PETITIONER:
HOECHST PHARMACEUTICALS LTD. AND ANOTHER ETC.

Vs.

RESPONDENT:
STATE OF BIHAR AND OTHERS

DATE OF JUDGMENT06/05/1983

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
VENKATARAMIAH, E.S. (J)
MISRA, R.B. (J)

CITATION:
1983 AIR 1019 1983 SCR (3) 130
1983 SCC (4) 45 1983 SCALE (1)723
CITATOR INFO :

R	1985 SC 12	(13)
RF	1986 SC1085	(14)
F	1987 SC 494	(6)
F	1988 SC 322	(4)
RF	1988 SC 329	(14)
RF	1988 SC1708	(24)
R	1990 SC1637	(21)
RF	1990 SC2072	(11,46)
R	1992 SC1310	(7)
RF	1992 SC2169	(15)

ACT:
Bihar Finance Act, 1981-Sub-ss. (I) and (3) of s. 5-Levy of surcharge on sales tax and prohibition from passing on liability thereof to purchasers- Whether void in terms of opening words of Art. 246(3)for being in conflict with Paragraph 21 of Drugs (Price Control) order, 1979 issued under s. 3(1) of Essential Commodities Act?-whether violative of Arts. 14 and 19(1) (g) ?- Whether it is an essential characteristic of Sales Tax that these seller must have right to pass it on to consumer 7-Whether classification of dealers on the basis of 'gross turnover' as defined in s. 2(j) invalid ?

Constitution of India-Art. 246-State Legislatures Power to make law with respect to matters enumerated in List 11-Whether subject to Parliaments power to make law in respect of matters enumerated in List 111 ?-Doctrine of 'pith and substance' and the principle of 'Federal Supremacy '.

Constitution of India-Art. 254(i)-Can repugnancy between a State law and a law made by Parliament arise outside the Concurrent field ?

Constitution of India-Arts. 200 and 201-Governor's decision to refer a Bill t o President-Whether subject to Court s scrutiny ?-'Assent of President '- Whether justiciable ?

HEADNOTE:
Sub-section (l) of s. S of the Bihar Finance Act, 1981 provides for the levy of a surcharge in addition to the tax payable, on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs and, sub-s. (3) thereof prohibits such a

dealer from collecting amount of surcharge payable by him from the purchaser. In exercise of the power conferred by this section, the State Government fixed the rate of surcharge at 10 per cent of the total amount of tax payable by a dealer.

Two of the appellants in this batch of appeals were companies engaged in the manufacture and sale of the medicines throughout India whose branches sales depots in Bihar were registered as dealers. Their products were sold through wholesale distributors/stockists appointed in almost all the districts of the Slate and their gross turnover within the State during the relevant period ran into crores of rupees. Most of the medicines and drugs sold by them were covered by the Drugs (Price Control) Order, 1919 issued under sub-s. (l) of

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s. 3 of the Essential Commodities Act in terms of which they were expressly prohibited from selling those medicines and drugs in excess of the controlled A price fixed by the Central Government from time to time but were allowed to pass on the liability to the consumer. During the assessment years 1980-81 and 1981-82 they had to pay the surcharge under s. 5(1) of the Bihar Finance Act, 1981 at 10 per cent of the tax payable by them.

The appellants challenged the Constitutional validity of sub-s. (3) of s. 5 but the same was repelled by the High Court relying on the decision in S. Kodar. v. State of Kerala, [1979]1 S.C.R. 121.

It was contended on behalf of the appellants: (i) that sub-s. (3) of s. S of the Act which is a State law relatable to Entry 54 of List 11 of the Seventh Schedule to the Constitution and which provides that no dealer shall be entitled to collect the surcharge levied on him is void in terms of the opening words of Art. 246(3) of the Constitution as it is in direct conflict with paragraph 21 of the Drugs (Price Control) order 1979, issued under sub-s. (1) of s. 3 of the essential Commodities Act, 1955 which is a Union Law relatable to Entry 33 of List III and which enables the manufacturer or producer of drugs to pass on the liability to pay sales tax to the consumer; (ii) that the words "a law Mads by Parliament which Parliament is competent to enact ' contained in Art. 254(1) must be construed to mean not only a law made by Parliament with respect to one of the matters enumerated in the Concurrent List but also to include a law made by Parliament with respect to any of the matters enumerated in the Union List and therefore sub-s. (3) of s. 5 of the Act being repugnant to Paragraph 21 of the Control order is void under Art. 254(iii) that if both sub-s. (1) and sub-s. (3) of s. 5 were relaxable to Entry 54 of List II, there was no need for the Governor to have referred the Bihar Finance Bill, 1981 to the President for his assent and that the President's assent is justiciable; (iv) that dealers of essential commodities who cannot raise their sale prices beyond the controlled price cannot be equated with other dealers who can raise their sale prices and absorb the surcharge and since sub-s. (3) of s. S treats "unequals as equals" it is arbitrary and irrational and therefore Violative of Art. 14 of the Constitution: (v) that sales tax being essentially an indirect tax, the legislature was not competent to make a provision prohibiting the dealer from collecting the amount of surcharge and that the true nature and character of surcharge being virtually a tax on income, sub-s. (3) of s. 5. is unconstitutional as it imposes an unreasonable restriction upon the freedom of trade guaranteed under Art.

19(1)(g). (vi) that sub-s. (3) of s. S of the Act which is a State law being repugnant to paragraph 21 of the Drugs (Price Control) Order which is issued under a Union law, the latter must prevail in view of the non obstants clause in s. 6 of the Essential Commodities Act and the former which is inconsistent therewith should be by-passed in terms of the decision in Hari Shankar Bagla and Anr. v. State of Madhya Pradesh, [1955] I S.C.R. 380. and (vii) that in view of the decision in A. V fernandez v. State of Kerala.[1957] S.C.R. 837, sub-s. (1) of s. 5 of the Act which makes the "gross turnover" as defined in s. 2(j) of the Act which includes transactions taking place in the course of inter-state or International Commerce to be the basis for the levy of surcharge is ultra vires the State Legislature,

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Dismissing the appeals,

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HELD: 1. (a) It cannot be doubted that the surcharge partakes of the nature of sales tax and therefore it was within the competence of the State Legislature to enact sub-s. (1) of s. 5 of the Act for the purpose of levying surcharge on certain class of dealers in addition to the tax payable by them. When the State Legislature had competence to levy tax on sale or purchase of goods under Entry 54 of List II of the Seventh Schedule it was equally competent to select the class of dealers on whom the charge would fall. If that be so, the State Legislature could undoubtedly have enacted sub-s. (3) of s. S prohibiting the dealers liable to pay the surcharge under sub-s.(l) thereof from recovering the same from the purchaser. [156 H-157 B]

(b) The power of the State Legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II and to make ancillary provisions in that behalf is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for projecting the power of Parliament to make a law under Entry 33 of List III into the State s power of taxation under Entry 54 of List II. Otherwise, Entry 54 of List II will have to be read as: "Taxes on sale or purchase of goods other than the essential commodities, etc." When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate legislature. Entry 54 of List II is only subject to Entry 92A of List I and there can be no further curtailment of the State's power of taxation.

[183 F-H, 184 A-B]

(c) The Constitution effects a complete separation of the taxing power of the Union and of the States under Art. 246 The various entries in the three lists are not 'powers of legislation, but 'fields of legislation. The power to legislate is given by Art. 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production supply and distribution of essential commodities under Entry 33 of List II, although the liability to pay tax may be a matter incidental to the Centre's power of price control. [184 E-G]

(d) A scrutiny of Lists I and II would show that there is no overlapping anywhere in the taxing power and that the Constitution gives independent sources of taxation to the

Union and the States. There is a distinction made between general subjects of legislation and taxation and these are dealt with in separate groups of entries: in List I, Entries I to 81 deal with general subjects of legislation and entries 82 to 92A deal with taxes; in List II Entries I to 44 deal with general subjects of legislation and Entries 45 to 63 deal with taxes. This mutual exclusiveness is also brought out by the fact that in List III, there is no entry relating to a tax it only
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contains an entry relating to levy of fees. Thus, in our Constitution, a conflict of taxing power of the Union and of the States cannot arise. The two A laws viz., sub-s. (3) of s. S of the Act and paragraph 21 of the Drugs (Price Control) order issued under sub-s (I) of s. 3 of the Essential Commodities Act operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between them. [184 H-185 F]

M.P. Sundararamier and Co. v. State of Andhra Pradesh and Anr., [1958] S.C.R. 1422, referred to.

Seervai: Constitutional Law of India, 3rd Ed., Vol, I, pp. 81-82, referred to.

(e) The words 'Notwithstanding anything contained in cls. (2) and (3) in cl. (1) of Art. 246 and the words "Subject to cls. (1) and (2)" in cl. (3) thereof lay down the principle of Federal Supremacy viz., that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State power as enumerated in Lists ll and III, and in case of overlapping between Lists li and III, the former shall prevail. But the principle of Federal Supremacy laid down in Art. 246 cannot be resorted to unless there is an 'irreconcilable' conflict between the Entries in the Union and State Lists. The non obstante clause in cl. (I) of Art. 246 must operate only if reconciliation should prove impossible. However, no question of conflict between the two Lists will arise is the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one List, and encroachment upon another List is only incidental [165 A-E]

(f) The true principle applicable in judging the constitutional validity of sub-s. (3) of s. S of the Act is to determine whether in its pith and substance it is a law relatable to Entry 54 of List II and not whether there is repugnancy between it and paragraph 21 of the Drugs (Price Control) order The constitutionality of the law has to be judged by its real subject matter and. not by its incidental effect upon any topic of legislation in another field. Once it is found that in pith and substance the impugned Act is a law on a permitted field any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act. No doubt, in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in List II, then, under the terms of Art. 246(3) it is not to be deemed to come within the classes of subjects assigned exclusively to Parliament under Art. 246(1) even though the classes of subjects looked at singly overlap in many respects. The whole distribution of powers must be looked at from the point of view of determining the question of validity of the impugned Act. It is within the competence of the State Legislature under Art. 246(3) to provide for matters which though within the competence of Parliament,

are necessarily incidental to effective legislation by the State Legislature on the subject of legislation expressly enumerated in List II. [162 B, 171 D, 177 C-E]

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In the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, [1939] F.C.R, 18; Citizen Insurance Company v. William Parsons, L.R. [1882] 7 A.C. 96; Attorney General for the Province of ontario v. Attorney General for the Dominion of Canada, L.R. [1912] A.C. 571; A.L.S.P.P.L. Subrahmanyam Chettiar v. Muttuswami Goundan, [1940] F.C.R. 188; Governor General in Council v. Province of Madras, [1945] F.C.R. 179; The Province of Madras v. Messers Boddu Paidanna & Sons, [1942] F.C.R. 90, Prafulla Kumar Mukherjee & Ors v. Bank of Commerce Ltd., Khulna, A.I.R. [1947] P.C. 60; and Grand Trunk Railway Company of Canada v. Attorney General of Canada, L R [19071 A.C. 65, referred to.

2.(a) The question of repugnancy under Art. 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Art. 254(1) has no application to cases of repugnancy due to overlapping found between List ll on the one hand and List I and List Ill on the other. If such overlapping exists in any particular case, the State law will be ultra Vires because of the non obstante clause in Art. 246(1) read with the opening words 'Subject to' in Art 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. [145 C, 181 F]

(b) It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Art. 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the Concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as List I. But, if Art. 254(1) is read as a whole, it will be seen that it is expressly made subject to cl. (2) which makes reference to repugnancy in the field o Concurrent List. In other words, if cl. (2) is to be the guide in the determination of the scope of cl. (l), the repugnancy between Union and State law must be taken to refer only to the Concurrent field. Art. 254(1) speaks of a State law being repugnant to a law made by Parliament or an existing law. The words "with respect to qualify both the clauses in Art. 254(1) viz., a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The underlying principle is that the question of repugnancy arises only when both the legislatures are competent to legislate in the same field, i.e., with respect to one of the matters enumerated the Con-current List. [181 G-182 A, R-C]

Deep Chand v. State of Uttar Pradesh & Ors [1959] Supp. 2 S.C.R. 8 Ch. Tika Ramji & ors v. State of Uttar Pradesh & Ors., [1956] S.C.R. 393 zaverbhai Amidas v. State of Bombay, [1955] I S.C.R. 799; M. Karunanidhi v. Union of India, [1979] 3 S.C.R. 254; T. Barai v. Henry Ah Hoe, [1983] I S.C.C. 177; A. S. Krishna v. State of Madras, [1957] S.C.R. 399; Clyde Engineering CÃ¸. Ltd. v. Cowburn, [1926] 37 Com. L.R. 465; Ex Parte Mclean, [1930] 43

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Com. L R. 472; and Stock Motor Ploughs Limited v. Forsyth,

[1932] Com. L.R. 128, referred to.

(c) Entry 54 of List II is a tax entry and therefore there is no question of repugnancy between sub-s. (3) of s. 5 of the Act and paragraph 21 of the Control order. The question of repugnancy can only arise in connection with the subjects enumerated in the Concurrent List as regards which both the Union and the State Legislatures have concurrent powers. [178 G-179 B] B

3. It is clear from Arts. 200 and 201 that a Bill passed by the State Assembly may become law if the Governor gives his assent to it or if, having been reserved by the Governor for the consideration of the President, it is assented to by the President. There is no provision in the Constitution which lays down that a Bill which has been assented to by the President would be ineffective as an Act if there was no compelling necessity for the Governor to reserve it for the assent of the President. It is for the Governor to exercise his discretion and to decide whether he should assent to the Bill or should reserve it for consideration of the President to avoid any future complication. Even if it ultimately turns out that there was no necessity for the Governor to have reserved a Bill for the consideration of the President still he having done so and obtained the assent of the President, the Act so passed cannot be held to be unconstitutional on the ground of want of proper assent. This aspect of the matter, as the law now stands, is not open to scrutiny by the Courts. In the instant case, the Finance Bill which ultimately became the Act in question was a consolidating Act relating the Different subjects and perhaps the Governor felt that it was necessary to reserve it for the assent of the President The assent of the President is not justifiable and the Court cannot spell out any infirmity arising out of his decision to give such assent. [193 A-194 B]

Teh Chang Poh @ Char Meh. v. Public Prosecutor., Malaysia, L.R. [1980] A.C 458. referred to.

4. (a) There is no ground for holding that sub-s. (3) of s. 5 of the Act is arbitrary or irrational or that it treats "unequals as equals" or that it imposes a disproportionate burden on a certain class of dealers. A surcharge in its true nature and character is nothing but a higher rate of tax to raise revenue for general purposes. The levy of surcharge under sub-s. (l) of s. S falls uniformly on a certain class of dealers depending upon their capacity to bear the additional burden. The economic wisdom of a tax is within the exclusive province of the legislature. The only question for the Court to consider is whether there is rationality in the behalf of the legislature that capacity to pay the tax increases by and large with an increase of receipts. The view taken by the Court in kodar's case that, to make the tax of a large dealer heavier is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay, and thus to arrive at a more genuine equality, is in consonance with social justice in an egalitarian State. [186 H-187 A, 191 B, 191 A]

S. Kodar v. State of Kerala, [1975] I S.C.R. 121, relied on.

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(b) There is no basis for the submission that the Court was wrong in Podar's case. The contention that ability to pay is not a relevant criterion for upholding the validity of sub-s. (3) of s. 5 of the Act in question cannot be accepted. On questions of economic regulations and related matters, the Court must defer to the legislative judgment.

When the power to tax exists, the extent of the burden is a matter for the discretion of the law-makers It is not the function of the Court to consider the propriety or justness of a tax or enter upon the realm of legislative policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied The equality clause in Art. 14 does not take away from the State the power to classify a class of persons who must bear the heavier burden of tax. The classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequalities. [189 H-190 G]

(c) There is no lacteal foundation laid to support the contention that the levy of surcharge imposes a disproportionate burden on a certain class of dealers such as manufacturers or producers of drugs, etc. The business carried on by the appellants in the State of Bihar alone is of such magnitude that they have the capacity to bear the additional burden of surcharge That apart under the scheme of the Control order the profit margins of manufacturers and producers of medicines and drugs is considerably higher than that of wholesalers. If the appellants find that the levy of surcharge cannot be borne within the present price structure of medicines and drugs, they have the right to apply to the Centrals Government for revision as the retail price of 'formulations under paragraph I S of the Control order. [186 F, 187 G, 189 G]

5. It is no doubt true that a sales tax is, according to the accepted notions, intended to be passed on to the buyer, and the provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. However, it is not an essential characteristic of sales tax that the seller must have the right to pass it on to the consumer; nor is the power of the legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers Whether a law should be enacted, imposing a sales tax, or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not affect the competence of the legislature. The contention based on Art. 19(1)(g) cannot therefore be sustained. [191 E-H]

The Tata Iron & Steel Co., Ltd. v. The State of Bihar, [1958] S.C.R. 1355; M/s. J. K Judge Mills Co. Ltd. v. 'The State of Uttar Pradesh, 1962, 2 S.C.R. 1 and S. Kodar v. State of Kerla, [1975] I S.C.R. 121, referred to.

6. (a) The appellants being manufacturers or producers of 'formulations' are not governed by paragraph 21 of the Control order but by paragraph 24 thereof and therefore the price chargeable by them to wholesaler or distributor is inclusive of sales tax. There being no conflict between sub-s. (3) of
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s. 5 of the Act and paragraph 24 of the Control order, the question of the non obstante clause to s. 6 of the Essential Commodities Act coming into play does A not arise. [158 G]

Hari Shankar Bagla & Anr. v. State of Madhya Pradesh, [1955] 1 S.C.R. 380, referred to.

(b) Even otherwise, i.e., if some of the appellants were governed by paragraph 21 of the Control order, that would hardly make any difference. Under the scheme of the Act, a dealer is free to pass on the liability to pay sales tax payable under s. 3 and additional sales tax payable

under s. 6 to the purchasers. Sub-s. (3) of s. 5 however imposes a limitation on dealers liable to pay surcharge under sub-s. (I) thereof from collecting the amount of surcharge payable by them from the purchasers which only means that surcharge payable by such dealers under sub-s. (I) of s. 5 will cut into the profits earned by such dealers. The controlled price or retail price of medicines and drugs under paragraph 21 remains the same, and the consumer interest is taken care of inasmuch as the liability to pay surcharge; under sub-s. (3) of s. 5 cannot be passed on. That being so, there is no conflict between sub-s. (3) of s. 5 of the Act and paragraph 21 of the Control order. [158 H-159 C]

The predominant object of issuing a control order under sub-s. (I) of s. 3 of the Essential Commodities Act is to secure the equitable distribution and availability of essential commodities at fair prices to the consumers, and the mere circumstance that some of those engaged in the field of industry, trade or commerce may suffer a loss is no ground for treating such a regulatory law to be unreasonable, unrest the basis adopted for price fixation is so unreasonable as to be in excess of the lower to fix the price, or there is a statutory obligation to ensure a fair return to the industry. [159 G-H]

Shree Meenakshi Mills Ltd. v. Union of India, [1974] 2 S.C.R. 398; and Prag Ice & oil Mills v. Union of India, [1978] 3 S.C.R. 293. referred to

7. The decision in Fernandez's case is an authority for the proposition that the State Legislature, notwithstanding Art. 286 of the Constitution, while r making a law under Entry 54 of the List II can, for purposes of registration of a dealer and submission of returns of sales tax, include the transactions covered by Art. 286. That being so, the constitutional validity of sub s. (I) of s. 5 which provides for the classification of dealers whose gross turnover during a year exceeds Rs. 5 lakhs for the purpose of levy of surcharge in addition to the tax payable by them, is not assailable. So long as sales in the course of inter-State trade and Commerce or sales outside the State and sales in the course of import into, or export out of the territory of India are not taxed there is nothing to prevent the State Legislature while making a law for the levy of surcharge under Entry 54 of the List II to take into account the total turnover of the dealer within the State and provide that if the gross turnover of such dealer exceeds Rs. 5 lakhs in a year he shall, in addition to the tax, also pay a surcharge at such rate not exceeding 10% of the tax as may be provided. The liability to pay the surcharge is not on the Gross turnover

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including the transactions covered by Art. 286 but is only on inside sales and A the surcharged is sought to be levied on dealers who have a position of economic superiority. The definition of gross turnover in s. 2(j) is adopted not for the purpose of bringing to surcharge inter-State sales etc., but is only for the purpose or classifying dealers within the State and to identify the class of dealers liable to pay such surcharge. There is sufficient territorial nexus between the persons sought to be charged and the State seeking to tax them.

[196 F-197 D]

A. V. Fernandez v. State of Kerala, [1957] S.C.R. 837; State of Bombay v. R.M.D. Chamarbaugwala, [1957] S.C.R. 874; The Tata Iron and Steel Company Ltd. v. State of Bihar, [1958] S.C.R. 1355; and International Tourist Corporation

etc. v. State of Haryana and Ors., [1981] 2 S.C.R. 364, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 2567, 2818-20, 2648, 3277, 2817, 2918, 3079-83, 3001-04, 3543-48, 2810-16, 3375, 2864-2917, 2989-3000, 3084-3088, 3268-71, 3253-54, 3399-3400 of 1982.

Appeals by special leave from the Judgments and orders dated the 30th April, 1982, 5th, 6th, 7th, 10th, 11th, 12th, 13th, 15th, May, 1982, 3rd, 17th, 23rd, August, 1982 of the Patna High Court in C.W.J.C Nos. 1788, 3726, 3727, 4529 of 1981, 253, 688, 1473 of 1982, 2771/81, 96/82, 1233, 1498, 1907, 1986 of 81, 1042, 1043, 1121, 1044 of 1982, 3198, 3197, 3195, 3147, 3146, 3148, 1573, 1377, 1802, 1852, 1800, 1950, 1776 of 1981, 1038 of 1982, 1300, 1301, 1303, 1329, 1334, 1383, 1648 of 1981, 255 of 1982, 1193, 1198, 1204, 1206, 1209, 1211, 1213, 1214, 1262-64, 1273, 1282, 1283, 1287, 1331, 1355 1382, 1384, 1386, 1431, 1432, 1484, 1488, 1489, 1548, 1645, 1734, 1833 of 1981, 78 of 1982, 1154, 1160, 1168, 1169. 1186, 1187, 1191, 1549, 1556, 1557-58, 1415, 1461, 1465, 1487 of 1981, 251 of 1982, 228, 1321 of 1981, 394, 1478 of 1982, 1320/81, 902, 565/82, 1775, 1177, 1801 of 1981, 503/82, 1804/81, 1, 3, 4, 6 & 7 of 1982, 3079, 3528 of 1981, 1947/82, 1254/82, 2922/81, 1372/82, 1408 & 1482 of 1981.

AND

Special Leave Petitions Nos. 10744-53, 9554-58, 9788, 9821-22, 10907, 9095, 1202-05, 9886-88, 9500-02, 9753, 9523, 10912, 11069, 10754-56, 10797-10812, 10891, 9702, 9782, 9561, 14001, 14364-66 of 1982, 1393-96, 1422-23, 1472-73 of 1983.

From the Judgments and orders dated the 30th April, 1982, 3rd May, 5th, 6th, 7th, 10th, 11th, 12th, 13th May, 19th August 9th & 15th September, 8th & 18th October 1982, 20th & 21st January, 1983 of the Patna High Court in C.W.J.C. Nos. 1176, 1516

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1435, 1177, 1618, 1469 & 1252 of 1982, 3398/81, 1355/82, 525182, 3640, 3641, 3642, 3743 & 3745 of 1982, 1326, 1784, 1405, 1854, 3337, A 1656 of 1981, 349, 1108, 1148, 4073, 4074, 4075 of 1982, 3118, 3080, 1161, 1374, 2804, 3035 of 1981, 4213/82, 1517/82, 1278, 1414, 1290, 1291, 1292, 1297, 1306, 1200, 1212, 1256, 1276, 1277, 1485 of 1981, 484, 509/82, 1517, 1578, 1450, 4037, 2944, 1788, 2889 of 1981, 1547, 506, 507, 508, 4931, 1253, 1431, 1432, 207 & 214 of 1982 & 182 & 203 of 1983.

WITH

Writ Petitions Nos. 9266, 10055-56, 7002-09, 7019-23, 7024, 7921-22, 7996.97, 8508-10, 9680-92, 9322, 7647-53, 8005, 8067, 7160 of 1982, 415 76-78, 640-41, 652 of 1983

(Under article 32 of the Constitution of India)

A.B. Divan, A.K. Sen, Shankar Ghose, P.R. Mridul, Hardev Singh & S.T. Deasi, Talat Ansari, Ashok Sagar, Sandeep Thakore, Ms. Rainu Walia, D.N. Misra, D.P. Mukherjee, B.R. Agarwala, Miss Vijayalakshmi Menon, U.P. Singh, B.B. Singh. B.S. Chauhan, Anil Kumar Sharma, Praveen Kumar, A.T. Patra, Vineet Kumar, A.K. Jha, M.P. Jha, R.S. Sodhi, A. Minocha, Mrs. Indu Goswamy, S.K. Sinha, Vinoo Bhagat, P.N. Misra, KK. Jain and Pramod Dayal for the Appellants.

K Parasaran, Solicitor General, R.B. Mahto, Addl. Advocate General. Bihar. Pramod Swarup and U.S. Prasad for

the Respondents.

The Judgment of the Court was delivered by

SEN, J. These are appeals by special leave from a judgment and order of the High Court of Patna dated April 30, 1982 by which the High Court upheld the constitutional validity of sub-s. (I) of s.5 of the Bihar Finance Act, 1981 ("Act' for short) which provides for the levy of a surcharge on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs, in addition to the tax payable by him, at such rate not exceeding 10 per centum of the total amount of tax, and of sub-s. (3) of s. 5 of the Act which prohibits such dealer from collecting the amount of surcharge payable by him from the purchasers.

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The Bihar Finance Act 1981, is not only an Act for the levy A of a tax on the sale or purchase of goods but also is an Act to consolidate and amend various other laws. We are here concerned with s. S of the Act which finds place in Part I of the Act which bears the heading "Levy of tax on the sale and, purchase of goods in Bihar and is relatable to Entry 54 of List II of the Seventh Schedule. By two separate notifications dated January 15, 1981 the State Government of Bihar in exercise of the powers conferred by sub-s. (I) s. S of the Act appointed January, IS; 1981 to be the date from which surcharge under s. 5 shall be leviable and fixed the rate of surcharge at 10 per centum of the total amount of the tax payable by a dealer whose gross turnover during a year exceeds Rs. 5 lakhs, in addition to the tax payable by him. The Act was reserved for the previous assent of the President and received his assent on April 20, 1981. There is no point raised as regards the validity of the notifications in question and therefore there is no need for us to deal with it.

The principal contention advanced by the appellants in these appeals is that the field of price fixation of essential commodities in general, and drugs and formulations in particular, is an occupied field by virtue of various control orders issued by the Central Government from time to time under sub-s. (I) of s. 3 of the Essential Commodities Act, 1955 which allows the manufacturer of producer of goods to pass on the tax liability to the consumer and therefore the State Legislature of Bihar had no legislative competence to enact sub-s. (3) of s. S of the Act which interdicts that no dealer liable to pay a surcharge, in addition to the tax payable by him, shall be entitled to collect the amount of surcharge, and thereby trenches upon a field occupied by a law made by Parliament. Alternatively, the submission is that if sub-s (3) of s. 5 of the Act were to cover all sales including sales of essential commodities whose prices are fixed by the Central Government by various control orders issued under the Essential commodities Act, then there will be repugnancy between the State law and the various control orders which according to s. 6 of the Essential Commodities Act must prevail. There is also a subsidiary contention put forward on behalf of the appellants that sub-s. (I) of s. S of the Act is ultra vires the State Legislature in as much as the liability to pay surcharge is on a dealer whose gross turnover during a year exceeds Rs. 5 lakhes or more i.e. inclusive of transactions relating to Sale or purchase of goods which have taken place in the course of inter-state trade or commerce or outside the State or in the course of import into, or

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export of goods outside the territory of India. The submission is that such transactions are covered by Art. 286

of the Constitution and A therefore are outside the purview of the Act and thus they cannot be taken into consideration for computation of the gross turnover as defined in s. 2 (j) of the Act for the purpose of bearing the incidence of surcharge under sub-s. (1) of s. 5 of the Act.

It will be convenient, having regard to the course taken in the arguments, to briefly refer to the facts as are discernible from the records in Civil Appeal No. 2567 of 1982 - Messrs Hoechst Pharmaceuticals Limited & Another v. The State of Bihar & others, and Civil Appeal No. 3277 of 1982 - Messrs Glaxo laboratories (India) Limited v. The State of Bihar & others. Messrs Hoechst Pharmaceuticals Limited and Messrs Glaxo Laboratories (India) Limited are companies incorporated under the Companies Act, 1956 engaged in the manufacture and sale of various medicines and life saving drugs throughout India including the State of Bihar. They have their branch or sales depot at Patna registered as a dealer under s. 14 of the Act and effect sales of their manufactured products through wholesale distributors or stockists appointed in almost all the districts of Bihar who, in their turn, sell them to retailers through whom the medicines and drugs reach the consumers. Almost 94% of the medicines and drugs sold by them are at the controlled price exclusive of local taxes under the Drugs (Price Control) order, 1979 issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act and they are expressly prohibited from selling these medicines and drugs in excess of the controlled price so fixed by the Central Government from time to time which allows the manufacturer or producer to pass on the tax liability to the consumer. The appellants have placed on record their printed price-lists of their well-known medicines and drugs manufactured by them showing the price at which they sell to the retailers as also the retail price, both inclusive of excise duty. It appears therefrom that one of the terms of their contract is that sales tax and local taxes will be charged wherever applicable.

These appellants have also placed on record their orders of assessment together with notices of demand, for the assessment years 1980-81 and 1981-82. For the assessment year 1980-81, the Commercial Taxes officer, Patna Circle, Patna determined the gross turnover of sales in the State of Bihar through their branch office at Patna of Messrs Hoechst Pharmaceuticals Limited on the basis of the return
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filed by them at Rs. 3,13,69,598,12p. and the tax payable thereon at Rs. 19,65,137.52.p. The tax liability for the period from January 15, 1981 to March 31, 1981 comes to Rs. 3,85,023.33.p. and the surcharge thereon at 10% amounts to Rs. 38,503.33p. Thus the total tax assessed of Messrs Hoechst Pharmaceuticals Limited including surcharge for the assessment year 1980-81 amounts to Rs. 20,03,640.85p. The figures for the assessment year 1981-82 are not available. Foe the assessment years 1980-81 and 1981-82 the annual returns filed by Messrs Glaxo Laboratories (India) Limited show the gross turnover of their sales in the State of Bihar through their branch at Patna at Rs. 5,17,83,985.76p. and Rs. 5,89,22,346.64p. respectively. They have paid tax along with the return amounting to Rs. 34,06,809.80p. and Rs. 40,13,057.28p. inclusive of surcharge at 10% of the tax for the period from January 15, 1981 to March 31, 1981 and April 1981 to January 19, 1982 amounting to Rs. 34,877.62p. and Rs. 3,09,955.86p. respectively. There is excess payment of Rs. 55,383.98p. in the assessment year 1980-81 and Rs. 13,112.35p. in the year 1981-82. These figures show the

magnitude of the business carried on by these appellants in the State of Bihar alone and their capacity to bear the additional burden of surcharge levied under sub-s. (I) of s. 5 of the Act.

The High Court referred to the decision in S. Kodar v. State of Kerala(1) where this Court upheld the constitutional validity of sub-s. (2) of s. 2 of the Tamil Nadu Additional Sales Tax Act, 1970 which is in pari materia with sub-s. 3 of s. S of the Act and which interdicts that no dealer referred to in sub-s. (l) shall be entitled to collect the additional tax payable by him. It held that the surcharge levied under sub-s. (1) of s. 5 is in reality an additional tax on the aggregate of sales effected by a dealer during a year and that it was not necessary that the dealer should be enabled to pass on the incidence of tax on sale to the purchaser in order that it night be a tax on the sale of goods. Merely because the dealer is prevented by sub-s. (3) of s. 5 of the Act from collecting the surcharge, it does not cease to be a surcharge on sales tax. It held relying on Kodar's case, supra, that the charge under sub-s. (I) of s. 5 of the Act falls at a uniform rate of 10 per centum of the tax on all dealers falling within the class specified therein i. e. whose gross turnover during a year exceeds Rs. 5 lakhs, and is therefore not discriminatory and violative of Art. 14 of the Constitution, nor is it possible to say that

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because a dealer is disabled from passing on the incidence of surcharge to the purchaser, sub-s. (3) of s. 5 imposes an unreasonable A restriction on the fundamental right guaranteed under Art. 19 (1) (g). As regards the manufacturers and producers of medicines and drugs, the High Court held that there was no irreconcilable conflict between sub-s. (3) of s. 5 of the Act and paragraph 21 of the Drugs (Price Control) order 1979 and both the laws are capable of being obeyed. Undeterred by the decision of this Court in Kodar's case, supra, the appellants have challenged the constitutional validity of sub-s. (3) of s. 5 of the Act in these appeals on the ground that the Court in that case did not consider the effect of price fixation of essential commodities by the Central Government under sub-s (I) of s. 3 of the Essential Commodities Act which, by reason of s. 6 of that Act, has an overriding effect notwithstanding any other law inconsistent therewith.

These appeals were argued with much learning and resource particularly with respect to federal supremacy and conflict of powers between the Union and State Legislatures and as to how if there is such conflict, their respective powers can be fairly reconciled. In support of these appeals, learned counsel for the appellants have advanced the following contentions viz: (1) The opening words of Art. 246 (3) of the Constitution "Subject to clauses (1) and (2)" make the power of the Legislature of any State to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule subject to the Union power to legislate with respect to any of the matters enumerated in List I or List III. That is to say, sub-s. (3) of s. 5 of the Act which provides that no dealer shall be entitled to collect the surcharge levied on him must therefore yield to s. 6 of the Essential Commodities Act which provides that any order made under s. 3 of the Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other then the Act or any instrument having effect by virtue of any enactment other than the Act. The entire submission proceeds

on the doctrine of occupied field and the concept of federal supremacy. In short, the contention is that the Union power shall prevail in a case of conflict between List II and List III. (2) sub-s. (3) of s. 5 of the Act which provides that no dealer shall be entitled to collect the amount of surcharge levied on him, clearly falls within Entry 54 of List II of the Seventh Schedule and it collides with, and or is inconsistent with, or repugnant to, the scheme of Drugs (Price Control) order? 1979 generally so far as
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price fixation of drugs is concerned and particularly with paragraph 21 which enables the manufacturer or producer of drugs to pass on the liability to pay sales tax to the consumer. If that be so, then there will be repugnancy between the State law and the Control order which according to s. 6 of the Essential Commodities Act, must prevail. It is the duty of the Court to adopt the rule of harmonious construction to prevent a conflict between both the laws and care should be taken to see that both can operate in different fields without encroachment. It is therefore submitted that there is no question of repugnancy and it can be avoided by the principle of reconciliation. That is only possible by giving full effect to the non obstante clause in s. 6 of the Essential Commodities Act. (3) The provisions contained in sub-s. (3) of s. 5 of the Act is ex facie and patently discriminatory. The Essential Commodities Act treats certain controlled commodities and their sellers in a special manner by fixing controlled prices. The sellers so treated by this Central law are so circumstanced that they cannot be equated with other sellers not effected by any control orders. The class of dealers who can raise their sale prices and absorb the surcharge levied under sub-s. (1) of s. 5 and a class of dealers like the manufacturers andproducers of medicines and drugs who cannot raise their sale prices beyond the controlled price are treated similarly. Once the fact of different classes being separate is taken, than a State law which treats both classes equally and visits them with different burdens, would be violative of Art. 14. The State cannot by treating unequals as equals impose different burden on different classes. (4) The restriction imposed by sub-s. (3) of s. 5 of the Act which prevents the manufacturers of producers of medicines and drugs from passing on the liability to pay surcharge is confiscatory and casts a disproportionate burden on such manufacturers and producers and constitutes an unreasonable restriction on the freedom to carry on their business guaranteed under Art. 19 (1) (g). (5) Sub-s (1) s. 5 of the Act is ultra vires the State Legislature of Bihar insofar as for the purpose of the levy of surcharge on a certain class of dealers, it takes into account his gross turnover as defined in s. 2 (j) of the Act. It is urged that the State Legislature was not competent under Entry 54 of List II of the Seventh Schedule to enact a provision like sub-s. (1) of s. S of the Act which makes the grass turnover of a dealer as defined in s. 2 (j) to be the basis for the levy of a surcharge i. e. inclusive of transactions relating to sale or purchase of goods which have taken place in the course of inter-state trade or commerce or outside the territory of India. Such transactions are outside the purview of the Act and therefore they cannot be taken
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into consideration for computation of the gross turnover as defined in s. 2 (j) of the Act for the purpose of bearing the incidence of surcharge.

The contention to the contrary advanced by the learned

Solicitor General appearing on behalf of the State of Bihar is that there is no inconsistency between sub-s. (3) of s. 5 of the Act and paragraph 21 of the Control order and both the laws are capable of being obeyed. According to him, the question of repugnancy under Art. 254(1) between a law made by Parliament and a IdW made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent list, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will to the extent of repugnancy, become void. The learned Solicitor General contends that the question has to be determined not by the application of the doctrine of occupied field but by the rule of 'pith and substance'. He further contends that the appellants being manufacturers or producers of drugs are not governed by paragraph 21 of the Control order which relates to retail sale but by paragraph 24 thereof which deals with sale by a manufacturer or producer to wholesale distributor. Under paragraph 24 of the Control order, the manufacturer or producer is not entitled to pass on the liability to pay sales tax and the price that he charges to the wholesaler or distributor is inclusive of sales tax. He also contends that the controlled price of an essential commodity particularly of medicines and drugs fixed by a control order issued by the Central Government under sub-s. (1) of s: 3 of the Essential Commodities Act is only the maximum price thereof and there is nothing to prevent a manufacturer or producer of medicines and drugs to sell it at a price lower than the controlled price. All that will happen, the learned Solicitor General reasons, is that the levy of surcharge under sub-s. (1) of s. 5 of the Act will cut into the profits of the manufacturer or producer but that will not make the State law inconsistent with the Central law. As regards medicines and drugs, the surcharge being borne by the manufacturers or producers under sub-s. (3) of s. 5 of the Act, the controlled price of such medicines and drug to the consumer will remain the same. Lastly, the Solicitor General submits that there is no material placed by the, appellants to show that the levy of surcharge under sub-s. (I) of s. 5 of the act would impose a burden disproportionate to the profits

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earned by them or that it is confiscatory in nature. There is, our opinion, considerable force in these submissions.

Before proceeding further it is necessary to mention that the contentions raised on behalf of manufacturers and producers of medicines and drugs can govern only those appellants who are dealers in essential commodities, the controlled price of which is exclusive of sales tax as filed by control orders issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act, but cannot be availed of by the other appellants who are dealers in other commodities. The case of such appellants would be squarely governed by the decision of this Court in Kodar's case, supra, and their liability to pay surcharge under sub-s. (1) of s. 5 of the Act must be upheld, irrespective of the contentions raised in these appeals, on based on the opening words "Subject to clauses (1) and (2)" in Art. 246(3) of the Constitution and on s. 6 of the Essential Commodities Act. It is therefore necessary to first deal with the principle laid down in Kodar's case, supra.

In Kodar's case, supra, this Court upheld tho Constitution validity of the Tamil Nadu Additional Sales Tax Act, 1970 which imposes additional sales tax at 5% on a

dealer whose annual gross turnover exceeds Rs. 10 lakhs. The charging provision in sub-s. (1) of s. 2 of that Act is in terms similar to sub-s. (1) of s. 5 of the Act, and provides that the tax payable by a dealer whose turnover for a year exceeds Rs. 10 lakhs shall be increased by an additional tax 5% of the tax payable by him. Sub-s. (2) of that Act is in pari materia with sub-s. (3) of s. 5 of the Act and provides that no dealer referred to in sub-s. (I) shall be entitled to collect the additional tax payable by him. The Court laid down that: (l) The additional tax levied under sub-s. (I) of s. 2 of that Act was in reality a tax on the aggregate of sales effected by a dealer during a year and therefore the additional tax was really a tax on the sale of goods and not a tax on the income of a dealer and therefore falls within the scope of Entry 54 of List II of the Seventh Schedule. (2) Generally Speaking, the amount or rate of tax is a matter exclusively within the legislative judgment and so long as a tax retains its avowed character and does not confiscate property to the State under the guise of a tax, its reasonableness cannot be questioned by the Court The imposition of additional tax on a dealer whose annual turnover exceeds Rs. 10 lakhs is not an unreasonable restriction on the fundamental rights guaranteed under Art. 19(1)(g) or (f) as the tax
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is upon the sale of goods and was not shown to be confiscatory. (3) It is not an essential chracteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for seller to collect the tax from the purchasers. Merely because sub-s. (2) of s. 2 of that Act prevented a dealer from passing on the incidence of additional tax to the purchaser, it cannot be said that the Act imposes an unreasonable restriction upon the fundamental rights under Art. 19(1)(g) or (f). The Act was not violative of Art. 14 of the Constitution as classification of dealers on the basis of their turnover for the purpose of levy of additional tax was passed on the capacity of dealers who occupy position of economic superiority by reason of their greater volume of businesses i.e. On capacity to pay and such classification for purposes of the levy was not unreasonable.

In order to appreciate the implications of the wide ranging contentions advanced before us, it is necessary to set out the relevant statutory provisions.

Sub-s. (1) of s. 5 of the Act provides for the levy of surcharge on every dealer whose gross turnover during a year exceeds Rs. 5 lakhs and, the material provisions of which are in the following terms:

> "5. Surcharge (I) Every dealer whose gross turnover during a year exceeds rupees five lakhs shall, in addition to the tax payable by him under this Part, also pay a surcharge at such rate not exceeding ten per centum of the total amount of the tax payable by him, as may be fixed by the State Government by a notification published in the official Gazette:
>
> Provided that the aggregate of the tax and surcharge payable under this Part shall not exceed, in respect of goods declared to be of special importance in inter-State trade or commerce by section 14 of the central Sales Tax Act, 1256 (Act 74 of 1956), the rate fixed by section 15 of the said Act:

The expression "gross turnover" as defined in s. 2(j) Of the Act insofar as material reads: -

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"2(j) "gross turnover" means-

(i) for the purposes of levy of sales tax, aggregate of sale prices received and receivable by a dealer, during any given period, in respect of sale of goods (including the sale of goods made outside the State or in the course of inter-State trade or commerce or export) but does not include sale prices of goods or class or classes or description of goods which have borne the incidence of purchase tax under section 4."

Sub-s. (3) of s. 5 of the Act, the constitutional validity of which is challenged, provides:

"5(3) Notwithstanding anything to the contrary contained in this Part, no dealer mentioned in sub-s. (1), who is liable to pay surcharge shall be entitled to collect the amount of this surcharge."

It is fairly conceded that not only sub-s. (1) of s. 5 of the Act which provides for the levy of surcharge on dealers whose gross turnover during a year exceeds Rs. 5 lakhs, but also sub-s. (3) of s. 5 of the Act which enjoins that no dealer who is liable to pay a surcharge under sub-s. (I) shall be entitled to collect the amount of surcharge payable by him, are both relatable to Entry 54 of List II of the Seventh Schedule which reads:

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

There can be no doubt that the Central and the State legislations operate in two different and distinct fields. The Essential Commodities Act provides for the regulation, production, a supply distribution and pricing of essential commodities and is relatable to Entry 33 of List III of the Seventh Schedule which reads:

"33. Trade and commerce in, and the production, supply and distribution of,- .

(a) the products of any industry where the control of such industry by the Union is declared by Parliament

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by law to be expedient in the public interest, and imported goods of the same kind as such products."

The definition of "essential commodities" in s. 2(a) of the Essential Commodities Act now includes 'drugs' by the insertion of cl. (iva) therein by Act 30 of 1974. Sub-s. (I) of s. 3 of the Essential Commodities Act provides: B

"3. Powers to control production, supply, distribution, etc., of essential commodities-

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof. and trade and commerce therein."

Sub-s. (2) lays down without prejudice to the generality of the powers conferred by sub-s. (1), an order made therein may provide for the matters enumerated in cls. (a) to (f). Cl. (c) of sub-s. (2) provides:

"For controlling the price at which an essential com modify may be bought or sold."

S. 6 of the Essential Commodities Act which has an important bearing on these appeals is in these terms:

"6. Effect of orders inconsistent with other enactments- Any order made under section 3 shall have effect not withstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act."

The Drugs (Price Control) order, 1979 issued by the Central Government in exercise of the powers conferred under s. 3 of the Essential Commodities Act, 1955 provides for a comprehensive scheme of price fixation both as regards bulk drugs as well as

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formulations. The expressions "bulk drug" and "formulation" are A defined in paragraph 2(a) and 2(f) as:

"2. In the order, unless the context otherwise requires,-

(a) "bulk drug" means any substance including pharmaceutical, chemical, biological or plant product or medicinal gas conforming to pharmacopoeal or other standards accepted under the Drugs and Cosmetics Act, 1940, which is used as such or as an ingredient in any formulations;

(f) "formulations" means a medicine processed out of, or containing one or more bulk drug or drugs, with or without the use of any pharmaceutical aids for internal or external use for, or in the . diagnosis, treatment, mitigation or prevention of disease in human beings or animals, but shall not include-

We are here concerned with the impact of sub-s. (3) of s. 5 of the Act on the price structure of formulation, but non the less much stress was laid on fixation of price of bulk drugs under paragraph 3(2) which allows a reasonable return to the manufacture under sub paragraph (3) thereof. A manufacturer or producer of such bulk drugs is entitled to sell it at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

What is of essence is the price fixation of formulations and the relevant provisions are contained in paragraph, 10 to 15, 17, 20, 21 and 24. Paragraph 10 provides for a formula according to which the retail price of formulation shall be calculated and it reads:

"10. Calculation of retail price of formulations-The retail price of a formulation shall be calculated in accordance with the following formula, namely:

R.P.=(M.C+C.C+P.M.+P.C) X

1 + MU / 100 + ED

Where-

"R.P." means retail price.

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"M C." means material cost and includes the-cost of drugs and other pharmaceutical aids used including h overages, if any, and process loss thereon in accordance with such norms as may be specified by the Government from time to time by notification in official Gazette in this behalf.

"C.C." means conversion cost worked out in accordance with such norms as may be specified by the Government from time to time by notification in the official Gazette in this behalf.

"P.M." means the cost of packing material including process loss thereon worked out in accordance with such norms as may be specified by the Government

from time to time by notification in the official Gazette in this behalf.

"P.C." means packing charges worked out in accordance with such norms as may be specified by the Government from time to time by notification in the official Gazette in this behalf.

"M.U." means mark-up referred to in paragraph 11.

"E.D." means excise duty:

Provided that in the case of an imported formulation the landed cost shall from the basis for fixing its price along with such margin as the Government may allow from time to time.

Provided further that where an imported formulation is re-packed, its landed cost plus the cost of packing materials and packing charges as worked out in accordance with such norms as may be specified by the Government from time to time, by notification in the official Gazette, shall form the basis for fixing its price.

Explanation-For the purposes of this paragraph, "landed cost" shall mean the cost of import of drug inclusive of customs duty and clearing charges".

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The expression "mark-up" referred to above is dealt within A paragraph 11 and it provides:

"11. Mark-up referred to in paragraph 10 includes the distribution cost, outward freight, promotional expenses, manufacturers margin and the trade commission and shall not exceed-

(i) forty percent in the case of formulations specified in Category I of the Third Schedule;

(ii) fifty-five percent in the case of formulations specified in Category II of the said Schedule:

(iii) one hundred per cent in the case of formulations specified in Category III of the said Schedule."

It is unnecessary for our purposes to reproduce the provisions of paragraphs 12 to 14 which formulate a detailed scheme of price fixation.

Paragraph 15 confers power of revision of prices and it reads:

"15. Power to revise prices of formulations-Not withstanding anything contained in this order .

(a) The Government may, after obtaining such information as it may consider necessary from a manufacturer or an importer, fix or revise the retail price of one or more formulations marketed by such manufacturer or importer, including a formulation not - specified in any of the categories of the Third Schedule in such manner as the pre-tax return on the sales turnover of such manufacturer or importer does not exceed the maximum pre-tax return specified in the Fifth Schedule;

(b) the Government may, if it considers necessary so to do in public interest, by order, revise the retail price of any formulation specified in any of the categories of the Third Schedule."

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Paragraph 17 Casts a mandatory duty on the Central Government to maintain 'Drugs Prices Equalisation Account' to which shall be credited-

(a) by the manufacturer, importer or distributor, as the case may be-

(i) the amount determined under sub-paragraph (2) of paragraph 7;

(ii) the excess of the common selling price or, as the case may be, pooled price over his retention price;

(b) such other amount of money as the Central Government may, after due appropriation made by Parliament by law in this behalf, grant from time to time.

The amount credited to the Drugs Prices Equalisation Account is meant to compensate a manufacturer, importer or distributor the short-fall between his retention price and the common selling price or, as the case may be, the pooled price for the purpose of increasing the production, or securing the equitable distribution and availability at fair prices, of drugs after meeting the expenses incurred by the Government in connection therewith. Every manufacturer, importer or distributor is entitled to make a claim for being compensated for the short-fall.

Paragraph 19 interdicts that every manufacturer or importer of a formulation intended for sale shall furnish to the dealers, State Drug Controllers and-the Government, a price list showing the price at which the formulation is sold t.) a retailer inclusive of excise duty. Every such manufacturer or retailer has to give effect to the change in prices as approved by the Government. Every dealer is required to display the price list at a conspicuous part of the premises.

It is, however, necessary to reproduce paragraphs 20, 21 and 24 as they are of considerable importance for our purposes and they read:

"20. Retail price to be displayed on label of container-Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible

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print mark on the label of the container of the formulation or the minimum pack thereof offered for retail sale, the maximum retail price of that formulation with the words "retail price not to exceed" preceding it, and "local taxes extra" succeeding it."

"21. Control of sale prices of formulations specified in Third Schedule-No retailer shall sell any formulation specified in any of the categories in the Third Schedule to any person at a price exceeding the price specified in the current price list or the price indicated on the label of the container or pack thereof, whichever is less, plus the local taxes, if any, payable.

Explanation-For the purpose of this paragraph, "local taxes" includes sales tax and octroi actually paid by the retailer under any law in force in a particular area."

"24. Price to the wholesaler and retailer-

(a) No manufacturer, importer or distributor shall sell a formulation to a wholesaler unless otherwise permitted under the provisions of this order or any other order made thereunder at a price higher than:

(a) the retail price minus 14 per cent thereof, in the case of ethical drugs, and

(b) the retail price minus 12 percent thereof, in the case of non-ethical drugs.

(2) No manufacturer, importer, distributor or wholesaler shall sell a formulation to a retailer unless otherwise permitted under the provisions of this order or any order made thereunder, at a

price higher than:-
(a) the retail price minus 12 percent thereof, in the case of ethical drugs, and
(b) the retail price minus 10 percent thereof, in the case of non-ethical drugs.

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Explanation-For the purposes of this paragraph-
(i) "ethical drugs" shall include all drugs specified in Schedule C, entries Nos. 1, 2, 3, 7, 8 and 9 of Schedule C(l), Schedule E, Schedule G, Schedule and Schedule L, appended to the Drugs and Cosmetics Rules, 1945 made under the Drugs and Cosmetics Act, 1940, (23 of 1940); and
(ii) "non-ethical drugs" shall mean all drugs other than ethical drugs.

(3) Notwithstanding anything contained in sub-paragraphs (1) and (2), the Government may, by a general or special order, fix, in public interest, the price to the wholesaler or retailer in respect of any formulation the price which has been fixed or revised under this order."

Much emphasis was laid on fixation of price of bulk drugs under paragraph 3 which provides by sub-paragraph (1) that the Government may, with a view to regulating the equitable distribution of an indigenously manufactured bulk drug specified in the First Schedule or the Second Schedule and making it available at a fair price and subject to the provisions of sub-paragraph (2) and after making such inquiry as it deems fit, fix from time to time, by notification in the official Gazette, the maximum price at which such bulk drug shall be sold. Sub-paragraph (2) enjoins that while filing the price of a bulk drug under sub-paragraph (1), the Government may take into account the average cost of production of each bulk drug manufactured by efficient manufacturer and allow a reasonable return on net-worth. Explanation thereto defines the expression "efficient manufacturer" to mean a manufacturer (i) whose production of such bulkdrug in relation to the total production of such bulk drug in the country is large, or (ii) who employs efficient technology in the production of such bulk drug. Sub-paragraph (3) provides that no person shall sell a bulk drug at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any, payable.

It is urged- that while fixing the price of bulk drug, the Government has to take into-account the average cost of production

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of that bulk drug by a particular manufacturer, by taking into A consideration the cost to a manufacturer who employs efficient methods and allowing a reasonable return on the net-worth of the drug manufactured. Otherwise, every manufacturer will show a figure as cost of production, which may not be acceptable. The average cost of production of an efficient manufacturer is made the standard for fixing the price but such fixation of the price of bulk drug allows a reasonable return to the manufacturer. Under sub-paragraph (3) the manufacturer or producer of such bulk drug is entitled to sell it at a price not exceeding the price so fixed plus local tax if any, payable.

Much stress is laid that the average cost of an efficient manufacturer allows a reasonable return on net-worth of the drug manufactured and the price so fixed is exclusive of local taxes i.e. sales tax. It is further urged that the term "local taxes" in sub paragraph (3) means and

includes sales tax leviable in a State and attention is drawn to Explanation to paragraph 21 for that purpose. We fail to appreciate the relevance of sub-paragraph (3) of paragraph 3 which relates to a manufacturer or producer of bulk drugs or of paragraph 21 of the Control order which fixes the controlled price of formulations specified in the Third Schedule exclusive of local taxes i.e. sales tax. The appellants are manufacturers or producers of medicines and drugs and are governed by paragraph 24. Under paragraph 24, a manufacturer or producer is not entitled to sell a formulation to a wholesaler at a price higher than the retail price minus 14% thereof in case of ethical drugs and minus 12% in case of non-ethical drugs. It is quite clear upon the terms of paragraph 24 that the price chargeable by the appellants as manufacturers or producers is a price inclusive of sales tax. The entire argument built upon sub-paragraph (3) of paragraph 3 and paragraph 21 of the Control order showing that the controlled price is exclusive of sales tax and thereof is in conflict with sub-s (3) of s. S of the Act appears to be wholly misconceived. It is urged that the appellants in their price lists have a term embodied that sales tax would be chargeable from a wholesaler or distributor and therefore they are entitled to recover sales tax on the sale of their medicines and drugs cannot possibly prevail. Such a term would be in clear violation of para graph 24 of the Control order which is an offence punishable under s. 7 of the Essential Commodities Act.

It cannot be doubted that a surcharge partakes of the nature of sales tax and therefore it was within the competence of the State

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Legislature to enact sub-s. (I) of s. S of the Act for the purpose of levying surcharge on certain class of dealers in addition to the tax payable by them. When the State Legislature had competence to levy tax on sale or purchase of goods under Entry 54, it was equally competent to select the class of dealers on whom the charge will fall. If that be so, the State Legislature could undoubtedly have enacted sub-s. (3) of s. S of the Act prohibiting the dealers liable to pay a surcharge under sub-s. (I) thereof from recovering the same from the purchaser. It is-fairly conceded that sub-s. (3) of s. S of the Act is also relatable to Entry 54. The contention however is that there is conflict between paragraph 21 of the Control order which allows a manufacturer or producer of drugs to pass on the liability to pay sales tax and sub-s. (3) of s. S of the Act which prohibits such manufacturers or producers from recovering the surcharge and therefore it is constitutionally void. It is said that- the Courts should try to adopt the rule of harmonious construction and give effect to paragraph 21 of the Control order as the impact of sub-s. (3) of s. S of the Act is on fixation of price of drugs under the Drugs (Price Control) order and therefore by reason of s. 6 of the Essential Commodities Act, paragraph 21 of the Control order which provides for the passing on of tax liability must prevail. The submission rests on a construction of Art. 246 (3) of the Constitution and it is said that the power of the State Legislature to enact a law with respect to any subject in List II is subject to the power of Parliament to legislate with respect to matters enumerated in Lists I and III.

It is convenient at this stage to deal with the contention of the appellants that if sub-s. (3) of s. 5 of the Act were to cover all sales including sales of essential

commodities whose prices are controlled by the Central Government under the various control orders issued under sub-s. (I) of s. 3 of the Essential Commodities Act, then there will be repugnancy between the State law and such contral orders which according to s. 6 of the Essential Commodities Act must prevail. In such a case, the State law must yield to the extent of the repugnancy. In Hari Shankar Bagla & Anr. v. State of Madhya Pradesh(1) the Court had occasion to deal with the non-obstante clause in s. 6 of the Essential Supplies (Temporary Powers) Act, 1946 which was in pari materia with s. 6 of the Essential Commodities Act and it was observed:

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> "The effect of section 6 certainly is not to repeal any one of these laws or abrogate them. Its object is simply to by-pass them where they are inconsistent with the provisions of the Essential Supplies (Temporary Powers) Act, 1946, or the orders made thereunder. In other words, the orders made under section 3 would he operative in regard to the essential commodity covered by the Textile Control order wherever there is repugnancy in this order with the existing laws and to that extent the existing laws with regard to those commodities will not operate. By-passing a certain law does not necessarily amount to repeal or abrogation of that law. That law remains unrepealed but during the continuance of the order made under section 3 it does not operate in that field for the time being."

The Court added that after in order is made under s. 3 of that Act, s. 6 then steps in wherein Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than that Act.

Placing reliance on the observations in Hari Shankar Bagla's case, supra, it is urged that the effect of the non-obstante clause in s. 6 of the Essential Commodities Act is to give an overriding effect to the provisions of paragraph 21. It is further urged that paragraph 21 of the Control order having been issued by the Central Government under sub-s. (1) of s 3 of the Essential Commodities Act which permits the manufacturer or producer to pass on the liability to pay sales tax must prevail and sub-s. (3) of s. S of the Act which is inconsistent therewith is by-passed. The contention appears to be misconceived. The appellants being manufacturers or producers of formulations are not governed by paragraph 21 of the Control order but by paragraph 24 thereof and therefore the price chargeable by them to a wholesaler or distributor is inclusive of sales tax. There being no conflict between sub-s. (3) of s. S of the Act and paragraph 24 of the Control order, the question of non-obstante clause to s. 6 of the Essential Commodities Act coming into play does not arise.

Even otherwise i. e. if some of the appellants were governed by paragraph 21 of the Control order, that would hardly make any difference. Under the scheme of the Act, a dealer is free to pass

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on the liability to pay sales tax payable under s. 3 and additional sales tax payable under s. 6 to the purchasers. Sub-s. (3) of s. S of A the Act however imposes a limitation on dealers liable to pay surcharge under sub-s. (1) thereof from collecting the amount of surcharge payable by them from the purchasers which only means that surcharge payable by such dealers under sub-s. (I) of s. S of the Act will cut

into the profits earned by such dealers. The- controlled price or retail price of medicines and drugs under paragraph 21 remains the same, and the consumer interest is taken care of in as much as the liability to pay surcharge sub-s. (3) of s. 5 cannot be passed on. That being so, there is no conflict between sub-s. (3) of s. S of the Act and paragraph 21 of the Control order. The entire sub mission advanced by learned counsel for the appellants proceeds on the hypothesis that the various control orders issued under sub-s. (1) of s. 3 of the Essential Commodities Act are for the protection of the manufacturer or producer. There is an obvious fallacy in the argument which fails to take into account the purpose of the legislation.

Where the fixation of price of an essential commodity is necessary to protect the interests of consumers in view of the scarcity of supply, such restriction cannot be challenged as unreasonable on the ground that it would result in the elimination of middleman for whom it would be unprofitable to carry on business at fixed rate or that it does not ensure a reasonable return to the manufacturer or producer on the capital employed in the business of manufacturing or producing such an essential commodity.

The contention that in the field of fixation of price by a control order issued under sub-s. (1) of s. 3 of the Essential Commodities Act, the Central Government must have due regard to the securing of a reasonable return on the capital employed in the business of manufacturing or producing an essential commodity is entirely misconceived. The predominant object of issuing a control order under sub-s. (1) of s. 3 of the Act is to secure the equitable distribution and availability of essential commodities at fair prices to the consumers, and the mere circumstance that some of those engaged in the field of industry, trade and commerce may suffer a loss is no ground for treating such a regulatory law to be unreasonable, unless the basis adopted for price fixation is so unreasonable as to be in excess of the power to fix the price, or there is a statutory obligation to ensure a fair return to the industry. In Shree Meenakshi Mills
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Ltd. v. Union of India(l) Ray, J speaking for the Court rejected the A contention that the controlled price must ensure a reasonable return on the capital employed in the business of manufacturing or producing essential commodities in these words-:

> "In fixing the prices, a price line has to be held in order to give preference or predominant consideration to the interests of the consumers or the general public over that of the producers in respect of essential commodities. The aspect of ensuring availability of the essential commodities to the consumer equitably and at fair price is the most important consideration."

In Prag Ice & Oil Mills & Anr. etc. v. Union of India(a) Chandrachud, J. (as he then was) negatived a similar contention that fixation of a price without ensuring a reasonable return to the producers or dealers was unconstitutional. In repelling the contention, Chandrachud J. speaking for the Court referred to the two earlier b decisions in Panipat Cooperative Sugar Mills v. Union of India(3) and Anakapalle Cooperative Agricultural & Industrial Society Ltd. v. Union of India(4) and observed:

> "The infirmity of this argument, as pointed out in Meenakshi Mills's case, is that these two decisions turned on the language of s 3 (3C) of the Essential

Commodities Act under which it is statutorily obligatory to the industry a reasonable return on the capital employed in the business of manufacturing sugar. These decisions can therefore have no application to cases of price fixation under s. 3 (1) read with s. 3 (2) (c) of the Act. Cases falling under sub-ss. (3A), (3B) and (3C) of s. 3 of the Act belong to a different category altogether."

The learned Chief Justice then observed:

"The dominant purpose of these provisions is to ensure the availability of essential commodities to the consumers at a fair price. And though patent injustice to

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the producer is not to be encouraged, a reasonable return on investment or a reasonable rate of profit is not the sine qua non of the validity of action taken in furtherance of the powers conferred by s. 3 (1) and s. 3 (2) (c) of the Essential Commodities Act. The interest of the consumer has to be kept ill the forefront and the prime consideration that an essential commodity ought to be made available to the common man at a fair price must rank in priority over every other consideration."

The contention advanced does not take note of the distinction between the controlled price fixed under cl. (c) of sub-s. (2) of s. 3 of the Act read with sub-s. (I) thereof and the procurement price fixed under sub-ss. (3A), (3B) and (3C). In fixing a procurement price under sub-ss. (3A), (3B) and (3C), there is a statutory obligation cast on the Central Government to ensure a fair return to the producers or dealers of essential commodities. while in fixing the controlled price under c]. (c) of sub-s. (2) of s. 3 read with sub-s. (1) thereof, the predominant factor is the basis to secure the equitable distribution and availability of essential commodities at fair prices to the consumers and a reasonable return on investment or a reasonable rate of profit to the manufacturer or producer i... not a relevant criterion although it should not ordinarily work patent injustice to a manufacturer or producer. Just as the industry cannot complain of rise and fall of prices due to economic factors in open market, it cannot similarly complain of some increase in, or reduction of, prices as a result of an order issued under sub-s. (I) of s. 3 of the essential commodities Act, or a cut in the margin of profits brought about by a provision like sub-s. (3) of s. 5 of the Act which provides that a manufacture or producer shall not be entitled to recover the surcharge levied on him under sub-s. (I) of s. S of the Act because such increase or reduction is also based on economic factors.

The principal point in controversy is: Whether there is repugnancy between sub-s. (3) of s. 5 of the Act and paragraph 21 of the Control order and therefore sub-s. (3) of s. 5 must yield to that extent. The submission is that if Parliament chooses to occupy the field and there is price fixation of an essential commodity with liberty to pass on the burden of tax to the consumer by a law made by Parliament under Entry 33 of List III of the Seventh Schedule, then it is not competent for the State Legislature to enact a provision

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like sub-s. (3) of s. S of the Act while enacting a law under Entry 54 of List II prohibiting the passing on of liability of tax to the purchaser.

The true principle applicable in judging the constitutional validity of sub-s. (3) of s. S of the Act is to determine whether in its pith and substance it is a law relatable to Entry 54 of List II of the Seventh Schedule and not whether there is repugnancy between sub-s. (3) of s. S of the Act and paragraph 21 of the Drugs {Price Control) order made under sub-s. (1) of s. 3 of the Essential Commodities Act, is therefore void. In dealing with the question, we must set out Art. 246 of the Constitution which is based on s. 100 of the Government of India Act, 1935 and it reads:

"246(1) Notwithstanding anything in clauses (2) and t (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not 9 included in a State notwithstanding that such matter is a matter enumerated in the State List."

It is obvious that Art. 246 imposes limitations on the legislative powers of the Union and State Legislatures and its ultimate analysis would reveal the following essentials:

1. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I

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notwithstanding anything contained in cls. (2) and (3). The non-obstante clause in Art. 246(1) provides for predominance or supremacy of Union Legislature. This power is not encumbered by anything contained in cls. (2) and (3) for these causes them selves are expressly limited and made subject to the non-obstante clause in Art. 246(1). The combined effect of the different clauses contained in Art. 246 is no more and no less than this: that in respect of any matter falling within List I, Parliament has exclusive power of legislation.

2. The State Legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule and it also has the power to make laws with respect to any matters enumerated in List III. The exclusive power of the State Legislature to . legislate with respect to any of the matters enumerated in List II has to be exercised subject to cl. (l) i.e. the exclusive power of Parliament to legislate with respect to matters enumerated in List I. As a con sequence, if there is a conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in

List TI must supersede pro tanto the exercise of power of the State Legislature.

3. Both Parliament and the State Legislature have con- current powers of legislation with respect to any of the matters enumerated in List III.

Art. 254 provides for the method of resolving conflicts between a law made by Parliament and a law made by the Legislature of a State with respect to a matter falling in the Concurrent List and it reads:

"254(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then,

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subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall if it has been reserved for the consideration of the President and has received his assent, prevail in that State.

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

We find it difficult to subscribe to the proposition advanced on behalf of the appellants that merely because of the opening words of Art. 246(3) of the Constitution "Subject to clauses (I) and (2)" and the non-obstante clause in Art. . 246(1) ''Notwithstanding . anything in clauses (2) and (3)", sub-s. (3) of s. 5 of the Act which provides that no dealer shall be entitled to collect the amount of surcharge must be struck down as ultra vires the State Legislature inasmuch as it is in consistent with paragraph 21 of the drugs (Price Control) order issued by the Central Government under sub-s. (I) of s. 3 of the Essential Commodities Act which enables the manufacturer or producer of drugs to pass on the liability to pay sales tax to the consumer. The submission is that sub-s. (3) of s. 5 of the Act enacted by the State Legislature while making a law under Entry 54 of List II of the Seventh Schedule which interdicts that a dealer liable to pay surcharge under sub-s. (1) of s. 5 of the Act shall not be entitled to collect it from the purchaser, directly trenches upon Union power to legislate with respect to fixation of price of essential commodities under Entry 33 of List Ill. It is said that if both are valid, then ex hypothesi the law made by Parliament must prevail and the State law pro tanto must yield. We are afraid, the contention cannot prevail in view of the well accepted principles,

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The words "Notwithstanding anything contained in clauses (2) and (3) ' in Art. 246 (l) and the words "Subject to clauses A (I.) and (2)" in Art. 246(3) lay down the

principle of Federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List T shall prevail over the State power as enumerated in List II and III. and in case of overlapping between List 11 and III, the 13 former shall prevail. But the principle of Federal supremacy laid down in Art. 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the Entries in the Union and State Lists. In the case of a seeming conflict between the Entries in the two lists, the Entries should be read together without giving a narrow and restricted sense to either of them. Secondly, an attempt should be made to see whether the two Entries cannot be reconciled so as to avoid a conflict of jurisdiction. lt should be considered whether a fair reconciliation can be achieved by giving to the language or the Union Legislative List a meaning which, if less wide than it night in another context bear, is yet one that can properly be given to it and equally giving to the language of the State Legislative List a meaning which it can properly bear. The non-obstante clause in Art. 246(l) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two lists will arise if the impugned legislation, by the application of the doctrine of "pith and substance" appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

Union and State Legislatures have concurrent power with respect to subjects enumerated in List III, subject only to the pro- vision contained in cl. (2) of Art. 254 i.e. provided the provisions of the State Act do not conflict with those of any (Central Act on the subject. However, in case of repugnancy between a State Act and a Union Law on a subject enumerated in List III, the State law must yield to the Central law unless it has been reserved for the assent of the President and has received his assent under Art. 254(2). The question of repugnancy arises only when both the Legislatures are competent to legislate in the same field i.e. when both the Union and the State laws relate to a subject specified in List III and occupy the same field.

As regards the distribution of legislative powers between the Union and the States, Art. 246 adopts with immaterial alterations the

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scheme for the distribution of legislative powers contained in s. 100 A of the Government of India Act, 1935. Our Constitution was not written on a clean slate because a Federal Constitution had been established by the Government of India Act, 1935 and it still remains the framework on which the present Constitution is built. The provisions of the Constitution must accordingly be read in the light of the provisions of the Government of India Act, 1935 and the principles laid down in connection with the nature and interpretation of legislative power contained in the Government of India Act, 1935 are applicable, and have in fact been applied, to the interpretation of the Constitution.

In the matter of the Central Provinces & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938(1) Gwyer, C.J. referred to the two decision of the Privy Council in Citizen Insurance Company v. Wiliam Parsons(2) and Attorney General for the Province of Ontario v. Attorney General for the Dominion of Canada(3) which in his opinion had laid down 'most clearly the principles which should be applied by Courts in the matter of deciding upon the competence of the two rival Legislatures that have been set up under the

Indian Federal system.

With regard to the interpretation of the non-obstante clause in s. 100(l) of the Government of India Act, 1935 Gwyer, C.J. observed:

> "It is a fundamental assumption that the legislative powers of the Centre and Provinces could not have been intended to be in conflict with one another and, therefore, we must read them together, and interpret or modify the language in which-one is expressed by the language of the other."

"In all cases of this kind the question before the Court", according to the learned Chief Justice is not "how the two legislative powers are theoretically capable of being construed, but how they are to be construed here and now."

The general scheme of the British North America Act, 1867 with regard to the distribution of legislative powers, and the general

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scope and effect of ss. 91 and 92, and their relations to each other were fully considered and commented upon in the case of Citizen Insurance Company's case, supra. Sir Montague Smith delivering the judgment for the Board evolved the rule of reconciliation observing:

> "In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters Falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective power. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together and the language of one interpreted and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the Section, so as to reconcile the respective powers they contain and give effect to all of them.

Earl Loreburn, L.C. delivering the judgment of the Judicial Committee in Attorney-General for the Province of Ontario's case, (supra) observed that in the interpretation of ss. 91 and 92 of the E: British North America Act:

> "If the text is explicit, the text is conclusive alike for what it directs and what it forbids."

When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act.

In A.L.S.P.P. Subrahmanyan Chettiar v. Muttuswami Goundan(l) Gwyer, C.J. reiterated that the principles laid down by the Privy Council in a long line of decisions in the interpretation of ss. 91 and 92 of the British North America Act, 1867 must be accepted as a guide for the interpretation of s. 100 of the Government of India Act, 1935:

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> "It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that build adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute

is examined to ascertain its 'pith and substance' or its true nature and character for the purpose of determining whether it is legislation in respect of matters in this list or in that."

It has already been stated that where the two lists appear to conflict with each other, an endeavour should be made to reconcile them by reading them together and applying the doctrine of pith and substance. It is only when such attempt to reconcile fails that the non-obstante clause in Art. 246(1) should be applied as a matter of last resort. For, in the words of Gwyer, C.J. in C.P. & Berar Taxation Act's case, supra:

"For the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship."

The observations made by the Privy Council in the Citizen's Insurance Company's case, supra, were quoted with approval by Gwyer, C.J. in C.P. & Berar Taxation Act's case, supra, and he observed that an endeavour should be made to reconcile apparently conflicting provisions and that the general power ought not to be construed as to make a nullity of a particular power operating in the same field. The same duty of reconciling apparently conflicting provisions was reiterated by Lord Simonds in delivering the judgment of the Privy Council in Governor-General in Council v. Province of Madras(1):

"For in a Federal constitution in which there is a division of legislative powers between Central and Provincial Legislatures, it appears to be inevitable that controversy should arise whether one or other legislature

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is not exceeding its own, and encroaching on the other's constitutional legislative power, and in such a controversy it is a principle, which their Lordships do not hesitate to apply in the present case, that it is not the name of the tax but its real nature, its "pith and substance" as it has sometimes been said, which must determine into what category it falls." B

Their Lordships approved of the decision of the Federal Court in The Province of Madras v. Messrs Boddu Paidanna & Sons(l) where it was held that when there were apparently conflicting entries the correct approach to the question was to see whether it was possible to effect a reconciliation between the two entries so as to avoid a conflict and overlapping.

In Prafulla Kumar Mukherjee & Ors. v. Bank of Commerce Ltd., Khulna(1) Lord Porter delivering the judgment of the Board laid down that in distinguishing between the powers of the divided jurisdictions under list I, II and III of the Seventh Schedule to the Government of India Act, 1935 it is not possible to make a clean cut between the powers of the various Legislatures. They are bound to overlap from time to time, and the rule which has. been evolved by the Judicial Committee whereby an impugned statute is examined to ascertain its pith and substance or its true character for the purpose of determining in which particular list the legislation falls, applies to Indian as well as to Dominion legislation. In laying down that principle, the Privy Council observed:

"Moreover, the British Parliament when enacting the Indian Constitution had a long experience of the working of the British North America Act and the Australian Commonwealth Act and must have known that it is not in practice possible to ensure that the powers

entrusted to the several legislatures will never overlap."

The Privy Council quoted with approval the observations of Gwyer, C.J in Subramanyan Chettiar's case, supra, quoted above, and observed:

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"No doubt experience of past difficulties has made A the provisions of the Indian Act more exact in some particulars, and the existence of the Concurrent List has made it easier to distinguish between. those matters which are essential in determining to which list particular provision should be attributed and those which are merely incidental. But the overlapping of subject-matter is not avoided by substituting three lists for two, or even by arranging for a hierarchy of jurisdictions. Subjects must still overlap, and where they do, the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth. and many of the subjects entrusted to provincial legislation could never effectively be dealt with."

It would therefore appear that apparent conflict with the Federal power had to be resolved by application of the doctrine of pith and substance and incidental encroachment. Once it is found that a law made by the Provincial Legislature was with respect to one of the matters enumerated in the Provincial List, the degree or extent of the invasion into the forbidden field was immaterial. "The invasion of the provinces into subjects in the Federal List", in the words of Lord Porter, "was important":

" ... not .. because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining as to what is the pith and substance of the impugned Act. Its pro visions may advance so far into federal territory as to show that its true nature is not covered with Provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking ? once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

The passage quoted above places the precedence according to the three lists in its proper perspective. In answering the objection that

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view does not give sufficient effect to the non-obstante clause in s. 100(1) of the Government of India Act, 1935, as between the three lists, the Privy Council observed:

"Where they come in conflict, List I has priority over Lists III and II and List III has priority over List II."

But added:

"The priority of the Federal Legislature would not prevent the Provincial Legislature from dealing with any matter within List II though it may incidentally affect any item in List I."

It would therefore appear that the constitutionality of the law is to be judged by its real subject matter and not by its incidental effect on any topic of legislation in another

field.

The decision of the Privy Council in Prafulla Kumar Mukherjee's case, supra, has been repeatedly approved by the Federal Court and this Court as laying down the correct rule to be applied in resolving conflicts which arise from overlapping powers in mutually exclusive lists. It may be added as a corollary of the pith and substance rule that once it is found that in pith and substance an impugned Act is a law on a permitted field any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act; Ralla Ram v. Province of East Punjab(2), State of Bombay v. Nerothamdas Jethabai & Anr(2), State of Bombay v. F. N. Balsara(3), A. S. Krishna v. State of Madras(4), M. Karunanidhi v. Union of India(5), Union of India v. H.S. Dhillon(6) and Southern Pharmaceuticals & Chemicals Trichur & Ors. etc. v. State of Kerala & Ors. etc.(7)

In Laskin's Canadian Constitutional Law, 4th edn., it is observed at p. 24 that the doctrine of paramountcy Is tied up with

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the "trenching" doctrine in the first of the four propositions formulated by Lord Tomlin in Attorney-General for Canada v. Attorney General for Britain Columbia & Ors.(1) case, and then he goes into the question,: "What is the basis of the paramountcy doctrine ?" Laskin quotes from Lefroy's Canada's Federal System at p. 126:

> "But the rule as to predominance of Dominion legislation it may be confidently said, can only be invoked in cases of absolutely conflicting legislations in pari materia, when it would be an impossibility to give effect to both the Dominion and the provincial enactments."

The learned author refers two the two decisions of the Privy Council in Attorney-General of Ontario v. Attorney-General of Canada(2) and City of Montreal v. Montreal Street Railway(3) laying down that:

> "There must be a real conflict between the two Acts, that is, the two enactments 'must come into collision'..... or 'comes into conflict .... over a field of jurisdiction common to both'."

Laskin observes that the "conflict" test espoused by these authorities seems clear enough in principle even if it raises problems in application. He then at p. 26 notices that there is a recent trend in the decisions of the Supreme Court of Canada to the strict view of paramountcy reflected in the conflict or collision test, which he describes as the test of operating incompatibility and observes at p. 27 : .

> "It is necessary to be reminded at all times that no issue of paramountcy can arise unless there is in existence federal and provincial legislation which, independently considered, is in each case valid. If either piece of legislation, standing alone, is invalid there is no occasion to consider whether the field has been occupied. The issue that will have been resolved in such case would be the anterior one of the "matter embraced by the legislation, whether of Parliament or of the provincial legislature, as the case may be."

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At p. 28, he states:

> "The doctrine of occupied field applies only where there is a clash between Dominion legislation and provincial legislation within an area common to both."

Here there is no such conflict. The Union and the State laws operate on two different and distinct fields and both the laws are capable of being obeyed.

Questions of conflict between the jurisdiction of Parliament of the Dominion and of the Provincial Legislature have frequently come up before the Privy Council and we may briefly refer to the decisions relied upon though they are of little assistance to the appellants. In Grand Trunk Railway Company of Canada v. Attorney-General of Canada(1), Lord Dunedin observed:

> The construction of the provisions of the British North America Act has been frequently before their Lordships. It does not seem necessary to recapitulate the decisions. But a comparison of two cases decided in the year 1894-viz., Attorney-General of Ontario v. Attorney General of Canada(2) and Tennant v. Union Bank of Canada(3)-seem to establish these two propositions First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and secondly, that if the field it not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

In a later decision of the Privy Council in Attorney-General for Canada v. Attorney-General for British Columbia & Ors. case, supra, Lord Tomlin summarized in four propositions the result of the earlier decisions of the Board on the question of conflict between the Dominion and Provincial Legislatures. The third proposition is to the effect that it is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the

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legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91. The fourth proposition on which the entire argument of learned counsel for the appellants proceeds is based upon the dictum of Lord Dunedin in Grand Trunk Railway Company's case, supra, set out above.

It is well settled that the validity of an Act is not affected if lt incidentally trenches upon matters outside the authorized field and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature.

In Board of Trustees of the Lethbrige Northern Irrigation District & Anr. v. Independent order of Foresters(1), Viscount, Caldecote, L.C. Observed:

> "These sections have been the subject of repeated examination in the Judicial Committee, and there can no longer be any doubt as to the proper principles to their interpretation, difficult though they may be in application. Lord Haldane, in delivering the judgment of the Judicial Committee in, Great West Saddlary Co. v. The King(2) said "The rule of constraction is that general language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous." In a later decision of the

Judicial Committee, Attorney-General for Canada v. Attorney-General for British Columbia, supra, Lord Tomlin summarized in four propositions the result of the earlier decisions of the Board on questions of conflict between the Dominion and the Provincial Legislatures. The first proposition is to the effect that the legislation of the Provincial Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the Provincial

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Legislatures by s. 92, Lord Tomlin referred to Tennant v. Union Bank of Canada, supra, as the authority for this statement."

Viscount Caldecote then observed:

"In applying these principles, as their Lordships propose to do, an inquiry must first be made as to the "true nature and character of the enactment in question" Citizen Insurance Co. Of Canada v. Wiliam Parsons) (supra) or, to use Lord Watson's words in delivering the judgment of the Judicial Committee in Union Colliery Company of British Columbia v. Bryden(1) as to their "pith and substance". Their Lordships now address themselves to that inquiry."

"Legislation", said Lord Maugham in delivering the judgment of the Privy Council in Attorney-General for Alberta v. Attorney-General for Canada,(2) "given in pith and substance within one of the classes specially enumerated in s. 91 is beyond the legislative competence of the Provincial Legislature under s. 91". At p. 370 of the Report, Lord Maugham laid down on behalf of the Privy Council:

"Since 1894 it has been a settled principle that if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in s. 91 and is properly within one of the subjects enumerated in s. 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation."

(Emphasis supplied.)

Lord Maugham's reference to the year 1894 points to the decision of the Privy Council in Attorney-General for Ontario v. Attorney-General for Canada, supra.

In Attorney-General for Canada v. Attorney-General for the Province of Quebed,(3) Lord Porter in delivering the judgment of the Board drew attention to these principles and then observed:

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"In calling attention to these principles their Lordships are but repeating what has many times been set forth in the judgments of the Board, and it only remains to apply them to the individual case under consideration. '

The rule of pith and substance laid down by the Privy-Council was reaffirmed by Viscount Simon in Attorney-General of Sasketchewan v. Attorney-General of Canada & Ors (1)

This was emphasized very clearly by Lord Atkin while dealing with the validity of the Milk and Milk Products Act (Northern Ireland) which was impugned as violating s. 4 of the Government of Ireland Act, 1920 in Gallahagher v. Lynn(2) in his own terse language:

"It is well established that you are to look at the "true nature and character" of the legislation; Russell v. The Queen(3) "the pith and substance of the legislation". If on the view of the statute a, whole, you find that the substance of the legislation is within the express powers, then it is now invalidated if incidentally it affects matters which are outside the authorized field."

Much stress is laid on the fourth propositions formulated by Lord Tomlin in Attorney-General for Canada v. Attorney-General for British Columbia & Ors., (supra) based on the dictum of Lord Dunedin in Grand Trunk Railway Company of Canada's case, supra, which, even at the cost of repetition, we may set out below:

"4. There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet, the Dominion legislation must prevail: see Grand Trunk R. of Canada v. Attorney-General of Canada, (supra)."

The question is whether the field is not clear and the two legislations meet and therefore on the doctrine of Federal supremacy sub-s (3)
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of s. S of the Act must be struck down as ultra vires The principle deducible from the dictum of Lord Dunedin as applied to the distribution of legislative powers under Art 246 of the Constitution, is that when the validity of an Act is challenged as ultra vires, the answer lies to the question, what is the pith and substance of the impugned Act ? No doubt, in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If however, the matter dealt with comes within any of the classes of subjects enumerated in List II, then it is under the terms of Art. 246 (3) not to be deemed to come within the classes of subjects assigned exclusively to Parliament under Art. 246 (1) even though the classes of subjects looked at signly overlap in many respects. The whole distribution of powers must be looked at as Gwyer, C. J. Observed in C.P. & Berar Taxation Act's case, supra, in determining the question of validity of the Act in question. Moreover, as Gwyer, C.J. Laid down in Subrahmaniyan Chettiar's case, (supra), and affirmed by their Lordships of the Privy Council in Prafulla Kumar Mukherjee's case, (supra) it is within the competence of the State Legislature under Art.
246 (3) to provide for matters which, though within the competence of Parliament, are necessarily incidental to effective legislation by the State Legislature on the subject of legislation expressly enumerated in List II.

We must then pass on to the contention advanced by learned counsel for the appellants that there is repugnancy between sub-s (3) of s. S of the Act and paragraph 21 of the Drugs (Price Control) order and therefore sub-s. (3) of s. 5 of the Act is void to that extent. Ordinarily, the laws could be said to be repugnant when they involve impossibility of obedience to them simultaneously but there may be cases in which enactments may be inconsistent although obedience to each of them may be possible without disobeying the other. The question of "repugnancy" arises only with reference to a legislation falling in the Concurrent List but it can be cured by resort to Art. 254 (2).

As we have endeavoured so far, the question raised as to the constitutional validity of sub-s. (3) of s. S of the Act has to be determined by application of the rule of the pith and substance whether or not the subject-matter of the impugned legislation was competently enacted under Art. 246, and therefore tho question of repugnancy under Art. 254 was not a matter in issue. The submission
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put forward on behalf of the appellants however is that there is direct collision and/or irreconciliable conflict between sub-s. (3) of s. 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act which is relatable to Entry 33 of List III. It is sought to be argued that the words "a law made by Parliament which Parliament is competent to enact" must be construed to mean not only a law made by Parliament with respect to one of the matters enumerated in the Concurrent List but they are wide enough to include a law made by Parliament with respect to any of the matters enumerated in the Union List. The argument was put in this form. In considering whether a State law is repugnant to a law made by Parliament, two questions arise: First, is the law made by Parliament viz. the Essential Commodities Act, a valid law ? For, if it is not, no question of repugnancy to a State law can arise. If however it is a valid law, the question as to what constitutes repugnancy directly arises. The Second question turns on a construction of the words "a law made by Parliament which Parliament is competent to enact" in Art. 254 (1).

Strong reliance is placed on the judgment of the High Court of Australia in Clyde Engineering Company Limited v. Cowburn(1) and to a passage in Australian Federal Constitutional Law by Colin Howard, 2nd edn. at pp. 34-35. Our attention is also drawn to two other decisions of the High Court of Australia: Ex parte Mc Lean(2) and Stock Motor Ploughs Limited v. Forsyth.(3) The decision in Clyde Engineering Company's cases, supra, is an authority for the proposition that two enactments may be inconsistent where one statute takes away the rights conferred by the other although obedience to each one of them may be possible without disobeying the other. The contention is that paragraph 21 of the Control order confers a right on the manufacturers and producers of medicines and drugs to pass on the liability for sales tax while sub-s. (3) of s. 5 of the Act prohibits such manufacturers or producers from passing on such liability. The argument cannot prevail for two obvious reasons viz (1) Entry 54 of List II is a tax entry and therefore there is no question of repugnancy between sub-s. (3) of s. 5 of the Act which is a
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law made by the State Legislature for the imposition of tax on sale or purchase of goods relatable to Entry 54 and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act which is a law made by Parliament relatable to Entry 33 of List III. And (2). The question of 'repugnancy' can only arise in connection with the subjects enumerated in the Concurrent List as regards which both the Union and the State Legislatures have concurrent powers so that the question af conflict between laws made by both Legislatures relating to the same subject may arise.

This Court has considered the question of repugnancy in several cases and in Deep Chand v. The State of Uttar Pradesh & Ors.(1) the result of the authorities was thus

stated by Subba Rao, J.:

"Nicholas in his Australian Constitution, 2nd edn., p. 303, refers to three tests of inconsistency or repugnancy:

1. There may be inconsistency in the actual terms of the competing statutes;
2. Though there may be no direct conflict, a State law may be inoperative because the Commonwealth law, or the award of the Commonwealth Court, is intended to be a complete exhaustive Code; and
3. Even in the absence of intention, a conflict may arise when both State and Commonwealth seek to exercise their powers over the same subject-matter."

In Ch. Tika Ramji & Ors. v. The State of Uttar Pradesh & Ors.(2) the Court accepted the above three rules evolved by Nicholas, among others, as useful guides to test the question of repugnancy.

Art. 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State

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law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Art. 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Cl. (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in cl. (1), cl. (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to cl. (2). The proviso to Art. 254(2) empowers the Union Parliament to repeal or amend a repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together.: See: Zaverbhai Amaidas v. State of Bombay(1), M. Karunanidhi v. Union of India(2) and T. Barai v. Henry Ah Hoe d: Anr.(2)

We may briefly refer to the three Australian decisions relied upon. As stated above, the decision in Clyde Engineering Company's case (supra), lays down that inconsistency is also created when one statute takes away rights conferred by the other. In Ex Parte McLean's case,

supra, Dixon J. laid down another test viz., two
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statutes could be said to be inconsistent if they, in respect of an identical subject-matter, imposed identical duty upon the subject, but provided for different sanctions for enforcing those duties. In Stock Motor Ploughs Limited's case, supra, Evatt, J. held that even in respect of cases where two laws impose one and the same duty of obedience there may be inconsistency. As already stated the controversy in these appeals falls to be determined by the true nature and character of the impugned enactment, its pith and substance, as to whether it falls within the legislative competence of the State Legislature under Art. 246(3) and does not involve any question of repugnancy under Art. 254(1).

We fail to comprehend the basis for the submission put forward on behalf of the appellants that there is repugnancy between sub-s. (3) of s. 5 of the Act which is relatable to Entry 54 of List II of the Seventh Schedule and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act relatable to Entry 33 of List III and therefore sub-s. (3) of s. 5 of the Act which is a law made by the State Legislature is void under Art. 254(1). The question of repugnancy under Art. 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will, to the extent of repugnancy become void. Art. 254(1) has no application to cases of repugnancy due to overlapping found between List II on the one hand and List I and List III on the other. If such overlapping exists in any particular case, the State law will be ultra vires because of the non-obstante clause in Art. 246(1) read with the opening words "Subject to" in Art. 246(3). In such a case, the State law will fail not because of repugnance to the Union law but due to want of legislative competence. It is no doubt true that the expression "a law made by Parliament which Parliament is competent to enact" in Art. 254(1) is susceptible of a construction that repugnance between a State law and a law made by Parliament may take place outside the concurrent sphere because Parliament is competent to enact law with respect to subjects included in List III as well as 'List I" But if Art. 254(1) is read as a whole, it will be seen that it is expressly made subject to cl. (2) which makes reference to repugnancy in the field of Concurrent List-in other words, if cl. (2) is to be the guide in the determination of scope of cl. (1), the
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repugnancy between Union and State law must be taken to refer only to the Concurrent field. Art. 254(1) speaks of a State law being repugnant to (a) a law made by Parliament or (b) an existing law.

There was a controversy at one time as to whether the succeeding words "with respect to one of the matters enumerated in the Concurrent List" govern both (a) and (b) or (b) alone. It is now settled that the words "with respect to" qualify both the clauses in Art. 254(1) viz. a law made by Parliament which Parliament is competent to enact as well as any provision of an existing law. The under lying principle is that the question of repugnancy arises only when both the Legislatures are competent to legislate in the

same field i.e. with respect to one of the matters enumerated in the Con current List. Hence, Art. 254(1) can not apply unless both the Union and the State laws relate to a subject specified in the Con current List, and they occupy the same field.

This construction of ours is supported by the observations of Venkatarama Ayyar, J. speaking for the Court in A. S. Krishna's case, supra, while dealing with s. 107(1) of the Government of India Act, 1935 to the effect:

> "For this section to apply, two conditions must be fulfilled: (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other, It is only when both these requirements are satisfied that the Provincial law will, to the extent of the repugnancy, become void."

In Ch. Tika Ramji's case, supra, the Court observed that no question of repugnancy under Art. 254 of the Constitution could arise where parliamentary legislation and State legislation occupy different fields and deal with separate and distinct matters even though of a cognate and allied character and that where, as in that case, there was no inconsistency in the actual terms of the Acts enacted by Parliament and the State Legislature relatable to Entry 33 of List III, the test of repugnancy would be whether Parliament and State Legislature, in legislating on an entry in the Concurrent List, exercised their powers over the same subject-matter or whether the laws enacted by Parliament were intended to be exhausted as to cover the entire field, and added:

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> "The pith and substance argument cannot be imported here for the simple reason that, when both the Centre as well as the State Legislatures were operating in the con current field, there was no question of any trespass upon the exclusive jurisdiction of the Centre under Entry 52 of List I, the only question which survived being whether put in both the pieces of legislation enacted by the Centre and the State Legislature, there was any such repugnancy."

This observation lends support to the view that in cases of overlapping between List II on the one hand and Lists I and III on the other, there is no question of repugnancy under Art. 254(1). Subba Rao. J. speaking for the Court in Deep Chand's case, supra, interpreted Art. 254(1) in these terms:

> "Art. 254(1) lays down a general rule. Clause (2) is an exception to that Article and the proviso qualified the said exception. If there is repugnancy between the law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Con current List, the law made by Parliament shall prevail to the extent of the repugnancy and law made by the State shall, to the extent of such repugnancy, be void."

In all fairness to learned counsel for the appellants, it must be stated that they did not pursue the point any further in view of these pronouncements.

We are unable to appreciate the contention that sub-s. (3) of s. 5 of the Act being a State law must be struck down as ultra vires as the field of fixation of price of essential commodities is an occupied field covered by a central legislation. It is axiomatic that the power of the

State Legislature to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List 11 of the Seventh Schedule and to make ancillary provisions in that behalf, is plenary and is not subject to the power of Parliament to make a law under Entry 33 of List III. There is no warrant for projecting the power of Parliament to make a law under. Entry 33 of List III into the State's power of taxation under Entry 54 of List II. Otherwise, Entry 54 will have to be read as: 'Taxes on the sale or purchase of goods other than essential commodities etc
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cetra'. When one entry is made 'subject to' another entry, all that it means is that out of the scope of the former entry, a field of legislation covered by the latter entry has been reserved to be specially dealt with by the appropriate Legislature. Entry 54 of List II of the Seventh Schedule is only subject to Entry 92A of List I and there can be no further curtailment of the State's power of taxation. It is a well established rule of construction that the entries in the three lists must be read in a broad and liberal sense and must be given the widest scope which their meaning is fairly capable of because they set up a machinery of Government.

The controversy which is now raised is of serious moment to the States, and a matter apparently of deep interest of the Union. But in its legal aspect, the question lies within a very narrow compass. The duty of the Court is simply to determine as a matter of law, according to the true construction of Art. 246(3) of the Constitution, whether the State's power of taxation of sale of goods under Entry 54 of List II and to make ancillary provisions in regard thereto, is capable of being encroached upon by a law made by Parliament with respect to one of the matters enumerated in the Concurrent List. The contention fails to take into account that the Constitution effects a complete separation of the taxing power of the Union and of the States under Art. 246.

It is equally well settled that the various entries in the three lists are not 'powers of legislation, but 'fields' of legislation. The power to legislate is given by Art. 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control.

"Legislative relations between the Union and the States inter se with reference to the three lists in Schedule VII cannot be under stood fully without examining the general features disclosed by the entries contained in those Lists: "Seervai in his Constitutional Law of India, 3rd edn. vol. 1 at pp. 81-82. A scrutiny of Lists I and II of the Seventh Schedule would show that there is no overlapping
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anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States. Following the scheme of the Government of India Act, 1935, the Constitution has made the taxing power of the Union and of the States mutually exclusive and thus avoided the difficulties which have arisen in some other Federal Constitutions from overlapping powers of taxation.

It would therefore appear that there is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation ill a separate group. In M.P. Sundararamier & Co. v. The State of Andhra Pradesh & Anr.(1) This Court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92A deal with taxes. In List 11, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal With taxes. This mutual exclusiveness is also brought out by the fact that in List Ill, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect of matters given in that list other then court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State s exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-s. (3) of s. 5 of the Act and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play.

The remaining part of the case presents little difficulty. It would be convenient to deal with the contention based on Arts. 14 and 19 (1) (g) of the Constitution together as the submissions more or less proceed on the similar lines. It is urged that the provision contained in sub-s. (3) of s. 5 of the act is violative of Art. 14 of the Constitution inasmuch as it is wholly arbitrary and irrational and it

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treats "unequals as equals". It is urged that the Essential Commodities Act treats certain controlled commodities and their sellers in a special manner by fixing controlled prices. The dealers so treated by this Central law are so circumstanced that they cannot be equated with other dealers who can raise their sale prices and absorb the surcharge levied under sub-s. (1) of s. 5 of the act and a class of dealers like manufacturers and producers of medicines and drugs and other dealers of essential commodities who cannot raise their sale prices beyond the controlled price are being treated similarly without any rational basis. Once the fact of different classes being separate is taken, then a State law which treats both classes equally and visits them with different burdens would be violative of Art. 14. The State cannot by treating 'equals as unequals' impose different burdens on different classes. It is submitted that the restriction imposed by sub-s. 3 of s. 5 of the act which prevents the manufacturers and producers of medicines and drugs and other essential commodities from passing on the liability to pay surcharge is confiscatory and imposes a disproportionate burden on such manufacturers and producers or other dealers.

These two abstract questions have been convassed on the basis that each of the appellants was a dealer having a gross turnover of Rs. 5 lakhs or more in a year and therefore liable to pay surcharge, in addition to the tax

payable by him, under sub-s. (1) of s. 5 of the Act. It is lamentable that there is no factual foundation laid to support the contention that the levy of surcharge under sub-s. (1) of s. 5 of the Act imposes a disproportionate burden on a certain class of dealers such as manufacturers or producers of drugs and pharmaceuticals or dealers engaged in the business of distribution and sale of motor-trucks etc. to support the assertion that sub-s. (3) of s. 5 of the Act which prohibits such persons from passing on the liability to pay surcharge is arbitrary or irrational, or that it treats 'unequals as equals' and thus infringes Art. 14 of the Constitution or is confiscatory in nature.

There is no ground whatever for holding that sub-s. (3) of s. 5 of the Act is arbitrary or irrational or that it treats 'unequals as equals', or that it imposes a disproportionate burden on a certain class of dealers. It must be remembered that sub-s. (1) of s. 5 of the Act provides for the levy of a surcharge having a gross turnover of Rs 5 lakhs or more in a year at a uniform rate of 10 per centum of the tax payable by them, irrespective whether they are dealers in essential

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commodities or not. A surcharge in its true nature and character is nothing but a higher rate of tax to raise revenue for general purposes. The levy of surcharge under sub-s. (1) of s. 5 of the Act falls uniformly on a certain class of dealers depending upon their capacity to bear the additional burden. From a fiscal point of view, a sales tax on a manufacturer or producer involves the complication of price-structure. It is apt to increase the price of the commodity, and tends to be shifted forward to the consumer. The manufacturers or producers often formulate their prices in terms of certain profit targets. Their initial response would be to raise prices by the full amount of the tax. Where the conventional mark-up leaves substantial unrealized profits, successful tax shifting is possible regardless of the nature of the tax. If, on the other hand, the tax cannot be passed on to the consumer, it must be shifted backwards to owners inputs. Despite theoretical approach of economists, businessmen always Regard the tax as a cost and make adjustments accordingly, and this is brought out by John C. Winfrey on Public Finance at p. 402 in the following passage:

> "The businessman .. .. has been skeptical regarding the entire approach of marginal cost pricing. His position has been that taxes are treated as a cost when determining prices, be it as part of a full-cost pricing" rule? by application of a conventional mark-up rate defined net of tax, or by pricing to meet a net of tax target rate of return. According to these formulas, a change in tax rate leads to an adjustment in price. The profits tax becomes a quasi sales tax. The fact that such a price policy is not consistent with the usual concepts of profit maximization does not disprove its existence."

Pausing here for a moment, we may observe that a surcharge being borne by the manufacturers and producers of medicines and drugs under sub-s. (3) of s. 5 of the Act, the controlled price of such medicines and drugs to the consumer will remain the same. From the figures set out above, it will be seen that the business carried on by the appellants in the State of Bihar alone is of such magnitude that they have the capacity to bear the additional burden of surcharge

levied under sub-s. (1) of s. 5 of the Act. It roughly works out to one paisa per rupee of the sale price of the manufactured commodity. There is no material placed on record that the surcharge levied under sub-s. (1) of s. 5 of the Act imposes a
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disproportionate burden on the appellants or that it is confiscatory in nature.

The argument of arbitrariness is an argument of despair. Sub-s. (1) of s. Of the Act levies surcharge on dealers whose gross turnover in a year exceeds Rs. 5 lakhs irrespective of whether such dealers deal in essential commodities or not. lt is a general tax and all dealers falling within the class defined under sub-s. (1) of s. 5 of the Act have been levied the surcharge at a uniform rate of 10 per centum of the tax. It will be noticed that first proviso to sub-s. (1) of s. 5 enjoins that the aggregate of the tax and surcharge payable under the Act shall not exceed, in respect of goods declared to be of special importance in inter-State trade or commerce by s. 14 of the Central Sales Tax Act, 1956, the rate fixed by s. 15 thereof. Under s. 14 of the Act, almost all commodities which are essential to the life of the community are declared to be goods of special importance in inter-State trade or commerce and therefore the maximum sales tax leviable on sale or purchase of such goods cannot exceed 4 per cent. It would therefore appear that generally dealers having a gross turnover of Rs. 5 lakhs in a year dealing in commodities covered by s. 14 will not have to bear the burden of surcharge under sub-s. (1) of s. 5 of the Act. It is the misfortune of these appellants that medicines and drugs are not declared to be of special importance in respect of inter-State trade or commerce by s. 14 of the Central Sales Tax Act. That apart, the appellants as manufacturers or producers of drugs under paragraph 24(1) have to bear the burden of sales tax on the controlled price that they cannot charge to a wholesaler a price higher than (a) the retail price minus 14 per cent thereof, in the case of ethical drugs; and (b) the retail price minus 12 per cent thereof, in the case of non-ethical drugs. Under paragraph 24(2) they cannot sell to a retailer at a price higher than (a) the retail price minus 12 per cent thereof, in the case of ethical drugs; and (b) the retail price minus 10 per cent thereof, in the case of non-ethical drugs. These provisions merely indicate that there is a margin of 14 per cent to the wholesaler in the case of ethical drugs and of 12 per cent in the case of non-ethical drugs,. and the wholesaler has a margin of 2 per cent in either case when he sells to the retailer. In contrast, the profit margins of manufacturers and producers of medicines and drugs is considerably higher. Under the scheme of the Drugs (Price Control) order, the calculation of the retail price of formulations under paragraph 10 has to be accordance with the formula set out therein. One of the elements that enters
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into the price structure is the 'mark-up' which is defined in paragraph 11 to include distribution cost, outward freight, promotional expenses, manufacturers margin and trade commission. Clauses (1) to (3) of the Third Schedule show that the mark-up ranges from 40% in the case formulations specified in category (i), 55% in the case of formulations specified in category (ii) and 100% in the case of formulations specified in category (iii). This gives an indication of the extent of profits earned by the manufacturers and producers of formulations.

In Market situations where uncertainty about demand prevails and mark-up pricing is practised, the usual response is to attempt to shift taxes to the consumer. Musgrave in his Public Finance in Theory and Practice observes that economists like to think of business behaviour as being rational, in the sense of following a maximising rule, but businessmen may not act rationally. They regard the tax as a cost and make adjustments accordingly:

> "One of these is the practice of markup or margin pricing. Under this rule, costs are "marked-up" to allow for a customary ratio of profits to costs, or price is set such as to leave profits (i.e., sales minus cost) a customary fraction of sales. Whether this gives rise to shifting depends on how costs and margins are defined. Shifting occurs if the tax is included as a cost, or if the margin if defined net of tax."

It would therefore appear that businessmen are skeptical regarding the entire approach of marginal cost pricing. their position is that taxes are treated as a cost when determining prices, be it as part of a "full-cost-pricing" rule, by application of a conventional mark-up rate defined net of tax, or by pricing to meet a net of tax target rate of return. According to these formulae, a change in tax rate leads to an adjustment in price. If the appellants find that the levy of surcharge under sub-s. Of s. 5 of the Act cannot be borne within the present price structure of medicines and drugs, they have the right to apply to the Central Government for revision of the retail price of formulations under paragraph 15 of the Control order.

It was a startling proposition advanced by learned counsel for the appellants that the Court was wrong in Kodar's case in

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justifying on the basis of economic superiority the burden of additional sales tax on a certain class of dealers. It was held by the Court relying upon the dissenting opinion of Cardozo, J. in Stewart Dry Goods Co. v. Lewis [1935] 294 US 550 that a gross sales tax graduated at increasing rates with the volume of sales on a certain class of dealers does not offend against Art. 14 of the Constitution. The contention that ability to pay is not a relevant criterion for upholding the validity of sub-s. (3) of s. 5. Of the Act cannot be accepted. To say the least, there is no basis for this submission. It is beyond the scope of this judgment to enter into intricacies of public finance viz. Objectives and criteria of a tax, problems of shifting et cetera. Nor is it necessary for us to enter into a discussion of the so called benefit principle, or the alternative approach of ability to pay. There is probably widespread agreement now that taxes that fall on the 'better-off' rather than the worse-off' and are progressive rather tean proportional, are to be preferred. The concept of 'ability-to-pay' implies both equal treatment of people with equal ability, however measured, and the progressive rate structure. The 'ability-to-pay' doctrine has strong affinities to egalitarian social philosophy, both support measures designed to reduce inequalities of wealth and income.

On questions of economic regulations and related matters, the Court must defer to the legislative judgment. When the power to tax exists, the extent of the burden is a matter for discretion of the law-makers. It is not the function of the Court to consider the propriety or justness of the tax, or enter upon the realm of legislative policy. If the evident intent and general operation of the tax

legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied. The equality clause in Art. 14 does not take-from the State power to classify a class of persons who must bear the heavier burden of tax. The classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequalities.

In Kodar's case, supra, the constitutional validity of a similar levy was upheld on the capacity to pay. It was observed:

> "The large dealer occupies a possition of economic superiority by reason of his greater volume of his business. And to make his tax heavier, both absolutely and relatively, is Dot arbitrary discrimination,, but an attempt
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> to proportion the payment to capacity to pay and thus to arrive in the end at more genuine equality."

The economic wisdom of a tax is within the exclusive province of the Legislature. The only question for the Court to consider is whether there is rationality in the belief of the Legislature that capacity to pay the tax increases by and large with an increase of receipts. The view taken by the Court in Kodar's case, supra, is in consonance with social justice in an egalitarian State and therefore the contention based on Art. 14 of the Constitution must fail.

The contention that sub-s. (3) of s. 5 of the Act imposes an unreasonable restriction upon the freedom of trade guaranteed under Art. 19 (1) (g) of the Constitution proceeds on the basis that sales tax being essentially an indirect tax, it was not competent for the Legislature to make a provision prohibiting the dealer from collecting the amount of surcharge cannot prevail. It is urged that the surcharge does not retain its avowed character as sales tax but in its true gature and character is virtually a tax on income, by reason of the limitation contained in sub-s. (3) of s. 5 of the Act. We are not impressed with the argument. Merely because a dealer falling within the class defined under sub-s. (1) of s. 5 of the Act is prevented from collecting the surcharge recovered from him, does not affect the competence of the State Legislature to make a provision like sub-s. (3) of s. 5 of the Act nor does it become a tax on his income. It is not doubt true that a sales tax is, according to the accepted notions, intended to be passed on to the buyer, and the provisions authorising and regulating the collection of sales tax by the seller from the purchaser are a usual feature of sales tax legislation. But it is not an essential characteristic of a sales tax that the seller must have the right to pass it on to the consumer, nor is the power of the Legislature to impose a tax on sales conditional on its making a provision for sellers to collect the tax from the purchasers. Whether a law should be enacted, imposing a sales tax, or validating the imposition of sales tax, when the seller is not in a position to pass it on to the consumer, is a matter of policy and does not effect the competence of the legislature: see: The Tata Iron & Steel Co. Ltd. v. The State of Bihar(1): M/s. J.K. Jute Mills Co. Ltd. v. The State of Uttar Pradesh & Anr.(2) 5. Kodar v. State of Kerala.(3) The contention based on the Art. 19 (1) (g) cannot therefore be sustained.

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There was quite some discussion at the Bar as to

whether the assent of the President is justiciable. rt was submitted that since not only sub-s. (1) of s. 5 of the Act which provides for the levy of a surcharge on dealers having a gross turnover of Rs. 5 lakhs in a year but also sub-s. (3) thereof which interdicts that no such dealer shall be entitled to recover the amount of surcharge collected from him, are both relatable to Entry 54 of List II of the Seventh Schedule, there was no occasion for the Governor to have referred the Bill under Art. 200 to the President for his assent. It is some what strange that this argument should be advanced for the first time after a lapse of 30 years of the inauguration of the Constitution. Immediate provocation for this argument appears to be an obiter dictum of Lord Diplock while delivering the judgment of the Judicial Committee in Teh Cheng Poh @, Char Meh v. Public Prosecutor, Malaysia(1) that "the Courts are not powerless when there is a failure to exercise the power of revocation of a Proclamation of Emergency "issued by the Ruler of Malaysia under s. 47 (2) of the Internal Security Act. The ultimate decision of the Privy Council was that since by virtue of s 47 (2) of that Act the security area proclamation remained lawful until revoked by resolutions of both Houses of Parliament or by the Ruler, it could not be deemed to lapse because the conditions upon which the Ruler had exercised his discretion to make the Proclamation were no longer in existence. That being so, the decision in Teh Cheng Poh's case, supra, is not an authority for the proposition that the assent of the President is justiciable nor can it be spelled out that that Court can enquire into the reasons why the Bill was reserved by the Governor under Art. 200 for the assent of the President nor whether the President applied his mind to the question whether there was repugnancy between the Bill reserved for his consideration and received his assent under Art. 254 (2).

The constitutional position of a Governor is clearly defined. The Governor is made a component part of the Legislature of a State under Art. 168 because every Bill passed by the State Legislation has to be reserved for the assent of the Governor under Art. 200. Under that Article, the Governor can adopt one of the three courses, namely: (1) He may give his assent to it, in which case the Bill becomes a law; or (2) He may except in the case of a 'Money Bill' withhold his assent therefrom, in which cases the Bill falls through unless the procedure indicated in the first proviso is followed

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i. e. return the Bill to the Assembly for consideration with a message, or (3) He may "on the advice of the Council of Ministers" reserve the Bill for the consideration of the President, in which case the President will adopt the procedure laid down in Art. 201. The first proviso to Art. 200 deals with a situation where the Governor is bound to give his assent and the Bill is reconsidered and passed by the Assembly. The second proviso to that Article makes the reservation for the Consideration of the President obligatory where the Bill would, "if it becomes law, dergoate from the powers of the High Court". Under Art. 201, when a Bill is reserved by the Governor for the consideration of the President, the President can adopt two courses, namely: (1) He may give his assent to it in which case again the Bill becomes a law; or (2) He may except where the Bill is not a 'Money Bill', direct the Governor to return the Bill to the House or, as the case may be, the Houses of the Legislature of the State together with such message as is mentioned in the first proviso to Art. 200.

When a Bill is so reserved by the President, the House or Houses shall reconsider it accordingly within a period of six months from the date of receipt of such message and if it is again passed by the House or Houses with or without amendment, it shall be presented again to the President for his consideration. Thus, it is clear that a Bill passed by the State Assembly may become law if the Governor gives his assent to it or if, having been reserved by the Governor for the consideration of the President, it is assented to by the President

There is no provision in the Constitution which lays down that a Bill which has been assented to by the President would be ineffective as an Act if there was no compelling necessity for the Governor to reserve it for the assent of the President. A Bill which attracts Art. 254 (2) or Art. 304 (b) where it is introduced or moved in the Legislative Assembly of a State without the previous sanction of the President or which attracted Art. 31 (3) as it was then in force, or falling under the second proviso to Art. 200 has necessarily to be reserved for the consideration of the President. There may also be a Bill passed by the State legislature where there may be a genuine doubt about the applicability of any of the provisions of the Constitution which require the assent of the President to be given to it in order that it may be effective as an Act. In such a case, it is for the Governor to exercise his discretion and to decide whether he should assent to the Bill or should reserve it for consideration of the President to avoid any furture complication Even if it ultimately turns out that there was no necessity for the Governor to have
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reserved a Bill for the consideration of the President, still he having done so and obtained the assent of the President, the Act so passed cannot be held to be unconstitutional on the ground of want of proper assent. This aspect of the matter, as the law now stands, is not open to scrutiny by the courts. In the instant case, the Finance Bill which ultimately became the Act in question was a consolidating Act relating to different subjects and perhaps the Governor felt that it was necessary to reserve it for the assent of the President. We have no hesitation in holding that the assent of the President is not justiciable, and we cannot spell out any infirmity arising out of his decision to give such assent.

There still remains the contention that for the purpose of levying surcharge it is impermissible to take into account the method of computation of gross turnover, the turnover representing sales in the course of inter-State trade and outside the State and sales in the course of export out of India. It is urged that the non-obstante clause in s. 7 of the Act has the effect of taking these transactions out of the purview of the Act with the result that a dealer is not required nor is he entitled to include them in the calculations of his turnover liable to tax thereunder. The submission is that sub-s. (1) of s. 5 of the Act is ultra vires the State Legislature in so far as for purposes of levying the charge, the incidence of liability of a dealer to pay such surcharge depends on his gross turnover as defined in s. 2 (j) of the Act. In support of the contention, reliance was placed on the following passage in the judgment of this Court in A. V. Fernandez v. State of Kerala(1):

> "There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax

on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the

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sales or purchases are exempted from taxation altogether. The legislature cannot enact a law imposing or authorising the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed.

The submission appears to proceed on a misapprehension of the principles laid down in Fernandez's case, supra.

To understand the ratio deducible in Fernandez's case, supra, a few facts have to be stated. The business of the assessee in that case consisted in the purchase of copra, manufacture of coconut oil and cake therefrom and sale of oil and cake to parties inside the State and sale of oil to parties outside the State. In 1951, the Travancore-Cochin General Sales Tax Act, 1125 was amended by addition of s. 26 which incorporated the ban of Art. 286 of the Constitution and was in pari materia with s. 7 of the Act. For the year 1951-52, the Sales Tax officer assessed the assessee to sales tax on a net assessable turnover by taking the value of the whole of the copra purchased by him, adding thereto the respective values of the oil and cake sold inside the State and. deducting only the value of the copra relatable to the oil sold inside the State. It was contended by the assessee that in the calculation of the net turnover, he was entitled to include the total value of the oil sold by him, both inside and outside the State, and deduct therefrom the total value of the copra purchased by him and further, under the overriding provision of s. 26 of the Act, he was entitled to have the value of the oil sold outside the State deducted. The main controversy between the parties centered around the method of computation of the net turnover. The contention advanced by the assessee was rejected by the High Court, which limited the deduction to purchase of copra relatable to the sales inside the State. In affirming that decision, this Court observed that so far as sales of coconut oil outside the State were concerned, they were, as it were, by reason of s. 26 of the Act read in conjunction with Art. 286, taken out of the purview of the Act, and that they had the effect of setting at naught and obliterating in regard thereto the provisions contained in the Act relating to the imposition of tax on the sale or purchase of such goods and in

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particular the provision contained in the charging section, s. 3, and the provisions contained in r. 20(2) and other provisions which were incidental to the process of levying such tax. The aforementioned passage relied upon cannot be read out of context in which it appears and if so read, it

is hardly of any assistance to the appellants.

In the penultimate paragraph in Fernandez's case, supra, the Court after laying down that the non-obstante clause in s. 26 had the effect of taking sales in the course of inter-State trade and outside the State out of the purview of the Act with the result that the dealer was not required nor entitled to include them in computation e of the turnover liable to tax thereunder, observed:

> "This position is not at all affected by the provision with regard to registration and submissions of returns of the sales tax by the dealers under the Act. The legislature, in spite of its disability in the matter of the imposition of sales tax by virtue of the provisions of Art. 286 of the Constitution, may for the purposes of the registration of a dealer and submission of the returns of sales tax include these transactions in the dealer's turnover. Such inclusion, however, for the purposes aforesaid would not affect the non-liability of these transactions to levy or imposition of sales tax by virtue of the provisions of Art. 286 of the Constitution and the corresponding pro vision enacted in the Act, as above."

The decision in Fernandez's case, supra, is therefore clearly an authority for the proposition that the- State Legislature notwithstanding Art. 286 of the Constitution while making a law under Entry 54 of List II of the Seventh Schedule can, for purposes of the registration of a dealer and submission of returns of sales tax, include the transactions covered by Art. 286 of the Constitution That being so, the constitutional validity of sub-s. (1) of s. 5 of the Act which provides for the classification of dealers whose gross turnover during a year exceeds Rs. 5 lakhs for the purpose of levy of surcharge, in addition to the tax payable by him, is not assailable. So long as sales in the course of inter-State trade and commerce or sales outside the State and sales in the course of import into, or export out of the territory of India are not taxed, there is nothing to prevent the State Legislature while making a law for the levy of a surcharge under Entry 54 of List II of the Seventh

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Schedule to take into account the total turnover of the dealer within the State and provide, as has been done by sub-s. (1) of s. 5 of the Act, that if the gross turnover of such dealer exceeds Rs. 5 lakhs in a year, he shall, in addition to the tax, also pay a surcharge at such rate not exceeding 10 per centum of the tax as may be provided. The liability to pay a surcharge is not on the gross turnover including the transactions covered by Art. 286 but is only on inside sales and the surcharge is sought to be levied on dealers who have a position of economic superiority. The definition of gross turnover in s. 2(j) of the Act is adopted not for the purpose of bringing to surcharge inter-State sales or outside sales or sales in the course of import into, or export of goods out of the territory of India, but is only for the purpose of classifying dealers within the State and to identify the class of dealers liable to pay such surcharge. The underlying object is to classify dealers into those who are economically superior and those who are not. That is to say, the imposition of surcharge is on those who have the capacity to bear the burden of additional tax. There is sufficient territorial nexus between the persons sought to be charged and the State

seeking to tax them. Sufficiency of territorial nexus involves a consideration of two elements viz.: (a) the connection must be real and not illusory, and (b) the liability sought to be imposed must be pertinent to that territorial connection: State of Bombay v. R.M.D. Chamarbaugwala(1), The Tata Iron & Steel Co. Ltd. v. State of Bihar(2), and International Tourist Corporation etc. etc. v. State of Haryana & Ors.(3) The gross turnover of a dealer is taken into account in sub-s. (1) of s. 5 of the Act for the purpose of identifying the class of dealers liable to pay a surcharge not on the gross turnover but on the tax payable by them.

For these reasons, these appeals and the connected writ petitions and special leave petitions are dismissed with no order as to costs.

H.L.C. Appeals dismissed.

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