

ZAVERBHAJ AMAIDAS

v.

THE STATE OF BOMBAY

[MEHR CHAND MAHAJAN C.], MUKHERJEA,
VIVIAN BOSE, JAGANNADHADAS and
VENKATARAMA AYYAR J J.]

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Constitution of India, Art. 254(2), Government of India Act, 1935, s. 107(2)—Principle embodied therein—Essential Supplies (Temporary Powers) Act (XXIV of 1946) s. 7 as amended by Act LII of 1950—Bombay Act XXXVI of 1947—S.2—Subject matter of legislation identical—Repugnancy—Repeal by necessary intendment.

Article 254(2) of the Constitution is, in substance, a reproduction of s. 107(2) of the Government of India Act, 1935, the concluding portion whereof is incorporated in a proviso with further additions. The principle embodied therein is that when there is legislation covering the same ground both by the Centre and by the State, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, was amended in 1948 and 1949 and thereafter by Act LII of 1950.

Held, that Act LII of 1950 is a legislation in respect of the same matter as Bombay Act (XXXVI of 1947) within the meaning of Art. 254(2) of the Constitution and therefore s. 2 of Bombay Act XXXVI of 1947 cannot prevail as against s. 7 of the Essential Supplies (Temporary Powers) Act as amended by Act LII of 1950.

It is a well-settled rule of construction that if a later statute again describes an offence created by a previous one and imposes a different punishment or varies the procedure, the earlier statute is repealed by the later statute.

Attorney-General for Ontario v. Attorney-General for the Dominion [1896] A.C. 348, *Smith v. Benabo* [1937] 1 K.B. 518, and *Michell v. Brown* (1 El. & EL 267, 274) referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal
Appeal No. 31 of 1953.

Under article 132(1) of the Constitution of India from the Judgment and Order dated 21-1-1953 of the High Court of Judicature at Bombay in Criminal Revision Application No. 642 of 1952.

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I. C. Dalal and P. K. Chatterjee for the appellant.

M. C. Setalvad, Attorney-General of India (P. A. Mehta and P. G. Gokhale, with him) for the respondent.

1954. October 8. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—This is an appeal against the judgment of the High Court of Bombay dismissing a revision petition filed by the appellant against his conviction under section 7 of the Essential Supplies (Temporary Powers) Act No. XXIV of 1946.

The charge against the appellant was that on 6th April, 1951, he had transported 15 maunds of juwar from his village of Khanjroli to Mandvi without a permit, and had thereby contravened section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949. The Resident First Class Magistrate of Bardoli who tried the case found him guilty, and sentenced him to imprisonment till the rising of the Court and a fine of Rs. 500. The conviction and sentence were both affirmed by the Sessions Judge, Surat, on appeal. The appellant thereafter took up the matter in revision to the High Court of Bombay, and there for the first time, took the objection that the Resident First Class Magistrate had no jurisdiction to try the case, because under section 2 of the Bombay Act No. XXXVI of 1947 the offence was punishable with imprisonment, which might extend to seven years, and under the Second Schedule to the Criminal Procedure Code, it was only the Sessions Court that had jurisdiction to try such offence. The answer of the State to this contention was that subsequent to the enactment of the Bombay Act No. XXXVI of 1947, the Essential Supplies (Temporary Powers) Act had undergone substantial alterations, and was finally re-cast by the Central Act No. LII of 1950; that the effect of these amendments was that Act No. XXXVI of 1947 had become inoperative, that the governing Act was Act No. LII of 1950, and that as under that Act the maximum sentence for the offence in question was three years, the Resident First Class Magistrate had jurisdiction over the offence.

The revision petition was heard by a Bench consisting of Bavdekar and Chainani JJ. Bavdekar J. was of the opinion that the amendments to the Essential Supplies (Temporary Powers) Act including the re-enactment of section 7 in Act No. LII of 1950 did not trench on the field covered by the Bombay Act No. XXXVI of 1947, which accordingly remained unaffected by them. Chainani J., on the other hand, held that both Act No. XXXVI of 1947 and Act No. LII of 1950 related to the same subject-matter, and that as Act No. LII of 1950 was a Central legislation of a later date, it prevailed over the Bombay Act No. XXXVI of 1947. On this difference of opinion, the matter came up under section 429, Criminal Procedure Code, for hearing before Chagla C. J., who agreed with Chainani J. that there was repugnancy between section 7 of Act No. LII of 1950 and section 2 of the Bombay Act No. XXXVI of 1947, and that under article 254(2), the former prevailed; and the revision petition was accordingly dismissed. Against this judgment, the present appeal has been preferred on a certificate under article 132(1), and the point for determination is whether contravention of section 5(1) of the Bombay Food Grains (Regulation of Movement and Sale) Order, 1949, is punishable under section 2 of the Bombay Act No. XXXVI of 1947, in which case the trial by the Resident First Class Magistrate would be without jurisdiction; or whether it is punishable under section 7 of the Essential Supplies (Temporary Powers) Act, as amended by Act No. LII of 1950, in which case, the trial and conviction of the appellant by that Magistrate would be perfectly legal.

It is now necessary to refer in chronological sequence to the statutes bearing on the question. We start with the Essential Supplies (Temporary Powers) Act No. XXIV of 1946 enacted by the Central Legislature by virtue of the powers conferred on it by 9 and 10, George VI, Chapter 39. It applied to the whole of British India. Section 3 of the Act conferred power on the Central Government to issue orders for regulating the production, supply and distribution of essential commodities and under section 4, this power could be

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delegated to the Provincial Government. Section 7(1) provided for punishment for contravention of orders issued under the Act, and ran as follows :

“If any person contravenes any order made under section 3, he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both, and if the order so provides any Court trying such contravention may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty :

Provided that where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall make such direction, unless for reasons to be recorded in writing it is of opinion that the direction should not be made in respect of the whole or as the case may be, a part of the property.”

The State of Bombay considered that the maximum punishment of three years' imprisonment provided in the above section was not adequate for offences under the Act, and with the object of enhancing the punishment provided therein, enacted Act No. XXXVI of 1947. Section 2 of the said Act provided (omitting what is not material for the present purpose) that “Notwithstanding anything contained in the Essential Supplies (Temporary Powers) Act, 1946, whoever contravenes an order made or deemed to be made under section 3 of the said Act shall be punished with imprisonment which may extend to seven years, but shall not, except for reasons to be recorded in writing, be less than six months, and shall also be liable to fine.” This section is avowedly repugnant to section 7(1) of the Essential Supplies (Temporary Powers) Act. Section 107(2) of the Government of India Act, which was the Constitution Act then in force, enacted that,

“Where a Provincial law with respect to one of the matters enumerated in the Concurrent Legislative List contains any provision repugnant to the provisions of an earlier Dominion law or an existing law with respect to that matter, then, if the Provincial law having been reserved for the consideration of the Governor-General has received the assent of the Governor-General,

the Provincial law shall in that Province prevail, but nevertheless the Dominion Legislature may at any time enact further legislation with respect to the same matter."

On the footing that the subject-matter of Act No. XXXVI of 1947 fell within the Concurrent List, the Bombay Government obtained the assent of the Governor-General therefor, and thereafter it came into force on 25th November, 1947. The position therefore was that by reason of section 107(2) of the Government of India Act, Act No. XXXVI of 1947 prevailed in Bombay over section 7 of the Essential Supplies (Temporary Powers) Act; but at the same time, it was subject under that section to all and any "further legislation with respect to the same matter", that might be enacted by the Central Legislature.

The contention of the State is that there was such further legislation by the Central Legislature in 1948, in 1949 and again in 1950, and that as a result of such legislation, section 2 of the Bombay Act No. XXXVI of 1947 had become inoperative. In 1948 there was an amendment of the Essential Supplies (Temporary Powers) Act, whereby the proviso to section 7(1) was repealed and a new proviso substituted, which provided *inter alia* that,

"Where the contravention is of an order relating to foodstuffs which contains an express provision in this behalf, the Court shall direct that any property in respect of which the order has been contravened shall be forfeited to His Majesty, unless for reasons to be recorded in writing it is of opinion that the direction should be made not in respect of the whole, or as the case may be, a part of the property."

The Essential Supplies (Temporary Powers) Act was again amended in 1949. Under this amendment, the proviso to section 7(i) was repealed, and a new clause substituted in the following terms :

"(b) Where the contravention is of an order relating to foodstuffs, the Court shall (i) sentence any person convicted of such contravention to imprisonment for a term which may extend to three years and may, in addition, impose a sentence of fine, unless for

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reasons to be recorded, it is of opinion that a sentence of fine only will meet the ends of justice ; and

(ii) direct that any property in respect of which the order has been contravened or a part thereof shall be forfeited to His Majesty, unless for reasons to be recorded it is of opinion that such direction is not necessary to be made in respect of the whole, or, as the case may be, a part of the property."

Then came Central Act No. LII of 1950, under which the old section 7 was repealed and a new section enacted in the following terms :

"(1) If any person contravenes any order under section 3 relating to cotton textiles he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine ; and any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government.

(2) If any person contravenes any order under section 3 relating to foodstuffs,—

(a) he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine, unless for reasons to be recorded the Court is of opinion that a sentence of fine only will meet the ends of justice ; and

(b) any property in respect of which the order has been contravened or such part thereof as to the Court may seem fit shall be forfeited to the Government, unless for reasons to be recorded the Court is of opinion that it is not necessary to direct forfeiture in respect of the whole or, as the case may be, any part of the property :

Provided that where the contravention is of an order prescribing the maximum quantity of any food-grain that may lawfully be possessed by any person or class of persons, and the person contravening the order is found to have been in possession of foodgrains exceeding twice the maximum quantity so prescribed, the Court shall—

(a) sentence him to imprisonment for a term which may extend to seven years and to a fine not less than

twenty times the value of the foodgrain found in his possession, and

(b) direct that the whole of such foodgrain in excess of the prescribed quantity shall be forfeited to the Government.

Explanation :—A person in possession of foodgrain which does not exceed by more than five maunds the maximum quantity so prescribed shall not be deemed to be guilty of an offence punishable under the proviso to this sub-section.

(3) If any person contravenes any order under section 3 relating to any essential commodity other than cotton textiles and foodstuffs, he shall be punishable with imprisonment for a term which may extend to three years, or with fine or with both, and if the order so provides, any property in respect of which the Court is satisfied that the order has been contravened may be forfeited to the Government.

(4) If any person to whom a direction is given under sub-section (4) of section 3 fails to comply with the direction, he shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both."

It must be mentioned that while the amendments of 1948 and 1949 were made when section 107(2) of the Government of India Act was in force, the Constitution of India Act had come into operation, when Act No. LII of 1950 was enacted. Article 254(2) of the Constitution is as follows :

"Where a law made by the Legislature of a State specified in Part A or Part B of the First Schedule 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

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respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.”

This is, in substance, a reproduction of section 107(2) of the Government of India Act, the concluding portion thereof being incorporated in a proviso with further additions. Discussing the nature of the power of the Dominion Legislature, Canada, in relation to that of the Provincial Legislature, in a situation similar to that under section 107(2) of the Government of India Act, it was observed by Lord Waston in *Attorney-General for Ontario v. Attorney-General for the Dominion*⁽¹⁾, that though a law enacted by the Parliament of Canada and within its competence would override Provincial legislation covering the same field, the Dominion Parliament had no authority conferred upon it under the Constitution to enact a statute repealing directly any Provincial statute. That would appear to have been the position under section 107(2) of the Government of India Act with reference to the subjects mentioned in the Concurrent List. Now, by the proviso to article 254(2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central Legislature could not under section 107(2) of the Government of India Act, and enact a law adding to, amending, varying or repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The position then is that under the Constitution Parliament can, acting under the proviso to article 254(2), repeal a State law. But where it does not expressly do so, even then, the State law will be void under that provision if it conflicts with a later “law with respect to the same matter” that may be enacted by Parliament.

In the present case, there was no express repeal of the Bombay Act by Act No. LII of 1950 in terms of the proviso to article 254(2). Then the only question to be decided is whether the amendments made to the Essential Supplies (Temporary Powers) Act by the Central Legislature in 1948, 1949 and 1950 are “further

(1) [1896] A.C. 348.

legislation" falling within section 107(2) of the Government of India Act or "law with respect to the same matter" falling within article 254(2). The important thing to consider with reference to this provision is whether the legislation is "in respect of the same matter." If the later legislation deals not with the matters which formed the subject of the earlier legislation but with other and distinct matters though of a cognate and allied character, then article 254(2) will have no application. The principle embodied in section 107(2) and article 254(2) is that when there is legislation covering the same ground both by the Centre and by the Province, both of them being competent to enact the same, the law of the Centre should prevail over that of the State.

Considering the matter from this standpoint, the first question to be asked is, what is the subject-matter of the Bombay Act No. XXXVI of 1947? The preamble recites that it was "to provide for the enhancement of penalties for contravention of orders made under the Essential Supplies (Temporary Powers) Act, 1946." Then the next question is, what is the scope of the subsequent legislation in 1948, 1949 and 1950? As the offence for which the appellant has been convicted was committed on 6th April, 1951, it would be sufficient for the purpose of the present appeal to consider the effect of Act No. LII of 1950, which was in force on that date. By that Act, section 7(1) of the Essential Supplies (Temporary Powers) Act as passed in 1946 and as amended in 1948 and 1949 was repealed, and in its place, a new section was substituted. The scheme of that section is that for purposes of punishment, offences under the Act are grouped under three categories—those relating to cotton textiles, those relating to foodstuffs, and those relating to essential commodities other than textiles or foodstuffs. The punishments to be imposed in the several categories are separately specified. With reference to foodstuffs, the punishment that could be awarded when the offence consists in possession of foodgrains exceeding twice the maximum prescribed is imprisonment for a term

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which may extend to seven years, with further provisions for fine and forfeiture of the commodities. In other cases, there is the lesser punishment of imprisonment, which may extend to three years. Section 7 is thus a comprehensive code covering the entire field of punishment for offences under the Act, graded according to the commodities and to the character of the offence. The subject of enhanced punishment that is dealt with in Act No. XXXVI of 1947 is also comprised in Act No. LII of 1950, the same being limited to the case of hoarding of foodgrains. We are, therefore, entirely in agreement with the opinion of Chagla C.J. and Chainani J. that Act No. LII of 1950 is a legislation in respect of the same matter as Act No. XXXVI of 1947.

Bavdekar J. who came to the contrary conclusion observed, and quite correctly, that to establish repugnancy under section 107(2) of the Government of India Act, it was not necessary that one legislation should say "do" what the other legislation says "don't", and that repugnancy might result when both the legislations covered the same field. But he took the view that the question of enhanced penalty under Act No. XXXVI of 1947 was a matter different from that of punishment under the Essential Supplies (Temporary Powers) Act, and as there was legislation in respect of enhanced penalty only when the offence was possession of foodstuffs in excess of twice the prescribed quantity, the subject-matter of Act No. XXXVI of 1947 remained untouched by Act No. LII of 1950 in respect of other matters. In other words, he considered that the question of enhanced punishment under Act No. XXXVI of 1947 was a matter different from that of mere punishment under the Essential Supplies (Temporary Powers) Act and its amendments; and in this, with respect, he fell into an error. The question of punishment for contravention of orders under the Essential Supplies (Temporary Powers) Act both under Act No. XXXVI of 1947 and under Act No. LII of 1950 constitutes a single subject-matter and cannot be split up in the manner suggested by the learned Judge. On this principle rests the rule

of construction relating to statutes that "when the punishment or penalty is altered in degree but not in kind, the later provision would be considered as superseding the earlier one." (Maxwell on Interpretation of Statutes, 10th Edition, pages 187 and 188). "It is a well settled rule of construction", observed Goddard J. in *Smith v. Benabo*⁽¹⁾, "that if a later statute again describes an offence created by a previous one, and imposes a different punishment, or varies the procedure, the earlier statute is repealed by the later statute : see *Michell v. Brown*⁽²⁾, per Lord Campbell."

It is true, as already pointed out, that on a question under article 254(1) whether an Act of Parliament prevails against a law of the State, no question of repeal arises ; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, will be equally applicable to a question under article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law. We must accordingly hold that section 2 of Bombay Act No. XXXVI of 1947 cannot prevail as against section 7 of the Essential Supplies (Temporary Powers) Act No. XXIV of 1946 as amended by Act No. LII of 1950.

The appellant also sought to argue that the subject-matter of the legislation in Act No. XXXVI of 1947 was exclusively in the Provincial List, and that section 107(2) of the Government of India Act and article 254(2) of the Constitution which apply only with reference to legislation on subjects which are in the Concurrent List, have no application. The very legislation on which the appellant relies, *viz.*, Act No. XXXVI of 1947, proceeds, as already stated, on the basis that the subject-matter is in the Concurrent List. The appellant raised this question before the learned Judges of the Bombay High Court, and they rejected it. In the application for leave to appeal to

(1) [1937] 1 K.B. 518.

(2) 1 El. and El. 267, 274.

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this Court which was presented under article 132(1), the only ground that was put forward as involving a substantial question as to the interpretation of the Constitution was, whether the Bombay Act No. XXXVI of 1947 was repugnant and void under article 254 of the Constitution. No other question having been raised in the petition, we must decline to permit the appellant to raise this point.

In the result, the appeal fails and is dismissed.

Appeal dismissed.

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INDIA UNITED MILLS LTD.

v.

COMMISSIONER OF EXCESS PROFITS
 TAX, BOMBAY.

[MEHR CHAND MAHAJAN C.J., S. R. DAS
 GHULAM HASAN, BHAGWATI and
 VENKATARAMA AYYAR JJ.]

Excess Profits Tax Act (XV of 1940), ss. 15, 26(3)—Meaning and import of the word 'discovers'—Allowance granted to assessee on his representation—Subsequent facts show that representation as untrue, Effect of.

The word 'discovers' in s. 15 of the Excess Profits Tax Act, 1940, is not limited to facts discovered, which existed during the relevant chargeable accounting period for which assessment is reopened under the section but also includes facts so discovered which came into existence subsequent to such accounting period.

Allowance was granted to an assessee by the Central Board of Revenue under s. 26(3) of the Act for the chargeable accounting period during the war on the ground that certain buildings, plant and machinery provided for production of war materials will not be required for the purposes of assessee's business after the termination of the war. But it was discovered that even after the termination of war the buildings, plant and machinery in question were actually used by the assessee for his business.

Held, that the Excess Profits Tax Officer had ample power to proceed against the assessee to reassess him under s. 15 of the Act.

Dodwarth v. Dale ([1936] 2 K.B. 503 : 20 Tax Cases 285) ; *Anderson and Halstead Ltd. v. Birrell* ([1932] 1 K.B. 271 : 16 Tax Cases 200) ; *Gray (H.M. Inspector of Taxes) v. Lord Penrhyn* (21