

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 14433 of 2008****With****SPECIAL CIVIL APPLICATION NO. 8208 of 2009****With****SPECIAL CIVIL APPLICATION NO. 14491 of 2008****With****CIVIL APPLICATION NO. 13982 of 2008****In****SPECIAL CIVIL APPLICATION NO. 14433 of 2008****With****CIVIL APPLICATION NO. 13983 of 2008****In****SPECIAL CIVIL APPLICATION NO. 14491 of 2008****With****SPECIAL CIVIL APPLICATION NO. 14492 of 2008****With****SPECIAL CIVIL APPLICATION NO. 14539 of 2008****With****SPECIAL CIVIL APPLICATION NO. 15195 of 2008****With****SPECIAL CIVIL APPLICATION NO. 15437 of 2008****With****SPECIAL CIVIL APPLICATION NO. 149 of 2009****With****SPECIAL CIVIL APPLICATION NO. 238 of 2009****With****SPECIAL CIVIL APPLICATION NO. 150 of 2009****With****SPECIAL CIVIL APPLICATION NO. 2513 of 2009****With****SPECIAL CIVIL APPLICATION NO. 17672 of 2011****With****SPECIAL CIVIL APPLICATION NO. 15719 of 2012****With****SPECIAL CIVIL APPLICATION NO. 15720 of 2012****With**

**SPECIAL CIVIL APPLICATION NO. 3332 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 3336 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 3993 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 3331 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 3994 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 8697 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 7416 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 7418 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 16463 of 2014**

**With**

**SPECIAL CIVIL APPLICATION NO. 15435 of 2008**

**With**

**SPECIAL CIVIL APPLICATION NO. 15613 of 2008**

**With**

**SPECIAL CIVIL APPLICATION NO. 5471 of 2015**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE THE ACTING CHIEF JUSTICE MR. JAYANT PATEL**

**and**

**HONOURABLE MR.JUSTICE N.V.ANJARIA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	<b>Yes</b>
2	To be referred to the Reporter or not ?	<b>Yes</b>
3	Whether their Lordships wish to see the fair copy of the judgment ?	<b>No</b>

4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No
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KALYAN JANTA SAHAKARI BANK LTD....Petitioner(s)

Versus

STATE OF GUJARAT & 1....Respondent(s)

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**Appearance in SCA No.14433/2008:**

MR TUSHAR P HEMANI WITH MS VAIBHAVI PARIKH, ADVOCATE for the  
Petitioner(s) No. 1

MS MEGHA JANI, ADVOCATE for the Petitioner(s) No. 1

**Appearance in SCA No.8208/2009 and SCA No.14539/2008**

MS AMRITA AJMERA for the Petitioner(s) No. 1- 2

**Appearance in SCA Nos.14491/2008, 14492/2008 and 7416/2014**

MR MR BHATT, LD. SR. ADVOCATE WITH MRS.MAUNA BHATT for the  
Petitioner(s) No. 1

**Appearance in SCA Nos.15195/2008, 15437/2008 and 3993/2014**

MR MAULIN RAVAL WITH MS SHIVYA DESAI, ADVOCATE for the  
Petitioner(s) No. 1

**Appearance in SCA Nos.149/2009, 150/2009**

MR BHARAT T RAO, ADVOCATE for the Petitioner(s) No. 1

**Appearance in SCA No.238/2009**

MR ANIP A GANDHI, ADVOCATE for the Petitioner(s) No. 1

**Appearance in SCA No.2513/2009**

MR SK PATEL, ADVOCATE for the Petitioner(s) No. 1

**Appearance in SCA No.17672/2011**

MR BHARAT BHAVSAR, ADVOCATE for the petitioner(s) No. 1

**Appearance in SCA Nos.15719/2012 and 15720/2012**

MR AS ASTHAVADI, ADVOCATE for the Petitioner(s) No. 1 – 2

**Appearance in SCA Nos.3332/2014 and 16463/2014**

MR VISHVAS K SHAH WITH MR MASOOM K SHAH, ADVOCATE for the  
Petitioner(s) No. 1

**Appearance in SCA No.3336/2014**

MR HARSH N PAREKH, ADVOCATE for the Petitioner(s) No. 1 – 3

**Appearance in SCA No.8697/2014**

MR PRABHAKAR UPADYAY, ADVOCATE for the Petitioner(s) No. 1

**Appearance in SCA Nos.15435/2008 and 15613/2008**

MR DEVEN PARIKH, LD. SR. ADVOCATE WITH MR KUNAL NANAVATI FOR  
NANAVATI ASSOCIATES, ADVOCATE for the Petitioner(s) No. 1

**Appearance in SCA No.5471/2015**

MR DHAVAL D. VYAS, ADVOCATE for the Petitioner(s) No. 1 - 2

**Appearance for Respondents in petitions**

MR KAMAL TRIVEDI, LD. ADVOCATE GENERAL WITH MS S.K. VISHEN, LD.  
AGP for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 1 - 2

MR MIHIR THAKORE, LD. SR. ADVOCATE WITH MR MIHIR JOSHI, LD. SR.  
ADVOCATE WITH MR SN SOPARKAR, LD. SR. ADVOCATE WITH MR  
SANDEEP SINGHI WITH MR PARTH CONTRACTOR WITH MR PRANJAL  
BUCH, SINGHI & CO, ADVOCATE for the Respondent(s) No. 2

MS DHARMISHTA RAVAL, ADVOCATE for Respondent(s) SEBI

MR SHRIJIT PILLAI FOR TRIVEDI & GUPTA, Respondent(s) No. 5 in  
SCA Nos.3993/2014 and 3994/2014

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CORAM: **HONOURABLE THE ACTING CHIEF JUSTICE MR.  
JAYANT PATEL**  
and  
**HONOURABLE MR.JUSTICE N.V.ANJARIA**

Date : 15/01/2016

CAV JUDGMENT  
(PER : HONOURABLE MR.JUSTICE N.V.ANJARIA)

In the present batch of group of petitions,

what is at stake is the legislative competence, and therefore constitutional validity of the Sardar Sarovar Narmada Nigam Limited (Conferment of Power to Redeem Bonds) Act, 2008.

**1.1** Passed by the Gujarat Legislature and received assent of the Governor on 29<sup>th</sup> March, 2008, the Act was brought into existence to confer power on the Sardar Sarovar Narmada Nigam Limited-respondent No.2 herein, to redeem premature the Deep Discount Bonds issued by it.

**2.** As all the captioned petitions involve common challenge, similar facts and identical issues as well as the prayers being on the same lines, they were heard together. Accordingly, they are being finally decided simultaneously by this common judgment.

**2.1** The discussion hereinafter, for convenient reference, is classified as per following sub-heads and the corresponding paragraphs thereto.

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petitioners	
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Impugned Law and Central Legislations	
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### **Basic Challenge and the Prayers**

**3.** The challenge, as stated above, is addressed to the constitutionality of Sardar Sarovar Narmada Nigam Limited (Conferment of Powers to Redeem Bonds) Act, 2008 (hereinafter referred to as "the impugned Act" for the sake of brevity). Legislative competence of Legislature of State is called in question for enacting the said law on the various grounds.

**3.1** In each of the petitions, the common prayer is to declare the impugned Act as unconstitutional. In the second place, it is prayed to set aside notice dated 03<sup>rd</sup> November, 1994 issued to the petitioners-Bond- holders by the Sardar Sarovar Narmada Nigam Limited (SSNNL)-respondent No.2 to redeem the Bonds. The third common prayer is to declare all the steps taken by respondent No.2 SSNNL on the basis of the impugned Act as illegal and void and not binding to the Bond- holders. It is further prayed to command the respondents not to take any step or action in any manner so as to unilaterally alter the financial covenants and conditions mentioned in the Certificate of Bond. It may be mentioned that in petitions, what is prayed is only to declare the Act as unconstitutional; in other petitions, all of the above prayers are made.

**3.1.1** In Special Civil Applications Nos.14433 of 2008, 15719 of 2012, 15720 of 2012, 2513 of 2009, 16463 of 2014, 7418 of 2014, 150 of 2009, 14539 of 2008, 15195 of 2008, 149 of 2009, 5471 of 2015 and 3331 of 2014, additional prayer is made to direct the respondents to pay remaining amount and/or to recoup

the financial loss on account of early redemption of the Bonds.

### **Representative facts from main Petition**

**3.2** As the arguments were heard in Special Civil Application No.14433 of 2008, the same is treated as main petition. The primary facts set out herein are taken from the record of that petition.

**3.2.1** The petitioner of Special Civil Application No.14433 of 2008 is a Scheduled Cooperative Bank having its registered office at Mumbai. The petitioner acquired 800 Bonds on 27<sup>th</sup> September, 2009 at the cost of Rs.04,68,00,000/- from secondary market at the yield anticipated on the maturity date to be 8.025%. It is the say of the petitioner that the date is calculated on the basis of excess of maturity value over the current rate or security factored by remaining duration. It is the case of the petitioner that it purchased the Bonds with a view to hold to the same till maturity.

**3.2.2** Respondent No.2-Sardar Sarovar Narmada Nigam Limited came out with an Issue of Deep Discount Bonds (DDBs) by issuing a Prospectus on 29<sup>th</sup> September, 1993. The Bonds were of the face value of Rs.01,11,000/-. They were issued in the year 1994 at a discounted price of Rs.03,600/-. The tenure as per the original terms was of 20 years. At the end of the said period, that is, in the year 2014, Bond-holder was to be offered the face value of Rs.01,11,000/-. Under the conditions mentioned in the Prospectus, the Bonds were



redeemable at the option of the Bond-holder at the end of 7<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> years commencing from 1993, for Rs.12,500/-, Rs.25,000/- and Rs.50,000/- at the end of respective dates. More than seven lakhs Deep Discount Bonds issued to the public as above and they were listed in 10 Stock Exchanges across the country.

**3.2.3** On 29<sup>th</sup> March, 2008, the State of Gujarat promulgated a statute being an Act No. 12 of 2008 being the impugned legislation, whereby, the powers were conferred on the company to redeem the Bonds notwithstanding anything contained in the conditions relating to redemption of Bonds in the Prospectus. The various terms and conditions of the DDBs are set out in detail hereinafter.

**3.2.4** It is the case of the petitioners based on the conditions of the Issue that there was only a "Put Option", implying thereby that only in case of investors willing to surrender the Bonds for premature redemption, they can do the same at determined rates and on specified dates. There was no "Call Option", and it is the contention of the petitioners that respondent No.2-SSNNL could not have redeemed the Bonds premature prior to the date of maturity and expiry period.

**3.2.5** In the impugned Act, condition No.3A was inserted on the financial covenants giving right to Sardar Sarovar Narmada Nigam Limited (SSNNL) to redeem the Bonds prior to the end of the original period contemplated. On 3<sup>rd</sup> November, 2011, the Board of Directors of respondent No.2-SSNNL decided to redeem

all the Deep Discount Bonds on 10<sup>th</sup> January, 2009 with redeemed face value at Rs.50,000/- for each Bond as against original face value of Rs.1,11,000/-. The Bond-holders which included the petitioner, received notice dated 26<sup>th</sup> November, 2008 of redemption requiring to submit necessary details within the specified time.

**3.2.6** Such notice regarding premature redemption was issued in similar fashion to all Bond-holders which stated that the Government of Gujarat has passed the impugned Act, that the Board of Directors of the Nigam had on 03<sup>rd</sup> November, 2008 in their meeting decided, in terms of the Act to redeem the Deep Discount Bonds earlier and the date for such redemption could be 10<sup>th</sup> January, 2009 with deemed value of Rs.50,000/- per Bond. The notice stated to the Bond-holders that pursuant to provisions of Section 154 of the Companies Act, 1956 and the Listing Agreement with the Stock Exchanges, the Register of Transfers of DDBs and the Register of Deep Discount Bond-holders of Nigam shall remain closed from 13<sup>th</sup> December, 2008 to 10<sup>th</sup> January, 2009-both days inclusive-for the purpose of updation of said Registers and the Bond-holders were further informed to undergo the procedural formalities for receiving the premature redemption and payment.

### **Concise Facts of Cognate Petitions**

**3.3** The facts relating to individual petitions may be referred to in a nutshell. The petitioners of Special Civil Application No.8208 of 2009 are the

private individuals. The petitioners acquired 1 Bond on 07<sup>th</sup> January, 1995.

**3.3.1** The petitioner of Special Civil Application No.14491 of 2008 is Indian Oil Corporation Limited (Refineries Division) Employees Provident Funds which acquired 2950 Bonds at an average rate of Rs.56,000/- from the secondary market as per its case.

**3.3.2** The petitioner of Special Civil Application No.14492 of 2008 is Indian Oil Corporation Limited Employees Superannuation Benefit Fund which is a trust set up by Indian Oil Company Limited. It is the case of the petitioner that it purchased 800 Bonds from the secondary market at the rate of Rs.55,900/- in the year 2007, investing total Rs.04,47,20,000/-.

**3.3.3** The petitioners of Special Civil Application No.14539 of 2008 are the private individuals who acquired 1 Bond on 30<sup>th</sup> January, 1995.

**3.3.4** The petitioner of Special Civil Application No.15195 of 2008 is India Tourism Development Corporation Limited, Staff Provident Fund Trust who acquired 594 Bonds in the year 2005 at the cost of Rs.02,91,56,575/- from the secondary market.

**3.3.5** The petitioner of Special Civil Application No.15437 of 2008 is Win-Medicare Limited Employees Provident Fund; it is a trust engaged for safeguarding interest of the members who are employees of the associate companies. This the petitioner acquired 916 Bonds between the year 2005 to 2007 at the cost of

Rs.04,93,00,950/- from the secondary market at the competitive rates to secure yield on the date of maturity.

**3.3.6** One Kanta Devi is the petitioner of Special Civil Application No.149 of 2009. The said petitioner has been holding 12 Bonds of SSNNL and it is averred that the Bonds are mutated in the name of the petitioner company in the Demate Account. It is further stated that at the end of the maturity period, the petitioner was to get Rs.13,32,000/-.

**3.3.7** Hasting Jute Mill Provident Fund is the petitioner of Special Civil Application No.238 of 2009 who acquired 200 Bonds in the year 2006 at the cost of Rs.60,750/- from the secondary market and stated that it expected the yield at the end of the maturity period.

**3.3.8** The petitioner of Special Civil Application No.150 of 2009-M/s.Sunmarg Securities Private Limited. Its case is that it held 105 Bonds and it is stated that on the maturity date, the petitioner was expecting to get Rs.116.55 Lacs.

**3.3.9** The petitioner of Special Civil Application No.2513 of 2009-Jay Shree Provident Fund Institution, is a registered trust and the holder of 550 Bonds issued by SSNNL. It is the case of the petitioner that premature redemption of all the Bonds would result into a huge loss of Rs.01,35,21,082/- on the purchase price of Rs.03,23,32,300/-. It is stated that the petitioner would suffer loss of principal amount in

the sum of Rs.48,32,300/- and the loss of interest would be Rs.86,88,782/-.

**3.3.10** The petitioner of Special Civil Application No.17672 of 2011 is Shree Digvijay Cement Company Limited Employees Provident Fund. These petitioners having purchased the Bonds at the relevant time, are aggrieved by premature redemption sought to be effected under the impugned Act.

**3.3.11** The petitioners of Special Civil Application No.15719 of 2012 are the private individuals and purchased 1 Bond comprising Certificate No.128719.

**3.3.12** The petitioners of Special Civil Application No. 15720 of 2012 are also the private individuals. They have stated that on the basis of Prospectus and advertisement, they invested Rs.03,600/- by purchasing 1 Bond under Certificate No.128719.

**3.3.13** The petitioner of Special Civil Application No.3332 of 2014 is Maharashtra State Electricity Board's Contributory Provident Fund. This petitioner acquired 22684 Bonds from the secondary market at the cost price of Rs.13,18,95,850/- at the premium of Rs.05,02,33,450/- over the face value of Rs.03,600/- per Bond with the face value of Rs.01,11,000/- as on 11<sup>th</sup> January, 2014. The said petitioner is also aggrieved by premature redemption.

**3.3.14** Petitioner of Special Civil Application No.3336 of 2014 is Maharashtra State Road Transport Corporation's Contributory Provident Fund and others.



It is its case that from 23<sup>rd</sup> June, 2005 onwards, the petitioner purchased 10,385 Deep Discount Bonds from secondary market in Mumbai at the cost price of Rs.55,42,56,500/- at the premium of Rs.51,68,70,500/- over the face value of Rs.03,600/- per Bond with the face value of Rs.01,11,000/- as on 11<sup>th</sup> January, 2014. It is the further case of the petitioners that they purchased the said Bonds from the secondary market at such high premium because of the clear and specific assurances given by the respondent Nos.2 and 3 guaranteeing the face value of the Bonds mentioned in the Bond document.

**3.3.15** The petitioner of Special Civil Application No.3993 of 2014 is Hotel Janpath Employees Provident Fund, a Trust engaged in safeguarding the interest of its members who are employees at Hotel Janpath. This petitioner purchased the Bonds between the year 2005 and 2007 and that there was no call option available to respondent No.2. The said petitioner is aggrieved by premature redemption of Bonds acted upon under the impugned Act.

**3.3.16** The petitioners of Special Civil Application No.3331 of 2014 are (i) Sri. Mohan D. Kulkarni, (ii) Mysore Paper Mills Employees' Group Gratuity Trust Fund, (iii) Sri. S. Kempaiah and (iv) Mysore Paper Mills Employees' Provident Fund Trust. Petitioner No.2 acquired 100 Bonds aggregating the issue price of Rs.50 Lacs for which the maturity value was Rs.01,11,00,000/- whereas respondent No.4 acquired 164 Bonds aggregating the issue price of Rs.82 Lacs for

which the maturity value was Rs.01,82,04,000/-. The said petitioners are aggrieved by premature redemption effected under the impugned Act.

**3.3.17** The petitioner of Special Civil Application No.3994 of 2014 is SSNNL Investors Grievance Redressal Forum. This petitioner is also aggrieved having purchased the Bonds which are prematurely redeemed.

**3.3.18** The petitioner of Special Civil Application No.8697 of 2014 is Allahabad Kshetriya Gramin Bank Provident Fund Trust managed as per the provisions of the Employees Provident Fund Act, 1952 having its office situated at Allahabad. It is the case of this petition that it wanted to maximize the returns for its members, therefore purchased on the different dates the Deep Discount Bonds issued by SSNNL from the Stock Market. On 04<sup>th</sup> October, 2006, 50 Bonds were purchased by this petitioner at the rate of Rs.52,450/- per Bond; On 08<sup>th</sup> December, 2006, 47 Bonds came to be purchased by the petitioner at the rate of Rs.53,050/- per Bond; On 01<sup>st</sup> December, 2007, 50 Bonds were purchased by this petitioner at the rate of Rs.54,490/- per Bond; On 18<sup>th</sup> May, 2007, 40 Bonds came to be purchased by the petitioner at the rate of Rs.54,750/- per Bond; On 03<sup>rd</sup> August, 2007, 25 Bonds came to be purchased by the petitioner at the rate of Rs.55,100/- per Bond; a notice was received by the petitioner regarding premature redemption, pursuant to which the complaints were made to the Securities and Exchange Board of India as to the basis on which the redemption was arrived at. SSNNL sent a pay order of

Rs.1,06,00,000/- being the redemption amount to the petitioner.

**3.3.19** The petitioner of Special Civil Application No.7416 of 2014 is the private individual who purchased in the year 2004-2005 the Bonds for the value of Rs.01,15,134/- at the relevant time.

**3.3.20** The petitioner of Special Civil Application No.7418 of 2014 are the private individuals who are the residents of Gurgaon, State of Haryana. They invested in 20 Bonds at purchase price of Rs.72,000/- and it is pleaded in the petition inter alia that the reason for investment in the Bonds was that there was no Call Option available to respondent No.3.

**3.3.21** The petitioner of Special Civil Application No.16463 of 2014 is a private individual who invested in 50 Bonds.

**3.3.22** The petitioner of Special Civil Application No.15435 of 2008 is the Board of Trustees Hindustan Steel Limited Bhailai Steel Project Provident Fund. It is the case of the petitioner that with an intention to reap the benefit of interest in the yield at the end of maturity period of the Bonds, it purchased 5000 DDBs in three different lots in September-October 2005 from the secondary market at total investment of Rs.27.67 crores at the market price obtained on that date.

**3.3.23** The petitioner of Special Civil Application No.15613 of 2008 is the Board of Trustees for Bokaro

Steel Employees' Provident Fund. The petitioner purchased by a single lot 3218 DDBs from the secondary market investing Rs.20 crores approximately at a market price at the relevant time. It is the case that because of premature redemption of the Bonds sought to be effected under the impugned Act, the petitioner would suffer huge loss in crores. The petitioner has given details of purchased lot and the investment.

**3.3.24** The petitioners of Special Civil Application No.5471 of 2015 are private individuals. They purchased 01 Bond.

**3.4** It appears that Writ Petition No.2812 of 2008 and Writ Petition No.2869 of 2008 were filed before the Hon'ble Mumbai High Court, challenging the Act, 2008. Subsequently, transferred petitions before the Hon'ble Supreme Court of India came to be filed for transfer of all the pending proceeding before this Hon'ble Court as well as in the Hon'ble Mumbai High Court. It further appears that petitioner filed an application before the Supreme Court seeking direction against the Nigam to issue fresh cheque for the amount of Rs.01,06,00,000/- and the applicant be permitted to encash the same subject to outcome of the challenge to the vires of the Act. Several petitions being Special Civil Application Nos.3331 of 2014, 3993 of 2014, 3994 of 2014, 7418 of 2014, 3332 of 2014 and 3336 of 2014 were filed before High Courts of other States. The Apex Court passed order dated 10<sup>th</sup> December, 2013 in Writ Petition (Civil) Nos.04-05 of 2009 and allied matters, and transferred different Writ Petitions to this Court.

### 3.4.1 The Apex Court passed following order.

"In these cases the petitioners have questioned the legislative competence of the State legislatures to enact the impugned 'Sardar Sarovar Narmada Nigam Limited' (Conferment of Power to Redeem Bonds) Act, 2008 ('Act' 12 of 2008). While according to petitioners the subject is covered by Entry 46 of the List I of Seventh Schedule to the Constitution of India, according to learned counsel for the State, the subject is covered by Entry 43 of List II of the Seventh Schedule. While some of the writ petitions have been filed under Article 32 of the Constitution of India, other writ petitions have been filed before different High Courts, namely, Gujarat High Court, Bombay High Court and Karnataka High Court under Article 226 of the Constitution of India which were also transferred to this Court for hearing alongwith writ petitions filed under Article 32 of the Constitution of India.

On hearing the parties, we find that the main question relates to legislative competence of the State legislature to enact to Act in question. Prima facie as it appears that no question relating to petitioner's right under Part III of the Constitution of India is involved, we are of the view that the parties should pursue their case under Article 226 of the Constitution of India before one High Court i.e. Gujarat High Court. Learned counsel for the parties also agree to pursue their remedy under Article 226 of the Constitution of India before the Gujarat High Court. We, accordingly, allow the concerned petitioners to convert their petitions under Article 32 of the Constitution of India, as petitions filed under Article 226 of the Constitution of India and transfer the writ petitions and all other writ petitions (now listed as



transfer case) to Gujarat High Court for decision on merit.

Parties are given liberty to file additional affidavit/counter affidavit or amended petition taking additional grounds to challenge the validity of the law before the Gujarat High Court.

The Gujarat High Court is expected to decide the writ petitions expeditiously. All the cases before this Court stand closed."

**3.4.2** Accordingly the said matters came to be listed, converted into Special Civil Applications and were placed with other similar petitions in which similar issue of constitutional validity of Sardar Sarovar Narmada Nigam Limited (Conferment of Power to Redeem Bonds) Act, 2008 was under challenge.

**3.4.3** It appears that all such Special Civil Applications being Special Civil Application Nos.8208 of 2009, 14433 of 2008, 14491 of 2008, 14491 of 2008, 14492 of 2008, 14539 of 2008, 15195 of 2008, 15434 of 2008, 15437 of 2008, 149 of 2009, 238 of 2009, 150 of 2009, 2513 of 2009, 3331 of 2014, 3332 of 2014, 3336 of 2014, 3993 of 2014 and 3994 of 2014 came to be listed before the Division Bench of this Court on 17<sup>th</sup> June, 2014 and the Division Bench issued Notice to the Advocate General making it returnable on 24<sup>th</sup> June, 2014. It may be further stated that out of the petitions of other High Courts transferred to this Court, though notice was issued to the petitioners concerned in those matters, in one such Special Civil Application No.3331 of 2014 despite service of notice,

petitioners have not filed their appearance. As far as Special Civil Application Nos.3994 of 2024 and 7418 of 2014 are concerned, notice is unserved, but since they form part of the group and involve identical challenge, they stand disposed of as per what is held in this judgment.

### **Conditions of the Issue**

**3.5** The following were the important terms and conditions on which the Deep Discount Bonds were issued mentioned in the Prospectus of the Issue dated 29<sup>th</sup> September, 1993, may be extracted, copy of which forms part of the record of the petition.

#### **"Terms of the present issue**

The Bonds now being offered are subject to the provisions of the Act, terms of this Prospectus, Application Form, Memorandum and Articles of the Company (hereinafter referred to as 'Memorandum' and 'Articles' respectively). In addition to such terms, the Bonds shall also be subject to such other terms and conditions to be incorporated in the Bond Trust Deed/Bond Certificates/Letters of Allotment and the guidelines for the listing of securities issued from time to time."

#### **"Nature of Instruments**

The Bonds are secured and are in the nature of promissory notes."

#### **"Deep Discount Bond**

Each Deep Discount Bond having a face value of Rs.1,11,000 will be issue at a discounted price of Rs.3600/- with a maturity period of 20 years from the date of allotment. An investor will have the option to withdraw the Bond, at the end of 7<sup>th</sup>, 11<sup>th</sup> and 15<sup>th</sup> year from the date of allotment. In the event of such earlier withdrawal by the investor, the deemed face value of the Bond would be as under.

<b>In case of withdrawal</b>	<b>Deemed Face Value</b>
At the end of 7 year	Rs.12,500
At the end of 11 years	Rs.25,000
At the end of 15 years	Rs.50,000"

**3.5.1** The Bonds were non-convertible. Minimum number of Bond required to be applied was one and there was no maximum limit. The terms of payment were that the full issue price was Rs.3600/- per Bond to be paid as indicated along with the application one half and rest of one half at the time of allotment.

**3.5.2** It provided procedure for withdrawal and transfer of Bonds and it was stated that Bonds were in the nature of Promissory Notes. The relevant clauses are as under,

**"Procedure for withdrawal**

In order to exercise his option to withdraw the Bond amount before the redemption date at the end of the periods as specified above, the Bondholder should send the Bond certificate(s) duly discharged by signing on the back of the Bond Certificate alongwith a written intimation mentioning his intention to withdraw, to the Company so as to reach them between three (3) and six (6) months prior to the date of withdrawal.

In the event of Bondholder deciding to withdraw the Bond at any of the period mentioned above, the Bondholder shall first get the Bonds registered in his name. The Bonds will be redeemed or withdrawn only on the surrender of the Bond certificates by the registered Bondholders."

**3.5.3** About transferability, the following covenants were inserted.

**"Transferability of the Bonds**

The Bonds being in the nature of promissory notes are transferred by endorsement and delivery. The endorsement by the transferor shall be made on the Bond by affixing his signature at the place indicated thereon.

However, the payment of interest and amounts due on redemption/withdrawal will be made only to the registered holder of the Bonds as mentioned earlier.

In exercise of the powers conferred to it pursuant to Section 620 of the Act, the Central Government vide notification no.1294(E) dated 17.12.86 has directed that the provisions of sub-section (1) of Section 108 of the Act, in so far as it requires a proper instrument of transfer to be duly stamped and executed by or on behalf of the transferor and by or on behalf of the transferee shall not apply with respect to Bonds issued by a Government Company, provided that an intimation by the transferee specifying his name, address and occupation, if any, has been delivered to the Company alongwith the Certificate/Letter of Allotment relating to the Bond.

In other words there would be no requirement of a duly executed stamped transfer deed to be attached alongwith the Bond Certificate for the purpose of registration of transfer. To have the Bond transferred in his/her name the transferee would simply send the endorsed Bond Certificate to the Company requesting transfer alongwith details of his/her name, address and occupation, if any."

**3.5.4** Industrial Credit and Investment Corporation of India Limited was the Trustee of the Issue. The company executed Trust Deed on 31<sup>st</sup> December, 1994. It was stated that the Trustees confirm that they will protect the interest of the Bondholders in the event of default of the company in regard to timely payment of interest and repayment and principal and they will take necessary action including enforcement of security at the cost of the company. The major events of withdrawal which will necessitate repayment before maturity were indicated thus,

"(1) Default in payment of monies due in respect of interest and principal owing upon the Bonds.

(2) Default in payment of any other monies including costs, charges and expenses incurred by the Trustees.

(3) Winding up of the Company

(4) If the Company ceases, without the consent of the Trustees, to carry on its business or gives notice of its intention to do so.



(5) If it is certified by a Chartered Accountant or a firm of Chartered Accountants appointed by the Trustees that the liabilities of the Company exceed its assets."

**3.5.5** It was stated in the Prospectus that applications were made before the Government of Maharashtra, Government of Gujarat, Government of Rajasthan as well as Government of Madhya Pradesh under the relevant provisions of the Public Trust Act applicable in the respective State for declaration to treat the Bond as public security. Rights of Bondholders were mentioned as under.

**3.5.6** On the rights of holders of the Bonds, it was provided as under,

**"Rights of Bondholders**

(i) The Bonds shall not confer upon the holders thereof a right to receive notices or Annual Reports of, or to attend and/or vote, at the General Meetings of the Shareholders of the Company.

(ii) The rights, privileges and conditions attached to the Bonds may be varied, modified and/or abrogated with the consent in writing of the holders of at least three-fourths of the outstanding amount of the Bonds or by a Special Resolution passed at a meeting of the Bondholders, provided that, nothing in such consent or resolution shall be operate against the Company where such consent or resolution modifies or varies the terms and conditions governing the Bonds, if the same are prejudicial to the interest of the Company.

(iii) The registered holder of the Bonds and/or in the case of joint holders, the one whose name stands first in the Register shall be entitled to vote in respect of such Bonds, either in person or by proxy at any meeting of the Bondholders and every such holder shall be entitled to one vote on a show of hands, and on a poll his voting rights shall be in proportion to the outstanding nominal value of Bonds held by him on every resolution placed before such meeting of the Bondholders. The quorum for such meetings shall be five Bondholders present in person.

(iv) The provisions contained in Annexure C and/or Annexure D of the Companies (Central Government's)



General Rules and Forms, 1956, will apply to the meetings of the Bondholders.

(v) A Register of Bondholders will be maintained in accordance with Section 152 of the Act, and all principal sums and the interest becoming due and payable will be paid to the registered holders only and in case of jointholders, to the person whose name appears first in the Register of Bondholders.

(vi) The Bondholders will be entitled to their Bonds free from equalities and/or cross claims by the Company against the original or any intermediate holders thereof.

(vii) The Bonds comprising the present issue shall rank pari passu interest without any preference or priority of one over the other or others of them.

(viii) The Bonds will be subject to the terms and conditions, to be incorporated in the documents/agreements to be entered into with the Bond Trustees and in the Bond Certificates/Allotment Letters to be issued."

**3.5.7** The power to re-purchase and re-issue Bond was mentioned in the following way,

"Subject to the provisions of Section 121 of the Act, the Board shall have the power exercisable at its absolute discretion; from time to time, to repurchase all or any of the Bonds, at any time prior to the specified date of redemption and may re-issue the same or may cancel them.

Where the Company has redeemed or repurchased any of the Bonds, the Company shall have and shall be deemed always to have had the right to keep such Bonds alive for the purpose of re-issue and in exercising such right the Company shall have and shall be deemed always to have had the power to re-issue such Bonds either by re-issuing the same Bonds or by issuing other Bonds in their place."

**3.5.8** The Prospectus stated details about the company-SSNNL. It further stated the details of object of the Issue to be to part finance the Sardar Sarovar Project and to repay bridge finance. The project cost of the Sardar Sarovar, the flow fund statement of the estimated fund, etc., were mentioned.

## **Tripartite Agreement**

**3.6** The Prospectus of the Issues of the DDBs also mentioned inter alia about a Tripartite Agreement entered into. It appears that on 20<sup>th</sup> August, 1993, a Tripartite Agreement came to be entered amongst the State Government, SSNNL and the Trustees of the Issue in order to provide adequate comfort to the investors in relation to the Issue of the Bonds, whereunder it was agreed that the Government of Gujarat would provide funds to SSNNL. A copy of the same was produced and relied on in course of the hearing on behalf of the State Government.

**3.6.1** The said Tripartite Agreement may be conveniently reproduced herein.

### **"TRIPARTITE AGREEMENT**

This Tripartite Agreement at Gandhinagar this 20<sup>th</sup> day of August One Thousand Nine Hundred and Ninety Three BETWEEN (1) SARDAR SAROVAR NARMADA NIGAM LIMITED, a Company incorporated under the Companies Act, 1956 having its Registered Office at Block No.12, 1<sup>st</sup> Floor, New Sachivalaya Complex, Gandhinagar-382 010, Gujarat India, hereinafter referred to as "SSNNL" (which expression shall unless it be repugnant to the subject or context or meaning thereof be deemed to mean and include its successors and assigns) of the ONE PART; (2) THE STATE GOVERNMENT OF GUJARAT, through the GOVERNOR OF THE STATE OF GUJARAT, hereinafter referred to as "GOG" (which expression shall unless it be repugnant to the subject or context or meaning thereof be deemed to mean and include its successors) of the SECOND PART; AND (3) THE INDUSTRIAL CREDIT AND INVESTMENT CORPORATION OF INDIA LIMITED, a Company incorporated under the Indian Companies Act, 1913 having its Registered Office at 163, Backbay Reclamation, Bombay-400 020-25, hereinafter referred to as "ICICI" (which expression shall, unless it be repugnant to the subject or context or meaning thereof, mean and include its successors and assigns and the Trustees for the time being) as the party of the THIRD PART.

**WHEREAS**

(1) SSNNL has been set up by the GOG as a Company whose entire share capital is owned by GOG for the implementation of the Sardar Sarovar Project (hereinafter referred to as "the Narmada Project") which is a multi-purpose joint project of four States viz. Gujarat, Madhya Pradesh, Maharashtra and Rajasthan, inter alia, involving the construction of 1210 metre long concrete gravity dam in Gujarat. The completed dam would rise 146.50 Mtr. Net above the river bed and 157.5 metres above the deepest excavation point.

(2) The Narmada Project would on completion create a reservoir of 5800 million cubic metres extending to more than 214 kilometers upstream, covering 370 square kilometers and also envisages the construction of a concrete canal, 460 kilometers in length going upto the Rajasthan border and also other distribution canals. Power generating facilities would be located on the river bed and on the reservoir outlet to the main canal. The River Bed Power House (RBPH) located underground on the right bank, downstream of the main dam, would be quipped with 6 reversible Francis Type Turbine Units, each with a capacity of 200 MW. The Canal Head Power House (CHPH) situated on the right bank, upstream of the main dam, is designed as a conventional surface station with 5 Kaplan type units of 50 MW capacity. The total generating capacity would be 1450 MW. Water supply and distribution facilities would include the construction of a 460 Km long main canal leading to the Gujarat-Rajasthan border. The canal would be concrete lined and have a capacity of 1133 cumecs (40,000 cusecs) at the head and about 71 cumecs (2,500 cusecs) at the tail end. The main canal would be supported by branch canals and minor distribution systems measuring about 75,000 Kms.

(3) It is estimated that the Narmada Project would encompass 18,00,000 hectares situate in 3339 villages of 62 Talukas of 12 Districts of the State of Gujarat and these would be irrigated on the completion of the Narmada Project. Further, over 75% of the common areas which have been classified as drought prone are expected to get the benefits of irrigation from the distribution system. The irrigation facility would extend to various States. Besides, as mentioned above, there would be additional power generation of 1450 MW from the aforesaid Power Houses. The Narmada Project would provide drinking water facilities to 8215 villages and 135 urban centres and would assist in the supply of potable water in a number of villages in North Gujarat and increases the agricultural production and domestic power generation in the order of Rs.2,175

Crores per annum.

(4) GOG through SSNNL has already invested a large sum running into several hundred Crores in the Narmada Project, under implementation. The Narmada Project is presently partially complete and requires considerable Additional Funding for the purposes of satisfactory and timely implementation of the Narmada Project. GOG is vitally concerned with the successful and timely implementation of the Narmada Project so that it does not suffer for want of adequate funding.

(5) Having invested considerable sums from out of budgetary allocations of GOG and also through assistance made available by multilateral agencies, SSNNL needs to bridge a part of the fund gap for the Narmada Project by raising resources through non-budgetary sources. Accordingly, SSNNL have proposed to raise resources through public subscription of various debt instruments.

(6) The Narmada Project implemented through a Company whose entire share capital is owned by GOG viz. SSNNL is being implemented as part of the development and commercial activities of GOG and as mentioned above with a view to make available various benefits of development, irrigation, power generation and other attendant benefits to the people of Gujarat and other neighboring states (viz., Madhya Pradesh, Rajasthan and Maharashtra) who are participating in the Narmada Project and would be sharing part of the cost thereof in accordance with the decision of the Narmada Water Dispute Tribunal.

(7) SSNNL upon obtaining all requisite corporate and regulatory approvals, proposes to issue bonds for subscription by investors with a view to partially bridge the net gap of Rs.2350 crores, from out of the non-budgetary sources. SSNNL proposes to issue-

(a) "Deep Discount Bonds" of the face value of Rs.1,11,000/- each issued at deepdiscounted price of Rs.3,600/- each having stipulated maturity period

And

(b) 18% Non Convertible (Non Cumulative) Bonds of the face value of Rs.5000/- each redeemable after the expiry of a specified period commencing from the date of allotment.

The Deep Discount Bonds referred to in sub para (a) above are hereinafter called "DD Bonds" and the 18% Non Convertible (Non-Cumulative) Bonds



referred to in sub para (b) above are hereinafter called "NC Bonds". The DD Bonds and NC Bonds are wherever the context so admits, collectively referred to as the "said Bonds". The aggregate issue proceeds of the said Bonds is Rs.300 Crores (Rupees three hundred Crores).

(8) The instrument in relation to the DD Bond shall be issued in such form as would be set forth in the security and other documentation. The brief particulars of the features of the instrument would be referred to in the Offer Document. It is expected that DD Bonds would be listed on several recognised Stock Exchanges and as such would be governed by the terms to be set out in the Offer Document.

(9) The interest on the NC Bonds would be subject to tax including withholding tax. The NC Bonds are liable to be redeemed after the expiry of a specified period commencing from the date of allotment, at a premium of 5% on the face value and shall be governed by the terms to be set out in the Offer Document. It is expected that the NC Bonds will be listed on several recognised Stock Exchanges in India.

(10) SSNNL has obtained requisite corporate authorisations and other approvals and proposes to file Offer Documents with the Securities and Exchange Board of India (SEBI) to seek their clearance.

(11) SSNNL, has, with a view to facilitate the recovery of interest on the NC Bonds and the principal amount of the said Bonds to be issued by the SSNNL, approached and requested ICICI to act as Trustees for the benefit of the holders of the Bonds who would be allotted or would hold said Bonds issued by SSNNL, and to act as Trustees in respect of the Security. ICICI has agreed to act as such Trustees.

(12) In order to provide adequate comfort to the investors proposing to subscribe to the said Bonds, about the ability of SSNNL to service the said Bonds, SSNNL has requested GOG to agree that, upon a request being made in the prescribed form and/or, in accordance with this Agreement, for providing Additional Funding in such manner as may be required by SSNNL, inter alia, for the purposes of servicing payments of principal interest, premium and all other charges and expenses in relation to the said Bonds, GOG would make available such funds to SSNNL in the manner and on the basis provided herein. In this connection, it is necessary that various provisions be made, setting out the circumstances under which such amounts of Additional Funding (in whatever form) may be called up by SSNNL from GOG, and, applied towards servicing of principal, interest, premium and other charges and expenses in



relation to the said Bonds, and the Security to be created pursuant to the provisions hereof, and to enable the Trustees to take all steps as may be necessary for the protection of the interest of the Bondholders, as provided herein.

(13) The parties being desirous of recording the terms and conditions of such arrangements have entered into this Tripartite Agreement as hereinafter appearing.

**NOW THEREFORE IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES AS FOLLOWS:-**

1. Definitions: Marginal notes or sub-headings are inserted for convenience only and shall not affect the construction hereof and in these presents and Schedules hereto, unless there is something in the subject or context inconsistent therewith. The following expressions shall have the meaning hereinafter mentioned, that is to say:-
  - (a) "Bonds" or the "said Bonds" shall mean collectively the Deep Discount Bonds (DD Bonds) and the 18% Non-Convertible (non-Cumulative) Bonds (NC Bonds) of the aggregate value (issue proceeds) of Rs.300 Crores proposed to be issued pursuant to a decision of the Board of Directors of SSNNL dated 18-1-1993 and in terms of the Offer Documents.
  - (b) "DD Bonds" shall mean the Deep Discount Bonds (Series 'A') of the face value of Rs. 1,11,000/- each proposed to be issued in terms of Board Resolution dated 18.1.1993 by SSNL, and in terms of the offer Documents.
  - (c) "Designated Account" or "Designated Accounts" shall mean such bank account or accounts specified as designated accounts under clause 3(b) hereof.
  - (d) "NC Bonds" means the 18% Non-Convertible (non-cumulative) Series I Bonds of the face value of Rs. 5,000/- each issued in terms of Board Resolution dated 18.1.1993, and in terms of the offer Documents.
  - (e) 'Notice' (whether or not used in its capitalised form, but subject to the context) shall mean the Request or notice in writing in the form prescribed herein issued by SSNL or the Trustees requiring Additional Funding from GOG.
  - (f) "Additional Funding" shall mean any one or more or any combination of various types of funding agreed to be provided by GOG to SSNNL, under the provisions of Clause 3 hereof, and where the context so requires, shall include the disbursements made by GOG under the

provisions of Clause 3(d) hereof.

- (g) "Bondholder(s)" shall mean the holder/s of a Bond/s for the time being.
- (h) "Event of Eligibility to call" shall mean of the events referred to in clause 4 hereof, upon the occurrence of which, SSNNL (or as specified herein the Trustees on behalf of SSNNL) shall become entitled to call upon GOG to provide Additional Funding in the manner and on the terms prescribed, in clause 3 hereof and the applicable Schedule.
- (i) "GOG" mean the Government of Gujarat.
- (j) "Immovable Property" shall mean that piece and parcel of immovable property referred to in Clause 7(a) hereof which is intended to be secured/charged in favour of the Trustees as stated therein.
- (k) "ICICI" shall mean The Industrial Credit and Investment Corporation of India Limited having its registered office at 163 Backbay Reclamation, Bombay 400 020.
- (l) "Outstanding" from time to time shall mean in the aggregate, outstanding towards principal, interest premium and other charges and expenses whatsoever in relation to the said Bonds and/or the Security, as being due and payable to the Bondholder/s and/or the Trustees under the provisions of this Agreement or other agreement(s) or offer Document/s or arrangement entered into pursuance hereof;
- (m) "Offer Documents" shall mean the prospectus and other documents regarded as offer documents in respect of the issue of said Bonds for inviting subscriptions to the said Bonds from the public.
- (n) "Partly Paid Shares" shall mean the partly paid

shares of SSNL to be issued shortly and identified by the Board of Directors of SSNNL and/or by the Trustees as the party paid up shares for the purpose of his Agreement.

- (o) "Preview Date" shall mean in relation to each Service Date, a date being 45 calendar days prior to the service date, both days not being included. In case the "Preview Date" falls on a holiday, the prior working day shall be the "Preview Date".
- (p) "Request" (whether or not used in its capitalised form but subject to the context) shall mean the Notice in the form prescribed herein for Additional Funding.
- (q) "Schedule" shall mean any Schedule attached to this agreement containing the principal terms and conditions relating to the modalities of Additional Funding.
- (r) "Security" shall mean the mortgage, charge or lien or other security interest created/to be created by SSNNL in favour of the Trustees acting as trustees for the Bondholders in accordance with Clause 7(a) hereof.
- (s) "Service Date", "Service Dates" shall mean any or all dates during the term of the said Bonds on which any payment of principal, interest, premium, redemption amount(s) or any other sum whatsoever falls due for payment by SSNNL to the Bondholders.
- (t) "SSNNL" shall mean Sardar Sarovar Narmada Nigam Limited, a company having its registered office at Block No.12, 1<sup>st</sup> Floor, New Sachivalaya Complex, Gandhinagar, Gujarat.
- (u) "Trustees" shall mean the trustees for the Bondholders and shall in the first instance mean

ICICI and in the event of any change or substitution of Trustees shall mean such substituted Trustees.

**CONSIDERATION**

2. In the circumstances recited above, SSNNL has requested GOG to enter into this Agreement with a view to provide for various matters and contractual obligations of GOG to make available and to provide Additional Funding to SSNNL as may be required for the purposes of facilitating and enabling, if necessary, SSNNL to make payments of and to service the payment and repayment of principal, interest, premium and other charges and expenses in relation to the said Bonds. GOG in its capacity as the sole shareholder of SSNNL, and, being the principal sponsoring party in relation to the Narmada Project, under implementation by SSNNL, has agreed to enter into and execute this Agreement and has permitted SSNNL under the Offer Documents proposed to be issued by SSNNL to make certain representations therein in relation to the provisions of this Agreement.

**PREVIEW PROCESS AND EVENT OF ELIGIBILITY TO CALL**

3 (a) SSNNL has agreed to make payment to the Bondholders of all amounts of principal, interest, premium and all other charges and expenses as provided herein and as would be prescribed in the Offer Documents. SSNNL hereby agrees and declares that it shall duly discharge such obligations for the payment/repayment of the above sums and/or the Outstandings, in relation to the said Bonds from out of its own funds and assets.

(b) SSNNL shall in consultation with the Trustees and not later than 30 days from the date of allotment of the said Bonds, set up a "No Lien Account"

with a Bank approved by the Trustees, and to be called the "Designated Account". The operations of the said Designated Account and all withdrawals from the said Designated Account shall be made only in consultation with the Trustees, and shall, exclusively be utilised for the purpose of servicing the said Bonds and/or the payments of the Outstandings in relation thereto. SSNNL may in consultation with the Trustees open more than one Designated Account as may be required, all of which shall be known as "the Designated Account (s)".

(c) On each Preview Date, SSNNL and the Trustees, shall, in relation to the funds available for payments to be made on the relevant Service Date, determine whether SSNNL is in a position to fully pay and discharge its payment obligations on the relevant Service Date. In the event, that on the Preview Date there are inadequate funds in the Designated Account (s) available for payment on the relevant Service Date, or if the Trustees are otherwise satisfied, having regard to the circumstances pertaining to SSNNL that it would be in a position to fully pay and/or discharge obligations on the relevant Service Date, the Trustees and/or SSNNL shall forthwith be entitled to declare that an Event of Eligibility to Call has occurred, and shall forthwith be entitled to communicate the same to the appropriate official of GOG, being the "Additional Chief Secretary (FD) Government of Gujarat" or failing him or in case of redesignation, to the Chief Secretary, Government of Gujarat.

(d) (i) Upon the communication of the Event of Eligibility to Call as aforesaid to GOG by the Trustees and/or SSNNL in the form of a Notice referred to aforesaid, intimating the extent of the Additional Funding required, GOG agrees to promptly make disbursement into the Designated Account/s of requisite funds, to the extent so required by SSNNL and/or the



Trustees. GOG further agrees that it shall communicate its decision in relation to the mode and combination of the Additional Funding required, in respect whereof GOG shall have the sole discretion to decide. GOG agrees that it shall unconditionally make disbursement of the amount requested by the Trustees and/or SSNNL under the aforesaid Notice/intimation of the Event of Eligibility to call and that the pendency of the final decision in relation to mode and combination of Additional Funding shall not be a ground of withhold or delay disbursement.

(ii) GOG agrees that the disbursements so made by GOG under the aforesaid clause (I) or the Additional Funding provided by GOG shall be subordinated in all respects to the obligations of SSNNL to the Bondholders. Accordingly GOG agrees not to recall such disbursements which have been made to SSNNL or the Additional Funding which shall continue as such until all the obligations of SSNNL to the Bond holders in accordance with the terms of issue have been fully complied with/satisfied.

(iii) GOG agrees to make the disbursement under clause (I) or the Additional Funding, by credit to the said Designated Account(s) atleast 7 (seven) days prior to the Service Date.

(iv) It is also agreed that GOG shall in relation to the extent of the Additional Funding requested by the Trustees and/or SSNNL be entitled to seek any clarification in respect of the mode of computation or any other details in that behalf but, the pendency of such request or clarification shall not be a basis for withholding any disbursement prior to the Service Date or in any manner delay or postpone the provision of such Additional Funding. It is further agreed that any pending dispute or clarification

regarding one or more Service Dates, shall not be a ground for withholding any further disbursements and it is an essential term of this Agreement that GOG unconditionally agrees to make available the requisite amount of Additional Funding/Disbursement in respect of each Service Date to the extent requested for by the Trustees and/or SSNNL from time to time in accordance with the provisions of this Agreement.

(v) The Notice referred to in sub-clause (d) above shall be generally in accordance with the provisions of Annexure - I attached hereto and, shall be considered as having been properly communicated to the GOG if the notice or request is delivered to the Additional Chief Secretary, F.D., GOG, Gujarat or failing him or in case of redesignation, to the Chief Secretary, Government of Gujarat.

(vi) It is expressly clarified that neither SSNNL nor the Trustees shall be required or obliged in any manner to inquire into or ascertain whether any internal procedures, resolutions or consents are required to be obtained or complied with by GOG nor to the pendency of such procedure to be an excuse or ground for non-payment of the Additional Funding or any delay in making available the same to SSNNL and/or Trustees as requested therein. They shall presume all such compliance. SSNNL and/or the Trustees shall, upon valid delivery of the Notice or Request as above be entitled to assume and GOG warrants that such Notice has been validly delivered and that all internal compliances, approvals and procedures have been complied with an, in any event there is no material requirement outstanding for compliance in that behalf.

(e) The Notice issued by the Trustees upon GOG shall be binding on GOG and the same shall to the extent applicable also be subject to the provisions of

the Security and such other arrangements in favour of the Trustees under the provisions of clause 6 hereof. Upon the issuance of such notice for Additional Funding by the Trustees, all further modalities in relation to the obtaining of the Additional Funding from GOG, the entering into of proper arrangements of loan and security, or, as may otherwise be required by the provisions of this Agreement, including if necessary, any arrangements or documents to be entered into and/or executed in favour of the Trustees, shall be entered into and executed by the Trustees, as the constituted attorneys for SSNNL who are hereby irrevocably and unconditionally authorised to do so. GOG agrees to comply with all such actions of the Trustees and shall duly punctually perform their obligations in that behalf.

(f) SSNNL and GOG also agree to indemnify and keep indemnified the Trustees from and against any loss or damage caused to any party as a result of the Trustees exercising all such powers and authorities referred to above or otherwise for any reason whatsoever.

(g) (i) On or before each Preview Date, SSNNL shall on the assumption that an Even of Eligibility to Call may occur on that date, pass all corporate resolutions including Board Resolutions and, shall comply with all necessary formalities and issue all necessary authorisations as may be required by the Trustees in that behalf to enable SSNNL by itself and/or the Trustees to issue a notice seeking Additional Funding and all such corporate resolutions and procedures shall be complied with to the end and intent that in the event of a Eligibility to Call occurring by then, SSNNL and/or the Trustees can forthwith proceed to issue the Notice upon GOG seeking Additional Funding without any delay, or having to

comply with any fresh formalities or modalities in order to seek Additional Funding from Government of Gujarat prior to the Service Date. All such corporate resolutions, formalities and compliances shall be carried out and implemented to the satisfaction of the Trustees, on or before the Preview Date and any requirement in that behalf indicated by the Trustees shall be final and binding upon SSNNL and GOG.

(ii) Without prejudice to (i) above, SSNNL shall also pass all such corporate resolutions and comply with all procedures and formalities as may be required by the Trustees, under the provisions of Articles of Association of SSNNL to enable the forfeiture of any shares on which calls have not been paid up by GOG or, if necessary for the enforcement of any security which may be held by the Trustees in that behalf or, for submitting to the order or direction of any Court or other appropriate authority to the extent that the exercise of any remedies by the Trustees against SSNNL and/or GOG shall be expeditiously undertaken, if necessary by the Trustees under such authority.

4. In the event of the Additional Funding being in the form of subscription to equity or payment of calls on the Partly Paid Shares, then, it is agreed by GOG, that SSNNL and the Trustees on behalf of SSNNL, subject to the provisions of law and of the Articles of Association of SSNNL, are entitled to make one or more calls of such amount or amounts as they think fit, in respect of Partly Paid Shares, with the condition that shares having the same amount paid up thereon being considered as shares of the same class. The Trustees as agents and attorneys of GOG are also irrevocably authorised on behalf of GOG to agree with SSNNL to credit the amount of Additional Funding or such

part thereof as may be decided as being appropriate to a portion of or to a limited number of Partly Paid Shares of the same class with a view to make them fully paid, whilst on the other hand retaining them as Partly Paid Shares of the same class or to reduce the outstanding unpaid amount on such other Partly Paid Shares by crediting a portion of the Additional Funding to such other Partly Paid Shares, all to the end and intent that SSNNL and/or the Trustees shall have the discretion and authority to credit or direct the credit of the amount of the Additional Funding to the partly paid shares of the same class in a disproportionate manner, if that is found appropriate at that stage having regard to all circumstances prevalent at that time. The Articles of Association of SSNNL shall as soon as possible be amended in a form and manner satisfactory to the Trustees, in order to facilitate and enable the performance of the obligations under this Agreement, and/or any other arrangements and documents entered into pursuant to the provision hereof.

#### REMEDIES

5. The Additional Funding to be provided by GOG in terms of its obligations as aforesaid, shall be made available to SSNNL or as the circumstances may require, to the Trustees acting as agents for SSNNL, subject to the provisions of the Security more particularly set out in Clause 7 hereof. In the event of GOG failing to provide such Additional Funding, then in addition to any remedies which the Trustees may be entitled to pursue against SSNNL, they shall additionally also be entitled to the specific performance of all such obligations in an appropriate court of law



and in relation thereto require and to also claim such damages as they may be entitled to in that behalf under law. The Trustees and/or Bondholders shall give credit to SSNNL in respect of such amounts as may be recovered by the Trustees and/or Bond holders in pursuance of the above. The Trustees may without prejudice to all its other rights, including the rights to sue GOG for payment of the Additional Funding, also forfeit the Partly Paid shares where GOG does not pay the called up amount and to exercise the power of reissue thereof in favour of any party of its choice.

**APPROPRIATION**

- (i) The amounts of Additional Funding received pursuant to payment or credits made by GOG in the Designated Account shall be applied for discharge of the obligations in relation to the relevant Service Date. The payment shall be applied in the first instance to payment of all costs, charges and expenses if any of recovery or realisation by the Trustees, in the second instance to all payments of interest and other charges of a revenue nature falling due on the relevant Service Date and in the third instance to the payment of all amounts of a principal or capital nature falling due on the relevant Service Date.

**SECURITY AND ADDITIONAL DOCUMENTATION**

- (ii) SSNNL agrees that the said Bonds and Outstandings relating thereto shall be secured by SSNNL in such form and manner as may be agreed by and between themselves and the Trustees. The form and manner of security may interalia include:

- (a) a mortgage on the said immovable property

being a bungalow situate on a sub-plot No.8 admeasuring 2503.002 square meters on plot NO.280, Town Planning Scheme No.14, Near Narmada Colony, Dafnala, Shahibaug, Ahmedabad in the State of Gujarat.

- (b) a first charge on the Additional Funding and in respect of the rights of and benefits accruing to SSNNL under the provisions of this Agreement.
- (iii) SSNNL and GOG agree that they shall also enter into and execute such further documentation and arrangement as may be required in relation to the Security and for making provision for various covenants of positive and negative nature and to issue such further confirmation as may be deemed necessary by the Trustees for the better protection of the interests of the Bondholders and for the due performance of the obligations by SSNNL and/or GOG under this Agreement.
- (iv) SSNNL shall duly observe and perform all the terms, conditions, covenants and stipulations in respect of the said Bonds as may be applicable and shall not commit any breach or default thereof.
- (v) SSNNL shall issue to each Bondholder a Bond Certificate in the form and the salient features whereof are described in the Offer Documents indicated in the Trust Deed in respect of the Bonds allotted to him after obtaining the requisite Certificate of Registration of Charge from the Registrar of Companies, Gujarat, in respect of the mortgage and charge under the Debenture Trust Deed to be executed between SSNNL

and the Trustees ("the Trust Deed").

(vi) It is hereby further agreed by and between the parties hereto as follows:-

(a) that the Trustees shall have all powers, authorities and discretions as are provided for in the Trust Deed and/or the additional documentation referred to in Clause 8 hereof and under this Agreement

(b) that SSNNL shall pay all such stamp duties (including any additional stamp duty) other duties, cesses, taxes, charges and penalties which SSNNL may be required to pay according to the laws for the time being in force in the State in which its properties are situated and in the event of SSNNL failing to pay such stamp duties, other duties, cesses, taxes and penalties as aforesaid, which failure in the opinion of the Trustees is likely to prejudice the interest of the Bondholders, the Trustees will be at liberty (but shall not be bound) to pay the same or arrange for payment of the same for the purpose of protection and preservation of the Security or for enforcement of the Security by the Trustees and SSNNL shall repay the same to the Trustees on demand without demur with interest thereon at the rate of 21% per annum

(c) The Trustees may, from time to time or at any time waive on such terms and conditions as to them shall seem expedient, and without reference to the Bondholders any breach by SSNNL or GOG of any of the covenants and provisions in these presents contained but without prejudice to the rights of the

Trustees in respect of any subsequent breach thereof.

(vii) Upon proof being given to the reasonable satisfaction of the Trustees that all the said Bonds for the time being issued have been paid off or satisfied and upon payment of all costs, charges and expenses incurred by the Trustees (including the remuneration of the Trustees and all interest therein) the Trustees shall, at the request and cost of SSNNL release or reassign to SSNNL or as SSNNL may direct, the Security or such part thereof as may therein subject to such security to be created by SSNNL in favour of the Trustees thereon.

(viii) The provisions of this Agreement and the obligations contained thereunder shall be binding upon GOG notwithstanding that SSNNL at any stage ceases to be a wholly owned subsidiary of GOG or, notwithstanding, any reorganisation, amalgamation, or winding up of SSNNL or any other event of similar nature.

(ix) This Agreement shall be effective on and from the date first hereinabove written and shall be in force till all the monies in respect of the Bonds have been fully paid and discharged.

IN WITNESS WHEREOF the Company has caused its Common Seal to be affixed to this Agreement has caused this Agreement to be executed in triplicate and the other parties hereto have caused to be executed the same by their respective officials/Constituted Attorneys on the day, month and year first above written as hereinafter appearing."

## **Related facts and events**

**3.7** Further the terms of the Prospectus inter alia provided that any change in the conditions of the Issue would require a consent in writing of the Bondholders comprises not less than three-fourth of the outstanding amount of the Bonds or by a Special Resolution passed at a meeting of such Bondholders.

**3.7.1** It is pertinent that in the year 2004, a premature redemption of the Deep Discount Bonds was attempted. The SSNNL had issued a notice dated 27<sup>th</sup> April, 2004 convening a meeting of the Bondholders for the purpose of early redemption of the Bonds. In the said meeting a special Resolution was to be considered. The special Resolution then proposed, reproduced in its relevant part read as under,

"RESOLVED THAT pursuant to the provisions of the Prospectus dated 29<sup>th</sup> September, 1996 for issue of Secured Redeemable Non Tax Exempt Deep Discount Bonds in the nature of Promissory Notes (Deep Discount Bonds) and subject to such approval of Authority(ies), if any, as may be necessary consent of Deep Discount Bondholders be and is hereby accorded for modification/variation of rights, privileges, terms and conditions attached to the Deep discount Bonds, to provide that the Company shall have the right/authority for early redemption of Deep Discount Bonds at the end of the 11<sup>th</sup> year from the date of allotment with the same Deemed Face Value for the 11<sup>th</sup> year as fixed in the Prospectus for withdrawal of Deep Discount Bonds by Deep Discount Bond Holders and on exercising the right/authority for early redemption at the end of the 11<sup>th</sup> year, the Company will intimate by giving two months notice, to all the registered holders of Deep Discount Bonds, prior to the date of the early redemption and from the date of the early redemption the Deep Discount Bonds shall stand fully discharged and the Company shall not be liable to pay any interest, damage, compensation, cost, charges on such Deep Discount Bonds even if the Deep Discount Bond certificate is not surrendered for receipt of redemption amount."

**3.7.2** It appears that since certain



representations were made to Security Exchange Board of India about non-fixing of the Book Closure Date, upon intimation by the SEBI, the Debenture Trustees had withdrawn the notice. At that time things had rested there.

**3.7.3** It was thereafter that in the year 2008 the State Legislature enacted the impugned law, thereby premature redemption was permitted by modifying the terms of financial covenants and conditions in the Bond Certificate with retrospective effect by way of statutory provision. A Call option was given to the Company-SSNNL. A notice dated 03<sup>rd</sup> November, 2008 was issued to the Bond-holders mentioning therein inter alia that if the Deep Discount Bonds were not surrendered for redemption, interest would not be paid beyond 10<sup>th</sup> January, 2009.

### **Text of Impugned Legislation**

**3.8** Before proceeding further, the entire text of impugned legislation being Gujarat Act No.12 of 2008 as published in the Government of Gujarat Gazette extraordinary, dated 29<sup>th</sup> March, 2008 which is divided into three Sections, is reproduced hereunder.

#### **"GUJARAT ACT. 12 OF 2008**

To confer power on the Sardar Sarovar Narmada Nigam Limited to redeem in the public interest, the Deep Discount Bonds issued by it.

It is hereby enacted in the Fifty-ninth Year of the Republic of India, as follows:-

10. This Act may be called the Sardar Sarovar Narmada Nigam Limited (Conferment of Power to Redeem Bonds) Act, 2008.

(1) Notwithstanding anything contained in the terms of prospectus dated the 29<sup>th</sup> September, 1993 issued by the Sardar Sarovar Narmada Nigam Limited being a Government Company within the meaning of section 617 of the Companies Act, 1956 (hereinafter referred to as "the Company") in respect of the Bonds or in the Trust Deed dated the 31<sup>st</sup> December, 1994 between the Company and the trustees, or in any other document relating to Deep Discount Bonds or in condition No.7 appearing under the heading "financial covenants" and conditions" specified on the reverse side of the Bonds (hereinafter referred to as "the said financial covenants and conditions") the legislative Assembly of Gujarat hereby amends, in the public interest, the said financial covenants and conditions as follows namely:-

In the said financial covenants and conditions after condition No.3 relating to redemption, the following condition shall be inserted and shall be deemed always to have been inserted with effect on and from the date of the allotment of the Bonds, namely,

"3A. (a) Notwithstanding anything contained in condition No.3 relating to redemption and in the terms of withdrawal appearing under condition No.9, each Bond having the face value of Rs.1,11,000 issued at Rs.3,600 shall be redeemed earlier on such date and with such deemed face value as the company may determine by payment of the amount so determined:

Provided that the deemed face value shall be so determined as not to be less than such amount as may be arrived at by raising the deemed face value of Rs.25,000 as on 11<sup>th</sup> January, 2005 at the rate of 18.92 per cent, for the period beginning from the said date of 11<sup>th</sup> January, 2005 till the date of redemption so determined.

(b) The Company shall publish the date and the deemed face value determined under clause (a) in the newspaper in English and Gujarat language in the area having wide circulation."

(2) The new condition 3A inserted in the said financial covenants and conditions by sub-section (1) shall be deemed to have been incorporated in and to have formed part of each of such Bonds with effect on and from the date of its allotment i.e. the 11<sup>th</sup> January, 1994 (irrespective of whether the Bond is in possession of a Bond holder or not.)

3. No civil court shall have jurisdiction to entertain any question arising out of any provision of this Act and of the Deep Discount Bonds (as amended by this Act) issued by the Company and no injunction shall

be granted by any civil court in respect of any action taken or to be taken in pursuance of any financial covenant or condition of the Bonds."

**3.8.1** The Statement of Objects and Reasons for the above legislation reads as under,

"The Sardar Sarovar Narmada Nigam Limited has issued Deep Discount Bonds in the year 1993 having a face value of Rs.1,11,000 at a discounted price of Rs.3,600 each with a maturity period of 20 years from the date of allotment i.e. 11<sup>th</sup> January, 1994 thereby collecting Rs.257.09 crores for financing the Sardar Sarovar Project. The Bond at the end of 7<sup>th</sup>, 11<sup>th</sup>, 15<sup>th</sup> and 20<sup>th</sup> year from the date of allotment with a deemed face value of Rs.12,500/- Rs, 25,000/-, Rs.50,000/- and Rs.1,11,000/- respectively.

The financial covenants and conditions of the Bonds do not given option to the Nigam to redeem the Bonds comes to about nineteen per cent considering the present trend of declining rates of interest which has stabilized at 10.75 per cent and the enormous liability of the Nigam to make payment of Rs.7,445.26 crores at the end of 20<sup>th</sup> year when the Bonds mature, it is considered necessary, in the public interest, to provide in the financial covenants and conditions of the Bonds, an option to the Nigam to redeem the Bonds prematurely on a date to be determined by the Nigam so as to save about Rs.4,616/- crores. It is, therefore, considered necessary to amend the financial covenants and conditions of the Deep Discount Bonds so as to enable the Nigam to redeem the Bonds on a date determined by it."

#### **Broad Facts of Contentions**

**4.** The main contentions of the petitioners against the validity of the legislation are inter alia

that (i) there is no entry either in the State List being List II or the Concurrent List being List III in the Seventh Schedule to the Constitution, under which the impugned law could have been enacted; (ii) even if the court is to hold that the subject matter of the legislation falls within any of the entries available either in List II or List III, to the State Legislature, the doctrine of repugnancy would operate; (iii) the impugned legislation amounts to an encroachment on the legislative field of parliament; (iv) impugned law stand in conflict with the central laws namely Securities Contract (Regulations) Act, 1956, the Securities and Exchange Board Act, Indian Companies Act, 1956 and Negotiable Instruments Act, 1882; and (v) the field in which the impugned legislation operate was already occupied by the central legislations.

**4.1** As against the above, the defence of the side of the respondents has been that the impugned legislation falls under Entry 43 in List II under the title "Public Debt of the State" and further falls under Entry 20 in relation to "Economic and Social Planning" in List III. According to them, the subject matter of the legislation in question falls in pith and substance under the said two entries and therefore, state legislature could validity enact the law which is referable to said entries. According to the submission, the impugned law does not encroach upon the legislative field kept for the Parliament and cannot be said to be in conflict with any of the central statutes which occupy the different fields.

**4.1.1** While the above are the broad stand and the grounds raised by the parties, their submissions and contentions covering the different issues and aspects on the basic proposition, are referred to in detail hereinbelow.

**Submissions on behalf of the petitioners**

**4.2** Learned Senior Counsel Mr. Deven Parikh with learned advocate Mr. Kunal Nanavati for the petitioners inter alia canvassed the following main submissions,

(i) The State did not have source of power to enact the legislation in question. No Entry either in List II or List III would confer the legislative competence for passing the impugned law.

(ii) The Entry 43 in List II of Public Debt of State does not apply. The 'Public Debt' is a special connotation and meaning. It has specific context to the Consolidated Fund. It has restrictive meaning.

(iii) Every debt of State is not public debt. The impugned statute does not relate to 'Public Debt of State'. There is a distinction between the public debt and other debt in the context of Entry 43.

(iv) Article 292 and 293 deal with the borrowing power of the State. They are to be read with Rule 2(a) and Rule 7 of Gujarat Fiscal Rules, 2006.



They cannot be the basis to bring impugned legislation within the legislative entry 'Public Debt of the State'.

(v) An Entry in the List in Schedule VII cannot be read in such a wide manner as sought to be read with reference to the impugned law.

(vi) The impugned Act is repugnant and a clear encroachment in the legislative field earmarked for the Parliament only.

(vii) On the scope and applicability of Article 246 and 254 of the Constitution, as well as to highlight the concept of repugnancy of State law vis-a-vis Central law, and the circumstances in which the repugnancy may arise, following decisions were pressed into service.

- (1) **State of Madras Vs M/s.Gannon Dunkerley and Co. (Madras) Ltd. [AIR 1958 SC 560],**
- (2) **Sahara India Real Estate Corporation Limited Vs Securities and Exchange Board of India [(2013) 1 SCC 1]**
- (3) **State of Orrisa Vs M/s.Tulloch and Co. [AIR 1964 SC 1284, para 15]**
- (4) **Deep Chand Vs State of U.P. (AIR 1959 SC 648(1), para 29]**
- (5) **Ch. Tika Ramji Vs State of U.P. [AIR 1956 SC 676, para 31]**

(6) **Engineering Kungar Union Vs Electro Steels Casting Ltd. [(2004) 6 SCC 36, para 17],**

(7) **Govt. of A.P. Vs J. B. Educational Society [(2005) 3 SCC 212, para 8 to 12, 15 and 16]**

(viii) The repugnancy may arise even otherwise than in respect of Entry in List III-the Concurrent List. Decision in **State of Kerala Vs Mar Appran Kuri Company Limited [(2012) 7 SCC 106, para 39, 40 and 47]** was relied on.

(ix) The Indian Companies Act, 1956, the Securities Contract (Regulation) Act, 1956 and the Security and Exchange Board of India Act, 1992 are the central laws which cover the entire field and are complete code in themselves. The Issue of Deep Discount Bonds and the attendant rights and liabilities are governed under the aforesaid Central laws.

(x) The impugned law in its nature, effect and by virtue of the provisions enacted comes into direct conflict with the above Central laws.

(xi) The impugned law is colourable legislation. Decision in **K.C. Gajapati Narayan Deo Vs State of Orissa [AIR 1953 SC 375] [para 9]** was relied on in this regard.

**4.2.1** For assailing the impugned legislation on the ground of unreasonablity, the learned senior counsel made following further submissions-(a) No

unforeseen circumstance came into existence subsequent to the contract; redemption in the interest rate was foreseeable; the amount payable eventually was crystallized before-hand at the time of contract; (b) Redemption was not to be made out of the earnings of the company, but there was a security provided and there was a tripartite agreement. (c) There was no question of security to the extent of 1.25 times having been got reduced in value; (d) No demand was made in the tripartite agreement till the statute was enacted. (e) The rate of interest of 18.92% cannot be said to be unconscionable when Issue guaranteed it. (f) There was a application of mind in the context of modification of terms by  $\frac{3}{4}$  majority of Bond-holders; (g) The petitioners are in position of trust for their workers; (h) "A" Rating was obtained for the Bonds and they were offered as public security. (i) Subsequently, modification of terms was unreasonable and cannot be justified. (j) The ex-parte redemption under the impugned Act was a fraud on the powers.

#### **Further submissions**

**4.3** The other learned advocates for the different petitioners Mr.Maulin Raval, Mr.B.T. Rao Mr.Tushar Hemani, and Mr.Masoom Shah adopted the above submissions of learned senior counsel and made additional submissions summarized as under,

(i) An Entry in any of the Lists in the Seventh Schedule to the Constitution should be construed in its legal meaning and not as per its popular meaning. Giving broad meaning to the Entry does

not mean depriving it of its essence of the meaning. For this proposition, decision of the Supreme Court in **State of Madras Vs Gannon Dunkerley & Co. (Madras) Ltd [AIR 1958 SC 560, para 8, 12, 17, 60]** was relied on.

(ii) By giving wider meaning, the other Entry should not be rendered meaningless. The decisions in **Union of India Vs Shah Goverdhan L. Kabra Teachers' College, [AIR 2002 SC 3675]** was relied in support.

(iii) The word 'Public Debt of State' being the Entry 43 in List II cannot be divided into different words and for interpreting. It is to be construed as one single phrase.

(iv) The impugned Act is fraud on the legislative powers.

(v) Provisions of nine central statutes are violated because of the impugned law-(a) Section 126 to 141 of the Contract Act made redundant,

(b) Section 55 to 66, 68, 119, 637 and 641 of the Companies Act, 1956 are violated, (c) Provisions of the Income-Tax Act, (d) Provisions of the Negotiable Instrument Act, (e) Provisions of SEBI Act, (f) Provisions of Security Contract Act and (g) Provisions of Employees' Provident Fund Act.

(vi) The concept of federal supremacy would apply. This proposition was highlighted by

relying on paragraphs 62 to 67, 71, 76, 89, 98, 100 from the decision of the Supreme Court in **Offshore Holdings (P) Ltd. Vs Bangalore Development Authority [(2011) 3 SCC 139]**.

**4.3.1** On behalf of the Securities Exchange Board of India (SEBI), learned advocate Ms.Dharmishta Raval supported the case of the petitioners, submitting as under,

(a) The Issue of the Deep Discount Bond was governed by the regulatory provisions of SEBI Act. She relied on the Preamble and Section 11 of the Act.

(b) SEBI is a regulatory body. Once the issue is floated, the regulatory mechanism of SEBI as per the statutory provisions would come into play. Section 30 of the SEBI Act was referred to.

(c) Decision in **Sahara India Real Estate Corpn. Ltd. Vs SEBI [(2013) 1 SCC 1, para 66]** was relied on to contend that SEBI Act is self-contained Code.

**4.3.2** Before the Supreme Court, in Transfer Petitions, Security Exchange Board of India filed affidavit and raised various contentions against the validity of the legislation concerned. It was highlighted that SSNNL was a company incorporated under the Companies Act and was wholly owned by Government of Gujarat and was a government company within the meaning of Section 617 of the Companies



Act. Giving the details of the Issue of Bonds mentioned that as on 03<sup>rd</sup> November, 2008, 06,69,371 DDBs were outstanding and out of the said total 01,70,462 DDBs were held by 01,29,841 investors in the State of Gujarat and the remaining 04,98,909 Bonds were held by 02,79,335 investors outside the State of Gujarat.

**4.3.3** Learned advocates for the petitioners in addition to above submitted that when the Issue was floated throughout the country and the same was listed in different stock markets, the impugned legislation affected the rights of the Bond-holders who are outside the State and who purchased the Bonds outside the State; in other words, the impugned legislation has extra-territorial operation and such law could not have been enacted by the State. It was submitted that the legislative powers of the State could not extent beyond the territory and the rights of the Bond-holders outside the State could not have been adversely affected and they could not have been deprived of the benefits flowing from the Issue including earning the interest at the prescribed rate. Learned advocates assailed the constitutionality of the legislation on the aforesaid ground of it having an extra-territorial operation. The petitioners in the next submitted that the consequential relief prayed for of directing the SSNNL to pay the interest for the left out period and further to make good the financial loss suffered by the Bond-holders due to premature redemption should be allowed. This, it was submitted, was necessary more particularly when the Civil Suit

was also barred as per the provision in the impugned legislation.

**4.4** Learned advocate appearing for the respondent further submitted that the consequential prayers made by the petitioners may not be granted by this court. It was submitted that what was canvassed for grant of interest as per the condition of the Issue of the Bonds, for the left-out period, however the same cannot be granted inasmuch as the Bond holders may not have retained the Bonds with accrued interest till the date of impugned legislation; it is a matter of fact to be gone into and that whether the SSNNL continued to enjoy the principal amount. It was submitted that even if the amount at the time of premature redemption was accepted by a Bond holder, the facts remains that the principal amount with accrued interest came to be parted with by the SSNNL and the same was received and enjoyed by the recipient Bond holder. According to the submission of the respondent, it could not be said that the Bond holders were completely deprived of the interest which could be treated as damage or loss. It was further submitted that even if it is considered for the sake of argument, this would involve quantification of damage which required fact finding inquiry in respect of the benefits claimed to have been earned by the respective Bond holders after receipt of principal amount and interest upto the date of redemption. Even if the recipient Bond holders had earned out of the amount, at what rate the earning was made and to which use the amount was put to, and what nature of investment was

made are all the questions to be considered on the basis of evidence and factual inquiry. It was therefore submitted that this court may not award the damages even if the court were to hold the impugned legislation to be unconstitutional or void.

#### **Decisions relied on behalf of petitioners**

**4.5** Out of the various decisions relied on by learned counsel for the petitioners, few may be referred to with reference to the proposition canvassed.

(1) Decision in **Kishan Parkah Sharma Vs Union of India [(2001) 5 SCC 212, Para 18]** was relied on for canvassing the principle of excessive delegation and to contend that the impugned legislation suffers from the said vice.

(2) Decisions in **M.C. Mehta Vs Union of India [AIR 1987 SC 1086(1), para 29]**, **Shrikant Vs Vasantrao [(2006) 2 SCC 682, para 19 28 and 30]**, **Pradeep Kumar Biswas Vs Indian Institute of chemical Biology [(2002) 5 SCC 111, para 20]** and **Dr. S.L. Agarwal Vs the General Manager, Hindustan Steel Ltd. [AIR 1970 SC 1150, para 8, 9 and 10]** were relied on to submit that even though respondent No.2 may be a State for the purpose of Article 12 of the Constitution, it nevertheless cannot be equated with State Government.

(3) Decision in **Jogendra Lal Saha Vs State of Bihar [AIR 1991 SC 1148]** was pressed into service

for the purpose of the following proposition contained therein.

"7. The contract in question is in fact contrary to the scheme of this Act. It tries to take away the right of the contractor to be paid excess money earned on subsequent sale, though Section 83(3) of the Act authorises the contractor to claim the excess amount within the time stipulated. Some of the other terms under the contract also run counter to the provisions. When Parliament provides a special statute to cover a given situation, there is an obligation on the State while entering into contracts with citizens in regard to matters so covered, to follow the special procedure and obtain the protection which the law intends to confer in regard to such transactions instead of allowing its activities to run in a different direction."

(4) **Union of India Vs Shah Governdhan L. Kabra Teachers' College [(2002) 8 SCC 228]** was relied on to contend that the Entry cannot be interpreted by extending the meaning unreasonably. **Punjab Distilling Industries Ltd. Vs The Commissioner of Income-tax Punjab [AIR 1965 SC 1862, para 11]** as well as **Association of Natural Gas Vs Union of India [(2004) 4 SCC 489, para 42]** were relied on for similar proposition.

(5) **State of Tamil Nadu Vs K. Shyam Sunder [(2011) 8 SCC 737, para 51, 52 and 53]** as well as **Grand Kakatiya Sheraton Hotel and Towers Employees and Workers Union Vs Srinivasa Resorts Limited [(2009) 5 SCC 342, paras 78, 79 and 80]** were referred to for contending that there was element of unreasonability and arbitrariness in the impugned law.

(6) **Mannalal Khetan Vs Kedar Nath Khetan [(1977)**

2 **SCC 424**, para 19 to 22] was pressed into service to contend that where a contract express or implied, is expressly or by implication forbidden by statute, the Court will not lend its assistance.

(7) **M/s.Helos and Matheson Information Technology Limited C/o. Corporate Law Chambers India Vs Securities and Exchange Board of India [Securities Appellate Tribunal, Mumbai Appeal No.69 of 2011 decided on 16<sup>th</sup> November, 2011]** was relied on to submit that the Listing Agreement is statutory in nature.

(8) **Sundaram Finance Limited Vs State of Gujarat [Gujarat High Court judgment, Special Civil Application No.6223 of 2011 and Special Civil Application No.12009 of 2001]** was also pressed into service.

#### **Submissions of the State**

4.6 Learned Advocate General Mr.Kamal Trivedi defended the impugned legislation by making following submissions,

(i) The entries in the three Lists to the Seventh Schedule are required to be construed in a broad and liberal manner and the field indicated in any entry must be allowed to cover incidental and ancillary matters. The decision in **Welfare Assn., A.R.P. Vs Ranjit P. Gohil [(2003) 9 SCC 358, Para 28 to 30]** was pressed into service.



(ii) The impugned legislation clearly falls under Entry 43 List II namely "Public Debt of the State". This Entry read with Entry 20 List III namely "Economic and Social Planning" applies. The pith and substance of the legislation has to be seen.

(iii) The public debt is borrowing by the State and its instrumentality. Furthermore, the facts of the legislation had a link with budgetary source.

(iv) The impugned legislation properly derives its legislative field as per the entry above and the state is competent to enact the said statute. There is no conflict between the impugned legislation and any other law made by the Parliament.

(v) The doctrine of incidental encroachment was emphasized to submit and contend that there is no encroachment over the field of the Parliament by virtue of the impugned enactment.

(vi) Because of tripartite agreement dated 20<sup>th</sup> August, 1993 the State Government entered the shoe of SSNNL, the debt of SSNNL become State debt which was not segragable from the State liability, it became public debt of the State.

(ix) It was not compulsory for SSNNL to redeem the Bonds and the provisions in the

impugned enactment were in the nature of empowerment given to the Nigam.

(vii) Liability of guarantor and principal debtor is co-extensive. The State undertook the liability of SSNNL by virtue of tripartite agreement.

(viii) Decision in **Bank of Bihar Vs Damodar Prasad [AIR 1969 SC 297, para 3 and 5]**, decision in **Industrial Finance Corp. of India Ltd. Vs Cannanore Spg. and Wvg. Mills Ltd [(2002) 5 SCC 54, para 36]** were relied on to highlight the principle that creditor is not required to be exhaust the remedies against the principal debtor; secondly that the liability of the guarantor is strict liability and co-extensive with the principal debtor.

**4.6.1** By placing reliance on the tripartite agreement and the effect thereof, it was submitted by learned Advocate General that by virtue of the tripartite agreement, the debt of the SSNNL became the liability of the State Government which became guarantor under the agreement. Referring to provisions of Sections 128 and 140 of the Contract Act and the decision in the **Bank of Bihar Vs Dr.Damodar Prasad [AIR 1969 SC 297]** submitted that under Section 128 in the Indian Contract Act, save as provided in the contract, the liability of surety is co-extensive with that of principal debtor. The surety become liable to pay the entire amount and the liability was immediate not to be referred until the creditor exhausts the

remedy under the principal debtor. The similar proposition was canvassed by relying on **Industrial Financial Corporation of India Ltd. Vs Cannanore Spg. and Wvg. Mills Ltd. [(2002) 5 SCC 54]**.

**4.6.2** Learned Advocate General placed reliance on paragraph 3 to 5 and Paragraph 7 of the affidavit which inter alia stated about the Sardar Sarovar Project, its object, history and its development. It was averred that SSNNL was incorporated to implement the Project speedily; that SSNNL is a wholly owned company of Government of Gujarat and a special purpose vehicle was created to meet with economic and social requirements of the State. In the affidavit, objects of SSNNL were highlighted vis-a-vis the Sardar Sarovar Project. It was further stated that till the end of March, 2008 Government of Gujarat had released Rs.18,489.85 crores against Rs.02,166.39 crores released by the other beneficiary States. It was stated that the Government of Gujarat had been receiving assistance by way of loan from Government of India for accelerating the pace of the Project. Learned Advocate General by referring to the averments and narration of facts on this aspects, wanted to contend that the impugned law was in relation to social and economic planning in the context of multi-purpose Sardar Sarovar Project. He wanted to submit that that Government of Gujarat had borrowed money for the Project which was through respondent No.2-SSNNL and for the said borrowing, Government of Gujarat had issued guarantees in public interest. His attempt was to also indicate thereby that it was a public debt of

the State which was being discharged through means of the impugned law.

#### **Decisions relied on behalf the State Government**

**4.7** Following decisions were relied on by learned Advocate General in support of his above submissions,

(1) **G.N. Venkataswamy Vs Tamil Nadu Small Industries Development Corporation Ltd. [AIR 1981 Madras 318, paragraphs 1,2,10,16, 19, 26, 58].** Thereby interpretation of expression 'public debt' was highlighted that the expression "public debt" has a meaning of its own as reflected in the Public Debt Act, 1944. The expression connotes only borrowing by the Government from the public and does not take in any amount payable by the public Government much less to the Corporations in question. Entry 43, therefore, cannot be relied upon to support the competency of the State Legislature to enact S. 52-A.

(2) **Secretary to Govt. Public Works and Transport Department, Andhra Pradesh Vs Adoni Ginning Factory [AIR 1959 Andhra Pradesh 538, paragraph 13]** and it was submitted that existence of contracts made by government does not curtail legislative powers. In that case law was enacted for regulating prices by the state.

(3) **M/s. Raghubar Dayal Jai Parkash and 3. Vs The Union of India [AIR 1962 SC 263, paragraphs 1, 19 to 26]** for same above proposition.

(4) **Damadilal Vs Parashram**, [(1976) 4 SCC 855, paragraph 11] was pressed into service to contend that contractual obligation can be attached by the competent legislation.

(5) **The Bank of Bihar Ltd. Vs Dr.Damodar Prasad** [AIR 1969 SC 297, paragraphs 3,5], **Industrial Finance Corpn. of India Ltd. Vs Cannanore Spg. and Wvg. Mills Ltd.**, [(2002) 5 SCC 54, paragraph 36] and **Maharaj Umeg Singh Vs State of Bombay** [AIR 1955 SC 540, paragraphs 1, 8 , 12 to 14] were pressed into service for submitting on the rights and status of guarantor vis-a-vis principal debtor as well as effect of guarantee.

(6) **State of T.N. Vs G.N. Venkataswamy**, [(1994) 5 SCC 314, paragraphs 16 to 19] and **Mardia Chemicals Ltd. Vs Union of India**, [(2004) 4 SCC 311, paragraphs 2,5,33,66, 67] were pressed into service to submit as to how economic legislation should be interpreted and the principles which may be applied for considering the challenge to its constitutionality.

(7) **Jayantilal Ravishankar Bhatt Vs State of Gujarat** [1970 ILR 844 Guj., at page 850, 860 to 862] and **Animal Welfare Board of India Vs A. Nagaraja**, [(2014) 7 SCC 547, paragraphs 79, 88 to 90] were referred to on the principle of incidental encroachment and repugnancy.

(8) **Dayaram Vs Sudhir Batham** [(2012) 1 SCC 333,



paragraphs 23 to 29, 32, 35]

(9) **G.T.L. Infrastructure Ltd. Vs State of Gujarat** [2014 (1) GLR 725, paragraphs 28, 29], **State of A.P. Vs McDowell & Co.** [ (1996) 3 SCC 709, paragraph 27], **Welfare Assn., A.R.P. Vs Ranjit P. Gohil**, [(2003) 9 SCC 358, paragraphs 28 to 30], **Alka Ceramics Vs Gujarat State Financial Corporation** [1985 (1) GLR 57, paragraphs 1 to 4, 11, 12, 14, 17, 26, 30, 31] and **Orient Paper and Industries Ltd. Vs State of Orissa** [1991 Supp (1) SCC 81, paragraphs 1,2, 9 to 14 , 22, 23] were referred to on the aspect of legislative competency and the parameters for determining the same.

**4.7.2** A Division Bench decision of this court in **Jayantilal Ravishankar Bhatt Vs State of Gujarat** [1970 GLR 844] was relied on in which the constitutional validity of Gujarat Industrial Development Act was challenged on the ground that the subject matter falls under Entry 48 of List I in the Seventh Schedule of the Constitution,

"When a law is impugned on the ground that it is *ultra vires* the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation, its pith and substance. If on examination, it is found that the legislation is in substance on a topic within the competence of the legislature, it should be held to have valid in its entirety, even though incidentally it might trench on matters beyond its competence. The extent of the encroachment on matters beyond its competence may be an element in determining whether the legislation is colourable, that

is, whether in the guise of making a law on the matter within its competence, the legislature is, in truth, making a law on a subject beyond its competence. But where that is not the position, the fact of encroachment does not affect the vires of the law even as regards the area of encroachment."

**4.7.3** For buttressing the contention that the Entries in the three Lists should be construed widely and also to include ancillary and incidental matters, learned Assistant Government Pleader relied on decision in **Welfare Association** as well as Division Bench decisions of this court in **Alka Ceramic Jayantilal Ravi Shankar Bhatt, GTPL Infrastructure**.

**Submissions and Contentions on behalf of respondent No.2-SSNNL**

**4.8** Learned senior counsel Mr.Mihir Joshi appearing for respondent No.2-Nigam supported the impugned legislation by making following submissions,

(i) By referring various clauses in the prospectus it was submitted that there is an element of public debt and also a public interest dimension,

(ii) He highlighted following aspects and figures were highlighted

(a) 300 crores in aggregate out of which 256.90 crores was from Deep Discount Bond being the fund raised for the project.

(b) Rs.7445 crores was required to be repaid

at the end of redemption period. Bonds are issued in January, 1994 and the 20 years period was to expire in 2009.

(c) On the date of redemption, that is 10<sup>th</sup> August, 2009 the total liability of repayment would have been Rs.3346 crores and more. The amount of Rs.3042.85 crores was already paid.

(d) The petitioners are holding for Rs.245.31 crores which constitute only 7.3% of the total redemption amount.

(e) The State has allocated Rs.18,000 crores for the project and the cost books 20% escalation.

(f) The State wanted to save itself from spending about Rs.4,000 crores more and therefore passed the Statute taking up the liability of SSNNL which was its limb. It was in realm of social and economic planning, the counsel emphasized.

(g) Reliance was placed on decision of the Supreme Court and in particular paragraph 22 thereof in **Viklad Coal Merchant, Patiala, Vs Union of India [AIR 1984 SC 95]** in support of the submission that the impugned legislation could be enacted for the purpose of social and economic planning.

(iii) The consideration of the challenge has to be placed in the context of public debt of the State so arising and the legislation enacted by the State for this purpose which has public interest element and it is also in course of social and economic planning, for, the whole subject matter relates to Narmada Project.

(iv) In the project the entire interest burden is to be discharged by the State of Gujarat and the total debt is divided into three stages.

(v) There was no inviolable right for the investors. A withdrawal option was available.

(vi) The objects and reasons of the impugned Act are quite relevant, it was submitted by learned counsel and he highlighted the same.

(vii) Intention of the Legislature was not to legislate on the Bond but basically and for all purposes to reduce the public debt for managing and pursuing economic and social planning.

(ix) The budgetary allocation, the tripartite agreement, the nature of project, the assets generated, etc., are the strong aspects which link the entire exercise of passing the impugned legislation in relation to the debt of the State. Therefore the subject was public debt of the State and Entry 43 in List II read

with Entry 20 in List III would apply.

(x) In pith and substance, the concept of public debt was acted upon. It was submitted that referring to any other Entry in List I would be on the contrary a colourable exercise.

(xi) He submitted that the motive of the Legislature cannot be examined but the factual aspect must be examined for judging the legislative competency of the impugned Act.

(xii) On the reasonableness of the legislation, it was submitted that the petitioners did not have any fundamental right, nor constitutional right, nor statutory right available to urge as a ground to challenge the impugned Act.

(xiii) The rights are in the arena of contract. About the redemption permitted under the impugned legislation, it was submitted that right to redeem is a standard right and there is nothing illegal when the State has in exercise of its legislative powers for which it had the source of Entry in List II, by enacting a law provided for early redemption for valid consideration.

(xiv) Merely because the contractual rights are modified, it did not render the action unreasonable nor the Act was open to challenge on the ground of Article 14. There was no



manifest arbitrariness because of which it could be said that a statute is against the tenats of Article 14.

(xv) Retrospectivity by itself is not invalid.

(xvi) The claim of larger sum at the end of the Five Years was an event yet to occur.

(xvi) He relied on decision in **Dharam Dutt Vs Union on India [(2004)1 SCC 712]** about reasonableness in the context of Article 19 to judge the validity of the provision.

(xvii) From decision in **R.C. Tobacco (P) Ltd. Vs Union of India [(2005)7 SCC 725, para 21, 22 and 30]** were relied on the aspect of retrospectively.

(xviii) For contending that one man legislation can be a valid exercise of legislative powers, he relied on decision in **S.P. Mittal Vs Union of India [(1983)1 SCC 51, paragraphs 162 to 164]**.

**4.8.1** Learned senior counsel for SSNNL submitted on the aspect of legislative competence that the first step is to determined the field of legislation with reference to the Entry in the List concerned. It was submitted that once the field is validly traced from an Entry for the subject-matter of the enactment, the legislative competency would stand established. According to his submission the next question would be

to consider whether the field or subject in respect of which the State Legislature has enacted the law, is occupied by any law made by the Parliament. He submitted that after these two aspects are cleared, the Court has to further see whether the law made by the State Legislature has entrenched the law made by the Union Legislature. Here more pertinent question would be the extent of entrenchment or encroachment. It would be the moot question whether the encroachment is marginal or substantial. He submitted that the incidental encroachment of law by the State Legislature in the area of law made by the Parliament would not render the State law invalid once the legislative field was available to the State Legislature under an Entry for enacting its law. He submitted that merely because of law of the State Legislature is in apparent disharmony, it would not get automatically invalidated and further inquiry would be necessary whether it stands in real conflict with the Central legislation. There is indeed no dispute to the aforesaid principle stated by learned senior counsel. The question to be addressed while considering the constitutionality of legislation enacted by the State Legislature when pitted against the law made by the Central Legislature, would be whether both the laws having regard to the legislative Entry to which they claim their competence and existence, can stand together duly reconciled.

#### **Decisions Relied on by Respondent No.2-SSNNL**

**4.9** Learned senior counsel for SSNNL relied on the following decisions to buttress his above

submissions and elaborated them, to further emphasise that the legislation is on the economic aspect and the said context cannot be overlooked while judging its constitutionality from different standpoint- (i) **Ishwari Khetan Sugar Mills(P) Ltd. Vs State of U.P.** [(1980) 4 SCC 136]; (ii) **R.K.Garg Vs Union of India** [(1981) 4 SCC 675]; (iii) **State of Kerala Vs Mar Appraem Kuri Company Limited** [(2012) 7 SCC 106]; (iv) **Rajiv Sarin Vs State of Uttarakhand** [(2011) 8 SCC 708]; (v) **Animal Welfare Board of India Vs A. Nagarja** [(2014) 7 SCC 547]; (vi) **State of Madhya Pradesh Vs Rakesh** [(2012) 6 SCC 312]; (vii) **Viklad Coal Merchant Patiala etc. Vs Union of India** [AIR 1984 SC 95]; (viii) **Builders Association of India Vs Union of India** [AIR 1989 SC 1371]; (ix) **Association of Leasing and Financial Service Companies Vs Union of India** [(2011) 2 SCC 352]; (x) **State of A.P. Vs MCDOWELL & Co,** [(1996) 3 SCC 709]; (xi) **Dalmia Cement (Bharat) Ltd. Vs Union of India** [(1996) 10 SCC 104]; (xii) **S.P.Mittal Vs Union of India** [(1983) 1 SCC 51]; (xiii) **Dharam Dutt Vs Union of India** [(2004) 1 SCC 712]; (xiv) **R.C.Tobacco (P) Ltd. Vs Union of India** [(2005) 7 SCC 725].

**4.9.1** Learned senior counsel Mr.S.N. Soparkar made submissions on the same lines. Learned senior counsel Mr.Mihir Thakore emphasized the approach of the court to the question of vires to submit that the court's function is not to strike down the law by picking up the holes. The court should also lean to uphold the legislation. In this regard, he relied on decision in **Govt. of A.P. Vs P. Laxmi Devi** [(2008) 4 SCC 720,

paragraphs 39, 40 to 49, 55, 61, 64, 70, 73].

5. In light of the above factual conspectus and the contentions canvassed on behalf of the parties, the following aspects emerge for examination, broadly stated.

(a) The application and ambit thereof of Article 246 and Article 254 of the Constitution;

(b) Whether the impugned legislation can be said to be tracing its legislative field from Entry 43 in the State List and from Entry 20 in the Concurrent List, the said Entries either taken individually or conjointly;

(c) Whether the impugned law enacted by the State Legislature is repugnant and whether such repugnancy arises vis-à-vis the legislations enacted by the Parliament;

(d) Whether having regard to the doctrine of occupied field, the impugned legislation stands valid or it is unconstitutional because of its inroad into the subject matter field occupied by the Central legislation;

(e) For the purpose of (c) and (d) above, what is the scope and operational ambit of the laws enacted by the Union Legislature, namely (i) the Securities Interest (Regulation) Act, 1956; (ii) Securities and Exchange Board of India Act, 1992; (iii) the Indian Companies Act, 1956; (iv) the Negotiable Instruments Act, 1882 and (v)

Indian Contract Act, 1872 for their concerning provisions compared to the impugned legislation;

(f) The nature, scope, ambit and effect of the impugned law made by the State Legislature;

(g) The encroachment into, conflict with and trenching upon by the impugned legislation vis-à-vis the aforesaid laws made by the Parliament; the vires and the constitutionality of the impugned law;

(h) The question of consequential relief.

### **Constitutional Provisions**

6. It is in the setting of the interpretational effect and operational scope and ambit of the provisions of Article 246 read with Article 254, further to be read with the relevant Entries, that the controversy as to the constitutionality of the impugned law is to be considered.

6.1 Article 246 deals with the subject matter of laws made by Parliament and by the legislatures of State. The Article reads as under,

**"246. Subject-matter of laws made by Parliament and by the Legislatures of States**

(1) Notwithstanding anything in clauses (2) and (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 included b [in a State] notwithstanding that such matter is a matter enumerated in the State List."

**6.1.1** Article 254 is another provision to be read with Article 246. Article 254 speaks of inconsistency between laws made by Parliament and laws made by legislatures of State. It is reproduced herein.

**"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States**

(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 to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, 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 the 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."

**6.1.2** Article 246 gives supremacy to the Parliament in respect of enacting laws and vests exclusive power in the Parliament to make laws in respect of any of the matters enumerated in List I in the VIIth Schedule. List I known as Union List sets out the different heads - the subject matter in respect of which the Parliament is conferred an exclusive power for making laws. List II in the VIIth Schedule which is the State List, enumerates the subjects on which the State has the power to make laws. List III - the Concurrent List envisages the subjects in respect of which the Parliament as well as the State Legislatures may enact laws. The power of the State Legislatures to make law in respect of matters enumerated in List II is subject to the power of Parliament to make laws in respect of the matters enumerated in the Union List as well as in the Concurrent List. Clause (3) of Article 246 makes the power of the State Legislature subject to clauses (1) and (2).

**6.1.3** Dealing with inconsistency between the laws made by the Parliament on one hand, and the laws made by the State Legislature on the other, Article 254 operates in two facets. First is to provide the mechanism to resolve the conflict between the two laws when placed against one another in case of conflict. Secondly, a problem of determining whether a particular State Law is repugnant to the Central Act is addressed; in other words, it states as to when the repugnancy arises.

**6.1.4 In Govt. of A.P. and Vs J. B. Educational Society [(2005) 3 SCC 212]**

"9. The Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non-obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union legislature in the event of an overlap of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State legislature with respect to a matter enumerated in List II of the Seventh Schedule."

"10. There is no doubt that both Parliament and the State legislature are supreme in their respective assigned fields. It is the duty of the Court to interpret the legislations made by the Parliament and the State legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non-obstante clause in Clause (1) of Article 246, the Parliamentary legislation would prevail notwithstanding the exclusive power of the

State legislature to make a law with respect to a matter enumerated in the State List."

"11. With respect to matters enumerated in the List III (Concurrent List), both the Parliament and the State legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict."

**6.1.5** About scope, applicability and working of Article 254, the Apex Court in **Vijay Kumar Sharma Vs State of Karnataka [(1990) 2 SCC 562]** explained as under which may be pertinently extracted.

"The Court has to examine in each case whether both the legislations or the relevant provisions therein occupy the same field with respect to one of the matters enumerated in the Concurrent List and whether there exists repugnance between the two laws. The emphasis laid by Art. 254 is "with respect to that matter". Clause (1) of Art. 254 posits as a rule that in case of repugnancy or inconsistency between the State law and the Union law relating to the same matter in the Concurrent List occupying the same field, the Union law shall prevail and the State law will fail to the extent of the repugnancy or inconsistency whether the Union law is prior or later in point of time to the State law. To this general rule, an exception has been engrafted in cl. (2) thereof, viz., provided the State law is reserved for consideration of the President and it has received his assent, and then it will prevail in that State notwithstanding its repugnancy or inconsistency with the Union law. This exception again is to be read subject to the proviso to cl. (2)

thereof, which empowers the Parliament to make law afresh or repeal or amend, modify or vary. the repugnant State law and it became void even though it received President's assent. In short, cl. (1) lays down a general rule; cl. (2) is an exception to cl. (1) and proviso qualifies that exception. The premise is that the law made by the Parliament is paramount and Union and State law must relate to the same subject matter in the Concurrent List. It is, thus, made clear that the Parliament can always, whether prior or subsequent to State law, make a law occupied by the State law. An absurd or an incongruous or irreconcilable result would emerge if two inconsistent laws or particular provisions in a statute, each of equal validity, could co-exist and operate in the same territory." (Para 63)

### **Relevant Entries**

7. The legislative Entries which were referred to in the rival submissions on behalf of the parties claiming to be bearing a relation to the subject matter of the impugned legislation may be mentioned.

7.1 In the List I, namely, the Union List, Entry 44 is in respect of "incorporation, regulation and winding up of corporations whether trading or not, with objects not confined to one State, but not including universities."

7.1.1 Entry 46 in the same List relates to "Bill of exchange, cheques, promissory notes and other like instruments."

7.1.2 The subject of "Stock Exchanges and Futures Markets" is Entry 48 in the very List.



**7.1.3** Also in Union List, Entry 35 is "Public Debt of the Union" which was juxtaposed with similar Entry in the State List.

**7.2** From the State List, that is, List II, Entry 43 is "Public Debt of the State".

**7.3** As far as the Concurrent List is concerned, the Entries referred to were Entry 7, Entry 20 and Entry 43.

**7.3.1** Entry 7 states the subject as "Contracts including partnership, agency, contract of carriage and other special forms of contracts, but not including contracts relating to agricultural land."

**7.3.2** Entry 20 is about "Economic and social planning".

**7.3.3** Entry 43 reads: "Recovery in a State of claims in respect of taxes and other public demands, including arrears of land-revenue and sum recoverable as such arrears, arising outside that State."

**7.4** Respondents' case is that Entry 43 in "State List" being "Public Debt of State" and Entry 20 in "Concurrent List" namely "Economic and Social Planning" come into play. The legislative competency of the State to enact the impugned legislation is derived from the said two entries read and taken together.

#### **Interpretative Principles for Legislative Entries**

**8.** In order to appreciate the submissions as to

under which legislative head, the impugned legislation would fall, it is quite necessary to bear in mind, therefore to discuss, the parameters informing the interpretation of the legislative Entries in the three Lists to the Seventh Schedule. It is the principle well understood that the legislative Entries earmark the respective fields for the two Legislatures. They are not the source of power to legislate; the fountain-source of power is Article 246 of the Constitution with other applicable Constitutional provisions. The functions which the three Lists in the Seventh Schedule and the Entries contained therein, discharge is to only demarcate the legislative fields between the Parliament and the State Legislature.

**8.1** The Supreme Court has observed that each general word employed in the Entries has been held to carry an extended meaning so as to comprehend all ancilliary and subsidiary matters within the meaning of the Entry, however with a rider provided with simultaneous emphasis, as observed in **Welfare Association A.R.P. Maharashtra Vs Ranjit P. Gohil [(2003) 9 SCC 358]** that,

"... So long as it can be fairly accommodated subject to an overall limitation that the courts cannot extend the field of an Entry to such an extent as to result in inclusion of such matters as the framers of the Constitution never intended to be included within the scope of the Entry **or so as to transgress into the field of another Entry placed in another List.**

(emphasis supplied)

**8.2** Similar was the observation in **Shah**

**Goverdhan L. Kabra Teachers' College (supra)** that the rule of liberal construction of an Entry would not enable the Legislature to make a law relating to a matter which has no rational connection with the subject-matter of Entry. It was observed that the Court sometime is duty-bound to guard against extending the meaning of words beyond their reasonable connotation in its anxiety to preserve the power of the Legislature. The Supreme Court stated, "while an Entry is to be given its widest meaning, it cannot be so interpreted as to override another Entry or make another Entry meaningless and in case of an apparent conflict between the different Entries it is the duty of the court to reconcile them..." For reconciliation, the doctrine of pith and substance has to be applied and brought into play, guided the Apex Court.

**8.3** The decision of the Supreme Court in **Gannon Dunkerley's** case was referred to and relied on. From that decision and the development in law in relation thereto, it is possible to learn the interpretational. In that case, (**AIR 1958 SC 560**) the words "sale of goods" in Entry 48 in List II of the Seventh Schedule of the Government of India Act, 1935 was considered. The Supreme Court held that in defining the words "sale of goods", its meaning cannot be extended so as to cover the transactions which are not sales of goods within the Sale of Goods Act. It was held that a building contract where the agreement between the parties was that the contractor should construct the building according to specifications contained in the agreement in consideration of an agreed payment, it

was not a contract to sell materials used in the construction nor the property in those materials pass as movables and in that view, it was held, that the provision of Madras General Sales Tax (Amendment) Act, 1947 defining a sale to include a works contract was ultra vires and void.

**8.3.1** Though the actual effect of **Gannon Dunkerley's** case ceased to operate because of the Parliament enacted the Constitution (46<sup>th</sup> Amendment) Act, 1982 by inserting Clause 29(A) in Article 366 of the Constitution to define the phrase "Tax on Sale or Purchase of Goods" and enlarge the meaning of sale. By the said legislative act, the Parliament unbounded the meaning of 'sale of goods', given by the Supreme Court while interpreting Entry 48 List II for those words it contained. In other words by enacting amended definition as above, the interpretational scope for enlargement of meaning of the said Entry was indirectly widened.

**8.3.2** The constitutional doyen-scholar H.M. Seervai in his Constitution of India-A Critical Commentary (4<sup>th</sup> Edition 2011, Volume 3) after discussing the **Gannon Dunkerley's** case on the above aspect and the post-decision developments viewed to opine that following observations in **Gannon Dunkerley's** case were the law accurately stated,

"To sum up from the expression 'sale of goods' in Entry 48 is a *nomen juris*, its essential ingredient being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a

building contract which is, as in the present case, one entire and indivisible-and that is its norm, there is no sale of goods, and it is not within the competence of Provincial Legislature under Entry 48 to impose a tax on the supply of materials used in such a contract treating it as a sale."

**8.3.3** The necessary ingredients of sale of goods, as the Supreme Court explained, the agreement to sell for a price and the passing of property, therefore the words 'sale of goods' were to be given meaning accordingly. The decision in **Gannon Dunkerley's** case and the subsequent development in law after the said judgment on the aspect of the Entry help understand what could be the interpretational contours and the canons which may be applied for the permissible extent of extending the meaning and import of an Entry.

**8.3.4** What implies is that while construing the words in an Entry, the essence and the crux of the meaning have to be adhered to and the basic ingredients of the words in the Entry cannot be divorced from it while giving an extended meaning to it. This dictum would apply with rigour when a particular Entry contains a legal terms or words or it is a technical phrase or it in its connotation justifies to give it a special meaning.

**8.4** On the basis of **Gannon Dunkerley's** decision, it was submitted on behalf of the petitioners that wherever the Entry contains legal words, they should be given their legal meaning. They therefore contended that the words 'public debt of the State', being Entry



43 in the State List sought to be relied on by the State, has to be given a legal and technical meaning and its concept cannot be extended so as to cover include the impugned legislation.

**8.5** In a Madras High Court decision in **G.N. Venkataswamy (supra)** relied on behalf of the State, while holding Section 2A of Tamil Nadu Revenue Recovery Act as ultra vires the powers of the State Legislature, the Division Bench of the High Court observed to held that the State law for its subject-matter provisions was not falling within the expression 'public debt'. Section 52A of the said Act empowered recovery of sums due to the Tamil Nadu Agro Industries Corporation which may be notified by the State Government of Tamil Nadu in the Gazette to be recovered as arrears of land revenue. The Supreme Court decision in **Gannon Dunkerley & Co. (supra)** was quoted. Thereafter, the Madras High Court held,

"when an expression like 'land revenue' has acquired a definite and well understood meaning before the promulgation of the Constitution and it is in that meaning the said expression has been used in the Constitution, it is not open to the State Legislature by a fiction to treat something which is not land revenue as land revenue and make a law with respect to the same." (Para 49)

**8.5.1** The submission of learned Advocate General of Stat of Tamil Nadu was that the Act could fall under Entry 43 of List II was negatived and it was observed that the expression 'public debt' has a meaning of its own as reflected in the Public Debt

Act, 1944; the expression connotes only borrowing by the Government from the public, therefore was not to come to support to the State Legislature to be competent to enact Section 52A.

**8.6** The Entries in the three Lists obviously cover a very wide range of topics and the subjects, as wide as the areas and activities in which the State would have to unfold itself and for that purpose need to legislate on those subjects. If the rainbow-range of different Entries in the State List and Concurrent List are attentively considered, there are certain Entries specifying the legislative field by describing such field with general words. The generality of the subject and the words would naturally book for it a wide meaning. It would be naturally possible to attach broadest possible meaning while interpreting the same. There are Entries which denote the commercial words. There are Entries which delineate the subject in the socio-economic arena. Entries also include the Entries on the subject of polity or democratic areas. There are other Entries which contain the words which are technical. Still there are Entries which are in the nature of legal phrases. The rainbow-range of the Entries, their subjects and the nature thereof would accommodate interpretation and meaning differently in the context of the very nature of the subject mentioned in the Entry. While the cardinal principle of broad and wide interpretation would generally govern the meaning in the Entries, the extent of enlargement which may be admissible for interpreting an Entry would vary with the Entry itself, the concept

inheres, its context and its meaning *per se*. Where the subject-field in the Entry is technical or legal in nature or contains defining word or words, such cases would be the cases of caution. Such kind of Entries cannot be interpreted or construed for its meaning too wide in a manner as the other Entries general in nature may permit.

**8.7** The summing-up principles for interpreting the legislative Entry would be that Entry should normally receive wide interpretation to include all incidental and ancillary matters. However, while enlarging, it should not be robbed off its essence and essential ingredients. An Entry can also not be interpreted too wide to override another Entry. The interpretation of an Entry cannot be so attached so as to render another Entry of its meaning. It would be also an impermissible interpretation, if in the process, such interpretation and meaning transgresses into the field of another Entry placed in another List. In other words, enlargement is permissible, but enlarged without taking away extract of it is the principle. In zealotry to save the legislative power of a legislature, the zone of meaning of an Entry cannot be flexed where it does not really reach.

### **Legislative field and impugned law**

**9.** The case of the respondents being that the impugned law is referable to Entry 43 in List I, that is, "Public Debt of the State", contentions were canvassed in detail by learned advocates on the concept of public debt of the state and it was sought

to explain that the impugned law belongs to the said field. Their contentions may be summarized appropriately at this stage.

**9.1** It was contended that because of the tripartite agreement, the debt of the state government was treated in the realm of public debt of the state. Article 293 was relied on to submit that it conferred the borrowing power and that the executive power of the state extends to borrowing within the territory of India. On the basis of Article 293(3) was further relied on to submit that such borrowing would include the loan which has been made to the state by the government of India or in respect of which a guarantee has been given. The definition of "debt" in sub clause (8) of Article 366 was pressed into service.

**9.2** It was submitted that the interpretation to "Public Debt of the State" is required to be given in the context of debt as a charge from the Consolidated Fund. In this regard, various Articles of the Constitution were relied on namely (1) Articles 199 defines Money Bill, (2) Article 200 speaks of Assent to the Bills by Governor. (3) Article 202 deals with Annual Financial Statement. (4) Article 204 regarding Appropriation of Bills. Therefore the submission of respondents is inter alia that the impugned legislation falls under the head "Public Debt of the State" because the amount which was born by the State for redemption of the Bonds was charged from the Consolidated Fund.

**9.3** On behalf of the State Government, additional affidavit dated 05<sup>th</sup> October, 2015 was filed. Therein, it was stated that (i) the Bill relating to the impugned Act was passed by the State Legislature as a Money Bill on 26<sup>th</sup> March, 2008 as provided under Article 199 of the Constitution. (ii) Respondent No.2 company SSNNL is a public undertaking specified in Schedule-III to the Gujarat Legislative Assembly Rules, 1960. (iii) The company's accounts are examined under the provisions of Rule 200B by the committee of public undertaking constituted under Rule 200A of the Rules. (iv) As per the tripartite agreement dated 20<sup>th</sup> August, 1993, SSNNL addressed communication dated 29<sup>th</sup> December, 2008 to the State Government putting forthwith its demand for making the fund available to meet with the redemption liability.

**9.3.1** The affidavit was relied on to submit that the supplementary expenditure to be incurred during the financial year 2008-2009 which was not provided in the Annual Final Statement in that year, was provided by the Supplementary Statement along with other expenditure and the same was tabled before the State Legislature. The said Supplementary Statement of Expenditure for the Year 2008-2009 is at A-II page 120. After debate in the assembly, Appropriation Bill came to be passed, and Assent to it was granted by His Excellency the Governor on 03<sup>rd</sup> March, 2009 giving rise to the Gujarat (Supplementary) Appropriation Act, 2009. Following was further stated and was relied on from the affidavit,



"the provisions contained in Articles 292 and 293 of the Constitution, inter alia, empower the State Government to give guarantee and to enact laws to regulate the limit thereof. In this behalf, the State legislature initially enacted a legislation called "The Gujarat Guarantees Act, 1963", fixing the limit in this behalf upto Rs.8000 crore, which came to be revised to Rs.20,000 crore only by virtue of the Gujarat State Guarantees (Amendment) Act, 2001. Pertinently, the guarantee extended by the State Government under Tripartite agreement dated 20.08.1993, was within the prescribed limit. Thus, the actions on the part of the respondent State in the present case, to stand as a guarantor in the matter of redemption of Deep Discount Bonds, as provided under the said Tripartite Agreement dated 20.08.1993 and to arrange for appropriation of monies from the Consolidated Fund of the State, to discharge its liability towards the Public Debt of the State in the matter of redemption of the said bonds, are very much covered within the provisions contained in Articles 292 and 293 of the Constitution."

**9.4** Submissions were made to contend that the impugned legislation is for the purpose of economic and social planning as the State wanted to manage its financial liability in respect of Sardar Sarovar Narmada Project. It was submitted that Entry 20 in the Concurrent List would attract to provide the legislative field to the law concerned. Learned counsel for the Nigam relied on decision in **R.K. Garg Vs Union of India [(1981) 4 SCC 675]** wherein Special Bonds (Immunities and Exemptions) Act, 1987 was challenged and it was held that the legislation in particular in respect of economic matters, that may be crudities and inequities and even possibility of abuse

but on that count alone, the law cannot be struck down as invalid. It was contended that the law relating to economic activities should be viewed with greater latitude than the laws touching civil rights. Learned senior counsel relied on to elaborate the very proposition, paragraph 40 from the decision of the Supreme Court in **Dalamiya Cement (Bharat) Limited Vs Union of India [(1996) 10 SCC 104]**. On the similar lines, it was submitted on the basis of **R.C. Tobacco (P) Limited Vs Union of India [(2005) 7 SCC 725]** that the Government is free to determine the priorities in the matter of utilization of finances and the Courts cannot place an embargo on the plenary power of Legislature.

**9.5** The interpretation of the concept of 'Public Debt of State' canvassed as aforesaid was refuted by learned senior counsel and other learned advocates for the petitioners and it was submitted by relying on the provisions of Government of India Act, 1985, in particular Item V of List II, the Entry in the Federal Legislative List, by explaining the concept of 'Borrowing Power of State' that the phrase 'Public Debt of State' has a special meaning and the subject matter of the impugned legislation does not touch in any way to the said concept. It was submitted that even if it was a case, the charging the amount to the consolidated fund does not automatically bring the subject within the purview of public debt.

**9.5.1** It was the submission on behalf of the petitioners that "public debt of the State" is a

concept so specially defined. The phrase does not allow bifurcation of words such as into 'public' or 'debt' or 'public debt' separating from the total concept and thereby to construe the same accordingly.

### **Pith and Substance of Impugned Legislation**

**10.** The above discussion goes to underline that the dictum of giving broad or wide interpretation to an Entry does not mean that the field indicated in the Entry can be enlarged too wide to bring something really unshocked within that sphere. The Entry cannot be artificially widened so as to denude it of its essence and meaning.

**10.1** The question of conflict between the two Lists will not arise in the cases where the impugned legislation, by applying the doctrine of Pith and Substance, would fall exclusively or would be predominantly referable to Entry of the subject in the State List. The encroachment to the Union List in such case would be only incidental. In other words, in Pith and Substance, the law would be a permissible legislative exercise by the State Legislature which would be acting within its powers and the area. On the other hand, if in pith and substance the law made by the State Legislature falls within the legislative realm of Parliament, it would produce a reverse result and the State law would not be able to stand valid.

**10.2** Under the doctrine of Pith and Substance, true character of legislation is ascertained. It is also emphasized that name given by the Legislature to the legislation is not material. In applying the

doctrine of Pith and Substance, (i) the enactment as a whole, (ii) the main object and purpose of the enactment and (iii) the scope and effect of the provisions, are relevant considerations. The nature of the provisions of the enactment in respect of which the encroachment to the field of matter in the Union List is considered, the extent of encroachment as well as kind of encroachment, which again would mean the nature of the provisions of two Acts alleged to be in conflict with each other are to be considered.

**10.3** In **Association of Natural Gas Vs Union of India [(2000)4 SCC 489]**, the Supreme Court was concerned with the interpretation of Entry 53 in List I, namely petroleum and petroleum products vis-à-vis Entry 25 "Gas and Gas Works" in List II, under which the Gujarat Gas (Regulation of Transmission, Supply and Distribution) Act, 2001 was enacted by the State Legislature, the Court viewed the State legislation to be ultra vires.

**10.3.1** It is the following reasoning which the Supreme Court supplied to the construction of Entry 53 in List I vis-a-vis Entry 25 in List II so as to construe the scope of the State List Entry vis-a-vis Union List Entry to finally held that State Legislature did not have legislative competency to enact Gujarat Gas (Regulation, Transmission, Supply and Distribution) Act, 2001.

"Natural gas being a petroleum product, we are of the view that under Entry 53 List I, the Union Government alone has got legislative competence. Going by the

definition of gas as given in Section 2(g) of the Gujarat Act wherein "gas" has been defined as a "a matter of gaseous state which predominantly consists of methane", it would certainly include natural gas also. We are of the view that under Entry 25 List II of the Seventh Schedule, the State would be competent to pass a legislation only in respect of gas and gasworks and having regard to collocation of words "gas and gasworks", this entry would mean any work of industry relating to manufactured gas which is often used for industrial, medical or other similar purposes. Entry 25 of List II, as suggested for the States, will have to be read as a whole. The expressions therein cannot be compartmentally interpreted. The word "gas" in the entry will take colour from the other word "gaswork". In *Ballantine's Law Dictionary*, 3rd Edn., 1969 "gasworks" is defined as "a plant for the manufacture of artificial gas". Similarly in Webster's New 20<sup>th</sup> Century Dictionary, it is defined as "an establishment in which gas for heating and lighting is manufactured". In [www.freedictionary.com](http://www.freedictionary.com) "gasworks" is explained as "a manufactory of gas, with all the machinery and appurtenances; a place where gas is generated". The meaning of the term "gasworks" is well understood in the sense of the place where the gas is manufactured. So it is difficult to accept the proposition that "gas" in Entry 25 List II includes natural gas, which is fundamentally different from manufactured gas in gasworks. Therefore, Entry 25 of List II could only cover manufactured gas and does not cover natural gas within its ambit. This will negative the argument of States that only they have exclusive powers to make laws dealing with natural gas and liquefied natural gas. Entry 25 of List II only covers manufactured gas. This is the clear intention of framers of the Constitution."

(Para 43)



**10.3.2** The principle stated in paragraph 13 of the aforesaid judgment was that an Entry in one List cannot be so interpreted as to make it cancel or obliterate another Entry or make another Entry meaningless. Entry 25 in List II was not interpreted which would have have an effect of obliterating Entry 53 in the Union List.

**10.3.3** The above observations on the interpretation of the words in Entry stand in support of the proposition which were canvassed by learned advocates for the petitioners that the Entry "Public Debt of the State" in List II is to be construed as one concept and one phrase and the same cannot be bifurcated for attaching convenient interpretation to the same.

**10.4** The doctrine of pith and substance would apply in also judging as to whether the legislation falls within particular Entry. In **Surahmanayan Chettiar Vs Muttu Swami Goundan [AIR 1941 FC 47]**, it was observed and held,

"No doubt it is an important matter, not, as Their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned 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 moneylending 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."

**10.5** In **Union of India Vs Shah Goverdhan L. Kabra Teachers' College [(2002)8 SCC 228]**, it was stated,

"This rule, however, would not enable the legislature to make a law relating to a matter which has no rational connection with the subject-matter of any entry. The court sometimes is duty-bound to guard against extending the meaning of the words beyond their reasonable connotation in anxiety to preserve the power of the legislature. (emphasise supplied)

**10.5.1** In the aforementioned case, the Supreme Court was examining sub Section (4) of Section 17 of National Council for Teachers Education Act, 1993 vis-à-vis Entry 66 of List I in the Seventh Schedule of the Constitution. The provision provided that the qualification in teacher education obtained from an unrecognized institution shall be invalid for the purpose of employment under the government. The Supreme Court held that on examining the statute as a whole and on scrutiny of object and scope, the provision dealt with the coordination and determination of standard for higher education falling within Entry 66 of List I in the Seventh Schedule of the Constitution.

**10.5.2** It was explained,

"When a law is impugned as being ultra vires of the legislative competence, what is required to be ascertained is the true character of the legislation. If on such an examination it is found that the legislation is in substance one on a matter assigned to the legis-

lature then it must be held to be valid in its entirety even though it might incidentally trench on matters which are beyond its competence. In order to examine the true character of the enactment, the entire Act, its object, scope and effect, is required to be gone into. The question of invasion into the territory of another legislation is to be determined not by degree but by substance. The doctrine of "pith and substance" has to be applied not only in cases of conflict between the powers of two legislatures but in any case where the question arises whether a legislation is covered by particular legislative power in exercise of which it is purported to be made." (Para 7)

**10.6** The principle mentioned by the Supreme Court in **A.K. Krishna Vs Madras State [AIR 1957 SC 297]**, may be recollected that while considering the pith and substance of the impugned legislation and its true character as well as the subject matter of legislative field, that it is not competent either for the Center or a State under the guise of pretence or in the form of exercise of its own powers, to carry out and object which is beyond its powers and trespass on the exclusive power of the other. Merely on the basis of projected object and the submission that the impugned Act wanted to achieve a particular purpose, is not the consideration to disregard the true character of the law. The Supreme Court observed,

"Even if the object or purpose is within the legislative field of the Legislature, it cannot be achieved by legislating on a subject-matter outside its competence... **It is the subject matter of legislation which is to be seen in order to determine its pith and substance and not "the motive which actuates the**

**Legislature" or "the ultimate and desired to be attained"."** (emphasis supplied)

**10.7** The situation arising in a case where a State Legislature claims to have enacted the law with reference to a subject purportedly deriving the field from an Entry which in actuality is the field not earmarked for the State Legislature, and the consequences thereof, may be explained with reference to the decision of the Supreme Court in case of **E.V. Chinnaiah Vs State of Andhra Pradesh [(2005) 1 SCC 394]**. The petitions challenging validity of Andhra Pradesh Schedule Caste (Rationalisation of Reservation) Act, 2000 were dismissed by Five Judge Bench by majority of 4:1 and before the Supreme Court question was agitated for consideration inter alia on the issue whether the State of Andhra Pradesh had legislative competence under Entry 41 List II or Entry 25 of List III. By the said enactment, the Schedule Castes mentioned in the Presidential List prepared under Article 341 of the Constitution, came to be grouped as A,B,C and D, so divided and thereby the 15% reservation for backward classes in the State in educational institutions and in the services of the State under Articles 15(4) and 16(4) of the Constitution were apportioned. The contention against the validity of the said Act was that the same really did not deal with the field of legislation contemplated under the aforesaid Entries but in reality the same was targeted to sub-divide the Schedule Caste and the enactment was not justifiable with reference to Entry 41 in List II and Entry 25 in

List III.

**10.7.1** As if answering the contention of the side of the respondents that the object of the legislation is a governing criteria for judging its field and therefore legislative competence, the objects of the enactment cannot be the solitary yardstick,

"....If the objects stated in the enactment were the sole criteria for judging the true nature of the enactment then the impugned enactment satisfies the requirement on application of the doctrine of pith and substance to establish the State's legislative competence, but that is not the sole criteria. As noted above, the Court will have to examine not only the object of the Act as stated in the statute but also its scope and effect to find out whether the enactment in question is genuinely referable to the field of legislation allotted to the State." (Para 31)

(emphasis supplied)

**10.7.2** The Supreme Court held on the said law that the primary object of the said impugned enactment was to create groups of sub-castes in the List of Schedule Castes applicable to the State and apportionment of reservation is only secondary and consequential. Whatever may be the object of this classification and apportionment of reservation, the State cannot claim to legislative power to make such law tracing its legislative competence to Entry 41 of List II or Entry 25 of List III. A beckoning principle is laid down in the reasoning of the Supreme Court that the law in question was not a law governing the field of education or the field of State Public Services.



**10.8** On interpretative aspect for considering whether the impugned legislation relating to premature redemption of Bonds is in pith and substance, a law falling under Entry 43 in List II or Entry 20 in List III or both taken together, the above decision in **E.V. Chinnaiah (supra)** provides closer lines to be applied. Examined on the principle of pith and substance, and in particular viewing with reference to the provisions, in particular Section 3A of the impugned legislation, the subject of the law does not made indeed traces its subject matter field to the Entry 43 in List II and Entry 20 in List III and having regard to the nature of provisions and their pith and substance, the said Entries could not be said to be the native field for the subject of impugned legislation.

**10.9** Reverting to the impugned legislation, its nomenclature and the actual provisions deal with the redemption of Bonds. The power is conferred on SSNNL by the State by enacting law to prematurely redeem the Deep Discount Bonds. Section 3A seeks to substitute and alter the conditions of the original Issue of Bonds with regard to the time of their redemption, the date and the face value. The law in its true character and substance deals with the securities. The State by enacting the said provisions in the impugned Act has legislated to alter the special contract which was created at the time of issuance of Bond. The conditions attached to the Bonds which were listed in various stock exchanges, which provided for procedure for dealing with them, for redemption payment and the

tenure were changed and replaced by the new one as per the provisions of the Act.

**10.9.1** When the impugned legislation is looked upon as a whole, it is not possible to accept the submission that the said law falls within the Entry 'Public Debt of State' in List II. The law for its legislative field cannot be said to be referable to 'Public Debt of State' and the said Entry is not available for the State to derive power to legislate and to justify the competence to legislate. As such the impugned legislation has nothing to do with the subject of public debt of the State. Even remote connection with this concept cannot be perceived for the impugned legislation. Similarly, the submission that Entry 20 in List III is attracted, namely the field of economic and social planning, is also misconceived because when the kind, nature and the essentials of the provisions of the impugned Act are considered, it cannot be said that the law in pith and substance it relates to economic and social planning.

".... Thus, the rule of pith and substance is applied to determine whether the impugned legislation is within that competence under Arts. 246(1) and 246(3) of the Constitution, and to resolve the conflict of jurisdiction. If the Act in its pith and substance falls in one List it must be deemed not to fall in another List, despite incidental encroachment and its validity should be determined accordingly. The pith and substance rule, thereby, solves the problem of overlapping of "any two entries of two different Lists vis a vis the Act on the basis of an inquiry into the "true nature and character" of is the legislation. The

Court examines the legislation as a whole and tries to find whether the impugned law is substantially within the competence of the Legislature which enacted it, even if it incidentally trespasses into the legislative field of another Legislature. In a case where the question of validity of an Act arises, it may be that the topic underlying the provisions of the Act may in one view of the matter fall within the power of the Centre, and on another view within the power of the States. When this happens, it is necessary to examine the pith and substance of the impugned legislation; and to see whether in its pith and substance it fails within one or the other of the Legislative Lists. As stated earlier the constitutionality of the Impugned Act is not determined by the degrees of invasion into the domain assigned to the other legislature but its pith and substance and its true nature and character to find whether the matter falls within the domain of the enacting legislature. The incidental or ancillary encroachment into forbidden field does not affect the competence of the legislature to make the impugned law." (Para 89)

**10.10** In view of the principles governing the interpretation of Entry stated as above, coupled with the substance and true character gatherable from the contents of the provisions of the impugned legislation, it has to be ruled that the said law cannot claim the said legislative field for its competency. "Public Debt of the State" is not the legislative house for the impugned legislation a rendezvous, more particularly when its subject-matter is measured in pith and substance.

**10.11** Article 246 uses the expression "with respect to", which brings into play the doctrine of

pith and substance in understanding the exertion of the legislative power. Though the words with respect to persuade to interpret an Entry in wide manner, it is observed by the Supreme Court in **Ujagar Print Vs Union of India [(1989)3 SCC 488]** that even while viewing whether particular law is with respect to particular topic, the test is that the legislation as a substantial and not merely a remote connection with the subject dealt with in the Entry. It is not possible to view the impugned law even employing the words "with respect to" to be for public debt of the State because in its essence and substance it is not with respect to the public debt of the State.

**10.11.1** The impugned law cannot be traced to any Entry in the State List. The provision which it engrafts and the total effect it creates on the subject is about prematurely dealing with the securities. The various statutes competently enacted by the Central Legislature operate in relation to the subject dealt with. Therefore if the legislative field is to be traced for the impugned law, it can be traced in its pith and substance only in the realm where parliamentary law have been operating. This is elaborated hereinafter. It may be that since the Issue of Bonds was in the realm of contract created which has give rise to contractual obligation and thereafter by the impugned law those contractual obligations have been varied or set-at-naught, one may view the subject-matter of the impugned legislation referable to Entry 7 of the Concurrent List which is "Contracts including partnership, agency, contract of carriage

and other special forms of contracts, but not including contracts relating to agricultural land". The impugned law may be viewed as creating special contract by nullifying the previous contract.

### **Repugnancy and its Aspects**

**11.** When repugnancy arises, the repugnant state law stands voided and rendered unconstitutional against the law made by the Parliament. The repugnancy is a constitutional concept with reference to the power of the legislature of the state and the central legislature to legislate in respect of different legislative heads and subjects distributed in the three Lists in the Seventh Schedule to the Constitution. The connotation repugnancy has its various facets and dimensions. The repugnancy may relate to the right of the Legislature concerned to enact. It has direct nexus with its competency qua the field earmarked for it in the Entry in the relevant List and the dominant power of the Parliament to competently legislate in respect of the subject. It may arise for the reason that the state law has encroached into the central law and created a situation of conflict and the co-existence of both the laws is not possible.

**11.1** The repugnancy will arise in the situation where the subject matter area is occupied by the legislation validly enacted by the Parliament, and a state legislature seeks to exercise its legislative powers claiming legislative competence from an Entry or Entries from either of the Lists, in respect of matter or matters for which the field is completely



occupied. When such a situation is obtained, the state legislature is denuded of its right to legislate in that area, for, such would be a situation where mere existence of the state law, even if the aspect of co-existence with the state law is to be kept aside, results into a situation of disharmony and discordance for the plain reason that the Parliament has legislated completely on the subject matter. The variants of repugnancy, if to be so called, are the necessary corollary of, and the extension of, the salutary principle of federal legislative supremacy envisaged in our Constitution in the scheme of legislative powers.

**11.2** On a reading of Article 254, it says that repugnancy arises where any provision of law made by a legislature of a State is repugnant to any provision of law made by the Parliament, implying thereby that repugnancy arises for the State law vis-à-vis the Central law even in respect of "any provision of law". Therefore, it arises in respect of a single provision in the State law as against the Central law. When so found, the same would create a repugnancy. Sub clause (2) of Article 254 says that when repugnancy arises in respect of the legislature of a State with respect to one of the matters in the concurrent list is inconsistent with any provision of an existing law with respect to the matter, it is the Central Law which would prevail. The proviso speaks that the Parliament is not prevented from enacting any law or adding or amending or varying or repealing by an enactment on the said matter and in case of conflict,

such enactment will prevail over the State Legislation. Article 254 professes the doctrine of federal supremacy.

**11.3** The above broadly highlighted aspects of repugnancy for a State law against the Central law may be comprehended with more clarity by delving into the decisions of the Apex Court.

**11.4** In **Deep Chand Vs State of U.P.[AIR 1959 SC 648]**, the Supreme Court explained the concept of repugnancy by pointing out the triple tests, (1) Whether there is direct conflict between the two provisions; (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; and (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

**11.4.1** The Supreme Court highlighted the parameters by observing further,

"29. Nicholas in his Australian Constitution, 2<sup>nd</sup> Edition, page 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."

This Court in *Ch. Tika Ramji v. The State of Uttar Pradesh* (1) accepted the said three rules, among others, as useful guides to test the question of repugnancy. In *Zaverbhai Amaidas v. The State of Bombay* (2), this Court laid down a similar test. At page 807, it is stated:

"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."

**11.5** In **M. Karunanidhi Vs Union of India [(1979) 3 SCC 431]**, the Supreme Court elaborated the principle thus,

"1. Where the provisions of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

2. Where however a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.

3. Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be

upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254(2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254." (Para 8)

**11.6** In **J. B Educational Society (supra)**, the Supreme Court observed as under,

"Thus, the question of repugnancy between the Parliamentary legislation and the State legislation can arise in two ways. First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in Concurrent List and there is a conflict. In both the situations, Parliamentary legislation will predominate, in the first, by virtue of the non-obstante clause in Article 246(1), in the second, by reason of Article 245(1). Clause (2) of Article 245 deals with a situation where the State legislation having been reserved and having obtained President's ascent

prevails in that State; this again is subject to the proviso that the Parliament can again bring a legislation to override even such State legislation."

(Para 12)

**11.7** In **Vijay Kumar Sharma (supra)** the Supreme Court considered the constitutional validity of Karnataka Contract Carriages (Acquisition) Act, 1976 enacted under Entry 42 of List III and its repugnancy to the Motor Vehicles Act, 1988 enacted under Entry 35 of List III. Even though the Apex Court on the facts of that case and after comparing the provisions of the Karnataka Act, held that the said State law was not unconstitutional and was enacted within the legislative area demarcated in the Entry for the State, however in the judgment the Supreme Court after considering the several decisions elucidated the meaning and test of repugnancy. In that case, it was contended that the provisions of Sections 14 and 20 of the Karnataka Act were in direct conflict with the Motor Vehicles Act, 1988, the Central law. The Supreme Court rejected the contention. However the reasoning supplied by it not accepting the contention and holding the Karnataka Act to be within the legislative competence of the State, would help to understand the issues arising in the present case so as to enlighten the considerations on the basis of which a State law can be said to be within a particular Entry, that is the legislative field available to it. In the case before the Supreme Court, the State Legislation, that is, Karnataka Contract Carriages Act had received the assent of the President.



**11.7.1** In **Vijay Kumar (supra)**, the Apex Court explained how the repugnancy would arise between the two legislations,

"Repugnancy between the two pieces of legislation, generally speaking, means that conflicting results are produced when both laws are applied to the same set of facts. Repugnancy arises when the provisions of both laws are fully inconsistent or are absolutely irreconcilable and that it is impossible to obey without disobeying the other. Repugnancy would arise when conflicting results are produced when both the statutes covering the same field are applied to a given set of facts." (para 64)

**11.7.2** Following were the exhaustive conclusions,

"The result of the above discussion leads to the following conclusions:

(a) the doctrine of repugnance or inconsistency under Art. 254 of the Constitution would arise only when the Act or provision/ provisions in an Act made by the Parliament and by a State Legislature on the same matter must relate to the Concurrent List III of Seventh Schedule to the Constitution must occupy the same field and must be repugnant to each other;

(b) In considering repugnance under Article 254 the question of legislative competence of a State Legislature does not arise since the Parliament and the Legislature of a State have undoubted power and jurisdiction to make law on a subject, i.e. in respect of that matter. In other words, same matter enumerated in the Concurrent List has occupied the field.

(c) If both the pieces of legislation deal with separate and distinct matters though of cognate and

allied character repugnancy does not arise.

(d) It matters little whether the Act/Provision or Provisions in an Act fall under one or other entry or entries in the Concurrent List. The substance of the "same matter occupying the same field by both the pieces of the legislation is material" and not the form. The words "that matter" connotes identity of "the matter" and not their proximity. The circumstances or motive to make the Act/ Provision or Provisions in both the pieces of legislation are irrelevant.

(e) The repugnancy to be found is the repugnancy of Act/ Provision/ Provisions of the two laws ' and not the predominant object of the subject-matter of the two laws.

(f) Repugnancy or inconsistency may arise in diverse ways, which are only illustrative and not exhaustive I

(i) There may be direct repugnance between the two provisions;

(ii) Parliament may evince its intention to cover the whole same field by laying down an exhaustive code in respect thereof displacing the State Act, provision or provisions in that Act. The Act of the Parliament may be either earlier or subsequent to the State law;

(iii) Inconsistency may be demonstrated, not necessarily by a detailed comparison of the provisions of the two pieces of law but by their very existence in the statutes;

(iv) Occupying the same field; operational incompatibility; irreconcilability or actual collision in their operation in the same territory by the Act /provision or provisions of the Act made by the Parliament and their counter parts in a

State law are some of the true tests;

(v) Intention of the Parliament to occupy the same field, held by the State legislature may not be expressly stated but may be implied which may be gathered by examination of the relevant provisions of the two pieces of the legislation occupying the same field;

(vi) If one Act/ Provision/ Provisions in an Act make lawful that which the other declare unlawful the two to that extent are inconsistent or repugnant. The possibility of obeying both the laws by waiving the beneficial part in either set of the provisions is no sure test;

(vii) If the Parliament makes law conferring right/obligation/privilege on a citizen/ person and enjoins the authorities to obey the law but if the State law denies the self same rights or privileges negates the obligation or freezes them and injuncts the authorities to invite or entertain an application and to grant the right/ privilege conferred by the Union law subject to the condition imposed therein the two provisions run on a collision course and repugnancy between the two pieces of law arises thereby;

(viii) Parliament may also repeal the State law either expressly or by necessary implication but Courts would not always favour repeal by implication. Repeal by implication may be found when the State law is repugnant or inconsistent with the Union law in its scheme or operation etc. and conflicting results would ensue when both the laws are applied to a given same set of facts or cannot stand together or one law says do and other law says do not so. In other words, the Central law declares an act or omission lawful while the State

law says them unlawful or prescribes irreconcilable penalties/ punishments of different kind, degree or variation in procedure etc. The inconsistency must appear on the face of the impugned statutes / provision/ provisions therein;

(ix) If both the pieces of provisions occupying the same field do not deal with the same matter but distinct, though cognate or allied character, there is no repeal by implication,

(x) The Court should endeavour to give effect to both the pieces of legislation as the Parliament and the legislature of a State are empowered by the Constitution to make laws on any subject or subjects enumerated in the Concurrent List 111 of Seventh Schedule to the Constitution. Only when it finds the incompatibility or irreconcilability of both Acts/ provision or provisions, or the two laws cannot stand together, the Court is entitled to declare the State law to be void or repealed by implication; and

(xi) The assent of the President of India under Art. 254(2) given to a State law/ provision/provisions therein accord only operational validity though repugnant to the Central law but by subsequent law made by the Parliament or amendment/modification, variation or repeal by an act of Parliament renders, the State law void. The previous assent given by the President does not blow life into a void law.

Scope and operation of Rule of Pith and Substance and predominant purpose vis a vis Concurrent List."

(para 88)

**11.8 A Calcutta High Court decision in O.P. Stewart Vs B.K. Roy Chaudhury [AIR 1939 Cal 628]**

lucidly explained the concept of repugnancy, which decision was referred to with approval by the Supreme Court in **Deep Chand (supra)**. The Calcutta High Court stated thus,

"It is sometimes said that two laws cannot be said to be properly repugnant unless there is a direct conflict between them, as when one says "do" and the other "don't", there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test: there may well be cases of repugnancy where both laws say "don't" but in different ways. For example, one law may say, "No person shall sell liquor by retail, that is, in quantities of less than five gallons at a time" and another law may say, "No person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time". Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified".

"The principle deducible from the English cases, as from the Canadian cases, seems therefore to be the same as that enunciated by Isaacs, J. in the Australian 44 hour case (37 C.L.R. 466) if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law".



## **The Concept of Occupied Field**

**12.** Though the test that two legislations—one by the Legislature of a State and the other enacted by Parliament when cannot stand together without disobeying one for obeying the other, is a sure test to apply to judge the state of repugnancy, yet another cannon, important and surer, emanates from the observations in the above discussed decisions. This test is one of dominant law by the Union, more precisely stated, the principle of occupied field.

**12.1** In **Rajiv Sarin (supra)** the Supreme Court observed that whether on account of exhaustive code doctrine or whether on account of irreconcilable conflict concept, the real test is that would there be a room or possibility for both the Acts to apply. The Supreme Court further stated that the only other area where repugnancy can arise is where the superior legislature, namely, Parliament has evinced an intention to create a complete code.

**12.2** In **State of Orissa Vs Tulloch and Co. [AIR 1964 SC 1284]**, the Apex Court explained the doctrine of occupied field stating,

"But even if the matter was res integra, the argument cannot be accepted. Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. **But two enactments may be repugnant to each other even though obedience to each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a**

superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation. In the present case, having regard to the terms of s.18(1) it appears clear to us that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until rules were framed, there was no inconsistency and no super-session of the State Act." (Para 15)

(emphasis supplied)

**12.2.1** The facts of the above case may be considered in some detail for understanding the principle. On a lease being granted by State of Orissa under Mines and Minerals (Development and Regulation) Act 1948 (Central Act), Tulloch and Company started working a manganese mine. The State of Orissa passed Orissa Mining Areas Development Fund Act, 1952 under which the State Government was authorized to levy a fee for development of "mining areas" in the State. After bringing these provisions into operation, State of Orissa demanded from Tulloch and Company on August 1, 1960 fees for the period July, 1957 to March, 1958. Tulloch and Company challenged the legality of the demand before the High Court under Article 226 of the Constitution. The writ petition was allowed on the ground that on the coming into force of the Mines and Minerals (Regulation and Development) Act of 1957, hereinafter called the "Central Act of 1957", which was brought into force from 1st June, 1953 the Orissa Mining Areas Development Fund Act 1952 should be deemed to be non-existent. This was the controversy which came before this Court.

**12.2.2** One of the points which arose for determination was repugnancy. It was urged that the object and purpose of Orissa Mining Areas Development Fund Act, 1952 was distinct and different from the object and purpose of the Central Act of 1957, with the result that both the enactments could validly co-exist since they did not cover the same field. The argument was rejected by the Supreme Court. It was held that having regard to the terms of Section 18(1) the intention of Parliament was to cover the entire field. That, by reason of declaration by Parliament under the said Section the entire subject matter of conservation and development of minerals was taken over for being dealt with by Parliament thus depriving the State of the power hitherto possessed.

**12.2.3** Relying on the judgment of the Constitution Bench of the Supreme Court in the case of **Hingir-Rampur Coal Co. Vs State of Orissa (1961) 2 SCR 537**, it was held in **Tulloch's** case that for the declaration to be effective it is not necessary that the rules should be made or enforced; all that was required was a declaration by Parliament to the effect that in public interest regulation and development of the mines should come under the control of the Union. In such a case the test must be whether the legislative declaration covers the field or not. In **Tulloch's** case, the Constitution Bench of the Apex Court applied the test and ruled that the Central Act of 1957 intended to cover the entire field dealing with regulation and development of mines being under the

control of the Central Government.

**12.2.4** On the aspect of occupied field it was observed,

"The principle deducible from the English cases, as from the Canadian cases seems therefore to be the same as that enunciated by Issacs, J. in the Australian 44 hour case (1926) 37 CLIZ 466 if the dominant law has expressly or impliedly evinced its intention to cover the whole field, then a subordinate law in the same field is repugnant and therefore inoperative. Whether and to what extent in a given case, the dominant law evinces such an intention must necessarily depend on the language of the particular law." (Para 46)

**12.2.5** The Apex Court explained,

"when repugnancy is alleged between the two statutes, it is necessary to examine whether the two laws occupy the same field, whether the new or the later statute covers the entire subject matter of the old, whether legislature intended to lay down an exhaustive code in respect of the subject matter covered by the earlier law so as to replace it in its entirety and whether the earlier special statute can be construed as remaining in effect as a qualification of or exception to the later general law, since the new statute is enacted knowing fully well the existence the earlier law and yet it has not repealed it expressly. The decision further lays down that **for examining whether the two statutes cover the same subject matter, what is necessary to examine is the scope and the object of the two enactments, and that has to be done by ascertaining the intention in the usual way and what is meant by the usual way is nothing more or less than the ascertainment of the dominant object of the two legislations.**" (Para 46) (emphasis supplied)



**12.3** In **I.T.C. Ltd. Vs State of Karnataka, [1985 Supp SCC 476]**, the Supreme Court was concerned with Entry 52 of List I which authorized the Central Legislature to take over any industry it likes. It was found that by virtue of the Tobacco Board Act, 1975, the Parliament chose to occupy the entire field of tobacco industry which includes all kinds of tobacco and its by-products. After considering the provisions of the Central Act vis-à-vis the provisions in Karnataka Agricultural Produce Marketing (Regulation) Act, 1966 which provided for levy and collection of market fee from the sellers of tobacco, the same to be repugnant to the Central Act and was held to be unconstitutional. It was observed that once the Center takes over an industry under Entry 52 of List I and passes an Act to regulate the subject matter in the field of legislation, the State Legislature ceases to have any jurisdiction to legislate in that field. And if it does so, the legislation would be ultra vires the powers of the State Legislature.

**12.4** The Supreme Court in **Animal Welfare Board of India Vs A. Naga Raja [(2014) 7 SCC 547]** stated the principle in following words.

"Instances are many, where the State law may be inconsistent with the Central law, where there may be express inconsistency in actual terms of the two legislations so that one cannot be obeyed without disobeying the other. Further, **if the Parliamentary legislation, if intended to be a complete and exhaustive code, then though there is no direct conflict, the State law may be inoperative. Repugnancy**



will also arise between two enactments even though obedience to each of them is possible without disobeying the other, if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field."

(Para 76) (emphasis supplied)

**12.5** Another decision of the Supreme Court which may be referred to is **State of Kerala Vs Mar Appraem Kuri Co. Ltd. [(2012) 7 SCC 106]** which held with reference to Entry 7 in List III, Schedule VII that the Chit Funds Act, 1982 which was a law made by the Parliament under the said Entry intended to cover entire legislative field with regard to conduct of chit funds, etc. therefore the Kerala Chitties Act, 1975 became void and stood *pro tanto* repealed when the Chit Funds Act, 1982 was made.

**12.6** In **State of J&K Vs M.S. Farooqi [(1972) 1 SCC 872]**, the Apex Court stated,

"24. We may also refer to the observations of Evatt, J., in *Stock Motor Plough Ltd. v. Forsyth* [(1932) 48 SCC 128] which were extracted in *Tika Ramji* case:

"It (the test of covering the field) is no more than a cliché of expressing the fact that, by reason of the subject-matter dealt with, and the method of dealing with it, and the nature and multiplicity of the regulations prescribed, the Federal authority has adopted a plan or scheme which will be hindered and obstructed if any additional regulations whatever are prescribed upon the subject by any other authority; if, in other words, the subject is either touched or trenched upon by State authority.""

**12.6.1** In the case before the Supreme Court, Entry 7 of List III which dealt with the subject of "Contracts" was considered. The Entry covers special contracts also. Since it is in Concurrent List both the Parliament and State Legislature are competent to enact the law with respect thereto. Explaining the doctrine of complete code, the Supreme Court observed,

"There is one more way in which this problem can be approached. Both the courts below have proceeded on the basis that there are conflicting provisions in the Central Act, 1982 vis-à-vis the State Act, 1975 (see paragraphs 13, 14 & 15 of the impugned judgment). In our view, the intention of the Parliament was clearly to occupy the entire field falling in Entry 7 of List III. The 1982 Act was enacted as a Central Legislation

"ensure uniformity in the provisions applicable to chit fund institutions throughout the country as such a Central Legislation would prevent such institutions from taking advantage either of the absence of any law governing chit funds in a State or exploit the benefit of any lacuna or relaxation in any State law by extending their activities in such States". (Para 55)

**12.6.2** On what may be the criteria to consider the existing Central law a complete code, it was stated,

"The background of the enactment of the Central Chit Funds Act, which refers to the Report of the Banking Commission has been exhaustively dealt with in the case of Shriram Chits and Investment (P) Limited [(1993) Supp 4 SCC 226] as also in the Statement of Objects and Reasons of the 1982 Act. The clear intention of enacting the Central 1982 Act, therefore, was to make the Central Act a complete code with regard to the business of

conducting chit funds and to occupy the legislative field relating to such chit funds.

(Para 56)

Each and every aspect relating to the conduct of the chits as is covered by the State Act has been touched upon by the Central Act in a more comprehensive manner. Thus, on 19.08.1982, the Parliament in enacting the Central law has manifested its intention not only to override the existing State Laws, but to occupy the entire field relating to Chits, which is a special contract, coming under Entry 7 of List III. Consequently, the State Legislature was divested of its legislative power/ authority to enact Section 4(1a) vide Finance Act No. 7 of 2002 on 29.07.2002, save and except under Article 254(2) of the Constitution. Thus, Section 4(1a) became void for want of assent of the President under Article 254(2)." (Para 58)

**12.7** The complete code doctrine which stands highlighted as above, stems from the concept of federal legislative supremacy. In the realm of legislative field demarcated by the Constitution, the Parliament enjoys position of dominance and it is vested with supremacy as far as the field of legislation is concerned. The doctrine recognizes the field for the Union Legislature as a final authority to legislate in respect of such field. If the State law is in respect of the very field or subject matter which is fully occupied by the Central legislation and the operational ambit of such Central legislation evinces and intention of the Parliament to cover the area of the subject matter in its entirety, the State is prohibited to enter into the said legislative field. The emphasis in the occupied field concept is

on the "field occupied" and other considerations pale into insignificance once the parliamentary law is found to have been occupied the total field on the subject of legislation concerned.

### **Impugned Law and Central Legislations**

#### **(i) Securities Contract Act vis-à-vis Impugned Law**

13. Keeping the foregoing discussion as back-light, proceeding now to consider the different Central legislations with reference to which the impugned law is assailed as repugnant and therefore not constitutionally valid. The discussion hereinbelow would go to show as to how the impugned legislation becomes irreconcilable, and that it amounts to an impermissible inroad and interjection into the field occupied by the laws made by the Parliament on the subject-matter.

13.1 It is a major plank submission of petitioners that the impugned legislation stands in conflict with the Securities Contracts (Regulation) Act, 1956, in particular Section 21 and 21A of the Act were pressed into service which read as under.

**"20. Prohibition of options in securities.—(1)** Notwithstanding anything contained in this Act or in any other law for the time being in force, all options in securities entered into after the commencement of this Act shall be illegal.

(2) Any option in securities which has been entered into before such commencement and which remains to be performed, whether wholly or in part, after such

commencement, shall, to that extent, become void.

**21. Power to compel listing of securities by public companies.**—Notwithstanding anything contained in any other law for the time being in force, if the Securities and Exchange Board of India] is of opinion, having regard to the nature of the securities issued by any public company as defined in the Companies Act, 1956 (1 of 1956), or to the dealings in them, that it is necessary or expedient in the interest of the trade or in the public interest so to do, it may require the company, after giving it an opportunity of being heard in the matter, to comply with such requirements as may be prescribed with respect to the listing of its securities on any recognised stock exchange."

**13.1.1** The Listing Agreement covered under the Securities Contract Act has a statutory character for itself, the procedures and prohibitions prescribed under the Act in relation to the securities and dealing thereof are the effective measures contemplated and they are obligatory. The impugned law and the effect of its provisions can be said to have been in direct conflict with the provisions of the Securities Contract Act in such a way that both cannot stand together.

**13.2** In a commentary on Constitution of India by Durga Das Basu, 8<sup>th</sup> Edition, 2011, the author refers to English decision in **R Vs Justice of Middlesex [(1831) 2 B&Ad 891]** mentions one of the circumstances as inconsistency operating as an implied repeal of the Act—"If two statues give authority to two public bodies to exercise power which cannot consistently with the object of the Legislature co-exist, the



earlier must necessarily be deemed to have been repealed by the later statute."

**13.3** In a decision of Apex Court in **Union of India Vs C. Dinakar, IPS [(2004)6 SCC 118]** it was held that when Parliament passed an enactment prescribing procedure for selection to the post of Director of C.B.I. different from the procedure contained in the Rules of Delhi Police Special Establishment Act, 1946, the Rules stood impliedly repealed especially when they were inconsistent with the provisions of the Act.

**(ii) SEBI Act vis-a-vis Impugned Law**

**14.** The Securities Contracts (Regulation) Act and the SEBI Act closely interact in their provisions, operations and applicability. The requirements contained in both relating to the securities, etc., are inextricably inter-wooven.

**14.1** The Securities Exchange Act came to be enacted with a purpose to prevent undesirable transactions in the security. The law intends to regulate the business of dealing in the securities by providing for matters connected therewith. The law in its incident also subserves to protect the interest of the investors by its regulatory and punitive provisions. It is relevant to note that the Securities Contract Act and the SEBI Act closely interact in their function. The Legislature has in respect of several provisions applied doctrine of incorporation or doctrine of reference to apply the provisions of

Securities Contract Act and various definitions for the purpose of SEBI Act. The Securities Contract Act also interacts with Companies Act. This Act provides for listing of securities in the stock exchange, permissible conditions and various kinds of prohibitions.

**14.1.1** This Act provided for establishment of Board and intended to protect the interests of investors in securities. The Act seeks to promote development of and further to regulate the securities market and it regulates all matters connected therewith or incidental thereto. The statement of objects and reasons at the said central legislation inter alia mentioned that capital market has witness tremendous growth in recent times and there is an increasing participation of the public. It viewed that confidence of the investors in the capital market can be sustained by ensuring investors' protection. With this object, the Government decided to vest SEBI the statutory powers to deal with and regulate the matters relating to capital market and the affairs and transactions which take place in the capital market.

**14.1.2** Section 2(i) of the Act defines security and states that it has the meaning assign to it in Section 2 of the Securities Contracts (Regulation) Act, 1956. Sub-section (2) of Section 2 says that words and expression used and not defined in this Act but defined in the Securities Contracts (Regulation) Act, 1956 or the Depositories Act, 1996 shall have the meanings respectively assigned to them in that Act.

The law contains various provisions for establishment of Board, its function, the regulatory mechanism; it further provides the mechanism for registration of stock brokers and contains prohibitory measures and provisions against manipulative and deceptive devices to check and control insider trading, etc. There are provisions for penalty and adjudication in case of defaults and breach of the regulatory flatters. Section 29 empowers Central Government to make Rules in respect of the matters enumerated whereas Section 30 invests the Board with powers to make Regulations.

**14.1.3** Section 30 of the SEBI Act empowers the Board to make Regulations for the matters enumerated, of which what is provided in Clause (c) of sub-section (2) is relevant. Section 30(2)(c) says that the Board may make Regulations in respect of matters relating to issue of capital, transfer of securities and other matters incidental thereto and the manner in which such matters shall be disclosed by the companies under Section 11A.

**14.1.4** Section 11A may also be referred which empowers the Board to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities for the purpose of protection of investors. Under Section 11A(1)(a) he Board may specify by Regulations the matters relating to issue of capital, transfer of securities and other matters incidental thereto as well as the manner in which such matter shall be disclosed by the companies. Under sub-clause (b) the Board, may by general or

special orders, prohibit any company from issuing prospectus, offer document, etc., and soliciting money from public; it may also specify conditions in that regard. Sub-section (2) of Section 11A says that without prejudice to the provisions of Section 21 of the Securities Contracts (Regulation) Act, 1956, the Board may specify the requirements for listing and transfer of securities and other matters incidental thereto.

**14.1.5** In exercise of powers conferred under Section 30, the Board has framed the Regulations called the Securities and the Exchange Board of India (Issue of Capital and Disclosure Requirement) Regulations, 2009. They are statutory in nature and deal with the entire field relating to the issue of securities, its control, regulation, further prescribing common conditions for public issues, requirements in respect of such issues, provisions in general with regard to the issue of shares, securities and other market traded securities, the eligibility requirements; they deal with area of pricing in public issue, restriction on transferability, minimum requirements, the question of disclosure in respect of different kind of issues and all such connected and incidental matters and aspects. The Regulations are regulatory as well as prohibitory in nature.

**14.1.6** Regulation 24 of the aforesaid Regulations may be reproduced as it bears a striking relevance.

**"24. Alteration of rights of holders of specified securities.-**No issuer shall alter the terms (including

the terms of issue) of specified securities which may adversely affect the interests of the holders of that specified securities, except with the consent in writing of the holders of not less than three-fourths of the specified securities of that class or with the sanction of a special resolution passed at a meeting of the holders of the specified securities of that class."

**14.1.7** Chapter III of the Regulations contains detailed provisions regarding public issue, the eligibility requirement thereof, the conditions to be observed, etc. In other words, the Securities Act and the Regulations framed thereunder is a pervasive regulatory mechanism in the nature of statutory machinery which have laid down the legal provisions in the subject.

**14.2** It would be clear from the above discussion that the operation of the two laws namely Securities Contracts (Regulation) Act and the SEBI Act is in the very subject-matter area dealt with by the impugned legislation. The impugned law suffers from the vice of irreconcilable operability vis-a-vis the above parliamentary legislations. Similar would be the position when the impugned legislation is placed against the Companies Act.

**(iii) Indian Companies Act vis-à-vis Impugned Law**

**15.** Certain provisions of the Companies Act, 1956 may be considered in the context of the impugned legislation and its field. Section 55 of the Companies Act, 1956 enjoins that:



"55. A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus."

**15.1** Section 60, 61 and 117A may also be looked at.

**"60. Registration of prospectus**

(1) No prospectus shall be issued buy or on behalf of a company or in relation to an intended company unless, on or before the date of its publication, there has been delivered to the Registrar for registration a copy thereof signed by every person who is named therein as a director or proposed director of the company or by his agent authorised in writing, and having endorsed thereon or attached thereto-

(a) any consent to the issue of the prospectus required by section 58 from any person as an expert; and

(b) in the case of a prospectus issued generally, also-

(i) a copy of every contract required by clause 16 of Schedule II to be specified in the prospectus, or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof; and

(ii) where the persons making any report required by Part II of that Schedule have made therein, or have, without giving the reasons, indicated therein, any such adjustments as are mentioned in clause 32 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor.

(2) Every prospectus to which sub-section (1) applies shall, on the face of it,-

(a) state that a copy has been delivered for registration as required by this section; and

(b) specify any documents required by this section to be endorsed on or attached to the copy so delivered, or refer to statements included in the prospectus which specify those documents.

(3) The Registrar shall not register a prospectus unless

the requirements of section 55, 56, 57 and 58 and sub-section (1) and (2) of this section have been complied with and the prospectus is accompanied by the consent in writing of the person, if any, named therein as the auditor, legal adviser, attorney, solicitor, banker or broker of the company or intended company, to act in that capacity.

(4) No prospectus shall be issued more than ninety days after the date on which a copy thereof

(5) If a prospectus is issued without a copy thereof being delivered under this section to the Registrar or without the copy so delivered having endorsed thereon or attached thereto the required consent or documents, the company, and every person who is knowingly a party to the issue of the prospectus, shall be punishable with fine which may extend to fifty thousand rupees.

**61. Terms of contract mentioned in prospectus or statement in lieu of prospectus, not to be varied**

A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of, or except on authority given by, the company in general meeting."

**117A. DEBENTURE TRUST DEED**

(1) A trust deed for securing any issue of debentures shall be in such form and shall be executed within such period as may be prescribed.

(2) A copy of the trust deed shall be open to inspection to any member or debenture holder of the company and he shall also be entitled to obtain copies of such trust deed on payment of such sum as may be prescribed.

(3) If a copy of the trust deed is not made available for inspection or is not given to any member or debenture holder, the company and every officer of the company who is in a default, shall be punishable, for each offence, with fine which may extend to five hundred rupees for every day during which the offence continues."

**15.1.1** Section 62 of the said Act provides for payment of compensation to every person who subscribes for any shares or debentures on the faith of the prospectus for any loss or damage he may have sustained by reason of any untrue statement included

in the prospectus. Similarly, Section 63 of the said Act provides for criminal liability for mis-statements made in the prospectus. Section 72 of the Companies Act provides that:

"72. (1)(a) No allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally, and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the fifth day after that on which the prospectus is first so issued or such later time, if any, as may be specified in the prospectus:"

**15.2** Decision of the Supreme Court in **N.Parthasarathy Vs Controller of Capital Issues, [(1991) 3 SCC 153]** was relied on by the petitioners in the context of the above provisions to contend against the validity of the impugned legislation.

"Thus, it is evident from a consideration of the above provisions of the Companies Act that the terms of contract mentioned in the prospectus or the statements in lieu of the prospectus cannot be varied except with the approval of and on the authority given by the company in the general meeting. Therefore, the consent that was given by the Central Government nay by the Controller of Capital Issues, on a consideration of the special resolution adopted in the Extraordinary General Meeting of the shareholders of the company on August 28, 1989 cannot be varied, changed or modified both as regards the reduction of the amount of debentures as well as the purposes for which the fund will be utilised contrary to what has been embodied in the prospectus and approved by the Controller of Capital Issues on the basis of the special resolution adopted

at the general meeting of the shareholders of the company. Sub-section (6) of Section 3 of the Capital Issues (Control) Act, 1947 states that:

"3.(6) The Central Government may by order at any time

—

(a) revoke the consent or recognition accorded under any of the provisions of this section; or

(b) where such consent or recognition has been qualified with any conditions, vary all or any of those conditions:

Provided that before an order under this sub-section is made, the company shall be given a reasonable opportunity of showing cause why such order shall not be made."

### **Nature of the impugned legislation**

**16.** It is seen hereinabove that the impugned legislation read as a whole for the content and consequences of its provisions is about premature redemption of the Deep Discount Bonds. Upon a bare reading of the impugned Act extracted in whole above, it reveals to be providing for alteration and modification of the financial covenants and conditions which govern the issue of Deep Discount Bonds when they were floated by the Nigam. It substituted condition No.3 relating to the redemption of the Bonds by inserting condition No.3A as above. It was provided that notwithstanding anything contained in the original condition No.3 as well as in the terms regarding withdrawal in original condition No.9, the Bonds shall be redeemable at an earlier date with such deemed face value which the company namely SSNNL may

determine. The SSNNL was thus empowered to redeem the Bonds earlier to its actual maturity at a deemed face value not less than Rs.25,000/-as on 11<sup>th</sup> January, 2005. The SSNNL was enabled to publish the date for the purpose and the deemed face value by giving advertisement in the newspaper - English as well as Vernacular language. Section 3 of the Act bared the jurisdiction of the civil court to entertain any question arising out of any provision of the Act. The filing of civil suit and seeking injunction in respect of any action taken in pursuance of any condition of Bond was disallowed.

**16.1** Section 3A of the impugned legislation relating to redemption comes into direct conflict of Section 20 of the Securities Regulation Act. Section 2(h)(ii) of the Securities Contracts Act defines government securities. Section 20 provides for listing whereas Section 21 defines obligations of the parties and the authorities concerned to observe certain things.

**16.2** Importantly, Section 2(h) which contains definition of "Securities", include in 2(h)(ii) "Government Security". The Act defines the "Government Security" in Section 2(b) reading thus-"Government Security" means a security created and issued, whether before or after the commencement of this act, by the Central Government or a State Government for the purpose of raising a public loan and having one of the forms specified in clause (2) of section 2 of the Public Debt Act, 1944.



**16.2.1** When Government Security is included in the definition of "Securities" and the affairs and aspects relating to Government Security are governed by the Security Contracts (Regulation) Act, 1956, it produces a significant and far-reaching results not only considering that the impugned law is inconsistent and in conflict with the said Central law, but also that because of this, the contention of the State and the respondents that the impugned legislation attracts for its legislative field the "Public Debt of the State" can be said to be loosing its teeth, if at all there was any. Taking all these provisions of the Securities Contracts (Regulation) Act together as above, they operate to displace the legislative competence for the impugned Act.

**16.3** The conditions of the Prospectus of the Issue gives to the Bonds the status of promissory note. They are sought to be prematurely redeemed in breach of conditions. In that way, it also entrenched into the field of the provisions of the Negotiable Instruments Act. furthermore, it would be seen that Section 3A of the Act reduces the face value and gives power to the Nigam which is not only an excessive delegation but it is irrational because it leaves for the Nigam to take decision as to make saving and the extent of saving to be made for the State. Learned advocates for the petitioners were right in submitting that it was giving of uncontrolled discretion and power by virtue of which also, the provision of

Section 3A was rendered bad and ultra vires.

**16.4** The laws and regulations contained in the Securities Contract (Regulation) Act, SEBI Act and the Companies Act, 1956, few of which are referred hereinabove to demonstrate the irreconcilability with the legislation enacted for effecting premature redemption of the Bonds, do prescribe a statutory framework in respect of Issue and trading of the securities. The Agreements which are executed in relation to the subject, are statutory agreements at times. The Prospectus is also viewed as a statutory document. The discordance, the conflict and irreconcilability between the impugned State legislation and the Central laws above may arise in many ways and on several fronts not permitting obedience of provisions of one law without committing breach of the other law. As the Central laws operate pervasive in relation to the subject-matter and occupy the entire field, there is a clear situation of stand-off for the impugned law made by the State and it cannot stand constitutionally valid.

**16.5** It is crystal-clear on consideration of the various provisions of the Securities Contracts Act, SEBI Act and the Companies Act, there area of operation and the subject matter that deal with, comparing the same with the actual field which the impugned legislation seek to cover, it cannot be denied that the impugned law in its pith and substance, is a law enacted in respect of the

legislative field already occupied and operational of the abovesaid Central statutes. Once the field relating to the Bonds/Securities, and the regulatory aspect thereof and the dealing of such matters is occupied by the Parliament by enacting laws on the subject, the State could not be enacted the impugned legislation as it had no such legislative power. Applying the doctrine of occupied field, the impugned legislation is clearly repugnant to the Central statutes and therefore, the same is required to be treated as unconstitutional and de-hors the legislative powers of the State.

#### **Thin but Tight Line of Distinction**

17. The line of distinction are thin and often blurring in the concepts of encroachment by one Legislature over the field of other, inconsistency, conflict, repugnancy and the concept of occupied field. If the State Legislature has enacted a law which is otherwise in pith and substance falls within the legislative field earmarked for it, but while enacting such competent law, the same to some extent encroaches upon the law made by the Union Legislature and if such encroachment is incidental or negligible in its extent allowing both the provisions to stand together, the State law would not be repugnant. If the extent of encroachment or erosion effected by the State Legislature is of such nature that it gives rise to a clear conflict between two provisions, then the law made by the State Legislature cannot stand valid vis-a-vis law made by the Parliament. The clear and

direct conflict would in such case give rise to repugnancy. The term repugnant is ordinarily used with reference to the law enacted on the subject falling in the Concurrent List but since the repugnancy is a concept suggesting inconsistency and conflict between the State law and the Central law, it may arise in more than one ways and may often become traceable to the realm other than the Concurrent List. The repugnancy is a state and status of law made by the State Legislature vis-a-vis the law made by the Central Legislature, therefore its connotation may have other facets and folds which in terms of constitutionality require the State legislation to be voided against the Central legislation.

**17.1** It is the nature and not the extent of encroachment, which is material to judge whether law made by the State Legislature and the law made by the Parliament can stand together and can be reconciled, which is the real test to judge whether the law of the State Legislature can stand without being voided.

**18.** The doctrine of occupied field will entail pervasive effect. If the State Legislature has ventured to enact law in relation to the subject matter, the field of which subject matter has already been occupied by the Union legislations, State Legislature would not have legislative competency to legislate in that field. This doctrine apply where the law or laws made by the Parliament in their provisions vis-a-vis provisions of the State Legislature operate

in the field of the subject and they evinces intention of the Parliament to control and occupy the field. In that case, legislation made by the State cannot stand. State legislation would be divested from its legislative competency for entering into such occupied field and legislate for its own. This principle is something which displaces forever the right of the State Legislature to legislate in respect of a subject, for which the Central Legislature has already legislated to cover the entire field. When the doctrine of occupied field applies in a given case, the question of extent of encroachment loses its significance as irrelevant.

**19.** There are several aspects which bring out irreconcilability beyond repair between the two legislations which give rise to repugnancy and which do not allow the two legislations to stand together. These aspects and concepts are 'operational incompatibility', 'irreconcilability', 'occupied field', 'repealed by implication'. Viewed from the standpoint of any of the above yardsticks, the impugned legislation fails to stand the test of constitutionality.

**19.1** A jurisdictional view is also held that the concept of ultra vires is more fundamental than repugnancy. Ultra vires is something referable to incompetency, whereas repugnancy refers to inconsistency. The impugned law has to be declared ultra vires the Constitution for want of legislative competence by the State Legislature.



**20.** Though the learned counsel for both the sides canvassed their submissions and raised various contentions, since the Court has found the impugned legislation to be constitutionally invalid for want of legislative competence on the above delineated clear grounds, no need arose for dealing with all and other contentions. Accordingly we have not dealt with all the contentions.

**20.1** Various decisions were relied on by learned advocates for both the sides, of which the Court has referred to which are relevant after considering all the judgments cited.

### **Conclusion**

**21.** In view of all the aforesaid reasons and discussion, it has to be held that the impugned Sardar Sarovar Narmada Nigam Limited (Conferment of Power to Redeem Bonds) Act, 2008 does not fall within the legislative head or legislative field either under Entry 43 in the State List being 'Public Debt of the State' or under Entry 20 in the Concurrent List being 'Economic and Social Planning', to the Seventh Schedule of the Constitution nor it traces legislative field even by reading the said two Entries together. It is held that the impugned legislation is constitutionally invalid, for, the impugned legislation and the provisions thereof operate in the legislative field already occupied by the competent Central legislation, in particular Securities Contract (Regulation) Act, 1956, Security Exchange Board of

India Act, 1992, the Indian Companies Act, 1956 as the provisions of these Central legislations govern the matters and aspects sought to be dealt with and provided for by the impugned legislation. The State Legislature cannot claim and does not have the legislative competence to enact the impugned law. If the legislative head is to be traced for the impugned legislation, at the best, the same may be traced in Entry 7 in the Concurrent List for the reason that the impugned legislation and the provisions enacted therein deal with the special kind of contract which would be falling within the said Entry. But then even in this purview the State law fails to co-exist and stands in conflict with the Security Contracts (Regulation) Act. The impugned legislation could be traced for its legislative head at the best, to Entry 7 in List III-the Concurrent List to the Seventh Schedule of the Constitution, as the impugned legislation and the provisions enacted therein deal with the subject-special kind contract falling within that Entry. The impugned legislation, however in its pith and substance is a law in respect of any in connection with the Regulation of Securities and the governing mechanism therefor which are provided for by the aforesaid laws made by the Parliament. The provisions of the impugned legislation are irreconcilable with the Central legislation occupying the field. The impugned law made by the State Legislature and the laws made by the Union Legislature aforesaid, having regard to their subject matter area, nature and effect cannot stand together. The impugned

law cannot be obeyed without disobeying the Central legislations. Therefore the conclusion is that the enacting of impugned legislation amounts to an incompetent legislative exercise by the State Legislature. We declare that the Act is constitutionally invalid.

### **What consequential relief**

**22.** Adverting to the aspect of consequential relief which could be granted, the petitioners have prayed for further relief to pay remaining amount and/or to recoup the financial loss on account of early redemption of the Bonds. Though we have held the legislation to be unconstitutional, we cannot grant the consequential relief of paying the loss or damages as prayed for, because it would require leading of evidence and such prayer cannot be granted in writ jurisdiction. This is for the simple reason that the loss claimed to have been sustained, whether suffered or not and if suffered, the exact nature thereof cannot be considered unless the aspects of benefits realized or possible to be realized but for the premature redemption of the Bonds and due to early encashment effected which the Bond-holder has either accepted or accepted under protest, are gone into in their necessary details. This exercise pre-supposes going into facts. This fact-finding inquiry has to be upon evidence to be led in that regard. It is only when such claim is established upon such process, the question of consequential relief pursuant to the invalidation of the legislation concerned could be considered. The aspect of breach of terms and

conditions in relation to the Deep Discount Bonds would have to be gone into in the Suit in light of the factual details attendant to a particular individual case. However the bar provided under the impugned legislation under the Civil Court's jurisdiction and therefore institution of the Suit in relation to the Bonds, stands lifted as the Act is held unconstitutional. The Civil Court's jurisdiction would become available for going into in accordance with law including the law of limitation and other governing legal considerations, for an aggrieved party to have a recourse thereto. The additional relief which some of the petitioners have prayed may be considered in that way only. In writ jurisdiction, even after holding the legislation to be constitutionally invalid, we cannot advert to, much less grant the consequential relief.

**22.1** Even as regards the claim for consequential relief and availing the remedy of filing of Suit, it is required to be clarified, and we clarify here that a limited class of persons, and not all the Bondholders *in rem* would be entitled to file civil suit. The law of limitation has to be allowed its play which would bar the civil suit for all those Bondholders who have either accepted the redemption amount with or without protest and who have not challenged the law in question and have not filed petitions before this Court. Even amongst the petitioners in the present batch of petitions, it is clarified that only those petitioners who are before this Court and who have accepted the redemption amount of the Bonds under protest would be entitled to take such recourse. It is

further clarified that those Bond-holders, even though they have filed petitions to challenge the legislation but have accepted the redemption amount without protest and unconditionally, would not be entitled to file the civil suit for any consequential relief. We hasten to further add and clarify that even in respect of the aforesaid limited segment of petitioners/Bond-holders, we do not express any opinion on the merits of their claim for consequential relief which they may opt to agitate before the Civil Court.

23. All the petitions are allowed in terms and to the extent as above. Rule is made absolute in the respective petitions to the extent above.

**ORDER IN CIVIL APPLICATIONS**

In view of decision in the main petitions, Civil Application Nos.13982 of 2008 and 13983 of 2008 do not survive for any orders. Accordingly they are disposed of.

(JAYANT PATEL, ACJ.)

(N.V.ANJARIA, J.)

**FURTHER ORDER**

After pronouncement of the order, learned Advocate General as well as learned senior counsel Mr.Mihir Joshi appearing for State and SSNNL respectively, requested that the operation of judgment be stayed for some time so as to enable the State and SSNNL to approach the higher forum.

The aforesaid request is opposed by the learned advocates appearing for the petitioners



contending inter alia that when the Act has been declared as unconstitutional, its operation cannot be continued further and civil suit, if any to be filed, would take some time.

Considering the facts and circumstances, the operation of the judgment shall remain stayed for a period of eight weeks.

(JAYANT PATEL, ACJ.)

(N.V.ANJARIA, J.)

Anup

