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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20TH DAY OF JUNE, 2025

BEFORE

THE HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

WRIT PETITION NO.3935 OF 2008 (GM-KEB)

C/W

WRIT PETITION NO.1644 OF 2009 (GM-KEB)

IN WP NO.3935/2008:

BETWEEN:

1. M/S SONA SYNTHETICS,
(A UNIT OF VALLIAPPA TEXTILES),
A COMPANY INCORPORATED
UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956 & HAVING ITS
OFFICE AT YEDAMADEE VILLAGE,
KAGGALAHALLI POST, HAROHALLI,
KANAKAPURAREP BY ITS ADMINISTRATIVE
OFFICER MR SIVA RAO.

2. SRI KRISHNA SPINNING &
WEAVING MILLS PVT LTD.,
A COMPANY INCORPORATED
UNDER THE PROVISIONS OF
THE COMPANIES ACT 1956 &
HAVING ITS OFFICE AT SUBRAMANYAPURA,
BANGALORE-560061,
REP BY ITS MANAGING DIRECTOR
MR Y G M MADHUSUDAN.

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3. M/S RAMKUMAR MILLS PVT LTD.,
A COMPANY INCORPORATED
UNDER THE PROVISIONS OF
THE COMPANIES ACT 1956 &
HAVING ITS OFFICE AT RAJAJINAGAR,
BANGALORE-560010,
REP. BY ITS EXECUTIVE DIRECTOR,
MR SHIVKUMAR A YADALAM.

4. M/S SUBADRA TEXTILE PVT LTD.,
A COMPANY INCORPORATED
UNDER THE PROVISIONS
OF THE COMPANIES ACT 1956 &
HAVING ITS OFFICE AT NO.11,
MAGADI MAIN ROAD,
AGRAHARDASARAHALLI,
BANGALORE-560079,
REP. BY ITS MANAGING DIRECTOR,
MR V S RAJAGOPAL.

5. MARIS SPINNERS LTD.,
A COMPANY INCORPORATED
UNDER THE PROVISIONS OF
THE COMPANIES ACT 1956 &
HAVING ITS OFFICE AT HUNSUR,
K R NAGAR ROAD,
KATTEMALAVADI-571134,
HUNSUR TQ MYSORE,
REP BY ITS GENERAL MANAGER
MR R THANGAMARIAPPAN.

6. VISHNU TEXTILES LTD.,
A COMPANY INCORPORATED
UNDER THE PROVISIONS
OF THE COMPANIES ACT 1956
& HAVING ITS OFFICE
AT PERIYA PATNA TALUK,
KAMPALAPURA-571136 MYSORE DIST,

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REP BY ITS FACTIRY MANAGER MR R ASHOK.

7. SREE JAYALAKSHMI AUTO SPIN LTD.,
A COMPANY INCORPORATED
UNDER THE PROVISIONS
OF THE COMPANIES ACT 1956 & HAVING ITS
OFFICE AT SANJANA DAVANGERE ROAD,
CHITRADURGA-577502,
REP BY ITS MANAGING DIRECTOR
MR K V PRABHAKAR.

8. SRI ANJANEYA COTTON MILLS LTD.,
A COMPANY INCORPORATED UNDER THE
PROVISIONS OF THE COMPANIES ACT 1956 &
HAVING ITS OFFICE AT T-6,
3RD FLOOR, GEM PLAZA 66,
INFANTRY ROAD BANGALORE-560001,
REP BY ITS MANAGING DIRECTOR ,
MR R MANJUNATH.

9. SREE GANESAR TEXTILE MILLS LTD.,
A COMPANY INCORPORATED UNDER
THE PROVISIONS
OF THE COMPANIES ACT 1956 & HAVING ITS
OFFICE AT JAYALAKSHMI
POONA BANGALORE ROAD,
DAVANGERE - 577002,
REP. BY ITS DIRECTOR,
MR R MANJUNATH.

10. M/S GOKAK TEXTILE MILLS LTD.,
(GOKAK MILLS DIVISION),
A COMPANY INCORPORATED UNDER THE
PROVISIONS OF THE COMPANIES ACT 1956 &
HAVING ITS OFFICE AT NO.6,
GOKAK FALLS-591308,
REP BY ITS POWER OF ATTORNEY HOLDER,
MR KAMALAPRASAD MOHANLAL BHAYYA.

...PETITIONERS

(BY SRI M S RAGHAVENDRA PRASAD, ADVOCATE)

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AND:

1. THE STATE OF KARNATAKA,
   VIDHANA SOUDHA,
   DR. AMBEDKAR VEEDHI,
   BANGALORE-560001,
   REP. BY ITS CHIEF SECRETARY.

2. DEPARTMENT OF PARLIAMENTARY
   AFFAIRS & LEGISLATION,
   STATE OF KARNATAKA,
   VIDHANA SOUDHA,
   DR AMBEDKAR VEEDHI,
   BANGALORE-1,
   REP BY ITS SECRETARY.

3. DEPARTMENT OF ENERGY,
   STATE OF KARNATAKA,
   VIDHANA SOUDHA,
   DR AMBEDKAR VEEDHI,
   BANGALORE-1,
   REP. BY ITS SECRETARY.

4. BANGALORE ELECTRICITY SUPPLY COMPANY LTD.,
   OFFICE AT CFC BUILDING,
   NRUPATHUNGA ROAD, BANGALORE-1,
   REP HEREIN BY ITS GENERAL MANAGER TECH
   BANGALORE CITY.

5. CHAMUNDESWARI ELECTRICITY SUPPLY
   CORPORATION LTD.,
   OFFICE AT NO.927, LJ AVENUE COMMERCIAL
   COMPLEX NEW KANTHARAJ URS ROAD,
   SARASWATIPURAM, MYSORE-570009,
   REP HEREIN BY ITS MANAGING DIRECTOR,
   MYSORE.

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6. MANGALORE ELECTRICITY SUPPLY,
CORPORATION LTD OFFICE AT MAROLI,
KULASHEKARA, MANGALORE-575005,
REP. HEREIN BY ITS MANAGING DIRECTOR,
MANGALORE.

7. HUBLI-DHARWAD ELECTRICITY SUPPLY
CORPORATION LTD OFFICE AT EUREKA TOWERS
T B ROAD DESHPANDE NAGAR HUBLI-580029,
REP HEREIN BY ITS MANAGING DIRECTOR,
DHARWAD.

8. GULBARGA ELECTRICITY SUPPLY COMPANY LTD.,
OFFICE AT MAIN ROAD, GULBARGA-585102,
REP. HEREIN BY ITS MANAGING DIRECTOR
GULBARGA.

...RESPONDENTS

(BY SRI RAJKUMAR M, AGA FOR R1 TO R3,
SRI H.V.DEVARAJU, ADV. FOR R4 TO R6
R7 AND R8 ARE SERVED BUT UNREPRESENTED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO - QUASH THE AMENDMENT TO SECTION 3(1) OF THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) ACT, 1959 BY VIRTUE OF THE AMENDING ACT 7 OF 2003 WHICH CAME INTO EFFECT FROM 1.4.2003 AS BEING UNCONSTITUTIONAL, ULTRAVIRES AND ILLEGAL IN SO FAR AS PETITIONERS ARE CONCERNED AND ETC.,

IN WP NO.1644/2009:

BETWEEN:

FEDERATION OF KARNATAKA CHAMBERS
OF COMMERCE AND INDUSTRY COMPANY REGISTERED
UNDER THE PROVISION OF THE MYSORE
COMPANIES ACT, 1938, KEMPEGOWDA ROAD,
BANGALORE-560009,

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REP. BY ITS SECRETARY LT. COL. N VIJAY KUMAR.

...PETITIONER

(SRI M S RAGHAVENDRA PRASAD, ADVOCATE)

AND:

1. THE STATE OF KARNATAKA,
   VIDHANA SOUDHA,
   DR. AMBEDKAR VEEDHI,
   BANGALORE-560001,
   REP. BY ITS CHIEF SECRETARY.

2. DEPARTMENT OF PARLIMANETARY
   AFFAIRS AND LEGISLATION,
   STATE OF KARNATAKA,
   VIDHANA SOUDHA,
   DR. AMBEDKAR VEEDHI,
   BANGALORE-560001.
   REP. BY ITS SECRETARY - 560001.

3. DEPARTMENT OF ENERGY,
   STATE OF KARNATAKA,
   VIDHANA SOUDHA,
   DR. AMBEDKAR VEEDHI,
   BANGALORE-560001,
   REP. BY ITS SECRETARY.

4. BANGALORE ELECTRICITY
   SUPPLY COMPANY LTD.,
   OFFICE AT CFC BUILDING,
   NRUPATHUNGA ROAD,
   BANGALORE-560001,
   REP. HEREIN BY ITS
   GENERAL MANAGER TECH
   BANGALORE CITY.

5. CHAMUNDESWARI ELECTRICITY SUPPLY
   CORPORATION LTD.,
   OFFICE NO 928, LJ AVENUE

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COMMERCIAL COMPLEX,
NEW KANTHARAJ URS ROAD,
SARASWATIPURAM, MYSORE-570 009,
REP. HEREIN BY ITS MANAGING DIRECTOR,
MYSORE.

6. MANGALORE ELECTRICITY
SUPPLY CORPORATION LTD.,
OFFICE AT MAROLI, KULASHEKARA,
MANGALORE-575 005,
REP. HEREIN BY ITS
MANAGING DIRECTOR MANGALORE.

7. HUBLI-DHARWAD
ELECTRICITY SUPPLY CORPORATION LTD.,
OFFICE AT EUREKA TOWERS,
T.B.ROAD DESHPANDE NAGAR,
HUBLI-580029,
REP. HEREIN BY ITS
MANAGING DIRECTOR DHARWAD.

8. GULBARGA ELECTRICITY
SUPPLY COMPANY LIMITED
OFFICE AT MAIN ROAD,
GULBARGA-585 102,
REP. HEREIN BY ITS MANAGING DIRECTOR
GULBARGA.

...RESPONDENTS

(BY SRI RAJKUMAR M, AGA FOR R1 TO R3,
SRI H V DEVARAJU, ADVOCATE FOR R4 TO R6,
R7 AND R8 ARE SERVED BUT UNREPRESENTED)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE AMENDMENT TO SECTION 3 OF THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) ACT, 1959 BY VIRTUE OF THE AMENDING ACT 7 OF 2003 WHICH CAME INTO EFFECT FROM 1.4.2003 AS BEING UNCONSTITUTIOAL, ULRTA VIRES AND ILLEGAL SO FAR AS PETITIONER IS CONCERNED AND ETC.

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THESE PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 26TH APRIL, 2025 AND COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE MR JUSTICE ANANT RAMANATH HEGDE

CAV ORDER

The questions that arose in these two writ petitions are;

(i) *Whether the supply of electricity to ensure minimum demand, without actual consumption of electricity, amounts to consumption or sale and enables the State to levy tax on the tariff for the supply of electricity?*

(ii) *Whether Section 3(1) of the Karnataka Electricity (Taxation on Consumption) Act, 1959 (For short 'Act, 1959') as amended by Amending Act 7 of 2003 and Amending Act 5 of 2004 imposing tax on* ***electricity charges*** *ultravires?*

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2. During the pendency of the writ petitions, in terms of Act No.24 of 2018, Section 3(1) of the Act, 1959, is amended, and by reason of amendment, the tax is levied only on ***'sale and consumption of electricity'.*** The tax on ***'electricity charges',*** imposed under the impugned provisions on supply of electricity, was done away in 2018 amendment vide Act No.24 of 2018.

3. Since the petitioners had questioned the tax on ***electricity charges,*** and because of the amendment during pendency of writ petitions, tax on ***electricity charges on supply*** is done away, the State contends that the petitioners' challenge that the provisions are *ultravires* becomes academic, and writ petitions have become infructuous. Thus, the Court, in addition to two questions referred to above, has to answer the following question as well.

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> *"Whether the petition challenging the constitutional validity of a provision of law becomes infructuous, if the impugned provision is amended, or omitted during the pendency of the proceeding?"*

4. If the answer to the above question is in the *affirmative,* then the Court need not examine the question on the *vires* of the provision. If the answer is in the *negative,* then the Court needs to examine the question on the *vires* of the provisions.

5. The answer to the above question does not appear to be simple "Yes" or "No". The answer depends on the consequence of the provisions of law under challenge, on the petitioners.

6. If the provisions are held to be *ultra vires*, and if the petitioners are entitled to restitution or some other consequential relief, then the petitions do not become infructuous.

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7. If the provisions are held to be *ultra vires*, and the petitioners are not entitled to any further relief by way of restitution or otherwise, then the Court petitions do become infructuous.

8. If the petitioners have suffered a consequence which can be quantified in terms of money, then the petition does not become infructuous merely because the provisions under challenge are omitted or amended.

9. Admittedly, in terms of the impugned provisions, the petitioners have paid Tax on the electricity charges, which included tax on 'minimum tariff'. The contention is that the provisions imposing tax on supply of electricity are *ultra vires*. If the said contention is accepted and the provisions are held to be *ultra vires*, then the imposition and collection of such tax on minimum charges for the supply of electricity would be illegal. As a consequence, the

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State has to refund the tax collected, as collection of such tax amounts to 'unjust enrichment' by the State at the cost of the rate payer, subject, of course, the petitioners have not passed on the tax burden to their customers.

10. It is indeed true that the amended provisions are not in force in view of the amendments brought into effect during the pendency of the writ petitions. However, the petitioners apart from challenging the constitutional validity, have also sought the consequential order for repayment of tax collected by respondent No.1. Under these circumstances, the petitions challenging the constitutional validity of the provisions are not rendered purely academic and need be considered on merits notwithstanding the amendment of the law during the pendency of the petitions.

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11. The petitioners have challenged the Constitutional validity of Section 3(1) of the Karnataka Electricity (Taxation on Consumption) Act, 1959 (For short 'Act, 1959') as amended by Amending Act 7 of 2003 and Amending Act 5 of 2004.

12. In terms of the impugned provision, the tax was levied on *electricity charges*, which included the charges on *consumption as well as supply*.

13. Relevant portion of Section 3(1) of the Karnataka Electricity (Taxation on Consumption) Act, 1959, before the amendment vide Act No.7 of 2003 reads as under:-

> ***"3. Levy of tax on consumption of energy:*** *(1)Subject to the provisions of this Act, there shall be levied and paid to the State Government* ***on the units of energy consumed every month****, a tax (hereinafter referred to as "electricity tax") calculated at a rate not exceeding twelve paise per unit of energy as may, by notification, be specified by the State Government, and different rates may be specified in respect of different classes of consumers:*

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xxx
xxx
xxx

(Emphasis supplied)

14. The above-mentioned provision provided for the levy of tax not exceeding 12 paise per unit of '***energy consumed'*** every month as may be notified by the State Government.

15. The Act No.7 of 2003 amended Section 3(1) of the Principal Act, and after the amendment, the relevant portion of Section 3(1) of the Act, 1959, reads as under:-

> *"3. **Levy of tax on electricity charges**:-*
>
> *(1) Subject to the provisions of this Act, there shall be levied and paid to the State Government, advalorem tax (hereinafter referred to as the **"electricity tax") at five percent on the electricity charges payable (excluding arrears)** by all the consumers except consumers under agricultural (irrigation pump sets upto and inclusive of Ten Horse Power), Bhagya jyothi and Kutirajyothi categories.*
>
> ***(emphasis supplied).***

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16. Under the amended provision, the State is enabled to impose ad-valorem tax @ 5% on the `***electricity charges'*** payable by all the consumers except the consumers under the Agricultural (Irrigation Pump sets up to an exclusive of 10 horsepower) Bhagya Jyoti and Kutira Jyoti categories.

17. The Act No.5 of 2004 amended Section 3 of the Principal Act, and after the amendment, the relevant portion of Section 3(1) of the Act, 1959 reads as under:-

> *"**3.<u>Levy of tax on electricity charges</u>**:-*
>
> *(1) Subject to the provisions of this Act, there shall be levied and paid to the State Government, ad valorem tax (hereinafter referred to as the **"electricity tax") <u>at five percent on the electricity charges payable (excluding arrears)</u>** by all the consumers except consumers under agricultural (irrigation pump sets upto and inclusive of Ten Horse Power), Bhagya jyothi and Kutirajyothi categories.*
>
> *(2) Subject to the provisions of this Act, there shall be levied and paid to the State Government, with effect from the date of commencement of Karnataka Electricity (Taxation on Consumption) (Amendment) Act, 2004 till the first day of July, 2004, an electricity*

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tax @ Twenty Five paise per unit on all units of energy consumed by any person, -

(i) Not being a licensee who has generated such energy; or

(ii) To whom it is supplied free of charge by a person not being a licensee who has generated such energy.

(emphasis supplied).

18. As can be noticed, the liability to pay tax under the original provision before 2003 amendment was on the ***energy consumed***, whereas under the amended provisions of 2003 and 2004, the liability to pay tax was on the ***electricity charges,*** which also included the ***'minimum tariff'*** levied for the supply of electricity. To put it differently, under the unamended provision, there was no obligation to pay tax on the *minimum charges* levied on supply, but the liability to pay tax was only on the *electricity consumed*.

19. The petitioners have questioned the constitutional validity of the aforementioned

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provisions on various grounds. However, at the time of hearing, the challenge was confined to legislative competence to levy tax on the *electricity which is supplied but not consumed*.

20. Learned counsel appearing for the petitioners would contend that the State lacked legislative competence to impose a tax on the energy which is not consumed by the petitioners. The State's power to legislate on taxation on electricity, is traceable only to Entry No. 53 in List II of Seventh Schedule. Under the said entry, State can impose tax only on the *energy consumed,* but not on the *energy supplied,* is the contention.

21. Elaborating on the contention, the learned counsel would further urge that all the electricity supplied is not necessarily consumed by the consumer, and the State can impose tax only on the electricity consumed. The supply up to a point is to

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ensure that the electricity is readily available for consumption, and for that, the distributor or licensee collects a tariff, which is called as *minimum tariff* and said tariff is not a tariff on sale and not taxable.

22. Learned counsel for the petitioners in support of his contention would rely upon the following judgments of the Hon'ble Apex Court.

1. ***Southern Petrochemical Industries Co. Ltd. V. Electricity Inspector and ETIO and Others.***[1]
2. ***State of Mysore V. West Coast Paper Mills Ltd and another.***[2]
3. ***Sri Visakaa Fabrics Private Limited v. State of Tamil Nadu and others.***[3]
4. ***M.P. Cement Manufacturers Association v. State of M.P. and others.***[4]

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[1](2007) 5 SCC 447
[2]*(1975) 3 SCC 448*
[3]*W.P (MD) No.8961 of 2007 and MP(MD) No.1 of 2007*
[4]*(2004) 2 SCC 249*

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23. Learned Government Advocate for the State in addition to the contention that the writ petitions are rendered infructuous in view of the amendment to the provisions under challenge, would also contend that the provisions are *intra vires* and the State has the legislative competence to impose tax on the supply of electricity and the charges levied on it. It is also urged that there is a presumption in favour of the constitutional validity of a provision, and no case is made out to rebut the said presumption.

24. Learned Government Advocate would also urge that even if the provisions are held to be unconstitutional, the petitioners are not entitled to claim a refund of the tax alleged to have been paid by them, as the petitioners have not pleaded that they have not passed on the tax liability on their customers. Learned Government Advocate also pointed out that no relief for refund of the tax is

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claimed from respondent No.1/State. In support of the contention, learned Government Advocate relied on the judgment of the Apex Court in ***Mafatlal Industries Ltd. and others vs. Union of India and others.***[5]

Discussion on the question of *vires*.

25. The Act, 1959, is enacted to have a uniform tax structure all over the State on taxation on the consumption of electricity. The statement of objects and reasons would point out that the law was enacted to have a *uniform tax on consumption of electricity.* The nomenclature of the Act is "THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) ACT, 1959".

The preamble of the Act, 1959 reads as under:

[5] *(1997) 5 SCC 536*

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> *"An Act to provide for the levy of tax **on the consumption of electrical energy** in the State of Karnataka.*
>
> *WHEREAS it is expedient to provide for the levy of tax **on consumption of electrical energy** in the State of Karnataka."*

(emphasis supplied)

26. There is no dispute that the Act, 1959, was enacted in exercise of the legislative power conferred under Entry No.53 in List–II of Seventh Schedule. Under the Constitution of India, there are two distinct legislative fields covering electricity. Entry No.53 in List II and Entry No.38 in List III of the Seventh Schedule.

27. The legislative field provided under Entry No.53 in List II (State List) is as under:

> "***Tax on the consumption or sale of electricity."***

The plain reading unmistakably suggests that the taxing power is conferred on the State on the *consumption or sale of electricity*."

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Entry 38 in List III (Concurrent list) deals with "Electricity".

28. In paragraphs No.56 and 60, and 138 of ***Southern Petrochemical Industries Company Ltd,*** supra, the Apex Court has held as under:

> ***"56.*** *A bare perusal of Entry 53 of List II and Entry 38 of List III, however, clearly suggests that they are meant to operate in different fields.*
>
> ***60.*** *Entry 53 of List II provides for a taxation entry; whereas Entry 38 of List III provides for a non-taxation entry dealing with general aspects of electricity, excluding taxation. The 1998 Act empowers the Commission only to fix the electricity tariff or the charges for consumption of electricity. The legislation made by the State is independent of actual tariff of electricity charges. Tariff would mean a cartel of commerce and normally it is a book of rates. (BSES Ltd. [(2004) 1 SCC 195] , SCC at p. 208)."*
>
> ***138.*** *We have noticed hereinbefore that the legislative fields carved out by reason of Entry 53 of List II and Entry 38 of List III of the Seventh Schedule of the Constitution of India operate in different fields. The 1948 Act was enacted to provide for the rationalisation of the production and supply of electricity, and generally for taking measures conductive to electrical development".*

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29. As noticed above, the Apex Court has held that both Entries No.53 and 38 operate in a different field. In other words, Entry No.38 does not enable the State to pass a law on taxation in connection with the consumption and sale of electricity. The law on taxation on electricity is authorised only in Entry No.53 of List II of Seventh Schedule. If the makers of the constitution intended to cover all aspects, including taxation on consumption and sale of electricity in List III (Concurrent list) of seventh schedule, there was no need to have taxation on consumption and sale of electricity in List II of Seventh schedule.

30. Any interpretation to hold that the expression 'Electricity' appearing in Entry No.38 in List III includes taxation on consumption or sale of electricity will render Entry No.53 in List II *otiose*. It is a settled position that the interpretation should always

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lean in ensuring the provision of law or any expression in a provision of law is not rendered *otiose*. That is more so when it comes to the interpretation of the provisions of the Constitution of India.

31. Hence this Court is of the view that Entry No.38 in List III enables the State to legislate on electricity, except the taxation on consumption of and sale of electricity, and the State's legislative power to impose tax on electricity is traceable only under Entry No.53 in List II and such power is confined only on *consumption and sale of electricity*.

32. As already noticed, the petitioners are not aggrieved by the tax imposed on consumption. The grievance is on the tax imposed on electricity charges, which also includes the electricity not sold. Thus, the question that arises for consideration is,

> *"Whether the supply of electricity to ensure minimum demand without actual*

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consumption of electricity amounts to consumption or sale"?

33. In Paragraphs No.139 and 150 of ***Southern Petrochemical Industries Co. Ltd***, supra, the Apex Court has held as under:

> ***"139.*** *Tariff is framed by the State Electricity Boards under Sections 46 and 49 of the 1948 Act. They may have different considerations for imposition of tariffs. We have noticed hereinbefore, the definition of "tariff" in BSES Ltd. [(2004) 1 SCC 195] whereupon Mr Andhyarujina himself relied upon. A tax on tariff and a tax on consumption or sale of electrical energy, thus, operate in different fields. If it is to be held that the power of the Electricity Regulatory Commission to fix tariff does not include a power to impose tax, axiomatically, the same principle would apply also when a tax is sought to be levied on consumption or sale of electrical energy and not on tariff. Power of taxation, as noticed hereinbefore, operates differently from power to impose tariff. A tariff validly framed by the licensee, in exercise of its statutory power, may lay down a higher rate on the sale of power to various types of consumers having regard to the necessity to maintain infrastructure. A maximum demand charge, when levied, does not contemplate a sale or consumption of electrical energy. Maximum tariff is provided for various reasons. xxx".*
>
> *150. Supply does not mean sale. A fortiori it does not also mean consumption".*

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34. The Apex Court has held that the supply of electricity to ensure a continuous supply when the electricity is not consumed is not a sale.

35. Thus, if the licensee supplies electricity to a consumer and demands a certain Tariff as a *minimum Tariff* payable, irrespective of consumption, then such Tariff cannot be termed as a *Tariff on consumption or a tariff on sale*. The charges for consumption start only when the electricity is consumed. The minimum Tariff imposed is towards the cost of ensuring a continuous supply of electricity. Only when the said supply is consumed by the consumer, has to pay for consumption charges. Thus, only when the electricity is consumed it is *sold*. Till then, it is only a supply. If the supply of electricity to a consumer is charged then it is a Tariff, on supply, not on sale.

36. To consider whether the supply of electricity up to a point where the consumer has not consumed the

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electricity is a sale of electricity, reference to Section 4 of the Sale of Goods Act, 1930(for short, "Act, 1930") is necessary.

> ***"4.Sale and agreement to sell****.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.*
>
> *(2) A contract of sale may be absolute or conditional.*
>
> *(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.*
>
> *(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred."*

37. Section 4 of the Act, 1930 recognises both *'sale',* where the transfer of ownership and possession takes

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place, as well as the *'agreement for sale',* where the seller agrees to transfer the goods at a future time.

38. Under sub-section (3) of Section 4 of the Act, 1930, when the goods are transferred from the seller to the buyer, it is a 'sale'. Whereas, when the goods are agreed to be sold at a future time, then such a contract is an 'agreement to sell'. Sub-section (4) of Section 4 of the Act, 1930 provides that the 'agreement to sell' becomes a 'sale' when the goods are transferred or the conditions in the 'agreement to sell' are fulfilled

39. There is no dispute that when the supplier of electricity supplies electricity to the designated point at the consumer's place, it is quite possible that the consumer may tap the electricity so supplied for consumption or may not use it at all. If it is consumed by the consumer, then the consumer has to pay the price fixed for such consumption, where the delivery actually takes place, and electricity is utilised by the consumer. In such an event, the delivery is

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complete and the electricity is used, and the sale of electricity is complete.

40. However, if the consumer does not tap and consume the electricity so supplied, the delivery of the goods (electricity) does not take place, and the *contract **for** sale* of electricity does not end up in a *contract **of** sale*, and it only remains a contract for sale, in which situation there is no sale.

41. When the supplier of electricity supplies electricity to a specified point at a place belonging to the consumer, from where the consumer can tap the electricity for consumption, it is only an 'agreement to sell' electricity and not a 'sale' of electricity. For example, if 220 kW of electricity is supplied to the consumer, after one hour, if the consumer has consumed 10 units of electricity, the actual 'sale' would be only 10 units and not the number of units supplied which is more than what is consumed. It is also relevant to note that the consumed unit does not include

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the number of units lost in transmission up to the specified point at the consumer's place. Once those 10 units are consumed, the State has the power to impose a tax on the price of 10 units consumed as same amounts to taxation on consumption as well as sale.

42. If the consumer is taxed on the 'minimum tariff' charged for the supply of electricity for ensuring constant supply for consumption of electricity at any given point of time, then it amounts to taxation on electricity *which is not yet sold but only agreed to be sold*. Looking at the language used in Entry No.53 of List-II of Seventh Schedule, it is evident that State has the power to enact a law on consumption and sale. Entry No.53 in List-II of Seventh Schedule does not enable the State to enact law to impose tax when the electricity not sold but agreed to be sold, where the actual sale does not take place. Thus, State lacks legislative competence to impose a tax on electricity charges, which includes the minimum tariffs on

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electricity supplied but not sold. Thus, impugned provisions amount to a colourable exercise of legislative power.

43. For the aforementioned reasons, this Court is of the view that the provisions of the amended Section 3(1) of the Act, 1959 as amended vide Act No.7 of 2003 and Act No.5 of 2004 providing for tax on electricity charges which includes the 'minimum tariff' are unconstitutional as the State has no legislative competence to levy tax on 'minimum tariff' for the electricity which is not consumed. Hence, the petitioners succeed in their challenge to the constitutional validity of the aforementioned provisions.

44. Now the question is, "Whether the petitioners are entitled to a refund of the tax paid by way of restitution?"

45. Writ Petition No.1644/2009 is filed by the Federation, and Writ Petition No.3935/2008 is filed by the Companies.

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46. The prayer in both petitions is to direct the power transmitting companies to refund the tax collected on the premise that such tax is unconstitutional. The impugned provisions specifically provide that the tax shall be paid to the State. However, power transmitting companies are enabled to collect the tax on behalf of the State. It is not the case of the petitioners that the tax so collected is retained by respondents No. 4 to 8 the power transmitting companies. The tax collected is with respondent No.1/State. No prayer for refund is made against the respondent No.1, to whom the tax has been remitted.

47. Thus, the petitions are, in a way, defective. Thus, the prayer to recover the tax from power transmitting companies is not maintainable.

48. Though the learned counsel for the petitioners would submit that the prayer is to be moulded and direction is to be issued to the State to refund the tax collected, this Court is unable to accept such a plea for moulding the

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prayer to reimburse the tax by the State. The reason is simple. Merely because a law providing for a tax on 'minimum tariff' on electricity is held to be unconstitutional, the petitioners are not automatically entitled to reimbursement of tax collected under a law which is declared unconstitutional.

49. The Apex Court, in ***Mafatlal Industries Ltd.,*** supra,has exhaustively dealt with the question of restitution where tax (Excise duty) has been illegally collected. The Apex Court has held that even if a law is declared as unconstitutional, the restitution is not automatic, and it depends on the pleading and proof of actual loss or damage suffered on account of the law which is declared unconstitutional.

50. The Apex Court has also dealt with the possible remedies for the parties who have suffered loss on account of an unconstitutional levy of tax. The party may have to file a suit or avail the refund mechanism, if any, provided in

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the Statute or in appropriate cases may invoke Article 226 of the Constitution of India. However, the remedy under Article 226 of the Constitution of India is again subject to certain other riders like the availability of an alternate remedy and disputed questions of fact, if any, required to be dealt with.

51. It is a well-settled principle of law that a person who seeks restitution has to establish that he has suffered actual damage/loss on account of the unconstitutional levy of tax. It is quite possible that the person who has paid the tax, being the manufacturer of certain products, like the petitioners in Writ Petition No.3935/2008, might have passed on the tax burden to the actual consumers of their respective products. Such being the position, the petitioners are required to plead and establish that the tax burden, which is imposed on them, is absorbed by them, and the tax burden is not passed on to the consumers. To that effect, there has to be a pleading and proof.

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52. It is noticed from the pleadings in Writ Petition No.3935/2008 that the petitioners have not raised such a plea. When that being position, the Court cannot direct the State to refund the tax collected under the law, which is declared unconstitutional, unless the State is allowed to meet the contention that the tax burden was not passed on to the consumers and suffered by the petitioners in W.P.No.3935/2008.

53. As far as the W.P.No.1644/2009 is concerned, the petition is filed by the Federation of Karnataka Chambers of Commerce and Industry Company, which is not the Manufacturer and it is only the consumer of electricity for its own use. It cannot pass the tax burden on others, as it is not the manufacturer or seller of any product. Thus, the petitioner in Writ Petition No.1644/2009 has absorbed the tax burden imposed under the law, which has now been declared unconstitutional. Such being the case, the consequence of restitution does follow, notwithstanding the

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fact that there is no specific prayer against the State. The State is not put to any prejudice for want of any prayer against the State for refund of the tax. The State was put on notice on the plea relating to the *vires* of the impugned provisions. Thus, in Writ Petition No.1644/2009, the order for refund of tax collected under the impugned provisions is consequential.

54. In the said petition, the Court can certainly mould the relief, as the State cannot take the contention that the Federation has passed on the tax burden to some other person. However, it is made clear that the W.P.No.1644/2009 is not considered as a petition on behalf of the members of the petitioner Federation. There is no pleading to consider the petition as the one representing its members, and particulars of the members are also not provided. The relief of refund of tax granted to the petitioner in W.P. 1644/2009 is only on the tax on

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electricity charges paid by the petitioner from 15.01.2009 (the date of the petition) till 18.07.2018.

55. Since this Court has held that the provision imposing tax on the 'minimum tariff' for supply of electricity is unconstitutional, the logical conclusion would be that the State could not have collected the tax from the petitioners. However, the oral prayer for a direction to refund the tax so collected from respondent No.1 is rejected for want of a proper plea that the petitioners have not passed on the tax burden on their customers while selling their products. Nonetheless, the petitioners' right to recover the tax paid, in case the petitioners have absorbed the tax burden and not passed it on to the consumer should not be taken away for want of a necessary plea in these petitions.

56. Since the law is declared as unconstitutional, liberty is to be reserved to the petitioners in Writ Petition No.3935/2008 to initiate appropriate proceedings as advised in law (keeping in mind the law laid down in

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Mafatlal Industries Ltd., supra) as there is a fresh cause of action to seek refund of the tax collected, as such collection is now held to be unconstitutional. However, it is also required to be noticed that the writ petition was filed on 07.03.2008, and the provisions impugned came into effect on 01.04.2003 and 16.10.2004. Hence, it is made clear that though the petitioners are permitted to initiate appropriate action as advised in law for a refund, the petitioners shall not claim a refund of tax paid before 07.03.2008, i.e., the date on which the writ petition is filed.

57. It is also required to be observed that the Writ Petition was filed in the year 2008, and the impugned provisions came into effect in the years 2003 and 2004. The petitioners have not chosen to question the said provisions till 2008. Under these circumstances, the petitioners in W.P. No.3935/2008, if entitled to claim reimbursement (subject to proof of loss/damage), are entitled to claim reimbursement only from 07.03.2008, the date of the writ

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petition, till 18.07.2018, i.e., the date on which the impugned provisions are amended.

58. It is also required to be observed that though the law is held to be unconstitutional and the said law which is now declared unconstitutional is omitted in the year 2018, the benefit of this judgment is available only to the petitioners who have approached the Court and not to others who have not challenged the provision of law and paid the tax. Taking into consideration that the impugned provisions were omitted in 2018, this Court has to observe that the persons who have not questioned the impugned provisions should not be allowed to take the benefit of this judgment declaring the impugned provisions as *ultra vires.*

Conclusions:

(i) Section 3(1) of the Karnataka Electricity (Taxation on Consumption) Act, 1959, as amended by Act No.7 of 2003 and Act

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No.5 of 2004, imposing tax on electricity charges, declared as unconstitutional.

(ii) Supply of electricity to the consumer to ensure availability of electricity for consumption, does not amount to consumption or sale, unless the electricity consumed by the consumer, and the State has no legislative competence under Entry No.53, List II of Seventh Schedule to the Constitution of India to levy tax on minimum tariff. The State is competent to levy tax under Entry No.53, List II of Seventh Schedule only on actual consumption or sale of electricity.

(iii) Petition challenging the constitutional validity of a provision *ipso facto* does not become infructuous, if the provisions under challenge are amended or omitted

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during the pendency of the petition. Whether such petition becomes infructuous or not depends on the nature of relief sought and consequences suffered under the provisions questioned which are to be decided on the facts and circumstances obtained in such case.

59. Hence, the following:

ORDER

(i) Writ Petition No.3935/2008 is ***allowed-in-part***.

(ii) Writ Petition No.1644/2009 is ***allowed***.

(iii) Section 3(1) of the Karnataka Electricity (Taxation on Consumption) Act, 1959, as amended by Act No.7 of 2003 and Act No.5 of 2004, imposing tax on electricity charges, declared as unconstitutional.

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(iv) Respondent No.1-State shall reimburse the tax collected from the petitioner in Writ Petition No.1644/2009 from 15.01.2009 - the date of the petition till 18.07.2018 - the date on which the impugned provisions are amended.

(v) The petitioners in Writ Petition No.3935/2008 are at liberty to initiate appropriate proceeding to recover the tax collected on the consumption of electricity from 07.03.2008 - the date of petition, till 18.07.2018 - the date of the amendment of the provision, subject to proof that the petitioners have not passed the tax liability on the consumers and other parameters laid down in ***Mafatlal Industries Ltd. and others***

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vs. Union of India and others, (1997) 5 SCC 536.

(vi) It is made clear that only the tax on 'minimum tariff' is held unconstitutional and not the tax collected on the consumption of electricity.

Sd/-
(ANANT RAMANATH HEGDE)
JUDGE

Brn