
(2000) 02 AHC CK 0006

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 136 of 1986 (Tax)

Jagdish Prasad

APPELLANT

Vs

Passenger Tax Officer and Another

RESPONDENT

Date of Decision : 02-02-2000

Acts Referred:

Motor Vehicles Act, 1988 — Section 2(29), 2(6)

Uttar Pradesh Motor Gadi (Yatri Kar) Adhiniyam, 1962 — Section 18, 19, 2, 3, 3(1)

Citation : AIR 2000 All 205 : (2000) 4 RCR(Civil) 24

Hon'ble Judges : M.C. Agarwal, J; M. Katju, J; G.P. Mathur, J

Bench : Full Bench

Advocate : Ravi Kant, for the Appellant; Standing Counsel for Respondents, for the Respondent

Final Decision : Dismissed

Judgement

M. Katju, J.—I have perused the judgment of my esteemed brother Hon"ble G. P. Mathur, J. and regret my inability to agree with the same. Hence I am giving my own decision.

2. The petitioner is an owner of four buses registered as contract carriages with the Regional Transport Authority, Mathura. The petitioner entered into a contract with Indian Oil Corporation Ltd. A true copy of the agreement is Annexure to the writ petition. Under this contract the petitioner has placed its vehicles at the disposal of the Corporation for carrying the employees of the Corporation from their residence to the office of the Corporation. The petitioner is paid charges not according to the number of passengers but according to the kilometers covered by the vehicle. In lieu of rendering such services the petitioner is paid an amount as provided in Article 31 of the Contract (Page 29 of the writ petition.).

3. By means of this petition, the petitioner is challenging the levy of passenger tax under the U.P. Motor Gadi (Yatri-Kar) Adhiniyam 1962 (hereinafter referred to as the Adhiniyam). In paragraph 11 of the writ petition it is alleged that if a vehicle is run by a person exclusively in connection with his trade or business

without any hire or reward from the passengers, the incidence of taxation under the Adhiniyam would not be attracted. In paragraph 13 of the writ petition it is alleged that the petitioner does not ply vehicles for hire or reward and the petitioner does not collect passenger tax from the passengers. In paragraph 14 of the petition it is alleged that since the provisions of the Adhiniyam did not cover the petitioner, he did not submit the monthly returns as required by Section 6 but the Passenger Tax Officer, issued notice u/s 6 to the petitioner. In response to this notice the petitioner appeared before the Passenger Tax Officer, and submitted that he does not carry passengers for hire or reward and that he had placed his vehicles at the disposal of the corporation for providing transport service to its employees. However, the Passenger Tax Officer did not consider the petitioner's submissions and passed assessment orders, true copies of which are Annexure 2 to 5 to the petition. Against these orders the petitioner filed appeals which have been dismissed by the Deputy Transport Commissioner by the order dated 8-11-1985, Annexure-5 to the petition. Aggrieved the present writ petition has been filed.

4. A counter affidavit has been filed in which it is not denied that the petitioner had entered into an agreement with the Corporation for providing transport facility to the Corporation for which the petitioner was paid charges on monthly basis. In paragraph 9 of the counter affidavit it is admitted that the petitioner was not paid according to the number of passengers but the Corporation in accordance with the contract paid in lump sum on monthly basis. In paragraph 13 of the counter affidavit it is asserted that the petitioner was liable to pay Passenger Tax, and the orders of the authorities are correct.

5. We have heard learned counsel for the petitioner Shri Ravi Kant and also learned Chief Standing Counsel for the respondents. Learned counsel for the petitioner invited my attention to Entry 56 of List II of the Seventh Schedule to the Constitution, which reads "taxes on goods and passengers carried by road or on inland water ways". Learned counsel argued that the provisions of the Adhiniyam must be construed in a manner so as to be in consonance with Entry 56, and if any provision in the Adhiniyam has two Interpretations the one which will make it inconsonance with Entry 56 shall be preferred. Entry 56 of List II provides for a tax on goods or passengers carried by road. It is evident this tax must be imposed on the goods or passengers, that is to say, it should be directly on the goods or passengers. In this connection learned counsel for the petitioner referred to the decision of the Supreme Court in *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, . In that case it was held that the cess based on royalty derived from mining land cannot be treated as a tax on land within the meaning of Entry 49 of List II. Paragraph 28 to 36 of this decision which deals with the meaning of a "tax on land", are instructive. In paragraph 31 the Court referred to the earlier decision of the Supreme Court in the case of *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, where a distinction was drawn between a tax on land and a tax on income arising from land. The former was a tax directly imposed on land, while the latter was not. A

tax on royalty could not be said to be a tax directly imposed on land, and hence it would not come under Entry 49. Thus, the test (as stated in paragraph 34) was whether the impact of the tax was on the land or on royalty. Similarly in *Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others*, it was held that a tax on the capital value of the assets of an individual is not a tax directly on land under Entry 49.

6. The above decisions of the Supreme Court are helpful in interpreting Entry 56 of List II. A tax on passengers must be a tax directly imposed on passengers, though it need not be directly collected by the State from the passengers. In other words, the impact of the tax must be on the passengers.

7. The interpretation sought to be given by learned standing counsel to Section 3(1) and its explanation II would place these provisions outside the scope of Entry 56 to List II of the Seventh Schedule because such an interpretation would put the impact of the tax not on the passengers but on the operator of the vehicle. Such an interpretation would make these provisions unconstitutional, and hence it should be avoided.

8. In *A.S. Karthikeyan and Others Vs. State of Kerala and Another*, the Supreme Court upheld the validity of the Kerala Motor Vehicles (Taxation of Passengers and Goods Amendment) Act 1971. However, in paragraph 45 of the said judgment it has been noticed by the Supreme Court that the passenger tax under that Act was always paid by the passengers although it was paid to the State by the operators who collected the tax as well as the fare from the passengers.

9. In the present case, however, the passengers pay no tax but the petitioner who is only an operator of the vehicle pays it. The Corporation provides a facility to its employees for carrying them from their residence to the office. The petitioner does not realize any passengers tax from the passengers carried in this vehicle, as alleged in paragraph 13 of the writ petition.

10. A perusal of the Adhiniyam shows that u/s 3(1) a tax is levied by the State Government on every passenger carried by a stage carriage at a rate equivalent to five percent of the fare payable by such passenger to the operator of the stage carriage. Learned standing counsel laid emphasis on Explanation II of Section 3(1) of the Adhiniyam which states "in the case of a contract carriage the fare payable for the carriage divided by the number of passengers therein shall be deemed to be the fare payable by each such passenger....." Learned standing counsel argued that in view of Explanation II passenger tax was payable by the petitioner even if the passengers did not pay any tax.

11. Explanation II to Section 3(1) is a deeming provisions and it provides a convenient method of assessing the tax. If Explanation II is construed to mean that something which is not a tax on passengers should nevertheless be treated to be a tax on passengers such an interpretation would make the tax beyond the scope of Entry 56 as per the ratio of the decision of the Supreme Court in *The*

State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., . In that case it was held that something which is not a sale cannot be deemed to be a sale and then taxed. Hence Explanation II must be held to apply only to taxes imposed directly on passengers, and it is a provision for convenient assessment of such a tax. It will not apply to a case (like the present one) where an operator has contracted with a Company to transport its employees on a payment of a sum uncorelated with the passengers. In the present case the tax is really being levied not on the passengers put on the operator, and hence !t does not fall under Explanation II to Section 3(1) as interpreted in the light of Entry 56 to List II of the Seventh Schedule.

12. The tax being levied will also not fall under Entry 57 to List II because it is not a tax on vehicles but a tax on the operator or the income accruing to the operator under the contract. In fact there is a separate tax on vehicles in the State known as the U.P. Motor Vehicles Taxation Act, 1935.

13. The tax being levied on the petitioner would not also fall under Entry 35 to List II. This Entry is not a taxing Entry. As is well settled, power to tax must be derived from a specific taxing entry, vide Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, Moreover, the expression "principles on which taxes on such vehicles are to be levied" in Entry 35 of List III does not confer power to tax but only connotes rules of guidance in the matter of taxation vide State of Assam v. Labanya AIR 1967 SC 1575.

14. Learned standing counsel invited our attention to the decision of a Division Bench of this Court in Mahboob Hasan v. Passenger Tax Officer 1988 All. LJ 1026, in that case the petitioner had been granted a contract carriage permit for plying its vehicle from Allahabad to Phulpur for carrying the employees of IFFCO. The payment of hiring of the bus was made on monthly basis within 15 days of presentation of the bill to IFFCO by the petitioner. The Division Bench held that the provisions of the Adhiniyam were applicable to the petitioner and hence he had to pay the passenger tax.

15. Since we are sitting as a Full Bench the aforesaid division bench decision is not binding on us. Moreover, it appears to us that the Division Bench decision in Mehboob Hasan's case (1998 All.LJ 1026) (supra) is a judgment per incuriam as it has completely overlooked Entry 56 of the List II of the Seventh Schedule of the Constitution. As held by the Supreme Court in the State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, , if a judgment is passed without noticing some statutory provision it becomes a judgment per incuriam. In our opinion the decision in Mehboob hasan"s case (supra) was passed without noticing Entry 56 of List II of the Seventh Schedule to the Constitution and hence it is a judgment per in curiam. As already mentioned above, Entry 56 of the List II permits imposition of tax on passengers carried by road. The tax must be directly imposed on the passengers. No doubt the machinery for collection of the tax can be of different types and it is not necessary that the tax should be directly collected by the State Government from the passengers as held in A.S.

Karthikeyan and Others Vs. State of Kerala and Another, , but nevertheless it must be a tax on passengers, otherwise it will be outside the scope of Entry 55, List II of the Seventh Schedule to the Constitution. This aspect as well as Entry 56 of the List II, has been totally overlooked by the Division Bench in Mehboob Hasan's case (1988 All. LJ1026) (supra). The facts of the present case disclose that there is no tax on passengers at all and the tax is in fact levied on the contractor (the petitioner). Hence it is outside the scope of Entry 56 and is consequently illegal.

16. In Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, the Supreme Court observed (In paragraph 40) "Incuria literally means carelessness. In practice per incuriam appears to mean per ignoratium. English Courts have developed this principle in relaxation of the rule of the rule of stare decisis. The "quotable in law" is avoided and ignored if it is rendered in ignoratium of a statute or other binding authority vide Young v. Bristol Aeroplane Co. Ltd. (1944)2 All.ER293."

17. The decision in Mehboob Hasan's case (1988 All. LJ 1026) was rendered in ignorance of not merely a statutory provision but a constitutional provision viz. Entry 56. Hence it is clearly per incuriam.

18. In our opinion the decision in Mehboob Hasan's case (1988 All LJ 1026) (supra) is not only per incuriam but is also sub-silento.

19. In "Salmond on Jurisprudence" 12th Edn. the meaning of a decision sub-silento has been explained as follows:

"A decision passes sub-silento when a particular point of law involved in the decision is not perceived by the Court or is not present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the Court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub-silento."

20. An illustration of a decision sub-silento is Gerard v. Worth of Paris Ltd. [1936]2 All ER 905 where a dismissed employee who had obtained damages against a Company for wrongful dismissal applied for a garnishee order on a bank account standing in the name of the Liquidator of the company. In this case the question whether a garnishee order could legally be made on an account standing in the name of the Liquidator was not considered at all. Hence when the question was raised in the subsequent case Lancaster Motor Co. v. Bremith Ltd. (1941) KB 675 it was held that the previous decision was not binding.

21. In State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, it was held (per R.M. Sahai, J.) "A decision passes sub-silentowhen the

particular point of law involved in the decision is not perceived by the Court or present in its mind (Salmond on Jurisprudence 12th Edn. Page 153)."

22. The decision in Mehboob Hasan's case (1988 All. LJ 1026) (supra) is to our mind a judgment sub-silento because a consideration of Entry 56 List II was logically involved in the interpretation of Section 3(1) and Explanation II of the Adhiniyam, but Entry 56 was not noticed by the Division Bench.

23. For the above reasons, the petition succeeds. A writ of certiorari is issued quashing the orders dated 10-9-1981 (Annexure-2 to 5) and the order 8-11-1985 of the Deputy Transport Commissioner (Annexure-6) and a mandamus is issued restraining the respondents from assessing the petitioner under the U.P. Motor Gadi (Yatri Kar) Adhiniyam, 1962 or from demanding or realizing any amount under the said Adhiniyam from the petitioner. Any amount realised illegally from the petitioner shall be refunded to him within three months from the date of production of a certified copy of this order before the authority concerned. There is no order as to costs.

M. C. Agarwal, J.

24. The question which requires consideration in this writ petition is whether having regard to Entry 56 of State List of Seventh Schedule to the Constitution a contract carriage operator is exigible to passenger tax under U. P. Motor Gadi (Yatri Kar) Adhiniyam, 1962 (hereinafter referred to as the Adhiniyam).

25. The assessment and demand of passenger tax from a contract carriage operator under the provisions of U. P. Motor Gadi (Yatri Kar) Adhiniyam was upheld by a Division Bench of this Court in Mahaboob Hasan v. Passenger Tax Officer 1988 All. LJ 1026. A learned Single Judge, who heard the writ petition earlier, was of the opinion that the view taken in the aforesaid decision was per incuriam as the Bench did not take into consideration the effect of Entry 56 of List II of Seventh Schedule of the Constitution with reference to which the Adhiniyam had been enacted. It was held that the Adhiniyam imposed a liability upon operator and not upon a passenger and since in view of Entry 56, the State legislature had no legislative competence to tax an operator, the demand of the tax from the petitioner was invalid. The writ petition was accordingly allowed on 27-8-1992 and the orders passed by the respondents were quashed. The passenger Tax Officer preferred an appeal before the Supreme Court, which set aside the order of the learned Single Judge and directed that the writ petition be heard by a larger Bench. That is how the matter has come before us for hearing.

26. The petitioner entered into an agreement with Indian Oil Corporation (Mathura Refinery) where under he provided four buses for transporting its employees from various places in the city to the Refinery and back. The agreement provided that the hiring charges for each bus would be Rs. 11,062.50 per month on an aggregate run upto 3500 kilometres and for every additional run over and above the said figure, extra payment was to be made at the rate of Rs. 2.50 per Kilometer. The agreement contained a clause "providing, operating

and maintaining in good condition 48/50 Seaters Delux Bus including payment of all taxes, insurance, cost of all fuel lubricants, spare for smooth running and all wages and other payment for operating and maintenance crew as per direction and instructions of Corporation " The Passenger Tax Officer, Mathura issued notices to the petitioner for levy of passenger tax for the period 1-10-1980 to 30-6-1981 with regard to four buses provided by him. In response to the query made from Mathura Refinery it sent information that the total payment made to the petitioner included passenger tax as well. The passenger Tax Officer by his order dated 10-9-1981 held that the petitioner was liable to pay Rs. 10,092.40 towards passenger tax with regard to bus No. USO 5625. Similar order was passed with regard to three other buses provided by the petitioner. The petitioner preferred appeals before the Deputy Transport Commissioner (Passenger Tax) U.P. Lucknow which were dismissed on 8-11-1985 by a common order. The present writ petition has been filed for quashing of the order dated 10-9-1981 of the Passenger Tax Officer and the order dated 8-11-1985 of the Deputy Transport Commissioner.

27. Sri Ravi Kant learned counsel for the petitioner has submitted that the U.P. Motor Gadi (Yatri Kar) Adhiniyam 1962 has been enacted by the State legislature with reference to Entry 56 of List II of Seventh Schedule of the Constitution which reads as "Taxes on goods and passengers carried by road or inland waterways." In order that the Adhiniyam may be a valid piece of legislation, the impact of tax should be on the passenger and not on the owner or operator of the vehicle. It is urged that the Adhiniyam must be construed in a manner so as to be in consonance with Entry 56 and if any provision in the Adhiniyam is capable of several interpretations, one which makes it in consonance with Entry. 56 would be the proper and correct one and that alone should be taken into consideration, otherwise the Adhiniyam will become unconstitutional. According to learned counsel a contract carriage is out side the scope of Section 3 of the Adhiniyam and no passenger tax could be levied in such a case. The assessment and demand of the tax from the petitioner amounts to levy of tax upon the operator and not upon the passengers which is outside the scope of Entry 56 and therefore the impugned orders are wholly illegal. Sri Ravi Kant has further submitted that the vehicle of the petitioner is not a stage carriage and consequently no passenger tax could be realised from him. Learned standing counsel has, on the other hand, submitted that the Adhiniyam is a valid piece of legislation having been enacted with reference to Entry 56 of List II of Seventh Schedule of the Constitution and even with regard to a contract carriage, the tax imposed is not on the operator but on a passenger though it is realised through the agency of the operator. Explanation II to Section 3 of the Adhiniyam clearly shows that the impact of tax is on a passenger and not on the owner or operator of the vehicle. He has further submitted that the vehicle of the petitioner is a stage carriage within the meaning of Section 2(g) of the Adhiniyam and therefore it is exigible to tax under the Adhiniyam.

28. In order to appreciate the contention raised at the bar it is necessary to

notice certain provisions of the U.P. Motor Gadi (Yatri Kar) Adhiniyam 1962 (hereinafter referred to as the Adhiniyam) and of Motor Vehicles Act, 1939 (hereinafter referred to as the M.V. Act)

29. The preamble of U.P. Motor Gadi (Yatri Kar) Adhiniyam, 1962 reads follows:

"An Act to provide for the levy of a tax on passengers carried in certain classes of public service vehicles in the State of Uttar Pradesh."

Certain provisions of the Adhiniyam are being reproduced below:

"2. (d) "operator" means any person whose name is entered in the permit in respect of the stage carriage is the holder thereof, and when there is no such permit, the owner of the stage carriage, and includes:

(i) & (ii) (omitted as not relevant)

2. (e) "passengers" means any person travelling in a stage carriage, but shall not include the operator, the driver or the conductor or an employee of the operator of the stage carriage travelling in the bone fide discharge of his duties in connection with the stage carriage;

2. (g) "stage carriage" means a motor vehicle carrying or adapted to carry more than six passengers (excluding the driver), and which carries passengers for hire or reward, at separate fares paid by or for individual passengers, either for the whole Journey or the stages of the journey and includes any omnibus when used as a contract carriage;

2. (k) the words and expressions "contract carriage" "fare", "motor vehicle", "omnibus", "permit" and "State transport undertaking" shall have the meaning assigned to them in the Motor Vehicles Act, 1939.

3. Levy of tax on passengers carried by stage carriages --

(1). From and after the coming into force of this section there shall be levied and paid to the State Government a tax on every passenger carried by a stage carriage at a rate equivalent to sixteen per cent of fare payable by such passenger to the operator of the stage carriage in respect of his journey in the State:

Provided that the amount of tax shall, whenever necessary

(a) & (b) (omitted as not relevant)

Explanation I -- When a passenger is carried by stage carriage at a concessional rate or without being charged any fare, the fare normally payable for the journey shall for the purposes of this section be deemed to be the fare payable by such passenger.

Explanation II -- In the case of a contract carriage the fare payable for the carriage divided by the number of passengers there in shall be deemed to be the

fare payable by each such passenger, provided that when the fare payable for the carriage is less than seventy-five percent of that worked out at the maximum rates, if any, fixed for contract carriage in pursuance of the Motor Vehicles Act, 1939, such seventy-five per cent shall be deemed to be the fare payable for the carriage.

5. Method of collection of tax --

(1) The tax shall be collected by the operator of the stage carriage and paid to the State Government in the prescribed manner.

Provided that the State Government may accept, or agree to accept, a lump sum in lieu of the amount of tax that may be payable by the operator to the State Government:

Provided further that any change in the rate of which comes into force after the date of agreement shall have the effect of making a corresponding (proportionate) change in the lump sum agreed up in relation to that part of the period of the agreement during which the charged rate remains in force.

(2) The State Government may by rule require the operator to purchase the stamps and use the same for the collection of the tax".

Section 6 enjoins that the operator shall submit a return in the prescribed form in respect of every such stage carriage held by him. Section 7 requires that the tax shall be paid every month into a Government Treasury. Section 8 provides procedure in absence of return or when the same is incorrect or incomplete and it gives power to the Passenger Tax Office to determine the tax after giving reasonable opportunity of making representation to the operator. Section 10 gives power to him to levy penalty if tax is not paid in time. Section 13 provides for an appeal against certain categories of orders. Section 16 requires every operator to keep and maintain accounts and register in the prescribed form in respect of stage carriage and fare tax collected in respect of passengers travelling therein. Section 30 of the Adhiniyam gives rule making power to the State Government and clause (C) of sub-sec.(2) gives power to make rules prescribing principles for determining lump sum which may be accepted in lieu of the amount of the tax. In exercise of the aforesaid power the State Government has made U.P. Motor Gadi (Yatri Kar) Niyamawali, 1962 (hereinafter referred to as the Rules). Rule 4 casts a duty upon an operator to collect tax in respect of passenger.

Section 2(3), 2(4), 2(18-A), 2(25) and 2(29) of Motor Vehicles Act read as follows :

"2. (3) "Contract carriage" means a motor vehicle which carries a passenger or passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for, a, fixed or agreed or sum--

(i) On a time basis whether or not with reference to any route or distance, or

(ii) from one point to another, and in either case without stopping to pick up, or set down along the line of route passengers not included in the contract, and includes a motor cab notwithstanding that the passengers may pay separate fares;

2. (6) "fare" includes sums payable for a season ticket or in respect of the hire of a carriage;

2. (18-A) "omnibus" means any motor vehicle construed or adapted to carry more than six persons excluding the driver.

2. (25) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a motor cab, contract carriage, and stage carriage;

2. (29) "stage carriage" means a motor vehicle carrying or adapted to carry more than six persons excluding the driver which carries passengers for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey."

30. The power to legislate is given by Article 245 and other Articles of Constitution of India. The entries in the three lists of the Seventh Schedule to the Constitution are legislative heads or fields of legislation. These demarcate the area over which appropriate legislature can operate. The language of the entries should be given widest amplitude. It is the duty of the Court to find out its true intent and purpose and to examine a particular legislation in its pith and substance and to determine whether it fits in one or the other of the lists. (See *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, : *India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others*, .

31. The language used in the preamble of the Adhiniyam "an Act to provide for the levy of a tax on passengers carried in certain classes of public service vehicle" is indicative of the event that occasions the liability for payment of the tax. The liability of the passengers to pay the tax is created from the expression "there shall be levied and paid to State Government a tax on every passenger carried by a stage carriage at a rate equivalent to sixteen per cent of fare payable by such passenger to the operator of a stage carriage." The fare is clearly payable by the passenger. If the passenger is liable to pay the fare, it necessarily follows that the liability for payment of tax is also on him. The operator only collects the tax from the passengers in the shape of an extra amount added to the fare. But that does not alter the fact that the liability for payment of the extra sum is on the passenger and that extra sum is in reality the tax amount which after collection by the operator is paid to the Government and not retained by the operator himself. Therefore the incidence of the tax is on the passenger which is in consonance with Entry 56 of List II of the Seventh Schedule.

32. The vehicles or the petitioner carry passengers under a contract at a fixed or

agreed rate on time basis and they do not pick up or set down passengers not included in the contract. Therefore, they are contract carriages within the meaning of Section 2(3) of the M.V. Act and also for the purpose of Adhiniyam in view of Section 2 (k) thereof. In fact in para 1 of the writ petition it is averred that vehicles of the petitioner are registered as contract carriage with Regional Transport Authority Mathura. The definition of the "stage carriage" as given, in Section 2(g) of the Adhiniyam is different from the definition given to this expression in Section 2(29) of M.V. Act as it contains a clause "and includes any omnibus when used as a contract carriage". The word "include" is generally used in interpretation clauses in order to enlarge the meaning of word or phrases occurring in the body of statute and when it is so used those words or phrases must be construed as comprehending, not only such things, as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Section 2 (18-A) of M. V. Act defines an "omnibus" and it means any Motor Vehicle constructed or adapted to carry more than six persons excluding the driver. Thus it is obvious that the vehicles provided by the petitioner under the agreement are stage carriages within the meaning of Section 2 (g) of the Adhiniyam.

33. The charging section is Section 3 of the Adhiniyam and Sub-section (1) thereof provides that there shall be levied and paid to the State Government a tax on every passenger carried by a stage carriage at a rate equivalent to sixteen per cent or fare payable by such passenger to the operator of the stage carriage. Explanation II to this sub-section specifically deals with a contract carriage and it provides that the fare payable by the carriage divided by the number of passengers shall be deemed to be fare payable by each such passenger. There can be no dispute that the vehicles of the petitioner carry passengers as defined in Section 2 (e) of the Adhiniyam as the employees of Mathura Refinery travel therein from their residences to the place of work and back. So far as the question of payments of fare is concerned, the definition of fare in Section 2 (6) of M. V. Act says that it includes any sum payable in respect of hire of a contract carriage. The petitioner has entered into an agreement under which he is paid a fixed sum towards hire of his vehicle. In para 12 of the writ petition, it is averred that petitioner is paid charges not according to number of passengers but according to kilometres covered by the vehicle and in lieu of rendering such services he is paid compensation. In our opinion mere use of the expression compensation will make no difference in view of inclusive definition of the word "fare" as given in Section 2 (6) of the M.V. Act, whereunder any sum payable in respect of hire of the contract carriage would amount to fare. Thus there can be no escape from the conclusion that the employees of the Mathura Refinery who availed of the facility of travelling by the vehicles of the petitioner come within the ambit of Sub-section (1) of the Section 3 of the Adhiniyam.

34. Sri Ravi Kant has contended that no passenger tax can be levied in respect of a contract carriage as the passengers travelling therein are not issued tickets and there can be no compliance of Section 18 and 19 of the Adhiniyam. He has

further submitted that no fare is paid by a passenger travelling in a contract carriage and at any rate this amount can not be determined with certainty. In our opinion the contention raised has no substance. The legislature while enacting the Adhiniyam was fully conscious of the fact that in view of Entry 55 of List II of Seventh Schedule of the Constitution, it had legislative competence to make only such kind of legislation wherein the impact of tax would be on one passenger and not on the operators. It was for this reason that contract carriage was included in the definition of "stage carriage" as given in Section 2 (g) of the Adhiniyam and Explanation II was added to Section 3 which is the charging section by means of a subsequent amendment made by U.P. Act No. IV of 1953. Explanation II clearly provides that in case of a contract carriage fare payable by the carriage divided by number of passengers therein shall be deemed to be fare payable by each passenger. In view of this Explanation II there can be no difficulty in determining the fare which has been paid by each passenger. By way of example if a contract carriage having a seating capacity of 50 is hired for a month and the hiring charges paid for the same are Rs. 3000/- towards fare, it would mean that each passenger had paid Rs. 2/- per day towards fare charges. If on a particular day the number of passengers travelling in the vehicle is only 40, it will be deemed that each passenger had paid a fare of Rs. 2.50 and the tax can be calculated on its basis. Thus, in view of Explanation II of Sub-section (1) of Section 3 there can be no difficulty in ascertaining the total amount of fare paid by the passengers travelling in a contract carriage and no problem will arise in complying with the provisions of Adhiniyam. The employees of an undertaking travelling in contract carriage hired by their employer may not be issued a ticket but they are issued a pass, which authorise them to avail of such facility and this pass takes the place of a ticket. At any rate the mere fact that in a given case there may not be a strict compliance of Section 18 and 19 of the Adhiniyam cannot lead to an inference that no passenger tax can be levied upon a person travelling in a contract carriage if the operator of such vehicle had received some amount towards hiring charges of his vehicles. The record shows that while inviting tenders for providing transport facility to the employees of Mathura Refinery it was specifically mentioned that the rates quoted should be inclusive of payment made towards all taxes (Annexure-1 to the writ petition). The charges paid to the petitioner under the agreement also included the amount towards payment of passenger tax under the Adhiniyam. The petitioner, therefore, cannot be heard to say that he is not liable to pay any passenger tax.

35. Sri Ravi Kant has submitted that if the State Legislator had no legislative competence to enact a taxing statute with regard to a particular matter it cannot do so by enacting a deeming clause which creates a fiction. In support of this proposition he has placed reliance upon *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, wherein it was held that a power to enact a law with respect to tax on sale of goods under the Entry 48 of List II must, to be intra vires, be one relating in fact to sale of goods and accordingly the Provincial legislature cannot in the purported exercise of its power to tax sales, tax,

transactions which are not sales by merely enacting that they shall be sales. In our opinion, this principle can have no application to the present case in view of plain language of the statute. No legal fiction has been created in the substantive part of Sub-section (1) of Section 3 of the Adhiniyam which is the charging section. It says in unequivocal term that tax will be levied on every passenger carried by stage carriage and it is clearly referable to Entry 55 of List II of Seventh Schedule. The deeming provision has been introduced only with a view to determine the amount of fare paid by a passenger in a contract carriage. The Adhiniyam does not depend upon any deeming provision or a fiction for its application but applies on its own force. The deeming provision operates on entirely different field namely, in calculating the exact amount of fare paid by a passenger.

36. Sri Ravi Kant has strenuously urged that the Adhiniyam apparently imposes the tax on a passenger but in reality the liability is imposed upon the operator or owner of the vehicle which the State legislature while legislating with respect to Entry 55 of the List II of Seventh Schedule cannot do. In support of the submission that the Adhiniyam in fact taxes the income of the operator or owner, reliance is placed on India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, : India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, and M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, . In India Cement Ltd. the question involved was whether levy of cess on royalty was within the competence of the State legislature. Section 115 of Madras Panchayats Act (Act No. 35 of 1958) enjoined that there shall be levied in every panchayat development block, a local cess at the rate of 45 paise on every rupee of land revenue payable to the government in respect of any land for every Fasli. An explanation to the said section was added by Tamil Nadu Panchayats (Amendment and Miscellaneous Provisions) Act, 1964, which was deemed always to have been incorporated and it provided that "land revenue" means public revenue due on land and included water cess payable to the Government for water supplied or used for the irrigation of land, royalty, lease amount or other sum payable to the Government In respect of land held from the Government on lease or licence. By explanation added in 1964 the meaning of the word "land revenue" was expanded and even royalty amount and lease amount or other sum payable to the Government in respect of land held direct from the Government on lease or licence was included in the same. After analysing the provisions of the Act it was held as under :

"Cess on royalty cannot also be justified under Entry 49 of List II of the Seventh Schedule as taxes on land and buildings. Entry 49 List II contemplated a levy on land as a unit and the levy must be directly imposed on land and must bear a definite relationship to it. There is a clear distinction between tax directly on land and tax on income arising from land. Royalty which is indirectly connected with land, cannot be said to be a tax directly on land as a unit. Royalty is payable on a proportion of the minerals extracted from the land, No tax can be levied or is leviable under the impugned Act if no mining activities are carried on. Hence, it is

manifest that it is not related to land as a unit which is the only method of valuation of land under Entry 49 of List II. Cess is an additional charge on that royalty. Therefore, the Impugned legislation in its pith and substance is a tax on royalty and not a tax on land."

37. In the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, , the validity of levy of a "cess" based on the royalty derived from mining lands was under challenge. The Orissa Cess Act laid down that all lands shall be liable to payment of cess in addition to any land revenue, tax, cess, rate or fee otherwise payable in respect thereof. The amendment incorporated by Act No. 42 of 1976 made it clear that "land held for carrying on mining operations" were not exempt from the cess. Sub-section (1) of Section 5 of the Act provided that cess shall be assessed on annual value of all lands, on whatever tenure held, calculated in the manner provided in Act. Sub-section (2) which gave the rate at which such cess was to be levied was amended by Act No. 17 of 1989 and it provided that in case of land held for carrying on mining operations in relation to any minerals, such percentum of the annual value as the State Government may, by notification, specify from time to time in relation to such mineral. Schedule II to the Act prescribed percentage which the cess was to bear to the annual value and they varied from 650% in the case of sand to 300% in the case of coal and 200% in the case of certain minerals such as, iron, ore. "Annual value" was defined in Section 7 and Sub-section (3) thereof as amended by Act No. 17 of 1989 laid down that in the case of lands held for carrying on mining operations, the annual value shall be the royalty or as the case may be, the dead rent payable by the person carrying on mining operations to the government or the pit's mouth value wherever it has been determined. In view of this provision it was held that the charge of cess as a percentage and as multiple of the amount of the royalty and the mode and calculation of the cess amount along with royalties and as part thereof showed that the legislation was with regard to royalty rather than with respect to the land. It was consequently held that the legislation not being with regard to "land" it could not be justified as tax on land falling within the purview of Entry 49 of List II to Seventh Schedule of the Constitution. The authorities cited by the learned counsel for the petition are clearly distinguishable as in the case of India Cement Ltd. and Others Vs. State Of Tamil Nadu and Others, by an artificial definition given to "land revenue" royalty was included therein and in the case of M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others, by amendment of the Act "annual value" was to be the royalty or dead rent. No such artificial definition has been given in the Adhiniyam nor it is dependent upon any deeming clause or fiction for its application. The tax is imposed upon the passenger and it has direct correlation to fare paid by him. While calculating the tax the income or earning of the operators do not come into picture at all.

38. Learned counsel for the petitioner has submitted that the provisions of the Adhiniyam themselves indicate that burden of tax is on the operator which takes it outside the scope and ambit of Entry 56 of List II. In this connection reference

has been made to Sections 5 to 17 of the Adhiniyam. In our opinion, the contention raised has no substance. The provisions in three Lists of Seventh Schedule in so far as they relate to powers of taxation refer to subjects on which taxes can be levied. Then there have to be objects i.e, persons on whom those taxes can be levied and through whom the same can be collected. For example Entry 49 of List II makes "land and buildings" as the subject of taxes. But neither land nor building can by itself pay the taxes. Therefore there has to be a human being on whom the tax will be levied with reference to particular lands or buildings. Such person may be an owner or an occupier. Similarly Entry 54 makes sale or purchase of goods as the subject of taxation by the State. Such tax has to be levied either on the seller or the purchaser. Therefore every law levying a tax has to be with reference to a subject and had to have an object on whom the tax can be levied and from whom the tax can be collected. Under U.P. Trade Tax Act, tax is levied on sale or purchase of goods. When the tax is levied on the sale, through actual burden of the tax falls on the buyer but the seller is entitled to realise the amount of tax from the buyer as provided in Section 8A (2) (i) of U.P. Trade Tax Act. Section 3 of U.P. Entertainment and Betting Tax Act provides that tax shall be levied and paid on all payment for admission to an entertainment. The tax paid by the viewer but invariably the duty to collect tax on the person providing entertainment. Similarly under the Income Tax Act for facility of collection of taxes provision has been made in Section 192 to 196-D of the Act for deduction of Income tax at source by the person responsible for paying the sums that amount to income. Therefore-from the mere fact that mode of collection of tax under the Adhiniyam is through the medium of operator it cannot be held that the impact of tax is not on the passenger or the same is on the operator.

39. Similar laws relating to levy of passenger or goods tax have been enacted by other States and their vires were challenged. In *Sainik Motors v. State of Rajasthan* AIR 1951 SC 1480, the subject matter of challenge was Rajasthan Passengers and Goods Taxation Act, 1959. Section 3 (1) of the Act provided for levy of a tax on all fares and freights in respect of all passengers and goods transported by motor vehicles. Explanation to this sub-section creates a fiction that when passengers are carried and goods are transported by a motor vehicle and no fare or freight has been charged, the tax shall be levied and paid as if such passengers were carried or goods transported at the normal rates prevalent on the route. The second proviso to section 4 lays down that in case of contract carriages, the State Government may accept a lump sum in lieu of tax chargeable on fare in the manner prescribed. A similar contention the tax imposed under the Act was not on passengers or goods but was on the income of the operators was repelled by the Court and it was held as follows :--

"Section 3, Rajasthan Passengers and Goods Taxation Act, 1959, in terms, speaks of the charge of the tax in respect of all passengers carried and goods transported by Motor Vehicles and though the measures of the tax is furnished by the amount of fare and freight charged, it does not cease to be a tax on

passengers. The explanation to Section 3(1) lays down that even if passengers are carried or goods transported without the charge of fare or freight, the tax has to be paid as if fare or freight has been charged. This clearly shows that the incidence of the tax is upon passengers and goods, though the amount of tax is measured by fares and freights. Though the tax is laid on passengers and goods, the amount varies in the case of passengers according to the distance travelled, and in the case of goods because the freight must necessarily differ on account of weight, bulk and nature of the goods transported. The tax levied by Section 3 is in pith and substance a tax on passenger and goods and not on income of the petitioners or on fares and freights. The charging section does not go beyond Entry 56 of List II Schedule 7 of the Constitution and is not unconstitutional on that ground."

40. In *A.S. Karthikeyan and Others Vs. State of Kerala and Another*, a similar contention was raised while challenging the validity of Kerala Motor Vehicles (Taxation of Passengers and Goods) (Amendment) Act, 1970. The Act provided that there shall be levied and paid to the Government a tax on all passengers, luggage and goods carried by stage carriage and all goods transported by public carrier vehicle. Rule 3 (2) of the Kerala Motor Vehicles (Taxation of Passengers and Goods) Rules 1963 framed under the Act provided that the fares and freights collected from the passengers or consignors of goods, as the case may be, may include in it, such proportion of the tax as is payable u/s 3 of the Act and the Prescribed Authority while making the assessment under Sub-rule (i) shall calculate the tax due to the Government under the Act from the fares and freights collected on the same proportion. While repelling the challenge to the vires of the Act the Court held as follows :--

"Kerala Act 18 of 1971 amending Kerala Act 25 of 1963 is not invalid on the ground that it charges tax not on passengers and goods but on the income of the operators. Nor is it invalid on the ground that the levy of tax under it being with retrospective effect it is unjust and unreasonable. The tax is imposed by the principal Act (25 of 1963) and not by the Amendment Act 18 of 1971. It is on passengers and goods, but is collected through the agency of operators who collect it along with the fare. The tax and the fare are different and the rates of tax having been specified to be "in a rupee" there is no difficulty in ascertaining the tax from fare. Thus the tax was an element included in the fare structure and its retrospective validation could not be said to be unjust because the operators collected the entire amount. The Act (18 of 1971) is therefore within the competence under Entry 56 of the State List."

41. In *International Tourist Corporation and Others Vs. State of Haryana and Others*, , a challenge was raised to Haryana Passengers and Goods Taxation Act, in so far as it permitted the levy of tax on passengers and goods carried by vehicles plying entirely on the national highway but within the State of Haryana. The writ petitions were filed by transporters/operators plying the stage carriage and contract carriage between Delhi and places in the State of Jammu & Kashmir

on the national highway 1 and 1A without picking or setting down passengers and goods in route and in the course of journey it was necessary for them to travel through the State of Haryana as part of the national highway No. 1 passes through the said State. The challenge to the vires of the Act was repealed and it was held that taxing power of the State legislature in regard to passenger and goods carried by road or on inland waterways is to be found in Entry 56 and there is no warrant for holding that such taxing power is controlled by another Entry in List II which is unrelated taxing power. It was further held that when the goods were merely transported through the State in the course of inter-State trade and commerce, the taxable event is the carrying of goods and passengers on roads within the State thereby making use of the facilities provided by the State. In the same judgment validity of Section 9 of the U.P. Motor Gadi (Mal-kar) Adhiniyam, 1964 which provided for the payment of lump sum in lieu of the amount of tax that might be payable was also upheld on the ground that the rate of the lump sum tax is relatable to the freight carried or the period of journey or both.

42. In *Atma Ram Budhia Vs. State of Bihar*, Section 12 of the Bihar Finance Act, 1950 which provided at tax on all passengers carried by stage carriage and contract carriage was challenged on similar ground. A Special Bench of three Judges upheld the validity of the Act with the following observation :--

The tax imposed by Part III of the Bihar Finance Act, 1950, is not beyond the legislative competence of the State Legislature and is valid.

The preamble to the statute, the heading or Part III itself, and the language of Section 12(1) or the various other provisions of the Act show that the tax was levied on goods and passengers and not upon the income of the owners and the fares and freights realisable by them. The fact that the tax is to be measured in proportion to the fares and freights realised does not alter the nature of the tax or affect its "intrinsic character" which is actually a tax upon the goods and passengers carried on the motor vehicles."

43. In *P. Mathurai Pillai and Others Vs. State of Madras*, Section 3 of Madras Motor Vehicles (Taxation of Passenger and Goods) Act, 1952, which levied a tax on all passengers carried by such carriage came up for challenge. It was held that Act does not impose a tax on income, it is a tax on passengers and goods and falls within Entry 56 of the State List. The views taken by the Patna High Court in *Atma Ram Budhia Vs. State of Bihar*, and by the Madras High Court in *Mathurai v. State of Madras* (supra) were approved by the Supreme Court in *Sainik Motors, Jodhpur and Others Vs. The State of Rajasthan*, referred to above.

44. Sri Ravi Kant next contended that the buses of the petitioner which were provided to Mathura Refinery under the agreement were private service vehicles and were not stage carriages and consequently no tax could be imposed under the provisions of the Adhiniyam. He placed strong reliance on; *Tata Engineering and Locomotive Co. Ltd. Vs. The Sales Tax Officer and Regional Transport Officer*,

Poona and Another, in support of the submission that in such category of vehicles no passenger tax could be levied. The expression "private service vehicle" or "public service vehicle" do not find place in the Adhiniyam. Though the preamble of the Adhiniyam no doubt says that it is an Act to provide for the levy of a tax on passengers carried in certain classes of public service vehicles in the State of Uttar Pradesh. We have considered in the earlier part of the, judgment that vehicles of the petitioner are "stage carriages" as defined u/s 2 (g) of the Adhiniyam as they are omnibus used as a contract carriage. The charging section namely Section 3 lays down that tax shall be levied on every passenger carried by a stage carriage at rate equivalent to 16 per cent fare payable by such Passenger. It does not make any reference to private service vehicle or public service vehicle. The TELCO case is clearly distinguishable on facts as the Company itself was owner of the vehicle which had provided transport facility to its employees to come to the factory from their respective villages. A nominal charge of Rs. 2/- or Rs. 5/- per month was levied for transportation. During the course of the argument of the case, the counsel for the company made a statement that in future no charge would be realised from the employees and they would be provided free transport. On facts the Court found that vehicles were not public service vehicles as no member of public had the right to use them even if he wanted to pay full charges and they were also not stage carriage within the meaning of the Act as no fare was paid by the employees travelling therein. On the finding that vehicles were neither public service vehicles nor stage carriages it was held that no tax could be levied. In the present case, it is the petitioner who is owner and operator of the vehicle and not the Mathura Refinery whose employees are transported by the same. The employees are not travelling without payment of any hire or reward. On the contrary, fairly heavy amount is being paid on their behalf by their employer namely Mathura Refinery. Therefore the principle enunciated in Tata Engineering and Locomotive Co. Ltd. Vs. The Sales Tax Officer and Regional Transport Officer, Poona and Another, has no application to the facts of the present case.

45. Sri Ravi Kant has also referred to two decisions of this Court namely M/s. Saraiya Distillery v. Passenger Tax Officer 1990 All LJ 782 and I.T.I. Limited Allahabad Vs. Passenger Tax Officer, Allahabad, . The vehicle had been acquired by M/s. Saraiya Distillery and was used for the transportation of its employees and children. It was specifically mentioned in the permit granted to it that the same shall be used for transportation of its employees and their children and that it shall not be used for carrying passengers on hire. It was also not disputed that the persons travelling in the vehicle do not pay any fare or reward to the company. In the second case ITI Ltd., had acquired the vehicles which were registered as private service vehicles and were operating under the welfare scheme for the petitioners employees and their children. The vehicles were used for transportation of the employees from the factory to the city and also for transportation of their children. They were being used exclusively by the employees of the company or their children and for a very limited purpose and

not by any one else. An amount of Rs. 25/- per month was being charged from the employees towards the maintenance charges and Rs. 4/- per month from the children for transport to the school and back. On these facts it was held that the vehicles were private service vehicles and were not stage carriage. In both the cases, reliance was placed on Tata Engineering and Locomotive Co. Ltd. Vs. The Sales Tax Officer and Regional Transport Officer, Poona and Another, for holding that no tax can be levied under the Adhiniyam. The facts of the present case are entirely distinguishable from these two cases and consequently they cannot be of any help to the petitioner.

46. Having given our careful consideration to the submissions made by the learned counsel for the parties, we are clearly of the opinion that the assessment and demand of passengers tax under the Adhiniyam from the petitioner is perfectly justified in law and there is no ground for interference with the impugned orders passed by the respondents No. 1 and 2.

47. The writ petition is, accordingly, dismissed and stay order is vacated. No cost.