

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

FRIDAY, THE 9TH DAY OF DECEMBER 2016/18TH AGRAHAYANA, 1938

WA.No. 2006 of 2012 IN WP(C).1390/2009

JUDGMENT IN WP(C) 1390/2009

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APPELLANT/PETITIONER:

RAJAH HEALTHY ACRES(P)LTD, PERUMANNUR.P.O,
CHALISSERY, PALAKKAD, REPRESENTED BY ITS
AUTHORISED SIGNATORY-DR.SREERAJ KUNNASSERY.

BY ADVS.SRI.V.V.ASOKAN
SRI.P.P.RAMACHANDRAN

RESPONDENTS/RESPONDENTS:

1. STATE OF KERALA REPRESENTED BY CHIEF SECRETARY
TO GOVERNMENT, SECRETARIAT, THIRUVANANTHAPURAM-695 001.
2. THE SECRETARY (TAXES), GOVERNMENT OF KERALA, SECRETARIAT,
THIRUVANANTHAPURAM-695 001.
3. THE COMMISSIONER, COMMERCIAL TAXES,
THIRUVANANTHAPURAM-695 001.
4. INSPECTING ASSISTANT COMMISSIONER (INVESTIGATION BRANCH),
DEPARTMENT OF COMMERCIAL TAXES, PALAKKAD-678 001.
5. INTELLIGENCE OFFICER(IB), COMMERCIAL TAX COMPLEX,
PALAKKAD-678 001.

BY SR.GOVERNMENT PLEADER SRI.MOHAMMED RAFIQ

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 31-10-2016 ALONG
WITH WA. 395/2013, THE COURT ON 09-12-2016 DELIVERED THE FOLLOWING:

Thottathil B.Radhakrishnan
&
Devan Ramachandran, JJ.

W.A.Nos.2006 of 2012 & 395 of 2013

Dated this the 9th day of December, 2016

JUDGMENT

Devan Ramachandran, J.

Luxury cars, luxury hotels - but luxury in hospitals: this would have been unthinkable a couple of decades ago. Hospitals were always scary and horrid with sterile white walls and linoleum floors staring at you. Hospital food was almost inedible dished out from its canteen and mess. The staff - matter of fact and nurses unfriendly and totally business like.

2. In the past, traditionally, hospitality industry has been focused on restaurants, lodging houses and hotels. But in the last couple of decades or so, its focus became more on patients' satisfaction in hospitals and hospitals are now more customer-focal and patient-

centric. A lot of attention is now bestowed on physical environment and services.

3. While the primary business of the hospitals is still healing, accommodation has become much more comfortable and several additional services, unthinkable a few years ago, have become common place and routine in many of the hospitals. It is recognised by the doctors and healers that the ambience and surroundings of the hospitals, especially the accommodation provided to the patients would impact recovery and contribute to the recuperative processes. Many of the hospitals now have much better infrastructure as compared to earlier. Furniture and interiors have been spruced up to give the patients and bystanders all the comforts and luxuries as are possible. The focus of hospitality in hospital is more on the interior design, trained staff and technologies like Televisions and inter connectivity and such other facilities and patients are willing to pay for all these. The

harbinger of these changes was the advent of what is known as medical/ hospital tourism. Patients travel from other countries and States for medical procedures on account of the high costs and waiting lists in their home town or home country coupled with availability of avant-garde technologies, skills and marketing of the medical care industry in Kerala. This has led to virtual globalisation of the health care market place.

4. These changes were obviously noticed by the Legislature of Kerala and by Kerala Finance Act, 2008 amendments were brought into the Kerala Tax on Luxuries Act, 1976 ('the Act' for brevity), bringing into its purlieus 'luxury' provided in a hospital and making it mandatory that every hospital having not less than five rooms for accommodation of patients and which charges Rs.1,000/- or more per room, excluding the charges for medicine, food and professional services, to be registered under the provisions of the Act. The effect of this

amendment was that the hospitals answering the criterion specified in the Act would become exigible to tax, for the luxury provided by them in the hospitals.

5. These amendments were immediately challenged by the appellants herein, which are hospitals providing Allopathic and Ayurvedic treatments and conventional methods of medical attention to various patients who come to them. The appellants mounted the challenge against the amendments before the learned Single Judge primarily on the ground that the amendments are beyond the legislative power of the State of Kerala under Entry 62 List II of VII Schedule of Constitution of India. The primary line of their attack was that levy of luxury tax under Entry 62 List II of VII Schedule of the Constitution would be permissible only if 'luxury' is provided in the hospitals and since they do not provide any luxury, but are only places of healing, the legislature has grossly exceeded in its competence while

legislating, for which it had no sanction under the relevant entry of the VII Schedule of the Constitution. The appellants had, in the writ petitions, detailed the various treatments and medical care attention that are being provided to their patients and they submit that the emphasis of the hospitals is to provide treatment to cure the diseases of the patients and by no stretch of imagination can it be said that any 'luxury' is being provided in the hospitals. The appellants asserted that patients would never go to a hospital for luxury. The immediate and proximate cause for their challenge before the learned Single Judge was that the appellants were, by the authorities under the Act, sought to be assessed and penalised under the relevant provisions of the Act for not obtaining registration under the Act and for not maintaining or returning the assessments as mandated by the provisions contained therein. The challenge of the appellants obviously was that they are not liable to be

registered under the Act or to be assessed thereunder and that, consequently no penalty could be imposed on them for the alleged violations mentioned in the impugned notices issued by the tax authorities.

6. The learned Single Judge, after elaborate consideration of all the materials and factors, dismissed the writ petitions and repelled the challenge against the constitutionality of the impugned amendments holding it to be within the legislative competence of the State Legislature and finding it to be intra vires the constitutional mandate.

7. We have heard these appeals in detail and we are in conformity with the findings of the learned Single Judge for the reasons, as we will presently state, which are not in variance with those given by the learned Single Judge, but complementary to it. We are also in conclusion that the amendments made to the Act, bringing into its sweep luxury in hospitals, do not suffer from any

constitutional infirmity and is intra vires the legislative competence of the State Legislature in making such amendments.

8. A multitude of judgments of the Hon'ble Supreme Court mirrors that there is presumption in favour of validity of the Statute. The courts are to presume that a particular law is intra vires and not ultra vires. The courts are also expected to construe the provisions of a Statute in such a way so as not to make it ultra vires but intra vires. If certain provisions of law, construed in one way, would make them consistent with the Constitution and another possible interpretation would make them unconstitutional, the courts are, under the mandate of various binding precedents of the Hon'ble Supreme Court, to lean in favour of the former construction which would make the Statute valid. The Rule of Interpretation, which is now settled, is that the construction which leads to unconstitutionality or that

results in invalidity rather than validity must be avoided (see **Express Newspapers (Private) Ltd. v. Union of India** (AIR 1958 SC 578), which is locus classicus on this point).

9. Once a presumption is validly attached to a Statute, the burden would be on him, who attacks it, to show that there has been a transgression of constitutional principles (see **Charanjit Lal v. Union of India** (AIR 1951 SC 41)). This principle has its underpinning, on the further presumption that the legislature understands and correctly appreciates the needs of its own people and that its laws are made to correct the problems made manifest by experience and that its discriminations are based on adequate grounds (this principle has been initially enunciated in **Middleton v. Texas Power and Lights Co.** (246 US 152) and accepted by the Hon'ble Supreme Court in **Madhya Pradesh v. Radhakrishnan** (AIR 1979 SC 249)). The courts have to keep in mind that the

legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

10. Chief Justice Chagla in **Nusserwanji v. State of Bombay** (AIR 1951 Bom 210) has stated this principle with felicity that “however repugnant and legislation may be to the conception which the court has, of what is right or wrong however drastic provisions of such legislation may be, if it does not, in fact, contravene any of the Articles of the Constitution which lay down the fundamental rights, then it would be the duty of the court to uphold that legislation” .

11. It is now well settled that a law made by a Parliament or Legislature can be struck down by the courts only on two grounds, namely, the legislature lacks legislative competence and that it has been passed in violation of any of the fundamental rights guaranteed in Part III of the Constitution or any other constitutional

provision. The Hon'ble Supreme Court in **State of A.P. v. Mc Dowell & Co.** ((1996) 3 SCC 709) had reiterated this very emphatically in its observations contained therein, which, for easy reference, is extracted as below:

“The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part II of the Constitution or of any other constitutional provision. There is no third ground. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19 (1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom.”

12. We note that the appellants have challenged the amendments made to the Act not on the ground that they are violative of the fundamental rights or other provisions of the Constitution, but singularly on the ground that those amendments have been made in excess of the powers available to the State Legislature under Entry 62 List II of VII Schedule of the Constitution of India. We remind ourselves that in **Naresh Shridhar Mirajkar v. State of Maharashtra** (AIR 1967 SC 1) the Hon'ble Supreme Court has cautioned that courts should not cover the grounds and make observations not directly involved in the proceedings and thus commanding that unless a point arises for consideration and decision out of the pleadings of the parties, the court shall not express its opinion on such remarks. Since the challenge is on the singular premise as aforementioned and no other, we will confine our consideration of the matter and examination of the law solely as to whether, in making these

amendments, the legislature had exceeded its powers of legislation under List II of VII Schedule. The pleadings and submissions would indicate irrefragably that the challenge to the amendments is in the realm of legislative competence of the State Legislature on the specific hypostasis of the the appellants' contention that the amendments are beyond the competence of the legislature only because there can be no activity in any hospital, which could be termed or classified as 'luxury'.

13. The Act has been obviously legislated by the Legislature of Kerala invoking its nomothetic powers under Entry 62 List II of VII Schedule of the Constitution of India. Entry 62 relates to 'taxes on luxuries, including taxation on entertainments, betting and gambling'. The Act was originally enacted in the year 1976 and it was intended to be an Act to provide for levy and collection of tax on luxury offered in the hospitals and lodging houses. However, by the Finance Act, 1994, the words 'provided

in the hospitals and lodging houses' were omitted and thus the Act was re-cast to be one for the levy and collection of tax on luxury. The fact that the State Legislature is competent to legislate on luxuries is obvious from Entry 62 List II of VII Schedule of the Constitution. The assertions essentially, in these writ appeals, impelled by the appellants are that there is no luxury in hospitals and that therefore, nothing can be taxed under the Act. This contention is further sought to be invigorated by them avouching that hospitals provide nothing intended to be luxury and that by artificially defining 'luxury provided in a hospital', as is done by the impugned amendments, the legislature has professed contrary to the field of legislative power under Entry 62 List II of VII Schedule of the Constitution. The appellants would, however, concede, when asked pointedly, that if there is any luxury, within its meaning as is defined under the Act, provided by hospitals, then it would be within the

constitutional ambit of the legislature to bring it to the sweep of the Act.

14. The word luxury is not one of easy definition. The Act defines luxury in Section 2(ee) of the Act to mean a 'commodity or service that ministers comfort or pleasure'. One of the earliest cases where the meaning of 'luxury' was attempted to be answered was **Abdul Kadir (A.B.) v. State of Kerala** (1962) Supp. 2 SCR 741). The Hon'ble Supreme Court, after very elaborate consideration as to whether tobacco was an article of luxury, concluded by answering it in the manner extracted as under:

“According to that entry, the State Legislatures can make laws in respect of 'taxes on luxuries, including taxes on entertainments, amusements, betting and gambling'. Question, therefore, arises as to whether tobacco can be considered to be an article of luxury. The word 'luxury' in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word 'luxury' is something which conduces enjoyment over and above the necessities of life. It

denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves.”

15. Almost forty years later, in **Godfrey Phillips India Ltd. v. State of U.P.** ((2005) 139 STC 537), the Hon'ble Supreme Court again considered several other writ petitions filed by the manufacturers, dealers and sellers of tobacco who were challenging imposition and levy of tax by various state legislatures on tobacco and tobacco products by treating them as 'luxuries' within the meaning of Entry 62 List II. All the earlier judgments including **Abdul Kadir** were considered by the Hon'ble Supreme Court in assessing the issue as to whether 'luxury' would mean an article or a thing or whether it could be construed to be an experience of comfort and pleasure in the circumferential purlieus of Entry 62 List II of VII Schedule of the Constitution. The Hon'ble Supreme Court then held that the word 'luxuries' in Entry 62 List II means the activity of enjoyment or an

indulgence, which is generally recognised as being beyond the necessary requirements of an average person and that it does not mean an article of luxury. The emphatic declaration of law thus made by the Hon'ble Supreme Court is found in paragraph 85 of the judgment, which deserves a complete reading and is, therefore, reproduced below:

“Hence on an application of general principles of interpretation, we would hold that the word “luxuries” in entry 62 of List II means the activity of enjoyment or indulgence in that which is costly or which is generally recognised as being beyond the necessary requirements of an average number of society and not articles of luxury.”

16. The Hon'ble Supreme Court also applied the principle of 'noscitur a sociis' with respect to the construction of Entry 62 List II of VII Schedule of the Constitution and concluded unambiguously that the words appearing therein 'including taxes on entertainments, amusements, betting and gambling' were not restrictive in its application to define luxury but that

the words have been deliberately used in order to make the scope of the defined word correspondingly wider. The Hon'ble Supreme Court on this locus observed:

“In the context of entry 62 of List II this would not mean that the word “luxuries” would be restricted to entertainments, amusements, betting and gambling but would only emphasise the attribute which is common to the group. If luxuries is understood as meaning something which is purely for enjoyment and beyond the necessities of life, there can be no doubt that entertainments, amusements, betting and gambling would come within such understanding. Additionally, entertainments, amusements, betting and gambling are all activities. “Luxuries” is also capable of meaning an activity and has primarily and traditionally been defined as such. It is only derivatively and recently used to connote an article of luxury. One can assume that the coupling of these taxes under one entry was not fortuitous but because of these common characteristics.

Where two or more words are susceptible of analogous meaning are clubbed together, they are understood to be used in their cognate sense. They take, as it were, their colour from and are qualified by each other, the meaning of the general word being restricted to a sense analogous to that of the less general.”

17. Once the meaning of the word 'luxury' is thus ascribed, we only have to then appraise the nomothetic competence, obtained to the State Legislature under VII

Schedule of the Constitution of India, to make the impugned amendments to the Act. The specific entry, ad rem the impugned amendments, in VII Schedule of List II in Entry 62 is "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". The competence of the State Legislature to enact on the matter of 'luxuries' is, therefore, incontestable since Article 246 of the Constitution grants exclusive power to make laws with respect to any of the matters enumerated in List II to the State Legislature.

18. The function of the Lists in Schedule VII of the Constitution is not to confer a power but to merely demarcate the legislative field and so must, as far as possible, be given a broad and comprehensive interpretation. The doctrine of liberal interpretation has a special application in the ambit of various legislative powers included in the VII Schedule because the allocation of the subjects to the Lists is not by way of

scientific or logical definitions but by way of a mere simplex enumeratio of broad categories (see **Assistant Commr, Urban Land-tax v. Buckingham and Carnatic** ((1970) 1 SCR 268). None of the items in the Lists are to be read in a narrow or restrictive sense. In construing an entry in a list conferring legislative powers, the widest possible construction, according to their ordinary meaning, must be put upon the words used therein (see **Punjab Distilling Industries Ltd. v. CIT** (AIR 1965 SC 1862) and **Balaji v. Income-tax Officer, Akola** (AIR 1962 SC 123)). In **Check-post Officer v. Abdulla** (AIR 1971 SC 792), these principles were re-stated very powerfully. It was unequivocally affirmed that a legislative entry does not merely enunciate powers; it specifies a field of legislation and widest import and significance be attached to it. The power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be

comprehended therein.

19. The impugned amendments to the Act define luxury provided in a hospital under Section 2(fb) as "accommodation for residence for use of amenities and services provided in a hospital, the rate of charges of which, excluding charges of food, medicine and professional services, is one thousand rupees per day or more". Section 4 of the Act further deals with levy and collection of luxury tax and specifies in sub-clause (e) therein that in respect of a hospital, for charges of accommodation for residence for use of amenities and services, tax be levied at the rate of ten percent per room where the gross charges, excluding charges of food, medicine and professional services, is one thousand rupees per day or more. Section 4, which is also one of the impugned amendments, thereafter makes it mandatory that tax can be collected for the luxury provided in any such institutions.

20. The impugned amendments, even on an ex facie examination, would show that what is sought to be taxed as 'luxury' in a hospital is only the accommodation for residence and for use of amenities and services provided, excluding the charges of food, medicine and professional services. However, the provisions do not treat all such accommodations and amenities as 'luxury', but only those, the charges for which is one thousand rupees per day or more. Similarly, for the purpose of levy of tax on such luxury, registration of the hospital is mandated only if such hospital has five or more rooms to be rented for accommodation of which the gross charges excluding food, medicine and professional charges is rupees one thousand or more per room.

21. We see that what is attempted by the Legislature is not to tax the fundamental and inherent services of a hospital like food, medicine and professional charges, but only the luxury of accommodation with

adscitious amenities, and that too, the gross value of which per day is more than rupees one thousand. These amenities and facilities are not intended for recovery, healing or treatment of the patients but are obviously intended for better comfort and pleasure of both the patient and bystander in a room. The Act defines the word 'luxury' to mean a commodity or service that ministers comfort or pleasure. The facilities that are provided in a hospital which are beyond the essential requirements like food, medicine, and professional services and a basic room have been accepted as luxury by the legislature in classifying them as such under the Act through the impugned amendments.

22. The definition of luxury in **Godfrey Phillips** (supra) has been declared by the Hon'ble Supreme Court to mean an activity of indulgence or enjoyment in that which is costly or which is generally recognised as beyond the necessary requirements of an average

number of society and not articles of luxury. Hence, such activity which is intended to provide comfort and pleasure beyond the requirements of the constitutive facilities of a hospital, which are essentially in the nature of food, medicine and professional services and a basic accommodation, would then satisfy the definition and tests of luxury laid down by the Hon'ble supreme Court in **Godfrey Phillips** (supra). The tax levied is not on the article providing luxury but on the experience of such luxury. To employ a simple analogy - tobacco is an article of luxury and smoking is the luxury. In such view of the matter, it is irrefutable that the amendments impugned in these appeals do not seek to tax any article of luxury per se but only the experience of the luxury relating to good accommodation and other amenities not linked directly to therapeutic, sanative or ameliorative constituents or components of the services given to a patient under its care by the hospitals. As we have already noticed above,

the word 'luxury' has been defined in the Act itself and, therefore, that definition would prevail and it is competent on the part of the legislature to give it a wide meaning so as to take in all such experience which ministers comfort or pleasure. This is completely and wholly within the competence of the Legislature to enact upon under Entry 62 of the VII Schedule of the Constitution, the matter being intrinsically and irreparably related to 'luxuries' as obtaining in the said Entry.

23. The final assault, so as to say, that the petitioners make on the impugned amendments is underpinned on the submission that it is irrational and without sufficient purpose. They make the assertions vehemently on the basis that the value of Rupees One thousand, which is treated to be the value that makes accommodation and amenities a 'luxury' is completely irrational, since it is exiguous and very meagre. It is their

assertion that the accommodation and amenities provided for a value of Rupees one thousand and more would not qualify it to be a luxury as is commonly understood. We have examined this submission with some care. The legislature should be presumed to have taken in its grasp all criteria and conditions which are within the scope of its cognizance in terms of the powers conferred on it and must be accepted as having been made for the purpose of achieving certain objectives. Interpretation of these provisions cannot be done mechanically but in an organic manner. We have to adopt an interpretation which does not retard or impede the objectives that are sought to be achieved. The legislature has classified accommodation and other amenities under the umbra of 'luxury' placing a pecuniary threshold of Rupees one thousand, obviously based on the relevant social and economic parameters of the people of the State.

24. As we have already seen above, the term luxury has been defined to exclude all the essential components of healing and care given by the hospital and includes only that which is not essential to such therapeutic care or healing. The legislature obviously thought that such accommodation and amenities beyond the pecuniary limit of Rupees one thousand can be classified as luxury and it is not something that the courts can interfere with merely because the perception which it holds, even it does, that such pecuniary limits are too low in order to classify as a luxury. We have to be aware of the fact that the legislature legislates for all the people of the State. It is intended to cater to all the classes in the socio-economic and cultural categories of people and it should be presumed that such legislation has been made taking into account all the relevant criterion including the economic one so as to cater not to a particular class but the entire citizenry. Legislation stems from the

experience of the evils and should not, therefore, be impeded by the particular beliefs or opinion that certain classes of people would hold. The wisdom of legislature has to be respected as being for the good of the citizenry at large and not to the sentiments of a few. The power given under the Constitution to legislate is large and wide and must be construed as such. The famous words of Justice Holmes in **Bain Peanut Co. v. Pinson** (282 US 499) is to be remembered that “the machinery of government would not work if it were not allowed a little play in its joints”. The duty of the court is only to interpret the provisions of the Constitution in a liberal spirit and to achieve the purposes and ideals set out in the Statute. As changes come in political and social life, the legislature is competent to adopt and evolve the Statutes in such a manner so as to answer such changes. Even though the powers granted do not change, the manner of its exercise would always depend upon the

evolving socio- economic and political scenario but emotions, sentiments, unfounded suspicions, wild apprehensions and imaginary threats would obtain no place while assessing the validity of such legislation. We have no doubt that the legislature has taken into consideration various criterion like the experience over the time, the mischief that is sought to be redressed, the requirements that are sought to be achieved and the purpose for which a tax is imposed. The classification of such accommodation and amenities as 'luxury', if it costs Rupees one thousand or more per day, is, therefore, made by the legislature for constitutionally sound principles and cannot, therefore, be obtruded by this Court in exercise of its powers under Article 226 of the Constitution of India. The legislature must surely be given the credit of being aware of the developments on the subject from time to time and be credited with the capacity to control and exercise the purposes and

requirements for which the power was committed to it under the Constitution. This is what is recognised as the doctrine of 'generic interpretation' meaning the entitlement to execute the power, with respect to new developments of the same subject that arise from time to time, under the control of the Authority to which the power is vested.

25. In view of the above and for the reasons that we have already stated in this judgment, we hold that the impugned amendments to the Act have been enacted by the legislature within its competence and therefore, is intra vires of the Constitution of India.

For these, the writ appeals fail and they are dismissed. In the circumstances of the case, there will be no order as to costs.

Thottathil B.Radhakrishnan, Judge

Devan Ramachandran, Judge