
(1963) 10 KL CK 0012
In the High Court Of Kerala
Case No : O.P. No. 745 of 1963

Antony

APPELLANT

Vs

Excise Commissioner and Others

RESPONDENT

Date of Decision : 24-10-1963

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 245, 245(1)
Government of India Act, 1935 — Section 143

Citation : (1964) KLJ 413

Hon'ble Judges : C.A. Vaidialingam, J

Bench : Single Bench

Advocate : K. Raghavan Nair, for the Appellant; V.P.G. Nambiar Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

Vaidialingam, J.—In this writ petition, Mr. K. Raghavan Nair, learned counsel for the petitioner, seeks the issue of a writ of mandamus directing the respondents, not to interfere with the petitioner's trade in the retail sale of intoxicating liquor for want of a licence issued by the first respondent. The Excise Commissioner, Board of Revenue, Trivandrum, the Assistant Excise Commissioner, Ernakulam, and the State of Kerala, represented by the Chief Secretary to the Government, Trivandrum, are respondents 1 to 3 respectively in this writ petition. The petitioner is the proprietor of Hotel Airlines, Ernakulam. According to him, he has been conducting a bar for the retail sale of foreign and Indian made liquor from 1-4-1962, on the basis of a licence granted by the Excise Commissioner, Ext. P. 1 u/s 15 of the Cochin Abkari Act, Act I of 1077—hereinafter referred to as the Act—and the rules framed thereunder. The petitioner further states that on 30-3-1963, he approached the 2nd respondent for renewal of the licence granted under Ext. P. 1 for the year 1963-64; but he was informed that a licence will be issued only if he pays a sum of Rs. 3000/- fixed by the Government as fees for the issue of a licence for retail sale of liquors. According to the petitioner, the said levy is unconstitutional, as it is in violation of the petitioner's fundamental

right under Art. 19 (1) (g) of the Constitution. The amount which is levied as fees, it is alleged, is sought to be collected without absolutely any service being rendered by the State in connection with the petitioner's trade. The petitioner also avers that Section 15 of the Act has to be struck down as it gives no indication whatsoever as to how the licence fees collected by the Government are to be expended for the benefit of the licence that is being issued to the petitioner. The petitioner further avers that the imposition, under the notification, relied on by the Government of a sum of Rs. 3000/- in respect of the petitioner's trade as licence fee, and the levy of a comparatively small amount in respect of licences to be taken by private clubs, amount to discrimination, and violates Article 14, and there is absolutely no reasonable classification, having any relation to the object of the legislation. The petitioner also avers that if any imposition as licence fee is to be made as against him, it cannot, in any event, exceed the amount which private clubs have to pay, namely Rs. 150/- for the same purpose.

2. In the original counter-affidavit filed by the State on 1st July 1963, the Government accept the position that the petitioner, who is the proprietor of Hotel Airlines, was holding foreign liquor 3 Hotel (Restaurant) Licence No. 6/62-63, for the financial year 1962-63; i.e. the year beginning from 1-4-1962 and ending with 31-3-1963. The State avers that the petitioner has ceased to be a licensee with effect from 1-4-1963, because he has not taken out a fresh licence for the current year. According to the state, the licence, that had been issued to the petitioner for the year 1962-63 namely Ext. P. 1, is not u/s 15 of the Act, as alleged by the petitioner, but really under Sections 10, 24 and 29 of the Act. The respondents also take up the position that the petitioner has not approached the 2nd respondent for renewal of his licence for the current year.

3. The State also accepts the position that it is a fact that the annual fee for a licence to sell liquor in a hotel (restaurant) has been raised from Rs. 2000/- to Rs. 3000/- in G.O.M.S. 253/63/Rev. dated 25th March 1963, a copy of which notification has been filed as Ext. R1 in these proceedings. The increase in the fees, according to the State, has not been confined only to licences that are issued to persons like the petitioner; but there has been an increase even in respect of other licences issued under the Act in respect of foreign liquor, namely Foreign Liquor Wholesale Licence and Foreign Liquor Club Licence. The State controverts the stand taken by the petitioner that Section 15 of the Act is void, and that the levy of Rs. 3000/- as licence fees is unconstitutional. On the other hand, according to the State, an examination of the various provisions of the Act, will show that the purpose of the Act is primarily to secure Abkari revenue, though under some of the sections, control of the trade in liquor and intoxicating drugs is also exercised.

4. The State takes up the definite position, after a reference to Sections 17(g) and 18(d) of the Act, that the fee that was being levied and which the petitioner has to pay for the current year, if he is to renew his licence, is in fact, and is

intended to be "a tax on the right to sell liquor". The State again repeats the stand to the effect that the licence fee, which is impugned by the petitioner in these proceedings, is only again a tax levied under the Act; and, inasmuch as such an impost is authorised by the Legislature, the fact that it is called a licence fee, cannot either affect its validity or legality, on the ground that it is a licence fee sought to be collected without rendering any service to the trade or business.

5. Again the State avers that the duty, which is collected under the Act, in the form of a fee u/s 18(d) of the Act, is not a fee for services rendered. The State also relies upon Section 17 of the Act as conferring a right on the Government to collect such duty as may be prescribed. The State also relies upon Section 29 of the Act, whereunder the Government have been given power to make rules for the purpose of carrying out the provisions of the Act. This power, according to the State, confers a right on the Government to levy tax and to make the necessary changes in the rate of the duty from time to time.

6. The respondents further aver that from 1953, the rate of fee for Foreign Liquor 3 Hotel (Restaurant) Licence, was Rs. 2000/-. The State also avers that Sections 10, 24 and 29 of the Act, as well as the rules framed thereunder, fully authorise the impost of a tax or duty in connection with the issue of licences for trade in foreign liquor. The State also controverts the stand taken by the petitioner that the levy of the fee violates Article 14 of the Constitution; and it also gives the reasons as to why a lower rate has been fixed for Foreign Liquor 4 Club Licence. The State avers that none of the fundamental rights, guaranteed to the petitioner, has been violated by the levy of the fees in question.

7. In view of the definite stand taken by the State that the levy in question is not a fee for any services rendered or claimed to be rendered, but a tax, the petitioner has filed a reply affidavit on 16-7-1963. The petitioner, in that affidavit contends that even as a levy of tax the impost is illegal, and violates Articles 14, 19 and 265 of the Constitution. The petitioner also takes up the position that Section 29 read with Section 69 of the Act, which authorises the framing of rules by Government levying tax as well as the rules, themselves levying this exorbitant tax, are illegal and void, in as much as essential functions of the Legislature to levy tax have been delegated to the executive. The further contention that has been taken by the petitioner is that, in any event, there is absolutely no guidance furnished in the matter of imposing levies by the Government under their rule-making power.

8. The petitioner has filed a further affidavit in this court on 11th September 1963, wherein he has taken up the contention that the State Legislature is incompetent to levy any tax, on a right to sell intoxicating liquor, and that the levy in question does not come under any of the entries relating to taxation under List II of the Seventh Schedule to the Constitution. He also alleges that the levy will not come under Entry 51 in List II, relating to excise duties on the manufacture of alcoholic liquors for human consumption, as according to him, the levy is not on the goods, but, even according to the Government, on the

right to sell the goods. The petitioner also avers, that if at all, the levy in question, must come under Entry 97 of List I, in which case, the State Legislature is not competent to enact the measure in question. The petitioner also states that if jurisdiction is to be found in the State Legislature to impose the levy, it can only be under Entry 60 of List II, in which case, again, the levy being far in excess of the limit prescribed under Article 276 (2) of the Constitution, is illegal and void.

9. Then the petitioner takes up a very definite stand that even if the Act, which is a pre-Constitution enactment, is immune from attack as transgressing the legislative competence of the State, the rules framed in 1953 and afterwards by the State Government, really amount to levy of tax by amending the Act itself, as will be seen by Section 69 of the Act; and such amendment of the Act, by executive action, after the coming into force of the Constitution, cannot be held to be legal. The only provision, according to the petitioner, which will save such enactments, will be Article 372 of the Constitution; and that Article only provides for the continuance of the existing laws; and any amendments to such laws can be made only by a competent Legislature or other competent authority. The executive Government is certainly not a competent Legislature, and it is also not a competent authority. If that is so, according to the petitioner, the amendment of the Act, by framing the rule in question, is illegal and void; and, in consequence, the levy is also illegal and void. The Petitioner also contends that inasmuch as the State has claimed the impost to be a tax even in that case, the levy as a tax of an amount at a rate higher than the rate existing as on 26-1-1950 is illegal and void. Article 277 specifically provides only for the continuance of the levies existing as on 26-1-1950, and no enhancement of the rates can be made.

10. The State has again filed a further supplementary counter affidavit on 14th October 1963. In that counter affidavit, the State controverts the allegation that the State Legislature is incompetent to levy any tax on a right to sell intoxicating liquors. The State again takes- up the definite stand that "the power of the State Legislature to levy the tax in question in this case can be traced to Entry 51, 60 and 62 in List II of the Constitution of India and also to Entry 8 of the same List". The State also avers that the tax, in this case, is a tax in relation to the goods and therefore it partakes of the nature of an excise duty which a State Legislature is entitled to levy under Entry 51 of List II. According to the State, Entry 97 of List I, has absolutely no application to the levy in question, and the levy is also not violative of Article 276(2) of the Constitution.

11. Pausing here for a minute, if according to the State, the levy in question in 1963, is under Entry 60 of List II, then inasmuch as the levy in the sum of Rs. 3000/- is far in excess of the amount specified in Article 276 (2), in my view the levy will have to be struck down on that short ground. But, the State also relies upon Entries 51 and 62 of List II of the Seventh Schedule.

12. The respondents also take up the position that the Legislative competence of

the Act, passed in 1077 by a Sovereign Legislature, cannot be examined in the light of the distribution of legislative power effected by the Lists in the Seventh Schedule to the Constitution. The State further elaborates the contention as to how the particular levy can be sustained under Entries 51, 60 and 62 of List II. The State also further avers that if this court comes to the conclusion that there is no power in the State, after the Constitution to impose a levy of this type, by virtue of Articles 277 and 372 of the Constitution, then, in that case, the levy as it stood at the commencement of the Constitution, is entitled to be continued. The State also avers that the petitioner has not objected to the payment of the levy, as it stood prior to the amendment effected in 1963.

13. From what is stated above, it will be seen that according to the petitioner, the levy is illegal and void inasmuch as it is a fee collected without any services being rendered by the State. The petitioner also alleges that the State Legislature has no competency to levy the impost in question, even assuming that it is a tax. The petitioner also takes up the stand that essential powers of legislation have been delegated to the executive.

14. Apart from all these contentions, the more serious attack, so far as I could see, against the levy in question, is that by enacting the rule levying the impost in 1963, the executive has amended the Act and levied tax, which it has no jurisdiction to do, after the coming into force of the Constitution. Any levy of tax by amendment of the Act after the Constitution, can only be by a competent Legislature, or by a competent authority, as provided in Article 372 (1). In fact, the petitioner also takes up the contention that even the State Legislature has no competence to pass a measure levying the impost in question, under any of the entries in List II of the Seventh Schedule. According to the State, the State Legislature is competent to levy this impost under Entries 51, 60 and 62 of List II, read with Entry 8 of the same list, in Schedule VII. The State has also taken up the position that there is no excessive delegation of any essential functions of the Legislature, and by virtue of the provisions contained in the Act itself, the Government have got full powers to impose the levy in question by enacting a rule which, no doubt, may have the effect of amending the statute itself; and being a pre-Constitution statute, the competency of the then Sovereign Legislature cannot be decided by the distribution of powers under the various lists in the Seventh Schedule.

15. In my view, the contentions raised regarding the competency of the State Legislature to levy the impost in question under Entries 51, 60 or 62 as well as the further question as to whether there has been an excessive delegation of legislative functions to the executive, without the executive furnishing any guidance or principles, as well as the jurisdiction of the delegated authority to levy the tax or fees, at any rate that it decides upon, will all arise for consideration, only if the State Legislature has imposed the levy in question by an appropriate law after the coming into force of the Constitution. Admittedly, in this case, the State Legislature has not promulgated the rule in question, on the

basis of which the tax is sought to be levied and collected. Even according to the State, the rule has been framed only by the Government by the issue of the notification, Ext, R1. The State Government also does not controvert the position that the rules framed by the Government under the Act, form part of the Act itself by virtue of Section 69 of the Act. In such a case, in my view, the action of the executive in framing the rule in question really amounts to an amendment of the Act. See also *State of Kerala and Others Vs. P.J. Joseph*, . Therefore the main question that arises for consideration is as to whether the executive authority, after the coming into force of the Constitution, has got competency and jurisdiction to amend the Act and levy tax notwithstanding the fact that it is a Pre-Constitution Act and there is a specific provision in the said Act itself conferring a power on the executive to so amend the Act. In the view that I take regarding this aspect, I do not think it necessary to deal with the various other contentions that have been taken by the learned counsel for the petitioner, as well as by the learned Advocate General for the State, and I do not express any opinion on those contentions.

16. But in this case inasmuch as the impost is claimed by the State to be a tax and not as a Fee, I will assume, for the purposes of this writ petition, that the levy is a tax. Because if the levy is a fee, various other questions will have to be considered in the light of the various decisions of the Supreme Court, for example, those reported in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, and *H.H. Sudhundra Thirtha Swamiar Vs. Commissioner For Hindu Religious and Charitable Endowments, Mysore*, . If the competency of the Legislature under Entry 51 of List II of the Seventh Schedule is to be considered, then the principles laid down by the decision of the Supreme Court reported in *Chhotabhai Jethabhai Patel and Co. Vs. The Union of India and Another*, , as also in its recent judgment in *Special Reference No. 1/1962*, as to what is meant by a duty of excise, will have to be adverted to. But inasmuch as I am considering only the limited question regarding the competency of the executive to amend the Act after 26-1-1950, it may not even be necessary to deal very elaborately with the scheme of the Act or the rules framed thereunder, excepting only to refer to a few sections, which will have a bearing on the point which is being discussed below.

17. The Act itself, which is of 1077 (M. E.) has been enacted for the purpose of consolidating and amending the law relating to the import, export, transport, manufacture, sale and possession of intoxicating liquor and of intoxicating drugs in the Cochin State, Chapter II deals with Establishment and Control, and Chapter III deals with Import, Export and Transport of liquor or of intoxicating drugs except in accordance with the provisions contained therein. Similarly Chapter IV relates to the manufacture, possession and sale of liquor or intoxicating drugs except in the manner provided therein. Chapter V relates to the levy of duty on liquor and intoxicating drugs. Section 17 therein authorises the Government to levy a duty on the various transactions referred to in clauses (a) to (g) therein. Section 18 again, provides for the duty being levied in one or

more of the ways indicated in clauses (a) to (f) thereof. Chapter VI deals with grant of licences Chapter VII deals with general provisions, and Section 29 is to be found in this chapter. u/s 29(I) the Government is authorised to make rules for the purpose of carrying out the provisions of the Act. Sub-section (2) thereof gives power again, to the Government to make rules in respect of the various matters provided for in clauses (a) to (q) therein. The rule in question has been framed under Sections 10, 24 and 29 of the Act.

17. Section 69 occurring in Chapter X, provides for the rules made and notifications issued under the Act, being made and issued by publication in the Gazette. It also provides that "all such rules and notifications shall thereupon have the force of law and be read as part of this Act and may in like manner be varied, suspended or annulled." The above extract will clearly show that the rules framed by the Government, u/s 29, have the force of law and they also become part of the Act. That means, the moment a rule is framed, it becomes part of the Act itself. Section 69 also makes provision for the Rules being varied, suspended or annulled. Therefore, it will be seen that every time a rule is made, it becomes part of the Act, and every time a rule is amended or modified or annulled, it will amount to an amendment of the statute itself. No doubt, such a power to amend the statute itself has been given to the executive u/s 69 of the Act. The question that arises for consideration will be whether such a power will survive after the coming into force of the Constitution.

18. It is not clear from the records as to what was the rate of duty that was being levied in respect of the licence held by the petitioner, on the date of the coming into force of the Constitution, namely 26-1-1950. But it will be seen that the Government issued a notification dated 17th January 1953 and published in the Gazette on the same date, by virtue of the powers conferred on them under Sections 10, 24 and 29 of the Act. The notification itself states that they are the revised rules regarding the sale etc., of foreign liquors. That notification also purports to be in supersession of an earlier Government notification dated 2nd June 1949. Probably the notification of 2nd June 1949 may give an indication as to the duty that was payable at the time of coming into force of the Constitution. In fact, the notification of 17th January 1953 clearly states that the rules framed thereunder will come into force from 1st April 1953; and the rules deal with the gallonage fee, etc., and the issue of licences for the sale of foreign liquor.

19. In respect of Foreign Liquor 3 Hotel (Restaurant) Licence, which was issued to the petitioner under Ext. P. 1, for the year 1962-63. it will be seen that under rule 13 (3) of the Rules framed under this notification, the annual licence fee was fixed in the sum of Rs. 2000/-. in fact, according to the State, the petitioner paid the sum of Rs. 2000/- provided for in this rule, and obtained the licence for 1962-63 under Ext. P.1. This levy of the annual fee of Rs. 2000/- in respect of such a licence, has been enhanced by the Government notification G.O.M.S. 253/63/Rev. dated 25th March 1963, to Rs. 3000/-. The said order has also been issued by the Government, as will be seen from Ext. R1 under Sections 10, 24

and 29 of the Act. I have already indicated that it is under those Sections that the rules were framed fixing the sum of Rs. 2000/- as licence fee even under the notification dated 17th January 1953. It is this notification that is under attack in this writ petition.

20. According to Mr. Raghavan Nair, learned counsel for the petitioner, if the levy is a tax, then the levy can only be continued at the same rate as on 26-1-1950, under Article 277 of the Constitution, and the State has no jurisdiction to enhance the levy, as that will violate Article 277. The learned counsel also relies upon the decision of the Supreme Court reported in Rama Krishna Ramanath Vs. The Janpad Sabha, Gondia, regarding the interpretation of the expression "continue to be levied" occurring in Section 143 of the Government of India Act, 1935, as also in Article 277 of the Constitution of India. Based upon this decision of the Supreme Court, the learned counsel for the petitioner urged that no increase can be effected in the rate of tax that was levied on 26-1-1950.

21. Mr. Raghavan Nair, learned counsel for the petitioner also urged that Article 372 (1) of the Constitution, which preserves the pre-Constitution statutes in the manner provided therein, clearly shows that the pre-Constitution enactments will continue to be in force "subject to the other provisions of this Constitution." The learned counsel also urged that, in view of the decision of the Supreme Court in Civil Appeals Nos. 295 to 298/62, it will not be open to his client to urge that a pre-Constitution law made by a competent authority is void after the date of the Constitution, on the ground that the authority has lost its legislative competence under the Constitution. But the learned counsel urged that having due regard to the scheme of the Constitution regarding the distribution of legislative powers under Article 245, any Act amending a statute, and imposing a tax can only be by the State Legislature. In that sense, the provision contained in Section 69 read with Section 29 of the Act, giving jurisdiction to the executive to amend an Act and levy tax is void after the coming into force of the Constitution. The learned counsel also urged that in any event, a pre-Constitution enactment, as provided in Article 372(1), will continue in force until it is altered or repealed or amended by a competent Legislature or other competent authority. In this case, the authority that has amended the Act, by framing the rules in 1963, is certainly not the competent legislature of the State. The said amendment has not also been effected by "other competent authority", as to who the "other competent authority" may be, the learned counsel urged, there is sufficient indication in Arts. 123, 213, 240, 249, 250 and 252 of the Constitution. The amendment has not been made by any of the authorities provided in those Articles. On the other hand, the learned Advocate General urged that the pre-Constitution enactment in this case, cannot be challenged on the ground that the Sovereign Legislature which passed it has lost its legislative competence under the Constitution. The said Act itself clearly gives jurisdiction to the Government u/s 29 of the Act to frame the necessary rules. u/s 69 of the Act, it is also provided that those rules are to be treated as part of the Act. Therefore, according to the learned advocate General, the machinery to amend the rules, and, in turn, the Act, is provided in

the statute itself; and if the statute cannot be challenged, the exercise of the power by the Government, even after 26-1-1950 cannot also be equally challenged.

22. I find considerable difficulty in accepting this contention of the learned Advocate General. No doubt, it is not open to the petitioner to challenge the Act, which is pre-Constitution Act, on the ground that the authority which passed it, namely the then Sovereign Legislature, has lost its legislative competence under the Constitution. That position is established by the decision of the Supreme Court in Civil Appeal Nos. 295 to 298/62. But Article 372 (1) also clearly provides that the continuance in force of such laws will be "subject to the other provisions of this Constitution." That, in my view, will also take in Articles 245 and 246 of the Constitution. I have already stated that according to the learned Advocate General, the levy is a tax and that it can be sustained under Entries 51, 60 and 62, read with Entry 8 in List II of the Seventh Schedule of the Constitution. If that is so, under Article 246 (3) it is specifically provided, that subject to clauses (1) and (2) the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II, in the Seventh Schedule.

23. Acceptance of the contention of the learned Advocate General, that even after the coming into force of the Constitution, it is open to the executive to frame laws or amend any pre-Constitution laws in respect of the various matters enumerated in List II of the Seventh Schedule, will mean that so far as the pre-Constitution enactments are concerned, the State Legislature is completely wiped out of the picture for all time to come. In my view, the scheme of the Constitution does not warrant the acceptance of the stand taken by the State in these proceedings. As pointed out by Subha Rao J., in Civil Appeals 295 to 298/62

....The words "subject to other provisions of the Constitution" mean that if there is an irreconcilable conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency. An Article of the Constitution by its express terms may come into conflict with a pre-Constitution law wholly or in part, the said Article or Articles may also, by necessary implication come into direct conflict with the pre-existing law. It may also be that the combined operation of a series of Articles may bring about a situation making the existence of the pre-existing law incongruous in that situation....

Adopting respectfully the principles laid down by His Lordship in the extract referred to above, in my view, there is an irreconcilable conflict between Section 69 read with Section 29 of the Act and Articles 245 (1) and 246 (3) of the Constitution. If that is so, it follows, from the extract quoted above, that the provisions of the Constitution shall prevail to the extent of the inconsistency. It therefore follows that the provisions of Section 69 read with Section 29 of the Act, giving power to the executive, the State Government to amend the Act and levy tax cannot be exercised after the coming into force of the Constitution, i.e.

26-1-1950. In consequence, it follows, that the exercise of the power under the notification in question, namely, Ext. R1, which really amounts to an amendment of the Act by the executive and levying of a tax is illegal and void.

24. No doubt, the learned Advocate General referred me to the decisions of the Supreme Court reported in *Sardar Inder Singh Vs. The State of Rajasthan*, , *State of Kerala and Others Vs. P.J. Joseph*, and *Bangalore Woollen, Cotton and Silk Mills Co. Ltd., Bangalore Vs. Corporation of the City of Bangalore*, by its Commissioner, Bangalore City, and *Orient Weaving Mills (P) Ltd. Vs. The Union of India (UOI)*, in support of his contention that the amendment of the statute by the executive authority under Ext. R. 1, is legal and valid. I have gone through every one of those decisions; and so far as I could see, the point that now arises for consideration did not arise for decision before their Lordships in any of the said decisions. Therefore, the notification Ext. R. 1, which amounts to amending the Act, by way of levying an additional tax, has to be struck down as illegal and void. The writ petition is allowed to the extent indicated above; and parties will bear their respective costs.