Supreme Court of India
Shree Mahavir Oil Mills & Anr vs State Of Jammu & Kashmir & Ors on 29 November, 1996
Author: B Reddy
Bench: B.P. Jeevan Reddy, Suhas C. Sen

PETITIONER:
SHREE MAHAVIR OIL MILLS & ANR.

Vs.

RESPONDENT:
STATE OF JAMMU & KASHMIR & ORS.

DATE OF JUDGMENT: 29/11/1996

BENCH:
B.P. JEEVAN REDDY, SUHAS C. SEN

ACT:

HEADNOTE:

JUDGMENT:

THE 29TH DAY OF NOVEMBER, 1996 Present:

Hon`ble Mr.Justice B.P. Jeevan Reddy Hon'ble Mr.Justice S.C. Sen Harish N.Salve, Sr.Adv. Ms.Bina Gupta, Alok Agarwal, Ramesh Singh, Ms.Rakhi Verma, Advs. with him for the Appellant.

M.L.Verma, Sr Adv, J.Manhas and Pawan Kumar, Advs. with him for State J U D G M E N T The following Judgment of the Court was delivered: B.P.JEEVAN REDDY,J.

Leave granted.

The State of Jammu & Kashmir seeks to encourage and promote the industrialisation of the State - like every other State in the country. Edible oil industry is one such. Because of certain inherent problems, the cost of production of edible oil in Jammu & Kashmir is said to be higher than the cost of production of similar edible in the adjoining States with the result that the manufacturers of edible oil in the adjoining State are able to sell their products in Jammu & Kashmir at a price lower than the price at which the local manufacturers are able to sell. This is said to have created a situation where the local industries are the prospect of closure; at any rates they were not able to

compete with the out-State manufacturers. They approached their government, which is seeking to protect their interest by inter alia exempting them totally from the levy of sales tax on the sale of their products. That has given rise to the writ petition from which the present appeal arises on the Jammu and Kashmir High Court dismissing the writ petition, they have approached this Court.

The Jammu & Kashmir Sales Tax Act contains four Schedules. Each of the Schedules carries a particular rate of sales tax. Edible oils were previously included in Schedule-D which prescribes the rate of tax at four percent. On December 20, 1993, edible oils were shifted from Schedule-D to Schedule-C, which prescribes the rate of the tax at eight percent. (It is stated that S.R.O.213 of 1993 issued on December 3, 1993 shifting edible oils from Schedule-D to Schedule-C was rescinded within about a week thereafter but was re-issued as S.R.O.124 of 1994 on May 27,1994).

With a view to protect the local edible oil industry, the Government of Jammu & Kashmir issued S.R.O.93 of 1991 on March 7, l991 under Section 5 of the Jammu & Kashmir Sales Tax Acts, 1962 directing that "the goods manufactured by a dealer operating as a small scale industrial unit in the State and registered with Director of Industries and Commerce, Handicrafts or Handloom Development, subject to the conditions specified belows shall be exempted from payment of tax to the extent and for the period specified in the Schedule forming Annexure-A". All the units manufacturing edible oil in the State are small scale industrial units as defined by the Jammu & Kashmir Government. (It appears that initially the limit was an investment of Rupees ten lakhs according to which one unit in the State did not qualify as a small scale industrial unit. Subsequently, it is stated the limit of investment was raised to Rupees thirty lakhs, as a result of which the said unit also fell under the definition of small scale unit). The exemption was total and the period of exemption was five years-which, has later been extended by another five years.

The result of the orders aforementioned was that while until December, 1993/May, 1994, the manufacturers of edible oil in other States were obliged to pay sales tax on the sales effected by them in the State of Jammu & Kashmir at the rate of four percent, the local manufacturers were totally exempted therefrom. In December, 1993/May. 1994, the rate of tax was raised from four percent to eight percent, as stated above. With the raising of the rate of sales tax to eight percent, the outside manufacturers were obliged to pay at eight percent while the local manufacturers were exempt fully. It is them local manufaturers were exempt fully It is then that some of the outside manufacturers including the appellants herein, approached the Jammu & Kashmir High Court by way of writ petitions which were dismissed by a learned Single Judge. The Letters Patent Appeals preferred by the appellants have also been dismissed by the Division Bench relying mainly upon the decision of this Court in Video Electronics Private Limited [190 (3) S.C.C.87].

Sri Harish Salve, learned counsel for the appellants, assailed the correctness of the judgment of the High Count on several grounds. Counsel submitted that the orders of the Government of Jammu & Kashmir exempting all the edible oil industries in the State from payment of sales tax unconditionally amounts to discriminating against the out- State manufacturers which is prohibited by Articles 301 and 304 of the Constitution. Counsel submitted that Part-XIII of the Constitution prohibits raising of fiscal barriers by the States, for such barriers are bound to interfere with the free movement of trade and commerce throughout the territory of India. Raising of protective walls may

be justified in international trade. The Government of India can and has been providing several such protectionist measures all these years to encourage the growth and establishment of industries, in the country and to protect them from competition from foreign manufactures. But similar measures cannot be provided by the State governments internally, i.e., within the country. The Parliament can, no doubt, be such measures but not the State Government, and certainly not without the prior sanction/assent of the President of India. Learned counsel submitted that the decision in Video Electronics has not been correctly understood by the High Court and that it does not purport to support the impugned measure. Learner counsel relied upon several decisions rendered by this Court under Part-XIII in support of his submissions.

On the other hand, Sri M.L.Verma. learned counsel for the State of Jammu & Kashmir, placed strong reliance upon the ratio and upon certain observations made in Video Electronics. Notwithstanding certain minor differences, learned counsel submitted, the principle of the said decision clearly applies to the facts of this case. Sri Verma submitted that when the rate of tax was four percent and the exemption in favour of local manufacturers was operating, the appellants never protested. Only when the rate of tax was raised from four to eight percents with the exemption in favour of local manufacturers continuing, the appellants came forward with writ petitions. If they were not aggrieved when the rate was four percents they cannot equally be aggrieved merely because the rate is raised to eight percent. Counsel brought to our notice certain figures relating to turn-over of the appellants within the state of Jammu & Kashmir and emphasised that the impugned measure has not really hurt the appellants` business and that the volume of their turn-over continues to rise notwithstanding the impugned measure. The submission is that the appellants can have no real or genuine grievance in the matter. Coupled with this, Sri Verma submitted, is the need for protecting the local manufacturers. Because of the peculiar economic conditions prevailing in the State, the cost of production of the local manufacturers is substantially higher than the cost of production of edible oil in the adjoining States or in other States in the country. Unless the impugned protective measure is provided to the local manufacturers, Sri Verma submitted, it was not possible for the local manufacturers to survive in the market. They would have been eliminated from their business and trade by the out-State manufacturers who are able to sell their goods at a lesser price. The purpose of the impugned measure, Sri Verma submitted, is, therefore, laudable. It is not directed against the out-State manufacturers but only towards saving the local ones. Even otherwise, counsel submitted, the principle of classification relevant under Article 14 has been held by this Court to be equally applicable under Article 304 and if so, it must be held that the classification made between local and out-State manufacturers is a reasonable one and designed to further the aforesaid laudable object.

Article 301 declares that "subject to the other provisions of this part, trade, commerce and intercourse throughout the territory of India shall be free". An exception is, however, provided in favour of Parliament by Article 302 which says that "Parliament 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". The power conferred upon the Parliament by Article 302 is, however, qualified by a rider provided in clause (1) of Article 303 which says that the power conferred upon the Parliament by Article 302 shall not however, empower the Parliament - or the legislature of State - "to make any law giving, or

authorising the giving of, any preference to one State over another, or making, or authorising the mating of any discrimination between one State or another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule".* Clause (2) of Article 303, is in the It is not very clear why clause (1) of Article 303 uses the words "nor the legislature of a State" when Article 302 does not refer to the legislature of a State at all. Probably, the idea was to declare affirmatively in the interest of removing any doubt - that even a legislature of a State shall not have the power to make any law giving or authorizing the giving of any preference to one estate over another or making or authorising the making of any discrimination between one state and another by virtue of their power to make a law with reference to the entries relating to trade and commerce in the Seventh schedule. Further, the additional of words "by virtue of any entry relating to trade and commerce of any of the Lists in the Seventh Schedule" at the end of the clause have also given rise to a good amount of controversy, which we shall refer to later, to the extent relevant.

nature of a classification. It says that "nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that 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". Article 304 deals with the power of the State legislatures. It begins with a non-obstante clause "Notwithstanding anything in article 301 or article 303". Article 303 was also referred to in this non-obstante clause evidently for the reason that clause (1) of Article 303 refers to "the legislature of a State" besides referring to Parliament. Article 304 contains two clauses. Clause (a) states that "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". The wording of this clause is of crucial significance. The first half of the clause would make it appear at first flush that it merely states the obvious: one may indeed say that the power to levy tax on goods imported from other States or Union territories flows from Article 246 read with Lists II and III in the Seventh Schedule and not from this clause. That is of course so, but then there is a meaning and a very significant principle underlying the clauses if one reads it in its entirety. The idea was not really to empower the State legislatures to levy tax on goods imported from other States and Union territories - that they are already empowered by other provisions in the Constitution - but to declare that power shall not be so exercised to discriminate against the imported goods vis-a- vis locally manufactured goods. The clauses though worded in positive language has negative aspect. It is, in truth, a provision prohibiting discrimination against the imported goods. In the matter of levy of tax - and this is important to bear in mind - the clause tells the State Legislatures - 'tax you may the goods imported from other States/Union Territories but do not, in that processs discriminate against them vis-a-vis goods manufactured locally'. In short, the clause says levy of tax on both ought to be at the same rate. This was and is a ringing declaration against the States creating what may be called "tax barriers" - or fiscal barrier", as they may be called - at or along their boundaries in the interest of freedom of trade, commerce and intercourse throughout the territory of India, guaranteed by Article 301. As we shall presently point out, this clause does not prevent in any manner the States from encouraging or promoting the local industries in such manner as they think fit so long as they do not use the weapon of taxation to discriminate against the imported goods vis-a-vis the locally manufactured goods. To repeat, the clause bars the States from creating tax

barriers - or fiscal barriers, as they can be called - around themselves and/or insulate themselves from the remaining territories of India by erecting such 'tariff walls'. Part-XIII is premised upon the assumption that so long as a State taxes its residents and the residents of other States uniformly, there is no infringement of the freedom guaranteed by Article 301; no State would tax its people at a higher level merely with a view to tax the people of other States at that level. And it is this clause which has a crucial bearing on this case. Now coming to clause (b), it empowers the legislature of the State to make a law and "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 Dill 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". (This proviso has, of course, to be read along with Article 255 which says that if the Act receives the assent of the Presidents the non-compliance with the requirement of obtaining the previous sanction to the introduction of the Bill is cured.) Though in appearance this clause reads like conferring on the State Legislatures a power akin to the power conferred upon the Parliament by Article 302, there are certain distinctions. Firstly, while Article 302, does not use the expression "reasonable" before the word "restrictions," this clause does. Secondly, this power can be exercised by the State Legislature only with the "previous sanction" of the President-which means the Union Ministry, or with the assent of the President, as explained above. It is probably our history which impelled the founding fathers to lay store by the Central Government in the matter of imposing restrictions, or reasonable restrictions, as the case may be on the freedom guaranteed, it is worthy of notice, is "throughout the territory of India" and not merely between the States as such; the emphasis is upon the oneness of the territory of India. Part-XIII starts with this concept of oneness but then it provides exceptions to that rule, as stated above, to meet certain emerging situations. As a matter of fact, it can well be said that clause (a) of Article 304 is not really an exception to Article 301, notwithstanding the non-obstante clause in Article 304 and that it is but a re-statement of a facet of the very freedom guaranteed by Article 301, viz., power of taxation by the States. (We need not refer to the other articles in Part-XIII for the purposes of this case).

Having noticed the scheme of Part-XIII, we may now turn to decided cases to see how these articles have been understood over the last fifty years.

The first decision to be noticed is, of course, in Atiabari Tea Co. Ltd. v. State of Assam [1961 (10 S.C.R. 809]. The legislature of Assam enacted the Assam taxation [on goods carried by Roads or Inland Waterways] Act, 1954 providing for levy of tax on certain goods carried by road or inland waterways in the State of Assam. Its constitutionality was questioned by a large number of tea companies who sold most of their produce outside the State of Assam after transporting it by road or waterways to West Bengal and other States. The majority opinion [Gajendragadkar, Wanchoo and Das Gupta, JJ.] stated their conclusion in the following words:

> "Our conclusion, therefore, is that when Art.301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act

imposed any direct restrictions on the very movement of such goods it attracts the provisions of Art. 301, and its validity can be sustained only if it satisfies the requirements of Art.302 or Art.304 of Part XIII. At this stage we think it is necessary to repeat that when it is said that the freedom of the movement of trade cannot be subject to any restrictions in the form of taxes imposed on the carriage of goods or their movement all that is meant is that the said restrictions can be imposed by the State Legislatures only after satisfying the requirements of Art.304(b). It is not as if no restrictions at all can be imposed on the free movement of trade."

It was also held:

"Thus considered we think it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Art. 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Art.301....We are, therefore, satisfied that in determining the limits of the width and amplitude of the freedom guaranteed by Art.301 a rational and workable test to apply would be: Does the impugned restriction operate directly or immediately on trade or its movement?"

In Automobile Transport [Rajasthan] Ltd. v. State of Rajasthan [1963 (1) S.C.R.491] validity of Section 4(1) of the Rajasthan Motor Vehicles Taxation Act, 1951 was challenged. The section levied a tax on all motor vehicles used in any public place or kept for use at the rates specified in the Schedules. Violation of the provision invited penalties provided under Section 11. Certain operators challenged the Act as violative of Articles 301 and 304(b). Since serious doubts were expressed with respect to the propositions enunciated by the majority and by Shah, J. in Atiabari tea Co. Ltd., the matters were referred to a larger Constitution Bench of seven Judges By a majority of 4:3, (S.K.Das, Kapur and Sarkaria,JJ joined by Subba Rao,J.], this Court upheld the constitutionality of the Act on the ground that the taxes levied by it are compensatory in nature and, therefore, outside the purview of Article

301. Once outside the purview of Article 301, it was held, Article 304 was also not attracted. The propositions emerging from the opinion of Das,J. have been neatly summarised in the head-note of the Supreme Court Reports in the following words:

"(i) The concept of freedom of trade, commerce and intercourse postulated by Art.301 must be understood in the context of an ordinary society and as part of a Constitution which envisaged a distribution of powers between the States and the Union, and if so understood, the concept must recognise the need and legitimacy of some degree of regulatory control, whether by the Union or the States. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities did not hamper trade, commerce and intercourse but rather facilitated them and, therefore, were not hit by the freedom declared by Art.301; such measures need not comply with the requirements of the provisions of Art.304(b) of the Constitution. (2)

> In view of the provisions of Art. 245, the restrictions in Part XIII of the Constitution applied to taxation laws; a and such laws were not confined only to by legislation with respect to entries relating to trade and commerce in any of the lists in the Seventh Schedule. (3) On a proper construction of the Act and the Schedules, the taxes imposed were really taxes for the use of the roads in Rajasthan. In basing the taxes on passenger capacity or loading capacity, the legislature had merely evolved a method and measure of compensation demanded by the State, but the takes were still compensation and charge for regulation."

Subba Rao, concurred with the above propositions though the learned Judge stated the propositions flowing from his opinion at Pages 564-565 separately. The majority opined that "the interpretation which has accepted by the majority in the Atiabari Tea Co. case is corrects but subject to this clarification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Art. 301 and such measures need not comply with the requirements of the proviso to Art. 304 (b) of Constitution."[Emphasis supplied] Firm A.T.B. Mehtab Majid & Co. v. State of Madras [1963 Suppl. (2) S.C.R.435] arose under the Madras general Sales Tax Act. The effect of Section 3 of the Act read with Rule 16 was that tanned hides and skins imported from outside the State of Madras and sold within the State were subject to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the State. Similarly, hides or skins imported from outside the State after purchase in their raw condition and then tanned inside the State were also subject to higher rate of tax than hides or skins purchased in raw condition in the State and tanned within the state. This distinction was attacked as violative of Articles 301 and 304(a) of the Constitution. Following the law laid down in Atiabari Tea Co.Ltd. and Rajasthan Automobiles, the Constitution Bench held:

> "It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourses if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax which has the effect of discriminating between goods of one State and goods of anothers may affect the free flow of trade and it will then offend against Art.301 and will be valid only if it comes within the terms of Art.304(a).
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> Article 304(a) enables the Legislature of a State to make laws effecting trades commerce and intercourse. It enables the imposition of taxes on goods from other States if similar goods in the State are subjected to similar taxes, so as not to discriminate between the goods manufactured or produced in that State and the goods which are imported from other States. This means that if the effect of sales-tax on tanned hides or skins imported from outside is that the latter becomes subject to a higher tax by the application of the proviso to sub-rule of r.16 of the Rules, then the tax is discriminatory and unconstitutional and must be struck down."

State of Madras v. N.K.Nataraja Mudaliar [1968 (3) S.C.R.829] considered the validity of sub-sections (2),2(A) and ( ) of Section 8 of the Central Sales Act. The respondent`s case was that they were violative of Articles 301, 302, 303 and 304. It was held by Shah,J. [speaking for himself, Mitter and Vaidyalingam,JJ.] that while the Central sales tax imposed under Section 3 violates Article 301 being a tax on movement of goods, it was saved by Article 302. The levy of different rates by sub-section (2A) was justified on the ground that the Act was meant for imposing tax to be collected and retained by the State and that in such a case the provision does not amount to a law contemplated by clause (1) of Article 303. For the same reason, it was held, leaving it to the States to levy tax at different rates also does not amount to practising discrimination. Article 304(a), it is significant to note, was said to have no application for the reason that it was not a case where tax was imposed on imported goods at a different rate from the rate leviable on goods manufactured locally. Certain observations made by Shah,j. are relied upon by the learned counsel for Jammu & Kashmir and must, therefore, be set out:

> "The flow of trade does not necessarily depend upon the rates of sales tax: it depends upon a variety of factors, such as the source of supply, place of consumption, existence of trade channels, the rated of freight, trading facilities, availability of efficient transport and other facilities for carrying on trade. Instances can easily be imagined of cases in which notwithstanding the lower rate of tax in a particular part of the counts goods may be purchased from another part, where a higher rate of tax prevails. Supposing in a particular State in respect of a particular commodity, the rate of tax is 2% but if the benefit of that low rate is offset by the freight which a merchant in another State may have pay for carrying that commodity over a long distance, the merchant would be willing to purchase the goods from a nearer State, even though the rate of tax in that State may be higher. Existence of long-standing business relations, availability of communications, credit facilities and a host of other factors - natural and business - enter into the maintenance of trade relations and the free flow of trade cannot necessarily be deemed to have been obstructed merely because in a particular state the rate of tax on sales is higher than the rates prevailing in other States."

[ Emphasis added ] It is significant to notice that these observations were made in the context of the argument that different rates of Central sales tax in different States on sale of similar goods is discriminatory. It was not a case like the present one where a State is levying a different/higher rate of tax on goods imported from other States than the rate applicable to sales of similiar goods manufactured within that State. We are unable to see how these observations help the State.

Hedge,J. concurred with Shah,J.

State of Tamil Nadu v. Sita Lakshmi Mills [1974 (3) S.C.R.1] holds that Section 8(2) of the Central Sales Tax Act is not violative of Articles 301, 302 and 303.

H.Anraj v. Government of Tamil Nadu [1985 Suppl.(3) S.C.R.342] is a decision af a Bench of two learned Judges. The Government of Tamil Nadu exempted the lottery tickets issued by it totally

while levying tax on lottery tickets issued by other governments and sold in Tamil Nadu. The Court held that laws imposing taxes can amount to restriction on trade, commerce and intercourse if they hampered the free flow of trade unless they are compensatory in nature and that the sales tax which had the effect of discriminating between goods of one State and another may affect free flow of trade and would be offensive to Article 301 unless saved by Article 304(a). It was held that the direct and immediate result of the notification was to impose an unfavourable and discriminatory tax.

India Cement & Ors. v. State of Andhra Pradesh & Ors. [1986 (1) S.C.C.743] is also a decision of two learned Judges. The Government of Andhra Pradesh had issued two notifications, one under Section 9{1) of the State Sales Tax Act and the other under Section 8(5) of the Central Sales Tax Act. Under the first notification, sales tax on sale of "cement manufactured by cement factories situated in the State and sold to the manufacturing units situated within the State for the purpose of..... " was reduced from 13.5% to 4% Under the second notifications the Central sales tax was reduced to two percent. The Government of Karnataka also issued a similar notification reducing in similiar situations Central sales tax from 15% to 2%. These were challenged as violative of Articles 301 and 304 and the challenge was upheld, The first ground upheld was that the "reasonable restrictions" contemplated by Article 304(b) can be imposed by a law made by legislature of the State and not by the orders of the Government, i.e., by executive action.* The second ground given, by the Bench [Ranganath Misra and M.M.Dutt,JJ.] is that "variation of the rate of inter-State sales tax does affect free trade and commerce and creates a local preference which is contrary to the scheme of Part XIII of the Constitution" and hence bad. In the course of discussion, the Bench observed:

> "There can be no dispute that taxation is a deterrent against free flow. As a result of favourable or unfavourable treatment by way of taxation, the course of flow of trade gets regulated either adversely or favourably. If the scheme which Part XIII guarantees has to be preserved in national interest, it is necessary that the provisions in the Article must be strictly complied with. One had to recall the farsighted This ground appears to be of doubtful validity as pointed out by a Three-Judge-Bench in Video Electronics v.

State of Punjab [1990 (3) S.C.C.87].

observations of Gajendragadkar,J.

in Atiabari Tea Co. case and the observations then made obviously apply to cases to the type which is now before us."

The facts in Weston Electronics v. State of Gujarat [1988 (2) S.C.C.568] are similar. Until 1981, the tax on sale of electronic goods under the Gujarat Sales Tax Act was fifteen percent whether the goods were manufactured within the State of Gujarat and sold or imported from outside. In 1981 - and again in 1986 however, a distinction was made between locally manufactured goods and those imported into the State. A lower rate was prescribed for the former. This was held to be discriminatory and offensive to Articles 301 and 304.

In West Bengal Hosiery Association. v. State of Bihar [1988 (4) S.C.C.134], the facts are practically similar to those in Weston Electronics as also the conclusion.

Video Electronics (P) Ltd. v. State of Punjab (1990 (3) S.C.C.87]: inasmuch as strong and almost exclusive reliance is placed by the learned counsel for the State of Jammu & Kashmir on this decision, it is necessary to examine the facts of and the law laid down in this decision (rendered by a Bench of three learned Judges) alittle more closely. In is decision, notifications issued by two States, viz., Uttar Pradesh and Punjab were considered. The notification issued by the Government of Uttar Pradesh provided an exemption in favour of new units established in specified areas and for the prescribed period [three to seven years] specified therein. It was further stipulated that the said benefit shall be available only to those new units which have commenced their production between the two dates specified by the government. The Punjab notification provided that "rate of the sales tax payable by an electronic manufacturing unit existing in Punjab in cases of electronic goods specified in Annexure-A was prescribed at one per cent as against the normal 12 per cent". [This is how the purport of the provision has been set out in the decision.] Both notifications were impugned as violative of Articles 301 and

304. The Bench comprising Mukharji,CJ, Ranganathan and Verma,JJ. upheld both the notifications. So far as the Uttar Pradesh notification was concerned, it was held that inasmuch as it was a case of grant of exemption "to a special class for a limited period on specific conditions" and was not extended to all the producers of those goods, it does not offend the freedom guaranteed by Article 301. Similarly, in the case of Punjab notification, it was held that since the exemption is for certain specified goods and also because "an overwhelmingly large number of local manufacturers of similar goods are subject to sales tax", it cannot be said that local manufacturers were favoured as against the outside manufacturers. In the course of their judgment, the Bench made certain observations which are strongly relied upon by Shri M.L.Verma,J. The observations are to the effect that while judging whether a particular exemption granted by the State offends Articles 301 and 304, it is necessary to take into account various factors. A State which is technically and economically weak on account of various factors should be allowed to develop economically by granting concessions, exemptions and subsidies to new industries. All parts of the country are not equally developed, industrially and economically. The concept of economic unity is an ever-changing one; it cannot be imprisoned in a strait-jacket. India is not already an economic unit. Economic unity is possible only when all the units of the country develop equally. The power to grant exemption is inherent in all taxing statutes end the Government cannot be deprived of this power by invoking Articles 301 and 304. The concept of economic barriers must be understood in a dynamic sense. The concept of economic unity or economic barriers must be read along with the power of exemption inhering in the State Governments. Where every State is exempting or reducing the rates of sales tax, there can be no question of an economic war between them. "A backward State or a disturbed State cannot with parity engage in competition with advanced or developed States. Even within a State there are often backward areas which can be developed only if some special incentives are granted. If the incentives in the form of subsidies or grant are given to any part of (sic or) units of a State so that it may come out of its limping or infancy to compete as equals with others, that in our opinion, does not and cannot contravene the spirit and the letter of Part XIII of the Constitution. However, this is permissible only if there is a valid reason, that is to say, if there

are justifiable and rational reasons for differentiation. If there is none, it will amount to hostile discrimination."

All the above observations were made to justify (1) grant of incentives and subsidies and (2) exemption granted to new industries, of a specified type [small scale industries commencing production within the two specified dates] and for a short period. They were not meant to nor can they be read as justifying a blanket exemption to all small scale industries in the State irrespective of their date of establishment. The case before us clearly falls within the ratio of the Constitution Bench decision A.T.M.Mehtab Majid and the decisions in India Cement, West Bengal Hosiery Association and Weston Electronics, The limited exception and Weston Electronics. The limited exception created in Video Electronics does not help the State herein for the reason that exemption concerned herein is neither confined to "new industries", nor is circumscribed by other conditions of the nature stipulated in the Uttar Pradesh notification. It is not possible to go on extending the limited exception created in the said judgment, by stages, which would have the effect of robbing the salutory principle underlying Part-XIII of its substance. Indeed, it has been the contention of Sri Salve that, on principle, the exception carved out in Video Electronics unsustainable. For the purpose of this case, it is not necessary for us to say anything about the correctness of Video Electronics. Suffice it to say that the limited exception carved out therein cannot be widened or expanded to cover cases of a different kind. It must be held that the total exemption granted in favour of small scale industries in Jammu & Kashmir producing edible oil [there are no large scale industries in that State producing edible oil] is not sustainable in law.

Sri Salve has brought to our notice a recent decision of the Supreme Court of U.S.A. in West Lynn Creamery, Inc., Vs. Jonathan Healy, Commissioner of Massachusetts Department of Food and Agriculture - judgment rendered on June 17, 1994 in Case No.93-141. The petitioner was a Milk dealer licenced to do business in the State of Massachusetts. Most of the milk consumed in that State was imported from other States. In 1992, the Government declared a State of emergency in view of declining trend in the price of raw milk. It found at the cost of production of milk in Massachusetts is higher than the cost of production, in other States and that to preserve and protect the milk industry in Massachusetts, it is necessary to take certain measures. Accordingly, an order was issued soon after the declaration of emergency which created the Massachusetts Dairy Equalization Fund. A levy was imposed upon all the milk sold in the State. At the end of each month, the proceeds of such levy were distributed among the producers of milk in Massachusetts alone. This order was attacked as violative of the Commerce Clause contained in Article 1(8) of the United States Constitution, which reads: "The Congress shall have power - to regulate Commerce with Foreign nations and among the several States, and with the Indian Tribes." The Court held [with one learned Judge, Scalia,J., concurring with the conclusion but on a reasoning different from that of the majority] that the order is bad. The majority observed that the "`negative' aspect of the Commerce Clause prohibits economic protectionism-that is, regulatory measures designed to benefit in-state economic interests by burdening out-of- state competitors....Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down....unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism". The Court observed that the avowed purpose and undisputed effect of the order is to enable her cost Massachusetts Dairy Farmers to compete with lower cost dairy farmers in other States and that the premium

payments are effectively a tax which makes milk produced out of state more expensive. The Court further observed that a pure subsidy funded out of general revenues ordinarily imposes no burden on inter-State commerce and that it merely assists local business. The impugned order, however, the Court pointed out, was "funded principally from taxes on the sale of milk produced in other States.....". To the same effect is the decision in Bacchus Imports Limited v. Dias [(1984) - 460 U.S.263].

Now, what is the ratio of the decisions of this Court so far as clause (a) of Article 304 is concerned? In our opinion, it is this: the States are certainly free to exercise the power to levy taxes on goods imported from other States/Union territories but this freedom, or power shall bot be so exercised as to bring about a discrimination between the imported goods and the similar goods manufactured or produced in that State. The clause deals only with discrimination by means of taxation; it prohibits it. The prohibition cannot be extended beyond the power of taxation. It means in the immediate context that States are free to encourage and promoted the establishment and growth or industries within their States by all such means as they think proper but they cannot, in that process, subject the goods imported from other States to a discriminatory rate of taxation, i.e., a higher rated to sales tax vis-a-vis similar goods manufactured/produced within that State and sold within that State. Prohibition is against discriminatory taxation by the States. It matters not how this discrimination is brought about. A limited exception has no doubt been carved out in Video Electronics but, as indicated hereinbefore, that exception cannot be enlarged lest it eat up the main provision. So far as the present case is concerned it does not fall within the limited exception aforesaid; it falls within the ratio of A.T.M.Mehtab Majid and the other cases following it. It must be held that by exempting unconditionally the edible oil produced within the State of Jammu & Kashmir altogether from sales tax, even if it is for a period of ten years, while subjecting the edible oil produced in other States to sales tax at eight percents the State of Jammu s Kashmir has brought about discrimination by taxation prohibited by Article 304(a) of the Constitution.

We are unable to see any substance in the objection raised by Sri Verma that not having attacked the exemption notification when the rate of tax was four percents the appellants should not be allowed to question the same when the rate of tax has climbed to eight percent. There can be no question of any acquiscence in matters affecting constitutional rights or limitations. Similarly the argument that the volume of trade of the appellants has not shown a downward trend inspite of the said exemption is equally immaterial apart from the fact that an explanation is offered therefor by Sri Salve. Yet another contention of Sri Verma that the principle of classification applicable under Article 14 is equally applicable under Articles 301 and 304(a) is of little help to the respondent-State. Article 14 speaks of equality; Article 301 speaks of freedom and Article 304(a) speaks of uniform taxation of both the imported goods and the locally produced goods by the States. According to Sri Verma, edible oil produced and sold in the State of Jammu & Kashmir and the edible oil, produced in other States and sold in the State of Jammu & Kashmir fall in two different classes and that the said classification is designed to achieve the objective of industrialisation of the State. We find it difficult to appreciate how can the concept of classification be read into clause (a) of Article 304 to undo the precise object and purpose underlying the clause. Sri Verma repeatedly stressed that the object underlying the impugned measure is a laudable one and that it seeks to serve and promote the interest of the State of Jammu & Kashmir which is economically and industrially an undeveloped

State besides being a disturbed State. We may agree on this score but then the measures necessary in that behalf have to be taken by the appropriate authority and in the appropriate manner. Part-XIII of the Constitution itself contains adequate provisions to remedy such a situation and there is no reason why the necessary measures cannot be taken to protect the edible oil industry in the State in accordance with the provisions of the said Part. Keeping the said aspect in view, we invoke our power under Article 142 of the Constitution and mould the relief to suit the exigencies of the situation.

We declare that the exemption granted by Notification No.S.R.O.93 of 1991 to local manufacturers/producers of edible oil is violative of the provisions contained in Articles 301 and 304(a). At the same time, we direct that:

(a) the appellants shall not be entitled to claim any amounts by way of refund or otherwise by virtue of or, as a consequence of the declaration contained herein and (b) that the declaration of invalidity of the impugned notification shall take effect on and from April 1,1997. Till that date, i.e., upto and inclusive of 31st March, 1997, the impugned notification shall continue to be effective and operative. Appeal allowed in the above terms.

There shall be no order as to costs.