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CASE COMMENTS

BHARAT FORGE, HUMPTY DUMPTY AND THE EMPEROR'S NEW CLOTHES

*Shyam Divan**

In the Spring of 1995 Justice Hansaria of the Supreme Court put a final polish to his opinion in the *Bharat Forge*[1] case. Both his colleagues on the bench, Justice Kuldip Singh, the senior most puisne judge of the court and the more recently appointed Justice Majumdar, had approved the ingenuity of Justice Hansaria's approach. An approach scarcely hinted at during arguments at the Bar, but invented, researched and developed by the Justice himself.

The *Bharat Forge* case will probably earn a passage or two in commentaries on statutory interpretation and emerge as a footnote in text books dealing with the municipal tax, octroi. However, the real significance of this judgment is not in what the court decides but in the wisdom it discards. For the judgment strays far from what many of us took to be rooted in our Constitution and fundamental to the business of our superior courts: The rule of law; the binding force of precedent; the constitutional mandate that no person may be taxed except with the authority of law; and the principle that in our republic the highest courts aid the citizen by upholding fundamental rights against state action and would never turn Art. 21 against a person to impose a tax.

Many courts will lean towards the treasury in a dispute over taxes: Judges are known to exercise their discretion in favour of government when the scales are evenly poised. Were this the route travelled by the *Bharat Forge* court, there would be no cause for alarm. But when a court grasps at an arcane, never-before-applied doctrine of *Scots* law - a doctrine so obscure that it is all but buried in Scotland itself - to saddle an Indian tax payer with a huge tax liability, there is reason for serious concern. One might well ask: In the wake of *Bharat Forge*, how secure is the Indian citizen from an illegal impost? If a Scots law doctrine can be so readily imported - without pleading or oral argument[2] - to prop an otherwise illegal levy, can relief

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1 *Municipal Corporation for City of Pune v. Bharat Forge Co. Ltd.*, (1995) 3 SCC 434. This judgment was followed by a short order dated 3rd May, 1995 dismissing the review petition filed by Bharat Forge. *Infra* n. 15.

2 Poona Municipal Corporation (PMC) relied on the Scots law doctrine of 'desuetude' for the first time in its written submissions filed after the hearing concluded. 'Desuetude' was not mentioned in any pleadings before the High Court or in the appeals filed before the Supreme Court. The doctrine was not urged in oral arguments at the Bar of the Supreme Court although the term was mentioned in passing.

ever be obtained from the courts? The *Bharat Forge* judgment deserves a hard look because it tears the fabric of settled tax jurisprudence and introduces a large measure of unpredictability in a field where certainty is of the essence.

THE CASE

'Octroi' derives from the Latin root 'auctorizare', meaning to authorise; an irony that will not be lost to readers as this story unfolds. It begins in August 1968 when a group of Bharat Forge officers hurried to their attorneys' office. They were indignant at the state government's move to withdraw an octroi exemption enjoyed by the company until then. Having tempted Bharat Forge to set up its forging plant and office at Mundhwa in the Poona cantonment with the promise of a 10 year octroi holiday, the authorities had gone back on their word before the decade was out. The octroi burden was certain to upset financial projections and depress the company's profits.

Delving into the records, the company's advocates discovered that the Poona Municipal Corporation (PMC), which was demanding and collecting octroi had no authority to do so. First, since the factory was located within the Poona cantonment (*not* Poona city), it was only the Cantonment Board that had the power to *levy* octroi under the Cantonments Act, 1924. The Board had not imposed octroi at the 1963 schedule of rates, which were the rates being applied to the goods imported by the company. Although the PMC had adopted the 1963 octroi schedule, that in itself was not enough since its jurisdiction was confined to Poona city. In the absence of a Cantonment Board resolution, there was no imposition or levy of octroi at the 1963 rates in the cantonment. Second, mandatory procedures for imposing fresh taxes in a cantonment, including the inviting of objections from the public and prior central government sanction, were not complied with when imposing the 1963 octroi rates. Third, the PMC had no authority to collect the octroi on behalf of the cantonment. Both statutes governing the municipal bodies required a written contract empowering collection. Indeed, Rule 3 of the PMC Octroi Rules provided that the octroi limits of the PMC would extend beyond the city to the Poona cantonment only where a statutory agreement was entered into between the PMC and the Board. Plainly, in the absence of a statutory contract, the collection of octroi by the PMC was illegal.

In February 1969 the company petitioned the Bombay High Court for a writ to strike down the illegal levy and collection of octroi by the PMC. The PMC and the Board resisted the action but after a lengthy hearing in 1979, the High Court upheld the company's contention. The court found that in the absence of any valid imposition at the 1963 rates, the schedule that applied in the cantonment was the previous lawful imposition notified in the Gazette in 1918. *Bharat Forge* was liable to pay octroi at the far lower 1918 rates and not under the 1963 schedule.[3]

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3 By the time the case was heard finally by the High Court the issue regarding the 10 year tax holiday was decided in favour of the company in view of the Supreme Court's decision in *Poona Municipality v. Bijlee Products (India) Ltd.*, AIR 1979 SC 304. However, the fundamental issue whether the 1963 rates could be applied to Bharat Forge remained open.

APPEAL TO THE SUPREME COURT

In 1981, the PMC and the Board appealed to the Supreme Court. Fourteen years later in March 1995, it reversed the High Court and foisted a 20 year tax burden on Bharat Forge running into several crores of rupees. According to the Supreme Court, even though there was no Cantonment Board resolution imposing octroi at the 1963 rates; no statutory contract between the PMC and the Board in respect of collection; and no compliance with the procedure for imposing fresh taxes under the Cantonments Act, 1924; the levy and collection of octroi at the 1963 rates still was backed by the authority of law. It is to this extraordinary judgment of the Supreme Court that we next turn.

To support the tax imposed in 1963, the Supreme Court resurrected a defunct general order issued in the previous century. On 12th March 1881, the Bombay Government with the previous sanction of the Governor General in Council, levied octroi duties in the Poona cantonment. The notification imposed:

> Octroi duties *at the rates for the time being leviable and in respect of the several articles for the time being dutiable* in the Municipality of Poona when such articles are imported into the cantonment from any place situate without the limits of the said Municipality.

The 1881 scheme was re-adopted with modification in 1883 and again in 1891. In 1918, the scheme was abandoned. The Poona cantonment adopted and published a schedule of its own octroi rates that were different from those in force in Poona city. The new octroi rates, introduced after several months of deliberations between the governments of India and Bombay and the cantonment authorities, were a part of a new tax regime contained in four sequential notifications. The 1918 notifications completely severed the link between the cantonment and the city with regard to the earlier common octroi rates. Goods brought into the cantonment were now to be taxed at the rates in the cantonment Schedule. As the Supreme Court held, the 1918 notifications *repealed* the 1881 common octroi levy in the city and the cantonment.

A NEW PATH CALLED DESUETUDE

To overcome the Poona cantonment's failure to adopt the 1963 PMC octroi rates, its lawyers argued that the 1881 common octroi levy continued despite the 1918 notifications. They asked the court to disregard the 1918 octroi schedule, *claiming that it was never implemented by the cantonment administration*. The executive decision not to enforce the 1918 notification rendered it 'still born'. Supporting this submission the PMC mentioned[4] the doctrine of desuetude and referred to Francis Bennion's text on *Statutory Interpretation*.[5] Bennion, the only authority cited by the PMC, says this under the heading 'Desuetude':

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4 *Supra* n. 2.

5 F.A.R. Bennion, *Statutory Interpretation: A Code* (1992).

> An enactment contained in an Act does not become inoperative through lack of use or the passage of time. This applies even though the enactment is disobeyed over a long period, and not enforced. Once in force, it remains law until repealed.[6]

He then elaborates:

> Desuetude is a legal process by which, through disobedience and lack of enforcement over a long period, a statute may lose its force without express or implied repeal by Parliament. The doctrine of desuetude does not apply to United Kingdom Acts. This is salutary, since otherwise an enquiry would be needed before the subject could know whether or not an apparent Act bound him. The idea that an Act need not be applied if it had never been enforced was put forward in the fourteenth century, but was later rejected.[7]

Clearly, Francis Bennion would have given short shrift to the PMC thesis that the 1918 statutory notifications could be disregarded due to non-implementation. And so too, one might have thought, would an Indian court.

The Bennion view rejecting desuetude has a parallel in Indian administrative law. The Supreme Court has consistently held that an executive decision or administrative practice cannot supersede or override a statutory rule or notification.[8] Applying this principle, the court should have turned down the PMC plea. Instead, it chose to pay lip service to *Mahendra Lal Jaini*, cautioning that "it would be hazardous to allow an executive authority to obliterate a statutory notification" and then proceeded to permit just that: Obliteration of the 1918 statutory notification because Poona octroi officials since long had adopted a contrary practice.

What impressed to the Supreme Court was not the binding precedent in *Mahendra Lal Jaini* nor the statement of law in Bennion's text nor even the wisdom of his commentary, but a footnote to his text, which read:

> Under Scots law the doctrine does apply to Acts of the Parliament of Scotland.[9]

Encouraged by this footnote, the Justices launched on some research of their own. The judgment quotes several passages on the doctrine of desuetude which were neither cited nor referred to at the Bar. After a lengthy discussion, the court said:

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6 *Ibid.* at 211.

7 *Ibid.* at 212.

8 *Mahendra Lal Jaini v. State of Uttar Pradesh*, AIR 1963 SC 1019, 1963 Supp (1) SCR 912; *K.M. Chikkaputtaswamy and Others v. State of Andhra Pradesh and Others*, 1985 (3) SCC 387; *State of M.P. and Another v. Municipal Corporation, Indore*, 1987 (Supp.) SCC 748; *C.L. Verma v. State of Madhya Pradesh and Another*, 1989 (Supp.) 2 SCC 437.

9 Bennion, *supra* n. 5 at 212.

> Though in India the doctrine of desuetude does not appear to have been used so far to hold that any statute has stood repealed because of this process, we find no objection in principle to apply this doctrine to our statutes as well. This is for the reason that a citizen should know whether, despite a statute having been in disuse for long duration and instead a contrary practice being in use, he is still required to act as per the 'dead letter'. We should think it would advance the cause of justice to accept the application of doctrine of desuetude in our country also. Our soil is ready to accept this principle; indeed, there is need for its implantation, because persons residing in free India who have assured fundamental rights including what has been stated in Art. 21, must be protected from their being, say, prosecuted and punished for violation of a law which has become 'dead letter'. A new path is, therefore, required to be laid and trodden.

Treading this 'new path', the court found that since the 1918 statutory notifications were not implemented by the city administrators, the 1918 notifications stood 'quasily repealed' by the process known in Scotland as desuetude.

THE LAW IN SCOTLAND

The irony is – there is *no such doctrine in Scotland*. Desuetude in Scots Law applies to ancient (pre-1707) statutes, which in spirit declare the general custom of the time. When the community adopted a contrary custom over a long period of time, the old statute lost the sanction of the community and was considered repealed by desuetude. For instance, statutes that relate to the observance of Sundays as days of rest and prayer and prohibiting other activities, have come up most frequently in litigation. *Bute v. More*[10] was about keeping a shop open on Sundays and *Brown v. Magistrates of Edinburough*[11] pertained to running cinemas on Sundays. Summarizing the position in Scotland, Mr. Nimmo Smith Q.C., member of the Scottish Law Commission says:

a) The doctrine of desuetude applies only to Acts of the Scottish Parliament enacted prior to the Treaty of Union in 1707. It does not apply to post-1707 Acts of the United Kingdom Parliament, even those which extend only to Scotland.

b) The doctrine is principally of historical and academic interest and it is highly unlikely that it will ever be applied in future cases in Scotland.

c) The doctrine applies to statutes affecting the personal conduct of individuals as members of the community where there has been a persistent contrary custom of the community. It operates so as to excuse compliance with the statute thus repealed and never to secure performance of an act.

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10 (1870) 9 M. 180.

11 (1931) S.L.T. 456.

d) The doctrine has never been applied, nor by its nature could it ever apply, to a statute regulating a public authority, to a statute relating to taxation or similar exactions.

e) The doctrine, being essentially destructive, could not operate so as to repeal a statute which in turn repealed an earlier statute, let alone revive the earlier statute.[12]

In the opinion of Mr. Nimmo Smith, "If a set of facts similar to those in the [*Bharat Forge*] case came before the Scottish Court any argument that the Doctrine of Desuetude was applicable *would be rejected out of hand... None* of the features in support of the application of the doctrine would be present and indeed the opposite is the case."

Emphasizing the historical basis of the doctrine of desuetude, Prof. Maher of the University of Strathclyde, Glasgow, says:

> It is little appreciated that desuetude in Scots law has its rationale solely in terms of the nature and function of a style of statute law which has long disappeared. Up until the 15th and 16th Centuries the primary source of law was the established practices, or 'custom', of the community. Statutes were not perceived as a method of creating new law. Rather the function of statutes was that of expressing, or restating, custom but statutes did not attempt to alter community custom in any fundamental way..... If community practice was in a form directly contrary to that stated in a statute it followed that the statute had wrongly described what that practice was. On this basis such a statute had failed in its purpose and, therefore, failed to count as law.
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> "During the 17th and 18th Centuries the role of statute as a source of law changed into something akin to its modern purpose. Statutes were now regarded as expressing the will of their enacting body or person; they were intended to create new law rather than to reflect existing community practice. On this view of the role of statutes, there was no scope for any doctrine of desuetude because contrary community practice did not indicate any 'failure' in the purpose of the statute.... It is accordingly anachronistic in the extreme to apply a principle such as Scots doctrine of desuetude to modern statutes which have a quite different function from the old Scottish statutes. It is only in relation to those old style of statute that desuetude in Scots law has its historical rationale.[13]

Mr. Nimmo Smith and Prof. Maher are categorical in their views. The Supreme Court completely misunderstood and misapplied the Scots law doctrine of desuetude.

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12 The expert opinions of Mr. Nimmo Smith and Prof. Maher on Scots law were filed by Bharat Forge in the Supreme Court along with its review petition. This was the first opportunity the company had for explaining the true scope and meaning of the doctrine.

13 *Id.*

A Scottish judge would never apply the doctrine to a modern taxing statute. The Supreme Court nevertheless did, giving its own meaning to the term, "desuetude". There is perhaps one authority that might justify this method of construction.

> "There is glory for you", said Humpty Dumpty.
>
> "I don't know what you mean by 'glory' ", Alice said.
>
> Humpty Dumpty smiled contemptuously. "Of course you don't – till I tell you. I meant, 'there's a nice knock-down argument for you!' "
>
> "But 'glory' doesn't mean 'a nice knock-down argument' " Alice objected.
>
> "When *I* use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."[14]

REVIEW: THE UNKINDEST CUT

But there is far more to this case than Humpty Dumpty jurisprudence. Bharat Forge in its review petition urged the Supreme Court to reconsider the matter in light of the expert opinions of Mr. Nimmo Smith and Prof. Maher. Here was an opportunity to correct the misstatement of Scots Law and the grave injustice in retrospectively applying a misstated principle. The Court, however, was not impressed. The judges claimed "even if the aforesaid opinions be correct, in our judgment the applicability of doctrine of desuetude is not founded on Scottish law... as we accepted the application of this doctrine keeping in view Art. 21 of the Constitution also, the type of which provision is not known to Scottish law".[15] This is the unkindest cut of all.

No issue of Art. 21 arose in the case. None was raised in the pleadings, oral arguments or written submissions. Not once during the hearing was there any mention of Art. 21 from the Bench or by counsel for the parties. Important as these factors are, they pale in the face of the real issues: How can a court entrusted under the Constitution to protect the fundamental right to life and liberty, turn around Art. 21 to foist a tax liability on an Indian company? Is Art. 21 meant to shield an illegal impost by the state? Should Art. 21, the citizen's bulwark against State lawlessness,

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14 L. Carroll, *Through the Looking-Glass*, quoted by Lord Atkin in *Liversidge v. Anderson*, (1942) AC 206 at 245.

15 The full text of the order dated 3rd May, 1995, dismissing the review petition reads:

> "1. We have perused the petitions for review; so also the considered opinions of two expert lawyers of Scotland, according to whom if a case of the present nature would come before Scottish Courts, the argument that the doctrine of desuetude was applicable "would be rejected out of hand", as put by Mr. W.A.N. Smith, Q.C.
>
> 2. Even if the aforesaid opinions be correct, in our judgment on applicability of doctrine of desuetude is not founded on Scottish law, as would be apparent from what has been stated in paragraphs 31 to 33 of the judgment; and as we accepted the application of this doctrine keeping in view Art. 21 of the Constitution also, the type of which provision is not known to Scottish law, we reject the review petitions."

be used to permit tax collectors to garner revenue in excess of notified rates? There is little to commend in the approach of the *Bharat Forge* court and much to condemn in it. The judgment deserves to be quickly overruled or, at the very least, distinguished to death.

OVERLOOKING STATUTES

Quite apart from the 'desuetude' theory, the Supreme Court's reasoning is seriously flawed. Assume desuetude was correctly applied by the court and that by a judicial sleight of the hand, the Poona Cantonment's 1918 schedule of rates fell by the wayside due to quasi-repeal. By itself, this would *not* revive the 1881 scheme which introduced the joint levy of octroi in the cantonment and the city. This is because the 1918 notifications repealed the 1881 notification and the joint levy scheme, therefore, stood effaced as soon as the 1918 notifications came into force. Sections 6 and 7 of the General Clauses Act of 1897 provide that the repeal of a law will not revive an older law which was not in force at the time of repeal. By holding that the 1881 scheme "held the field" upon the quasi-repeal of the 1918 notifications, the Supreme Court went against the express provisions of the General Clauses Act. There is no discussion on the General Clauses Act in the main judgment or in the order dismissing the review petitions.

One of the principal arguments urged by the company was that the PMC had no power to collect octroi on behalf of the Cantonment Board because Rule 3 of the PMC octroi Rules defined the octroi limits as the limits of Poona city. The rule mandates that a statutory contract must be executed between the PMC and the cantonment authorities, if collections are to be made by the PMC on behalf of the Board. No such statutory contract existed, supporting the company's stand. The court, however, side-stepped the company's objection by not dealing with it at all.

THE MISREADING OF PRECEDENT

The Supreme Court's treatment of binding precedent in the *Bharat Forge* case requires close examination. Many judgments were cited at the Bar, but most remarkable is the Court's treatment of two of its previous decisions: *Dhrangadhra Chemical Works Ltd. v. State of Gujarat*[16] and *Amalgamated Coalfields Ltd. v. Janapada Sabha*.[17] Citing these authorities, the company urged the Supreme Court to invalidate the demands raised by the PMC since the statutory procedure under the Cantonments Act was not followed before imposing octroi at the enhanced rates prescribed in the 1963 schedule. Both judgments hold that the procedure prescribed under the governing statute must be strictly followed when increasing a tax and any infirmity in complying with the procedure would render the levy invalid.

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16 (1973) 2 SCC 345.

17 (1963) Supp. 1 SCR 172.

Dealing with *Dhrangadhra Chemical Works*, the *Bharat Forge* court twice recorded that this judgment was delivered by a two-judge bench of the Supreme Court. This is incorrect, and the case report shows that three judges, namely, A.N. Ray, I.D. Dua and K.K. Mathew, JJ. constituted the bench which decided the matter. The *Dhrangadhra* decision was binding on the *Bharat Forge* court which also comprised of three judges. The *Bharat Forge* court distinguished the judgment on the ground that in *Dhrangadhra* "the Municipality's increase of octroi was its first act" unlike the situation in the *Bharat Forge* case, where octroi had already been imposed and the rate was merely being increased. Plainly, this ground for distinguishing *Dhrangadhra Chemical Works* is wrong. The *Dhrangadhra* judgment is short and crisp, covering less than 8 pages. In it, on no less than six occasions the judges mention that the impugned levy was *not* a first imposition (as incorrectly stated by the *Bharat Forge* court) but was an *enhancement* by 50 per cent of the prevailing octroi rates. Consider these excerpts from the judgment: (a) "the Municipality had *further increased* the octroi by 50 per cent with effect from July 1, 1953" (para 2); (b) "The appellant had raised three contentions before the High Court, namely,.... that the *enhancement* of octroi by 50 per cent from July 1, 1953, was illegal" (para 3); (c) "The Municipality has no power under the Rules to alter the Rules imposing the levy so as to *enhance* it. The High Court was also of the view that the Municipality had no power to *impose* or *enhance* the rate of octroi under the Rules" (para 6); (d) "This would seem to indicate that the Municipality purported to *enhance* the octroi under the Rules *as octroi had already been levied under the Rules*" (para 7); (e) "No objection was invited to the rules as required. Thereafter the proposal to impose octroi *at the enhanced rate* was finalized." (para 11); (f) "The Appellant can take just exception only to the extent of one-third of the amount shown in the demand notice as that alone represents the 50 per cent increase. In the result, we quash the demand notice to the extent of the *50 per cent increase*" (para 18).

Clearly, the impugned increase of octroi in *Dhrangadhra* was *not* the Municipality's first act. So much for the Supreme Court's reasoning in distinguishing *Dhrangadhra*.

The Supreme Court used the same means for distinguishing the constitution bench judgment in *Amalgamated Coalfields*. Here again, on the court's reading of the precedent, if found that the constitution bench was not dealing with an increase in the rates of an existing tax but was dealing with a first imposition of a tax. Yet again, the reasoning holds no water. At several places in the *Amalgamated Coalfields* judgment the constitution bench clearly records that the impugned levy pertained to an *increase* in the rate of the coal tax from the original 3 pies per ton to 9 pies per ton. In the discussion at pages 193-195 of the Supreme Court Reports, the court repelled the Janapada Sabha's contention that the statutory taxing procedure need be followed only for the first imposition, and held that every increase in the rate of tax, including the impugned enhancement, would amount to a fresh imposition requiring the statutory procedure to be strictly followed. The constitution bench struck down the increased levy and held that the government was entitled to collect tax at the old rate of 3 pies per ton. The *Amalgamated Coalfields* court concluded that if the

Janapada Sabha "intends to increase the rate of tax it must follow the procedure prescribed...," – the very argument urged by Bharat Forge.

Nothing in *Dhrangadhra Chemical Works* and *Amalgamated Coalfields* supports the Supreme Court's strained attempts at distinguishing these binding precedents by attributing 'facts' to those cases that were contrary to those recorded in the judgments themselves. This casual treatment of precedent by the Supreme Court is unconvincing. Indeed, the manner in which the Bharat Forge court went about its business casts a shadow across the rule of law.

RULE OF LAW

The rule of law is fundamental to our constitutional scheme of governance, and one of its basic tenets is the principle of legal certainty. This is the doctrine that laws should be prospective, open and clear so that every citizen may foresee the legal consequences of his or her actions. Now consider what the *Bharat Forge* court did in its anxiety to validate the impost. It clutched at an alien doctrine from Scotland which was neither pleaded nor orally argued. It acknowledged that the doctrine had never before been applied in India, but nevertheless applied it retrospectively to Bharat Forge, foisting a tax liability running into several million rupees. It justified the impugned levy on an understanding of Scots law which was completely incorrect. After the hearings concluded and without putting any questions to counsel on the point, the judges did personal research to invent their own 'desuetude' theory. When confronted with the expert Scots Law opinions on review, the court backtracked and justified its decision on the basis of the fundamental right to life and liberty guaranteed under Art. 21 of the constitution, although Art. 21 was never urged and never arose for consideration in the case. It used Art. 21 to foist a liability running into tens of crores of rupees on an Indian taxpayer after assuming that Scots law would not uphold such a levy. It declined to vigorously apply the settled principle of Indian administrative law which prevents an administrative decision from overriding or superseding a statutory notification. It casually discarded binding precedents by attributing alien 'facts' to those cases. The black letter provisions in the PMC Octroi Rules as well as the General Clauses Act were ignored, although arguments were urged by counsel at the hearing.

It is difficult to reconcile such a judgment with the principle of legal certainty, which is embedded in the rule of law. Indeed, if these are to be the principles applied to clothe judgments of the court, the day is not far when what the boy said about the Emperor's new clothes, will be said of our Supreme Court.