
(1956) 03 MAD CK 0029
In the Madras High Court
Case No : Writ Petition No. 36 of 1954

A.R. Krishna Iyer and Another	Vs	APPELLANT
The State of Madras		RESPONDENT

Date of Decision : 20-03-1956

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : AIR 1956 Mad 480 : (1957) ILR (Mad) 1368 : (1956) 69 LW 427 : (1956) 7 STC 346

Hon'ble Judges : Rajagopalan, J; Rajagopala Ayyangar, J

Bench : Division Bench

Advocate : K.V. Venkatasubramania Aiyar and V.R. Narayanan, for the Appellant; The Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Rajagopalan, J.—The only question that arises for consideration in this application under Article 226 of the Constitution is, whether the

proviso to Section 3(1)(b) of the Madras General Sales Tax Act (IX of 1939) (hereinafter referred to as the Act), offends Article 14 of the

Constitution and is therefore, void and unenforceable against the petitioners.

2. The first petitioner is the lessee of a restaurant, the Canteens Ltd., and he is a "dealer" as denned in the Act, a dealer who sells articles of food

and drink in a restaurant. The second petitioner, the Madras Hotels Association, is an association of similar dealers in articles of food and drink.

3. In the assessment year 1952-1953, the first petitioner was assessed on a turnover of Rs. 94,322-6-3, and under the proviso to Section 3(1)(b)

of the Act, he was assessed to sales tax at the rate of 4 1/2 pies in the rupee on that turnover. The assessment was completed by the assessing

authority, the Deputy Commercial Tax Officer, on 4th September, 1953, and a notice of demand in the prescribed form was issued to the first petitioner to pay the -assessed tax. The first petitioner did not avail himself of the statutory remedies of appeal and revision for which the Act provided. He challenged the validity of the statutory provision under which he was taxed, and he applied under Article 226 of the Constitution for the issue of a writ of certiorari or other appropriate writ to quash the order of assessment.

4. The learned Government Pleader took a preliminary objection to the maintainability of an application under Article 226 of the Constitution in the circumstances of this case. He pointed out that as the first petitioner had statutory remedies open to him provided by the Act itself to have the challenged assessment corrected, this Court should not in exercise of the jurisdiction vested in it under Article 226 of the Constitution issue a writ of certiorari even if the contention of the petitioners was well founded, that the impugned provision under which the first petitioner was taxed was invalid. The learned Government Pleader urged that the validity of the impugned provision need not be investigated at this stage in proceedings initiated by the petitioners under Article 226 of the Constitution. The existence of effective alternative remedies is by itself no bar to the assumption of jurisdiction under Article 226 of the Constitution. Normally, of course, it is a very relevant factor that the Court will take into consideration in deciding whether the jurisdiction undoubtedly vested in the Court under Article 226 of the Constitution, will be exercised in a given case. Whether the discretion should be exercised in favour of the first petitioner is the question.

5. In the present case without availing himself of the statutory right of appeal, the first petitioner has challenged the validity of the taxing provision in an application under Article 226 of the Constitution. None of the statutory tribunals, the assessing authority, the appellate authority, and the further appellate authority, the Appellate Tribunal, all of them creatures of the statute, could have examined the validity of a taxing provision of the Act, which brought them into existence, and the provisions of which Act they have to administer. In such a case, where a person complains that the taxing provision in the statute offends a fundamental right of his guaranteed by the Constitution and is, therefore, void and unenforceable against

him, the discretion of the Court should, in our opinion, be exercised even at an earlier stage, because even at the stages at which an appeal is provided for by the Act, the validity of the impugned provision cannot be adjudicated upon by the statutory tribunals. No doubt in such a case writs of prohibition have been recognised to stand on a different footing, from a case in which the relief asked for is a writ of certiorari. If before the assessment was completed the first petitioner had asked for a writ of prohibition to restrain the assessing authority under the Act from assessing the first petitioner on the basis of a taxing provision, the constitutional validity of which was challenged by the first petitioner, the validity of the taxing provision would certainly have had to be examined by the Court. That the assessment was completed in the case of the first petitioner does not, in the circumstances of this case, make any real difference to the question, should this Court exercise its discretion in favour of examining the validity of the impugned provision and pronouncing upon it at this stage, when the first petitioner has not availed himself of his statutory right of appeal, and his further statutory right of moving this Court in revision u/s 12B of the Act, after the right of appeal to the Appellate Tribunal has been availed of. The preliminary objection fails.

6. The relevant portion of the Act runs thus :-

Section 3. (1) Subject to the provisions of this Act,-

(a) Every dealer shall pay for each year a tax on his total turnover for such year ; and

(b) the tax shall be calculated at the rate of three pies for every rupee in such turnover :

Provided that if and to the extent to which such turnover relates to articles of food and drink sold in a hotel, boarding house or restaurant, the tax

shall be calculated at the rate of four and a half pies for every rupee, if the turnover relating to those articles is not less than twenty-five thousand rupees.

7. Ex facie the impugned statutory provision, there is an apparent discrimination. One class of dealers alone are required to pay a higher tax than

the other dealers. The charge is that the discrimination is irrational and so unconstitutional as it offends the fundamental right of the petitioners to the

equal protection of laws guaranteed by Article 14 of the Constitution. The

defence to that charge is that the validity of the challenged provision can be rested on the principle of reasonable classification.

8. Three lines of classifications run through the impugned provision, the proviso to Section 3(1)(b) of the Act : (1) from the group of dealers is

marked off one class of dealers, the dealers in articles of food and drink; (2) among the dealers in articles of food and drink a further division is

made and dealers in such articles sold in a hotel, boarding house or restaurant are marked off from the other dealers in such articles of food and

drink ; (3) there is a further division among dealers in articles of food and drink sold in hotel, boarding house or restaurant ; (a) those with a total

turnover of Rs. 25,000 and more; (b) those with a turnover of less than Rs: 25,000. When all these three lines of classification converge that group

of dealers is taxed at the higher rate of 4 1/2 pies in the rupee, while the other dealers to whom Section 3(1) of the Act alone applies are required

to pay only the lower or standard rate of 3 pies. It should be more convenient to refer in the rest of this judgment to the statutory class of dealers in

articles of food and drink sold in a hotel, boarding house or restaurant as ""dealers in a restaurant.

9. The proviso to Section 3(1)(b) of the Act was enacted by the Amending Act, Act XV of 1949, that is, before the Constitution came into force.

The Constitution is not retrospective in its operation. None the less the impugned statutory provision has to satisfy the test of equal protection of

laws guaranteed by Article 14 of the Constitution before it can be enforced now against the first petitioner. The initial presumption, of course, is in

favour of the validity of the statutory provision in question. In Metropolitan Casualty Insurance Co. v. Brownell 79 L. Ed. 1070, Stone, J., pointed

out :-

It is a salutary principle of judicial decision, long emphasised and followed by this Court, that the burden of establishing the unconstitutionality of a

statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known

or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the

knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state

of facts reasonably may be conceived to justify it.

10. In our opinion, those principles could well apply in testing the validity of any of the Acts in this country. Even though the Legislature of the

Province of Madras could not have been conscious of the limitation subsequently imposed by Article 14 of the Constitution when the Legislature

enacted the impugned provision in 1949, if the Courts can reasonably conceive of any state of facts, which now exists, when the validity of the

statutory provision is challenged, to justify the classification on which the legislative discrimination could be based, it is the duty of the Court to

uphold the validity of the legislative provision.

11. In *The State of Bombay and Another Vs. F.N. Balsara*, , the Supreme Court laid down some of the principles that should apply in testing the

correctness or otherwise of a claim of reasonable classification. Fazl Ali, J., observed:-

...(4) The principle (of equality) does not take away from the State the power of classifying persons for legitimate purposes. (5) Every classification

is in some degree likely to produce some inequality, and mere production of inequality is not enough. (6) If a law deals equally with members of a

well-defined class, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. (7) While

reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just

relation to the object sought to be attained and the classification cannot be made arbitrarily and without any substantial basis.

12. What we have to see primarily in this case is, whether the impugned taxing provision, the proviso to Section 3(1)(b) of the Act, satisfies the

seventh of the tests mentioned above.

13. We pointed out that there were at least three lines of classifications running through Section 3(1)(b) and the proviso thereto. All the three must

satisfy the test of reasonable classification. Even if one fails to satisfy the test, that would bring the impugned legislative provision within the scope of

the ban imposed by Article 14 of the Constitution.

14. The validity of the first distinction between dealers in articles of food and drink and other dealers was not challenged before us, and we have,

therefore, no need to examine further whether that classification could by itself

satisfy the test we referred to above.

15. Mr. Venkatasubramania Aiyar, learned counsel for the petitioners, urged that neither of the other two classifications bore a reasonable and just

relation to the objects of the Act, and that these classifications were arbitrary and without any substantial basis. Since, in our opinion, the

contention is well-founded with reference to the second of the classifications we have listed, the distinction between dealers in articles of food and

drink sold in a restaurant and other dealers in such articles, that should suffice to deny the validity of the impugned provision, namely, the proviso to

Section 3(1)(b) of the Act. We shall, therefore, refrain from examining the reasonableness or otherwise of the third of the classifications based on

the monetary factor, the limit of Rs. 25,000. We propose not to express any opinion on that question. It is not, therefore, necessary to decide in

these proceedings, whether the principle laid down by the majority of the learned Judges of the Supreme Court of America in *Stewart Dry Goods*

Co. v. Lewis 79 L. Ed. 1054, on which Mr. Venkatasubramania Aiyar relied on to a considerable extent, should be applied to examine the validity

of the proviso to Section 3(1)(b) of the Act.

16. No doubt in America a greater latitude is permissible in classification for purposes of taxation. It is not necessary to tax everything to tax

something. At page 587 of *Willis on Constitutional Law*, the learned author states :-

The Supreme Court permits a wider discretion in classification under the power of taxation, if possible, than it does under the police power. One

reason for this undoubtedly is the urgent need for revenue by the various Governmental agencies. A State does not have to tax everything in order

to tax something. It is allowed to pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably. The

Constitution does not say how cases shall be decided. All it says is that the States shall not deny to any person within their jurisdiction equal

protection of the laws. It does not say when persons are within the jurisdiction of a State nor what are equal laws. As a consequence the Supreme

Court decides cases as it thinks they ought to be decided with no other mandate than one to decide. The Supreme Court has been practical and

has permitted a very wide latitude in classification for taxation.

17. The same principles can well apply in deciding whether a given statutory provision satisfies the test of equal protection of laws guaranteed by

Article 14 of our Constitution. It should be obvious that taxation laws also should stand the test of the equal protection of laws guaranteed by

Article 14 of the Constitution. The seventh of the tests formulated by the Supreme Court in *The State of Bombay and Another Vs. F.N. Balsara*, ,

which we have extracted above, has to be satisfied by the proviso to Section 3(1) (b) of the Act before its validity can be upheld by this Court. Has

that test been satisfied in this case for justifying the distinction between dealers in articles of food and drink who sell such articles in hotels, boarding

houses and restaurants, and other dealers in the same commodities sold elsewhere than in hotels, boarding houses and restaurants, is the real

question.

18. The object of the Act as set out in the preamble is to provide for the levy of a general tax on the sale of goods in the State of Madras. The tax

is on the turnover of a dealer ; the turnover is made up of the individual transactions of sale or purchase. In the present case, we are concerned

only with the turnover of sales. Though the apparent incidence of the tax is on the dealer and on his annual turnover, it has been repeatedly

recognised by the Court that the ultimate economic incidence is on the consumer, the tax payable on the occasion of the sale being reflected in the

prices paid by the consumer when he effects the purchase. Whether it is the apparent or the real incidence of the tax that is the object of the levy

under the Act may not make any reasonable difference in principle to. the question we have to consider, whether there is a reasonable and just

relation between the classification and the object of the Act. A classification which may be reasonable if the object of the legislation, for example, is

to safeguard public health, may not be reasonable under different circumstances, for example, when the object of the Act is to tax the turnover of a

dealer.

19. Even after listening to the full and exhaustive arguments of the learned Government Pleader, we must confess our inability to visualise a just and

reasonable relation between the impugned classification underlying the proviso to Section 3(1)(b) of the Act, and the object of the Act. Dealers in

articles of food and drink with a turnover of Rs. 25,000 and more are divided into

two classes for purposes of taxation, and those that sell such articles in a hotel, boarding house or restaurant have to pay a higher tax. Normally, of course, only articles of food and drink prepared in the kitchen of the restaurant are sold in that restaurant. Even so, articles of food and drink sold in the restaurant are subjected to a higher tax. But the articles prepared by the same dealer and probably in the same kitchen will be subjected to a lower tax if sold in a shop next door or sold from a mobile van, both of which are familiar usages of such dealers in this City. Let us take another example. A dealer who sells cakes and pastries at a shop will pay less. He will pay more by way of tax if he sells the articles in a restaurant attached to or detached from his shop. The normal expectancy of consumption on the premises of the articles sold in a restaurant may not serve as an acceptable basis for the distinction. A daily turnover of about Rs. 70 is enough to attract the higher rate. Aerated water sold at a stall for consumption there will cost less than the same aerated water sold in a restaurant, on the assumption that the consumer ultimately pays.

20. Learned counsel for the petitioners pointed out that retail dealers in oilman stores also sell articles of food and drink, and many of them may have a much larger turnover than the proprietor of a restaurant. The former pays less than the latter. It is no doubt a relevant factor, but even if we confine ourselves to a consideration of the type of articles sold in a restaurant, we are unable to perceive a rational connection between the levy of the tax at a higher rate and the situs of the sales.

21. It is not for instance a tax on avocation. Neither is it a tax on business premises. Considerations of control of public health are not germane to the levy or the incidence of the tax. It is a tax on sales, i.e., on the total turnover of the sales. What then is the reasonable and just relation of the sale in a restaurant to the levy of the tax, which factor is absent when identical articles of food and drink are sold elsewhere, for example, in shops and in mobile canteens.

22. The learned Government Pleader urged that we could take note of some features of trade in restaurants, which he contended would sustain his claim of reasonable classification and a just relation thereof to the object of the Act. The learned Government Pleader pleaded that the turnover of

sales of articles of food and drink was normally higher in a restaurant than at other places where such articles are sold. That contention may not be quite correct. The Act itself provides for three classes of restaurants : (i) those with a turnover of less than Rs. 10,000 which are exempt from the levy of sales tax ; (ii) those with a turnover between Rs. 10,000 and Rs. 25,000 which pay at the standard rate of 3 pies ; (iii) those with a turnover of Rs. 25,000 and more which pay the higher rate. It should be difficult to sustain a claim that in each of these classes the position of the proprietor of a restaurant compares favourably with that of any other dealer in articles of food and drink. As we pointed out earlier, even if we take into account only the comparatively limited types of the articles of food and drink in the sale of which restaurants specialise, and even if we further limit the consideration to dealers with a turnover of Rs. 25,000 and more, there appears to be no rational basis, consistent with the scheme of the Act, for the statutory discrimination against keepers of hotels, restaurants and boarding houses, which marks them out for a higher rate of tax, under the proviso to Section 3(1)(b).

23. The learned Government Pleader urged next that restaurants specialise only in the sale of articles of food and drink, and they are therefore, different from other dealers. That is no real answer to the charge of discrimination as between the two classes even in the limited group of dealers in articles of food and drink. A further basis for classification that the learned Government Pleader suggested was that, because of the facilities for service available in hotels and restaurants, those dealers were in a position to charge higher prices for articles of food and drink they sold than other dealers in articles of food and drink. It is not enough to seek a basis for classification. That classification must have a reasonable and just relation to the object of the Act, which, we have again to point out, is really to tax the turnover of sales. That reasonable and just relation we are unable to discover in the impugned classification.

24. In our opinion, the distinction between two classes of dealers in articles of food and drink with an annual turnover of Rs. 25,000 and more, i.e., (i) dealers in such articles of food and drink sold in hotels, boarding houses and restaurants ; (ii) dealers in such articles of food and drink sold elsewhere, has no reasonable or just relation to the object of the Act, which is to

tax the turnover of the sales of a dealer. The apparent discrimination, which results in one class of such dealers being singled out for levy of tax at a higher rate, has not been explained by any classification with a reasonable basis, having a just and reasonable relation to the object of the Act. We are of opinion that the proviso to Section 3(1)(b) of the Act offends Article 14 of the Constitution and is, therefore, void and unenforceable against the first petitioner.

25. Since the assessment of the first petitioner was on the basis of a taxing provision, which, in our opinion, is invalid, the assessment will have to be set aside by the issue of a writ of certiorari. He could have been taxed u/s 3(1)(b) of this Act, but not under the proviso to Section 3(1)(b).

26. The petition is allowed. The rule is made absolute. The petitioners will be entitled to their costs. Counsel's fee Rs. 100.