IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3416 of 2010

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1. M/S B.P.Trading , a Partnership Concern having its place of business at Adampur Chowk, P.S. Adampur, District – Bhagalpur, through Its Proprietor, Brahmdeo Panjiyara, S/O Late Shyam Panjiyara, R/O Jagdispur, P.S. Jagdispur, Distt.- Bhagalpur
2. M/S Shankar Gas Service, a Proprietorship Concern Having Its Place Of Business At Parbatti Chowk, B Through Its Proprietor, Shankar Prasad Sah, S/O Late Chhedi Prasad Sah, R/O Parbatti Chowk, P.O., P.S., Town and Distt.- Bhagalpur
3. M/S Anuradha Indane Agency, a Partnership Firm Having Its Place Of Business At Sultanganj, P.S. Sul Null Through One Of Its Partners, Ugresh Kumar Singh, S/O Shri Arun Kumar Singh, R/O Station Road, P.S. Sultanganj, Distt.- Bhagalpur
4. M/S R.B.S.Indane Agency, a Proprietorship Concern Having Its Place Of Business At Naugachhia, P.S. Through Its Proprietor, Ram Balak Singh, S/O Late Kesher Singh, R/O Nh-31, Laxmi Hotel, P.S. Naugachhia, Distt.- Bhagalpur
5. M/S Madhu Gas Enterprises, a Proprietorship Concern Having Its Place Of Business At Tilkamanjhi Cho Through Its Proprietor, Dinesh Prasad Singh, S/O Late Jagannath Singh, R/O Tilka Manjhi Chowk, P.S. Tilkamanjhi, Distt.- Bhagalpur
6. M/S Shila Indane Agency, a Proprietorship Concern Having Its Place Of Business At Amarpur, P.S. Ama Through Its Proprietor, Rajesh Kumar Saha, S/O Shri Ram Bilash Saha, R/O At- Amarpur, P.O. and P.S. Amarpur, Distt.- Banka
7. M/S Bounsi Indane, a Proprietorship Concern Having Its Place Of Business At, P.O. and P.S. Bounsi, Through Its Proprietor, Sanjeev Kumar Sah, S/O Shri Rhankar Sah, R/O At Bounsi Daliya, P.O. and P.S. Bounsi, Distt.- Banka
8. M/S K C Indane Seva, a Proprietorship Concern Having Its Place Of Business At Mirjanhat, P.S. Muzah Through Its Proprietor, Chandeshwar Prasad Singh, S/O Late Deo Lakhan Singh, R/O Kazichak, Bounsi Road, P.O. Mirjanhat, P.S. Muzahidpur Distt.- Bhagalpur
9. M/S Katoria Indane, a Proprietorship Concern Having Its Place Of Business At, P.O. and P.S.- Katori Through Its Proprietor, Smt. Bela Choudhary, W/O Shri Surendra Prasad Choudhary, R/O Suiya Road, In Front Of Kanwariya Dharmshala, Katoria, P.S. Katoria, Distt.- Banka

... ... Petitioner/s

Versus

1. The State Of Bihar through the Chief Secretary, Government of Bihar, Old Secretariat, Patna.
2. The Principal Secretary-Cum-Commissioner Of Commercial Taxes, Bihar, Vikash Bhavan, Bailey Road, Pa
3. The Joint Commissioner Of Commercial Taxes Admn., Bhagalpur Division, Bhagalpur

4. The Dy. Commissioner Of Commercial Taxes, In-Charge Bhagalpur Circle, Bhagalpur

5. The Dy. Commissioner Of Commercial Taxes, In-Charge Banka Circle, Banka

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr.Satyabir Bharti, Advocate
For the Respondent/s : Mr. Vikash Kumar, SC-11

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 18-11-2021

The petitioner has prayed for the following relief(s):-

> "i) For a declaration that the rate of Entry-tax on any of the Scheduled Commodities to the extent exceeding the Rate of Bihar VAT is discriminatory, and the Notification-S O No. 85 dt. 13.09.2007 prescribing the rate on LPG being 4% against the Rate of LPG under the Bihar VAT being 1% is liable to be declared to be ultravires;
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> ii) For a declaration that Notification-S O No. 85 dt. 13.09.2007 which sought to amend S O No. 159 dt. 22.8.2003 after the same had became nonest in view of its source having been declared ultra vires is also ultra vires;
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> iii) For issuance of an appropriate writ(s) or order(s) or direction(s) to the respondents for restraining them from making any demand of entry tax from the Petitioner on the import of LPG in the local areas of the State of Bihar;
>
> iv) For a declaration that the Bihar Tax on entry of Goods into Local Areas for Consumption, Use or Sale Therein (Amendment & Validatiion) Act, 2008 (Act No. 13/2008 dt. 15.04.2008) being enforced with retrospective effect from 29.8.2006 as

ultravires Articles 14, 19(I)(g), 246, 301 and 304 of the Constitution of India; &

v) For a declaration that the Notification-S O No. 95 t. 31.07.2008 prscribing the rate on Domestic Cooking Gas being 4% aganst the Rate under the Bihar VAT being 1% is liable to be declared to be ultravires; and for anyh other relief(s) for which the Petitioner may legally be found entitled to in the facts & circumstances of the case."

In effect, the petitioner challenged the Constitutional validity of different provisions of the Bihar Tax on Entry of Goods into Local Area for Consumption, Use or Sale Therein Act, 1993, as amended from time to time.

It is a matter of record that Hon'ble the Apex Court vide judgment dated 14th of July, 2006 passed in Civil Appeal No. 3453 of 2002, titled as **M/s. JINDAL STAINLESS Ltd. & ANR. Vs. STATE OF HARYANA AND ORS.** had permitted the parties, before the Supreme Court, to place within two months additional material in the concerned writ petitions.

In most of the cases, such an additional material was not placed by the parties, perhaps for the reason that the issue decided in terms of the said judgment was pending consideration before a Larger Bench of Hon'ble the Apex Court.

Subsequently, a Constitution Bench (Nine Judges) of the Hon'ble Apex Court in the case of **JINDAL STAINLESS LIMITED & ANOTHER VS. STATE OF HARYANA &**

OTHERS, reported in (2017) 12 SCC 1, after examining the correctness of the decision rendered in the case of **Jindal Stainless Ltd. (2) and another Vs. State of Haryana and others, reported in (2006) 7 SCC 241** has observed as under:

> "1159. By majority the Court answers the reference in the following terms:
>
> 1159.1. Taxes simpliciter are not within the contemplation of Part XIII of the Constitution of India. The word "free" used in Article 301 does not mean "free from taxation".
>
> 1159.2. Only such taxes as are discriminatory in nature are prohibited by Article 304(a). It follows that levy of a non-discriminatory tax would not constitute an infraction of Article 301.
>
> 1159.3. Clauses (a) and (b) of Article 304 have to be read disjunctively.
>
> 1159.4. A levy that violates Article 304(a) cannot be saved even if the procedure under Article 304(b) or the proviso thereunder is satisfied.
>
> 1159.5. The Compensatory Tax Theory evolved in *Automobile Transport case* and subsequently modified in *Jindal's case* has no juristic basis and is therefore rejected.
>
> 1159.6. The decisions of this Court in *Atiabari*,

Automobile Transport and Jindal cases and all other judgments that follow these pronouncements are to the extent of such reliance overruled.

1159.7. A tax on entry of goods into a local area for use, sale or consumption therein is permissible although similar goods are not produced within the taxing State.

1159.8. Article 304 (a) frowns upon discrimination (of a hostile nature in the protectionist sense) and not on mere differentiation. Therefore, incentives, set-offs etc. granted to a specified class of dealers for a limited period of time in a non-hostile fashion with a view to developing economically backward areas would not violate Article 304(a). The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular Benches hearing the matters.

1160. States are well within their right to design their fiscal legislations to ensure that the tax burden on goods imported from other States and goods produced within the State fall equally. Such measures if taken would not contravene Article 304(a) of the Constitution. The question whether the levies in the present case indeed satisfy this test is left to be determined by the regular Benches hearing the matters.

1161. The questions whether the entire State can be notified as a local area and whether entry tax can be levied on goods entering the landmass of India from another country are left open to be determined in appropriate proceedings."

Perhaps, the only surviving issue requiring consideration by this Court is the one pointed out in Paragraph 1161, reproduced supra.

However, after the matter was heard for some time, we find the record to be totally silent on facts or grounds with regard thereto. No doubt, the issue is purely legal. But even the relevant provisions of the Statute claimed to be ultra vires are not on record and the reason is not far to seek for the petition was filed way back in the year 2010 and the Legislation amended/enforced subsequently. That apart, even during the course of hearing we find absolute incoherence with regard thereto.

As such, we are of the considered view that the petitioner files a fresh petition placing on record not only the specific legislation or part thereof, Constitutional validity whereof he wishes to challenge, as also specify the grounds, in addition to the one reproduced supra.

This he is permitted to do so within a period of eight weeks on the same and subsequent cause of action. As and when such petition is filed, the same shall be considered for hearing on priority basis.

Learned counsel for the petitioner invites our attention to the interim order dated 17.09.2010 and prays that the same to be made absolute, in finality.

We are not inclined to allow such a prayer. However, since we permit the petitioner to file an exhaustive petition on the same and subsequent cause of action, the such interim order(s) would continue for a further period of eight weeks, within which, a fresh petition be filed. We clarify that if such a petition is not filed within eight weeks and mentioned for early listing, the interim order(s) shall automatically stand vacated, without any further reference to this Court.

Petition stands disposed of in the aforesaid terms.

Interlocutory Application, if any, shall stand disposed of.

(Sanjay Karol, CJ)

(S. Kumar, J)

K.C.Jha/-

AFR/NAFR	
CAV DATE	
Uploading Date	24.11.2021
Transmission Date	