M/S Sharma Transport Rep.By Shri ... vs Government Of A.P. & Ors on 3 December, 2001

Author: Arijit Pasayat

Bench: B.N. Kirpal, K.G. Balakrishnan, Arijiy Pasayat

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           CASE NO.:
Appeal (civil) 4998  of  2000



PETITIONER:
M/S SHARMA TRANSPORT REP.BY SHRI D.P.SHARMA

        Vs.

RESPONDENT:
GOVERNMENT OF A.P. & ORS.

DATE OF JUDGMENT:       03/12/2001

BENCH:
B.N. Kirpal, K.G. Balakrishnan & Arijiy Pasayat



JUDGMENT:
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With [C.A. No.4999-5008/2000, C.A. No. 5009/2000, C.A. No.5010/2000, C.A. No.5011/2000, C.A. No.5012/2000] J U D G M E N T ARIJIT PASAYAT, J.

These appeals relate to a common judgment of the Andhra Pradesh High Court by which challenge to Notification issued by the State Government in G.O. Ms. No.83, Transport, Roads and Buildings (Tr.II) Department dated 5.6.2000 was rejected. By the said Notification issued under clause (b) of Section 9(1) of the Andhra Pradesh Motor Vehicles Taxation Act, 1963 (in short 'the Taxation Act') an earlier order dated 1.7.1995 issued by the Transport, Roads and Buildings (Tr. II) Department, was cancelled. The appellants who are operators of tourist buses originating from Karnataka State (their home State) and plying in adjacent States including the State of Andhra Pradesh filed the writ petitions assailing the legality and constitutional validity of the said Notification dated 5.6.2000.

Case of the appellants as canvassed before the High Court and reiterated in this Court is essentially as follows:

> Vehicles of the appellants are covered by the tourist vehicles permits issued by the State Transport Authority, Karnataka under Rule 64(1) of the Karnataka Motor

> Vehicles Rules and the authorization certificates issued by the same authority under the Motor Vehicles (All India Permit for Tourist and Transport Operators) Rules, 1993 (in short 'permit rules) and also the recognition certificates issued by the Director of Tourism, Bangalore under the said Rules. By virtue of these permits and certificates, tourist vehicles of the appellants are authorized to ply in certain contiguous States including the State of Andhra Pradesh. Central Government after discussions with the State Governments and with their consent formulated policies in the matter of concessions to be extended to tourist vehicles. A Notification dated 1.7.1995 was issued pursuant to a directive of the Central Government and its withdrawal is clearly unconstitutional. Rule 1(4) of the Permit Rules makes it clear that the conditions prescribed in Rules 82 to 85A of the Central Motor Vehicles Rules, 1989 (in short 'the Central Rules') do not apply to permits granted under the scheme governed by the Permit Rules.

Therefore, in the garb of levying taxes on fares and freights, the directives of the Central Government are being violated and the same is impermissible. With reference to Articles 73, 256 and 257 of the Constitution of India 1950 (for short 'the Constitution'), it is submitted that the directives of the Central Government are binding and the withdrawal Notification i.e. G.O.Ms.No.83 dated 5th June, 2000 is clearly illegal. With reference to Entry 35 of List III of the Seventh Schedule, it was submitted that the earlier Notification was in accord with the said entry. Section 88(9) of the Motor Vehicles Act, 1988 (in short 'the Act') throws considerable light on the controversy and similar is the position in respect of Section 88(14) of the Act. State Legislature has no competence to rescind or reverse the Notification conferring the benefits of concessional rate of tax to tourist operators. State law cannot go counter to the directives of Central Government on this subject. Therefore, the impugned Notification is beyond the legislative power which the State derives under Entry 57 of List II of the Seventh Schedule to the Constitution, in view of the express language used in Entry 35 of List III and also by virtue of the mandate contained in Article 254 of the Constitution. A plea of promissory estoppel was also pressed into service. It was submitted that the withdrawal of the concessional tax is an instance of arbitrary exercise of power which is not backed by any relevant consideration. Article 256 of the Constitution obligates the State to exercise its executive power to ensure compliance with the laws made by Parliament. Therefore, the impugned Notification could not have been withdrawn. In any event, after the withdrawal of the Notification there was a repeal of the relevant provision and without an operative Notification, taxes cannot be charged. Lastly, it was submitted that the action is clearly violative of guarantees and protections provided by Article 301 of the Constitution. It is to be noted that except the last stand indicated above, all other stands were examined by the High Court and negatived.

It was submitted by learned counsel appearing for the appellants that reliance placed by the High Court on the decision of this Court in B.A. Jayaram and Ors. Vs. Union of India and Ors. (1984 (1) SCC 168) is inappropriate as factual and legal background involved are different. In any event, some of the observations made in the said case need re-consideration in view of what has been stated by a 7-Judge Bench in The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Ors. (1963 (1) SCR 491).

Learned Solicitor General appearing for the Union of India stated that the letter dated 30th August, 1993 issued by the Joint Secretary to the Government of India to which reference was made in the Notification dated 1.7.1995 cannot be construed to be a directive by the Central Government to the States. Apparently, Articles 73, 256 and 257 deal with different situations in which directives can be issued. But the present case is one to which none of these Articles apply. He, however, submitted that there are certain observations in Jayaram's case (supra) which are prima facie at variance with the views expressed by the larger Bench in the Automobile Transport's case (supra).

Learned counsel appearing for the State of Andhra Pradesh submitted that there was no challenge before the High Court on the question of Article 301 of the Constitution, except a vague and general plea taken in the writ petitions. In any event, this was a case to which Article 301 of the Constitution had no application. In fact, President's assent had been taken and, therefore, without any plea being taken as to how the levy is not reasonable or is not in public interest. For the first time in these appeals, such a plea cannot be pressed into service. It was also submitted that this was not a case of repeal and was cancellation of a Notification in terms of Section 9 (1)(b) of the Taxation Act.

The respective stands need careful consideration. The primary question which appears to have been urged before the High Court was whether the letter of Joint Secretary to the Government of India dated 30th August, 1993 is in the nature of directive. Articles 73, 256 and 257 are the relevant provisions. Article 73 relates to the extent of executive power of the Union, while Articles 256 and 257deal with obligation of States and the Union and the control of the Union over the States in certain cases respectively. Entry 57 of List II of 7th Schedule deals with taxes on motor vehicles. This is, however, subject to the provisions of Entry 35 of List III. The said Entry of the Concurrent List reads as under:

> "Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied".

By no stretch of imagination the letter dated 30th August, 1993 can be regarded as a law laying down the principles of taxes on vehicles. It cannot also be treated as a subordinate legislation deriving its power or force from the Act or any other law made by the Union. It has been fairly stated by learned Solicitor General that though reference has been made to the consent of the various State Governments, it cannot be treated to be a directive. It was only a request to the States to act in terms of the deliberations which took place at the meeting of the Transport Development Council. The letter so far as relevant reads as follows:

> "No.RT-11053/1/92-MVL (Vol.II) 30th August, 1993 To:
>
> All the Transport Secretaries of The State Govts./Union Territory Administrations.
>
> Sub: Scheme for national permits for tourist coaches.
>
> Sir,

2.

3. I am writing to request you to take necessary action to incorporate these provisions relating to composite fee in the State Motor Vehicles Taxation Rules and also issue necessary instructions/guidelines to the State Transport Authorities for grant of permits. It may also be clarified that the composite fee is in lieu of all taxes.

Yours faithfully, (C.S.Khairwal) Joint Secretary to the Govt. of India"

This is not a case where the theory of occupied field can be made applicable. The Taxation Act essentially deals with fares charged from passengers and freight collected from them. On the contrary, the Act deals with levy on vehicles. They are conceptually different. Whatever has been stated above in the background of Article 73 is equally applicable to Articles 256 and 257 of the Constitution. Article 256 provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. This Article has application only when any law has been made by Parliament and the executive power of the State is made subservient to it by requiring it to ensure compliance with such laws. Where it appears to the Government of India that it is so necessary to do, directions can be issued. Article 257 provides that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union. Where the Government of India feels it so necessary to do so, it can issue a direction. At the cost of repetition it may be noted that there is no law specifying the principles of taxation on the subject matter of controversy so as to bring in application of either Article 256 or Article 257 of the Constitution.

It has to be noted that clause (b) in Article 73 cannot apply to legislative powers of the State. The expression 'agreement' referred to in the said clause has to be considered in terms of Article 299 of the Constitution. Article 246 deals with subject matter of laws made by Parliament and Legislatures of States. Clause (1) of the said Article gives exclusive power to deal with the matters enumerated in List II of the Seventh Schedule. The expression 'for that purpose' in Article 256 refers to the requirement of compliance with the laws made by Parliament. Article 256 operates if the Government of India feels that the executive power of the States is being exercised in a manner which may amount to impediment with the executive power of the Union. It has to be noted that Entry 56 of List II of the Seventh Schedule deals with passengers and the Union has no power to levy taxes in respect of passengers. Above being the position, there is no substance in the plea of the appellants that the letter of the Joint Secretary to the Government of India dated 30th August, 1993 was in the nature of a direction.

It is also submitted that Rule 1(4) of the Permit Rules is intended to curtail the power of State to levy taxes in respect of vehicles. This plea also is without any substance. The said rule is not intended to have the effect of curtailing power of States to levy taxes under relevant enactments. The said Rule reads as follows:

"1(4): The conditions prescribed in Rules 82 to 85-A of the Central Motor Vehicles Rules, 1989 shall not apply to the permits granted under this scheme".

Power to levy taxes on vehicles, whether mechanically propelled or not vests solely on the State Legislature, though it may be open to the Parliament to lay down the principles on which the taxes may be levied on mechanically propelled vehicles in the background of Entry 35 of List III. To put it differently, Parliament may lay down the guidelines for the levy of taxes on such vehicles, but the right to levy such taxes vests solely in the State Legislature. No principles admittedly have been formulated by the Parliament. In that sense, the Government of India's communication dated 30th August, 1993 does not in any sense violate the power of the State Legislature or its delegatee to levy or exempt taxes from time to time.

It is the stand of the appellants that what is ruled out by application of Rule 1(4) of the Permit Rules has been indirectly brought into force. Reference has been made to Rule 84 of the Central Rules to submit that the levy which is permitted in terms of that rule is clearly excluded of its application. This plea is equally without any substance as Rule 84 states that the liability to pay taxes under the law does not cease merely on account of obtaining a tourist permit. Said rule is not a substantive charging provision as far as levy is concerned. The power to levy tax, to reduce or exempt the tax and to withdraw concession granted did not have its source in Rule 84, but are clearly founded on the taxing statutes i.e. Taxation Act. It is nobody's case that State is authorized to levy or collect taxes only by operation of Rule 84.

Next plea is the oft repeated one of promissory estoppel. It has to be noted that even though a concession is extended for a fixed period, the same can be withdrawn in public interest. In Sales Tax Officer and another Vs. M/s Shree Durga Oil Mills and Anr. (1997 (7) SCALE 726), it has been held by this Court that a Notification granting exemption of tax can be withdrawn by any point of time. There cannot be estoppel against any statute. Where it is in public interest, the Court will not interfere because public interest must override any consideration of private loss or gain [see Kasinka Trading & Anr. Vs. Union of India & Anr. (1995 (1) SCC 274)]. In Shrijee Sales Corporation & Anr. Vs. Union of India (1997 (3) SCC 398), it was observed that where there was supervening public interest, the Government is free to change its stand and withdraw the exemption already granted. One such reason for changing its policy decision can be resource crunch and the loss of public revenue. There is preponderance of judicial opinion that to invoke the doctrine of promissory estoppel, clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and that bald expressions, without any supporting material, to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the Government would not be sufficient to press into aid the doctrine. The principle of promissory estoppel is that where one party has by his word or conduct made to the other a clear and unequivocal promise or representation which is intended to create legal relations or affect a

legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise or representation is made and it is in fact so acted upon by the other party, the promise or representation would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so, having regard to the dealings which have been taken place between the parties. The doctrine of promissory estoppel is now well established one in the field of administrative law. The foundation for the claim based on the principle of promissory estoppel in public law was laid by Lord Denning in 1948 in Robertson Vs. Minister of Pensions (1949 (1) K.B. 227). Prof. De Smith in his "Judicial Review of Administrative Action" (4th Edition at page 103) observed that "the citizen is entitled to rely on their having the authority that they have asserted".

Doctrine of 'Promissory Estoppel' has been evolved by the courts, on the principles of equity, to avoid injustice.

'Estoppel' in Black's Law Dictionary, is indicated to mean that a party is prevented by his own acts from claiming a right to the detriment of other party who was entitled to rely on such conduct and has acted accordingly. Section 115 of the Indian Evidence Act is also, more or less, couched in a language which conveys the same expression.

'Promissory Estoppel' is defined as in Black's Law Dictionary as 'an estoppel which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of promise, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of promise'.

These definitions in Black's Law Dictionary which are based on decided cases, indicate that before the Rule of 'Promissory Estoppel' can be invoked, it has to be shown that there was a declaration or promise made which induced the party to whom the promise was made to alter its position to its disadvantage.

In this backdrop, let us travel a little distance into the past to understand the evolution of the Doctrine of 'Promissory Estoppel'.

Dixon, J. as Australian jurist, in Grundt & Ors. Vs. The Great Boulder Proprietary Gold Mines Ltd. (1938 (59) CLR 641), laid down as under:

> "It is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it."

The principle, set out above, was reiterated by Lord Denning in Central London Property Trust Ltd. Vs. High Trees House Ltd. (1947 KB

130), when he stated as under:

> "A promise intended to be binding, intended to be acted upon, and in fact acted upon is binding"

Lord Denning approved the decision of Dixon, J. (supra) in Central Newbury Car Auctions Ltd. Vs. Unity Finance Ltd. & Anr. (1956 (3) All ER

905). Apart from propounding the above principle on judicial side, Lord Denning wrote out an article, a classic in legal literature, on "Recent Developments in the Doctrine of Consideration", Modern Law Review, Vol.15, in which he expressed as under :

> "A man should keep his word. All the more so when the promise is not a bare promise but is made with the intention that the other party should act upon it. Just a contract is different from tort and from estoppel, so also in the sphere now under discussion promises may give rise to a different equity from other conduct.
>
> The difference may, lie in the necessity of showing 'detriment'. Where one party deliberately promises to waive, modify or discharge his strict legal rights, intending the other party to act on the faith of promise, and the other party actually does act on it, then it is contrary, not only to equity but also to good faith, to allow the promisor to go back on his promise. It should not be necessary for the other party to show that he acted to his detriment in reliance on the promise. It should be sufficient that he acted on it."

This principle has been evolved by equity to avoid injustice. It is neither in the realm of contract nor in the realm of estoppel. Its object is to interpose equity shorn of its form to mitigate the rigour of strict law. In Union of India & Ors. Vs. M/s Anglo Afgan Agencies etc. (AIR 1968 SC 718), it was inter alia observed as follows:

> "We are unable to accede to the contention that the executive necessity releases the Government from honouring its solemn promises relying on which citizens have acted to their detriment. Under our constitutional set up no person may be deprived of his authority of law, if a member of the Executive seeks to deprive a citizen of his right or liberty otherwise than in exercise of power derived from the law common or statute the Courts will be competent to and indeed would be bound to protect the rights of the aggrieved citizens."

It was further held in its summing up thus :

> "Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, not claim to be the Judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."

In Century Spinning and Manufacturing Co. Ltd. & Anr. Vs. The Ulhasnagar Municipal Council & Anr. (1970 (3) SCR 854), this doctrine of promissory estoppel against public authorities was extended thus:

> "This Court refused to make distinction between the private individual and a public body to far as the doctrine of promissory estoppel is concerned."

In M/s Motilal Padampat Sugar Mills Co. (P) Ltd. Vs. State of Uttar Pradesh & Ors. (1979 (2) SCR 641), the doctrine of promissory estoppel was applied to the executive action of the State Government and also denied to the State of the doctrine of executive necessity as a valid defence. It was held that in a republic governed by the rule of law, no one high or low, is above the law. Every one is subject to the law as fully and completely as any other and the Government is no exception. The Government cannot claim immunity from the doctrine of promissory estoppel. Equity will, in a given case where justice and fairness demands, prevent a person from exercising strict legal rights even where they arise not in contract, but on his own Title deed or in statute. It is not necessary that there should be some pre-existing contractual relationship between the parties. The parties need not be in any kind of legal relationship before the transaction from which the promissory estoppel takes its origin. The doctrine would apply even where there is no pre-existing legal relationship between the parties, but the promise is intended to create legal relations and effect a legal relationship which will arise in future. It was further held that it is indeed pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned. The former is equally bound as the latter. Therefore, the Government cannot claim any immunity from the doctrine of promissory estoppel and it cannot say that it is under no obligation to act in a manner, i.e., fair and just or that it is not bound by the considerations of honesty and good faith. In fact, the Government should be held a high standard of rectangular rectitude while dealing with citizens. Since the doctrine of promissory estoppel is an equitable doctrine, it must yield where the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the Court would not raise an equity in favour of the promise and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government should be held bound by the promise made by it. But the Govt. must be able to show that in view of the fact as have been transpired, public interest would not be prejudiced. Where the Govt. is required to carry out the promise the Court would have to balance, the public interest in the Government's carrying out the promise made to the citizens, which helps citizens to act upon and alter his position and the public interest likely to suffer if the promises were required to be carried out by the Government and determine which way the equity lies. It would not be enough just to say

that the public interest requires that the Govt. would not be compelled to carry out the promise or that the public interest would suffer if the Govt. were required to honour it. In order to resist its liability the Govt. would disclose to the Court the various events insisting its claim to be except from liability and it would be for the Court to decide whether those events are such as to render it equitable and to enforce the liability against the Govt.

It is equally settled law that the promissory estoppel cannot be used compelling the Government or a public authority to carry out a representation or promise which is prohibited by law or which was devoid of the authority or power of the officer of the Government or the public authority to make. Doctrine of promissory estoppel being an equitable doctrine, it must yield place to the equity, if larger public interest so requires, and if it can be shown by the Government or public authority for having regard to the facts as they have transpired that it would be inequitable to hold the Government or public authority to the promise or representation made by it. The Court on satisfaction would not, in those circumstances raise the equity in favour of the persons to whom a promise or representation is made and enforce the promise or representation against Government or the public authority. These aspects were highlighted by this Court in Vasantkumar Radhakishan Vora Vs. The Board of Trustees of the Port of Bombay (AIR 1991 SC 14), Sales-tax Officer and another Vs. M/s Shree Durga Oil Mills and another (supra) and Dr. Ashok Kumar Maheshwari Vs. State of U.P. and another (1998 (2) SCC 502). Above being the position, the plea relating to promissory estoppel has no substance.

It has been pleaded as noted above that withdrawal is without any rational or relevant consideration. In this context, it has to be noted that the operators in the State of Andhra Pradesh are required to pay the same tax as those registered in other states. Therefore, there cannot be any question of irrationality. The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone. In the present cases all persons who are similarly situated are similarly affected by the change. That being so, there is no question of any discrimination. That plea also fails.

What remains now to be considered is plea in the background of Article 301 of the Constitution. The said Article talks of freedom of trade, commerce and intercourse. Imposition of a tax does not in every case tantamount to infringement of Article 301. One has to determine whether the impugned provision amounts to a restriction directly and immediately on the movement of trade or commerce. In the Automobile's case (supra), this question was elaborately and succinctly stated by this Court. Some of the observations relevant for the present dispute are as follows:

> "We have tried to summarise above the various stand points and views which were canvassed before us and we shall now proceed to consider which, according to us, is the correct interpretation of the relevant articles in Part XIII of the Constitution. We

may first take the widest view, the view expressed by Shah, J., in the Atiabari Tea Co. case (1961)1 SCR 809) a view which has been supported by the appellants and one or two of the interveners before us. This view, we apprehend, is based on a purely textual interpretation of the relevant articles in Part XIII of the Constitution and this textual interpretation proceeds in the following way. Article 301 which is in general terms and is made subject to the other provisions of Part XIII imposes a general limitation on the exercise of legislative power, whether by the Union or the States, under any of the topics taxation topics as well as other topics enumerated in the three lists of the Seventh Schedule, in order to make certain that "trade, commerce and intercourse throughout the territory of India shall be free". Having placed a general limitation on the exercise of legislative powers by Parliament and the State Legislatures, Article 302 relaxes that restriction in favour of Parliament by providing that that authority "may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest". Having relaxed the restriction in respect of Parliament under Article 302, a restriction is put upon the relaxation by Article 303(1) to the effect that Parliament shall not have the power to make any law giving any preference to any one State over another or discriminating between one State and another by virtue of any entry relating to trade and commerce in lists I and III of the Seventh Schedule. Article 303(1) which places a ban on Parliament against the giving of preferences to one State over another or of discriminating between one State and another, also provides that the same kind of ban should be placed upon the State Legislature also legislating by virtue of any entry relating to trade and commerce in lists II and III of the Seventh Schedule. Article 303(2) again carves out an exception to the restriction placed by Article 303(1) on the powers of Parliament, by providing that nothing in Article 303(1) shall prevent Parliament from making any law giving preference to one State over another or discriminating between one State and another, if it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. This exception applies only to Parliament and not to the State Legislatures. Article 304 comprises two clauses and each clause operates as a proviso to Articles 301 and 303. Clause (a) of that article provides that the Legislature of a State may "impose on goods imported from other States 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." This clause, therefore, permits the levy on goods imported from sister States any tax which similar goods manufactured or produced in that State are subject to under its taxing laws. In other words, goods imported from sister States are placed on a par with similar goods manufactured or produced inside the State in regard to State taxation within the State allocated field. Thus, the States in India have full power of imposing what in American State legislation is called the use tax, gross receipts tax, etc., not to speak of the familiar property tax, subject only to the condition that such tax is imposed on all goods of the same kind produced or manufactured in the taxing State, although such taxation is undoubtedly calculated to fetter inter-State trade and

> commerce. As was observed by Patanjali Sastri, C.J., in State of Bombay Vs. United Motors (1953 SCR 1069), the commercial unity of India is made to give way before the State power of imposing 'any' non-discriminatory tax on goods imported from sister States. Now, clauses (b) of Article 304 provides that notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law 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. The proviso to clause (b) says that no bill or amendment for the purpose of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. This provision appears to be the State analogue to the Union Parliament's authority defined by Article 302, in spite of the omission of the word 'reasonable' before the word 'restrictions' in the latter article. Leaving aside the pre-requisite of previous Presidential sanction for the validity of State legislation under clause (b) provided in the proviso thereto, there are two important differences between Article 302 and Article 304(b) which require special mention. The first is that while the power of Parliament under Article 302 is subject to the prohibition of preferences and discriminations decreed by Article 303(1) unless Parliament makes the declaration contained in Article 303(2), the State's power contained in Article 304(b) is made expressly free from the prohibition contained in Article 303(1), because the opening words of Article 304 contain a non-obstante clause both to Article 301and Article 303. The second difference springs from the fact that while Parliament's power to impose restrictions under Article 302 upon freedom of commerce in the public interest is not subject to the requirement of reasonableness, the power of the States to impose restrictions on the freedom of commerce in the public interest under Article 304 is subject to the condition that they are reasonable".

Freedom granted by Article 301 is of the widest amplitude and is subject to only such restrictions as are contained in the succeeding Articles in Part XIII of the Constitution. The following observations in Automobile's case are relevant:

> "Even in the matter of textual construction there are difficulties. One of the difficulties which was adverted to during the Constituent Assembly debates related to the somewhat indiscriminate or inappropriate use of the expressions 'subject to' and 'notwithstanding' in the articles in question. Article 302, as we have seen, makes a relaxation in favour of Parliament. Article 303 again imposes a restriction on that relaxation 'notwithstanding anything in Article 302 but Article 303 relates both to Parliament and the State Legislature, though Article 302 makes no relaxation in favour of the State Legislature. The non obstante clause in Article 303 is, therefore, somewhat inappropriate. Clause (2) of Article 303 carves out an exception from the restriction imposed on Parliament by clause (1) of Article 303. But again clause (2) relates only to Parliament and not to the State Legislature even though clause (1) relates to both. Article 304again begins with a non-obstante clause mentioning both Article 301 and Article 303, though Article 304 relates only to the Legislature of a State. Article 303 relates to both the State Legislature and Parliament and again the

> non obstante clause in article 304 is somewhat inappropriate. The fact of the matter is that there is such a mix up of exception upon exception in the series of articles in Part XIII that a purely textual interpretation may not disclose the true intendment of the articles. This does not mean that the text of the articles, the words used therein, should be ignored. Indeed, the text of the articles is a vital consideration in interpreting them; but we must at the same time remember that we are dealing with the constitution of a country and the inter-

connection of the different parts of the Constitution forming part of an integrated whole must not be lost sight of. Even textually, we must ascertain the true meaning of the word 'free' occurring in Article 301. From what burden or restrictions is the freedom assured? This is a question of vital Importance even in the matter of construction. In Section 92 of the Australian Constitution the expression used was 'absolutely free' and repeatedly the question was posed as to what this freedom meant.

We do not propose to recite the somewhat chequered history of the Australian decisions in respect of which Lord Porter, after a review of the earlier cases, said in Commonwealth of Australia V. Bank of New South Wales (1950 AC 235) that in the 'labyrinth of cases decided under Section 92 there was no golden thread.' What is more important for our purpose is that he expressed the view that two general propositions stood out from the decisions: (i) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (ii) that Section 92 of the Australian Constitution is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or inconsequential impediment which may fairly be regarded as remote. Lord Porter admitted "that in the application of these general propositions, in determining whether an enactment is regulatory or something more or, whether a restriction is direct or only remote or incidental, there cannot fail to be difference of opinion." It seems clear, however, that since "the conception of freedom of trade, commerce and intercourse in a community regulated by law presupposes some degree of restriction upon the individual", that freedom must necessarily be delimited by considerations of social orderliness. In one of the earlier Australian decisions (Duncan v. The State of Queensland) (1916 (22) CLR

556), Griffith, C.J. said:

> "But the word "free" does not mean extra legem, any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law". (p.573) As the language employed in Article 301 runs unqualified the Court, bearing in mind the fact that provision has to be applied in the working of an orderly society, has necessarily to add certain qualifications subject to which alone that freedom may be exercised. This point has been very lucidly discussed in the dissenting opinion which Fullagar,J., wrote in Mc Carter v. Brodie [(1950) 80 CLR 432], an opinion which was substantially approved by the Privy Council in Hughes and Vale Proprietary Ltd. V. State of New South Wales [(1955) AC 241]. The learned Judge gave several examples to show the distinction between what

was merely permitted regulation and what true interference with freedom of trade and commerce. He pointed out that in the matter of motor vehicles most countries have legislation which requires the motor vehicle to be registered and a fee to be paid on registration. Every motor vehicle must carry lamps of a specified kind in front and at the rear and in the hours of darkness these lamps must be alight if the vehicle is being driven on the road, every motor vehicle must carry a warning device, such as a horn; it must not be driven at a speed or in a manner which is dangerous to the public. In certain localities a motor vehicle must not be driven at more than a certain speed. The weight of the load which may be carried on a motor vehicle on a public highway is limited. Such examples may be multiplied indefinitely. 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 Article 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, 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' (Article 301) and 'restrictions' (Articles 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".

It was further observed:

"After carefully considering the arguments advanced before us we have come to the conclusion that the narrow interpretation canvassed for on behalf of the majority of

> the State cannot be accepted, namely, that the relevant articles in Part XIII apply only to legislation in respect of the entries relating to trade and commerce in any of the lists of the Seventh Schedule. But we must advert here to one exception which we have already indicated in an earlier part of this judgment. Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article
>
> 301.They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them".

The following conclusions really constitute the core of the principles:

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

It has to be noted that in Automobile's case (supra) as quoted above, it was held that 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 rema`ins compensatory it cannot operate as a hindrance. A Constitution Bench of this Court considered an identical question in M/s Sainik Motors, Jodhpur & Ors. Vs. State of Rajasthan (AIR 1961 SC 1480).

Observations in Jayaram's case (supra) to the following effect do not appear to have kept the said aspect in view when it was observed as follows:

> "Taxes of a compensatory and regulatory character are outside the expanse of Article 301 of the Constitution. Regulatory measures and compensatory taxes far from impeding the free flow of trade and commerce, often promote such free flow of trade and commerce by creating agreeable conditions and providing appropriate services. All that is necessary to uphold a tax which purports to be or is claimed to be a compensatory tax is, "the existence of a specific, identifiable object behind the levy and a nexus between the subject and the object of the levy".

(underlined for emphasis) A mere claim that tax is compensatory would not suffice. To that extent the observations in Jayaram's case (supra) do not reflect the correct position in law. Whether a tax is compensatory or not cannot be made to depend on the preamble of the statute imposing it. A tax cannot also be said not to be compensatory because the precise or specific amount collected is not actually used to providing any facilities.

We may note here that though arguments were advanced in the background of Article 301 of the Constitution, as has been rightly submitted by the learned counsel for the State of Andhra Pradesh, there were no pleadings in this regard in the writ petitions, excepting some general statements about violation of Article 301. It has been fairly considered that President's assent as required has been obtained. Thus the case is not relatable to Article 301, but Article 304. With reference to clause (b) of the said Article, it is submitted that mere obtaining assent is not sufficient, and it has to be shown that the levy was in public interest. There was no averment in the petitions before the High Court in this regard. There was also no view expressed by the High Court on this issue, in the absence of any argument or plea before it. The question whether public interest was involved or not required a factual adjudication. Since there were no pleadings, the State did not have an opportunity to indicate its stand. Under the circumstances, we do not think it appropriate to consider that question for the first time in these appeals, particularly, when factual adjudication would be necessary.

Coming to the plea relating to repeal of the Notification, it is to be noted that the Notification dated 1.7.1995 was issued in exercise of powers conferred under Section 9(1)(a) of the Taxation Act, while the impugned Notification was issued in exercise of powers conferred under Section 9(1)(6) of the said Act. It is to be noted that originally Notification was issued under Section 3 of the said Act and its operation has not been questioned. That being the position, there was no requirement to issue a fresh Notification to make the levy. Notification dated 1.7.1995, did not supersede the original Notification issued under Section 3 of the Taxation Act.

In the result, the appeals are dismissed.

.....J. (B.N. KIRPAL) .....J. (K.G. BALAKRISHNAN) .....J. (ARIJIT PASAYAT)
December 3, 2001