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In the Calcutta High Court

Case No : C.R. No. 4174 (W) of 1979

Jaspan Singh and Others APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 02-05-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 226, 301, 302

Citation : 93 CWN 450

Hon'ble Judges : Ajit Kumar Sengupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ajit Kumar Sengupta, J.—In this application under Article 226 of the Constitution the petitioner has inter alia challenged the imposition of Tax introduced by the Bengal Motor Vehicles Tax (Amendment) Act, 1963 (West Bengal Act I V of 1063). The petitioner nos. 1 and 2 are the joint holders of a Contract Carriage Permit issued by the Regional Transport Authority, Calcutta Region Authority plying a taxi for 4 passengers in Calcutta and its suburbs. The Taxi-cab belonging to the petitioners have been registered in the Public Vehicles Department, Calcutta and also been granted a Certificate of Registration. The seating capacity has been mentioned in the said Certificate of Registration only for 5. It is stated that at the time of renewal of certificate of fitness of the said taxi-cab and after the original figure ''5'' the figure "l" was added. In other words the said taxi-cab is valid for carrying 5 passengers and one driver.

2. The petitioner no. 5 is the holder of a contract carriage permit, issued by the said Regional Transport Authority, Calcutta Region authorising him to ply a taxi for 4 passengers inter alia in the whole of Calcutta Metropolitan area as also Basirhat, Bongon, Diamond Harbour and other areas on counter-signature by the State Transport Authority, West Bengal. The said Taxi Cab has been registered in the Public Vehicles Department, Calcutta and has been granted a Certificate of Registration in which the seating capacity of the said taxi cab is shown as ''5''.

3. Under the aforesaid respective permits the petitioners have placed 5 seated Ambassador car bearing Registration No. WBT 7322 and WBT 5416 respectively,

4. Under the provisions of Motor Vehicles Act, it is obligatory upon the petitioner to take out third party Insurance, and the premium to be payable to the Insurance Company in the case of Taxi-cabs governed by the number of passengers allowed to be carried: It is alleged that the petitioners are liable to pay under the Bengal Motor Vehicles Tax Act, 1932 a tax, which u/s 4 of the said Act, is payable at the rate specified in the Schedule which is on the basis of their respective taxi-cabs carrying 4 passengers. The said Section 4 of the said Bengal Vehicles Tax Act 1932 has been-amended from time to time and lastly such amendment was made by the Bengal Motor Vehicles Tax (Amendment) Act, 1963. The petitioners had hitherto been paying taxes as per Schedule amended by the said 1953 Act. According to the petitioners the Bengal Motor Vehicles Tax (Amendment) Act, 1963 is not a valid legislation.

5. It is alleged by the petitioners, while the petitioners went to pay tax for the year 1979 they were told that the tax would be payable from the owners of Ambassador Taxi cabs on the basis of passengers exclusive of the driver and that too with retrospective effect from August, 1975.

6. The petitioner made an enquiry and came to know that the Under Secretary and Controller of Cars, Ministry of Industry and Civil Supplies, Government of India, New Delhi by his letter No. 9/145/75-A.E.I(III) dated 31.5.1975 and addressed to all State Transportation Secretaries had given an unilateral executive direction to the effect inter alia that it has been decided to allow ambassador cars used as taxis to carry 5 passengers with immediate effect and that necessary authorisation may be issued. Pursuant to the said executive direction the respondent No.1 State of West Bengal, directed the respondent no.3 to issue necessary authorisation to allow Ambassador cars used as taxis to carry 5 passengers (exclusive of the driver) with immediate effect.

7. It is further alleged that the State of West Bengal defered implementation of realisation of the enhanced tax due to increase of seating capacity till 31.10.75 as a result whereof taxes payable on account of Ambassador taxis were being realised on the basis of carrying 4 passengers but now taxes are being demanded with retrospective effect from August, 1975. In other words, current taxes are being paid on the basis of 5 passengers for Ambassa dort axis, and arrears from August, 1975 on the basis of increase of carrying capacity by one as per the said executive direction at the rate of Rs. 5/- per month. According to the Schedule introduced by Bengal Motor Vehicles Tax (Amendment) Act, 1963 the rate of taxi is as follows :

Vehicles for carrying passengers plying for hire.

(2) Vehicles other than stage carriages with sea seating capacity for Rate of tax payable for the year

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(a) not more than 4

3 wheelers Rs. 200/-

4 wheelers Rs. 300/-

(b) More than 4 Rs. 360/- for 5 plus Rs. 50/- for every additional seal beyond 5.

8. The case of the petitioners is that they were plying their respective Ambassador taxi cabs in terms of their respective permits issued by the Regional Transport Authority, Calcutta Region valid for plying in the areas Under the terms of the said permits. They cannot carry more than 4 passengers as the limit of number of passengers to be carried in the said taxi cabs was fixed as 4 passengers. Accordingly by the unilateral executive direction they cannot be compelled to carry 5 passengers. The said unilateral executive direction cannot override the terms of their respective permits which lay down the condition that only 4 passengers can be carried by the said taxi-cabs. The said taxi-cab being permitted to ply in Calcutta and its suburbs, they are fitted with meter under the, Bengal Motor Vehicles Rules and the said motor provides for a single tariff, namely, a fixed fare at fixed rates to be paid on engagement irrespective as to whether one or four passengers use the said taxi cabs. In other words, separate individual fares per head is not allowed to be charged in the case, of taxi cab fitted with meters. The rates of fare as fixed for taxi cabs having meters is fixed on the basis of such taxi cabs carrying maximum number of 4 pasengers on a single engagement. The premium for third is also being paid on the basis of covering maximum of 4 passengers which the petitioners'' respective Ambassadors taxi cabs are licenced to carry under the said permits. According to manufacturers specification, Ambassador car are 5 seater is likely to hamper safe and efficient operation of the vehicles by the driver as 6 persons will cause serious interference in driving. It is contended that the executive direction issued unilaterally cannot be given effect and the petitioner or to change the Registration Certificate by increasing the seating capacity therein inclusive of the driver. It is also stated that besides Ambassador Taxi cabs there are Fiat and Standard Taxi cabs which are all authorised to carry 4 passengers and singling out Ambassador taxis for carrying 6 passengers just for the purpose of realising higher rate of taxes is discriminatory.

9. The petitioners have also challenged the unilateral executive direction effecting the change in the condition direction affecting the change in the condition of permit and direction the owners of taxi cabs to pay taxes on the basis of the seating capacity of a passenger.

10. The petitioners have challenged the amendment which was made by the Bengal Motor Vehicles (Amendment) Act 1963 as ultravires Article 304 of the Constitution of India on the ground that amending Act was introduced or moved in the State Legislature without the previous sanction of the President of India which is mandatory retirement.

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11. This application is not opposed on behalf of the respondents. This application was heard on several occasions.

12. In 1932 all types of articulated vehicles became liable to payment of tax under Bengal Vehicles Tax Act of 1932 and this Act of 1932 was promulgated with the assent of the Governor General of India u/s 80A of the Government of India Act, 1913 and the rates of taxes ''payable for different kinds of vehicles were shown in the schedule of the said Act. The said Act was amended by Bengal Motor Vehicles Tax (Amendment Act 1951 and by the said amending Act, the Schedule of the Original Act was substituted by a new Schedule. The said Amendment Act was passed alter the Constitution of India came into force on 26th January, 1950. Accordingly the said amendment Act was passed alter obtaining previous sanction of the President of India under Article 304(b) of the Constitution under the Schedule introduced by the Amendment Act of 1951, the rate of taxes for vehicles for carrying passengers plying for hire other than Motor buses in case of not carrying more than 4 persons excluding the driver and was calculated on the basis of unladen weight and the minimum tax payable was Rs.150/- and the maximum was Rs. 255/-.

13. In 1963 there was further amendment of the 1932 Act. Bengal Motor Vehicles Tax (Amendment) Act, 1963 introduced a new Section 12 and a new schedule increasing taxes. This 1963 amendment Act was passed without even obtaining prior assent of the President of India or his assent at all. Under Article 301 read with proviso to Article 304 Clause (b) of the Constitution of India, such prior assent or such assent was a mandatory requirement to make the said 1963 Amendment Act a valid legislation and to make the, imposition or enhancement of taxes and realisation of taxes thereunder legal. It is not in dispute that no such assent of the President was taken and/or given in respect of the 1963 Amendment Act and accordingly it is ultra vires the Constitution and all acts thereunder are void and all payments of taxes received under the said Act are not also to be retained by the Government.

14. It may be mentioned that the West Bengal Motor Vehicles Act, 1979 by which, the 1932 Act has been repeated, has been assented to by the President of India. The assent of the President was necessary as the Motor Vehicles Act, 1932 was being repealed by the West Bengal Legislature by another Act which is the 1979 Act to formulate and amend the provision relating to imposition of the levy of tax of Motor Vehicles under State Motor Vehicles. In 1951 when the amendment was made the assent of the President was obtained. When the amendment was made in 1963 no assent of the President was obtained at ail. Thus the amendment of 1963 is ultra vires of the Constitution and all lots thereunder are void.

15. The next contention of the learned Advocate for the petitioner is that the said executive direction of the Under Secretary to the Government of India and Controller of Cars, Ministry of Industry and Civil Supplies is illegal. The said direction is, inter alia, to the following effect: -

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" Sub : Fixing the number of passenger to be carried in Ambassador Taxis.

It has been decided to allow Ambassador cars used as taxis to carry 5 passengers with immediate effect. You are accordingly requested to issue necessary authorisation".

16. It is alleged that the said respondent, Under Secretary to the Government of India and Controller of cars, has been made a respondent being respondent no. 5 in this Rule. But the respondent has not appeared to show cause and/or to controvert the averments made in the petition.

17. Permits for taxis are to be obtained under the Motor Vehicles Act, 1939, and applications for taxi permits and permits to be granted are to be in this statutory forms prescribed by the Bengal Motor Vehicles Rules. In the said form against item no. 5, the seating capacity of the passengers has to be specified. The seating capacity is a condition of the Permit u/s 51(2) of the Motor Vehicles Act, 1939. in the affidavit of Prem Nath, the respondent no. 15, filed on 30th September, 1988, the Form COP under Rule 80(a)(ii) of the Bengal Motor Vehicles Rules, 1940, has been annexed. It shows the number of passengers'' seat in Col.5 specified as 6 including driver. It cannot be disputed that Ambassador car are 5 seater including driver. Applications were made and permits were granted for carrying 4 passengers in taxis. The taxis are fitted with meters and single rate is fixed on the basis of carrying 4 pasengers. This single fare is payable as soon as the taxi in enaged irrespective of whether one passenger or more used it.

18. Until April, 1979, no attempt was made to implement the aforesaid executive direction. However the respondent nos. 3 and 4 started to demand payment of Motor Vehicles tax from Ambassador taxi car owners on the basis of 5 passengers retrospectively after the new Act came into force and to cause alteration of seating capacity in the registration certificate, from 5 passengers including driver to 6 passengers including the alteration or giving the date of such alteration. This fact will appear form the affidavit of respondent no. 15 affirmed on 30th September, 1985. The impugned direction is not only unauthorised but also violates the manufacturer''s specification namely that Ambassador cars are 5 seater cars meant to carry in all 5 passengers arid against the terms of the permit. It also appears from'' the affidavit of the respondent no. 5 affirmed on 30th September, 1985, that the impugned direction has not been given effect to in Delhi where the Ambassador taxis pay tax on the basis of 4 passengers and in Howrah region. Although the Ambassador taxis of Howrah region are permitted to ply in Calcutta Metropolitan area, these taxis are permitted to carry 4 passengers and they pay Motor Vehicles Tax on the basis of such passengers, the current rate whereof under the Motor Vehicles Act, 1979, is Rs.97,00 per quarter as against Rs. 117. 8o per quarter which is being realised from Ambassador taxi owners of Calcutta region on the basis of 5 passengers. The direction is therefore discriminatory, arbitrary and unreasonable, It has not been disputed, that Delhi taxis and Howrah taxis are charged on the basis of 4

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passengers. This would be evident from the document annexed, to the affidavit of the respondent no. 15 affirmed on 30th September, 1985.

19. Even assuming that the impugned direction is valid, if it given effect to, the possibility of accidents would increase due to crowding of the front seat which would hamper the movements of the driver of such vehicles and disturb his concentration. The impugned direction is also unreasonable as it arbitrarily compels carrying of an extra passenger, paying of extra tax, payment of extra insurance premium to cover the extra passenger, extra wear and tear of the engine, tyres etc. due to extra load without any corresponding benefit to the operator of Ambassador Taxi who is saddled with a fixed rate of tarif. In the facts and circumstances of the case, the impugned direction is without authority of law and unreasonable and the action taken thereon is bad in law, being discriminatory and in violation of giving effect to it being levying of extra-tax and not for any benefit to the public. Article 301 provides for complete fredom subject to the provisions of Part XIII of the Constitution for both within the State and inter state. Article 302 deals with inter-state trade etc. Article 304(b) relates to laws both within the State or inter-state and enjoins fulfilment of the conditions :-

a) that in order to be valid such laws may impose only reasonable restriction in Article 19;

b) Such laws are in public interest; and

c) before they are passed prior assent of the President has been obtained.

20. The Motor Vehicles Tax (Amendment) Act, 1963 does not indicate the purpose or object of enhancing the tax and/or utilisation of such enhanced tax.

21. It is, therefore, a levy of tax simpliciter and, the object and character of this levy is purely fiscal and nothing else.

22. In the case of Atiabari Tea Co. Ltd. v. State of Assam and Ors. reported in AIR 1961 SC 232, the Supreme Court held :

" The provision contained in Act. 301 guaranteeing the freedom of trade, commerce and intercourse is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory-character; it is not also a mere statement of a directive principle of state policy; it embodies and enshrines a principle of paramount importance that the economic unity or the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country.

Though the power of leving tax is essential for the very existence of government, its exercise must inevitably be controlled by the constitutional provisions made in that behalf. It cannot be said that the power of taxation per se is outside the purview of any constitutional limitations.

The power of Parliament and the legislatures of the State to make laws including

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laws imposing taxes is subject to the limitations prescribed by the other relevant Articles in Part XIII must be regarded as imposing a constitutional limitation on the legislatures of the States. Wherever, it is held that Art. 301 applies the legislative competence of the Legislature in question will have to be. judged in the light of the relevant Articles of Part XIII.

Art. 301 applies not only to inter-state trade, commerce and intercourse but also to inter state trade, commerce and intercourse.

The freedom of trade guaranteed by Art. 301 is freedom from all restrictions except those which are provided by the other Articles in Part XIII.

On a careful examination of the relevant provisions of Part XIII as a whole as well as the principle of economic unity which it is intended to safeguard by making the said provisions, the conclusion is inevitable that the content of freedom provided for by Art. 301 was longer than the freedom contemplated by Section 27 of the Government of India Act of 1935 and whatever also it may or may not include, it includes movement of trade which is of the very essence of all trade and is its integral part. If the transport or the movement of goods is taxed solely on the basis that the goods are thus carried or transported that directly affects the freedom of trade as comtemplated by Art. 301 AIR 1938 SC 468(495), Ref.

But restrictions, freedom from which is guaranteed by Art. 301, would be much restrictions as directly and immediately restrict or impose the free movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fail within the purview of Art. 301. In determining the limits of the width and amplitude of the freedom guaranteed by Art. 301, a rational and workable test to apply would be : Does the impugned restriction operate directly or immediately on trade or its movement.

When it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legilations only after satisfying the requirements of Act. 301(b). It is not as if no restrictions at ail can be imposed on the free movement of trade".

23. The levy of enhanced tax cannot be said to be a reasonable restriction is public interest. In this connection, reliance has been placed on the judgment of the Supreme Court in the case of Kalyani Stores v. State of Orissa reported in AIR 1966 SC 1986. There the Supreme Court held :

" The appellant is a firm which deals in liquor at Rourkela in the Orissa State. It challenges the imposition of a duty of excise of foreign liquor imported into the State, levied at first at Rs.40 per L. P. Gallon and from April 1, 1961 at Rs. 70 u/s 27 of the Bihar and Orissa Excise Act, 1915. The original duty at Rs.40 was fixed by a notification issued in 1937 and it was enhanced by a notification issued on

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March 31, 1961, in exercise of powers u/s 90 of the Act. The appellant challenges the enhancement of duty as well as the duty at the original rate on the ground that since foreign liquor is not manufactured in the State and no duty of excise as such can be levied on locally manufactured foreign ''liquor, a countervailing duty cannot be charged on foreign liquor brought from an extra-State point in India. It is submitted that whole of the duty must fail as contrary to the intendment of the Constitution. It is also argued that even if the original duty at the rate of Rs.40 per L. P. gallon could be said to be leviable by virtue of Arts. 305 and 372 of the Constitution, which preserve existing laws or laws in force, the enhancement of the existing duty makes the imposition a new tax and such notification cannot be made if there is no possibility of the levy of the corresponding duty on locally manufactured goods of the same kind.

The notification of 1961 imposing additional burden was not an existing law. That notification infringed the guarantee of freedom under Art. 301 of the Constitution and might be saved only if it, fell within the exceptions contained in Arts. 302, 303 and 304 of the Constitution. Article 302 and 303 were not attacted. As no foreign liquor was manufactured or produced in the State, power to legislate given by Art. 304 was not available. Moreover, the notification being purely of fiscal nature could not be said to be a reasonable restriction on the freedom of trade. It, therefore, did not comply with the requirements of the Constitution contained of March 1951, enhancing the levy by Rs.30 must, therefore, be regarded as invalid. That notification, however, did not affect, the validity of the earlier notification of 1937, which must remain operative in view of Art. 305.

In this case the State has not come forward with either any affidavit or with any material to justify the enhancement. It is for the State to justify the enhancement. But the State has not come forward to discharge the onus that lies upon the State. In this connection, reference may be made to a decision of the Supreme Court in the case of Labhchand Dhanpat Singh Jain Vs. The State of Maharashtra, . There the Supreme Court observed as follows :

" We agree with Mr. Krishnamurthy Iyer that the onus of showing that the restrictions on the freedom of trade, commerce or reasonable, is upon the State. It is also true that no effort was made in the affidavit filed on behalf of the State in this case to show as to how that fact would not necessarily lead the court to hold that the restrictions are unreasonable. If the court on consideration, of totality of facts finds that the restrictions are reasonable, the court would uphold the same in spite of lack of details in the affidavit filed on behalf of the State. In judging the question of reasonableness of restrictions in the present case, we must bear in mind that the levy of luxury tax relates to tobacco, the consumption of which involves health hazard. Regulation of the sale and stocking of an article like tobacco which has a health hazard and is considered to be an article of luxury by imposing a licence fee for the same, in our opinion, is a permissible restriction in public interest within Article 304(b) of the Constitution. The material on record shows that except for cultivation of tobacoo on experiment

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basis, no tobacoo is grown in the area with which we are concerned. The levy of luxury. tax is bound to result in raising the price of tobacco in the area of erstwhile States of Travancore and Cochin. One of the likely effects of the enhancement of the price of a commodity entailing health hazards is to lower its consumption."

24. It will appear from the. decision of the Supreme Court that the test of reasonableness of restriction has been held to be the same in case of both Art. 19 and Act. 304(b) of the Constitution.

25. It is no doubt true in this case that a discrimination has been made as the Delhi taxis or Howrah taxis are charged on the basis of 4 passengers whereas Calcutta taxis are charged on the basis of 5 passengers. But where the taxi is not Ambassador but Fiat or other make, there the charge is on the basis of 4 passengers. The Ambassador cars are 5 seater cars (4 passengers and 1 driver) according to the specification of the manufacturer and this seating capacity was also mentioned in Registration Certificates of ''Cars of this make whether used as a private car or used as a taxi. In Delhi where metered and luxury Ambassador cars ply, the seating capacity of each car are show as 5 i.e. 4 passengers and 1 driver and Motor Vehicles Tax is levied on the basis of 4 passengers. In West Bengal Ambassador Taxis of Howrah region which are fitted with meters and which charge same fares are registered as 5 seater car i.e. 4 passengers and 1 driver and are permitted to carry 4 passengers and pay Motor Vehicles tax on the basis of 4 passengers. Those taxis are permitted to ply in Calcutta Metropolitan area also. In Calcutta region such Ambassador taxis and Ambassador private car were at ail material times registered as 5 seater car i.e. 4 passengers and 1 driver. In the case of taxis, permits given to the owners under the Motor Vehicles Act allowed them to carry 4 passengers, this being a condition of the permit and violation whereof could result in cancellation of the permit. It may be incidentally mentioned that when an Ambassador car is registered as a private car or is registered temporarily it is registered as a 5 seater car i.e. 4 passengers and 1 driver but when the very same car is coverted to a taxi the seating capacity is altered to 6 i.e. 5 passengers and I driver. Again if the very same car is again reconverted to a private car its seating capacity is brought back to 5 seater,

26. The action of the Respondents altering the seating capacity of Ambassador taxis from 5 to 6 seater i.e. 5 passengers and 1 drover realising M. V. Tax on the basis of the 5 passengers in place of 4 passengers which under the permits are allowed to be carried in, Ambassador taxis, cannot be sustained. This alteration is irrational, unreasonable and discriminatory and thoroughly arbitrary. There is no rational basis for discriminating Ambassador taxis of Calcutta with those of. Delhi and Howrah (particularly Howrah which is within the same state) as also with Ambassador car in private use. There is also no rationale or reasonable basis for such discrimination which violates Article 14 of the Constitution. In the motor Vehicle Rules, statutory forums of application for permits and for permits are preserved. In both the forms the seating capacity prayed for and seating

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capacity allowed have to be stated. It becomes a condition of the permits, violation whereof can entail cancellation of the permit. In the facts and circumstances, in my judgment the taxing provisions constitute unreasonable restriction. For the reasons aforesaid this application is allowed. The Rule is made absolute. The will be declaration in terms of prayer (d). Let appropriate Writs be issued. There will be no order as to costs.

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