

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21st DAY OF NOVEMBER, 2019

BEFORE

THE HON'BLE MRS.JUSTICE S.SUJATHA

WRIT PETITION No.12927/2017 (GM -- KEB)

BETWEEN:

ACC LIMITED
REGISTERED OFFICE CEMENT HOUSE
121, MAHARSHI KARVE ROAD,
CHURCH GATE, MUMBAI-400020
BY ITS DIRECTOR – PLANT
AND POA HOLDER
Mr. AMITAV SINGH
BRANCH OFFICE
THONDEBHAVI CEMENT WORKS
MADHUGIRI ROAD,
THONDEBHAVI, GAURIBIDANUR
CHICKBALLAPUR DISTRICT-561 213
KARNATAKA.

... PETITIONER

[BY SMT.SHOBHA S. BHAVIKATTI, ADV.]

AND:

- 1 . THE STATE OF KARNATAKA
BY ITS SECRETARY
DEPARTMENT OF ENERGY
VIKAS SOUDHA
DR. B.R.AMBEDKAR VEEDHI,
BANGALORE - 560 001.
- 2 . BANGALORE ELECTRICITY
SUPPLY COMPANY LIMITED
A GOVERNMENT OF KARNATAKA UNDERTAKING
CORPORATE OFFICE 2ND FLOOR,
K.R.CIRCLE, BANGALORE - 560 001
BY ITS GENERAL MANAGER.

- 3 . THE ASSISTANT EXECUTIVE ENGINEER (AEE)
OFFICE OF THE ASSISTANT EXECUTIVE
ENGINEER ELE (COMMERCIAL O & M)
BESCOM, GAURIBIDANUR
CHICKBALLAPUR DISTRICT-561 213
KARNATAKA.

- 4 . INDIAN ENERGY EXCHANGE LIMITED
A COMPANY REGISTERED UNDER
THE PROVISIONS OF THE COMPANIES
ACT, 1956, HAVING ITS REGISTERED
OFFICE AT FOURTH FLOOR,
TDI CENTRE, PLOT NO.7,
JASOLA, NEW DELHI - 110 025
REP BY ITS MANAGING DIRECTOR. ...RESPONDENTS

[BY SRI NILOUFER AKBAR, AGA FOR R-1;
SRI S.SRIRANGA, ADV. FOR R-2 & R-3;
NOTICE TO R-4 IS DISPENSED WITH.]

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE SUB-SECTION 1 OF SECTION 3 AND SUB-SECTION (2) OF SECTION 3 OF THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) AMENDMENT ACT, 2013, AS UNCONSTITUTIONAL AND ULTRA-VIRES THE CONSTITUTION OF INDIA VIDE ANNEXURE-A BEARING NOTIFICATION DATED 11.03.2013.

THIS PETITION HAVING BEEN HEARD AND RESERVED, IS COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THE COURT PASSED THE FOLLOWING:

ORDER

The petitioner has sought for a writ of mandamus to declare that the 1st respondent has no authority to raise a fiscal demand i.e., electricity tax on ad valorem basis at 6% on the wheeled consumption procured from the respondent No.4 under the "Open Access" system.

2. The petitioner is a Limited Company incorporated under the Companies Act, 1956, having its registered office at Mumbai. The petitioner is carrying on the business of manufacturing of cement and ready mixed concrete with a countrywide network of factories and sales offices. The petitioner is having its Cement Grinding Works at Thondebhavi, Gauribidanur, Chikkabailapur in Karnataka.

3. It is contended that the petitioner is a consumer of the 3rd respondent company having its R.R.No.GRHT16 with the Electricity Tariff under

HT(a)(ii) i.e., High Tension and Extra High Tension. The Extra High Tension Lines are operated and maintained by the Karnataka Power Transmission Corporation Limited (KPTCL) a transmission licensee and State Transmission Utility (STU) in the State of Karnataka. The petitioner is also an Inter State Open Access Consumer sourcing electricity under the Inter State Open Access as per the provisions of the Electricity Act, 2003 and the CERC Regulations framed thereunder. In order to source power for a short term open access, the petitioner is permitted to use the transmission lines or associated facilities for such lines on inter-state transmission system to which an application with a nodal agency, Karnataka State Load Dispatch Centre has to be made in accordance with the regulations. Subsequent to the amendment to Section 3 (1) and (2) of the Karnataka Electricity (Taxation on Consumption) Act, 1959 by Act No.31 of 2013 the demand has been raised by the respondent No.3 levying electricity tax on

ad valorem basis at 6% for open access from April 2013 on the inter state transmission system. Being aggrieved the petitioner is before this court.

4. Learned counsel Smt. Shobha S. Bhavikatti appearing for the petitioner submitted that the levy of tax on 'Consumers' who have been supplied with energy under the 'Open Access' system is not justifiable. It was argued that the petitioner is not liable to pay tax on consumption of electricity imported by way of procurement by open access in view of Entry 92A, List I of VII schedule of the Constitution of India. Placing reliance on Article 286 of the Constitution, it was contended that no law of a State is empowered to impose a tax on the sale or purchase of goods where such sale or purchase takes place outside the State. The power conferred upon the State Legislature by virtue of Entry 53, List II, VII Schedule extends to taxation of sale/consumption of electricity within the

State. The petitioners are sourcing the power from the inter-state open access system and hence does not attract consumption or sale under the Act. Placing reliance on the judgment of the Hon'ble Apex Court in the case of **State of A.P. Vs. National Thermal Power Corporation Limited & others reported in (2002)5 SCC 203**, submitted that electricity being goods, taxes on the consumption or sale of electricity in terms of Entry 53 must be consumption/sale within the State and not beyond the territory of State. The inter state movement of the electricity pursuant to contract of sale is an inter state sale not exigible to levy of tax under the State law.

5. Learned counsel for the respondent Nos. 2 and 3 placing reliance on the Cognate Bench decision of this Court in **Vijaya Steels Limited Vs. Bangalore Electricity Supply Company Limited in W.P.No.14434 of 2016 and allied matters**

(D.D.4.10.2016) submitted that the amended Sub-sections (1) and (2) of Section 3 of the Act has been declared intra vires the Constitution. The electricity sourced by the petitioner has been consumed in the State of Karnataka, as such levy of tax being on consumption of electricity within the State of Karnataka, the same is justifiable.

6. I have carefully considered the rival submissions of the learned counsel for the parties and perused the material on record.

7. The issue involved herein is no more *res integra* in view of the Cognate Bench decision of this Court in **Vijaya Steels Limited**, supra, whereby it has been observed thus:

“20. In the light of the above discussion, it is pertinent to state that the action of the respondents is not arbitrary or illegal in not amending the 2013 Act or levying the tax on the consumption of electricity. The state is

empowered by Entries 53 and 54 of List II of VII Schedule. Since the Act has legislated well within the provisions of Constitution, it has to be held that it is constitutional and not ultra vires or illegal. What is levied is on the consumption of electricity but not for supply of electricity. No matter whether a person generates electricity on his own or takes it from outside the State through open access system, but levying of tax is on consumption. As is held by the Hon'ble Supreme Court in the case of ANDHRA PRADESH v. NATIONAL THERMAL POWER CORPORATION LTD. (supra), the moment electricity is generated it is to be consumed and it cannot be stored. The moment electricity is generated within the State or from outside the State, it is to be consumed and accordingly, the State is empowered to levy tax on consumption. In the said case, the Hon'ble Supreme Court has not laid down law in respect of consumption of electricity and on the other hand it has been held that the State is empowered to levy tax as per Entries 53 and 54 of the List II of VII Schedule of the Constitution. In view of the

foregoing reasons and provisions of the Constitution and the Act, these petitions are liable to be dismissed and are accordingly dismissed.”

8. Though the learned counsel made an attempt to distinguish the said judgment based on the ruling of the Hon'ble Apex Court in the case of National Thermal Power Corporation Limited, supra, the same cannot be appreciated for the reason that the levy of electricity tax is on the consumption. It is not in dispute that the electricity sourced by the petitioner is consumed in the State of Karnataka.

9. Amended Section 3(1) and (2) of the Act reads thus:

“(1) Subject to the provisions of the Act, there shall be levied and paid to the State Government electricity tax on ad valorem basis at six per cent on the charges payable on the electricity sold to or consumed by, any consumers (excluding arrears) when

*electricity is supplied by licensee or non-
licensee through licensee or otherwise;*

*Provided that when the consumers
electricity at concessional rate or free of
charge the consumer shall be liable to pay
on the rate of charges electricity levied by the
licensees to the other consumers*

Except

*(i) the consumer under agricultural (irrigation
pumpsets upto and inclusive of 10 horse
power)*

*(ii) Bhagya Jyoti and Kutira Jyoti categories
up to an extent of free consumption allowed
by the State Government from time to time;
and*

*(iii) The consumers covered under sub-section
(2). (2) Subject to the provisions of this Act,
there shall be levied and paid to the State
Government by every non-licensee electricity
tax on all the units of electricity consumed by
himself at such rates specified by the State
Government by notification from time to time*

but not exceeding the rates specified below, namely;-

(a) Electricity tax not exceeding 50 paise per unit on captive consumption;

(b) Electricity tax not exceeding 50 paise per unit on auxiliary consumption in a generating station whether captive generating plant or co-generation plant or otherwise for the auxiliary loads exceeding 50 kilo watts."

10. Under the Scheme of the Act, Section 3 is the charging section. Levy is on the charges of electricity sold to or consumed by any consumers (excluding arrears).

11. Entry 53 of list II of the VII Schedule to the Constitution reads thus:

"53. Taxes on the consumption or sale of electricity"

12. Entry 54 of the List II of VII Schedule to the Constitution reads thus:

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

13. Entry 92-A of list I is extracted hereunder for ready reference.

“ 92-A Taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade and commerce.”

14. Article 246 of the Constitution envisages that the parliament has the exclusive power to make laws with respect to any of the matters referred to in List I in the VII Schedule of the Constitution of India and the State Legislature has no authority/power to tax in any manner an inter-state sale.

15. Article 286 of the Constitution imposes restrictions for levy of tax on the sale or purchase of goods from outside the State.

16. Open access is defined under Section 2(47) of the Electricity Act, 2003 which reads as under:

“2(47) – “Open access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission.”

17. Considering the aforesaid provisions, the Hon'ble Apex Court in the case of **NTPCL** supra, in paragraphs 23 to 28 has held thus:

“23. With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is goods it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92A of

List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if electricity was not includible in the meaning of term 'goods'. A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it, such tax would not be deemed to be a tax necessarily on manufacture or production or a duty of excise, as held by Constitution Bench in Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh 1962 Supp.(1) SCR 282. A mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, the electricity being goods, shall also be subject to provisions of Entry 92A of List I. This, in our opinion, is the best way of reading the two

entries. In C.P. Motor Spirit Act re., AIR 1939 FC 131, it was held that two entries in the lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The Court should strive at searching for reasonable and practical construction to seek reconciliation and give effect to all of them. If reconciliation proves impossible the overriding power of Union Legislature operates and prevails. Gwyer, C.J. observed

"A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act."

And again he said,

"An endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying the language of the one by that of the other. If needed such a reconciliation should prove impossible, then and only then, will the non-obstante clause operate and the federal power prevail."

In Calcutta Gas Co. Ltd. Vs. The State of West Bengal & Ors., 1962 Supp (3) SCR 1, the Constitution Bench has held that the same rules of construction apply for the purpose of harmonizing an apparent conflict between two entries in the same list.

What is inter-State sale?

24. It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients:

(i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods;

(ii) the goods must actually move from one State to another, pursuant to such contract of sale; the sale being the proximate cause of movement; and

(iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and

necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element. Precedents are legion; we may briefly refer to some of them. In *English Electric Company of India Ltd. Vs. Deputy Commercial Tax Officer*, 1977 (1) SCR 631, this Court held that when the movement of the goods from one State to another is an incident of the contract it is a sale in the course of inter-State sale and it does not matter which is the State in which the property passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. In *Union of India Vs. K.G. Khosla and Co. Ltd.*, (1979) 2 SCC 242, it was observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. Similar view was expressed in *M/s. Sahney Steel and Press Works Ltd. and Anr. Vs. Commercial Tax Officer and Others* (1985) 4 SCC 173. In *Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales-tax, Jabalpur* 1976 (4) SCC 124, after referring to *Balabhagas Hulaschand Vs. State of Orissa*, (1976) 2 SCC 44, it was observed that so far as Section 3 (a) of the C.S.T. Act is concerned there is no distinction between unascertained or future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual existence.

Effect of Entry-53, List-II, having remained unamended

25. *Having seen the properties of electricity as goods and what is inter-State sale, let us examine the effect of Entry 53, List II, having been left unamended by Sixth Amendment from another angle. Sixth Amendment did not touch Entry 53 in List-II and so the contents of Entry 53 were not expressly made subject to the provisions of Entry 92 A of List I and arguments were advanced, with emphasis, on behalf of the States of Andhra Pradesh and Madhya Pradesh contending that such omission was deliberate and therefore the restriction which has been placed only in Entry 54 by making it subject to the provisions of Entry 92A of List I should not be read in Entry 53. It was submitted that so far as sale of electricity is concerned even if such sale takes place in the course of inter-State trade or commerce the State can legislate to tax such sale if the sale can be held to have taken place within the territory of that State or if adequate territorial nexus is established between the transaction and State legislation. For the several reasons stated hereinafter such a plea cannot be countenanced.*

26. *The prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in Seventh Schedule. After the decision of larger Bench in Bengal Immunity Company Limited (supra) and Constitution Bench decision in Ram Narain Sons Ltd. & Ors. Vs. Asst. Commissioner of Sales Tax & Ors., 1955 (2)*

SCR 483, there is no manner of doubt that the bans imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over before a State legislature can impose tax on transactions of sale or purchase of goods. Needless to say, such ban would operate by its own force and irrespective of the language in which an Entry in List-II of Seventh Schedule has been couched. The dimension given to field of legislation by the language of an Entry in List-II Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of State legislature to enact 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. It was held in *Tata Iron and Steel Co. Ltd. Bombay Vs. S.R. Sarkar and Ors.* - 1961 (1) SCR 379 (at pages 387 and 388) that field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. In *20th Century Finance Corporation Limited (supra)* the Constitution Bench (majority) made it clear that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce. In view of Section 3 of the Central Sales Tax, 1956 all that has to be seen is whether the sale or purchase (a) occasions the movement of goods from one State to another; or (b) is effected by a transfer of documents of title to

the goods during their movement from one State to another. If the transaction of sale satisfies any one of the two requirements it shall be deemed to be a sale or purchase of goods in the course of inter-State trade or commerce and by virtue of Articles 269 and 286 of the Constitution the same shall be beyond the legislative competence of a State to tax without regard to the fact whether such a prohibition is spelled out by the description of a legislative entry in Seventh Schedule or not.

*27. It is well settled, and hardly needs any authority to support the proposition, that several entries in the three lists of Seventh Schedule are legislative heads or fields of legislation and not the source of legislative empowerment. [To wit, see *The Calcutta Gas Co. Ltd. Vs. The State of West Bengal & Ors.* (supra)]. Competence to legislate has to be traced to the Constitution. The division of powers between Parliament and the State Legislatures to legislate by reference to territorial limits is defined by Article 245. The subject-matters with respect to which those powers can be exercised are enumerated in the several entries divided into three groups as three Lists of Seventh Schedule. Residuary powers of legislation are also vested by Article 248 in the Parliament with respect to any matter not enumerated in any of the lists in Seventh Schedule. This residuary power finds reflected in Entry 97 of List I. If an Entry does not spell out an exclusion from field of legislation discernible on its apparent reading, the absence of exclusion cannot be*

read as enabling power to legislate in the field not specifically excluded, more so, when there is available a specific provision in the Constitution prohibiting such legislation.

28. *It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extra territorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra territorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In *Burmah Shell Oil Storage & Distributing Co. India Ltd. (supra)*, which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer, i.e. the one who consumes. In Entry 53, 'sale for consumption' (the meaning which we have placed on the word 'sale') would mean a sale for consumption within the State so as to bring a State Legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated*

because of extra territorial operation of State legislation.”

18. In the case of **NTPCL**, the Hon'ble Apex Court while analyzing the levy of tax on the sale of electricity, in the context of the inter-state sale has considered the legislative power of the State to levy tax on inter-state sale, whereas the present set of facts deals with the consumption of electricity within the State. Indeed, such levy of tax on consumption within the State under Entry 53 is held to be valid. There is no cavil on the legal proposition that the inter-state movement of electricity in pursuant to contract of sale is an inter state sale. But the consumption of the electricity being the incidence of levy of tax in terms of the Act, the consumption made in the State of Karnataka is exigible to levy of tax notwithstanding the electricity sourced from outside the State of Karnataka as amended Section 3(1) of the Act empowers the levy of

tax on electricity “sold to” or “consumed by” any consumers.

19. In view of the constitutional validity of the amended Section 3(1) and 3(2) of the Act being upheld in **Vijaya Steels**, supra, the levy of tax on the consumption of electricity within the State is justifiable.

Hence, for the aforesaid reasons, the writ petition does not merit any consideration, accordingly stands dismissed.

**Sd/-
JUDGE**

Dvr: