Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 541 OF 2010

1) M/s Bharti Telemedia Ltd.,
a Company incorporated under the
Companies Act, 1956, having its registered
Office at Bharti Crescent, 1, Nelson Mandela
Road, Vasant Kunj, Phase II, New Delhi
110 070, India having its local office at
Kamat Towers, 6th Floor, Dempo House,
Patto EDC Complex, Panaji, Goa 403 001
represented by its Shri Binu N.S. Puri,
Head, Legal and Regulatory Affairs
and duly constituted Power of Attorney
of the Petitioner, major, married, Indian
National, r/o. Mahindra Gardens,
S.V. Road, Goregaon (W), Mumbai 63. ….. Petitioner.

Versus

1) State of Goa,
Through its Chief Secretary,
Secretariat, Porvorim, Bardez, Goa.

2) The Commissioner of Commercial
Taxes, Office of the Commissioner of
Commercial Taxes, Old High Court
Building, M.G. Road, Panaji, Goa. …... Respondents.

Mr Shivan Desai, Advocate *for the Petitioner.*

Mr Suhas Parab, Addl. Govt. Advocate *for the Respondents.*

WITH

WRIT PETITION NO. 542 OF 2010

1) M/s Bharti Airtel Ltd.,

a Company incorporated under the Companies Act, 1956, having its registered Office at Bharti Crescent, 1, Nelson Mandela Road, Vasant Kunj, Phase II, New Delhi 110 070, India having its local office at Kamat Towers, 6th Floor, Dempo House, Patto EDC Complex, Panaji, Goa 403 001 represented by its Assistant Manager, Legal and duly constituted Power of Attorney holder Mr Nirmal Gulhane, 35 years old, married, Indian National, r/o. Charkop, Shivveer Apts., Kandivali (W) Mumbai 67. ….. Petitioner.

Versus

1) State of Goa,
Through its Chief Secretary,
having office at
Secretariat, Porvorim, Goa.

2) The Commissioner of Commercial Taxes, Office of the Commissioner of Commercial Taxes, Old High Court Building, M.G. Road, Panaji, Goa. …... Respondents.

Mr Shivan Desai, Advocate *for the Petitioner.*
Ms Sapna Mordekar, Addl. Govt. Advocate *for the Respondents.*

CORAM : M. S. SONAK &
VALMIKI SA MENEZES, JJ.

DATE : 24th APRIL 2023

ORAL JUDGMENT : (Per M.S. Sonak, J.)

1. Heard Mr Shivan Desai for the Petitioners, Mr Suhas Parab, learned Addl. Govt. Advocate for the Respondents in Writ Petition No.541/2010 and Ms Sapna Mordekar, learned Addl. Govt. Advocate for the Respondents in Writ Petition No.542/2010.

2. Since common issues of law and fact arise in both petitions, they are disposed of by a common judgement and order with the consent of the learned Counsel.

3. The Petitioners challenge the constitutional validity of the Goa Tax on Entry of Goods Act, 2000 (impugned Act) for want of legislative competence and, in any case, for contravening Articles 14, 19(1)(g), 265, 301 and 304(a) of the Constitution of India and seek consequential relief of refund of entry tax recovered by the State from the Petitioners.

4. The Goa Legislative Assembly enacted the Impugned Act after the bill was introduced with the previous sanction of the President. The Act provided 1st September 2000 as the appointed date on which it would come into force.

5. The Petitioner Bharti Telemedia Ltd. (BTL) is in the business of providing Direct to Home (DTH) services in various States in India, including the State of Goa, under a licence issued in terms of

the Indian Telegraph Act 1885. Similarly, the Petitioner Bharti Airtel Ltd. (BAL) is in the business of providing cellular telecommunication services in various States in India, including the State of Goa, also under a similar licence under the Indian Telegraph Act, 1885.

6. The Petitioners challenge the impugned Act, *inter alia,* on the ground that the same purports to relate to Entry 52 of List II of the Seventh Schedule to the Constitution of India but, in pith and substance, relates to entries in List I and consequently, beyond the legislative competence of the State legislature. Besides, the Petitioners urge that there is no link or correlation in respect of the Revenue from the levies under the impugned Act and the Revenue and expenditure under other enactments for provisions for roads, water, lighting, drainage, etc.

7. The Petitioners urge that the impugned tax is relatable to the levy of import duties under Entry 41, read with Entry 83 of List I of the Seventh Schedule to the Constitution. It is urged that the State legislature has no legislative competence to enact the impugned Act. Accordingly, it is urged that the impugned Act and the levy thereunder violate Articles 14, 19(1)(g), 265 and 301 of the Constitution of India.

8. The Petitioners urge that the provisions of the impugned Act are solely to augment the Revenue of the State. Consequently, they are not compensatory taxes for the use of trading facilities. It is urged that the levy is not regulatory since the same impedes the freedom of trade, commerce and intercourse. Finally, they urge that there are no circumstances to save such a levy under Article 304 of the Constitution.

9. The Petitioners urge that the tax levy for entry of goods into a local area directly impedes the freedom of trade guaranteed under Article 301 of the Constitution. Since there are no features essential to save such a levy under Article 304(b), the levy of tax under the impugned Act is wholly unconstitutional, null and void.

10. The Petitioners urge that the impugned Act textually and contextually excludes imported goods from its purview. Yet, the State authorities insist upon the levy of entry tax on imported goods, and such levy is ultra vires the impugned Act and 301 of the Constitution of India.

11. The Petitioners rely on ***Atiabari Tea Co. Ltd. vs. State of Assam*** – AIR 1961 SC 232, ***Automobile Transport Ltd. vs. State of Rajasthan*** – AIR 1962 SC 1406; ***Bhagatram Rajiv Kumar vs. Commissioner of Sales Tax, M.P.*** - 1995 Supp. (1) SCC 673 , ***Godfrey Phillips India and anr. vs. State of U.P. and ors. -***

(2005) 2 SCC 515 and ***State of Bihars and ors. vs. Bihar Chamber of Commerce and ors*** – (1996) 9 SCC 136

12. The learned Additional Government Advocates rely mainly on ***Jindal Stainless Limited and another vs State of Haryana and ors.*** - (2017) 12 SCC 1; ***Hindusthan National Glass & Industries Limited vs State of Maharashtra and Ors. -*** (2019) 3 Bom CR 625 and ***OCL India Ltd. vs State of Orissa and ors***. - 2022 SCC OnLine SC 1518 to submit that all the contentions raised by the Petitioners stand answered against them by these decisions. The learned Additional Govt. Advocates submit that these Petitions were instituted before the decision of the Nine Member Constitution Bench in *Jindal Stainless Limited* (supra). After the Constitution Bench clarified the position, all these contentions now raised stand fully answered.

13. Indeed, these Petitions were instituted before the decision of the Constitution Bench in *Jindal Stainless Limited* (supra). Therefore, most of the raised contentions stand answered against the Petitioners in the Nine Member Constitution Bench decision in *Jindal Stainless Limited* (supra).

14. By majority, the Constitution Bench answered the reference, which was necessitated due to conflicting opinions, in the following terms.

"11.59.1. 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".*

11.59.2. 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 304(a) cannot be saved even if the procedure under Article 304(b)or the proviso there under is satisfied.

1159.5. The compensatory tax theory evolved in Automobile Transport case and subsequently modified in Jindal Stainless Ltd. (2) v. State of Haryana, (2006) 7 SCC 241 case has no juristic basis and is therefore rejected.

1159.6. Decisions of this Court in Atiabari Tea Co. Ltd. v. State of Assam- AIR 1961 SC 232, Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, AIR 1962 SC 1406 and Jindal cases (supra) and all other judgments that follow these pronouncements are to the extent of such reliance over ruled.

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 Articles 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."*

15. The only questions referred to in paragraphs 1160 and 1161 of *Jindal Stainless Ltd.* (supra) were left open by the Constitution Bench, and such questions have also been raised in these Petitioners. However, the pleadings on these issues are wholly inadequate.

16. The above questions were also raised in Writ Petitions No. 471/2007 and 417/2014. However, both these Petitions were disposed of by a separate judgment and order dated 24th April 2023. Accordingly, for the reasoning in the said judgment and order, the same questions now raised in these Petitions must be answered against the Petitioners.

17. The argument, based upon the local area and the consequent effect upon the legislative competence of the State, additionally stands answered by the decision of the Division Bench of this Court

in *Hindustan National Glass & Industries Limited* (supra). The Division Bench, in paragraphs 62, 63, 64, 65, 66, 67, and 70, has dealt with this issue and answered the same against the Petitioners and favouring the State. The said paragraphs are now transcribed below for the convenience of reference :

> *"62. It is contended by petitioners that Entry tax cannot be levied only on goods coming from outside State by defining the entire State as a local area. In support of the submission, Petitioner had relied upon the decisions in the case of Thressiamma L. Chiravil v. State of Kerala – (2007) 7 VST 293 (Ker), ITC Ltd. vs. State of Tamil Nadu* – [2007] 7 VST 367 (Mad), *Bharat Earth Movers Ltd -vs- State of Karnataka- 2007 8 VST 69 Kar, Jaiprakash Associates Ltd v. State of Arunachal Pradesh-2009 SCC OnLine Gau 569, L & T Case Equipment v. State of Karnataka, (2010) 27 VST 447 in view of the decision in the case of Jindal (supra) the ratio in the said decision cannot be applied in this proceeding. In the case of State of Kerala vs William Fernandez – 2017 SCC OnLine SC 1291, the Apex Court has rejected the submission that entry tax legislation is not covered by Entry 52 of List II of the Seventh Schedule to the Constitution. It was observed that entry tax legislation must be given a broad/wide meaning and cannot be confined in the manner suggested. In each local area if the State levied tax on the entry of goods from another local area in the State, it would be required to grant a set off to the extent of VAT /entry tax already paid in the other local area. This would result in a duplication of administration and taxation, which the State chose to do away with by levying entry tax on the first entry of the goods into a local area in the State.*

63. In Jaika Automobiles vs State of Maharashtra – 1992 Mah LJ 1658, this Court in paragraph No.23 has observed as follows :

> *"23. Ground (d) Submission of the Petitioner is that there is in the field a tax in the nature of octroi duty imposed under the various municipal laws made under entry 542, List II and hence impost referable to that very entry amounts to double taxation and hence is bad in law. The submission is wholly misconceived. In the first place, there is neither constitutional nor statutory bar in express terms prohibiting levy of double taxes. Article 265 of the Constitution only mandates that, "no tax shall be levied or collected except by authority of law". Upon same object and person, separate taxes can be imposed for different purposes by the same authority or by different authorities. Last word on the topic can be found in recent decision of the Supreme Court in the case of Sri Krishna Das v. Town Area Committee (1990) 183 ITR 401 SC, wherein it is observed:*
>
> > *"Double taxation, in the strict legal sense means taxing the same property or subject-matter twice, for the same purpose, for the same period and in the same territory. To constitute double taxation, the two or more taxes must have been (1) levied on the same property or subject matter, (2) by the same Government or authority, (3) during the same taxing period, and (4) for the same purpose".*
>
> *Octroi duty and entry tax are imposed by the different authorities and for entirely two different purposes. Former is for augmenting the resources of the local body and the latter is for compensating the loss of Revenue of the State on account of diversion of*

transaction of sale and purchase of vehicles to the neighbouring States or Union Territories due to difference in the rates of sales tax. Goods taxable are not the same, though some may be common, eg., vehicle brought in the local area after 15 months of its registration under the MV Act in areas outside the State. Thus, there is no taxation of the same goods twice by the same authority and/or for the same purpose and hence there is no "double taxation"

64. The Supreme Court, in the case of Shaktikumar Sancheti Vs. State of Maharashtra – (1995) 1 SCC 351, has observed that :-

"Feeble attempt was made to submit that the tax being in addition to octroi realised by the local body it amounted to double taxation. The taxable event for entry tax is not same as octroi".

65. By way of amendment carried out in W.P. No.1813 of 2013, the Petitioner has alleged that levy of Entry Taxes under the Maharashtra Tax on Entry of Goods into Local Areas Act, 2002, is discriminatory, unconstitutional inasmuch as it differentiates between importers, who have no liability under the Maharashtra Value Added Tax Act, 2002 and those who are registered under MVAT Act and have VAT liability. The respondent's contention is that persons importing goods into a local area for their own use do not pay VAT in the State of Maharashtra. By levying entry tax at a rate that does not exceed the rate specified under the MVAT Act, such persons are placed in the same position as a person who procures those goods from within the State. This is in keeping with the rationale and purpose of providing a level playing field and ensuring there is no disparity in the rate of tax payable in respect of goods brought into a local area of the State and those already in such local area by virtue

of being manufactured or produced there. The Petitioner's submission regarding the grant of exemptions and set off ignore the fact that the proviso to Section 3(5) of the Entry Tax Act clarifies that dealers who are registered under the MVAT Act and are importing goods into a local area covered by the Entry Tax Act for the purpose of resale or export are liable to pay entry tax if the goods are not resold and are dealt with in any other manner. Notably, such registered dealers would; be liable to pay VAT or Central Sales Tax to the Revenue at the time of the resale since the MVAT Act and Central Sales Tax Act also apply to the local areas within the State covered by the Entry Tax Act. Such importers are, accordingly, placed on the same footing as other dealers who sell or buy; goods within the State. Instead of levying entry tax on such dealers and then granting a set-off, the Legislature has opted to grant a conditional exemption under Section 3(5) of the MVAT Act. The grant of such an exemption is neither discriminatory nor unconstitutional. The Petitioner's submissions further ignore the fact that the grant of set-off or exemptions to dealers who are registered within the State and importing goods into a local area covered by the Entry Tax Act has the same effect as grant of set-off to a dealer who purchases such goods domestically within a local area of the State. The purpose of a set off is to obviate any cascading effect of tax on the ultimate consumer. The set off under rule 52 is available to prevent the cascading effect of multi point taxation scheme which stops at the stage of consumer. The final consumer is not entitled to any set-off and has to sustain the burden of tax ultimately. Therefore, where the importer is itself the ultimate consumer of the goods imported into the local area and is not using them to manufacture further goods for sale, there is no question of granting set off in respect of the goods purchased. An importer consumer cannot be compared with an importer-manufacturer registered under MVAT Act and therefore

eligible for set-off under Rule 52 of the MVAT Rules. Further the MVAT Act and Rules framed thereunder do not provide for any set off to a person who is the ultimate consumer not registered under the Act. The Petitioner in this case is a final consumer and hence he is not entitled for any set-off nor for exemption from payment of entry tax under Section 3(5) of the Entry Tax Act. These provisions are neither discriminatory nor unconstitutional inasmuch as the different class of importers under the Entry Tax Act that the Petitioner refers to is similar to the different class of purchasers recognized under the MVAT Act viz., final consumers and persons who are purchasing for the purpose of re-selling the goods.

66. Under Entry 52 of List II of Seventh Schedule appended to the Constitution, the State is empowered to levy and collect entry tax on the entry of the goods into local areas. Further, the imposition of tax on sale or purchase of goods is permissible under entry 54 of List II. Entry 52 and Entry 54 are two separate fields of legislations. Incidence of tax under these two entries is also independent. Merely because the rate of tax under both the taxing statutes is the same, it cannot be said that the State is levying VAT in the garb of Entry Tax. The State having taken a conscious decision to avoid discrimination has decided not to levy Entry tax in excess of VAT applicable on similar goods.

67. Article 286 comes into operation only when there is imposition of tax on sale or purchase of goods and not when tax is sought to be imposed on entry of the goods into local areas within the State, as in the present case. Article 304(a) does not fetter the States from ensuring an equality in the rate of tax levied on goods that are imported from other states and goods manufactured or produced within the State. Since, under the Entry Tax Act and MVAT Act, the rate of tax on specified goods which are imported into the local

areas in the State of Maharashtra is brought at par with the rate on similar goods manufactured or produced in the State of Maharashtra, there is no infirmity in the provisions of the Entry Tax Act whether as alleged or at all. There is no unfair or arbitrary classification whether as alleged or at all.

68. ...

69. …

70. The Act in no way makes any discrimination against the local purchases and importers much less any hostile discrimination. The importers are given input tax credit of Entry Tax Paid to the Government against the VAT liability and balance is payable or refundable as the case may be. Hence tax burden of Entry Tax not borne by the dealers who purchase locally within the State who get set off of the input tax credit u/s 48 r/w 52, is balanced in case of persons who suffer entry tax by making provisions in the MVAT Act that the entry tax can be adjusted against the MVAT liability thus in effect the dealers who import from other State or Country are at par with local manufacturers who purchase from local dealers so far as burden of tax is concerned since in effect there is no entry tax at all when rebate or set off or ITC is granted for the same. Further as per the second proviso any local sales tax paid by the importer on the goods that are imported is also available for reduction from the entry tax payable under the Act. Thus the rebate is provided in second proviso of the Act that the tax payable by the importer under this Act shall be reduced by amount of tax paid, if any, under the law relating to General Sales Tax in force in the U.T. or the State in which the goods are purchased by the importer in effect takes care of the ground that the dealers who import goods are discriminated vis a vis the dealer who procure the goods from local sources."

18. The Division Bench has relied, *inter alia,* on the ***State of Kerala and ors. vs. Fr. William Fernandez and ors*** – (2021) 11 SCC 705, in which the contention based upon such legislations being beyond the legislative competence of the State under Entry 52, List II of the Seventh Schedule, was rejected.

19. Thus, having regard to the decision of the Constitution Bench in *Jindal Stainless Ltd.* (supra), *Fr. William Fernandez and ors* (supra), and *Hindustan National Glass & Industries Ltd.* (supra), and by following the reasoning therein, we dismiss these Petitions. Further, we adopt the reasoning in a separate Judgment and Order dated 24th April 2023 in Writ Petitions No. 471/2007 and Writ Petition No.417/2014 for disposing of these Petitions.

20. Accordingly, these Petitions are liable to be dismissed and are, hereby, dismissed. Interim order, if any, is vacated. The rule in both these Petitions is discharged. There shall be no order for costs.

VALMIKI SA MENEZES, J. **M. S. SONAK, J.**