

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.3.2016 & Pronounced on : 04.4.2016

CORAM

THE HONBLE MR.JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR.JUSTICE N.KIRUBAKARAN

Writ Petition Nos.22011 of 2012, 28941 & 33581 of 2014

Pondicherry Contract Carriage Owners'
Association
rep. by its President N.Varadaraja
179, Lal Bahadurshastry Street
Puducherry 605 001.Petitioner in WP.22011/12

M/s. Sharma Transports
rep. by Suresh Kumar Sharma
No.328, Sangeetha Bhavan
TSP Road, Kalasipalayam
Bangalore 560 002.Petitioner in WP.28941/14

All Omni Bus Owners and Operators
Association
rep. by its Secretary A.Anbazhagan
No.F4, Sriji Majestic Complex
Bus Stand, Koyambedu
Chennai 600 107.Petitioner in WP.33581/14

The State of Tamil Nadu
rep. by its Secretary to Government
Home (Transport) Department
Chennai.1st Respondent in all WPs

The State Transport Authority
Chennai 600 005.2nd Respondent in
WPs.22011/12 & 28941/14

The Transfer Commissioner Cum
State Transport Authority,
Chepauk, Chennai 600 005.2nd Respondent in WP.33581/14

Petitions under Article 226 of the Constitution of
India praying for in (i) WP No.22011 of 2012 - a writ of
Declaration declaring Section 5 by which the proviso is

added to Section 6 of the Principal Act to the effect that "To Section 6 of the principal Act, the following proviso shall be added namely:- "Provided that in respect of contract carriages specified in the Ninth Schedule such temporary licence may be issued on payment of tax at the rates specified in the Ninth Schedule" and also the consequential introduction of Clause (c) of the Ninth Schedule introduced in Tamil Nadu Act 13/2012 as ultra vires Article 14, 19(1)(d), 301 to 304 of the Constitution of India as void;

(ii) WP No.28941 of 2014 - a writ of Mandamus forbearing the respondents from collecting Motor Vehicles Tax per entry in respect of petitioner's contract carriages bearing Registration Nos. KA-01/D-5678, KA-01/AA-5274 and KA-01/6912 when once the motor vehicles tax as prescribed in the Schedule has been paid for a week or a month or a quarter depending on the validity of the permit; and

(iii) WP No.33581 of 2014 - a writ of Declaration declaring the Amendment made in Tamil Nadu Motor Vehicles Taxation (Amendment) Act 2012 in the Column (c) of Ninth Schedule with reference to levy of tax per entry for Omni Buses in so far as the Petitioner Members' Vehicles concerned as unconstitutional and ultra vires.

For Petitioners in : Mr.V.T.Gopalan, S.C.
WP Nos.22011/12 For Mrs.Radha Gopalan
& 28941/14
WP No.33581/14 : Mr.R.Muthukumarasamy, S.C.
For Mr.S.Govindaraman

For Respondents : Mr.A.L.Somayaji
Advocate General
Assisted by Mr.N.Srinivasan,
Additional Government Pleader

O R D E R
(Made by V.Ramasubramanian,J.)

By an amendment made under Tamil Nadu Act 13 of 2012, to the Ninth Schedule to the Tamil Nadu Motor Vehicles Taxation Act, 1974, hereinafter referred to as the Act, the State of Tamil Nadu imposed a tax of a fixed amount per seat or berth per entry, upon omni buses hired on contract carriage for a period not exceeding 7 days, 30 days and 90 days. Challenging the validity of the said amendment, the petitioners, who are omni bus operators, have come up with the above writ petitions.

2. We have heard Mr.V.T.Gopalan and Mr.R.Muthukumarasamy, learned senior counsel appearing for the writ petitioners and

Mr.AL.Somayaji, learned Advocate General assisted by Mr.N.Srinivasan, learned Additional Government Pleader appearing for the State of Tamil Nadu.

3. Clauses (a), (b) and (c) of the Ninth Schedule to the Act, respectively cover tourist motor cab, tourist maxi cab and omni bus, including sleeper coaches in respect of which permit is granted under Sub-sections (8) or (9) of Section 88 of the Motor Vehicles Act, 1988. The Ninth Schedule, as it stands amended under Tamil Nadu Act No.13 of 2012, read as follows:

"Contract carriages in respect of which temporary licence is issued -

(a) Tourist motor cab -

(i) If the temporary licence is for a period not exceeding 7 days - Rs.60.00 per entry

(ii) If the temporary licence is for a period exceeding 7 days but not exceeding 30 days - Rs.180.00 per entry

(iii) If the temporary licence is for a period exceeding 30 days but not exceeding 90 days - Rs.450.00 per entry

(b) Tourist maxi cab -

(i) If the temporary licence is for a period not exceeding 7 days - Rs.75.00 per seat per entry

(ii) If the temporary licence is for a period exceeding 7 days but not exceeding 30 days - Rs.160.00 per seat per entry

(iii) If the temporary licence is for a period exceeding 30 days but not exceeding 90 days - Rs.450.00 per seat per entry

(c) Omni bus including sleeper coach in respect of which permit is granted under sub-section (8) or (9) of section 88 of the Motor Vehicles Act, 1988-

(i) If the temporary licence is for a period not exceeding 7 days - Rs.600.00 per seat or berth per entry

(ii) If the temporary licence is for a period exceeding 7 days but not exceeding 30 days - Rs.1500.00 per seat or berth per entry

(iii) If the temporary licence is for a period exceeding 30 days but not exceeding 90 days - Rs.3500.00 per seat or berth per entry."

4. The objection of the petitioners is not entirely to the levy of an amount per seat or berth, but, it is to the levy "per entry".

5. The main grounds of challenge to the levy, can be summarised as follows:

(i) that the levy is not compensatory, but confiscatory in nature;

(ii) that the purported object of the levy is to address the issue of misuse of contract carriage permits by operators and hence, the same is bad in law; and

(iii) that the levy is violative of Article 14 of the Constitution.

6. The State of Tamil Nadu originally filed separate counter affidavits in two writ petitions. Subsequently, the State filed an additional counter affidavit detailing the purpose for which the amendment was brought forth.

7. In the counter and additional counter affidavits, the State seeks to justify the levy, primarily on three grounds, namely:

(a) that the temporary licences issued to contract carriages under Tamil Nadu Motor Vehicles Taxation Act, 1974 are more often misused by the operators, to make more than one trip within the duration for which such licences are granted and hence, there arose a necessity to plug the loophole;

(b) that the Government decided to impose the levy for the purpose of augmenting its resources and to utilise the revenue derived therefrom, for the welfare of the people, including the laying and maintenance of roads and the floating of several public welfare schemes; and

(c) that an amendment made for the purpose of plugging the hole in the law and for regulating the same, cannot be said to be illegal.

8. We have considered the rival submissions.

Misuse of temporary licences:

9. We shall first take up for consideration the contention based upon misuse of temporary licences.

10. It is claimed by the State in the additional counter affidavit filed by them that omni buses carrying tourists on a temporary licence, normally take a single licence for a period of seven days. But, they complete the trip around the State within two days, go back to their State and return with a new group of tourists for another trip in Tamil Nadu, by making use of the very same licence. In order to demonstrate that such misuse results in loss of revenue, the State has given a calculation in paragraphs 17 to 19 of their additional common counter affidavit. These paragraphs read as follows:

"17. If the Operator's vehicle has the

seating capacity of about 37 seats (with one seat to be counted towards the driver's seat) and secures a Temporary Permit for 7 days, then the tax has been levied as per clause (c) of 9th schedule is $\text{Rs.}600 \times 36 = \text{Rs.}21,600/-$ per entry.

If the operator misusing the vehicle all the seven days, then tax payable for 7 entries as per the amended Act 13/2012	$\text{Rs.}21,600 \times 7 \text{ entries}$ $= \text{Rs.}1,51,200/-$
Loss of Revenue to the Government by misusing the Permit	$\text{Rs.}1,51,200$ (-) $\text{Rs.}21,600 =$ $\text{Rs.}1,29,600/-$

18. If the same Operator's vehicle secures the Temporary Permit for about 30 days, then the tax levied as per clause (c) of 9th schedule is $\text{Rs.}1500 \times 36 = \text{Rs.}54,000/-$ per entry.

If the operator is misusing the vehicle, for example, say 15 days, then tax payable for 15 entries as per the amended Act 13/2012	$\text{Rs.}54,000 \times 15 \text{ entries}$ $= \text{Rs.}8,10,000/-$
Loss of Revenue to the Government by misusing the Permit	$\text{Rs.}8,10,000$ (-) $\text{Rs.}54,000 =$ $\text{Rs.}7,56,000/-$

19. If the same Operator's vehicle obtains the Temporary Permit for about 90 days, then the tax to be levied as per clause (c) of 9th schedule is $\text{Rs.}3500 \times 36 = \text{Rs.}1,26,000/-$ per entry.

If the operator is misusing the vehicle, for example, say 45 days, then tax payable for 45 entries as per the amended Act 13/2012	$\text{Rs.}1,26,000 \times 45 \text{ entries}$ $= \text{Rs.}56,70,000/-$
Loss of Revenue to the Government by misusing the Permit	$\text{Rs.}56,70,000$ (-) $\text{Rs.}1,26,000 =$ $\text{Rs.}55,44,000/-$

11. But, unfortunately for the State, a levy based upon the theory of misuse, has been held to be bad in at least two decisions of the Supreme Court. In *M.Narasimhaiah v. Deputy Commissioner for Transport* [1987 (Supp.) SCC 452], the levy of

additional tax under Section 8 of the Karnataka Motor Vehicles Taxation Act, 1957 was in question. In order to sustain the levy, the State of Karnataka argued in the said case that the liability of the registered owner to pay tax in respect of stage carriage depended upon the number of passengers carried in a vehicle on a given date and that when they carried excess passengers, they are taxed. While rejecting the said argument, the Supreme Court pointed out in the last portion of paragraph 13 that the law which imposes a tax should be construed strictly and that if the action on the part of the registered owner was contrary to the provisions of the Act, there was sufficient provision in the Act itself to take appropriate action against him and either to cancel the permit or to suspend it. In paragraph 14, the Court pointed out that the registered owner of a motor vehicle which is permitted to be used as a stage carriage cannot be asked to pay additional tax merely because he has carried on some occasions, more passengers than the maximum number of passengers that he is permitted to carry. In other words, a tax cannot be levied to prevent the misuse of the provision of law. If a tax is levied solely for the purpose of addressing the misuse by some persons of the provisions of a law, then the levy would partake the character of a penal provision.

12. In *Hardev Motor Transport v. State of Madhya Pradesh* [(2006) 8 SCC 613], the holders of contract carriage permits were using their vehicles as stage carriages. In fact, what was challenged in *Hardev Motor Transport* before the Supreme Court was the Constitutional validity of Clause (g) of Entry IV of the Schedule I of the Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991, as amended by the Madhya Pradesh Motoryan (Sanshodhan) Adhiniyam, 2004, read with Explanation (7) of the First Schedule thereof. This Clause (g) of Entry IV of the First Schedule, that was under challenge before the Supreme Court in *Hardev Motor Transport*, before its amendment, reads as follows:

Class of motor vehicle	Rate of quarterly tax for motor vehicles
(g) Motor vehicle plying without permit;	
A. Vehicle permitted to carry exceeding 3 but not exceeding 29 passengers (excluding driver)-	Rs.600 per seat per month in accordance with the entire registered seating capacity;
B. Vehicle permitted to carry exceeding 29 passengers (excluding driver)	Rs.1000 per seat per month in accordance with the entire registered seating capacity.

It was later amended to the following effect:

" (g) Motor vehicle plying without permit;

A. Vehicle permitted to carry up to 12 passengers (excluding driver) - Rs.1000 per seat per month in accordance with the entire registered seating capacity.

B. Vehicle permitted to carry more than 12 passengers (excluding driver) - Rs.1500 per seat per month in accordance with the entire registered seating capacity."

13. An argument was advanced in Hardev Motor Transport, on behalf of the State of Madhya Pradesh that many holders of permits violated the terms and conditions of permit and that therefore, the law was enacted to regulate the misuse. Rejecting the said argument, the Supreme Court held in paragraph 32 as follows:

"We have noticed that the Constitution Bench categorically states that compensatory tax cannot be progressive. We have furthermore noticed that, according to the Constitution Bench, imposition of tax cannot be a term or condition of a licence. If a permit has been granted, the holder of a permit is liable to comply with the conditions of permit. If he violates the terms and conditions of permit, law will take its own course. A permit is granted under the 1988 Act. If there is violation of the terms of permit, the consequences therefor, shall ensue as contained in Section 192-A of the 1988 Act. A distinction must be borne in mind that a tax cannot be imposed by way of penalty although penalty can be imposed for non-payment of tax or evasion of tax. The State may make suitable legislations in this behalf. But, the same would not mean that while specifying a rate of tax, the executive Government of the State can indirectly levy a penalty which it cannot do directly."

14. Though it is contended by Mr.AL.Somayaji, learned Advocate General that the object of the levy was to tax multiple trips made on the basis of a single licence and that same cannot be construed as a penalty, the said argument cannot stand in the light of settled principles. As pointed out by Mr.M.Srinivasan, J (as he then was) in V.Swaminathan & Others v. Motor Vehicle Inspector (W.P.No.10879 of 1992 etc. batch dated 04.12.1992], once a tax is paid for a particular period, it is not open to the authorities to demand tax for any part of that period on the only ground that the vehicle has gone out of the State once or

twice and entered the State again during that period. The learned Judge also pointed out in paragraph 9 of his decision that once tax is paid for a particular period, the owner of the vehicle is entitled to enter the State of Tamil Nadu as many times as he wants during that period. Therefore, after issuing a temporary licence for a contract carriage for a period of seven days, it is not open to the State to levy tax on the basis that multiple entries are made during the period.

15. As a matter of fact, if a single licence obtained by a contract carriage operator for a specified period of time, is not to be used to make multiple trips and multiple entries, the State ought to have indicated in the temporary licence itself, the number of entries that a contract carriage operator is entitled to make. If in check posts, the entries are marked, the next entry which is in excess of the number of trips or number of entries permitted, will automatically get prohibited. Instead of indicating the number of trips or number of entries that the holders of temporary licences are entitled to, the State thought fit to impose a financial burden, which not only falls upon the misusers, but also upon legitimate users of temporary licences. Therefore, the argument of misuse can hardly be the justification for the levy.

16. In the course of arguments, we requested the learned Advocate General to clarify as to how this levy could be justified, with particular reference to certain situations. For instance, if an operator takes a temporary licence for seven days to take people on a pilgrimage from Chennai to the temples in and around Chidambaram, located in Cuddalore District, the omni bus may have to make multiple entries into the State of Tamil Nadu, if it takes the route of East Coast Road. Before reaching Pondicherry, the omni bus will naturally enter into an area that falls within the Union Territory of Puducherry. Thereafter, it will get into an area that falls within Villupuram District of Tamil Nadu before actually reaching Union Territory of Puducherry. After crossing Puducherry, another entry will be made into the State of Tamil Nadu in Cuddalore District. By this process, the omni bus will make multiple entries even before the onward journey is completed on a single trip.

17. We may take another instance where a temporary licence is taken by the holder of a contract carriage permit to take a group of pilgrims from Chennai to Tirupati. Even before reaching Tirupati, the omni bus may have to cross the border of Tamil Nadu, enter into the State of Andhra Pradesh at a particular place, again cross the border of Andhra Pradesh to re-enter the State of Tamil Nadu before finally getting into the territory of

Andhra Pradesh. A travel from Chennai to Bangalore via Ranipet and Chithoor, is also hit by similar road blocks.

18. In response to the above pointed queries, it was submitted by Mr.AL.Somayaji, learned Advocate General that the purpose of the amendment in question, is not either to penalise or to impose an additional burden upon genuine operators and that this Court may even read down the statute so that persons who comply with the law by strictly adhering to licence conditions, do not suffer.

19. Drawing our attention to the Entry in Clause (c) of the Ninth Schedule which is under challenge, the learned Advocate General submitted that the levy is traceable to a special permit granted under Sub-sections (8) and (9) of Section 88 of the Motor Vehicles Act, 1988. Section 88(1) of the Motor Vehicles Act declares that a permit granted by the Regional Transport Authority to any one region shall not be valid in any other region, unless the permit has been countersigned by the Regional Transport Authority of that other region. Similarly, a permit granted in any one State shall not be valid in any other State unless countersigned by the State Transport Authority of that other State.

20. But, the mandate of Sub-section (1) of Section 88 is subject to certain exceptions, which are to be found in Sub-sections (7), (8) and (9) of Section 88. Sub-sections (8) and (9) of Section 88 of the Motor Vehicles Act, 1988, read as follows:

"(8) Notwithstanding anything contained in sub-section (1), but subject to any rules that may be made under this Act by the Central Government, the Regional Transport Authority of any one region or, as the case may be, the State Transport Authority may, for the convenience of the public, grant a special permit to any public service vehicle including any vehicle covered by a permit issued under section 72 (including a reserve stage carriage) or under section 74 or under sub-section (9) of this section for carrying a passenger or passengers for hire or reward under a contract, express or implied, for the use of the vehicle as a whole without stopping to pick up or set down along the line of route passengers not included in the contract, and in every case where such special permit is granted, the Regional Transport Authority shall assign to the vehicle, for display thereon, a special distinguishing mark in the form and

manner specified by the Central Government and such special permit shall be valid in any other region or State without the countersignature of the Regional Transport Authority of the other region or of the State Transport Authority of the other State, as the case may be.

(9) Notwithstanding anything contained in sub-section (1) but subject to any rules that may be made by the Central Government under sub-section (14), any State Transport Authority may, for the purpose of promoting tourism, grant permits in respect of tourist vehicles valid for the whole of India, or in such contiguous States not being less than three in number including the State in which the permit is issued as may be specified in such permit in accordance with the choice indicated in the application and the provisions of sections 73, 74, 80, 81, 82, 83, 84, 85, 86, clause (d) of sub-section (1) of section 87 and section 89 shall, as far as may be, apply in relation to such permits. "

21. Therefore, there is no dispute about the fact that the Entry contained in the Ninth Schedule, which is impugned in these writ petitions, is a levy on contract carriages to which special permits have been granted under Sub-sections (8) and (9) of Section 88. By the very nature of the permit, such special permits carry certain restrictions. These restrictions are (i) that they carry a passenger or passengers for hire or reward under a contract, (ii) that it is intended for the use of the vehicle as a whole without stopping to pick up or set down along the line of route, passengers not included in the contract.

22. Since the provisions of Sub-sections (8) and (9) of Section 88 are made subject to any Rules framed by the Central Government, the Central Government has issued the Central Motor Vehicles Rules, 1989, that contain certain provisions in Rules 82 to 85-A under the heading "Tourist Permits" in Chapter IV. Under Rule 82(1), an application for the grant of permit in respect of a tourist vehicle should be made in Form 45. Under Rule 85, a set of additional conditions to be satisfied by the holder of every tourist permit, granted in respect of a tourist vehicle other than a motor cab under Section 88(9) are indicated. In brief, these conditions can be summarised as follows:

- (i) the permit holder should carry the list of tourist passengers travelling in the vehicle in respect of each trip; and
- (ii) the tourist vehicle should commence its journey or end its journey, circular or otherwise in the home State, subject to

the condition that the vehicle shall not remain outside the home State for a period of more than three months.

23. There are provisions even in the Tamil Nadu Motor Vehicles Rules, 1989 that deal with the grant of special permits. Under Rule 170 of the Tamil Nadu Rules, an application for the grant of a special permit should be in Form PSPLA. This form contains specific columns that require the applicant to indicate the route or routes or area for which permit is desired, together with itinerary.

24. Under Rule 177 of the Tamil Nadu Rules, the holder of every contract carriage should maintain a list of passengers travelling in the vehicle. This list should contain the name of the passenger, his or her father/husband's name, age, address and the place where he boarded and alighted the vehicle.

25. After drawing our attention to the fact that the impugned Entry in the Ninth Schedule is traceable to special permits granted in terms of Sub-sections (8) and (9) of Section 88 and that the holder of such special permits are supposed to perform certain obligations indicated in Rule 85-A of the Central Motor Vehicle Rules, 1989 as well as Rules 170 and 177 of the Tamil Nadu Motor Vehicle Rules, 1989, it is contended by Mr.AL.Somayaji, learned Advocate General that the impugned enactment is only an enactment to plug the loophole in the law and that the same cannot be treated as a law addressed to prevent misuse. Relying upon the decision of the Supreme Court in the State of Tamil Nadu v. M.K.Kandaswami [1975 (4) SCC 745], the learned Advocate General submitted that when the main object of a provision of law is to plug leakage and prevent evasion of tax, the law cannot be said to be ultra vires. The learned Advocate General also referred to the decision of the Supreme Court in Travancore Tea Estates Co. Ltd. v. State of Kerala [1980 (3) SCC 619], where the Supreme Court was concerned with the validity of a levy on all vehicles that were suitable for use on roads. The Court held that the words "used or kept for use in the State" are to be construed as used or kept for use on the public roads of the State.

26. But, the contention of the learned Advocate General that the impugned provision is intended to plug the hole in the law and to prevent evasion of tax, does not appeal to us. As we have indicated elsewhere, the actual worry of the State, that led to the enactment of the impugned law was that contract carriage operators used to take temporary licences (or special permits) for a specified duration of time and thereafter, make number of trips with different sets of passengers. But, this worry could have been addressed by the State, by indicating the number of

trips or number of entries that could be made by the holder of the temporary licences or special permits. After all it is possible for the authorities to find out, from the log book maintained in the buses, the distance travelled on a single onward journey. The number of places covered and the distance between the place of commencement of journey and the last of the destinations in the onward journey, would make it very clear as to how many days the operator would require to complete the journey both ways. Depending upon this distance, the authorities can find out the number of trips that the operator can possibly make within the period of time for which temporary licence or special permit has been granted. Instead of doing the same, the State has resorted to the imposition of an additional burden that will fall not merely upon the misusers of temporary licence, but also upon the genuine users.

27. In *M.K.Kandaswami*, the Supreme Court was concerned only with a challenge to the assessment proceedings and demand notices issued under the Madras General Sales Tax Act, 1959. The Supreme Court was not concerned with the validity of any law in the said case. As seen from the first paragraph of the decision, the question before the Supreme Court was only as to the interpretation and scope of Section 7-A of the Madras General Sales Tax Act, 1959. Section 7-A that was introduced by Tamil Nadu Amendment Act 2 of 1970, made every dealer who purchased goods from a registered dealer or any other person to pay tax on the turnover relating to the purchase. While dealing with the challenge to the assessment proceedings, the High Court took a view that there were two expressions in Sub-section (1) of Section 7-A, which represented a contradiction in terms. One phrase was "goods, the sale or purchase of which is liable to tax under this Act". The other phrase was "purchases ... in circumstances in which no tax is payable". While reversing the decision of the High court, the Supreme Court pointed out that the interpretation given by the High court actually rendered Section 7A(1) wholly nugatory. It is in that context that the Court pointed out that the main object of Section 7-A, which was at once a charging as well as remedial provision, was to plug leakage and prevent evasion of tax. Therefore, the said decision did not deal with a law that imposed an additional burden upon all, just for the purpose of curtailing the misuse by a few.

28. Similarly, the decision in *Travancore Tea Estates* is also of no assistance to the respondents. What fell for consideration before the Supreme Court in that case was whether a vehicle merely kept for use in the State of Kerala, could be taken to be a vehicle that was used on the roads in the State of Kerala or not. The Supreme Court found that Section 3(2) of the

Kerala Motor Vehicles Taxation Act, contained an in-built safeguard by allowing the owners of vehicles to obtain a certificate from the Regional Transport Authority that the motor vehicle has not been used or kept for use. Thus, the Act, in the first instance, raised a presumption that a motor vehicle for which a certificate of registration was obtained, should be deemed to be used or kept for use in the State. But, at the same time, the Act also protected the interest of bonafide owners by enabling them to obtain a certificate of non-user from the prescribed authority. Such an in-built safeguard protecting the interests of genuine holders of temporary licences/ special permits of contract carriages is not found in the impugned provision. Hence, the contention of the petitioners that the law has been enacted on the theory of misuse and that therefore, it has to fail, has to be upheld.

29. Mr.AL.Somayaji, learned Advocate General brought to our notice a decision of the Division Bench of the Andhra Pradesh High Court in K.Srinivas v. Government of Andhra Pradesh [2010 (1) APLJ (HC) 297], where the High Court of Andhra Pradesh was seized of a challenge to Section 3-A of the Andhra Pradesh Motor Vehicles Taxation Act, inserted by way of an amendment under Andhra Pradesh Motor Vehicles Taxation (Amendment) Act, 2006. The facts out of which the said decision arose, require to be noted, to understand the reach of the ratio decided therein.

30. It appears that the Government of Andhra Pradesh originally issued a Government Order in the year 2002, prescribing a new rate of tax of Rs.5,500/- per seat per quarter in respect of stage carriages plying a distance exceeding 1000 kilometers a day. This levy was struck down by a larger Bench of the Andhra Pradesh High Court in L.Royal Reddy v. Government of Andhra Pradesh [AIR 2004 AP 347]. Thereafter, Section 3-A was inserted by way of an amendment under Amendment Act 33 of 2006. This Section 3-A empowered the Government to provide for the levy of an additional tax in respect of a motor vehicle specified in a category or class notified under Section 3, if it is misused or used not in accordance with the purpose for which the vehicle was registered or the permit was granted. This additional levy, under the proviso to Sub-section (1) of Section 3-A, was to be a sum equivalent to the difference between the tax already levied and collected and the tax which shall be leviable in respect of such a vehicle falling in another category.

31. The vires of Section 3-A was challenged on the ground that motor vehicles tax can be levied only as a compensatory measure for the use of the roads and not as a penalty. It was also contended that the penal provisions contained in the

Central enactment, namely the Motor Vehicles Act, 1988, for dealing with the misusers of permit conditions, occupied the field and hence, the State Government was denuded of the power to make a law on a matter which is already occupied by a parliamentary law.

32. In the context of the challenge so made, the Andhra Pradesh High Court examined the scope of Entry 35 of List III vis-a-vis Entry 57 of List II and held that a law enabling imposition of taxes on motor vehicles can be validly made under Entry 57 of List II, while a law providing for the levy of tax as a penalty can be made under Entry 35 of List III. On the question as to whether Section 3-A of the Andhra Pradesh Act was regulatory or compensatory or whether it was in the nature of a penalty, the Andhra Pradesh High Court found that since the Act prescribed under Section 3(2) different rates of tax for different classes of motor vehicles, Section 3-A purporting to impose an additional tax calculated by determining the difference between the amount levied for a vehicle falling under one category and the vehicle falling under another category was only regulatory and not a penal provision. Therefore, the Court upheld the statutory provision. However, one argument was advanced before the Andhra Pradesh High Court that the imposition of additional tax under Section 3-A naturally required an adjudication about the misuse or violation of permit conditions and that so long as no machinery is provided for such adjudication, the levy itself was invalid. This argument was accepted by the Andhra Pradesh High Court by pointing out that a clear distinction is to be made between a levy and the collection under Article 265 and that both the levy as well as collection should be authorised by law. Therefore, the Court pointed out that unless the procedure for imposition of the liability to pay a tax is prescribed by law, the collection cannot become lawful. Hence, the Andhra Pradesh High Court, even while upholding the validity of Section 3-A, restrained the State Government from taking action to levy and collect additional tax under Section 3-A until a notification was issued in accordance therewith and a machinery is provided by law not only for its adjudication, but also for collection.

33. Therefore, more than helping the State, the decision of the Andhra Pradesh High Court is actually helpful to the petitioners for the following reasons:

(i) Section 3A(1) of the Andhra Pradesh Act made a clear distinction between genuine operators who adhered to the terms and conditions of the licences/permits granted to them and those who violated the terms and conditions. But, the impugned enactment of the State of Tamil Nadu does not make a distinction

between those who comply with the law and those who do not. In the absence of any prescription in the temporary licence or special permit, to the effect that they cannot make more than one entry into the State, the multiple entries made by the operators into the State cannot be termed as a violation of the conditions of the permit or licence;

(ii) In any case, what survived before the Andhra Pradesh High Court was only the levy under Section 3-A, but not its collection, due to the absence of a machinery. The rationale behind the decision of the Andhra Pradesh High Court would apply to the cases on hand also. There is no machinery provided under the Act as to how the question whether the contract carriage permit holder has or has not made more than one entry, has to be adjudicated. As a consequence, the collection is shown to be arbitrary; and

(iii) As we have pointed out earlier, what was provided by Sub-sections (1) and (2) of Section 3 and Section 3A of the Andhra Pradesh Act was only different rates of taxes for different contingencies and the movement of an operator from one slab to another slab, upon the happening of a particular event. This is why the Andhra Pradesh High Court was persuaded to hold it as compensatory. It is nothing but common sense to know that an omni bus operator permitted to ply for a distance of 100 kilometers will use the roads more when they ply the vehicle for a longer distance. This is what was sought to be addressed under the Andhra Pradesh Act. But, in the case on hand, the very fact that there could be several entry points into the State of Tamil Nadu even before one onward journey could be completed, has been completely lost sight of. The expression "trip" appears to have been taken as synonymous to the expression "entry".

34. Therefore, the contention that the impugned provision is penal in nature has to be upheld.
Compensatory or confiscatory

35. Another ground of challenge to the impugned law is that it is not compensatory in character, but confiscatory. Drawing our attention to the averments contained in the counter affidavits individually filed and additional common counter affidavit filed by the State, it is contended by Mr.V.T.Gopalan, learned senior counsel that the levy is confiscatory in nature.

36. In paragraph 6 of the counter affidavit filed in W.P.No.22011 of 2012, it is stated by the respondents that "the Government utilises the revenue derived by the tax only for the welfare of the people of its State". Again, in paragraph 14 of the same counter affidavit, it is claimed that "the Government decided to increase its tax revenue by revising the temporary permit structure ...".

37. In paragraph 19 of the same counter affidavit, it is claimed by the Government as follows:

"The argument of the petitioner that the purpose of motor vehicles taxation is for laying and maintenance of roads and for which tax is calculated is not corrected. In addition to laying roads, the State Government utilises the tax revenue for other public welfare schemes also".

38. In paragraph 22 of the additional common counter affidavit filed by the State, it is claimed that for the construction of roads, bridges and maintenance cost, the expenditure incurred is more than the tax and fees collected by the Transport Department and that therefore, a policy decision was taken to introduce a new taxation measure under Act 13 of 2012 in accordance with the increase in expenditure. Again, in paragraph 23 of the same additional common counter affidavit, the State has claimed that the impugned levy is a regulatory measure imposed under Entry 57 of List II of the Seventh Schedule read with Article 246 of the Constitution.

39. In the light of the above stand taken by the State, it is necessary to see whether the impugned levy is compensatory or confiscatory.

40. After the Supreme Court held in *Atiabari Tea Co. Ltd. v. State of Assam* [AIR 1961 SC 232] that taxing laws are not excluded from the operation of Article 301 and that a law imposing restrictions on free trade, should pass the test of Article 304(a) or (b) to survive a challenge, the Supreme Court had an occasion to carve out an exception to Article 301, by propounding the concept of compensatory taxes in *Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan* [AIR 1962 SC 1406]. After pointing out that if a statute fixes a charge for a service provided by the State and imposes the same upon those who avail themselves of the service, the freedom of trade or commerce cannot be considered as impaired, the Supreme Court also formulated a working test in *Automobile Transport* for deciding whether a tax is compensatory or not. The test is to enquire whether the trade is having the use of certain facilities for the better conduct of its business and paying not patently much more than what is required for providing the facilities.

41. The concept so developed in *Automobile Transport* and the working test evolved therein continued to hold the field for

more than 30 years until a jolt was provided by the Supreme Court in *Bhagatram Rajeevkumar v. Commissioner of Sales Tax* [1995 Supp. (1) SCC 673]. In *Bhagatram*, the Supreme Court held that the concept of compensatory nature of tax has to be widened and that if there is substantial or even some link between the tax and the facilities extended to such dealers directly or indirectly, the levy cannot be impugned as invalid.

42. The decision in *Bhagatram* was relied upon by the Supreme Court in *State of Bihar v. Bihar Chamber of Commerce* [1996 (9) SCC 136].

43. But, the correctness of the views expressed in *Bhagatram* and followed in *Bihar Chamber of Commerce* was doubted by a two Member Bench in *Jindal Strips Ltd. v. State of Haryana* [2003 (8) SCC 60] and the matter was referred to a Constitution Bench, to lay down the parameters of judicially evolved concept of compensatory tax vis-a-vis Article 301.

44. In its decision in *Jindal Stainless Ltd. v. State of Haryana* [2006 (7) SCC 241], the Constitution Bench answered the reference by holding that the doctrine of "direct and immediate effect" of the impugned law on trade and commerce under Article 301, as propounded in *Atiabari Tea Co. Ltd.* and the working test enunciated in *Automobile Transport* for deciding whether a tax is compensatory or not, will continue to apply and that the test of "some connection or link" developed in *Bhagatram* and *Bihar Chamber of Commerce* was not correct.

45. Before coming to the said conclusion, the Constitution Bench pointed out in *Jindal Stainless Ltd.* that the concept of compensatory tax is not there in the Constitution, but is judicially evolved in *Automobile Transport* as part of a regulatory charge. On the difference between the exercise of taxing and regulatory power, the Constitution Bench held that though the primary purpose of a taxing statute may be different from the primary purpose of a regulatory measure, it is possible to use taxation also as a measure of regulation. Therefore, the Courts have to see whether the impugned law seeks to control the conditions under which an activity like trade is to take place. If it does, then such law is regulatory. But, if the impugned taxing or non-taxing law chooses an activity as the criterion and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301.

46. In paragraphs 39 to 45 of the report, the Constitution Bench broadly indicated the difference between, a tax, a fee and a compensatory tax. The principles enunciated therein, can be summarised as follows:

(i) While the tax is levied as part of a common burden and the principle behind such levy is the ability or capacity, without identification of a specific benefit or the identification of a benefit not capable of direct measurement, a fee is generally a payment where a special benefit is converted into common burden;

(ii) While the principle of ability to pay governs the levy of tax, the principle of equivalence governs the charging of fee or compensatory tax. As a corollary, the main basis of a fee or a compensatory tax is the quantifiable and measurable benefit;

(iii) While a tax can be progressive, a fee or compensatory tax has to be broadly proportional and not progressive; and

(iv) The basic difference between a tax and a fee/compensatory tax is that the former is based upon the concept of burden, while the latter is based upon the concept of repaying or reimbursement.

47. After indicating the difference between a tax, a fee and a compensatory tax, the Constitution Bench pointed out in paragraph 46 of its decision as to what a Court has to see when a law is impugned as violative of Article 301. The Court has to see whether the impugned enactment facially or patently indicates quantifiable data on the basis of which the compensatory tax is sought to be levied. The Act must indicate the benefit which is quantifiable or measurable and it must also indicate proportionality to the quantifiable benefit.

48. The importance of the decision of the Constitution Bench in *Jindal Stainless Ltd.* lies in the fact that focus was shifted from the doctrine of pith and substance of the levy to the effect and operation of the impugned law on inter-state trade or commerce. In paragraph 47 of its report, the Constitution Bench opined as follows:

"Therefore, whenever a law is challenged on the ground of violation of Article 301, the Court has not only to examine the pith and substance of the levy, but in addition thereto, the Court has to see the effect and operation of the impugned law on inter-state trade and commerce as well as intra-state trade and commerce."

49. Therefore, it is clear from the decision of the Constitution Bench that if the impugned levy is to be taken to be merely regulatory, the same should be shown to be something that does not affect the activity itself. If the impugned levy is held to be compensatory in nature, the Court has to find out the nature of the benefits/facilities/services provided, the cost of such services and the proportionality of the levy to

those services.

50. In Tamil Nadu Omni Bus Owners Association v. State of Tamil Nadu [(2009) 2 SCC 312], the Supreme Court pointed out that the initial burden will be on the persons making a challenge to the law, to provide a statistical data as to the disproportionality and that it is only thereafter that the burden will shift on to the State to submit quantifiable and measurable data.

51. In the case on hand, the question of the petitioners discharging the initial burden may not arise at all for one important reason. Logically, the tax that was originally levied, namely Rs.600/- per seat or berth for an omni bus plying on contract carriage for a period of seven days, can be multiplied by the number of trips made, for finding out the number of times the facility is used. But, the impugned levy is not directed against every trip made into the State within the period of seven days for which a special permit or temporary licence is granted. It is made per entry and as we have pointed out earlier, multiple entries can be made even before one trip is completed.

52. In any case, the State has not come out with any data either in their original counter affidavits or in their additional common counter affidavits. In some places in their counter affidavits, the State has described the levy as something intended to prevent misuse. In some places, the State has admitted to justify the levy by pointing out the cost of construction of roads, bridges, etc. In some cases, the State has very vaguely spoken about additional expenditure involved for the maintenance of facilities, without clearly indicating the nature of the facilities and the cost of maintaining them.

53. Therefore, the impugned levy appear to be confiscatory and not compensatory in nature.

Violative of Article 14

54. Relying upon the decision of the Supreme Court in Kunnaath Thathunni Moopil Nair v. State of Kerala [AIR 1961 SC 552], Mr.R.Muthukumarasamy, learned senior counsel appearing for one of the petitioners submitted that the impugned levy is also violative of Article 14. It is his contention that a taxing statute is not wholly impugned to attack on the ground that it infringes the equality clause under Article 14.

55. But, we do not think that the impugned levy can be assailed on the ground of violation of Article 14. In K.T.Moopil Nair, the Supreme Court was concerned with a tax levied on land

at a flat rate irrespective of whether any income arose out of the land or not. It was a case of failure to make classifications before imposing a levy. Insofar as the impugned levy is concerned, it does not discriminate between different classes of operators. Hence, the argument on the basis of Article 14 may not hold good.

Conclusion

56. Therefore, in fine, we are of the considered view that the challenge to the expression "per entry" indicated in the second column of the Ninth Schedule relating to the contract carriages in respect of which temporary licence is issued, insofar as omni buses covered by Clause (c) of the Ninth Schedule are concerned, has to be sustained.

57. Accordingly, the writ petitions are allowed and the expression "per entry" appearing along with the rate of tax indicated in the second column of the Ninth Schedule to the Tamil Nadu Motor Vehicles Taxation Act, 1974, as against Clause (c) therein covering contract carriages of omni buses, is declared ultra vires and unconstitutional. There will be no order as to costs. Consequently, connected M.Ps. are closed.

Sd/-

Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

kpl

To

1. The Secretary to Government,
Home (Transport) Department, Chennai.
2. The State Transport Authority,
Chennai 600 005.
3. The Transfer Commissioner Cum
State Transport Authority,
Chepauk, Chennai 600 005.

+1cc to Mr.S.Govindaraman, Advocate, S.R.No.21230

+1cc to Mrs.Radha Gopalan, Advocate, S.R.No.21003

+1cc to the Government Pleader, S.R.No.21127

W.P.Nos.22011 of 2012, 28941 & 33581 of 2014

GJ(CO)

CA(05/04/2016)