

(1972) 12 KAR CK 0004

In the Karnataka High Court

Case No : Writ Petition No's. 3964 and 3996 of 1970

D. Cawasji and Co.

APPELLANT

Vs

The State of Mysore and Another

RESPONDENT

Date of Decision : 06-12-1972

Acts Referred:

Constitution of India, 1950 — Article 19 (1) (f), 19 (1) (g), 226, 301, 304
Mysore Sales Tax Act, 1957 — Section 5 (3) (a)

Citation : (1973) 31 STC 445

Hon'ble Judges : V.S. Malimath, J;G.K. Govinda Bhat, J

Bench : Division Bench

Advocate : Kohla and A. Jagannatha Shetty, for the Appellant; R.N. Byra Reddy, Advocate-General and G.V. Shantaraj, High Court Government Pleader, for the Respondent

Judgement

Govinda Bhat, J.—In these writ petitions preferred under article 226 of the Constitution, the petitioners have challenged the constitutional validity of the Mysore Sales Tax (Amendment) Act, 1969 (Mysore Act 17 of 1969), hereinafter called the impugned Act. They have prayed for a mandamus directing the respondents to refund the amounts collected by way Of sales tax on duty of excise, education cess and health cess, on sales of arrack effected by the State to the petitioners between 1st July, 1966, and 30th June, 1967. The impugned Act by amendment of serial No. 39 in the Second Schedule to the Mysore Sales Tax Act, 1957 (Mysore Act 25 of 1957) (hereinafter called the Act) enhanced the rate of sales tax on "country liquor other than toddy" from "six and a half per cent." to "forty-five per cent." with retrospective effect to operate from the first day of April, 1966. It further validated the excess collection of tax made by the State.

2. In order to appreciate the contentions urged, it is necessary to set out briefly the relevant facts leading to the enactment of the impugned Act by the State Legislature.

3. Sales tax is collected on the sale of "country liquor other than toddy" by virtue of the power conferred on the State to make such collection u/s 5(3)(a), proviso, read with section 19 of the Act. The levy of sales tax on "country liquor other than toddy" is made by section 5(3)(a) of the Act on the first or the earliest of successive dealers in the State who is liable to tax at the rate specified under column 3 corresponding to serial No. 39 of the Second Schedule. By virtue of the first proviso to section 5(3)(a) of the Act, the State Government is deemed to be the first dealer in the State in respect of sale of any of the goods mentioned in serial Nos. 38, 39 and 40 of the Second Schedule and is entitled to collect tax u/s 19.

4. The State Government has the monopoly of first sale of arrack (which is "country liquor other than toddy"). Manufacture of arrack by distillation is done in the State under State control and the entire quantity manufactured by distillers in the State is sold to the State Government which in its turn supplies arrack to bonded depots in taluks. Under the Mysore Excise Act, arrack is liable to excise duty at the rates prescribed by the Government. During the relevant period, that is, from 1st April, 1966, to 30th June, 1969, excise duty on arrack was fixed at Rs. 2.75 a litre. The State does not collect excise duty from the distillers. From the distillery arrack is transported to bonded depots. The State collects excise duty together with cesses thereon from the licensees before they take delivery. The exclusive privilege of retail vending of arrack for each excise year which commences on the first day of July and ends on 30th June of the following year, is sold by the Government by auction. The successful bidders whose bids are accepted are granted licences for the exclusive privilege of retail vending. The retail selling price of arrack by the licensees is fixed by the State Government at or before the time of notifying sale of the exclusive privilege in respect of each excise year. One of the conditions of sale of the exclusive privilege is that the sales tax at the prescribed rates shall be payable by the licensees. Under the terms and conditions governing the licences, the licensees were required to deposit in the State Treasury under separate heads of account the sales tax payable to the State Government and the excise duty with the cesses.

5. There was no dispute as to the amount of sales tax payable by the licensees up to 1st April, 1966. However, with effect from 1st April, 1966, the State Government began to collect sales tax computed on the sale price of arrack plus excise duty and cesses thereon. Thus computed sales tax worked at 24 paise a litre which was collected along with the price of arrack sold. Aggrieved by the said action of the State Government, the petitioners approached this court for relief in Writ Petition No. 644 of 1966. This court by its order made on 27th April, 1966, granted stay of collection of sales tax on the amount of excise duty and the cesses.

6. As Writ Petition No. 644 of 1966 related to the excise year 1966-67 only, the petitioners preferred. Writ Petitions Nos. 1012 and 1013 of 1966 and obtained stay for the year 1967-68. Writ Petitions Nos. 644, 1012 and 1013 of 1966 were

heard by the court along with similar petitions preferred by other licensees and disposed of by a common judgment dated 12th July, 1968. The common question for decision before this court was, whether excise duty, health cess and education cess, levied on arrack and collected from the licensees did not form part of the "taxable turnover" of the State Government selling arrack to the licensees. This court held that excise duty and the cesses were not paid by the sellers - the State Government - but by the purchasers - the licensee - and therefore, did not become part of the price at which the goods were sold to the licensees and in that view, the State Government cannot collect sales tax on excise duty and the cesses which are in the nature of surcharges on excise duty : vide *D. Cawasji & Co. v. State of Mysore* [1969] 1 Mys. L.J. 461.

7. The State preferred an appeal to the Supreme Court against the judgment of this court; but it was subsequently withdrawn. During the pendency of the appeal, the privileges of vending liquor for the excise year 1968-69 were sold without any variation in the price of arrack fixed by the Government during the previous years at 55 paise a litre. During the year 1968-69, the State Government collected sales tax computing the same at six and a half per cent. of the actual sale price without including therein excise duty and the cesses.

8. Although the petitioners had secured stay of collection of the disputed sales tax amounts from 27th April, 1966, there were other licensees who had paid sales tax computed on the sale price of arrack plus excise duty and the cesses. When the decision of this court became final consequent on the withdrawal of the appeal preferred by the State, the State Government was faced with the situation of being required to refund several lakhs of rupees collected by way of sales tax on sales of arrack. To meet that situation, the Governor of Mysore passed Ordinance No. 3 of 1969 on 17th July, 1969, which was replaced by the impugned Act which came into force on the 19th of July, 1969.

9. For the excise year 1969-70, the price per litre of arrack was fixed by the State Government at Rs. 4 from 1st July, 1969, to 30th November, 1969, and Rs. 3.25 from 1st December, 1969, to 30th June, 1970. For the excise year 1970-71, the price per litre was Rs. 3. Since Mysore Ordinance No. 3 of 1969 enhancing the rate of sales tax from six and a half per cent. to 45 per cent. came into force after the commencement of the excise year 1969-70 and subsequent to the grant of licences for the said year, the Government apparently felt that the greatly enhanced rate of tax on the already enhanced price of arrack was not justified and, therefore, reduced the rate of tax from 45 per cent. to six and a half per cent. with effect from 1st July, 1969, by a notification issued in exercise of the power conferred u/s 8A of the Act. The result of the impugned Act read with the said notification, therefore, was that the rate of tax on arrack stood enhanced only for the period from 1st April, 1966, to 30th June, 1969.

10. The impugned Act (Mysore Act 17 of 1969) is a short enactment containing four sections. Section 1 gives its title and the date of its commencement. Section 4 repeals Mysore Ordinance 3 of 1969. The main section is section 2 which

effects amendment of the Second Schedule to the Act by substituting the words "forty-five per cent." for the words "six and a half per cent." in column 3 of serial No. 39 of the Second Schedule. The amendment is with retrospective effect from the first day of April, 1966. Section 3 is the usual validation section. By fiction of law created by section 2, the rate of tax on sale of "country liquor other than toddy" shall be deemed to have been 45 per cent. at all times from 1st April, 1966.

11. At the hearing, the learned counsel for the petitioners urged the following grounds :

I. That the impugned Act is a colourable piece of legislation.

II. That as the impugned Act does not remove the basis of the decision of this court in *D. Cawasji & Co. v. State of Mysore* ([1969] 1 Mys. L.J. 461), and its effect is to overrule the said decision without changing the law retrospectively, it is beyond the legislative competence of the State under the Constitution.

III. That the impugned Act makes a discrimination between purchasers of arrack from the State made before 1st July, 1969, and thereafter, and the said classification is arbitrary and is violative of article 14 of the Constitution.

IV. That the retrospective operation of the enhanced rate of tax of "forty-five per cent." with effect from 1st April, 1966, imposes on the petitioners additional burdens amounting to about Rs. 96.83 lakhs while the total profits earned by them is Rs. 55.13 lakhs, with the consequence that they are put to a loss of about Rs. 40.69 lakhs. The impugned Act is thus oppressive and confiscatory and as such violates the constitutional guarantee under article 19(1)(f) and (g) of the Constitution.

V. That the impugned Act imposes restrictions on the freedom of trade, commerce or intercourse in country liquor; but the previous sanction of the President under the proviso to article 304(b) of the Constitution has not been obtained.

I. Re : Colourable legislation. - Sri Kohla, for the petitioners, relying on the statement of objects and reasons appended to the Mysore Sales Tax (Second Amendment) Bill of 1969, submitted that the object of the impugned Act was to get over the effect of the decision of this court and retain the money already recovered by the Government which this court has held that it is not entitled and, therefore, it is a colourable piece of legislation. If the Legislature is competent to enact a legislation and none of the constitutional limitations are transgressed in enacting the legislation, it cannot be challenged on the ground that it is a colourable legislation, whatever be the motive behind the legislation. A legislation is stated to be colourable piece of legislation where the Legislature enacts the legislation which it is not competent to do or violates any of the constitutional limitations, but while so doing, camouflages or clothes it in a garb as to make it appear that it is within its legislative competence or that the

constitutional limitations are not violated : vide K.C. Gajapati Narayan Deo and Others Vs. The State of Orissa, . In the instant case, there is no question of want of legislative competence alleged. The first ground, in our opinion, is clearly untenable.

II. Re : Legislation has not cured the infirmity. - The argument of the learned counsel under this ground was that section 3 of the impugned Act nullifies the judgment of this court in D. Cawasji's case ([1969] 1 Mys. L.J. 461) without removing the basis for that decision and, therefore, the impugned Act is ineffective. In support of his contention, the learned counsel relied on the decision in State of Tamil Nadu v. N. Rayappa Gounder ([1970] II S.C.W.R. 850). In the said case all that the Legislature of Tamil Nadu did was to validate the assessments declared invalid by the Madras High Court without removing the basis of the decision of the court for holding that the assessments were not legal. The principles laid down by the Supreme Court in Rayappa Gounder's case ([1970] II S.C.W.R. 850) and the earlier cases referred to therein is that while the Legislatures under our Constitution have within the prescribed limits power to make laws prospectively as well as retrospectively, there is no power to ask any instrumentality of the State to disobey or disregard the decisions given by courts, without removing the basis of the decisions and thus rendering the same ineffective. In other words, if an assessment to tax is declared invalid by court and that decision has become final, the Legislature cannot say that such a decision shall be ineffective by merely passing a Validation Act, but the Legislature is competent to remove the basis of the decision rendered by a competent court by retrospective legislation and thus render the decision ineffective.

12. The argument of Sri Kohla for the petitioners was that this court has held that the State Government had no right to collect sales tax on the amount of excise duty and the cesses, that no law had been made to remove the basis of the said decision by enacting a retrospective legislation empowering the levy of sales tax on excise duty and the cesses and what the impugned Act has done merely is to enhance the rate of tax retrospectively from six and a half to 45 per cent., and further to validate the collections. This, according to the learned counsel, is not sufficient to render the judgment of this court ineffective and, therefore, the validation of collections by section 3 of the impugned Act is unconstitutional.

13. In our opinion, the entire argument is based on a misconception of the facts of the case. Under the Act, sales tax on sale of "country liquor other than toddy" is levied by virtue of section 5(3)(a) read with serial No. 39 of the Second Schedule to the Act. The tax is levied on the first or earliest of successive dealers in the State on the taxable turnover of sale of such dealer. By virtue of the proviso to section 5(3)(a) earlier referred to, the State Government is deemed to be the first dealer in the State in respect of sale by it of "country liquor other than toddy" and the State is also entitled to collect the tax u/s 19 when it effects

the sale. u/s 19 read with section 18, the State is not entitled to collect any amount by way of tax which exceeds the rate specified in the Act.

14. This court has not held that the State is not at all entitled to collect any amount by way of tax on the sale of arrack. The sale price of arrack during the years 1966 to 1969 was fixed at 55 paise a litre. The amount which the State was authorised to collect was six and a half per cent. of 55 paise on the sale of a litre of arrack which comes to about three and a half paise; instead, the State collected 24 paise and the excess collection was 20.5 paise a litre. The decision of this court is that the State without authority of law was collecting excess amounts by way of tax on the sale of arrack. It is relevant to state that under the Act where the State is deemed to be a dealer entitled to collect tax u/s 19, there is no provision for making an assessment of tax by the assessing authorities as in the case of ordinary dealers. Without making an assessment, the State Government is entitled to collect amounts by way of tax in the same manner as any other registered dealer authorised to do so u/s 18. By enhancing the rate of tax from six and a half to 45 per cent. with retrospective effect by enacting section 2 in the impugned Act, it has to be deemed that the rate of tax under the Act has always been 45 per cent. of the taxable turnover ever since 1st April, 1966. If the rate of tax was 45 per cent. on the sale price of arrack, which was 55 paise a litre, then the amount the State was authorised to collect comes to about 25 paise. Thus it will be seen that by the enactment of section 2 of the impugned Act the very basis of the complaint made by the petitioners before this court in the earlier writ petitions as also the basis of the decision of this court in Cawasji's case ([1969] 1 Mys. L.J. 461) that the State is collecting amounts by way of tax in excess of what was authorised under the Act has been removed. Thus the decision of this court has been rendered ineffective.

III. Re : Article 14. - It was contended that the two different rates for the period before and after 1st July, 1969, is discriminatory and, therefore, it offends article 14 of the Constitution. This argument has to be stated only to be rejected. It is not the case of the petitioners that there is any discrimination made between the licensees inter se during the period from 1st April, 1966, to 1st July, 1969. No class of licensees has been selected for discriminatory treatment and all are treated alike. It is common knowledge that the tax rates under taxing statutes are varied from year to year or even in the middle of a financial year.

"Classification for taxation is not reviewable by the courts unless palpably arbitrary. It is no concern of the court whether the classification is the wisest or the best that could be made. The classification need not be "reasonable and proper" according to the judgment of the reviewing Judges, but the court must be able to see that legislators could regard it as reasonable and proper without doing violence to common sense": vide Cooley on Taxation, Volume I, paragraph 334 at pages 715-716.

15. So long as the Legislature refrains from clear and hostile discrimination against particular persons or classes, courts have permitted an extremely wide

discretion in the matter of classification for tax purposes. The learned counsel for the petitioners has not shown as to how there is any hostile discrimination against particular persons or classes.

IV. Re : Article 19(1)(f) and (g). - The basis of this ground of attack has been explained in paragraphs 7 and 8 of the consolidated reply affidavit of the petitioners dated 12th November, 1971, at pages 55 and 56 of the typed paper book. It has been alleged therein that the total tax liability of the petitioners worked on the basis of the enhanced rate under the impugned Act would amount to Rs. 96,83,031 for the period 1st April, 1966, to 1st July, 1969, that the profits made by the petitioners during the said period comes to Rs. 55,13,355. Since the rate of tax has been increased with retrospective effect after the expiry of the licence period and the petitioners are no longer in a position to pass on the burden of the increased tax to the consumers, the petitioners would suffer loss of Rs. 40.69 lakhs. Therefore, it was submitted that the impugned Act is oppressive and confiscatory and as such it violates the constitutional guarantee under article 19(1)(f) and (g). The State Government in their affidavit dated 18th January, 1972, have disputed the correctness of the statement made by the petitioners as to the total tax liability on the basis of the impugned Act. In paragraph 5 of the said counter-affidavit, this is what has been stated :

"In paragraph 7 it is alleged that by levying sales tax at the enhanced rate of 45 per cent., the additional burden falling upon the petitioner will be to the tune of Rs. 96,83,031 as stated in annexure A to reply affidavit. This is entirely wrong. The liability arising upon the petitioner as a result of the amended Act is as shown in the annexed statement. It is very little more than the liability which arose under the original demand made on the petitioner. The petitioner has worked out the liability as Rs. 96,83,031 by calculating the 45 per cent. on the aggregate of price and excise duty and cesses. This is not correct. The sales tax of 45 per cent. has to be calculated only on the price part of it excluding the duty and cesses in view of the earlier judgment of this Honourable Court. When so done the liability will be much less as shown in column No. 6 of annexure A."

16. The grievance of the petitioners rests entirely on a misconception that the enhanced levy under the impugned Act has to be calculated on the price of arrack plus excise duty and the cesses. The decision of this court in D. Cawasji's case ([1969] 1 Mys. L.J. 461), that excise duty with the cesses thereon do not form part of the sale price of arrack and, therefore, cannot be included in the taxable turnover of the State Government when they sell arrack to the licensees has become final. There is nothing in the impugned Act to render the said judgment ineffective. The statement of objects and reasons appended to the Bill has also accepted the position that sales tax has to be collected only on the basic price of arrack. That being so, there is no foundation for the grievance of the petitioners that the impugned Act is oppressive and confiscatory.

17. It has to be noted that the retail selling price of arrack by the licensees as fixed by the Government was Rs. 9, 10 and 11 a litre for the years 1966-67,

1967-68 and 1968-69 respectively; the said rates were fixed on the assumption that the State is entitled to collect about Rs. 4 a litre inclusive of price, excise duty, cesses and sales tax. When it was ultimately decided by this court that the State is not entitled to collect 24 paise by way of sales tax on the sale of a litre of arrack, the rate of sales tax was enhanced from six and a half to 45 per cent. of the actual sale price, so as to legalise the collection of the sales tax already effected. It may also be relevant to state that if the State had chosen to do so, there was nothing to prevent it from increasing the price from 55 paise to Rs. 3 or even more, before the commencement of each excise year.

18. In *Basappa & Brothers v. Deputy Commissioner of Commercial Taxes* ([1971] 27 S.T.C. 241) , a similar challenge made against retrospective operation of amendment to the Central Sales Tax Act, 1956, by the Central Sales Tax (Amendment) Act (28 of 1969), was rejected by this court. In the said case, this court after referring to the decisions of the Supreme Court in *Rai Ramkrishna and Others Vs. The State of Bihar* , *Epari Chinna Krishna Moorthy, Proprietor, Epari Chinna Moorthy and Sons, Berhampur, Orissa Vs. State of Orissa*, and *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.* , stated the legal position thus :

"The power to make a law carries with it the power to give retrospective operation to the law. It is settled law that taxing statutes are not immune from challenge on the ground of violation of the fundamental rights guaranteed under articles 14 and 19(1)(f) and (g) of the Constitution of India. Although the Legislature is competent to give retrospective operation to its taxing statutes, the reasonableness of the retrospective operation of the law can be scrutinised by the court. It is conceivable that cases may arise in which the retrospective operation of a taxing statute may introduce such an element of unreasonableness that the restrictions imposed by it may be open to serious challenge as unconstitutional; but the test of the length of time covered by the retrospective operation cannot by itself be a decisive test. If the validity of a taxing statute is challenged in court and ultimately the highest court in the land holds that the statute is unconstitutional, the Legislature may amend the Act so as to bring it in conformity with the Constitution with retrospective effect and validate the assessments made under the statute declared as unconstitutional. Occasion may arise for amendment of a taxing statute for curing the defective provisions of a taxing statute which come to light in legal proceedings. A curative Act is generally given retrospective operation. When dealing with curative statutes, the courts have consistently held that the legislative purpose is by itself sufficient to justify the concomitant retroactivity."

19. During the period from 1st April, 1966, until the date when the State withdrew its appeal from the Supreme Court, the State was asserting that it was entitled to add the amount of excise duty and the cesses thereon to the sale price for purposes of computation of taxable turnover and on that basis sales tax was sought to be collected, and except in cases where there was stay obtained

from this court, sales tax was actually collected. During the said period the licensees were well aware of the view taken by the State Government and the quantum of sales tax sought to be recovered on sales of arrack. When ultimately that view of the State Government was not accepted by this court as correct, the impugned Act was enacted and retrospective operation was given to it. In view of the principles laid down by the Supreme Court and followed in Basappa's case ([1971] 27 S.T.C. 241), we are of the opinion that the retrospective operation given to the impugned Act does not constitute an unreasonable restriction on the freedoms guaranteed by article 19(1)(f) and (g) of the Constitution.

V. Re : Article 304(b). - The Act has received the assent of the President, but the impugned Act has not received either his previous sanction or subsequent assent. It was urged for the petitioners that levy of sales tax at such a high rate of 45 per cent. on sale of arrack imposes restrictions on the freedom of trade and since the previous sanction of the President has not been obtained as required by the proviso to article 304 of the Constitution, the impugned Act is unconstitutional. It is settled law that taxing laws as such are not excluded from the operation of articles 301 to 304; it does not, however, mean that all tax laws attract the provisions of Part XIII of the Constitution whether the impact on trade or its movement is direct and immediate or indirect and remote. Whether or not any particular tax law imposes a restriction on the freedom of trade, commerce or intercourse with or within the State depends on the fact whether the tax has the effect of directly or immediately restricting or impeding the free flow of movement of trade : vide *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, and *State of Madras Vs. N.K. Nataraja Mudaliar*, . In *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, , the Supreme Court rejected the contention that section 21 of the *Andhra Pradesh Sugarcane (Regulation of Supply and Purchase) Act of 1961* offended article 301 of the Constitution. In that case, the Supreme Court at page 608 stated :

"A non-discriminatory tax on goods does not offend article 301 unless it directly impedes the free movement or transport of the goods Normally, a tax on sale of goods does not directly impede the free movement or transport of goods It does not impede the free movement or transport of goods and is not violative of article 301."

20. Sales tax on arrack is a non-discriminatory tax. It is not shown as to how it directly impedes the free movement or transport of arrack. We have to judge the result of the impost having due regard to the nature of the trade. It may be that in certain circumstances a high rate of tax on sale of goods like essential goods of common consumption may have the effect of impeding the free movement of goods and as such, such an impost may violate the constitutional limitations under article 301. It would all depend on the nature of the trade and the nature of the goods involved in the trade. In the instant case, as stated in the earlier part of the judgment, there is no free trade in arrack. Manufacture and

distribution of arrack are under strict State control; besides the wholesale trade is State monopoly. The State may fix any price it chooses as selling price to the licensees; the retail selling price for the licensees is also fixed by the State Government under the powers vested under the Mysore Excise Act. The retail selling price of arrack fixed during the excise years 1966-67, 1967-68 and 1968-69 have not been varied consequent upon the enactment of the impugned Act. Having regard to the nature of the trade in arrack which is a State monopoly and the control the State exercises on its prices at all stages, it cannot be said that the very fact that a high rate of sales tax was imposed, such an impost has the effect of directly impeding the freedom of trade within the State. Consequently, the impugned Act, in our judgment, did not require the previous sanction of the President under the proviso to article 304 of the Constitution.

21. All the contentions urged for the petitioners having failed, for the reasons stated above, these writ petitions are dismissed with costs. Advocate's fee Rs. 250. One set.

22. Petitions dismissed.