IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITIONS NO. 210 & 316 OF 2002

WRIT PETITION NO. 210 OF 2002

1. Belgaum District Co-operative
Milk Producers' Societies Union Ltd.,
Belgaum Dairy Premises,
Kanbargi Road, Belgaum-590 016,
Karnataka State,
represented by its Managing Director.

2. The Kolar District Co-operative
Milk Producer's Societies Union Ltd.,
Kolar Dairy, N.H-4, Huthur Post,
Kolar-563 102, Karnataka State,
represented by its Managing Director.

3. Dharwar District Co-operative
Milk Producer's Societies Union Ltd.,
Product Dairy, Lakkammanahalli,
Indl. Area, Dharwar – 580 004,
Karnataka State,
represented by its Managing Director. …..... Petitioners.

V/s.

1. State of Goa,
represented by its Secretary to
Government of Goa,
Department of Animal Husbandry and
Veterinary Sciences, Panjim, Goa.

2. Directorate of Animal Husbandry &
Veterinary Services,
Pashu Samvardan Bhavan,
Patto, Panjim, Goa. …..... Respondents.

Mr. S. Nagananda Sr. Advocate with Mr. S. Sriranga and Mr. J. Godinho, Advocates for the petitioners.

Mr. Dattaprasad Lawande, Advocate General with Mr. P. Dangui, Government Advocate and Mr. A. Jamadar, Addl. Govt. Advocate for the respondents.

WRIT PETITION NO. 316 OF 2002

1. Karnataka Co-operative
Milk Producers' Federation Ltd.,
KMF Complex, Dr. M.H. Marigowda
Road, Bangalore – 560 029,
Karnataka State,
represented by its Director,
Dr. H. K. Prakash.

2. Belgaum District Co-operative
Milk Producers' Societies Union Ltd.,
Belgaum Dairy Premises,
Kanbargi Road, Belgaum-590 016,
Karnataka State,
represented by its Managing Director
Shri T. Kumara Swamy,

3. The Kolar District Co-operative
Milk Producer's Societies Union Ltd.,
Kolar Dairy, N.H-4, Huthur Post,
Kolar-563 102, Karnataka State,
represented by its Managing Director
Dr. M.N. Venkataram.

4. Shri Pandurang D. Patil,
Sasmolam Baina, Shivam Building,
Vasco-da-Gama, Goa.

5. Shri Arun Gurunath Chavan,
Vidya Nagar-Gogal,
Margao, Goa. …..... Petitioners.

V/s.

1. State of Goa,
represented herein by its Secretary to
Government of Goa,
Department of Co-operation,
Panjim, Goa

2. Registrar of Co-operative Societies
& Ex-Officio Joint secretary,
Panjim, Goa.

3. The Goa State Agricultural
Marketing Board, represented by its
Secretary, Margao Main Yard,
Arlem, Raia, Salcete, Goa. …..... Respondents.

Mr. S. Nagananda Sr. Advocate with Mr. S. Sriranga and Mr. J. Godinho, Advocates for the petitioners.

Mr. Dattaprasad Lawande, Advocate General with Ms. P. Bhandari, and Mr. A. Gomes Pereira, Addl. Government Advocates for the respondents.

CORAM :- F.M. REIS &
NUTAN D. SARDESSAI, JJ.

Date : - 26 JULY 2017

ORAL JUDGMENT : **(**PER F.M. REIS, J.)

Heard Mr. S. Nagananda, learned Senior Counsel appearing for the petitioners and Mr. Dattaprasad Lawande, learned Advocate General appearing for the respondents.

2. The above petitions, *inter alia*, seek a declaration that the provisions of the Goa Cess on Fluid Milk (Control) Act, 2000 and the Fluid Milk (Control) Rules, 2001, in so far as they relate to the levy and collection of cess on fluid milk imported in to the State of Goa, as illegal, ultra vires and unconstitutional. The petitioners amended the petition to seek a direction to the respondents to refund to the petitioners a sum of Rs. 25,19,064=85 collected from the petitioners by way of cess on milk between 01.06.2001 to 23.04.2003, along with interest thereon.

3. Briefly, it is the contention of the petitioners that the petitioners carry out the activities of manufacturing and supply of milk powder, butter, curds, etc. and that in the year 2000, the Goa Cess on Fluid Milk (Control) Act, 2000 was enacted and the assent of the Governor was taken on 28/8/2000 and the said Act came into force on 1/6/2001; whereas the Rules were published on 26/4/2001. The petitioners were paying cess under protest, claiming that the provisions of the said Act are unconstitutional. The petitioners filed the above writ petitions for the aforesaid reliefs.

4. It is the contention of the petitioners that there is no sales tax or any other levy on milk, as it is an essential commodity which provides essentially nutrients required for the human beings. It is further contended that the respondents enacted the law known as the Goa Cess on Fluid Milk (Control) Act, 2000 which came into force on 1st June, 2001. It is further contended that the Act is meant to provide for a levy and collection of cess on milk products of the milk provided in the State of Goa and other incidental matters. Section 4 of the said Act provides for a levy and collection of cess on fluid milk in the State of Goa at such rates as may be prescribed by the respondents. It is further pointed out that in exercise of such powers, the respondents by a Notification dated 6th August, 2001 provided for payment of cess at the rate of 15 paise for every litre of fluid milk brought into the State of Goa which is meant for sale. It is further contended that such provision would place serious restrictions on the inter-state trade and commerce between the States. Claiming that such provision is unconstitutional, the petitioners filed the above writ petitions for the reliefs stated therein.

5. The respondents have filed their reply, disputing the said contentions of the petitioners. It is their case that such a legislation was enacted to provide for levy and collection of cess on fluid milk and augment the dairy production and to make the State of Goa self reliant. It is further pointed out that enacting such a provision would, in fact, help the local milk producers to compete with the milk which was brought from the neighbouring States. It is also pointed out that the Authorities under the State Government provide several facilities to promote trade and commerce within the State to the petitioners and consequently, the challenge deserves to be rejected.

6. It is not in dispute that after filing of the above petitions, the said Act came to be amended by Notification dated 21.2.2003, whereby Rule 3 of the said Rules came to be amended and the payment of cess of 15 paise was made applicable to all the milk producers and distributors and not restricted only to the milk brought from the neighbouring States. In view of the said amendment, the challenge to the constitutional validity of the provision now in place of the said Act and the Rules would no longer survive.

7. The only aspect which remains to be considered is whether from the date the said Act came into force w.e.f. 1st June, 2001 until the said Amendment of 2003 such provision cannot stand on the ground of discrimination. The Apex Court in the Judgment in the case of **Jindal Stainless Ltd. and Ors. vs. State of Haryana and Ors.** MANU/SC/1475/2016, has held at paras 131, 132, 133 and 134, thus :

> "131. This Court held that the exemption given to manufacturers of edible oil was total and unconditional, while producers of edible oil from industries in adjoining states had to pay sales tax @ 8%. Grant of exemption to local oil producing units thereby put the former at a disadvantage. Having said that, the Court exercised its powers Under Article 142 of the Constitution and struck down the exemption by moulding the reliefs to suit the exigencies of the situation. The Court no doubt noticed a three-Judge Bench decision in Video Electronics v. State of Punjab MANU/SC/0644/1989MANU/SC/0644/1989 : (1990) 3 SCC 87 in which notifications issued by the States of U.P and Punjab providing for exemptions to new units established in certain areas for a prescribed period of 3 to 7 years were assailed as discriminatory. The challenge to the exemption was in that case also based on the alleged violation of Articles 301 and 304. This Court however upheld the notifications in question on

the ground that the same related to a specific class of industrial units and the benefit under the same was admissible for a limited period of time only. The Court observed that if an overwhelmingly large number of local manufacturers were subject to sales tax, it could not be said that the local manufactures were favored as a class against outsiders.

Adverting to the decision in Video Electronics (supra) this Court in Mahavir (supra) held the same to be distinguishable on the ground that the Punjab and U.P notifications were qualitatively different from the one issued by the Government of Jammu and Kashmir in as much as while the former benefited only specified units and limited the benefit to a specified period, the latter was not subject to any such limitations. This declared the Court resulted in discrimination vis-a-vis. outside goods. What is important is that in Video Electronics (supra) this Court recognized the difference between differentiation and discrimination and held that every differentiation is not discrimination. This Court noted that the word discrimination was not used in Article 14 as it has been used in Article 16, Article 303 and Article 304(a). The use of the word in 304.

(a) observed this Court involved an element of "intentional and unfavorable bias". So long as there was no such bias evident from the measure adopted by the state, mere grant of exemption or incentives aimed at supporting local industries in their growth, development and progress did not constitute discrimination.

132. We respectfully agree with the line of reasoning adopted in Video Electronics (supra). The expression "discrimination" has not been defined in the Constitution though the same has fallen for interpretation of this Court on several occasions. The earliest of these decisions was rendered in Kathi Raning Rawat v. The State of Saurashtra MANU/SC/0041/1952MANU/SC/0041/1952 : AIR 1952 SC 123, where a seven-Judge Bench of this Court held that all legislative differentiation is not necessarily discriminatory. Relying upon the meaning of the expression in Oxford Dictionary, Patanjali Sastri, CJ (as His Lordship then was) explained:

7. All legislative differentiation is not necessarily discriminatory. In fact, the word "discrimination" does not occur in Article 14. The expression "discriminate against" is used in Article 15(1) and Article 16(2), and it means, according to the Oxford Dictionary, "to make an adverse distinction with regard to; to distinguish unfavourably from others". Discrimination thus involves an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. If such bias is disclosed and is based on any of the grounds mentioned in Articles 15 and 16, it

may well be that the statute will, without more, incur condemnation as violating a specific constitutional prohibition unless it is saved by one or other of the provisos to those articles. But the position Under Article 14 is different. Equal protection claims under that Article are examined with the presumption that the State action is reasonable and justified. This presumption of constitutionality stems from the wide power of classification which the legislature must, of necessity, possess in making laws operating differently as regards different groups of persons in order to give effect to its policies.......

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

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

Any challenge to a fiscal enactment on the touchstone of Article 304(a) must in our opinion be tested by the same standard as in Kathi's case (supra). The Court ought to examine whether the differentiation made is intended or inspired by an element of unfavourable bias in favour of the goods produced or manufactured in the State as against those imported from outside. If the answer be in the affirmative, the differentiation would fall foul of Article 304(a) and may tantamount to discrimination. Conversely, if the Court were to find that there is no such element of intentional bias favouring the locally produced goods as against those from outside, it may have to go further and see whether the differentiation would be supported by valid reasons. In the words of Fazl Ali, J. discrimination without reason would be unconstitutional whereas discrimination with reason may be legally acceptable. In Video Electronic's case, this Court noted that the differentiation made was supported by reasons. This Court held that if economic unity of India is one of the Constitutional aspirations and if attaining and maintaining such unity is a Constitutional goal, such unity and objectives can be achieved only if all parts of the Country develop equally. There is, if we may say so, with respect considerable merit in that line of reasoning. A State which is economically and industrially backward on account of several factors must have the opportunity and the freedom to pursue and achieve development in a measure equal to other and more fortunate regions of the country which have for historical reasons, developed faster and thereby acquired an edge over its less fortunate country cousins. Economic unity from the point of view of such underdeveloped or developing states will be an illusion if they do not have the opportunity or the legal entitlement to promote industries within their respective territories by granting incentives and exemptions necessary for such growth and development. The argument that power to grant exemption cannot be used by the State even in case where such exemptions are manifestly intended to promote industrial growth or promoting industrial activity has not appealed to us. The power to grant exemption is a part of the sovereign power to levy taxes which cannot be taken away from the States that are otherwise competent to impose taxes and duties. The conceptual foundation on which such exemptions and incentives have been held permissible and upheld by this Court in Video's case is, in our opinion, juristically sound and legally unexceptionable. Video Electronics, therefore, correctly states the legal position as regards the approach to be adopted by the Courts while examining the validity of levies. So long as the differentiation made by the States is not intended to create an unfavourable bias and so long as the differentiation is intended to benefit a distinct class of industries and the life of the benefit is limited in terms of period, the benefit must be held to flow from a legitimate desire to promote industries within its territory. Grant of exemptions and incentives in such cases must be deemed to have been inspired by considerations which in the larger context help achieve the Constitutional goal of economic unity.

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

8. In the present case, it is not disputed that the petitioners as well as the milk producers of the State of Goa are similarly placed. The cess is levied only on the fluid milk brought into the State from

the neighbouring States which has been thereafter rectified by the amendment which was introduced in the year 2003. In such circumstances, we find that the respondents were not justified to collect the cess or introduce the said provision in the Act and the Rules of 2001, by imposing cess of 15 paise per litre, as such amount is collected only for the fluid milk brought from outside the State of Goa and there are no cogent reasons to justify such discrimination. Such discrimination would clearly mean that the amounts collected based on such provision, are unjustified and, as such, the petitioners are entitled for the amounts thereby paid. The amounts so collected towards the subject cess and the subject market fee are against the products not from the State of Goa. The only aspect which now remains to be examined is whether the petitioners are entitled for the refund of the amounts so collected.

9. In Writ Petition No. 210/002, the relief claimed by the petitioners is, inter alia, to declare the provisions of the Goa Cess on Fluid Milk (Control) Act, 2000 and the Fluid Milk (Control) Rules, 2001, so far as they relate to the levy and collection of cess on fluid milk imported into the State of Goa, as illegal, ultra vires,

unconstitutional and unenforceable. Another relief sought is for a direction to the respondents to refund to the petitioners a sum of Rs.25,19,064-85, collected from the petitioners by way of cess on milk between 1.6.2002 to 23.4.2003 along with interest thereon at the rate of 12% per annum. In Writ Petition No.316/2002, the relief claimed by the petitioners is inter alia for a declaration that the Notification No. 85/1/93-MR/MKT/RCS/315 dated 11/07/2002, issued in exercise of the powers conferred under Section 4 of the Maharashtra Agriculture Produce Marketing (Regulation) Act, 1963 in so far as they relate to the levy and collection of market fee on milk, butter and ghee imported into the State of Goa as illegal, ultra vires, unconstitutional and unenforceable. Another relief sought is for a direction to refund to the petitioners a sum of Rs.1,15,86,383/-, being the fee collected on milk, ghee, and butter, along with interest thereon at the rate of 12% per annum.

10. Mr. Dattaprasad Lawande, learned Advocate General, however, points out that the amounts of cess paid by the petitioners have been recovered from the consumers by the petitioners and, as such, the question of directing the respondents to refund the cess

collected from the petitioners would not at all arise. The learned Advocate General further points out that there is no averment in the petition to hold that such amount was not collected from the consumers of the milk products. The learned Advocate General further points out that as such, unless the petitioners satisfy the concerned Authorities that such amount has not been collected from the consumers, the question of issuing directions to refund such amounts would not at all arise. On the other hand, the learned Senior Counsel appearing for the petitioners has brought to our notice some packets to show that no such cess was recovered from the consumers.

11. Taking note of the contention of the learned Advocate General, we find that it would be appropriate to direct the respondents to hold an inquiry to ascertain whether any amount of cess collected from the petitioners has been passed on to the consumers of the milk products of the petitioners. Such an inquiry should be conducted after hearing the petitioners, who will be at liberty to produce necessary material in support of their claim. After such inquiry is conducted, in case any amount is payable to the petitioners, such amount would have to be refunded along with interest thereon at the rate of 6% per annum,

from the date of filing of the petition till actual payment.

12. As far as the amount of market fee paid by the petitioners, the learned Advocate General submits that in case the petitioners produce material to show that such amount has actually been paid by them, the amount so paid shall be refunded to the Petitioners, together with interest thereon at the rate of 6% per annum from the date of filing of the petition up to the actual date of payment. Such amounts have been collected individually from all the three petitioners in the above Writ Petition No. 316/2002. Taking note of the stand taken by the learned Advocate General with that regard, the respondents shall be liable to refund such amount on production of material showing the payment of such market fee to the concerned Authorities, together with interest thereon at the rate of 6% per annum from the date of filing of the petition till actual payment.

13. In view of the above, we pass the following :

O R D E R

(I) Both the petitions are partly allowed.

(II) The respondent No.2 is directed to hold an inquiry with regard to subject cess of 15 paise per litre, paid by the petitioners in the light of the observations made herein above

(III) In case any amounts are to be refunded to the petitioners in accordance thereof, the respondents shall refund such amounts to the petitioners along with interest thereon at the rate of 6% per annum, from the date of filing of the petition, upto the date of actual payment.

(IV) The respondents are directed to refund the amount of market fee paid by the petitioners based on the material produced before the respondent No.2 to substantiate such payment, together with interest thereon at the rate of 6% per annum from the date of filing of the petition till actual payment.

(V) Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J. **F.M. REIS, J.**

ssm.