event of sale, if the price is to be the basis for measuring tax, it must relate to actual transaction of sale that becomes the subject of tax and not to a different transaction that may take place in future at a price.

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53. By devising a methodology in the matter of levy of tax on sale of goods, law prohibits taxing of a transaction which is not a completed sale and also confines sale of goods to mean sale as defined under the Act. This cannot be overridden by devising a measure of tax which relates to an event which has not come into existence when tax is ex hypothesi determined, much less which can be said to be a completed sale and which cannot be the subject of legislation providing tax on "sale of goods" by transplanting a sum related to as "likely price" to be charged for subsequent sale to be taxed by the devise of measuring tax for the completed transaction which has become subject of tax."

(Emphasis supplied).

10. Learned counsel for the petitioner has also placed reliance upon the decision of the Hon'ble Apex Court, in **Bharat Sanchar Nigam Ltd. & Anr. Vs. Union of India & Ors.,** reported in *(2006) 3 SCC 1,* wherein also, the Hon'ble Apex Court has placed reliance upon the decision of **Gannon Dunkerley's** case *(supra),* to hold that the classical concept of sale was held to apply to the entry in the legislative list in that there had to be three essential components to constitute a transaction of sale, namely, (i) an agreement to transfer title, (ii) supported by consideration, and (iii) an actual transfer of title in the goods. It was also held that there was no sale in absence of any one of these elements. In the

said case, giving the brief history of Article 366(29A) of the Constitution of India, the law has been laid down by the Hon'ble Apex Court in the following terms:-

> *"39. The problem relating to the power of the States to levy tax on the sale of goods was then referred to the Law Commission by the Government of India. The Law Commission submitted its report in 1974 on a consideration of the scope of the levy of sales tax by the State Governments in respect of works contracts, hire-purchase transactions and also the transfer of controlled commodities by virtue of statutory orders. The Law Commission noted that these transactions resembled sales in substance and suggested three drafting devices for conferring the power of taxing these transactions on the States, viz.:*
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> *(a) amending the State List, Entry 54, or*
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> *(b) adding a fresh entry in the State List, or*
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> *(c) inserting in Article 366 a wide definition of "sale" so as to include works contracts.*
>
> *The Commission preferred the last alternative.*
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> *40. Recommendation (c) of the Law Commission to amend Article 366 by expanding the definition of sale to include the transactions negatived by the courts, was accepted by the Government. The Constitution (Forty-sixth Amendment) Bill, 1981 which was subsequently enacted as the Constitution (Forty-sixth Amendment) Act, 1982 set out the background in which the amendment to Article 366(29-A) of the Constitution was amended. Having noted the various decisions of the Supreme Court as well as of the High Courts excluding certain transactions from the scope of sale for the purpose of levy of sales tax, it was said that the position had resulted in scope for avoidance of tax in various ways. In the circumstances, it was considered desirable to put the matter beyond any doubt. Article 366 was therefore amended by inserting a definition of "tax on the sale or purchase of goods" in clause (29-A). ----------.*
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> *43. Gannon Dunkerley survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of "sale" for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of "deemed sales", the meaning of the word "goods" was not altered. Thus the definitions of the composite elements of a sale such as intention*

of the parties, goods, delivery, etc. would continue to be defined according to known legal connotations. This does not mean that the content of the concepts remain static. The courts must move with the times. But the Forty-sixth Amendment does not give a licence, for example, to assume that a transaction is a sale and then to look around for what could be the goods. The word "goods" has not been altered by the Forty-sixth Amendment. That ingredient of a sale continues to have the same definition. The second respect in which Gannon Dunkerley has survived is with reference to the dominant nature test to be applied to a composite transaction not covered by Article 366(29-A). Transactions which are mutant sales are limited to the clauses of Article 366(29-A). All other transactions would have to qualify as sales within the meaning of the Sales of Goods Act, 1930 for the purpose of levy of sales tax."

(Emphasis supplied).

11. Placing reliance on these decisions, it is submitted by learned counsel for the petitioner that the State Legislature, in its purported exercise of making law, for levying taxes on the sale or purchase of goods, cannot enact a law to give meaning of deemed sale to the transactions, which are not sales either under any of the clauses of Article 366(29 A) of the Constitution of India, or within the meaning of the Sales of Goods Act, for the purpose of levy of sales tax, by treating such transactions by deeming fiction. Learned counsel has submitted that by no stretch of imagination, in absence of the deeming fiction, as brought by sub-Section (5) of Section 9 in the JVAT Act, it can be said that the trade discounts / incentives, given by and received by the petitioner Company, could be treated as sales, inasmuch as, there was no transfer of consideration in so far as the trade discounts / incentives are concerned and, admittedly, prior to bringing Section 9(5) in the JVAT Act, by the amendment in the year 2011, such trade discounts / incentives were not subjected to taxation under the JVAT Act.

12. *Per contra,* learned counsel for the State has submitted that admittedly, the JVAT Act has come to an end in the year 2017 and it is no more in force after the GST regime. Learned counsel has submitted that the provisions of JVAT Act have automatically come to an end after coming into force of GST regime w.e.f. 01.07.2017, and there is no scope of any challenge to the *vires* of any provision of said Act, which is no more in force. In other words, it is submitted by learned counsel that there is no

scope of challenging the stale Act. It is further submitted by learned counsel for the State that in fact by bringing Section 9(5) of the JVAT Act, nothing new was brought within the purview of sales, which was not earlier the sale within the meaning of Article 366 (29A) of the Constitution of India. It is submitted by learned counsel that even in the cases of trade discounts / incentives, consideration must be deemed to have passed from the purchaser to the selling dealer, in form of the trade discount / incentive itself, given by the selling dealer. Learned counsel has tried to explain this by giving an example, that if in case of sale of any ten items, the selling dealer gives a trade discount, giving one more item to the purchaser free of cost, in that case, the consideration for 11th free item, is the sale of 10 other items to the purchaser. Learned counsel has, thus, submitted that since the trade discount / incentive is given in relation to the bulk sales made by the selling dealer to the purchaser, the consideration for that trade discount / incentive shall be deemed to be the bulk sale, and this interpretation satisfies all the four conditions of sale, as given in **Gannon Dunkerley's** case *(supra)*.

13. Learned counsel for the State has also submitted that it is a well settled principle of law that the laws, relating to economic activities should be viewed with greater latitude than the laws touching civil rights, and even if there are possibilities of abuse, that cannot in itself be a ground for invalidating the legislation. In support of his contention learned counsel has placed reliance upon the decision of the Hon'ble Apex Court in **R.K. Garg Vs. Union of India & Ors.**, reported in *(1981) 4 SCC 675*. It is pointed out by learned counsel that in the said case, the question was relating to the constitutional validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981, which was promulgated by the President of India "to provide for certain immunities to holders of Special Bearer Bonds, 1991 and for certain exemptions from direct taxes in relation to such Bonds and the matters connected therewith". It is submitted by learned counsel that even though, the ordinance was brought in order to help the persons making black money and evasion of tax, but the majority view that was taken by the Hon'ble Apex Court is as follows:-

> *"8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion*

etc. It has been said by no less a person than Holmes, J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud where Frankfurter, J., said in his inimitable style:

> *"In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events — self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability."*

The Court must always remember that "legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry"; "that exact wisdom and nice adaption of remedy are not always possible" and that "judgment is largely a prophecy based on meagre and uninterpreted experience". Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot, as pointed out by the United States Supreme Court in Secretary of Agriculture v. Central Roig Refining Company be converted into tribunals for relief from such crudities and inequities. There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience,

distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

14. Learned counsel for the State has further placed reliance upon the decision of the Hon'ble Apex Court in **Government of Andhra Pradesh & Ors. Vs. P. Laxmi Devi**, reported in *(2008) 4 SCC 720*, wherein where, the constitutionality of Section 47-A of the Indian Stamp Act, as amended by the A. P. Act 8 Act of 1998, was under challenge, the law has been laid down by the Hon'ble Apex Court as follows:-

"39. The court is, therefore, faced with a grave problem. On the one hand, it is well settled since Marbury v. Madison that the Constitution is the fundamental law of the land and must prevail over the ordinary statute in case of conflict, on the other hand the court must not seek an unnecessary confrontation with the legislature, particularly since the legislature consists of representatives democratically elected by the people.

40. The court must always remember that invalidating a statute is a grave step, and must therefore be taken in very rare and exceptional circumstances.

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42. The solution to this problem was provided in the classic essay of Prof. James Bradley Thayer, Professor of Law of Harvard University entitled The Origin and Scope of the American Doctrine of Constitutional Law which was published in Harvard Law Review in 1893. In this article, Professor Thayer wrote that judicial review is strictly judicial and thus quite different from the policy-making functions of the executive and legislative branches. In performing their duties, he said, judges must take care not to intrude upon the domain of the other branches of the Government. Full and free play must be permitted to that wide margin of considerations which address

themselves only to the practical judgment of a legislative body. Thus, for Thayer, legislation could be held unconstitutional only when those who have the right to make laws have not merely made a mistake (in the sense of apparently breaching a constitutional provision) but have made a very clear one, so clear that it is not open to rational question. ----------.

43. Thus, according to Prof. Thayer, a court can declare a statute to be unconstitutional not merely because it is possible to hold this view, but only when that is the only possible view not open to rational question. In other words, the court can declare a statute to be unconstitutional only when there can be no manner of doubt that it is flagrantly unconstitutional, and there is no way of avoiding such decision. The philosophy behind this view is that there is broad separation of powers under the Constitution, and the three organs of the State—the legislature, the executive and the judiciary, must respect each other and must not ordinarily encroach into each other's domain. Also the judiciary must realise that the legislature is a democratically elected body which expresses the will of the people, and in a democracy this will is not to be lightly frustrated or obstructed.

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46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if a State Legislature makes a law which only Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles). But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no manner of doubt that it violates a provision of the Constitution. If two views are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving a strained construction or narrowing down its scope vide Rt. Rev. Msgr. Mark Netto v. State of Kerala SCC para 6 : AIR para 6. Also, it is none of the concern of the court whether the legislation in its opinion is wise or unwise.

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67. Hence if two views are possible, one making the provision in the statute constitutional, and the other making it

unconstitutional, the former should be preferred vide Kedar Nath Singh v. State of Bihar. ----------.

68. The court must, therefore, make every effort to uphold the constitutional validity of a statute, even if that requires giving the statutory provision a strained meaning, or narrower or wider meaning, than what appears on the face of it. It is only when all efforts to do so fail should the court declare a statute to be unconstitutional.

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73. All decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State must therefore be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the court should not, unless compelled by the statute or by the Constitution, encroach into this field, or invalidate such law."

15. Learned counsel for the State has also placed reliance upon the decision of Hon'ble Apex Court in **Mafatlal Industries Limited & Ors. Vs. Union of India and Ors**., reported in *(1997) 5 SCC 536*, wherein it is held that in the matter of Taxation Laws, the Court permits great latitude to the discretion of the Legislature.

16. Learned counsel for the State has also submitted that in the present case only apprehending danger is challenged, inasmuch as, no assessment order is under challenge by the writ petitioners, whereby, their transactions, relating to trade discounts / incentives have been treated as sale. It is also submitted by learned counsel for the State that judicial review is not available to a stage prior to making of a decision, only on the ground of *quia timet* action. In support of his contention, learned counsel has placed reliance upon the decision of the Hon'ble Apex Court in **Keisham Meghachandra Singh Vs. Hon'ble Speaker Manipur Legislative Assembly and Ors.,** reported in *2020 SCC OnLine SC 55*.

17. Learned counsel for the State lastly pointed out that in the State of Kerala also, same provision was brought, in Kerala VAT Act, by Section 7, which reads as follows:-

"7. Trade discount etc. deemed to be sale in certain cases.- *Notwithstanding anything contained in any other provisions of this Act, where a dealer allows any trade discount or incentive in terms of quality in goods in relation to any sale effected by him, the quantity so allowed as trade discount or incentive,*

> ***shall be deemed to be a sale by the dealer****, who allows such trade discount or incentive* ***and a purchase by the dealer who receives such trade discount or incentive*** *and such sale shall form part of the sale in relation to which such trade discount or incentive is allowed."* (Emphasis is ours).

18. It is submitted by learned counsel that though the provision was challenged before the Kerala High Court, but the same was not entertained in **M/s Gulf Oil Lubricants India Limited Vs. Commissioner of Commercial Taxes, Thiruvananthpuram & Anr.,** [*(W.P.(C) No. 28594 of 2016 (Y),* decided on 25th of November, 2016].

19. Placing reliance on these decisions, learned counsel has submitted firstly, that nothing new has been brought in, by way of amendment, by bringing sub-Section (5) in Section 9 of the JVAT Act, secondly, in the present case only apprehending danger is challenged, by the writ petitioners, and judicial review is not available only on the ground of *quia timet* action, and thirdly, in any event in the matters of economic concerns, the Court should not generally interfere, as the laws relating to economic activities should be viewed with greater latitude than laws touching civil rights, and the State must be left with wide latitude in devising ways and means of fiscal or regulatory measures.

20. In reply of the submissions of learned counsel for the State, it is submitted by learned counsel for the petitioner that Section 9(5) was brought in JVAT Act by the Ordinance promulgated in the year 2011, and the present writ application was also filed in the year 2011 itself, challenging the said provision. It is submitted that, thereafter, there are several assessment orders of the writ petitioner, in which, the tax have been levied by the authorities, even on the trade discounts and incentives given by the writ petitioner, which are under challenge before the appellate / revisional authorities and the result of such appeals / revisions would depend upon the result of this writ application, as the appellate / revisional authorities, cannot enter into the *vires* of the Act. It is further submitted by learned counsel that the law is well settled that even *quia timet* actions can be challenged, if the actions of the State are arbitrary and violative of the fundamental rights of the citizens. In this connection, learned counsel for the petitioner has placed reliance upon the decision of the Hon'ble Apex Court in **Tashi Delek Gaming Solutions Ltd. & Anr. Vs. State of**

Karnataka & Ors., reported in *(2006) 1 SCC 442*, wherein the law has been laid down as follows:-

> *"37. If the agent was to be prosecuted for violation of the term of the notification, he could challenge the validity thereof. A fortiori, a quia timet application would also be maintainable. A person must be held to have access to justice if his right in any manner whether to carry on business is infringed or there is a threat to his liberty. Access to justice is a human right."* (Emphasis supplied).

21. Learned counsel for the petitioner has also placed reliance upon the decision of the Hon'ble Apex Court in State of **State of M.P. & Anr. Vs. Bhilal Bhai**, reported in *AIR 1964 SC 1004*, wherein it was held as follows:-

> *"15. We see no reason to think that the High Courts have not got this power. If a right has been infringed — whether a fundamental right or a statutory right — and the aggrieved party comes to the court for enforcement of the right it will not be giving complete relief if the court merely declares the existence of such right or the fact that that existing right has been infringed. Where there has been only a threat to infringe the right, an order commanding the Government or other statutory authority not to take the action contemplated would be sufficient. It has been held by this Court that where there has been a threat only and the right has not been actually infringed an application under Article 226 would lie and the courts would give necessary relief by making an order in the nature of injunction. ----------."* (Emphasis supplied).

22. Learned counsel for the petitioner has also pointed out that the example given by the learned counsel for the State is fallacious, inasmuch as, the argument that the consideration of the 11th item which has given free as trade discount, on the sale of 10 items, the consideration of the free item shall be the 10 items sold, cannot be accepted for the simple reason that the tax is already realized on the sale of 10 items. The State Government cannot impose tax on those items again.

23. Having heard learned counsels for both the sides and upon going through the record, we find that the submission of learned counsel for the State that in the matters of economic concerns, the Court should not generally interfere, as the laws relating to economic activities should be viewed with greater latitude than laws touching civil rights, and the State

must be left with wide latitude in devising ways and means of fiscal or regulatory measures, does not apply in the present case, as in this case, the constitutionality of Section 9(5) of the JVAT Act and the legislative competence of State Legislature in bringing sub-Section (5) in Section 9 of the JVAT Act, is challenged, on the ground that the same is beyond the legislative competence of the State, as in garb of Entry-54 List-II of Seventh Schedule of the Constitution of India, any transaction could not be added in Article 366(29A) of the Constitution of India, treating the same to be sale by a deeming fiction, even though, it is not a sale, within the meaning of Sale of Goods Act, or does not fall within the Article 366(29A) of the Constitution of India. The law is well settled in this regard right from **Gannon Dunkerley's** case *(supra),* in the year 1959, to **Bharat Sanchar Nigam's** case *(supra),* and **Rajasthan Chemists Association's** case *(supra),* in the year 2006, wherein the Hon'ble Apex Court has dealt with the several earlier decisions and has come to the conclusion that in order to levy tax on sale, the transactions must fall within any of the clauses of Article 366 (29A) of the Constitution of India, or within the meaning of the Sales of Goods Act, for the purpose of levy of sales tax. In absence thereof, the Provincial Legislature cannot, in the purported exercise of its power to levy tax on sales or purchases of goods, tax even such transactions, which are not sales or purchases, by merely enacting that they shall be deemed to be sales or purchases by the dealers. It is now more than well settled that it is not within the legislative purview or competence of the State Legislature to treat the transactions as sale or purchase, by merely enacting that they shall be deemed to so, even if such transactions do not fall within the categories, explained in Article 366(29A) of the Constitution of India, which transactions could be taxed by the State Government.

24. In the present case, we find that the State Government has exceeded its legislative competence and has in that effort, treated the trade discounts / incentives as taxable transactions, treating them to be sale by a deeming fiction by bringing sub-Section (5) in Section 9 of the JVAT Act, and has thus sought to make such transactions taxable, which are in addition to the transactions described under Article 366(29A) of the Constitution of India, which the State Government could not do, and admittedly, prior to bringing of Section 9(5) of the JVAT Act, into the Statute Book, such transactions were never being subjected to tax under

the JVAT Act. In fact, Explanation III of Section 2(xlviii) of the JVAT Act, defining 'Sale price', clearly states that sale price shall not include the cash discount, if shown separately, and allowed by the dealer in the ordinary course of trade practice. In spite of the fact that JVAT Act is no more in force, after coming into force of the GST regime, but the fact remains that the transactions, during the JVAT regime, are claimed to be taxed after the amendment made in the year 2011, which were not subjected to any tax, prior to the amendment of the JVAT Act in the year 2011.

25. We are of the considered view that by bringing Section 9(5) in the JVAT Act into the Statute Book, the dealers have been put to a disadvantageous position, which was not there, prior to the amendment made in the year 2011, and this putting the dealers into a disadvantageous position was not within the legislative competence of the State Legislature. No doubt, had this amendment in the JVAT Act been within the legislative competence of the State Legislature, there was no scope of any interference therein by this Court. But this is a clear case where the State Legislature was not having the legislative competence to give the expression “sale of goods” an extended meaning and to enlarge its legislative field to cover those transactions for taxing, which did not properly conform to the elements of sale of goods within the Sales of goods Act, or under Article 366(29A) of the Constitution of India, and were not satisfying the four conditions of sale, as given in **Gannon Dunkerley’s** case *(supra)*.

26. Though it is well settled that this Court should not interfere into the fiscal legislations, and the laws, relating to economic activities should be viewed with greater latitude than the laws touching civil rights, and even if there are possibilities of abuse, that cannot in itself be a ground for invalidating the legislation, but since the State action is not within the competence of the State Legislature, this Court has no option, but to strike down the action of the State Legislature, which was beyond its legislative competence. Even the decision cited by learned counsel for the State, in **P. Laxmi Devi's** case *(supra),* supports this view in so many words, when it lays down as follows:-

> *"46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the Constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways e.g. if*

a State Legislature makes a law which only Parliament can make under List I to the Seventh Schedule, in which case it will violate Article 246(1) of the Constitution, or the law violates some specific provision of the Constitution (other than the directive principles) ----------."

27. We do not find any substance in the submission of learned counsel for the State that in the present case only apprehending danger is challenged, and judicial review is not available at the stage prior to making a decision, on the ground of *quia timet* action. The law relating to *quia timet* action, is also no more *res integra*, in view of the law laid down by the Apex Court in **Bhilal Bhai's** case *(supra),* and **Tashi Delek Gaming Solutions Ltd.'s** case *(supra),* holding that a *quia timet* application would be maintainable.

28. For the foregoing reasons, we find no difficulty in holding that Section 9(5) of the JVAT Act, brought into force by amendment in the JVAT Act in the year 2011, is beyond the legislative competence of the State Legislature, and the same is *ultra vires* Article 246(1) of the Constitution of India, and cannot be sustained in the eyes of law. Accordingly, sub-Section (5) of Section 9 of the JVAT Act, as it stood with effect from 1.4.2010 to 30.06.2017 in the Statute Book, is hereby, held to be *ultra vires,* and accordingly, it has to be treated as if never existing in the Statute Book.

29. In view of the fact that we have held Section 9(5) of the JVAT Act to be *ultra vires*, no question survives to decide the retrospectively of the said provision, giving its retrospective effect with effect from 1.4.2010. This question is thus, left undecided.

30. In view of the aforementioned discussions and the question of law as answered above, this writ application succeeds, and is accordingly, allowed.

(H.C. Mishra, J.)

Deepak Roshan, J.:- *I agree.*

(Deepak Roshan, J.)

Jharkhand High Court, Ranchi.
Dated the 19th of March, 2020.
NAFR/ ***Amitesh***/-