

CASE NO.:

Appeal (civil) 3545-3562 of 1991

Appeal (civil) 12094-12258 of 1996

Appeal (civil) 827-833 of 1995

PETITIONER:

The State of Himachal Pradesh & others etc.

The State of Himachal Pradesh & others etc.

State of Himachal Pradesh & another etc.

RESPONDENT:

Yash Pal Garg (dead) by LRs & others etc.

M/s H.H. Exporters etc.

M/s Jai Mata Rolled Glass Ltd. & another etc.

DATE OF JUDGMENT: 30/04/2003

BENCH:

M.B. SHAH & ARUN KUMAR.

JUDGMENT:

J U D G M E N T

Shah, J.

The High Court of Himachal Pradesh by judgment and order dated 10.12.1990 allowed Civil Writ Petitions No.58 of 1978 etc. filed by the respondents challenging the validity of the provisions of the H.P. Taxation (On certain Goods carried by Road) Act, 1976 (No. 34 of 1976) (hereinafter referred to as "the 1976 Act") and held that the said provisions were unconstitutional and invalid. The Court held thus:

"We have seen earlier that by the impugned provision, there is a direct levy upon the carriage of goods by road and water ways. 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.

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."

The High Court also directed that the amount deposited towards the tax be refunded in terms of interim orders.

That judgment and order is challenged by the State of Himachal Pradesh by filing Civil Appeal Nos.3545/91 and others.

It appears that being aggrieved by the said judgment and order

and in order to avoid delay in recovering the road tax, apart from filing appeals, the State enacted the Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1991 (Act No.10 of 1991) (hereinafter referred to as "the 1991 Act"). The objects and reasons of the 1991 Act read thus: -

"The Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1976 was enacted under Entry 56, List II of the Seventh Schedule to the Constitution of India to levy a tax on certain goods which are carried by road within the State of Himachal Pradesh. The charging Section 3 of this Act categorically declared the levy of tax to be in addition to the tax levied or leviable under the Himachal Pradesh Passengers and Goods Taxation Act, 1955. The conspicuous distinction between the taxes imposed by the Act of 1955 and Act of 1976 is that while under the former Act the tax is calculation with reference to the fare or freight charged or chargeable, whereas under the Act of 1976, it is calculated with reference to weight or volume of goods carried by road. Nevertheless in both these enactments there exists identity of inextricable nexus with the carriage of goods by road.

2. In various writ petitions, the Hon'ble High Court of Himachal Pradesh has held that the tax levied under the aforesaid Act is a direct levy upon the carriage of goods by road and waterways and it is constitutionally invalid being violative of Article 301 read with Article 304(b) of the Constitution of India. The High Court has further ordered that the State Govt. shall refund, along with interest, the amount of tax deposited towards tax by the petitioners. This judgment, therefore, went against the basic intention underlying the enactment of the H.P. Taxation (On Certain Goods Carried by Road) Act, 1976, namely, a compensation for the huge expenditure incurred each year by the Govt. on construction, development and maintenance of roads and bridges within the State.

3. The Hon'ble Supreme Court in its various judgments has held that measures imposing compensatory taxes, do not come within the purview of restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution. The Court has also clearly declared that the tax imposed under Entry 56, *ibid*, is of a regulatory and compensatory character. The power to levy taxes on goods and passengers carried by road or inland waterways belongs exclusively to the State Legislature.

4. The invalidation of the Act is attributable principally to the unclear statement of objectives appended to its Bill and inadequate or feeble defence to prove that it was, in fact, a compensatory taxation measure. In the absence of effective reply the Hon'ble Court did not have the occasion to go to the compensatory character of this enactment. In the proposed Bill, the levy has been rationalized by making it chargeable on the slabs of mileage of roads actually used for carrying of goods within the State and the method or machinery of collection has also been suitably modified to remove the defects existing in the Himachal Pradesh Taxation (On Certain Goods Carried by Road) Act, 1976.

5. It is well known that the roads and bridges are life line in the hilly terrain of Himachal Pradesh and every year the State Government has to devote a sizeable chunk of its budget exclusively to the construction, development, repair, upkeep and maintenance of roads and bridges, without which any development is unthinkable. Besides loss of a recurring income of revenue of nearly Rs.9 crores each year, to the State Exchequer, the impending refund of tax will drain out not less than Rs.42 crores from the State exchequer, which will mean absolute halt to the construction, maintenance and development of roads and bridges for many years to come for want of funds. Hence, in order to ensure availability of sufficient funds for construction, development, upkeep and maintenance of roads and bridges in the State, it has become necessary to levy the tax on certain goods carried by road within the State. It is also essential to validate the tax imposed and collected by the State Govt. right from the date of commencement of the aforesaid Act.

6. The Bill seeks to achieve the aforesaid objectives."

The aforesaid Act was also challenged by filing Civil Writ Petition No.377/91 etc. before the High Court. By judgment and order dated 13th December, 1994, the writ petitions were allowed and the 1991 Act was also declared ultra vires and void ab initio. The State Government was directed to refund the tax already collected. The Court after considering various decisions rendered by this court held that the impugned Act would attract application of Article 301 and require compliance of Article 304(b) of the Constitution of India. The Court also observed that the Act under consideration merely because it was referable to Entry 56 of State List in the Constitution would by itself not be sufficient to hold that it is regulatory or compensatory in nature and that the nature of the law is not what its Preamble states it to be. The Court thereafter referred to the earlier decision rendered by it in M/s Yashpal Garg's case and held that it was not permissible to the State Legislature to overrule the said decision pending appeal before the Supreme Court. The Court observed that the effect of Court's judgment holding the 1976 Act constitutionally invalid was to obliterate the same from the statute book and hence, there was nothing to be repealed by the State Legislature. Hence, the writ petitions were allowed.

SUBMISSIONS:

The learned counsel appearing for the appellant submitted that the High Court materially erred in arriving at the conclusion that the State has failed to prove that the impugned road tax was not regulatory or compensatory in nature. It is his contention that the State of Himachal Pradesh is entirely hilly State and the cost of construction of roads and bridges is many times high as compared to other places and that roads are the only mode of transport and, therefore, in order to provide roads, bridges and repair thereof, the State Legislature had levied the tax to mobilise additional sources for developmental purposes. The said tax is by exercise of its power under Entry 56 of List 11 of Seventh Schedule to the Constitution.

As against this, the learned counsel for the respondents submitted that in the Writ Petition No.58/78 etc., the State of Himachal Pradesh failed to contend and prove that the impugned tax was compensatory or regulatory and as the assent of the President was not obtained as contemplated under Article 304(b), the High Court rightly arrived at the conclusion that 'the 1991 Act' was invalid. It

was contended that validation by the State Legislature without having assent of the President of India is also unconstitutional.

FINDINGS:

Before dealing with the contentions of the parties, we would first refer to the objects and reasons of 1991 Act wherein it has been specifically inter alia stated that:

(a) the roads and bridges are the lifeline in the hilly terrain of Himachal Pradesh and the State is not connected by railway;

(b) the State has to devote sizeable chunk of its budget exclusively to the construction, development, repair, upkeep and maintenance of roads and bridges without which any development is unthinkable.

(c) in such activities the State is having recurring loss of nearly nine crores.

For this purpose, learned counsel for the appellant has pointed out the chart revealing revenue accruals under the Act and the expenditure incurred on the trading facilities in the shape of roads and bridges during the periods 1976-77 to 1990-91 which is as under: -

Year

1976-77
1977-78
1978-79
1979-80
1980-81
1981-82
1982-83
1983-84
1984-85
1985-86
1986-87
1987-88
1988-89
1989-90
1990-91

Amount
Collected

50,11,226
66,12,664
1,21,49,137
1,37,31,528
1,03,64,058
1,81,22,000
1,16,12,100
1,48,51,000
1,24,00,000
2,65,89,000
4,52,26,000

4,46,50,000
4,88,00,000
7,04,54,000
6,51,82,000

Amount spent on
Maintenance of
Roads and
Bridges

4,49,85,411
4,81,23,104
7,17,57,370
8,35,90,831
6,86,93,317
7,76,99,475
11,83,92,845
9,58,34,413
13,60,75,532
16,89,00,219
14,59,31,541
24,18,16,260
17,08,11,484
18,77,53,395
20,11,34,322

Amount spent on
The construction
of roads and
Bridges

10,22,94,116
14,66,00,276
17,72,06,696
19,87,61,550
22,00,60,880
23,38,17,971
21,77,13,747
23,72,85,634
30,45,65,517
33,03,42,790
34,28,37,240
43,49,07,583
41,61,11,873
41,51,33,999
40,87,80,510

After referring to above-stated figures and the objects and reasons which clarified that the intention underlying 1976 Act was to compensate the State for the huge expenditure incurred each year on construction, development and maintenance of roads and bridges within the State, the High Court observed thus:

"In para 5 thereof, it is mentioned that the State spends a sizeable chunk of its budget exclusively to the construction, development, repair, upkeep and maintenance of road and bridges without which any development is unthinkable. The learned Advocate General has also filed additional affidavit in this court indicating the amount spent by the respondent-State in construction and maintenance of roads and bridges. It is stated in the aforesaid affidavit that a sum of Rs.20,11,34,322 was spent on the maintenance of roads

and bridges and Rs.40,87,80,510 on construction of roads and bridges during 1990-91 whereas only an amount of Rs.6,51,81,000 was collected as levy under the Act. It would, therefore, appear that though the respondent-State had spent about 61 crores of rupees in construction and maintenance of roads and bridges, it recovered only a sum of Rs.6 crores from the levy under the Act. Apparently, the levy is not compensatory in the sense stated by the learned Advocate General. It seeks to recover only a part of the expenses incurred in construction and maintenance of roads and bridges. This position has been, more or less, the same from the year 1976 onwards. In the context of these figures, it is submitted that the levy has been compensatory from 1976 and hence it is wrong to hold that it is directly affecting free flow of trade or commerce throughout the territory of India, as guaranteed under Article 301 of the Constitution."

The aforesaid reason recorded by the High Court that as the State Government recovers only a part of the expenses incurred in construction and maintenance of roads and bridges, the levy is not compensatory is, on the face of it, erroneous and cannot be sustained. For levy to be compensatory, it is not required that entire amount of cost incurred should be recovered. The State can and may incur the cost of construction and maintenance of roads and bridges from other revenue but that would not justify in holding that levy of tax is not compensatory. It is also settled that there can be no bar to intermingling of the revenue realised from regulatory and compensatory taxes and from other taxes of general nature, nor can there be any objection to more or less expenditure being incurred in case of compensatory and regulatory levy.

Further, in our view, the question involved in this appeal is squarely covered by number of decisions rendered by this Court.

In M/s Sainik Motors, Jodhpur & Others v. The State of Rajasthan [(1962) 1 SCR 517] the Court considered the provisions of the Rajasthan Passengers and Goods Taxation Act which provided that where passengers and goods were carried by motor vehicle from any place outside the State to any place within the State or from any place within the State to any place outside the State, tax was leviable on the fare or freight at a rate proportionate to the distance covered in the State when compared with the total distance of the journey. The Constitution Bench of this Court in such a situation held that by levy of such tax, no inter-State trade, commerce or intercourse is affected. The tax was for purpose of State, and falls upon passengers and goods carried by motor vehicles within the State. Such levy of tax cannot be said to offend Articles 301 and 304 of the Constitution.

It appears that the High Court solely relied upon the decision rendered by this Court in Atiabari Tea Co. Ltd. v. The State of Assam & others [(1961) 1 SCR 809] without considering the ratio laid down by a larger Bench of Seven Judges in The Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and others [(1963) 1 SCR 491]. In Automobile Transport case, this Court exhaustively considered the decision rendered in Atiabari Tea Co.'s case and held as under (as per majority) (page 522): -

"Nobody doubts that the application of rules like the above does not really affect the freedom of trade and commerce; on the contrary they facilitate the free flow of trade and commerce. The reason is that these rules cannot fairly be said to impose a burden on a trader or deter him from trading: it would be absurd, for example,

to suggest that freedom of trade is impaired or hindered by laws which require a motor vehicle to keep to the left of the road and not drive in a manner dangerous to the public. If the word 'free' in Art. 301 means 'freedom to do whatever one wants to do, then chaos may be the result; for example, one owner of a motor vehicle may wish to drive on the left of the road while another may wish to drive on the right of the road. If they come from opposite directions, there will be an inevitable clash. Another class of examples relates to making a charge for the use of trading facilities, such as, roads, bridges and aerodromes etc. The collection of a toll or a tax for the use of a road or for the use of a bridge or for the use of an aerodrome is no barrier or burden or deterrent to traders who, in their absence, may have to take a longer or less convenient or more expensive route. Such compensatory taxes are no hindrance to anybody's freedom so long as they remain reasonable; but they could of course be converted into a hindrance to the freedom of trade. If the authorities concerned really wanted to hamper anybody's trade, they could easily raise the amount of tax or toll to an amount which would be prohibitive or deterrent or create other impediments which instead of facilitating trade and commerce would hamper them. It is here that the contrast, between 'freedom' (Art. 301) and 'restrictions' (Arts. 302 and 304) clearly appears: that which in reality facilitates trade and commerce is not a restriction, and that which in reality hampers or burdens trade and commerce is a restriction. It is the reality or substance of the matter that has to be determined. It is not possible a priori to draw a dividing line between that which would really be a charge for a facility provided and that which would really be a deterrent to a trade; but the distinction if it has to be drawn, is real and clear. For the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. So long as a tax remains compensatory or regulatory it cannot operate as a hindrance."

The Court further held that the interpretation which was accepted by the majority in *Atiabari Tea Co.'s case*, subject to the following clarification, was correct:

"Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304(b) of the Constitution."

Even the view of minority rendered in the said case by *Hidaytullah, J.* (as he then was), it has been specifically held that "freedom in Article 301 does not mean anarchy. Similarly a demand for a tax from the traders in common with others is not a restriction of the right to carry on trade and commerce".

This aspect is highlighted in *Khyerbari Tea Co. Ltd. & Another v. The State of Assam* [(1964) 5 SCR 975], wherein the Court held thus:

"It would immediately be noticed that though the majority view in the *Automobile Transport (Rajasthan)* case substantially agreed with the majority decision in the case of *Atiabari Tea Co.*, there would be a clear

difference between the said two views in relation to the scope and effect of the provisions of Article 304(b). According to the majority view in the case of *Atiabari Tea Co.*, if an Act is passed under Article 304(b) and its validity is impeached, then the State may seek to justify the Act on the ground that the restrictions imposed by it are reasonable and in the public interest, and in doing so, it may, for instance, rely on the fact that the taxes levied by the impugned Act are compensatory in character. On the other hand, according to the majority decision in the *Automobile Transport (Rajasthan)* case, compensatory taxation would be outside Article 301 and cannot, therefore, fall under Article 304 (b)."

The aforesaid case is relied upon in *State of Karnataka and another v. M/s Hansa Corporation* [(1980) 4 SCC 697], wherein the Court observed thus:

"27. On a conspectus of these decisions it appears well settled that if a tax is compensatory in character it would be immune from the challenge under Article 301. If on the other hand the tax is not shown to be compensatory in character it would be necessary for the party seeking to sustain the validity of the tax law to show that the requirements of Article 304 have been satisfied.

The Court also observed:

30. . The effect of Article 304(a) is to treat imported goods on the same basis as goods manufactured or produced in a State. This Article further enables the State to levy tax on such imported goods in the same manner and to the same extent as may be levied on the goods manufactured or produced inside the State. If a State tax law accords identical treatment in the matter of levy and collection of tax on the goods manufactured within the State and identical goods imported from outside the State, Article 304(a) would be complied with. There is an underlying assumption in Article 304(a) that such a tax when levied within the constraints of Article 304(a) would not be violative of Article 301 and State legislature has the power to levy such tax."

Similarly, in *International Tourist Corporation etc. v. State of Haryana and Others* [(1981) 2 SCR 364] the Court negatived the contention that levy of tax on passengers and goods passing through the State of Haryana, from a place outside the State to a place outside the State interfered with the freedom of trade, commerce and intercourse throughout the territory of India and so it was violative of Article 301 of the Constitution. The Court considered the objection that no expenditure was incurred in connection with the development, construction, improvement and maintenance of National Highway in the State of Haryana and observed thus:

"We have pointed out in our judgment that the State Government incurs expenditure in connection with National Highways not by directly constructing or maintaining National Highways but by facilitating the transport of goods and passengers along the National Highways in various other ways such as lighting, traffic control, amenities for passengers, halting places for buses and trucks etc.etc.

And not by eastern windows only,
When daylight comes, comes in the light;
In front the sun climbs slow, how slowly!
But westward, look, the land is bright!

The petition is, therefore, dismissed."

Thereafter, in *Maharaja Tourist Service etc. v. State of Gujarat* [(1991) 2 SCR 524], the Court upheld the validity of the Punjab Motor Vehicle Taxation Rules and similar rules framed by the States of Gujarat, Rajasthan and Madhya Pradesh and held that the working test for deciding whether a tax is compensatory or not is to inquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities.

The aforesaid decisions and others were considered and followed by this Court in *Sharma Transport v. Government of A.P. and Others* [(2002) 2 SCC 188] and similar contentions were negatived by observing: -

"For the tax to become a prohibited tax it has to be a direct tax the effect of which is to hinder the movement part of trade. So long as a tax remains compensatory it cannot operate as a hindrance."

From the judgments as discussed above, it can be held:

- (a) A demand for tax from the traders in common with others is not a restriction on the right to carry on trade, commerce and intercourse.
- (b) Such tax would not come within the purview of the restrictions contemplated under Article 301 unless it is established that in reality, it hampers or burdens the trade and commerce.
- (c) So long as the tax remains compensatory or regulatory, it cannot operate as a hindrance.
- (d) If a State tax law accords identical treatment in the matter of levy and collection of tax on the goods manufactured within the State and identical goods imported from outside the State, Article 304(a) would be complied with. There is an underlying assumption in Article 304(a) that such a tax when levied within the constraints of Article 304(a) would not be violative of Article 301 and State legislature has the power to levy such tax.

In the present case, after the judgment rendered by the High Court in Writ Petition No.58/1978, the State Legislature enacted the 1991 Act wherein in Preamble, it is specifically stated that it was incurring much more expenditure than the revenue from the road tax. Necessary affidavit stating the expenditure incurred for construction and maintenance of roads and bridges as well as the total amount collected on the basis of tax was filed before the High Court. Undisputedly, most part of the State of Himachal Pradesh is not connected by railway. For a hilly area having heavy downpour every year, the roads require more expenditure for maintenance. For trade, commerce and intercourse, lying down of additional roads is also the necessity. The aforesaid facts were pointed out to the High Court, but the Court surprisingly arrived at the conclusion that as the State Government recovers only a part of the expenses incurred in construction and maintenance of roads and bridges, levy is not compensatory. As stated above, this reasoning cannot be sustained. In the present case, it is required to be held that the tax is compensatory in nature for giving better facilities to the passengers and traders,

therefore, it would not come within the purview of restrictions contemplated under Article 301. Hence, there is no question of complying with the requirement of proviso to Article 304(b) of the Constitution of obtaining previous sanction of the President.

REVALIDATING ACT:

The High Court also held that 1991 Act was ultra vires the power of the legislature as it has over-ruled the decision rendered in earlier writ petition in case of M/s Yash Pal Garg. This reason also cannot be sustained as it is settled law that the Legislature can change the basis on which a decision is rendered invalidating the Act and thereby validating the legislation which has been declared to be null and void. The cause for invalidating the Act can be removed and if such cause is removed, it cannot be said that the Legislature had acted beyond its competence.

The Legislature under the Constitution has within the prescribed limits powers to make laws prospectively as well as retrospectively. By exercise of its powers, the Legislature can remove the basis of a decision rendered by a competent Court thereby rendering that decision ineffective. {Re. The Municipal Corporation of the City of Ahmedabad and Another etc. etc. v. The New Shrock Spg. And Wvg. Co. Ltd. etc. etc. [(1970) 2 SCC 280]}. In Re. Cauvery Water Disputes Tribunal [(1993) Supp 1 SCC 96 (II)], same view is taken.

Further, while deciding the first case, i.e. Writ Petition No 58 of 1978 and others, the Court arrived at the conclusion that such a tax amounts to restriction of trade, commerce and intercourse among the States without considering its effect. The Court was required to determine whether the impugned provisions amounted to a restriction directly or indirectly on the movement of trade and commerce. Therefore, the said decision is also against the settled legal position and requires to be set aside.

However, pending appeals before this Court as the State Legislature has passed 'the 1991 Act', 'the 1976 Act' would not survive. The 1991 Act as discussed above was held to be ultra vires mainly on the ground that the State Legislature was not competent to enact a law so as to overrule the decision rendered by the High Court. The State Legislature enacted a new law by specifically stating that levy of tax was compensatory and that the revenue recovered from the tax was much less than the expenditure incurred by it for construction, maintenance and repair of roads and bridges in a hilly area. By pointing out these facts, it cannot be said that the Legislature was overruling the decision rendered in M/s Yashpal Garg's case. This only makes it clear that levy of road tax was compensatory. Competence of legislature to pass such law is not at all challenged and cannot be challenged.

Hence, these appeals are allowed and the impugned judgment and order passed by the High Court holding the H.P. Taxation (On Certain Goods Carried by Road) Act, 1991 (Act No.10 of 1991) as ultra vires is quashed and set aside. It is also held that as the 1976 Act does not survive because of its repeal and by enactment of the Himachal Pradesh Taxation (On Certain Goods carried by Road) Act, 1991 (Act No.10 of 1991), no further declaration is required to be granted. Ordered accordingly. There shall be no order as to costs.

IA No.28 of 2001 in CA NOs.3545-3562 of 1991.

In view of the order passed above, the intervention application is rejected.

JUDIS