

(1990) 12 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : C.W.P. No"s. 58, 62, 72, 73, 74, 77, 79, 230, 235, 261 and 300 of 1978, 109, 127, 130, 281 of 1979, 115 of 1983, 540 and 338 of 1988

Yash Pal Garg and Others

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 10-12-1990

Acts Referred:

Constitution of India, 1950 — Article 213, 255, 301, 302, 304
Himachal Pradesh Taxation (On Certain Goods Carried by Road) (Amendment) Act, 1979 — Section 3(3)
Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1976 — Section 3, 3(2)

Citation : (1990) 2 ILR HP 694

Hon'ble Judges : V.K. Mehrotra, J; Bhawani Singh, J

Bench : Division Bench

Advocate : K.D. Sood, in C.W.P. Nos. 109, 127 and 130 of 1979, Trilok Chauhan, in C.W.P. No. 235 of 1978 and Praneet Gupta and Bhupinder Gupta, in C.W.P. Nos. 115 of 1983, 540 and 338 of 1988, for the Appellant; M.L. Chauhan, Assistant A.G. in C.W.P. Nos. 109, 127 and 130 of 1979, M.L. Chauhan, C.W.P. No. 235 of 1978 and M.L. Chauhan in C.W.P. Nos. 115 of 1983, 540 and 338 of 1988, for the Respondent

Final Decision : Allowed

Judgement

V.K. Mehrotra, J.—This group of 18 writ petitions raises a common question. The facts in each of them are more or less the same. They were heard by us together. We propose to dispose them of by a common judgment.

2. The Himachal Pradesh Passengers and Goods Taxation Act, 1955 was in force in this State. Under it, the various articles of trade in the State, carried by road in motor vehicles/trucks or floated by rivers were subjected to a certain tax.

3. The Himachal Pradesh Taxation (On Certain Goods Carried by Road) Ordinance, 1976 (Ordinance No. 5 of 1976) was promulgated under which the State purported to levy an additional tax, over and above the tax levied or livable

under the Himachal Pradesh Passengers and Goods Taxation Act, 1955, on every kind of goods which were specified in column 2 of the Schedule at the rate specified against the goods in column 3. The Ordinance was replaced by the Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1976 (H.P. Act No. 34 of 1976).

4. The statement of objects and reasons given at the time of the introduction of the Bill, said:

In order to mobilise additional resources, it was proposed to levy a tax on fruits which are carried by road. The Legislative Assembly was not in session and circumstances existed which rendered it necessary for the Governor to take immediate action for promulgating an Ordinance under Article 213 of the Constitution. Accordingly, Ordinance, i.e., the Himachal Pradesh Taxation (On Certain Goods Carried by Road) Ordinance, 1976 (Ordinance No. 5 of 1976) was promulgated. This bill aims at replacing the aforesaid Ordinance without any modification.

5. Section 3 of the Act is a charging Section. It provides for levy and the rate of tax to be paid on every kind of goods, as noticed earlier, specified in column 2 of the Schedule to the Act, which were carried by mechanical vehicle, cart, animal and human agency or any other means, except railways and airways. The rate of tax, in respect of each of the goods mentioned in the Schedule, was indicated in column 3 of the Schedule. The Government, u/s 3 (2), is given the power to amend, by notification, column 3 of the Schedule, provided that the rates of tax specified in column 3 of the Schedule, shall not be enhanced or reduced by more than 50 per cent of the rates given therein at the time of the commencement of the Act.

6. The Himachal Pradesh Legislature passed Act No. 16 of 1978, called the Himachal Pradesh Taxation (On Certain Goods Carried by Road) (Amendment) Act, 1978 by which some items were added in the second Schedule. What was said, by way of aims and objects for introduction of the Bill, leading to this amendment, was that:

H.P. Taxation (On Certain. Goods Carried by Road) Act, 1976 and the Schedule appended thereto, only levies tax on fruits. Now in order to mobilise additional resources, for the development purposes, it has been decided to levy a tax on other goods like potatoes, timber and other forest produce such as bamboo, Katha, dioscorea and herbs, etc., which are carried by road.

7. Yet another amendment was made to the Act in the year 1979, known as the Himachal Pradesh Taxation (On Certain Goods Carried by Road) (Amendment) Act, 1979 (Act No. 6 of 1979), adding Sub-section (3) to Section 3 of the parent Act, giving power to the State Government to exempt, in public interest, any of the goods or class of goods specified in the Schedule, from the payment of tax under the Act subject to such conditions as it may deem fit.

8. Later, in the year 1985, the Himachal Pradesh Legislature passed H.P. Act No. 9 of 1985, known as the Himachal Pradesh Taxation (On Certain Goods Carried by Road) (Amendment) Act, 1985, by which the existing Schedule appended to the principal Act (as amended by Act No. 16 of 1978), was substituted with a new Schedule containing as many as 19 items.

9. What is noticeable is that none of the Acts dealing with the levy of tax on the goods mentioned in the Schedule, received the assent of the President at any stage.

10. The statement which has been made before this Court, by the Petitioners, is that the tax imposed by the Ordinance and thereafter by the Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1976, and the amendments made from time to time therein, had the effect:

to impair and put an impediment on the free flow of trade and commerce and intercourse, for example, by imposing high tariff trade barriers and imposts, which have a direct effect on the free flow of trade not only within the State but also inter-State trade. The Act affects the movement directly and immediately as distinguished from indirectly and remotely. If the tax is paid, the trade will be destroyed.

Since there is no similar tax levied in the neighbouring State of Punjab, Haryana, J&K and U.P. on goods carried by road, it would be impossible for the traders of Himachal Pradesh, including the Petitioners, to sell their goods with additional 8% levy which they have to bear by way of the tax. As such, it amounts to unreasonable restriction and restraint on the trade of the Petitioners." (See: Paragraphs 10 and 11 in C.W.P. No. 58 of 1978).

11. The State has filed a return. What has been asserted in it is that no previous sanction of the President of India was necessary to enact the Act, which is within the competence of the Himachal Pradesh Legislature and is neither discriminatory nor suffers from excessive delegation of power. However, that:

It is incorrect that impediment has been placed in the free flow of trade and commerce. Ours is a Welfare State and resources have to be augmented for meeting the expenditure on various socio-economic developmental activities of the Pradesh. The trade is least affected with the imposition of this tax.

The position of taxation in other States has no relevancy to this State, because every State has its own problems to be solved, resources to be tapped and the finances at its command This tax will form a part of the general revenue of the State.

12. What has been urged on behalf of the Petitioners before us is that the levy of tax, in the present cases, amounts to a restriction upon free trade, commerce and intercourse in the territory of India. It is violative of Article 301 of the Constitution.

13. Article 301 says that "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free".

Article 304, however, says that:

Notwithstanding anything in Article 301, the Legislature of a State may by law:

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impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

14. The scope of these Articles has been the subject-matter of various decisions of the Supreme Court. The first of these cases, which we may notice, was in the case of *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, . It was decided by a Constitution Bench.

15. The matter was gone into again in the year following by a seven Judge Bench of the Supreme Court in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, .

16. Both these cases were noticed by the Supreme Court the very next year in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, . This was also a decision by a Constitution Bench. The Bench noticed the aforesaid two earlier decisions and said, in so far as it is material for our purposes, (in paragraph 9) that:

The majority view in the *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, : (1961) 1 SCR 809 which has been accepted in the *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , is, as expressed by Gajendragadkar, J:

Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301 We are therefore satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Article 301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement? Our conclusion therefore is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States them selves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any

direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII.

Later, in paragraph 10, the Supreme Court observed that:

It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures.

17. The same view was expressed by the Supreme Court in *G.K. Krishnan and Others Vs. State of Tamil Nadu and Others*, . It was observed (in paragraph 15) that:

For a tax to become a prohibited tax, it has to be a direct tax, the effect of which is to hinder, the movement part of the trade. If the tax is compensatory or regulatory, it cannot operate as a restriction on the freedom of trade or commerce.

18. We may notice at this stage that in *G.K. Krishnan's* case, the Supreme Court was examining the validity of the imposition of enhanced tax on contract carriages by a Government order dated January 20, 1971 in exercise of powers conferred by the provisions of Madras Motor Vehicles Taxation Act, 1931 (3 of 1931). On facts, the Court felt that the tax under challenge was compensatory in character and was outside the ambit of the restriction envisaged by Part-XIII of the Constitution. The Supreme Court observed (in the concluding portion of paragraph 27) that:

It is unnecessary to pursue the matter further, as we think the tax imposed by the notification is compensatory in character and could not, therefore, restrict the freedom of trade and commerce, according to the decision in *Automobile* case.

19. In a recent case in *Buxa Dooars Tea Company Ltd. and Ors. v. State of West Bengal and Ors.* (1983) 3 SCC 211) the Supreme Court was called upon to examine the validity of certain Sections of the West Bengal Taxation Laws (Amendment) Act, 1981 and 1982. It said (in paragraph 9) that:

If the levy imposes a cess in respect of tea estates, it may well be said that even though the free flow of tea is impeded in its movement throughout the territory of India it is in consequence of an indirect or remote effect of the levy and that it cannot be said that Article 301 is contravened. The contention of the Petitioners is, however, that it is ostensibly only in respect of tea estates but in fact it is a levy on despatches of tea. If that contention is sound, there can be no doubt that it constitutes a violation of Article 301 unless the legislation is brought within the scope of Article 304(b)." (Emphasis supplied) On facts, the Court came to the conclusion that the impugned amendments brought in a levy on despatches of tea and declared it to be void.

20. Before parting with the precedents, we may notice a Single Judge judgment of the J.&K. High Court in Suchet Singh Vs. State of J. and K., , upon which great emphasis was laid by the learned Assistant Advocate General. After noticing the various decisions of the Supreme Court and reiterating the tests accepted therein, the learned Judge found, on facts that the levy under challenge before him was of a compensatory character. It is in this background that one has to appreciate the further observations (contained in paragraph 14) to the effect that:

the tax being intended for raising money for carrying on functions of Government and for sustaining manifold welfare activities undertaken by the State the burden imposed by it is reasonable and in public interest.

21. This decision need not detain us any further.

22. We have seen earlier that by the impugned provision, there is a direct levy upon the carriage of goods by road and waterways. It is not the case of the Respondent State that the levy was compensatory or regulatory in character. In any case, we do not find any mention in the reply filed by the State of any facts which may bring the levy in either of the two categories.

23. On the averments made in the petition, noticed by us earlier, which have not been effectively denied on behalf of the State, there is hardly any scope for saying that the levy does not amount to restriction within the meaning of Article 301 of the Constitution of India. The levy could only have been saved, in case the restriction brought about by it purported to be in public interest and that too if the assent of the President had been obtained either by way of previous sanction or even by obtaining his assent to the Act subsequently to bring it within the four corners of Article 255. Admittedly, there is no sanction of the President at any stage. Consequentially, the provisions of the Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1976 (Act No. 34 of 1976), as amended from time to time, are declared to be constitutionally invalid.

24. The petitions succeed. The amount deposited towards the tax by the Petitioners, in terms of the interim orders passed by this Court, be refunded to them by the State of Himachal Pradesh in accordance therewith.

25. The Petitioners shall be entitled to their costs.