

(1991) 04 KAR CK 0021
In the Karnataka High Court
Case No : W.Ps. No's. 14375 to 14381 of 1988

M/s. Galaxy Theatre and others

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 04-04-1991

Acts Referred:

Constitution of India, 1950 — Article 14, 276, 301, 304 (b), 38
Karnataka Entertainment Tax Act, 1958 — Section 4, 4 A

Citation : AIR 1992 Kar 215

Hon'ble Judges : R. Ramakrishna, J;K. Shivashankar Bhat, J

Bench : Division Bench

Advocate : Mr. K. Srinivasan, for the Appellant; Smt. D. Bhoopathy, HCGP and Shri C. Shivappa, Advocate General, for the Respondent

Judgement

Shivashankar Bhatt, J.—In these petitions the petitioners have challenged the validity of Ss. 4 and 4A of the Karnataka Entertainment Tax Act, 1958 ("the Act" for short) as unconstitutional. The main attack is founded on Articles 14 and 304(b) of the Constitution.

2. All the petitioners are owners of cinema theatres located at various towns and cities in the State of Karnataka.

3. Following contentions were urged by the learned counsel for the petitioners :

I(a) Section 4 of the Act is violative of Article 14 of the Constitution, since unequals are treated as equals, inasmuch as the Section does not classify the exhibitors with reference to the area, wherein the theatre is located, its population, size and nature of the theatre etc. All kinds of exhibitors, irrespective of their capacity to earn or capacity to entertain, are treated alike.

(b) The Table in Section 4 provides for different rates on shows depending upon the highest rate of admission fee in a theatre. Since all theatres, wherein Rs.2.50 ps. and above per seat are treated alike, almost all theatres in the State are practically treated alike.

(c) Smaller the theatre, the impact of the levy will be greater, as compared to a bigger theatre.

II(a) Section 4A provides for levy of tax on composition basis and the payment of tax therein is on the basis of "gross collection capacity", concept of which is unrelated to the realities and is oppressive.

(b) Section 4A results in levy of tax on income or capacity and the impost ceases to be a tax on entertainment.

III Concessions granted to regional films under Sections 4 and 4A are violative of Article 14 of the Constitution.

IV Proviso to Section 4A discriminates between same kinds of regional films by applying different rates dependent upon their production being in Karnataka or outside Karnataka State.

V The levy under Sections 4 and 4A are restrictions on freedom of trade and the Act having not received the assent of the President, offends Art. 304(b) of the Constitution.

VI The special features of mini-theatre as in W.P. 6081/1988, having a small capacity of 300 seats only in Belgaum city has been ignored by the impugned provisions and thus Article 14 is contravened.

The last contention, actually is an illustrative case involving earlier contentions, and therefore, need not be considered independently.

4. Before considering the pleadings and the contention, the scheme of the Act has to be noticed. The Act imposed a tax on entertainments. u/s 3, tax is levied on each payment for admission to an entertainment at the rates stated therein. This is essentially a tax levied on the receiver of the entertainment. Section 3A levies surcharge on the said tax levied u/s 3. Section 4 bears the marginal heading as "additional tax on cinematograph shows". This is levied in addition to the taxes levied under Ss. 3 and 3A. The tax is calculated in the manner laid down in the Table attached to the Section. The tax is levied entirely on the show of films. In other words this tax has no connection to the number of persons who are admitted to the show. The tax also is not related to the locality wherein the theatre is situated. For the sake of convenience this is also referred as the show tax. The rate of tax is dependent upon the highest rate of admission payable for a person in the theatre. If the highest rate per person for admission in the theatre concerned does not exceed Rs. 1.50 ps. the rate of show tax per show is Rs. 30/-. If the admission fee exceeds Rs. 1.50 ps. but within Rs. 2.50 ps. then the show tax is Rs. 50/- per show. If, however, the rate of admission in the theatre per person to the highest class of seat is above Rs. 2.50 ps., then the show tax is Rs. 80/- per show. Thus the theatres are classified with reference to the admission rate levied on a person to the highest class of accommodation available in the theatre. The first proviso governs the show of Kannada, Kodava, Konkani or Titlu films. The show tax is at a reduced rate in respect of the show of

these films (for the sake of convenience these films are hereinafter referred to as regional films"). The next proviso is applicable to the show of regional films in the theatres paying the tax in the manner opted u/s 4A. (It may be noted here that Section 4A provides for the payment of tax in lieu of the tax under Sections 3 and 3A and this payment u/s 4A may be paid on the basis of the percentage of the gross inflection capacity of the theatre).

5. The next proviso to Section 4 provides for the levy of show tax on the cinema theatres who have opted for the levy of tax u/s 4A, when the films exhibited are non-regional films. In fact this proviso should have come earlier immediately after Section 4 and the main Table.

6. Section 4(2) prohibits the proprietor of a cinema theatre from collecting the show tax from the persons admitted to the cinema theaire for entertainment. As per Section 4(3) there is a further concession in favour of the regional films screened in theatres in a locality having a population not exceeding 15,000.

Section 4A provides for an alternative manner of paying the entertainment tax in lieu of the levy under Sections 3 and 3A. The levy is based on the gross collection capacity. The phrase "gross collection capacity" is defined in the Explanation to Section 4A(1). This is a concept equated to the entire accommodation being filled up in the theaire on any day and the aggregation of all the payments received for such admission. On the race of it this is a simple procedure which would save the cinema theatre owners from maintaining an elaborate account for the payment of tax under Sections 3 and 3A. While Sections 3 and 3A imposes the tax on the basis of the actual admission for each show, Section 4A enables the cinema theatre owners to pay a lump sum based on the full capacity of the cinema theatre. However, u/s 4A the theatres are classified with reference to the population of the local area where the theatres arc situated. It is not necessary to refer to other provisions which, are mainly machinery sections. It is thus clear that under the Act while Sections 3 and 3A levies tax on the receiver of the entertainment, Section 4 imposes a tax on the giver of the entertainment; thus both aspects of act of an entertainment are covered by the Act.

7. In the several writ petitions petitioners have extracted relevant provisions challenged and have repeated the contentions slated above. But we do not find any where in the pleadings the particulars relating to the nature of the investment made by any of the exhibitors, the particulars relating to the expenditure normally involved in exhibiting a picture, the rentals paid to the distributors of films and other relevant particulars to establish the impact of the impugned provisions on the petitioners. The petitioners have contended that Section 4 should have classified the cinema theatres with reference to their location, capacity, quality and the facilities available, etc. According to the petitioner the levy of same rate of tax on any theaire solely dependent upon the rate of admission governing the highest sealing accommodation is arbitrary, and according to the petitioners almost all the theatres in the State have a rate of

admission more than Rs. 2.50 ps. per seat for the highest class of accommodation and therefore practically all the theatres in Karnataka are brought under the net of show tax at a uniform rate. This is the basic attack against Section 4. Some attempt is made in Writ Petition 6081/1988 which is by a proprietor of a mini-theatre in Belgaum city. The petitioner therein owns a mini theatre having a seating capacity of 372. But the particulars stops with this information.

8. In W. P. 22090/1989 the petitioner is the owner of a theatre situated in a town having a population not exceeding 25,000 and claims that the location is a rural area.

Section 4 of the Act has provided different rates as governing the regional films produced in Karnataka and the regional films produced outside Karnataka. This is also highlighted as vitiating the charge u/s 4 and as contravening Article 14 of the Constitution as well as Article 304(b).

9. The State in its objection statement has sought to justify the levy. The unit of tax being the show of films, it was contended that there is nothing wrong in levying a uniform tax on the show, as a measure of levy. The regional films are treated lightly when compared to other films, obviously to encourage the regional language which essentially belong to the people of this State. The film is not only a media of entertainment but also is a media of education. The regional culture would be enriched by encouraging only the regional languages, since languages are, after all, the media through which the culture could be expressed. It is further pointed out that, as far as the production of films in the State of Karnataka is concerned, the State is backward in that respect. The number of studios are not much and their names are given in the objection statement. These studios are not fully occupied since the studios at Madras and Bombay attract most of the producers of films. In these circumstances certain concessions were necessary to encourage the show of regional films produced in Karnataka as against similar and other films produced elsewhere.

Re : Contentions Nos. 1, 3, 4 and 6

Before considering these contentions it is necessary to refer to a preliminary objection put forth by the learned Advocate General. It was contended by the learned Advocate General that similar questions raised earlier were answered in favour of the validity of the provisions in a batch of writ petitions (W.Ps. 21237/83, etc. M/s. Basaveswara Touring Talkies v. State of Karnataka, decided on 22-8-1983) and the said decision was affirmed by a Division Bench.

10. Since parties are different and the impugned provisions in the instant case have undergone a few changes, the earlier decision cannot be held as a bar to the present writ petitions; however, earlier decision will be binding on us as a precedent to the extent its ratio is applicable. Smt. Somavanti and Others Vs. The State of Punjab and Others, supports the learned Advocate General to this extent. At page 160 Supreme Court held :

"It is sufficient to say that though Court may not have pronounced on this aspect of the matter we are bound by the actual decisions which catatonically negative an attack based on the right guaranteed by Article 19(1)(f). The binding effect of a decision does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which an argument was subsequently advanced was actually decided."

11. The earlier batch of writ petitions came up before Puttaswamy, J. His Lordship negated all the contentions of the petitioners therein and upheld Sections 4 and 4A of the Act. At para 9 of the order, some of the attacks against the provisions are stated as :

"The petitioners have alleged that the highest rate of admission in their theatres chosen as the base for imposing additional or show lax u/s 4 of the Act was irrational, arbitrary and was violative of Article 14 of the Constitution. Alternatively, they have urged that the uniform and unbearable levy of show tax u/s 4 of the Act without reference to the importance of the places, population, attendance of patrons, seating capacity of the theatres, nature of theatres like permanent or touring and their inherent difference and distinctions, was discriminatory, confiscatory and was violative of Articles 14 and 19(1)(g) of the Constitution. Section 4A introduced by the Amending Act is also challenged on the very same grounds on which S. 4 is challenged."

The impugned Section 4 in the said case is found in para 43 of the order and para 44 gives Section 4A. Scheme of Sections 4 and 4A and the Table comprised in them are substantively similar to the present Sections 4 and 4A though the concessions given to the regional films was not found in the earlier Section 4. Similarly, Section 4(2) found in the present provision against the exhibitor passing on the tax burden on the person admitted to the cinema theatre was not there earlier. The present Section 4 is thus attacked as more drastic and onerous since the exhibitor cannot pass on the burden to the audience.

12. Though earlier, show tax could be indirectly passed on to the audience, the said fact was not the basis for upholding the provisions though the Court refers to the possibility of this burden being passed on to the audience (vide para 61). The said benefit was considered to negative the attack against Section 4 as confiscatory in nature (para 62). Thereafter, validity of Sections 4 and 4A were considered on the assumption that the burden cannot be passed on to the audience; at para 64 Court said :

"Let me assume that the burden imposed by Sections 4 and 4A cannot be passed on to the patrons and must be exclusively borne by the petitioners."

At para 69, the lack of classification of the theatres on the ground of attack, was referred.

13. At para 81, the Court concluded after considering the main tests applicable :

"On the foregoing discussion, it follows that the attack of the petitioners against

Section 4 of the Act as offending Article 14 of the Constitution has no merit and requires to be rejected."

Again at para 82 :

"The attack of the petitioners to Section 4A based on Article 14 is also without any merit. On the very same reasons on which I have upheld Section 4, the challenge of the petitioners to Section 4A is liable to be rejected."

Court also noticed the classification of theatres made u/s 4A, on the basis of the population of the locality.

14. We are of the view that the decision of Puttaswamy, J. directly governs the present cases and the ratio of the decision is fully applicable. This decision has been affirmed by a Division Bench and we are informed that the cases are now pending before the Supreme Court.

15. The change in the language of Sections 4 and 4A are not substantial and the respective schemes of these provisions are the same as they were earlier, considered by Puttaswamy, J. The precedential value of the said decision cannot be diluted in the manner suggested by Sri Srinivasan.

16. The attack against Section 4 based on the concessions given to the regional films, however, will be considered by us. Since we have heard the matter at great length, we proceed to express our views, independently of the earlier decision, on all the points (as we are not dissenting from the earlier decision in any manner).

Equality is not an abstract concept. Realities of life, practicality of administration, conveniences of the public and requirement of simplicity of procedure are some of the factors to be considered as relevant in testing a complaint of discrimination. Same tax per show, irrespective of the size of the theatre, its location and facilities provided in the theatre, is attacked by the small theatre owners located in small towns, on the ground that they cannot be treated in the same manner as an urban theatre owners, whose theatres are luxurious, spacious and has the benefit of a larger audience. Small town theatre owners contend that metropolitan theatre owners are more capable who could pay a higher tax. The grouping of all theatre owners in the State as a single class, is attacked as an "over-inclusive".

17. The problem of classification and the restraint with which Courts venture to examine the classification under which a taxation law (sic) has been brought out by the Supreme Court in *The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another*, Mathew, J. speaking for the Constitution Bench, held at page 1313, thus :

"A reasonable classification is one which includes all who are similarly situated and none who are not. The question then is : what does the phrase "similarly situated" mean? The answer to the question is that we must look beyond the

classification to the purpose of the law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law. The purpose of a law may be either the elimination of a public mischief or the achievement of some positive public good.

Herod ordering the death of all male children born on a particular day because one of them would some day bring about his downfall employed such a classification."

After a few observations, the learned Judge proceeded to observe at page 13(4) thus:

"The question whether, under Article 14, a classification is reasonable or unreasonable must, in the ultimate analysis depend upon the judicial approach to the problem. The great divide in this area lies in the difference between emphasizing the actualities or the abstractions of legislation. The more complicated society becomes, the greater the diversity of its problems and the more does legislation direct itself to the diversities.

Statutes are directed to less than universal situations. Law reflects distinctions that exist in fact or at least appear to exist in the judgment of legislators -- those who have the responsibility for making law fit fact. Legislation is essentially empiric. It addresses itself to the more or less crude outside world and not to the neat logical models of the mind. Classification is inherent in legislation. To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic. (See the observations of Justice Frankfurter in *Morey v. Boud* (1957) 354 US 457

That the legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry, that exact wisdom and nice adoption of remedies cannot be required, that judgment is largely a prophecy based on meagre and uninterpreted experience, should stand as reminder that in this area the Court does not take the equal protection requirements in a pedagogic manner. (See Joseph Tussman and Jacobus ten Breck, "The Equal Protection of the Laws", 37 California Rev. 341).

In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events-self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability. See Joseph Tussman and Jacobus ten Breck. "The Equal Protection of the Laws" 37 California Rev. 341".

18. The urban theatre owner may, as well, say that he has to invest a huge capital to put up even a small theatre, having regard to the cost of the land and labour and his recurring expenditure also is quite heavy and, therefore, he should not be taxed in the same manner as a rural theatre owner, the latter having not spent much on capital investment can afford to pay a higher tax annually. The object of Section 4 is to levy the tax on the giver of the entertainment; the unit of taxation is the exhibitor, as a single entity; therefore, in the abstract, it is possible to say that an exhibitor having already incurred heavy expenditure should not be further burdened heavily, unlike a small-town theatre owner; added, the rental value per show payable for exhibition in a bigger town is certainly higher than in a smaller town. Entertainment tax on the exhibitor is not a tax on the capacity of the exhibitor, requiring a close relationship to the capacity. May be, under certain circumstances, the legislature in its wisdom may choose a higher levy on an "urban theatre owner" (this term should be read as including an urban exhibitor of films in this judgment).

19. When a tax levy is attacked as discriminatory, the harsh realities of discrimination, its oppressiveness and palpable injustice or hostility by such a levy has to be clearly brought out by the petitioners who attack the levy as discriminatory. In such a situation, the entire global picture of expenditure, income, capital outlay, normal returns, the affectation of the impugned tax, are to be pleaded and proved. Levy cannot be struck down on an application of any abstract formula.

20. The Table u/s 4 has classified the applicability of the rate of show tax into three categories. But the contention of the petitioners, is that, classification should have been made of theatres with reference to their location, size, etc.; in other words, levy of show tax on the exhibitor should vary depending upon the capacity of the exhibitor to attract or reach a larger audience. This is purely a theoretical approach; petitioners have neither placed proper material as to the discrimination nor placed any patent harshness resulting to them by this over-inclusive or all embracing classification of the subject of taxation. The oft cited decisions in connection with the contention that the law is arbitrary for the failure to classify properly, are Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, and the State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others,

21. In Moopil Nair's case facts spoke for themselves. Irrespective of the facilities or barren nature of the land, land tax was levied, even when the land did not yield any income, the resultant position was, the imposition became confiscatory and discriminatory. At page 559, Supreme Court held :

"It is clear, therefore, that apart from being discriminatory and imposing unreasonable restrictions on holding property, the Act is clearly confiscatory in character and effect. It is not even necessary to tear the veil, as was suggested in the course of the argument, to arrive at the conclusion that the Act has that unconstitutional effect."

Thus the harshness was too patent and could not be covered by any veil of legality or constitutionality. Position was the same in *Mails Raja's* case. The background to the ultimate conclusion, is found at page 1468 :

"Sections 3 and 4 are charging sections and they say in effect that a person will have to pay an additional assessment per acre in respect of both dry and wet lands. They do not lay down how the assessment should be levied. No notice has been prescribed, no opportunity is given to the person to question the assessment on his land. There is no procedure for him to agitate the correctness of the classification made by placing his land in a particular class with reference to ayacut, acreage or even taram. The Act does not even nominate the appropriate officer to make the assessment to deal with questions arising in respect of assessments and does not prescribe the procedure for assessment. The whole thing is left in a nebulous form. Briefly stated under the Act there is no procedure for assessment and however grievous the blunder made there is no way for the aggrieved party to get it corrected. This is a typical case where a taxing statute does not provide any machinery of assessment."

At page 1469, the Supreme Court found :

".....Further, the whole imposition of assessment was left to the arbitrary discretion of the officers not named in the Act without giving any remedy to the assesseees for questioning the correctness of any of the important stages in the matter of assessment, such as ayacut, laram, rate or classification or even in regard to the calculation of the figures. Not only the scheme of classification, as pointed out by us earlier, has no reasonable relation to the objects sought to be achieved, viz., fixation and rationalisation of rates but the arbitrary power of assessment conferred under the Act enables the appropriate officers to make unreasonable discrimination between different persons and lands. The Act, therefore, clearly offends Art. 14 of the Constitution."

22. Section 4B of the Act is a special provision in respect of video shows. In lieu of the tax payable under the preceding sections, a flat rate of tax is levied on video shows at the rate of Rs. 2,500/- per month. This was attacked for its failure to classify the video parlors depending upon the population of the area and the size of the video parlors, etc.; the contention urged was identical to the present contention, in *State of Karnataka and Another Vs. B. Ganesha Krishna Bhat and Others* etc., This was repelled. At para 8, the Bench (of which one of us was a parly) observed that :

"The trend of decisions starting from *Twy-ford Tea Company's* case would disclose that the ratio of *Moopil Nair's* case is applied only where lands and buildings, which have apparently no income, are taxed along with others which produce income. The view expressed in *Moopil Nair's* case had not been applied outside taxation on lands and buildings."

The principle governing the situation was stated at page 1054 (Para 9) :

"The object of subjecting taxing power to Article 14 of the Constitution is that the State should evenly and equitably distribute the burden of taxation. The Courts allow a wide latitude to legislative classification as there could be more than one classification and if the legislature selects one of them Courts would not be justified in interfering on the ground that the legislature ought to have adopted another basis which was more reasonably according to the Court. Hence, Courts interfere only in cases where classification is capricious, fanciful or arbitrary or clearly unjust. A classification can be over-inclusive or under-inclusive. In the former case, situations or classes which ought to have been included are brought within the ambit of law and in the latter cases situations or classes which ought to have been ordinarily included are left out. In either case it does not seem proper to strike down the classification as a whole unless it is incapable of extrication into the good and the bad or is so patently arbitrary and unjust."

Re : Concessions :

In a recent decision in Sri Krishna Das Vs. Town Area Committee, Chirgaon, levy of tax referred as weighing dues was challenged as discriminatory, in view of the exemptions granted to a few of the products. The observations of the Supreme Court found at page 654 are at page SC 2103; (of AIR) :

"The contention that the tax is discriminatory in view of the exemptions granted to some of the products and to those that enter the TAC by rail or motor transport is equally untenable. It is for the legislature or the taxing authority to determine the question of need, the policy and to select the goods or services for taxation. The courts cannot review these decisions. In paragraph 16 of the counter affidavit the TAC tried to explain the reason for not taxing salt, sugar and Justice stating that they were not local produce but were imported from distant places and that the tax was levied only on the local produce which came from the neighbouring places. Courts cannot review the wisdom or advisability or expediency of a tax as the court has no concern with the policy of legislation, so long as they are not inconsistent with the provisions of the Constitution. It is only where there is abuse of its powers and transgression of the legislative function in levying a tax, it may be corrected by the judiciary and not otherwise. Taxes may be and often are oppressive, unjust, and even unnecessary but this can constitute no reason for judicial interference. When taxes are levied on certain articles of services and not on others it cannot be said to be discriminatory. Cooley observes : "livery tax must discriminate; and only the authority that imposes it can determine how and in what directions". The TAC having decided to impose weighing dues on the goods mentioned in the bye-laws it is not for the court to question it on the ground that some similar commodities or commodities arriving by rail or road were not subjected to the tax."

These words certainly do not exclude the judicial scrutiny of fiscal legislation under Article 14 of the Constitution, but permits a wide latitude to the legislations in selecting the subject for the levy; the legislative wisdom in granting exemption to similar subject is to be rarely questioned. The principle

stated by Cooley in this regard is extracted by this Court in *B.P. Automobiles and Others Vs. State of Karnataka and Another*, Justice M. N. Venkatachaliah, speaking for this Court said at page 105 thus ;

"Even if there is a doubt in the mind of the court in regard to a question of constitutionality, it must be resolved by upholding constitutionality. Thomas Cooley (*A Treatise on the Constitutional Limitations*, page 182) says:

"It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an Act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject and never declare a statute, void, unless the nullity and invalidity of the Act are placed, in their judgment beyond reasonable doubt. A reasonable doubt must be solved in favour of the legislative action, and the Act be sustained."

23. The developed studios situated in Madras or Bombay may enable the production of a Kannada film there at a cheaper cost, when compared to the films produced in Karnataka; there may be several factors resulting in an advantage to a film producer outside Karnataka, such as modern studios with facilities for procuring the films speedily and at a cheaper cost, recording facilities, of sound and music, or availability of technicians etc. In view of the dubbing of languages, it is possible to produce a Kannada or other regional language films outside the State by engaging actors and artists willing to act for a lower remuneration (who may not even knew the language in which the film is produced). The competitive strength of a commercial product or of a film does not necessarily depend upon its cost, unless the competitive prices are patently divergent and glaringly the price structure of one is far lower than the other.

24. In the instant case, the discrimination is pleaded because of the concessions given to the locally produced films. It is not a case of hostile discrimination as against the "outside" films, but a case of protective discriminating to encourage economic and cultural growth within the State, by reducing the tax burden on the exhibitor whenever locally produced films are exhibited. The object is to accelerate productive activities within the State so that State of Karnataka may stand on par with other States in the matter of economic growth and cultural activities. It is necessary to remember here, that historically no other language in this country suffered by being distributed amongst various geographical units, as Kannada. Till the States reorganisation, Kannada speaking people were distributed amongst erstwhile States of Hyderabad, Bombay, Madras and Mysore, resulting in a slow growth of its cultural characteristics. State of Karnataka has, therefore, necessarily to take steps to accelerate growth of Kannada and other regional languages. The impugned tax concessions under the Act are only token and symbolic of this peculiarity of these regional languages.

25. The Supreme Court has referred to this principle in the decision reported in

M/s. Video Electronics Pvt. Ltd. v. State of Punjab, . At page 836, Supreme Court held :

"Power to grant exemption is inherent in all taxing legislations. Economic unity is a desired goal, economic equilibrium and prosperity is also the goal. Development on parity is one of the commitments of the Constitution. Directive principles enshrined in Arts. 38 and 39 must be harmonised with economic unity as well as economic development of developed and under-developed areas. In that light on Art. 14 of the Constitution, it is necessary that the prohibitions in Art. 301 and the scope of Art. 304(a) and (b) should be understood and construed. Constitution is a living organism and the latent meaning of the expressions used can be given effect to only if a particular situation arises. It is not that with changing times the meaning changes but changing times illustrate and illuminate the meaning of the expressions used. The connotation of the expressions used takes its shape and colour in evolving dynamic situations. A backward State or a disturbed State cannot with parity engage in competition with advanced or developed States. Even within a State, there are often backward areas which can be developed only if some special incentives are granted. If the incentives in the form of subsidies or grant are given to any part of units of a State so that it may come out of its limping or infancy to compete as equals with others, that, in our opinion, does not and cannot contravene the spirit and the letter of Part XIII of the Constitution. However, this is permissible only if there is a valid reason, that is to say, if there are justifiable and rational reasons for differentiation. If there is none, it will amount to hostile discrimination."

Some of the observations of the Supreme Court in M/s. Video Electronic (P.) Ltd. are very relevant to the instant cases before us. After referring to Indian Cement and Others Vs. State of Andhra Pradesh and Others, and Articles 301 and Indian Cement and Others Vs. State of Andhra Pradesh and Others, of the Constitution, the Supreme Court pointed out the need to harmonise the various provisions of the Constitution, which includes power given to the States to levy tax for its purposes. The need to enable any State to evolve a fiscal policy to accelerate its economic development was recognised at page 831. A few observations of the Supreme Court are :

"Hence, the economic development of States to bring these into equality with all other States and thereby develop the economic unity of India is one of the major commitments or goals of the constitutional aspirations of this land. For working of an orderly society economic equality of all the States is as much vital as economic unity."

Again :

"The taxes which do not directly or immediately restrict or interfere with trade, commerce and intercourse throughout the territory of India, would therefore, be excluded from the ambit of Art. 301 of the Constitution. It has to be borne in

mind that sales tax has only an indirect effect on trade and commerce."

Further down, it was pointed out,

"It has to be examined whether difference in rates per se discriminates so as to come within Arts. 301 and 304(a) of the Constitution. It is manifest that free flow of trade between two States does not necessarily or generally depend upon the rate of tax alone. Many factors including the cost of goods play an important role in the movement of goods from one State to another. Hence the mere fact that there is a difference in the rate of tax on goods locally manufactured and those imported would not amount to hampering of trade between the two States within the meaning of Art. 301 of the Constitution. As is manifest, Art. 304 is an exception to Art. 301 of the Constitution. The need of taking resort to exception will arise only if the tax impugned is hit by Arts. 301 and 303 of the Constitution. If it is not then Art. 304 of the Constitution will not come into picture at all. See the observations in *State of Madras Vs. N.K. Nataraja Mudaliar*, of the report. It has to be borne in mind that there may be differentiations based on consideration of natural or business factors which are more or less in force in different localities. A State might be allowed to impose a higher rate of tax on a commodity either when it is not consumed at all within the State or if it is felt that the burden falling on consumers within the State, will be more than that and large benefit is derived by the revenue. The imposition of rates of sales tax is influenced by various political, economic and social factors. Prevalence of differential rate of tax on sales of the same commodity cannot be regarded in isolation as determinative of the object to discriminate between one State and another. Under the Constitution originally framed revenue from sales tax was reserved for the States."

At page 832 (para 24)

"Every differentiation is not discrimination. The word "discrimination" is not used in Art. 14 but is used in Arts. 16, 303 and 304(a). When used in Art. 304(a), it involves an element of intentional and purposeful differentiation thereby creating economic barrier and involves an element of an unfavourable bias. Discrimination implies an unfair classification."

At page 833

"Economic unity of India is one of the constitutional aspirations of India and safeguarding the attainment and maintenance of that unity are objectives of the Indian Constitution. It would be wrong, however, to assume that India as a whole is already an economic unit. Economic unity can only be achieved if all parts of whole of Union of India develop equally, economically. Indeed, in the affidavits of opposition various grounds have been indicated on behalf of the respondents suggesting the need for incentives and exemptions, and these were suggested to be absolutely necessary for economic viability and survival of these industries in these States. These were based on cogent and intelligible reasons of economic encouragement and growth. There was a rationale in these which is discernible."

The power to grant exemption is always inherent in all taxing statutes. If the suggestions/submissions as advanced by the petitioners are accepted, it was averred, and in our opinion rightly, that it will destroy completely or make nugatory the plenary powers of the States. If the exemption is based on natural and business factors and does not involve any intentional bias, the impugned notifications to grant exemption for limited period on certain specific conditions cannot be held to be bad."

At page 833 (para 28)

"Concept of economic barrier must be adopted in a dynamic sense with changing conditions. What constitutes an economic barrier at one point of time often cease to be so at another point of time. It will be wrong to denude the people of the State of the right to grant exemptions which flow from the plenary powers of legislative heads in List II of the 7th Schedule of the Constitution. In a federal polity, all the States having powers to grant exemption to specified class for limited period, such granting of exemption cannot be held to be contrary to the concept of economic unity. The contents of economic unity by the people of India would necessarily include the power to grant exemption or to reduce the rate of tax in special cases for achieving the industrial development or to provide tax incentives to attain economic equality in growth and development. When all the States have such provisions to exempt or reduce rates the question of economic war between the States inter se or economic disintegration of the country as such does not arise. It is not open to any party to say that this should be done and this should not be done by either one way or the other. It cannot be disputed that it is open to the States to realise tax and thereafter remit the same or pay back to the local manufacturers in the shape of subsidies and that would neither discriminate nor be hit by Art. 304(a) of the Constitution. In this case and as in all constitutional adjudications the substances of the matter has to be looked into to find out whether there is any discrimination in violation of the constitutional mandate."

At page 836 referring to the Indian Cement case it was observed thus :

".....where there was a naked blanket preference in favour of locally manufactured goods as against goods coming from outside the State. These cases, as we read these, dealt with a conferment of exemption without any reason or concession in favour of indigenous manufactured goods which was not available in respect of the goods imported into that State."

26. Therefore, it is clear that grant of exemption or concession to the locally produced goods is not per se unconstitutional and question of discrimination would arise only in the case of blanket and naked preference which could be termed as an act of hostile discrimination; but, preference if based on sound economic policy, to bring the State on par with other Indian States, the legislative policy will be sustained. The taxation law to be invalidated on the ground of arbitrariness or as an inference with the freedom of trade, should be

vitiated by patent irrationality, lacking in a proper purpose.

27. Sri Srinivasan relied on the decision of this Court in Kapoor Investments (P) Ltd. Vs. State of Karnataka, to contend that the State's prescription that every theatre should compulsorily exhibit Kannada films for three months in an year was quashed by this Court and the analogy of the said case is applicable to the facts of the instant case -- (One of us was a party to the said decision) Rule 7A involved in the said case imposed the prescription referred by Sri Srinivasan. Power 6f the State Government was, in fact upheld by the Bench, at page 207, the Bench held :

".....we hold that Rule 7A framed by the State Government carries out the purpose of the Act and is not beyond the competence of the State Government and has been made in the interest of general public."

The Rule was struck down for the reason that a Uniform period for screening the Kannada films was prescribed without reference to individual hardships that may result to the exhibitors. At page 212 it was pointed out that :

"Therefore, unless a reasonably large number of Kannada films are produced which are qualitatively capable of attracting a reasonable audience, the compulsion to exhibit Kannada films at least for a period of 3 months in an year will result in causing great loss to the petitioners and such a compulsion will be an onerous burden on the exercise of fundamental right- to engage oneself in the trade of exhibiting films. It may be pertinent to observe that in the whole of the statement of objections, the State Government has not brought out at all as to how the period of 12 weeks has been chosen for imposing a restriction on the exhibitors to exhibit Kannada films. It is well known that in a particular locality there may be several theatres e.g., Mages tic area or Cantonment area and it is inconceivable that a particular film can be exhibited twice or thrice over through different theatres in the same locality without such theatres incurring loss."

Again at para 25 :

"Moreover, the rule-making authority has not made any provision for grant of exemption in the event of non-availability of Kannada films for exhibition. The petitioners are left with no remedy if they are not able to secure variety in Kannada films for exhibition and they would be compelled to exhibit one and the same film whether liked or disliked and whether there is audience or no audience."

The object behind the impugned Rule was accepted by the Courts; but its implementation was not properly done; this is clear from what is stated further,

"Further, in the absence of any material on record, we fail to understand as to how a period of 12 weeks in an year has been provided for exhibiting Kannada films. As to what is the rational behind fixing 12 weeks in an year, remains unexplained. We agree with the learned State Counsel that the impugned Rule has been made in public interest and a very laudable object is sought to be

achieved in the interest of the State. But without ascertaining and finding out (as no material in this regard has been placed on the record) whether all the theatres in the State would, fairly and without incurring loss, be able to exhibit Kannada films for 12 weeks in an year, a provision is made for exhibition of Kannada films for 12 weeks, which, on the face of it, appears to be wholly arbitrary and unreasonable."

The ratio of the above decision in Kapoor Investments (P.) Ltd. has nothing to do with the present grievances made out by the petitioners. The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment, was cited and observations in the concluding paragraphs were relied by the learned Counsel for the petitioners. A similar show-tax at a uniform rate per show was levied on the exhibitors, which was challenged in the said case. The first challenge was that the levy, in effect, was on the profession or trade of exhibiting films and hence the constitutional limitation about the quantum of tax per annum (i.e. not to exceed Rs. 100/- per annum, under the Government of India Act -- similar to the present Article 276 of the Constitution) was attracted; Supreme Court did not accept this plea of the petitioners; the levy was held to be a levy on the entertainment and such a levy can be imposed on the giver of the entertainment also and entertainment tax need not be confined to the persons receiving the entertainment. At page 585, after referring to the legislative entry empowering the legislation to make a law imposing the tax on "entertainments, luxuries, etc." the Court proceeded to hold :

"The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax."

Again,

"The impugned tax is a tax on the act of entertainment resulting in a show."

The attack based on Article 14 was not considered, thereafter, for want of proper pleadings. However, certain observations were made, which are relied upon heavily by Sri Srinivasan. It was observed :

"It may not be unreasonable or improper if a higher tax is imposed on the shows given by a cinema house which contains large seating accommodation and is situate in fashionable or busy localities where the number of visitor is more numerous and in more affluent circumstances than the tax that may be imposed on shows given in a smaller cinema house containing less accommodation and situate in some localities where the visitors are less numerous or financially in less affluent circumstances, be said to be similarly situate. There was, however, no material on which the trial Court could or we may now come to a decision as to whether there had been any real discrimination in the facts and circumstances of this case."

These observations in no way lay down a peremptory principle to the effect that a graded rate of tax alone could be imposed, classifying the theatres with reference to their localities, size, etc. The Supreme Court held that such a graded imposition by classifying the theatres appropriately was not unreasonable nor improper; in other words the principle to be adopted was left to the legislative wisdom; it does not mean that in every case, if this classification is not resorted, the imposition would become arbitrary. Test of arbitrariness lies elsewhere. Unreasonableness and arbitrariness has to be found put from the impact of the impost on the fundamental rights of the petitioners.

28. In *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, this principle was stated by the Supreme Court, at page 593 :

"Under the Constitution, protection against impairment of the guarantee of fundamental rights is determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action. Impairment of the right of the individual and not the object of the State in taking the impugned action, is the measure of protection,"

Again, after a few observations;

".....the validity of the State action must be adjudged in the light of its operation upon the rights of the individual and groups of individuals in all their dimensions."

Though these observations were made in the contrast of the then Articles 19(1) (f) and 31, the principle enunciated as above has a wider application, available to consider the impact of State action on other fundamental rights also.

29. As happened in *Western India Theatres case*, it is for the petitioners to plead and prove that the provisions of Article 14 of the Constitution are in any way affected and that the fundamental rights of the petitioners are vanquished by the impugned State action. The plea of the petitioners cannot be decided by resort to theoretical arguments or in abstract.

30. The latitude given to the Legislature in evolving any fiscal policy and its implementation, as against the judicial restraint required while approaching attacks against such a law, are again brought out in *P.M. Ashwathanarayana Setty and Others Vs. State of Karnataka and Others*, M. N. Venkatachaliah, J. speaking for the Supreme Court, observed at page 118 :

"The problem is indeed, a complex one not free from its own peculiar difficulties. Though other legislative measures dealing with economic regulation are not outside Art. 14, it is well recognised that the State enjoys the widest latitude where measures of economic regulation are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and What discriminations advance those special and economic policies. In view of the inherent complexity of these fiscal adjustments, Courts give a larger discretion to the Legislature in

the matter of its preferences of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustments of an economic measure are available, the Legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or that there were better ways of adjusting the competing interests and claims. The Legislature possesses the greatest freedom in such areas."

31. The decision of the Court reported in the case of Kamat and Co. and others Vs. State of Karnataka and another, pertains to the exemption given to a particular co-operative society, which, on the face of it affected the rival traders and hence the executive action in granting the exemption was struck down. This has no relevance to the instant case.

Re : Articles 301 and 304(b)

Re : Contention V :

32. In B.P. Automobiles and Others Vs. State of Karnataka and Another, the Bench observed :

"Normally, a tax which is non-discriminatory and in relation to goods used in inter-State trade or commerce, not so excessive or prohibitive as to become a direct and immediate impediment in the free flow of trade and commerce, on sale of goods does not violate Article 301."

33. Here levy of tax is not on goods, but on the entertainment. Mr. Srinivasan contends that the favour shown to the regional films produced in Karnataka affects the free flow of the films produced outside Karnataka, into Karnataka and thus Article 301 is attracted; if so, such a law requires Presidential assent to save it, under the proviso to Article 304(b) of the Constitution.

34. Free flow of trade, commerce or intercourse does not depend entirely on the parity of treatment in the matter of taxation. It is possible that cost of production of a particular goods in Karnataka may be higher! than the cost of production in another State. In such a situation tax concession to the goods produced in Karnataka would not affect the competing power of the goods produced outside the State. Though Mr. Srinivasan relied on the decision of the Supreme Court in Indian Cement and Others Vs. State of Andhra Pradesh and Others, the observations therein are actually not applicable to the instant case. The subsequent decision of the Supreme Court in M/s. Video Electronics (P.) Ltd."s case has distinguished Indian Cement"s case.

Re : Contention II :

35. This contention need not detain us long. It is an alternative provision for the benefit of the tax payer and to simplify the, procedure. It avoids the maintenance of an elaborate account of the collections made at every show in a theatre. Section 4-A enables the theatre owner to pay a lump sum in lieu of the

tax under Sections 3 and 3-A. The concession shown to the regional films and the films which have won awards cannot be nullified under Article 14 for the reasons already stated, while considering the main contention. Mr. Srinivasan, however, contended that the concept of gross collection capacity is very harsh and a theatre owner will have to imagine the existence of a situation wherein the theatre is deemed to have been fully occupied for a show on any particular date and the said particular date is not forthcoming in the Act.

36. It is not possible to accept this contention. There is no difficulty in imagining a situation when the entire seats are filled up and compute the possible collection from such admissions. There is no vagueness in the provision. It is obvious that the date for computation will be the date nearest when the exhibitor applies under S. 4A. S. 4A itself provides that the option thereunder will have to be exercised once a year and shall be final in that year. No contention was advanced regarding the impracticability of working out various provisions to S. 4A and therefore we need not consider the same. It will not be in the interest of theatre owners themselves to have these provisions struck down.

37. For the reasons stated above we find no merit in these writ petitions. They are accordingly dismissed and rule discharged. No order as to costs.

38. Petition dismissed.