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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 6TH DAY OF JUNE 2018 / 16TH JYAISHTA, 1940

WP(C).No. 19428 of 2012

PETITIONER(S)

M/S.FABINDIA OVERSEAS (P) LTD.
39/4749, R.MADHAVAN NAIR ROAD, ERNAKULAM, KOCHI 682 016,
REPRESENTED BY ITS AUTHORISED SIGNATORY, ARCHANA NANDAL.

BY ADVS.SMT.S.K.DEVI
SRI.M.RAJ MOHAN
SRI.SANTHOSH P.ABRAHAM

RESPONDENT(S):

1. THE ASST.COMMISSIONER (ASSESSMENT),
DEPT. OF COMMERCIAL TAXES, SPECIAL CIRCLE II, ERNAKULAM,
KOCHI 682 015.

2. STATE OF KERALA,
REPRESENTED BY ITS CHIEF SECRETARY, SECRETARIAT,
THIRUVANANTHAPURAM 695 001.

BY SR.GOVERNMENT PLEADER SRI. V.K.SHAMSUDEEN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 06-06-2018, ALONG WITH W.P.(C)NO. 22192 OF 2012 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Msd.
08.06.2018

WWW.LIVELAW.IN

WP(C).No. 19428 of 2012

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1: TRUE COPY OF THE ORDER NO.32071831874/2010-11 DATED 29.06.2012.

RESPONDENT(S)' EXHIBITS :

NIL

//TRUE COPY//

P.S.TO JUDGE

Msd.
08.06.2018

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"CR"

P.B.SURESH KUMAR, J.

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W.P.(C).Nos.19428, 22192 of 2012,

4408, 8900 & 14880 of 2015,

26980, 30423, 31422 & 39888 of 2016,

1108, 1111, 1112, 1113, 1115, 1123, 1162,

1166, 12707, 24232, 32432, 33426,

33486 & 39948 of 2017

&

10293 and 17372 of 2018

= = = = = = = = = = = = = ===================

Dated this the 6th day of June, 2018

J U D G M E N T

Sub section (1A) of Section 3 of the Kerala Surcharge on Taxes Act, 1957 ('the Act' for brevity), is challenged as unconstitutional, in this batch of writ petitions.

2. The facts of the cases are similar. As the State has filed its counter affidavit in W.P.(C) No.26980 of 2016, I shall refer to the facts of that case for the purpose of deciding the challenge against the statutory provision aforesaid.

WWW.LIVELAW.IN

3. The petitioner in W.P.(C).No.26980 of 2016, a company registered at Mumbai, is a dealer under the Kerala Value Added Tax Act. They are engaged in the retail sale of branded apparels, imitation jewellery, hand bags, wallets, belts etc. through its retail outlets spread across the State. The goods are stock transferred by the petitioner into the State from other States and sold in the State upon payment of taxes under the Kerala Value Added Tax Act. Placing reliance on sub section (1A) of Section 3 of the Act, the third respondent, the assessing authority of the petitioner, issued Ext.P1 notice to them demanding surcharge at the rate of 10 percent on the output tax collected by them for the year 2015-16, amounting to Rs.14,82,716/-. The petitioner objected the demand on the ground that sub section (1A) of Section 3 of the Act is unconstitutional. The third respondent has turned down the objection raised by the petitioner. Ext.P3 is the order issued by the third respondent in this connection. Ext.P3 order is straight away challenged in the writ petition on the ground that sub section (1A) of Section 3 of the Act is unconstitutional.

WWW.LIVELAW.IN

4. The Act is one providing for levy of surcharges on certain taxes. Sub-section (1A) of Section 3 of the Act provides that the tax payable under sub-sections (1) and (2) of Section 6 of the Kerala Value Added Tax Act shall, in the case of national or multinational companies functioning in the State as retail chains or direct marketing chains, who import not less than 50 percent of their stock from outside the State or country, and not less than 75 percent of whose sales are retail business, and whose turnover exceeds Rs.5 crores per annum, be increased by a surcharge at the rate of 10 percent. Explanation I to the said provision clarifies that retail chains and direct marketing chains mentioned therein mean retail sales outlets or part of retail sales outlets of companies which share a registered business name or commercial name by way of franchise agreements or otherwise with standardized sales, purchase and promotional activities. Explanation II to the said provision clarifies that retail business mentioned therein shall mean, sales to persons other than registered dealers.

5. The case of the petitioners is that dealers who do

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not import into the State more than 50 percent of their stock, but nevertheless fulfilling all the remaining conditions mentioned in the impugned provision, are not subjected to the levy under the said provision and therefore the said levy is also a levy on the goods imported into the State. According to the petitioners, such a levy shall conform to clause (a) of Article 304 of the Constitution and in so far as the impugned levy does not conform to clause (a) of Article 304 of the Constitution, the same is in violation of Article 301 of the Constitution and hence liable to be struck down. The petitioners would elaborate their case stating that Part XIII of the Constitution, consisting of Articles 301 to 307, is intended to ensure that inter-state barriers, both economic and political, are minimised, to protect the freedom of trade, commerce and intercourse for the economic unity of the nation. It is also stated by them that Part XIII of the Constitution discourages the growth of sectional and local interests of the States which would compromise the development of the nation as a whole. It is further stated by them that Article 301 which declares that the trade, commerce and intercourse throughout

WWW.LIVELAW.IN

the territory of India shall be free, subject to other provisions in Part XIII, acts as a fetter on the powers of the Parliament as also the State Legislatures in bringing in legislations otherwise than in accordance with the remaining provisions contained in Part XIII. It is further stated by them that though clause (a) of Article 304 empowers the State Legislatures to impose by law any tax on goods imported from other States, levy under that provision is permissible only if similar goods manufactured or produced in the State are subject to such tax and the same does not discriminate between the goods so imported and the goods so manufactured or produced in the State. As noted, according to the petitioners, the impugned provision does not conform to the mandate of clause (a) of Article 304 and hence violative of Article 301 of the Constitution. It is also the case of the petitioners that the impugned levy infringes the doctrine of equality established in Article 14 of the Constitution.

6. The stand taken by the State in the counter affidavit is that the impugned levy does not infringe Article 301 of the Constitution. It is also the stand of the State that the

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impugned levy was introduced with the specific objective of increasing the revenue of the State and for promoting indigenous and local business. It is the further stand of the State that it has the legislative competence to introduce a levy in the nature of one impugned in the writ petitions and the same being a matter of policy relating to taxation, it cannot be subjected to judicial scrutiny.

7. Heard Sri.G.Shivadass, Sri.A.Kumar, Dr.K.P.Pradeep, the learned counsel for the petitioners and Dr.Thushara James, the learned Government Pleader.

8. The learned counsel for the petitioners reiterated the case pleaded by the petitioners placing reliance on various decisions of the Apex Court.

9. Per contra, the learned Government Pleader contended that Article 301 is a stand alone provision and Article 304 which is an exception to Article 301 needs to be looked into only if Article 301 cannot be considered in isolation. According to the learned Government Pleader, the impugned levy is only an additional tax on multi national companies falling within the

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criteria provided therein, and the same does not in any way impede trade or business and therefore there is no infringement of Article 301 of the Constitution. It was also contended by the learned Government Pleader that Article 301 is not attracted in the instant case also for the reason that the impugned levy is only a levy based on the turnover of the dealer. It was pointed out by the learned Government Pleader that for the purpose of achieving economic parity, the States are empowered to enact legislations of this nature and merely for the reason that such legislations provide for differentiation between persons, goods or commodities, it cannot be contended that it violates the basic constitutional principles. It was also pointed out by the learned Government Pleader that the constitutional requirement is only that there shall be an intelligible differentia and the same should have a rational nexus to the object sought to be achieved by the legislation. According to the learned Government Pleader, economic parity and increase in revenue are the objects sought to be achieved by the legislation and the intelligible differentia is created by confining surcharge only to large business houses

WWW.LIVELAW.IN

satisfying the criteria provided in the provision. Placing reliance on the decision of the Apex Court in ***Video Electronics V. State of Punjab*** [(1990) 3 SCC 87], the learned Government Pleader also pointed out that merely for the reason that different tax structures are provided for the same goods, it cannot be contended that the legislation is bad. It was also pointed out by the learned Government Pleader that the legislation would become unconstitutional only if the differentiation is unjustifiable, unintelligible or devoid of reasons. Placing reliance on the decision of the Apex Court in ***Federation of Hotel and Restaurant Association of India v. Union of India*** [(1989) 3 SCC 634], the learned Government Pleader pointed out that the petitioners are in fact challenging the wisdom of the legislature in enacting the legislation and the legislative wisdom can never be subjected to judicial review.

10. I have given my thoughtful consideration to the contentions raised by the learned counsel on either side. A quote of the impugned provision namely, sub-section (1A) of Section 3 of the Act is necessary for dealing with the contentions of the

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parties effectively:

> *(1A) The tax payable under sub-sections(1) and (2) of section 6 of the Kerala Value Added Tax Act, 2003 (30 of 2004), other than declared goods as defined in section 14 of the Central Sales Tax Act, 1956 (Central Act 74 of 1956) shall, in the case of national or multinational companies functioning in the State as retail chains or direct marketing chains who import not less than fifty per cent of their stock from outside the State or country and not less than seventy-five per cent of whose sales are retail business and whose total turnover exceeds five crore rupees per annum, but excluding such class of dealers of certain commodities, which may be notified by the Government from time to time, be increased by a surcharge at the rate of ten per cent, and the provisions of the Kerala Value Added Tax Act, 2003(30 of 2004) shall apply in relation to the said surcharge as they apply in relation to the tax payable under the said Act.*
>
> *Explanation I :- For the purpose of this section big retail chains and direct marketing chains mean retail sales outlets or part of retail sales outlets of companies which share a registered business name or commercial name by way of franchisee agreements or otherwise with standardized sales, purchase and promotional activities.*
>
> *Explanation II :- For the purpose of this section 'retail business' shall mean sales to persons other than registered dealers."*

In terms of the impugned provision, the tax payable by a class of dealers registered under the Kerala Value Added Tax Act is increased by a surcharge at the rate of ten percent. As explicit from the provision, the same would apply only to dealers satisfying cumulatively the conditions namely, (i) that they shall

WWW.LIVELAW.IN

be a company incorporated in India or abroad (ii) that they shall be functioning in the State as retail chains or direct marketing chains, (iii) that they shall import not less than 50 percent of their stock from outside the State or country, (iv) that not less than 75 percent of their sales shall be to persons other than registered dealers and (v) that their turnover shall be more than five crore rupees per annum. In the light of the decision of this Court in ***Ernakulam Radio Company v. State of Kerala*** [1966 KLT 809] and the decisions in which the ratio therein was followed, there cannot be any dispute to the fact that the impugned levy is nothing but an additional tax on the goods sold by the dealers to whom the provision would apply. As noted, according to the petitioners, in so far as the impugned provision imposes an additional tax on dealers importing goods into the State from other States and fulfilling the remaining criteria mentioned in the provision, the same has to conform to the provisions of Part XIII of the Constitution. It is their specific case that the impugned provision does not conform to clause (a) of Article 304 and hence violative of Article 301 of the Constitution.

WWW.LIVELAW.IN

It is the further case of the petitioners that taxing statutes also have to conform to the principles of equality enshrined in Article 14 of the Constitution and the impugned provision does not satisfy the requirements of Article 14 as well.

11. As rightly contended by the petitioners, Part XIII of the Constitution, consisting of Articles 301 to 307, is intended to ensure that inter-state barriers, both economic and political, are minimised, to protect the freedom of trade, commerce and intercourse for the economic unity of the nation. The said part of the Constitution also discourages growth of sectional and local interests of the States which would compromise the development of the nation as a whole. Among the Articles in Part XIII, Article 301 declares that subject to the other provisions of Part XIII, trade, commerce and intercourse throughout the territory shall be free. Article 301 reads thus:

> *"301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."*

Article 304 confers on the Legislatures of States, notwithstanding anything contained in Article 301, the power to impose

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restrictions on trade, commerce and intercourse among the States. Article 304 reads thus:

> *"304. Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—*
>
> *(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and*
>
> *(b) 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."*

The scope and amplitude of Articles 301 and 304 of the Constitution have been dealt with in finer details by a Nine Judge Bench of the Apex Court recently in ***Jindal Stainless Steel Ltd. and another v. State of Hariyana and others*** [2016 (11) Scale I]. The Apex Court referred to and considered in the said case almost every judgment dealing with the said Articles rendered by the court till then and disapproved the ratio of some of the judgments. Paragraph 72 of the majority judgment in the

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said case dealing with the conclusion arrived at by the court as regards the scope of Articles 301 to 304 of the Constitution reads thus:

> *"72. The sum total of what we have said above regarding Articles 301, 302, 303 and 304 may be summarized as under:*
>
> *1. Freedom of trade, commerce and intercourse in terms of Article 301 is not absolute but is subject to the Provisions of Part XIII.*
>
> *2. Article 302 which appears in Part XIII empowers the Parliament to impose restrictions on trade, commerce and intercourse in public interest.*
>
> *3. The restrictions which Parliament may impose in terms of Article 302 cannot however give any preference to one State over another by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule.*
>
> *4. The restriction that the Parliament may impose in terms of Article 302 may extend to giving of preference or permitting discrimination between one State over another only if Parliament by law declares that a situation arising out of scarcity of goods warrants such discrimination or preference.*
>
> *5. Article 304(a) recognizes the availability of the power to impose taxes on goods imported from other States, the legislative power to do so being found in Articles 245 and 246 of the Constitution.*
>
> *6. Such power to levy taxes is however subject to the condition that similar goods manufactured or produced in the State levying the tax are also subjected to tax and that there is no discrimination on that account between*

WWW.LIVELAW.IN

goods so imported and goods so manufactured or produced.

7. The limitation on the power to levy taxes is entirely covered by Clause (a) of Article 304 which exhausts the universe in so far as the State legislature's power to levy of taxes is concerned.

8. Resultantly a discriminatory tax on the import of goods from other States alone will work as an impediment on free trade, commerce and intercourse within the meaning of Article 301.

9. Reasonable restrictions in public interest referred to in Clause (b) of Article 304 do not comprehend levy of taxes as a restriction especially when taxes are presumed to be both reasonable and in public interest."

In the light of the aforesaid conclusions, the power of the State to impose taxes on goods imported from other States cannot be doubted. Of course, the said power is subject to the limitation that such taxes shall not discriminate against the goods imported from other States. In other words, the proposition that levy of non-discriminatory tax would not infringe clause (a) of Article 304 and therefore, such levy would not violate Article 301 of the Constitution is affirmed.

12. One of the questions formulated for decision in the majority judgment rendered in ***Jindal Stainless Steel Ltd.*** (supra) was whether the entry tax levied by the States which

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were impugned in the matters before the Court was violative of Article 301 of the Constitution. In the context of the said question, the court considered the issue whether incentives in the form of exemption or reduced rate of tax levied by the State, in order to promote industrial development, would amount to discrimination and hence violative of clause (a) of Article 304 of the Constitution. After referring to the earlier judgments of the court in ***Shree Mahavir Oil Mills and Another v. State of Jammu and Kashmir and others*** [(1996) 2 SCC 39] and in ***Video Electronics V. State of Punjab*** [(1990) 3 SCC 87], the Apex court made the following observations:

> *"**130**. That brings us to the second part of question No.4 viz. whether the impugned State enactments violate Article 304(a) of the Constitution. That aspect will necessarily involve a careful reading of the impugned enactments and a proper appreciation of the scheme underlying the same. While we have at some length heard learned counsel for the parties on that aspect, we do not propose to deal with all the dimensions of that challenge based on Article 304(a) except two of them that were argued at great length by learned counsel for the parties. The first of these two dimensions touches upon the State's power to promote industrial development by granting incentives including those in the nature of exemptions or reduced rates of levy on goods locally produced or manufactured. On behalf of the assesses it was contended that grant of exemptions and incentives in favour of locally*

WWW.LIVELAW.IN

manufactured/produced goods is also one form of insidious discrimination which was impermissible in terms of Article 304(a) for such exemptions and incentives had the effect of putting goods from another State at a disadvantage. Relying upon a decision of two-Judge Bench of this Court in Shree Mahavir Oil Mills and Anr. v. State of Jammu and Kashmir and Ors. (1996) 11 SCC 39 it was argued that exemptions in favour of locally produced goods from payment of taxes was constitutionally impermissible and offensive to Article 304(a). That was a case where the State Government had totally exempted goods manufactured by small scale industries within the State from payment of sales tax even when the sales tax payable by other industries including manufacturers of goods in adjoining States was in the range of 8%. This exemption was questioned by manufacturers of edible oils from other States on the ground that the same was discriminatory and violative of Articles 301 and 304 of the Constitution.

***131**. This Court held that the exemption given to manufacturers of edible oil was total and unconditional, while producers of edible oil from industries in adjoining states had to pay sales tax @ 8%. Grant of exemption to local oil producing units thereby put the former at a disadvantage. Having said that, the Court exercised its powers under Article 142 of the Constitution and struck down the exemption by moulding the reliefs to suit the exigencies of the situation. The Court no doubt noticed a three-Judge Bench decision in Video Electronics v. State of Punjab (1990) 3 SCC 87 : (AIR 1990 SC 820) in which notifications issued by the States of U.P and Punjab providing for exemptions to new units established in certain areas for a prescribed period of 3 to 7 years were assailed as discriminatory. The challenge to the exemption was in that case also based on the alleged violation of Articles 301 and 304. This Court however upheld the notifications in question on the ground that the same related to a specific class of industrial units and the benefit under the same was admissible for a limited period of time only. The Court*

WWW.LIVELAW.IN

observed that if an overwhelmingly large number of local manufacturers were subject to sales tax, it could not be said that the local manufactures were favoured as a class against outsiders. Adverting to the decision in Video Electronics (AIR 1990 SC 820) (supra) this Court in Mahavir (supra) held the same to be distinguishable on the ground that the Punjab and U.P notifications were qualitatively different from the one issued by the Government of Jammu and Kashmir inasmuch as while the former benefitted only specified units and limited the benefit to a specified period, the latter was not subject to any such limitations. This declared the Court resulted in discrimination vis-a-vis. outside goods. What is important is that in Video Electronics (supra) this Court recognized the difference between differentiation and discrimination and held that every differentiation is not discrimination. This Court noted that the word discrimination was not used in Article 14 as it has been used in Article 16, Article 303 and Article 304 (a). The use of the word in 304 (a) observed this Court involved an element of "intentional and unfavourable bias". So long as there was no such bias evident from the measure adopted by the state, mere grant of exemption or incentives aimed at supporting local industries in their growth, development and progress did not constitute discrimination.

***132**. We respectfully agree with the line of reasoning adopted in Video Electronics (AIR 1990 SC 820) (supra). The expression "discrimination" has not been defined in the Constitution though the same has fallen for interpretation of this Court on several occasions. The earliest of these decisions was rendered in Kathi Raning Rawat v. The State of Saurashtra, AIR 1952 SC 123, where a seven-Judge Bench of this Court held that all legislative differentiation is not necessarily discriminatory. Relying upon the meaning of the expression in Oxford Dictionary, Patanjali Sastri, C.J. (as His Lordship then was) explained :*

"7. All legislative differentiation is not

WWW.LIVELAW.IN

> *necessarily discriminatory. In fact, the word "discrimination" does not occur in Article 14. The expression "discriminate against" is used in Article 15(1) and Article 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position under Article 14 is different. Equal protection claims under that article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies... .."*

133. *Fazl Ali J. in his concurring judgment explained the concept in the following words:*

> *"19. I think that a distinction should be drawn between "discrimination without reason" and "discrimination with reason". The whole doctrine of classification is based on this distinction and on the well-known fact that the circumstances which govern one set of persons or objects may not necessarily be the same as those governing another set of persons or objects, so that the question of unequal treatment does not really arise as between persons governed by different conditions and different sets of circumstances.*

WWW.LIVELAW.IN

> *The main objection to the West Bengal Act was that it permitted discrimination "without reason" or without any rational basis."*

Any challenge to a fiscal enactment on the touchstone of Article 304(a) must in our opinion be tested by the same standard as in Kathi's case (AIR 1952 SC 123) (supra). The Court ought to examine whether the differentiation made is intended or inspired by an element of unfavourable bias in favour of the goods produced or manufactured in the State as against those imported from outside. *If the answer be in the affirmative, the differentiation would fall foul of Article 304(a) and may tantamount to discrimination.* *Conversely, if the Court were to find that there is no such element of intentional bias favouring the locally produced goods as against those from outside, it may have to go further and see whether the differentiation would be supported by valid reasons.* *In the words of Fazl Ali, J. discrimination without reason would be unconstitutional whereas discrimination with reason may be legally acceptable. In Video Electronic's case (AIR 1990 SC 820), this Court noted that the differentiation made was supported by reasons. This Court held that if economic unity of India is one of the Constitutional aspirations and if attaining and maintaining such unity is a Constitutional goal, such unity and objectives can be achieved only if all parts of the Country develop equally. There is, if we may say so, with respect considerable merit in that line of reasoning.* *A State which is economically and industrially backward on account of several factors must have the opportunity and the freedom to pursue and achieve development in a measure equal to other and more fortunate regions of the country which have for historical reasons, developed faster and thereby acquired an edge over its less fortunate country cousins.* *Economic unity from the point of view of such underdeveloped or developing states will be an illusion if they do not have the opportunity or the legal entitlement to promote industries within their respective territories by granting incentives and exemptions necessary for such growth*

WWW.LIVELAW.IN

and development. The argument that power to grant exemption cannot be used by the State even in case where such exemptions are manifestly intended to promote industrial growth or promoting industrial activity has not appealed to us. The power to grant exemption is a part of the sovereign power to levy taxes which cannot be taken away from the States that are otherwise competent to impose taxes and duties. The conceptual foundation on which such exemptions and incentives have been held permissible and upheld by this Court in Video's case is, in our opinion, juristically sound and legally unexceptionable. Video Electronics, therefore, correctly states the legal position as regards the approach to be adopted by the Courts while examining the validity of levies. So long as the differentiation made by the States is not intended to create an unfavourable bias and so long as the differentiation is intended to benefit a distinct class of industries and the life of the benefit is limited in terms of period, the benefit must be held to flow from a legitimate desire to promote industries within its territory. Grant of exemptions and incentives in such cases must be deemed to have been inspired by considerations which in the larger context help achieve the Constitutional goal of economic unity.

***134**. Seen in the above context the decision in Mahabir Oil's case is indeed distinguishable inasmuch as the manufactures of edible oil were exempt totally and unconditionally while other manufacturers from outside the State were not so exempt. Whether or not the impugned enactments in the present batch of cases satisfy the tests referred to above and elaborated in Video Electronics case is a matter on which we do not propose to express any opinion for that aspect is best left open to be considered by the regular benches hearing these matters after the reference is disposed off.” (underline supplied)*

Among the cases referred to earlier, **Video Electronics** (supra)

WWW.LIVELAW.IN

was a case challenging the notifications issued by the States of Uttar Pradesh and Punjab providing tax exemptions from payment of Sales Tax for industrial units established in certain areas of the said States for a limited period, as discriminatory. As noted, the Apex Court held in the said case that such concessions would not offend clause (a) of Article 304 of the Constitution. **Shree Mahavir Oil Mills** (supra), on the other hand, was a case where the State of Jammu and Kashmir had totally exempted goods manufactured by small scale industries within the State from payment of Sales Tax, while the Sales Tax payable by other industries including manufactures of goods in adjoining States was in the range of 8%. In **Jindal Stainless Steels Limited** (supra), the Apex Court approved the ratio in both the said cases. In the light of the propositions laid down by the Apex Court in **Jindal Stainless Steels Limited** (supra) and the propositions laid down by the Apex Court in earlier cases which are approved in **Jindal Stainless Steels Limited** (supra), the following conclusions can be arrived at:

(1) that taxing statutes do not *per se* impede free

WWW.LIVELAW.IN

Trade, Commerce and intercourse unless they are discriminatory in nature,

(2) in the case of a challenge to a taxing statute, on the touchstone of clause (a) of Article 304, the Court has to see whether the differentiation is intended or inspired by an element of unfavourable bias in favour of the goods produced or manufactured in the State as against those imported from outside and

(3) that if the Court were to find that there is no such element of intentional bias favouring the locally produced goods as against those from outside, it may have to go further and see whether the differentiation would be supported by valid reasons, for, differentiation without a valid reason would be unconstitutional.

13. Reverting to the facts of the case on hand, as noted, the impugned provision would apply only to dealers satisfying cumulatively the conditions namely, (i) that they shall be a company incorporated in India or abroad (ii) that they shall be functioning in the State as retail chains or direct marketing

WWW.LIVELAW.IN

chains, (iii) that they shall import not less than 50 percent of their stock from outside the State or country, (iv) that not less than 75 percent of their sales shall be to persons other than registered dealers and (v) that their turnover shall be more than five crore rupees per annum. In other words, a dealer other than a company is not liable to pay surcharge under the impugned provision even if they fulfil conditions (ii) to (v) referred to above. Likewise, a dealer who fulfils condition No.(i), but not functioning in the State as a retail chain or direct marketing chain is also not liable to pay surcharge under the impugned provision even if they fulfil conditions (iii) to (v) referred to above. Again a dealer, who effects more than 25 percent of the sales to registered dealers, but satisfies conditions (i) to (iii) and (v) is not liable to pay surcharge under the impugned provision. Likewise, a dealer who satisfies conditions (i) to (iv), but does not satisfy condition No.(v) as regards the turnover is also not liable to pay surcharge under the impugned provision. As far as the first three instances mentioned above are concerned, the dealers are absolved from the liability to pay surcharge

WWW.LIVELAW.IN

irrespective of the value of the goods imported by them into the State. As such, the case of the petitioners that the differentiation made among the dealers registered under the Kerala Value Added Tax Act in terms of the impugned provision is intended or inspired by an element of unfavourable bias in favour of the goods produced and manufactured in the State as against those imported from outside, cannot be accepted.

14. The fact that the impugned provision differentiates between dealers who do not import goods into the State from other States, but fulfils the remaining conditions made mention of in the impugned provision and dealers, who fulfil all the conditions made mention of in the impugned provision, is not disputed. Now, the question to be examined is whether the differentiation made among the dealers registered under the Kerala Value Added Tax Act in terms of the impugned provision is supported by valid reasons. This question is relevant also for the reason that though the legislature is given a greater latitude in tax matters and empowered even to pick and choose the subject matter of tax, it is trite that any classification that is

WWW.LIVELAW.IN

effected by the legislature must conform to the mandate of Article 14 of the Constitution. The said proposition was also reiterated by the Nine Judge Bench of the Apex Court in **Jindal Stainless Steels Limited** (supra). Paragraphs 94 to 96 and 138 of the majority judgment in the said case which are relevant in the context read thus :

> *"**94 .** Then came **Kunnathat Thathunni Moopil Nair v. The State of Kerala and Anr. AIR 1961 SC 552**, where again one of the questions that fell for consideration was whether Article 265 of the Constitution was a complete answer to the attack against the Constitutionality of a taxing statute. This Court held that in order that a taxing law may be valid, the tax proposed to be levied must be within the legislative competence of the legislature imposing the tax and authorizing the collection thereof and that the tax must be subject to the condition laid down Under Article 13 of the Constitution. One of such conditions declared by this Court was that the legislature shall not make any law that takes away or abridges the equality Clause in Article 14. The Court declared that the guarantee of equal protection of laws must extend even to taxing statutes. It clarified that every person may not be taxed equally but property of the same character has to be taxed, the taxation must be by the same standard so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes similar burden on everyone with reference to that particular kind and extent of property on the basis of such taxation, the law shall not be open to attack on the ground of inequality even though the result of taxation may be that the total burden on different persons may be unequal. The Court summed up that taxing statute is not fully immune from*

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an attack on the ground that it infringes equality Clause Under Article 14, no matter the Courts are not concerned with the policy underlying the taxing statute or whether a particular tax could have been imposed in a different way or a way that the Court might think would have been more equitable in the interest of equity.

95. *To the same effect is the decision in* ***Laxmanappa Hanumantappa Jamkhandi v. Union of India AIR 1955 SC 3****. Reference may also be made to* ***Smt. Ujjam Bai v. State of Uttar Pradesh AIR 1962 SC 1621*** *which took note of the pronouncements of this Court in the three cases mentioned above to examine whether there was any conflict between the view taken in Moopil Nair case on the one hand and Ramjilal and Laxmanappa cases on the other, the Court found on a closer examination that there was no such conflict and clarified that the observation made in Ramjilal and Laxmanappa cases must in the context bear reference to abrogation of Article 31(1) only in so far as the admissibility of a challenge to taxation law with reference to Part III is concerned. The Court explained that in Moopil Nair's case this Court has held that a taxing statute was not immune from challenge Under Article 14 just because the legislature that imposed the tax was competent to levy the tax in terms of Article 265. This Court summed up the legal position in the following words:*

The result of the authorities may thus be summed up:

(1) A tax will be valid only if it is authorized by a law enacted by a competent legislature. That is Article 265.

(2) A law which is authorized as aforesaid must further be not repugnant to any of the provisions of the Constitution. Thus, a law which contravenes Articles 14 will be bad, Moopil Nair's case.

(3) A law which is made by a competent legislature and

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which is not otherwise invalid, is not open to attack Under Article 31(1). Ramjilal's case and Laxmanappa's case.

(4) A law which is ultra vires either because the legislature has no competence over it or it contravenes, some constitutional inhibition, has no legal existence, and any action taken thereunder will be an infringement of Article 19(1)(g) Himmatlal's case and Laxmanappa's case. The result will be the same when the law is a colourable piece of legislation.

(5) Where assessment proceedings are taken without the authority of law, or where the proceedings are repugnant to Rules of natural justice, there is an infringement of the right guaranteed Under Article 19(1)(f) and Article 19(1)(g); Tata Iron & Steel Co. Ltd.; Moopil Nair's case and Shri Madan Lal Arora's case.

96. *The above statement of law in our view is legally unexceptionable. The argument that Ramjilal and Laxmanappa's cases place taxing statute beyond the purview of challenge under Part III has been correctly repelled and fiscal statutes are also held to be open to challenge on the touchstone of Article 14 of the Constitution. The contention that an aggrieved citizen may have no remedy against a taxing statute does not, therefore, hold good. Whether or not a challenge to such a statute succeeds is, however, a different matter. It is fairly well settled by now that Courts show considerable deference to the legislature in the matter of quantum of tax that may be levied as also the subjects and individuals upon whom the same may be levied. Just because room for challenge to a fiscal statute is limited is in our view no reason to hold that levy of taxes otherwise within the competence of the legislature imposing the same should be seen as a restriction on free trade and commerce guaranteed Under Article 301 which Article does not either textually or contextually recognize levy of taxes as impediments except in cases where the same are discriminatory in*

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nature thereby being offensive to Article 304(a) of the Constitution.

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138. *Reference may also be made to the Constitution bench decision of this Court in Khandige Sham Bhat v. Agrl. ITO AIR 1963 SC 591 where this Court declared that a law may facially appear to be non discrimination and yet its impact on persons and property similarly situate may operate unequally in which event, the law would offend the equity clause. This implies that facial equality is not the only test for determining whether the law is constitutionally valid. What is equally important is the impact of the legislation. This Court held:*

> ***7.****..Though a law ex facie appears to treat all that fall within a class alike, if in effect it operates unevenly on persons or property similarly situated, it may be said that the law offends the equality clause. It will then be the duty of the court to scrutinise the effect of the law carefully to ascertain its real impact on the persons or property similarly situated. Conversely, a law may treat persons who appear to be similarly situate differently; but on investigation they may be found not to be similarly situate. To state it differently, it is not the phraseology of a statute that governs the situation but the effect of the law that is decisive. If there is equality and uniformity within each group, the law will not be condemned as discriminative, though due to some fortuitous circumstance arising out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine vide Purshottam Govindji v. B.M. Desai, and Kunnathat Thathuni Moopil Nair v. State of Kerala. But in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse lements,*

WWW.LIVELAW.IN

permit a larger discretion to the legislature in the matter of classification, so long it adheres to the fundamental principles underlying the said doctrine. The power of the legislature to classify is of "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways"

The impugned levy was introduced in Section 3 of the Act in terms of the Kerala Finance Act, 2008. Paragraphs 191 and 192 of the Budget Speech of the Finance Minister of the State dealing with the proposal to introduce the impugned levy read thus:

> "191. Sir, the social security schemes announced in this Budget will create a huge financial commitment. There is every likelihood that this will increase in the next three years. To meet this expenditure it is proposed to impose a 1% cess on sales taxes and value added tax levied by the State Government. It is hoped to raise Rs.100 crore through this measure.
>
> 192. Imposition of additional levies on the big chains coming into the retail sector has been demanded by almost all sections of society. It is proposed to impose a surcharge of 10% under the Kerala Surcharge on Taxes Act on the big retail chains, including on direct marketing chains, who import more than 50% of goods from outside the State, whose turnover exceeds Rs.5 crore per annum and 75% of whose sales are directly to consumers. Purchases from first sellers who are sister-concerns will be deemed to be an import of such retail chain. It is expected to raise Rs.2 crore additional resources through this measure."

The object of the legislation as evident from the Budget Speech is that the same was introduced with a view to augment the revenue for the purpose of implementing social security measures. Though in the counter affidavit filed by the State it is

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contended that the impugned levy was introduced with the specific objective of promoting indigenous and local business as well, such an object is absent in the Budget Speech of the Minister. Had the same been one of the objectives of the legislation, I have no doubt in my mind that the same would have certainly reflected in the Budget Speech of the Minister with supporting empirical data. In the absence of such an objective in the Budget Speech, the stand taken by the State in the counter affidavit that the impugned levy was introduced with the objective of promoting indigenous and local business cannot be accepted as a *bonafide* one. Further, the stand that the impugned levy is intended to promote indigenous and local business is too vague as the State has not divulged in the counter affidavit as to what they propose to do with the revenue generated for the promotion of indigenous and local business. If the objective of the legislation is augmentation of revenue, the question is whether there can be a differentiation between dealers who are importing goods into the State from other States and who are not, for the said purpose. In **Digvijay Cement Co. v. State of**

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Rajasthan [AIR 1997 SC 2609], the Apex Court held that prescription of different rates of tax for interstate and intrastate sales of cement on the basis that the same would lead to increase in sales and consequent increase in the revenue earnings of the State, cannot be accepted as sufficient justification for making such a differentiation. Even otherwise, it is trite that a classification can only be based on an intelligible differentia that bears a rational nexus with the object sought to be achieved by the legislation. Such classifications shall be founded on pertinent and real differences as distinguished from irrelevant and artificial ones. It must be based on some qualities or characteristics which are to be found in all the persons put together and not in others who are left out and those qualities or characteristics must have a reasonable relation to the object of the legislation. Article 14 forbids class discrimination in the matter of imposing liabilities upon persons arbitrarily selected out of a large number of persons similarly placed. In the instant case, as noted, the object sought to be achieved is augmentation of revenue. If the object of the legislation is augmentation of

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revenue, according to me, a classification of the dealers based on the criterion viz., whether they import goods into the State is *per se* unjustifiable and unintelligible. I have, therefore, no hesitation to hold that the impugned levy is discriminatory and violative of Article 301 read with clause (a) of Article 304 as also Article 14 of the Constitution.

15. Now, I shall deal with the contentions advanced by the learned Government Pleader. The contention that the impugned levy is only an additional tax on multi national companies falling within the criteria provided therein, and the same, therefore, does not in any way impede trade or business cannot be accepted, for the liability to pay surcharge applies only to multi national companies who import goods into the State from other States. The contention of the learned Government Pleader that Article 301 is not attracted in the instant case as the impugned levy is only a levy based on the turnover of the dealer also cannot be accepted. The turnover of the dealer is not the sole criterion for the levy. The dealers who have more turnover than what is mentioned in the impugned provision are not liable

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to the impugned levy if they do not import into the State goods from other States. True, for the purpose of achieving economic parity, the States are empowered to enact legislations imposing surcharge. But, the same shall not go against the provisions of the Constitution. Economic parity and increase in revenue are certainly legitimate objects for a legislation providing for surcharge as in the instant case and an intelligible differentia can certainly be created in such a legislation by confining surcharge only to large business houses. Had it been the situation, whether this Court would have interfered with the legislation is a totally different matter. As noted, in the instant case, the legislation classifies dealers on the criterion as to whether they import goods into the State from other States. The arguments of the learned Government Pleader referred to above may not, therefore, hold good in a case of this nature.

For all the aforesaid reasons, the writ petitions are allowed declaring that sub-section (1A) of Section 3 of the Act is discriminatory and violative of Articles 301 and 14 of the Constitution. All the proceedings initiated and orders issued

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based on the said provision against the petitioners will stand quashed. The surcharge, if any, paid by the petitioners in terms of the said provision shall be refunded to them.

Sd/-
P.B.SURESH KUMAR,
JUDGE

Divya

// true copy //

Sd/-
P.S. to Judge