

(2007) 03 KAR CK 0006

In the Karnataka High Court

Case No : Writ Petition No's. 42570, 48016 of 2004, 48015 of 2004, 45866 of 2004, 48389 of 2004, 49768 of 2004, 8224 of 2005, 7844 of 2005, 7843 of 2005, 6615 of 2005, 5467 of 2005, 3129 of 2005, 65 of 2005, 62 of 2005, 1606 of 2005, 67 of 2005, 47746 of 2004, 4838

Bharat Earth Movers Ltd.

APPELLANT

Vs

The State of Karnataka and Others

RESPONDENT

Date of Decision : 29-03-2007

Acts Referred:

Constitution of India, 1950 — Article 301, 304 (a), 304 (b)
Karnataka Special Tax on Entry of Certain Goods Act, 2004 — Section 3, 4, 5

Citation : (2007) 3 MPHT 69

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : K.P. Kumar, T. Suryanarayana and D. Prashanth Kumar, for King and Partridge etc. etc, for the Appellant; Udaya Holla, General and Niloufer Akbar, AGA etc. etc., for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—Writ petitioners are all persons who come within the definition of "assessee" as defined u/s 2(1)(a) of the Karnataka Special Tax on Entry of Certain Goods Act, 2004 [Karnataka Act No. 29 of 2004] [for short, the Act], who are complaining of the liability for payment of tax created in terms of the charging Section - Section 3 - of the Act, which reads as under:

3. Levy and collection of tax- (1) Subject to other provisions of this Act, there shall be levied and collected a tax on the entry of any notified goods into any local area for consumption, use or sale therein, on the value of the notified goods at the rate specified in respect of such goods under the Karnataka Sales Tax Act.

(2) The tax shall be payable by an importer in accordance with the provisions of this Act or the rules made thereunder.

to be a tax levied by the Karnataka State in violation of the provisions of Part-

XIII of the Constitution of India; that the levy of such a tax directly on goods brought from outside the state and when it enters any local area is in the nature of a restriction or curb placed on the inter-state movement of goods in violation of the mandate of Article 301 of the Constitution of India and therefore is unconstitutional.

2. The petitioners have also challenged such a levy on only goods brought from outside the State, as such levy is made payable by an importer who is a person who causes the entry of goods into the local area from any place outside the State for consumption or use therein and the levy being confined to only on persons who are importers, it is also discriminatory. It is the version of the petitioners that such a levy clearly violates the provisions of Article 304(a) of the Constitution of India. It is also contended that the levy of this nature only on goods brought from outside the State and while in transit is a levy which is a clear obstruction for movement of goods and being not a regulatory measure is also in violation of the provisions of Article 304(b) of the Constitution of India. It is further contended that assuming that the levy is a regulatory levy, without conceding the same, even then the provisions of the Act are unconstitutional for the reason that the requirement of the proviso to Article 304(b) of the Constitution of India i.e. the requirement of obtaining the previous sanction of the President before the introduction of the Bill leading to the Act having not been complied in the present case.

3. It is on such premise a declaration is sought for declaring the provisions of the Act to be unconstitutional, unenforceable and for quashing the assessment orders, demand notices, show cause notices and all other proceedings initiated under the Act for the purpose of enforcing the liability in terms of Section 3 of the Act. A prayer is also made for refund of tax already paid as a consequence to the granting declaratory relief and quashing the assessment orders etc.

4. Writ petitions having been admitted, State is put on notice and the respondent-state has sought to defend the validity of the provisions of the Act. Statement of objections, additional statement of objections, affidavits are all filed.

5. Essential defence put forth on behalf of the State is that the levy is in the nature of a compensatory levy and therefore it is out of the purview of Part-XIII of the Constitution of India itself. It is contended in this regard that the revenue raised from the levy of tax of this nature on the importers is broadly equivalent to the value of the facilities such as roads, lighting facility, drainage etc., provided to the importers; that providing such facilities costs considerable amount to the State; that it is estimated that 30% of such facilities are availed of by persons like the petitioners who are assesseees under the provisions of this Act and as the estimated revenue from the Act being broadly equivalent to 30% of the total expenditure incurred by the State for providing such basic essential facilities, the levy is more in the nature of a compensatory levy and therefore it cannot be said to be either a discriminatory levy or an impeding levy.

6. It is alternatively contended that a levy of this nature is not a discriminatory levy for the reason that while the class of tax payers who are assesseees under this Act and who bring the notified goods into the local areas within the State for the first time from outside the State of Karnataka, having not been subjected to any other levy, on such goods in the State, such persons steal a march over other persons who had to purchase the goods within the State before bringing them into the local area in the course of which they will have to pay sale tax or any other local tax and therefore the Legislature thought it fit to bring about a fair balance or to ensure that neither class gets an undue advantage in the matter carrying of trade, business in the State, has subjected the class of tax payers who are assesseees under the Act for achieving an equalizing effect in the matter of tax liability having an impact on the trade and business in the State, so that the persons like the petitioners who are importers and other persons who are non-importers receive an even treatment at the hands of the State. It is also urged in support of this contention that the equalizing effect can be achieved even if the levy is imposed under the present Act in respect of the levies imposed under the other enactments on goods which are of similar nature, produced within the State or purchased within the State but brought into the local area within the State and the liability towards the payment of entry tax under the present enactment being one to compensate or to ensure that persons like the petitioners do not steal an unfair advantage over other persons who are liable to pay tax under the other enactments within the State, the effect being one to remove the inequalities and therefore the levy is a non-discriminatory levy.

7. One another contention urged is that when once the State is able to show that the levy of tax by the State legislature having competence to make a law is not a discriminatory levy, as indicated in Article 304(a) of the Constitution of India and Article 304(a) being in the nature of an exemption to Article 301, so long as the requirements indicated in Article 304(a) are complied and the moment it is demonstrated by the State that the levy is a non-discriminatory levy and being a taxing statute, there cannot be any further examination of the validity of the Act or its provisions on the touchstone of Article 304 of the Constitution of India. It is for this reason the state contends that when once the state is able to show that the levy of tax u/s 3 of the Act is a non-discriminatory levy, there is no further requirement on the part of the State to still demonstrate that the effect of such levy is either regulatory or that the previous sanction of the President had been obtained prior to the introduction of the Bill in the state legislature. It is on such premise, the state has sought to defend the provisions of the Act.

8. These are the broad parameters of the dispute involved in this batch of writ petitions.

9. On behalf of the writ petitioners Sri Navroz H. Seervai, learned Senior Counsel led the arguments, supported by Sri G. Sarangan and Sri K.P. Kumar, learned Senior Counsel as also Sri Venkatesh and Sri R.V. Prasad. On behalf of the respondents-state, Sri Udaya Holla, learned Advocate General has made

elaborate submissions, stoutly defending the provisions of the Act.

10. It is on such basic aspects, the learned Counsel for both the parties have made elaborate submissions with varying hues and shades, deriving support from a good number of judgments rendered by the Supreme Court and a few more judgments of the High Courts, touching upon the effect of Part-XIII of the Constitution of India on taxing statutes and other laws.

11. I have heard Sri Navroz H. Seervai, learned Counsel for the petitioners and Sri Udaya Holla, learned Advocate General on behalf of the State at some length and the matter had been reserved for orders and on examining the pleadings, rival submissions that were urged in support of the parties, on examination of the provisions of the Act, Constitutional provisions and the authorities relied upon by the learned Counsel for both the sides, I proceed to pass the judgment as under.

12. Though it is more than 56 years of working of our Constitution and though the provisions of Part-XIII of the Constitution of India was subject matter of discussion, interpretation and decisions not only by High Courts but even by the Supreme Court from the very inception of the Constitution of India and even after a good number of judgments rendered by the Supreme Court on the provisions of Part XIII of the Constitution of India, the area is not clear. The scenario is messy, there is considerable scope for divergent views if not confusion and the last word on the understanding of the provisions of Part-XIII is yet to be uttered.

13. It is taking advantage of this state of affairs that the learned Senior Counsel appearing for the petitioners and the learned Advocate General have sought to project before the court that their respective version is the proper understanding of the provisions of Part-XIII of the Constitution of India and the authorities governing the interpretation of the Articles occurring in Part-XIII of the Constitution of India and for urging to accept their respective versions as the correct exposition of law, underlining the provisions of Part-XIII and the principles interpreted, evolved and laid down, as the touchstone to examine the validity of the provisions of the Act.

14. The areas where there is consensus, where there is scope for divergent views or conflicting views, the areas which appear to be not covered by any authentic or emphatic judgment, areas which appear to be not touched upon but present for examination, can be on a broad conspectus demarcated as under:

i) Part-XIII of the Constitution of India is a limitation/check on the Legislature power of the State Legislatures. The laws made by the State Legislatures have to necessarily answer and conform to the requirements of Part-XIII of the Constitution of India. No absolute immunity can be claimed to any law made by the Parliament from the applicability of the provisions of the Part-XIII of the Constitution of India.

ii) While under Article 301 of the Constitution of India, trade, commerce and intercourse is sought to be made free throughout the territory of India, certain exceptions are carved out under Article 302, where under the Parliament has enabling power to impose restrictions on such trade, commerce and intercourse whether between one State and the other or within the State, if so required in the public interest, subject to the provisions of Article 303 and the other exception being under Article 304(a), levy of any tax on goods imported from other states, if tax is imposed on like goods produced or manufactured within the State, so long as it does not result in discrimination in the levy of tax on such goods and further so long as the restriction on the free movement is a reasonable restriction and in public interest with the previous sanction of the President to the Bill [Article 304(b)].

The above are areas of clarity and certainty with no divergence.

iii) Whether Article 304 is a relaxing provision from the rigour of the application of Article 301 or Article 304 itself is a restricting provision on the legislative power of the State is one area of conflicting and divergent views.

iv) Another area of divergence in views is the manner in which the levy under a taxing statute can meet the accusation of discrimination, with one school of thought taking the view that the avoidance of discrimination should be demonstrated under the provisions of the very enactment in respect of levies on imported goods vis-a-vis goods produced or manufactured locally, the other school of thought is that the vice of discrimination can be avoided by way of impact or as a result of working of various levies under different enactments on similar goods, i.e. if a combined effect of the levies under different enactment, brings about parity on the sum total of the levies on imported goods and the similar goods produced or manufactured locally, even then discrimination is avoided.

v) The third area of divergence of views is the manner in which the provisions of Articles 304(a) and 304(b) operate as to whether a taxing statute is still required to conform to the requirements of Article 304(b) of the Constitution of India, even after satisfying the test of non-discrimination under Article 304(a). While one school of thought as urged in the present cases by the learned Advocate General is that when once the State is able to make out a case of non-discrimination under Article 304(a), nothing further is required to be done by the State, the other school of thought as propounded by Sri Navroz H. Seervai learned Senior Counsel appearing for the petitioners is that the two situations operate independently and even after satisfying the requirement of Article 304(a) in respect of a levy which can result in a restriction on the movement of goods, it has to still answer the requirements of Article 304(b) and by demonstrating that the restriction is a regulatory restriction in public interest and further the Bill has also received the previous sanction of the President.

vi) Yet another area of controversy is as to the meaning of the compensatory

levy. Here again, extreme positions have been taken by the teamed Senior Counsel Sri Seervai on behalf of the petitioners and Sri Udaya Holla, learned Advocate General, appearing on behalf of the State. While the stand of the petitioner or the submission of the learned Senior Counsel appearing for the petitioners is that no exclusive or corresponding service is provided to the class of tax payers who were assessed under the Act to the exclusion of other tax payers and therefore the levy is not a compensatory levy, the contention urged by the learned Advocate General is that realization by levy under the Act i.e. the net revenue under the Act being roughly equivalent to 30% of the expenditure incurred towards infrastructure provided to trade and commerce and the 30% of the trade and commerce representing such activity by import of goods, the levy is only a compensatory levy and therefore it does not even attract the application of Part-XIII of the Constitution of India

15. Submissions with reference to the above issues are based on the views expressed in different judgments relied upon by the learned Counsel for the parties.

16. Rival contentions of the parties and judgments relied upon by counsel for the parties are as under:

17. Sri Navroz H. Seervai, learned Senior Counsel, who led the arguments on behalf of the petitioners, has formulated the following propositions for acceptance on behalf of the petitioners:

a) That Section 3 of the Act brings about discrimination in the matter of levy of entry tax on the value of goods notified by the state government, which are brought into a local area from outside the state vis-a-vis similar goods entering the local area from within the state.

b) Levy of this nature per se is discriminatory and is therefore violative of Article 304(a) of the Constitution of India and unless it is demonstrated by the State that such a levy is not discriminatory and unless it is so demonstrated under the provisions of the very enactment, levy remains discriminatory and even if it is demonstrated that such levy may bring about parity in the matter of taxation by pointing out to the levies imposed under the other enactments on goods of similar nature, the requirement of Article 304(a) is not met and therefore the stand of the state that in the present case, the levy of entry tax under the Act on the goods imported from outside the State into the local area is only for bringing about a parity in the matter of levy of tax on similar goods brought into the local area from within the state, as prior to the goods being brought into the local area from any other place within the state, such goods would have suffered levy of sales tax under the Karnataka Sales Tax Act [for short, KST Act] and therefore brings about parity and is not discriminatory, is not tenable, as the discriminatory effect is not avoided by the working of the provisions of the same enactment.

c) Even if it is shown that the levy is not discriminatory, it has to always necessarily comply with the requirements of Article 304(b) of the Constitution,

inclusive of the proviso to this Article and in the present case, the state having not demonstrated that the levy is a regulatory levy and further the requirement of proviso to Sub-article (b) of Article 304 of the Constitution also being not satisfied, the provision is unconstitutional.

d) That the charging Section having not authorized the state government to issue notification notifying the goods in respect of which the levies can be imposed and collected, the Act is unworkable and the charging section fails. In support of this contention, reference is made to the provisions of Section 5 of the Act and it is contended that while Section 5 has expressly authorized the state government to issue a notification exempting the levy of tax on any specified class of importers or any class of notified goods, there is no such express authorization in favour of the state government u/s 3 of the Act and therefore the charging Section fails.

e) Notwithstanding the judgment of the Supreme Court in the case of Jindal Stainless Ltd. and Another Vs. State of Haryana and Others, a levy in the nature of compensatory levy is also non-discriminatory, the levy is always not necessarily a regulatory levy i.e. the moment the levy is shown to be a compensatory levy, it does not necessarily get out of the scope of Part XIII of the Constitution of India.

18. It is in support of such submissions, learned Counsel for the petitioners relied upon the following judgments:

Atiabari Tea Co., Ltd. Vs. The State of Assam and Others,

The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others,

Firm ATB Mehtab Majid & Co v. State of Madras AIR 1963 SC 28

Shree Mahavir Oil Mills v. State of JK (1997) 104 STC 148

Jindal Stainless Ltd. and Another Vs. State of Haryana and Others,

Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others,

State of Karnataka and Another Vs. Hansa Corporation,

Jindal Stripe Ltd. and Others Vs. State of Haryana and Others,

K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another,

K.S. Paripoornan Vs. State of Kerala and Others,

State of Uttar Pradesh and another Vs. M/s. Laxmi Paper Mart and others,

Avynyl Polymers Pvt. Ltd v. State of Karnataka (1998) 109 STC 26 kar

State of Bihar v. Bihar Chamber of Commerce : [1996]2SCR184

19. The judgment of the Supreme Court in the case of ATIABARI TEA COMPANY

LIMITED [supra] is strongly relied upon to demonstrate the discriminatory aspect and the judgment in the case FIRM ATB MEHTAB MAJID & CO [supra] is relied on to make good the submission that any distinction in the matter of rate of tax on similar goods on the premise that the locally produced goods have undergone a different process or a different treatment is an argument which is not acceptable on the strength of the law laid down in FIRM ATB MEHTAB MAJID & CO's case.

20. SHREE MAHAVIR OIL MILS" case [supra] is relied upon to support the submission that a taxing statute even if crosses the hurdle of Article 304(a) of the Constitution of India, it has to still answer the test of Article 304(b) and that if the imposition of a tax itself is a restriction on the movement [of goods] and has to always conform to the requirement of Article 304(b) of the Constitution of India. On the basis of the law declared in this case, it is urged that if extending a concession even for the purpose of protecting a locally manufactured goods vis-a-vis imported goods, results in discrimination and such discrimination is one which is clearly in the teeth of the Article 304(a) of the Constitution of India and unless the levy of tax on the locally manufactured goods and the imported goods are at the same rate, there is discrimination.

21. The judgment of the Supreme Court in the case of HANSA CORPORATION [supra] is relied upon for the proposition that even if a taxing statute is not discriminatory, it has to still meet the requirement of satisfying the proviso to Article 304(b), particularly when the taxing statute is an instance of a levy impeding the movement of goods, as in the present case.

22. Reliance on the decision of the Supreme Court in the case of LAKSHMI PAPER MART [supra] is also for the proposition touching on the requirement of Article 304(a) of the Constitution of India and the decision of the Division Bench of this Court in the case of AVYNYL POLYMERS PVT LTD. [supra] is for the proposition that non-discrimination part of levy should be made good only with reference to the same enactment and not with reference to the impact of the levies under different enactments.

23. Learned Counsel for the petitioners have relied upon the judgment of the Supreme Court in the case of JINDAL STAINLESS [supra] in support of the submission that the present levy is not in the nature of compensatory levy and applying the tests as laid down by the Supreme Court in this case for determination as to what is a compensatory levy, which in fact was by following the ruling of the Supreme Court in the case of AUTOMOBILE TRANSPORT LTD. [supra] and by overruling its earlier smaller Bench ruling in the case of Bhagatram Rajeev Kumar v. Commissioner of Sales Tax (1995) 96 STC 654 Pat and State of Bihar v. Bihar Chamber of Commerce (1996) 103 STC 1 Pat Submission is that the question can be determined only by applying the working tests enunciated in the case of AUTOMOBILE TRANSPORT LTD.

24. It is urged that on the admitted case of the respondent-state as indicated in its statement of objections, the levy is merely a revenue raising effort and not

either regulatory levy or a compensatory levy. The additional statement of facts placed before the court is contended to be hopelessly inadequate to answer the test laid down by the Supreme Court to hold the levy as compensatory levy as indicated in the case of JINDAL STAINLESS [supra].

25. Reference is also drawn to the statement of the Minister on the floor of the assembly while moving the Bill and in support of such submission, reliance is placed on the decision of the Supreme Court in the case of K.P VARGHESE and K.S. PARIPOORNAN [supra].

26. Sri G. Sarangan, learned Senior Counsel appearing for the petitioners in several of these petitions, has while placing reliance in many of these decisions, in addition sought to contend that in respect of the goods dealt with by the writ petitioners namely furnace oil, under the Act, the levy is in the nature double taxation and is therefore bad in law and in support of this submission, relied upon the decision of the Supreme Court in the case of Sri Krishna Das Vs. Town Area Committee, Chirgaon, .

27. Sri Sarangan has also submitted that even on the authority of the JINDAL STRIPE LTD. [supra], the activity in the nature of providing any public facilities cannot be termed as providing any special service to bring it within the scope of compensatory levy, as the service is not confined to a particular class of tax payers but is a service rendered in general and therefore not a compensatory levy.

28. Sri R.V. Prasad, learned Counsel appearing for some of the petitioners in this batch of writ petitions, has also submitted likewise.

29. Countering such submissions made on behalf of the petitioners, Sri Udaya Holla, learned Advocate General while has contended that the levy is a non-discriminatory levy; that it brings about parity in levying of tax on imported goods from outside the State into the local area and from within the State into the local area and therefore there is no discrimination, it is strongly urged that non-discriminatory aspect is made good by demonstrating that the impact of levies under different State enactments is such that it ultimately brings about a parity and it is also submitted that if the State is able to make good that there is no discrimination under Article 304(a), then there is no further requirement of satisfying the conditions in Article 304(b) of the Constitution of India.

30. Alternative submission on behalf of the respondent-state is that the levy of entry tax on goods imported into the local area under the Act is in the nature of a compensatory tax levied on dealers who import from outside the State and is therefore outside the operation of Part XIII of the Constitution of India.

31. Learned Advocate General has very strongly relied upon the non-reported judgment of a Division Bench of the Gujarat High Court in the case of Eagle Corporation Pvt. Ltd v. State of Gujarat decided on 10-10-2006 in Special Civil Application No. 8953 of 2004, and has vehemently urged that the ruling of the

Gujarat High Court following the judgments of the Supreme Court touching upon the aspect and discussing the same, eminently merits acceptance and urged this Court to follow such ruling for upholding the validity of the Act under challenge. It is submitted that this ruling applies on all aspects to the present situation on hand and this Court should follow and apply the ratio enunciated therein for disposing of the present batch of writ petitions. With respect to the learned Judges of the Division Bench of the Gujarat High Court, who have delivered the judgment in EAGLE CORPORATIONS case [supra], I am unable to agree with the view expressed and law laid therein for reasons which will become clear in the later part of this order.

32. It is with reference to the judgment of the Division Bench of the Gujarat High Court, the learned Advocate General has drawn attention to the observations made by the Supreme Court in the cases referred to and relied upon in the ruling of the Division Bench of the Gujarat High Court. The rulings are: HANSA CORPORATION [supra], Shaktikumar M. Sancheti and Another Vs. State of Maharashtra and Others, ; G.K. Krishnan and Others Vs. State of Tamil Nadu and Others, V. Guruviah Naidu & Sons v. State of Tamilnadu (1997) 1 SCC 234; Rattan Lal & Co. v. Assessing Authority, Patiala AIR 1970 SC 1743; Sri Doki China Guruvulu Son and Co. and Another Vs. Government of Andhra Pradesh and Another, ; Video Electronics Pvt. Ltd. and Another and Weston Electronics Ltd. and Another Vs. State of Punjab and Another, ; and Widea (India) Ltd v. State of Karnataka (2005) 8 SCC 22.

33. Learned Advocate General has also drawn the attention of the court to the observations made by the Supreme Court in the case of FIRM MEHTAB MAJID & CO and in the case of JINDAL STAINLESS STEEL LTD. (supra).

34. Learned Advocate General has placed reliance on the following decisions also:

B.R. Limited Vs. V.P. Gupta, Commissioner of Income Tax, Bombay,

Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd.,

Shri Balaganesan Metals Vs. M.N. Shanmugham Chetty and Others,

35. In support of the submission that under Article 304 requirement is for compliance with either Sub-article (a) or Sub-article (b) of Article 304 of the Constitution of India, it is urged that when once Article 304(a) is complied with, there is no further need for compliance with the requirement of Article 304(b), strong reliance is placed by the learned Advocate General on the decision of the Supreme Court in the case of SHAKTIKUMAR M. SANCHETI [supra], which dealt with the Constitutional validity of the Maharashtra Tax on Entry of Motor Vehicles into Local Areas Act, 1987, and submitted that the levy of entry tax on goods imported into the local area was identical to such levy under the Maharashtra Act and on the very judgment of the Supreme Court, upholding the levy in the Maharashtra enactment, the present levy should be upheld.

36. While reliance is placed on the decision of the Supreme Court in the case of

Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, , in support of the proposition that when once a taxing levy crosses the hurdle of complying with the requirement of Article 304(a), there is no further need to satisfy the requirement of Article 304(b) of the Constitution of India, it is also submitted that the law laid down by the Supreme Court in the case of ATIABARI TEA COMPANY LIMITED [supra] being virtually no more good law in the light of the view expressed by a larger Bench of the Supreme Court in the case of AUTOMOBILE TRANSPORT LTD. [supra], wherein the majority of the judges had agreed with the view expressed by the minority in the case of ATIABARI TEA COMPANY LIMITED the Judgment of the Supreme Court in the case of ATIABARI TEA COMPANY LIMITED is virtually no more good law! Attention is also drawn to para-28 of the judgment of the Supreme Court in the case of WIDEA (INDIA) LTD. (supra) in support of the submission that the view expressed in the case of ATIABARI TEA COMPANY LIMITED, is no more good law.

37. Learned Advocate General has also vehemently urged that courts while reviewing the validity of economic legislation should necessarily accord wide leeway to the legislature; that such matters cannot be examined in a watertight compartment; that the wisdom of the legislature cannot be lightly brushed aside, and has placed strong reliance on the observations of the Supreme Court in the cases of R.K. Garg v. Union of India AIR 1981 SC 2138 and Sushil Kumar Sharma Vs. Union of India (UOI) and Others, , and the decision of this Court in the case of Erappa Vs. State of Karnataka, .

38. Placing strong reliance on the observations made by the Supreme Court in para-11 of the judgment in FIRM MEHTAB MAJID & CO [supra], learned Advocate General submits that the argument that the state should demonstrate non-discrimination by the impact of levy under the same enactment is not made good and submits that while in fact there is no direct ruling of the Supreme Court to declare that for answering the requirement of Article 304(a) of the Constitution of India, non-discrimination should be made good by levy of tax under the very enactment, on the other hand the decision of the Supreme Court in the case of SHAKTIKUMAR M. SANCHETI [supra], wherein the levy under the Maharashtra Motor Vehicles Taxation Act had been upheld, it has to be necessarily inferred that non-discrimination aspect can be achieved by demonstrating the impact of several levies under the state enactment on imported goods vis-a-vis goods produced or manufactured locally, and if the resultant effect is to bring about parity and such being the situation in the present cases, the allegation of discrimination is to be rejected.

39. One proposition on which there is an agreement between the learned Counsel for the petitioners and the learned Advocate General is that if a levy is really in the nature of a compensatory levy, neither the vice of discrimination can be attracted to such a levy nor the levy can be said to be one which impedes or curtails free trade, commerce and intercourse. But the area of controversy is that while the learned Senior Counsel appearing for the petitioners contends that the

present levy is not one which can be characterized as a compensatory levy whether in law or on facts, the State has not made good that the levy is in the nature of a compensatory levy on facts assuming without conceding that in law it is a compensatory levy by placing necessary data and material to justify the claim.

40. The levy of tax being only in respect of the goods brought into a local area by an importer from outside the State and not on other persons, who bring similar goods to the very local area, discrimination is writ large on the face of the provisions. Though the allegations of discrimination is sought to be answered firstly by contending that the provisions of the very Act provide for such exemptions and concessions in favour of the persons who are made to pay the levy u/s 3 of the Act so that ultimately such persons in reality do not have any additional tax burden and in the alternative it is also contended that the allegation of discrimination cannot be decided in the light of the effect of the provisions of this Act alone, but when examined in the light of the combined effect of the provisions of the present Act with the KST Act, the resultant situation is that there is no material difference in the tax burden on the imported goods and the locally manufactured or produced goods of similar nature.

41. This aspect will be examined later on, but I would like to discuss the defence put up by the learned Advocate General that the levy is a compensatory levy in the first instance, as if the State is able to make good this defence, as agreed to by the learned Counsel for both sides, nothing further needs to be examined. The concept of a compensatory levy is now well established. It is also equally clear by now that while the tax is a common burden in the sense collection of tax is for meeting the expenditure of the State which is much larger, though such tax burden may be confined to a few persons, so long as the taxing statute passes the test of legislative competence and the test of Article 14 of the Constitution of India, it is sustained and there need not be any return or benefit on any of the taxpayer, the compensatory levy is one which burdens the beneficiary group or class and not others.

42. On the other hand, a fee is understood to be a compensation to be paid for specific service that is received by the individual seeking the service. It is only the person receiving the specific service or who seeks for a specific permission or licence who is required to pay fee, whereas others who do not seek service or the permission may not pay a fee. In the background of such distinction between a tax and the fee, the concept of compensatory levy by way of tax is understood to be one as in the nature of a levy to meet the special service or benefits provided to a class of persons as a whole, who will be called upon to bear the burden of tax. An exclusive service or special service to the class of tax payers who bear the burden is the sine qua non of a compensatory levy though not all members of the class of tax payers may avail of the special service or special benefit available to that class in general. It is also a requirement of a compensatory levy that the revenue gathered by such levy should separately

correlate to the value of service provided to the class of tax payers. While a little surplus is not frowned upon by the courts to take out the levy from the description of a compensatory levy, there should be proof of expenditure to be incurred for providing exclusive service or exclusive benefit to the tax payers to be proportionate to the revenue generated from this class of tax payers receiving the service/benefit.

43. The concept of compensatory levy does not and had never been understood to be a proportion of the general service provided to the citizens or trade as a whole and particular class of tax payer constituting a particular percentage of general trade like the petitioners in the present cases, as contended by the learned Advocate General; that the assesseees under the present enactment constitute 30% of the users of the facilities such as roads, water, drainage, lighting etc., provided by the local authorities and therefore the levy is to be taken as a compensatory levy.

44. In answering the allegation of discrimination under the provisions of the Act, the state has sought to justify the levy as one not discriminating between person to person, in the sense that under the provisions of the Act all assesseees who are importers are subjected to the very levy and therefore the very concept of discrimination cannot be called in aid. It is also urged that the levy being a compensatory levy, goes out of the purview of Part-XIII of the Constitution of India. Such a stand is taken in para-6 and 7 of the additional statement of objections filed by the State, which reads as under:

6. It is submitted that in the State, local bodies were earlier collecting octroi from all persons causing entry of goods into their local areas. Such amounts collected were spent on providing facilities and services to the taxpayers. Considering the representations of the trade and industry and other tax payers that levy of octroi was obstructing free movement of traffic and its implementation was not uniform throughout the State from 1979, in lieu of octroi, the State had introduced entry tax under the Karnataka Tax Entry of Goods Act, 1979. The levy under this enactment was applicable only to dealers i.e. who cause entry of goods into a local area in the course of their business. Under the Karnataka Special Tax on Entry of Goods Act 2004, the tax is payable in respect of the goods brought into a local area by all persons (importers). The revenue from this levy collected by the State is made over to this local bodies.

7. It is submitted that though the provisions of this law does not specify the proportionality of the quantifiable benefits that would accrue to the tax payers, the respondents should demonstrate that collection of this compensatory tax is not reimbursement for the quantifiable benefit provided to the tax payers by the local bodies. Thus, the norms laid down by the Hon"ble Supreme Court in the case of Jindal Stainless Steel Ltd in respect of a compensatory tax has been met.

45. The stand taken by the state is not one which answers the attack of allegation as urged on behalf of the petitioners in the context of Article 304(a) of

the Constitution of India. The type of discrimination frowned upon in Article 304(a) of the Constitution of India in respect of taxing statutes, is making a distinction between goods imported from outside the State and the goods available within the State. While it may be true that under the provisions of the Act itself no such distinction is made in the sense, all persons who are subjected to tax under the Act are uniformly treated, what is contemplated under Article 304(a) of the Constitution of India is not a situation of this nature, but the taxing enactment making a distinction between goods brought from outside the state and the goods which are within the State and levied while the goods enters a local area. As under the Act, it is only the goods imported into a local area from outside the State which are subjected to tax, it is obvious that there is no such tax on goods which originate from within the state and enter a local area, under the very enactment and the situation is clearly one disapproved under Article 304(a) of the Constitution of India.

46. In fact the submission that within the Act, there is no discrimination is an argument which if at all runs counter to the stand of the State and as urged by the learned Advocate General that the State can answer the attack of discrimination even with reference to the levy of tax under different enactments. It is therefore this defence fails on both counts and the allegation of discrimination is not met effectively by the State.

47. Also, the concept of tax being a compensatory and regulatory levy and therefore it goes out of the purview of Part-XIII of the Constitution of India, as propounded in *AUTOMOBILE TRANSPORT LTD* [supra] and explained in the case of *JINDAL STAINLESS STEEL LTD* [supra], the nature of a levy being compensatory/regulatory should not be confused with the regulatory nature of law imposing reasonable restrictions on freedom of trade, commerce and intercourse contemplated in Clause (b) of Article 304 of the Constitution of India. The concept of imposing reasonable restrictions and therefore the law being regulatory under Article 304(b) of the Constitution of India is not the same as the concept of compensatory/regulatory tax going out of the purview of Part-XIII of the Constitution of India.

48. I am of the clear view that even in law the present levy can never be accepted as a compensatory levy, as the State is not able to demonstrate any exclusive or special service provided to the class of taxpayers who bear the tax under the Act.

49. Assuming that the arguments of the learned Advocate General is good in law, even then the State has miserably failed to make good the defence on facts. There is absolutely no correlation to the revenue generated under the specific Act to the so-called expenditure incurred by the local authorities for providing the services mentioned by the respondents. I say so for the reason that the local authorities have their own means of raising revenues and in respect of the expenditure for meeting such benefits, 30% of the expenditure is sought to be collected from the assesseees under the Act. There are other levies imposed

under the other enactments by the State and the local authorities and such revenue is not at all accounted for. In fact there is no serious attempt at all on the part of the State to demonstrate either that the expenditure incurred towards the so-called services provided to the trading community in general is a particular amount and that the assesseees under the Act constitute 30% of such members of the trading community, for whose benefit the expenditure is incurred.

50. This apart no material at all is placed about the revenue to the State and the local authorities under the other enactments, which have link or nexus to the kind of facilities sought to be provided by the State such as provision for roads, water, lighting, drainage etc., etc. There is no link or correlation at all on facts in respect of the revenue from the levies under the present enactment and the revenue and expenditure under other enactments. The defence of the State that the levy under the Act is a compensatory levy fails miserably and is rejected.

51. That takes me to the question of discrimination urged with considerable vehemence by the learned senior counsel appearing for the petitioners. As noticed earlier, the discrimination is obvious on the face of the provisions of Section 3 of the Act. The learned Advocate General has pointed out to the provisions of Section 4 of the Act, which provides for reduction in the payment of tax liability under the KST Act in favour of importers who have paid tax under this Act and therefore it is urged that in reality there is no tax liability under the Act.

52. While in respect of the assesseees who are dealers under the KST Act also, there is some relief under this provision, the removal of discrimination is contingent upon the assessee effecting the sale of the very imported goods and it is achieved only when there is subsequent sales tax attracting tax under the KST Act and the refund of the difference if tax paid under the present enactment being found in excess, also being relegated to sale at a later stage and by claiming refund in the prescribed manner, the act of discrimination remains till one of these two things happens and it is not removed.

53. But in the case of the importer, who is not a dealer in notified goods, the situation is still worse, as Sub-section (2) of Section 4 of the Act provides for reduction in the tax liability to the extent of tax that might have been paid by such assessee earlier in the State of origin of the goods either by way of State Sales Tax or Central Sales Tax laws and only to that extent. Depending upon the rates of tax under the State Act from which the goods origin and under the Central Sales Tax Act and the rate of tax under the present Act, to that extent the complaint of discrimination remains and is not answered.

54. It must be borne in mind, this provision in the Act which is referred to seek support for the argument that the act of discrimination is removed even under the provisions of the very enactment and therefore the Act is not discriminatory, perhaps could have been a good defence if the complaint of discrimination should have been avoided in all situations and to the full extent. Unfortunately, even

after a combined operation of the provisions of Sections 3 and 4, the complaint of discrimination is not answered in toto and therefore the argument that there is no discrimination cannot be accepted.

55. The alternative defence on behalf of the State as urged by the learned Advocate General is that it is not necessary that the complaint of discrimination should be answered with reference to the provisions of the very enactment, but it can also be answered by demonstrating the net effect of levy of tax by the State Legislature on the particular goods or similar goods by a combined effect of several enactments and in the present case it is so achieved by a combined effect of levy of tax under the present Act and the KST Act.

56. It is urged that as goods which are imported from outside the State would not have suffered the local sales tax which would have been levied on goods purchased within the State and brought into the area, the levy under the Act on imported goods seeks to achieve parity of levies under the said enactment on imported goods and goods available within the State and moved into the local area. It is in respect of this submission which the learned Advocate General has drawn attention to the observations in the judgment of the Supreme Court in the cases of FIRM MBHTAB MAJID & CO [supra] as also Maharashtra Motor Vehicles Taxation Act case and Gujarat case.

57. While it is the submission of the learned Counsel for the petitioners that the act of discrimination cannot be got over by an attempt to demonstrate that the levy under different enactment of the State brings about a parity and several decisions of the Supreme Court and the High Courts are relied upon by the learned Counsel for the petitioners in support of the submission, what is pointed out in particular is that when this precise argument which had been urged earlier before the Division Bench of this Court it had been rejected and with reference to the law laid down by the Supreme Court and on the basis of such law laid down by the Supreme Court, it is not open to the State to put forth such a defence before this Court contrary to the law as laid down by the Division Bench of this Court in the case of AVINYL POLYMERS PVT LTD [supra] particular attention is drawn both by Sri Navroz H. Seervai, learned senior counsel appearing for the petitioners and Sri Udaya Holla, learned Advocate General appearing for the State, to paras 14, 15, 16, 17, 18, 19, 20 and 21 of this judgment.

58. While a perusal of this judgment of the Division Bench of this Court does indicate that the Division Bench was of the definite opinion that the State cannot urge the defence of act of discrimination being removed by calling in aid the argument of parity achieved by a combination of levies under different enactments of the State and the Division Bench held that this is the law as declared by the Supreme Court in the cases referred to above, what is urged on behalf of the State to get over this argument and the judgment of the Division Bench is based on the two-fold submissions of the learned Advocate General.

59. It is firstly sought to be urged that this judgment is per incuriam as the

judgment does not spell out any reason as to why the allegation of discrimination cannot be defended by the State by a combined effect of levies under different enactments of the State Legislature. It is also urged that in the light of the observations made by the Supreme Court in the case of MEHTAB MAJID A CO [supra], the Division Bench could not have taken this view and at any rate this judgment should be held to be sub silentio etc.

60. I am unable to accept either of the contentions in this regard, as it is not as though the Division Bench of this Court was unaware of the judgment of the Supreme Court on the subject. It is after referring to the judgments of the Supreme Court and purporting to be based on the law laid down by the Supreme Court, the argument advanced on behalf of the State was rejected and the Act in question was held to be a discriminatory Act.

61. Even the argument that it is sub silentio cannot be accepted as the question of the provisions of the Act being discriminatory provision was the very issue in the case before the Division Bench, that question was examined by the Division Bench and the very question has been answered directly and it is not as though the question is left unanswered and the decision arrived at not by considering this issue as is urged in the present case. Therefore the judgment cannot be characterized as sub silentio either.

62. Though by drawing my attention to several judgments of the Supreme Court, learned Advocate General has attempted to urge that even independent of this decision of the Division Bench, the Supreme Court has taken a different view and that should be followed, I am afraid this course of action is not open to this Bench, as the Division Bench was very much aware of the decision of the Supreme Court and it is only as an understanding of the law laid down by the Supreme Court and purporting to follow the law laid by the Supreme Court, the Division Bench has expressed the view that the State cannot contend that it can get over the complaint of discrimination by demonstrating the resultant parity achieved by the impact of levies under different enactment of the State Legislature. A Full Bench of this Court has taken the view that if a law laid down by a Division Bench in a given situation it is not open to the single Bench to characterize the ruling of the Division Bench as either per incuriam or as one not binding.

63. The other reason urged by the learned Advocate General in support of the submission is that the decision of the Division Bench in the case of AVINYL POLYMERS PVT. LTD. [supra] cannot be taken as a precedent is for the reason that the state and the assessee had carried the matter to the Supreme Court and ultimately while the special leave though had been granted and civil appeals had been disposed of by the Supreme Court, as per the order dated 18-7-2000, the Supreme Court has indicated that the high court while deciding the fresh batch of petitions will not be bound by its earlier decision and having disposed of the appeals with such observations, this Bench is not bound by the view expressed by the Division Bench, as it was the very judgment of the Division Bench

expressing this view which had been carried in appeal to the Supreme Court in Civil Appeal Nos. 7569-75 of 1997 and connected matters.

64. If that were to be the factual position, perhaps this argument could have carried some force and conviction. But unfortunately for the state government, the Supreme Court having noticed the subsequent development, such as issue of notifications by the State government on 7-1-1998 and 23-9-1998, superceding the earlier notifications and the latter notifications coming into effect retroactively and such notification being the subject matter of challenge again before the High Court, in a fresh batch of petitions, the Supreme Court observed that the appeals filed by the State of Karnataka became academic and nothing more survives. It is after disposal of the State appeals in such a manner, the Supreme Court considered the appeals filed by the assesseees and while disposing of such appeals of the assesseees the observation which is relied upon by the learned Advocate General was made. The order passed by the Supreme Court reads as under:

CA Nos. 3948/1998 and 1819-42/2000 be delinked and listed separated.

Leave granted in SLP(C) 134/1998.

Counsel for the parties agree that the appeals filed by the State of Karnataka have become infructuous. These appeals arise out of the Judgment of the Karnataka High Court before whom the respondents had challenged the notification dated 30th March 1994 and the amendment made on 31st March 1997 pertaining to entry tax. The said notification was quashed but while quashing the same, the High Court had accepted the contention of the State of Karnataka that the entry tax was compensatory in nature.

We are now informed that the aforesaid notifications on 30th March 1994 and 31st March 1997 has been superceded by notification dated 7th January 1998 and notification dated 23rd September 1998, which are retrospective in character. The later notifications are subject matter of challenge before the Karnataka High Court. As far as the State of Karnataka is concerned, it is not seeking to realize any tax under the earlier notification dated 30th March 1994 and 31st March 1997. This being so, the appeals filed by the State of Karnataka have become infructuous and nothing more survives.

As far as the appeals filed by the respondents are concerned, the same relates to the finding of the high court to the effect that the entry tax was compensatory in nature. Learned Advocate General agrees that without going into the merits this finding may be set aside and the high court will be at liberty to go into this question afresh while deciding the writ petition which have been filed challenging the subsequent notifications.

Ordered accordingly. The high court while deciding the fresh writ petitions will not be bound by the earlier decision The appeals are disposed of. No order as to costs.

Therefore, the observation is not of any avail to the State, as the appeal filed by the State questioning the legality of the judgment of the Division Bench of this Court in the case of AVINYL POLYMERS PVT LTD. [supra] declaring that the notification was discriminatory was not disturbed, but the state appeal was disposed of as having become academic which can only imply that the judgment of the high court gets merged with that of the order passed by the Supreme Court and the finding or declaration by the high court is left undisturbed.

65. If such is the test for determining as to whether the provisions is discriminatory or not and the combined effect to the present law and the KST Act cannot be called in aid as a defence to show that they achieve parity in the matter of levy of tax by the State Legislature on similar goods and therefore the further question as to whether it is actually achieved or not recedes to the background. The attack of discrimination, which is sought to be dispelled by operation of the provisions of the very enactment, as noticed earlier on the first contention, remains and therefore it will have to be held that the provision is inevitably one in violation of the requirement of Article 304(a) of the Constitution of India and has to be declared as unconstitutional.

66. In so far as the argument of the learned Advocate General placing reliance on the Judgment of the Supreme Court in SHAKTIKUMAR M. SANCHETI'S case is concerned, the argument of the provisions of the Maharashtra Act being in violation of the provisions of Article 304(a) of the Constitution of India was not even canvassed by the appellant before the Supreme Court and the Supreme Court did not examine this question. While it is a fact that the High Court had dispelled the argument of the Act being violative of Article 304(a) at the best, the law as laid down by the division Bench of the Bombay High Court can be accepted as a persuasive precedent. So also the position in respect of the Judgment of the Gujarat High Court in EAGLE CORPORATION'S case supra. But, in the light of the discussion above with reference to the Judgment of a division Bench of this Court in AVINYL POLYMERS' case, I cannot agree with the view expressed by either the Gujarat High Court or the Bombay High Court, but only follow the view of the division Bench of our Court and therefore I reject the contention urged on behalf of the State. This question being covered by the ratio in AVINYL POLYMERS' case, it is not possible to examine the argument of liberal construction to be employed in testing the validity of taxing statute when challenged on the ground of discrimination.

67. In this view of the development, I am not inclined to examine the contentions urged on behalf of the petitioners by Sri Navroz H. Seervai, learned Senior Counsel that the defence of valid classification available for defending the allegation of discretion under Article 14 cannot be called in aid to test the existence or otherwise of the discrimination under the provisions of Article 304(a) of the Constitution of India, as it has become unnecessary to answer this question.

68. Though the examination could have been stopped at this stage, as very

serious arguments have been addressed on the question as to whether the provisions of Article 304(b) are still attracted even after answering the question in the light of the provisions of Article 304(a) and lengthy submissions have been made at the Bar on this question and for the sake of completion of examination, I take up this contention next.

69. Learned Counsel for the petitioners and the learned Advocate General have relied upon a good number of judgments for contending that the conjunction "and" used between Sub-articles (a) and (b) of Article 304 of the Constitution of India should be understood as one to indicate that both operate simultaneously as urged by Sri Seervai, learned Senior Counsel, or on the contrary only in the alternative as contended by the learned Advocate General, and the authorities relied upon are not conclusive one way or the other and leave an element of ambiguity and scope for further arguments.

70. Even on an examination of the Article independent of the authorities, it is very clear that the situations contemplated under Sub-articles (a) and (b) of Article 304 of the Constitution of India are entirely different. While Sub-article (a) of Article 304 of the Constitution of India deals with the levy of tax on goods imported from outside the State and condemns discriminatory levy in that context, Sub-article (b) of Article 304 of the Constitution of India provides for relaxation in respect of a regulatory restriction on the freedom of trade, commerce and intercourse, so long as it is a reasonable restriction required to be imposed in public interest and the Bill before introduction had received the previous sanction of the President.

71. When the two provisions operate in different areas, examination has to be independent under each provision and in the context of the impugned legislation. A taxing statute though may be a statute imposing a non-discriminatory tax on goods imported from other states, if the effect of such levy is one to impede or obstruct free movement of trade, commerce and intercourse, it does attract Sub-article (b) of Article 304 of the Constitution of India. The movement in the context of movement of trade can only be on the movement of goods and the effect of the levy of tax is one to discourage or curb such movement, it is necessarily one which is in the way of freedom of trade and obstructs free movement of goods. The discussion in the judgments of the Supreme Court referred to and relied on by the learned Counsel indicate that while not all taxing statutes may be one impeding or obstructing the movement, like for example, levy of property tax or even levy of luxury tax or on mining activities, the levy of tax under the present enactment being directly on the very movement of goods i.e. the taxing event occurring when the goods cross into a local area and if there is no such movement, there being no tax, the present Act is undoubtedly an Act levying tax having the effect of restricting or obstructing free movement of goods.

72. While one argument is that the very fact that if such a levy is not discriminatory, then that by itself takes care of the requirements of Article 304 of the Constitution of India, as contended by the learned Advocate General, I am

unable to accept this proposition, for the reason that the taxing statute which has the effect of impeding movement but still found to be a non-discriminatory tax, at the best can be passing the test of Article 304(a) and not as one answering the requirements of Article 304(b) also. The moment it is found that the taxing statute is also one resulting in restrictions on the freedom of trade, commerce and intercourse inter state or within the State, the requirement of demonstrating that it is a reasonable restriction and in public interest and the further requirement of obtaining the previous sanction of the President in terms of the proviso inevitably gets attracted. In the present case, while no independent argument is advanced to contend that the restriction is a reasonable restriction imposed in public interest, it is not even in dispute that the Bill had not received the previous sanction of the President nor the defect cured by the Act having been reserved for the assent of the President and the assent having been given in terms of the provisions of Article 255 of the Constitution of India. For this reason also, the Act becomes unconstitutional, being violative of Sub-article (b) of Article 304 of the Constitution of India. The concept of a compensatory tax being outside the purview of Part-XIII itself as propounded in the case of AUTOMOBILE TRANSPORT LTD [supra] and as explained in JINDAL STAINLESS STEELS LTD's case [supra] is that a levy which is exclusively for meeting a special service or benefit to the tax payer is not even in the nature of a tax or a general levy and is more akin to the tax payer receiving the service from the state paying for it. Such is not the situation in the present cases and under the enactment under challenge.

73. In the result, these petitions are allowed, the provisions of the Act, particularly Section 3 of the Act are declared to be in contravention of Sub-articles (a) and (b) of Article 304 of the Constitution of India and therefore violates Article 301 and accordingly declared to be unconstitutional. The impugned assessment orders, demand notices etc., issued for giving effect to the provisions of the Act and the charging Section and all proceedings initiated under the Act stand quashed, by issue of writs of certiorari in all these petitions. As a consequence, the taxes collected by the State under the impugned provisions of the Act are required to be refunded to the persons who have paid them.

74. Rule made absolute. Parties to bear their respective costs.