

(1965) 08 KL CK 0001

In the High Court Of Kerala

Case No : W.A. No's. 134, 206 to 226 and 230 of 1964

Corporation of Calicut

APPELLANT

Vs

Jothi Timber Mart

RESPONDENT

Date of Decision : 31-08-1965

Acts Referred:

Constitution of India, 1950 — Article 14, 301, 303, 304, 304(b)

Citation : (1966) KLJ 80

Hon'ble Judges : M.S. Menon, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : V.R. Krishna Iyer and K. Raghavan Nair, for the Appellant; V.K.K. Menon, M. Ramachandran, P.S. Padmanabha Iyer, P.K. Shamsuddin, E. Ibrahimkutty, B. Moosakutty, K.V. Suryanarayana Iyer, T.L. Viswanatha Iyer, C.J. Balakrishnan and N.N. Venkitachalam, for the Respondent

Final Decision : Allowed

Judgement

M.S. Menon, C.J.—These appeals arise from a common order and raise a common question for decision. The question relates to the validity of Section 126 of the Calicut City Municipal Act, 1961, in the light of entry 52 in List II of the Seventh Schedule to the Constitution. The judgment under appeal has held that the said section is ultra vires of the said entry and it is the correctness of that decision that is challenged in these appeals by the Corporation of Calicut. Entry 52 reads as follows:

Taxes on the entry of goods into a local area for consumption, use or sale therein.

Sub-section (1) of Section 126 which alone is material for the decision of these appeals is in the following terms:

If the council by a resolution determines that a tax shall be levied on timber brought into the city, such tax shall be levied at such rates, not exceeding five rupees per ton, and in such manner as may be determined by the council:

Provided that no tax shall be levied on any timber brought into the city in the

course of transit to any place outside the city and directly removed out of the city by rail, road or water.

The contention of the appellant is that the timber tax authorised by the sub-section is well within the taxing power conferred by the entry.

2. The tax referred to in entry 52, when levied by a local authority, is commonly known as octroi. It is a tax on goods brought into a local area for consumption, use or sale therein; a tax which cannot be levied on goods merely passing through that area.

3. The Taxation Enquiry Commission, 1953-54, has dealt with octroi and terminal taxes in Volume III of their Report, pages 400--407. They pointed out that octroi has assumed growing importance in recent years, that the number of local bodies which levy it has been steadily on the increase, that more and more articles have tended to be included in octroi schedules, and that the rates themselves have been stepped up from time to time; and indicated the constitutional position of the taxes on goods as follows:

TAXES ON GOODS

Leviable by the State (and local bodies)

Leviable by the Union Government.

(1) Taxes on the entry of goods into a local area for consumption; use or sale therein (popularly known as octroi when levied by local bodies and "cess" when levied by the State)?Entry 52 of List II

(2) Taxes on goods carried by road or inland water-ways (Entry 54 of List II)

(3) Terminal taxes on goods carried by railway, sea or air.

(4) Taxes on railway freights

(Entry 89 of List I).

4. The Commission also emphasised the requirement peculiar to octroi that for octroi to become leviable, the goods must not only enter the area but must be for the purpose of consumption, use or sale therein, and said:

Usually, this requirement is sought to be satisfied by (a) the ab initio exemption of the goods which merely pass through the area, whether the exit is immediate or after an interval, or (b) by the subsequent refund of the tax collected on such goods. Exemptions and refunds, therefore, are the distinguishing features of the octroi system.

This part of the Report was quoted with approval by the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, a case which affords considerable assistance in dealing with the question involved in these appeals.

5. The enacting part of sub-section (1) of Section 126 contains no restriction. It does not say that the tax is only on timber brought into the city for consumption, use or sale therein. If there was no proviso, we would have been inclined to construe the words "brought into the city" as "brought into the city for consumption, use or sale therein" following the rule of construction adopted in AIR 1941 72 (Federal Court) . In that case the word "Property" occurring in the Hindu Women's Rights to Property Act, 1937, came up for consideration. Gwyer C.J. said:

No doubt if the Act does affect agricultural land in the Governor's Provinces, it was beyond the competence of the legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land.

6. The proviso, however, dispenses with the necessity of construing the enacting part in that fashion. So far as we can see, there are only four purposes for which timber will ever enter the area of the Corporation. They are:

- (1) for consumption in the city;
- (2) for use in the city;
- (3) for sale in the city; and
- (4) for transit through the city.

All the four purposes are within the enacting part of the section and what the proviso has done is to perform the usual office of a proviso--the attenuation of the ambit of a section--and eliminate the fourth of those purposes. The elimination brings the provision within the taxing power conferred by entry 52, and thereby ensures its constitutional strength and validity. The sub-section as curtailed by the proviso, in effect, will read as follows:

If the council by a resolution determines that a tax shall be levied on timber brought into the city for consumption, use or sale therein, such tax shall be levied at such rates not exceeding five rupees per ton, and in such manner as may be determined by the council.

7. Our attention was drawn to the decision of the House of Lords in West Derby

Union v. Metropolitan Life Assurance Society (66 L.J. Ch. 726) affirming the decision of the Court of Appeal in 66 L.J. Ch. 199. The section that arose for consideration in that case was Section 2 of the Power Law Loans Act, 1871. The Proviso to that section read as follows:

Provided that in the event of any loan outstanding at the time of the passing of this Act, no such redemption shall take place without the consent of the person or persons to whom the loan shall be owing.

On the basis of that proviso it was contended that in the case of loans contracted after the passing of the Act, redemption was possible "without the consent of the person or persons to whom the loan shall be owing."

8. The contention was repelled and the reason is not far to seek. The enacting part of Section 2 only conferred a power of borrowing at lower rates of interest for the redemption of loans outstanding at higher rates of interest. It did not cast any obligation whatsoever on the lenders to accept a redemption against their wishes and the terms of the borrowing.

9. The provision before us is entirely different. The enacting part of the subsection is couched in the widest terms and enables taxation of all timber brought into the city for all purposes, namely, for any or all of the four purposes mentioned in paragraph 7 above. And what the proviso does is not to add anything to the enacting part but to subtract therefrom one of the purposes which, if present, would not have been in consonance with the taxing power conferred by entry 52.

10. We should not also ignore the fact that there is a presumption of constitutionality. In Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, Fazl Ali J. said:

It is the accepted doctrine of the American Courts, which I consider to be well-founded on principle that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

The observations of Brougham L.C. in Langston v. Langston (1834-2 Cl. & F. 243) are that when two modes of reading are possible, "where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of commonsense) that you should rather lean towards that construction which preserves, than towards that which destroys."

11. It was submitted on behalf of the traders that Section 126 should not be upheld in view of article 301 of the Constitution. That article occurs in Part XIII of the Constitution and provides that subject to the other provisions of that part, trade, commerce and intercourse throughout the territory of India shall be free. In view of the decision of the Supreme Court in Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, it has now to be taken as settled law that tax laws are not outside the purview of Part XIII of the Constitution; and it may be that a

tax under entry 52 on the entry of goods into a local area for consumption, use or sale therein is a tax on the entry or movement of goods into one part of the country from another. If such is the case, the tax will come not merely within the sweep of article 301 but also of articles 304 (b) of the Constitution. That is why Basu says in his commentary:

Once the theory that Art. 301 is directed exclusively against laws made under the Entries relating to trade and commerce disappears and the octroi duty cannot be supported as regulatory and compensatory in nature, it would *prima facie* hit Art. 301 and, hence, it would be advisable to obtain the President's sanction. (Constitution of India, Volume 4, Fourth Edition, Page 490).

12. The relevant portion of article 304 reads as follows:

Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law--

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

We entertain no doubt that article 304 (b) justifies an octroi duty like the one before us and that a previous sanction or subsequent assent by the President will save the levy. There was no previous sanction by the President in this case. But there was a subsequent assent by him, on the 13th September 1961. That such subsequent assent will suffice is clear from Art. 255(c) of the Constitution and the following passage in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, :

It is of course true that if the previous sanction of the President is not obtained that infirmity may be cured by adopting the course authorised by Art. 255.

13. In *Transport Corporation of India Vs. Chairman, Municipal Council, Municipal Corporation and Another*, , the High Court of Madhya Pradesh has held that an octroi duty like the one before us does not attract article 301 at all. The correctness of the decision is doubted by Basu (Constitution of India, Volume 4, Fourth Edition, Page 489). In the view we have taken it is unnecessary for us to decide whether that decision is justified or not or the further contention urged on behalf of the Corporation that Article 301 will not affect the levy as it is essentially of a compensatory character.

14. The last submission on behalf of the traders was that article 14 of the Constitution has been violated. We were unable to see in Section 126 any denial of the equality before the law or the equal protection of the laws embodied in that article. It was then suggested that article 14 has been violated if not by Section 126 at least by some of the bye-laws framed under sub-section (6) of

Section 126 and sub-sections (1) and (3) of Section 369 of the Act. The bye-laws were published subsequent to the filing of the original petitions from which these appeals arise on 28-1-1964; and it was agreed that the Corporation will scrutinise the bye-laws afresh and amend them, if necessary. The question of the validity or otherwise of the bye-laws, therefore, does not arise for consideration and is not considered in this judgment.

15. There was a suggestion that the resolution of the council determining that a tax shall be levied on timber was not in order. There is nothing on record to support the suggestion and we see no warrant for the same.

16. Before closing this judgment we may point out why the judgment of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, , speaks of sale in the local area for the purpose of use or consumption in that area. That was because the Act concerned, as it stood at the relevant time, contained only the words "consumption and use" and the word "sale" had to be inferred as concomitant of the words "consumption and use". In entry 52 all the three words "consumption", "use" and "sale" occur, and as a result a sale, though it should be within the local area, need not necessarily be for the purpose of consumption or use therein. In the light of what is stated above the appeals have to be allowed and we do so. In the circumstances of the case, however, there will be no order as to costs.