
(1969) 03 KL CK 0003
In the High Court Of Kerala
Case No : W.A No's. 138 and 315 of 1969

Damodaran

APPELLANT

Vs

The State of Kerala and others

RESPONDENT

Date of Decision : 11-03-1969

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 19(1)(g), 19(6)
Government of India Act, 1935 — Section 175(3)

Citation : (1969) KLJ 686

Hon'ble Judges : T.C. Raghavan, J;P. Narayana Pillai, J

Bench : Division Bench

Advocate : V.K.K. Menon, M. Ramachandran, C.J. Balakrishnan and Miss. Narayanikutty Chettur in W.A 138/69 and O.V. Radhakrishnan in W.A. No. 315/69, for the Appellant;

Final Decision : Dismissed

Judgement

T.C. Raghavan, J.—These writ appeals are directed against the common judgment in two writ petitions disposed of by our learned brother Mathew J. along with a batch of other writ petitions involving the same questions. The appellants are bidders in auction of the right to vend country liquors as a monopoly in particular areas. They were the highest bidders; and they executed agreements to the Government and obtained licences. They paid some of the instalments of the kist too and then defaulted the payment of further instalments. The Government took steps to re-auction the right with a view to recover the difference in the amounts to be obtained in such re-auctions and the amounts payable by the appellants and also to recover the arrears of the kist under the Revenue Recovery Act. The appellants then filed writ petitions and obtained stay of the proceedings started by the Government. They contended that section 18A of the Cochin Abkari Act of 1977, which was amended by the Abkari Laws (Amendment and Validation) Act in 1964 and extended to the whole of Kerala by another Act in 1967, was ultra vires the Constitution as it infringed the fundamental right of the appellants to carry on the trade in liquor; and that

the rental was neither an excise duty nor a luxury tax nor a fee and therefore, an illegal exaction, for which there was no authority vested in the State under the Constitution. Mathew J. dismissed these contentions and dismissed the writ petitions. Several contentions have been raised before us by Mr. V.K.K. Menon, the counsel of the appellant in one of these cases. Since other writ petitions were also disposed of by Mathew J. by the same judgment, we allowed the counsel in some of those writ petitions also to intervene and advance arguments; and Mr. M. I. Joseph and Mr. K. Sudhakaran have also adduced arguments. Some of the contentions raised by Mr. V.K.K. Menon but not seriously pursued are that section 18A is ultra vires as it involved excessive delegation of legislative power; that many provisions of the Abkari Act offend the rights guaranteed under Art. 301 of the Constitution, since they imposed serious and unreasonable restrictions on the movement of the liquor trade; and that the contracts between the Government and the appellants were vitiated by a mutual mistake of law. These contentions have not been seriously pressed. However, regarding the last contention we shall add a few words towards the close of this judgment. The contentions which have been seriously pursued may now be considered.

2. The first contention is that section 18A offends the fundamental rights of the appellants under Articles 14 and 19(1) (g) of the Constitution. Before Mathew J. no argument appears to have been adduced that the appellants' fundamental right under Art. 14 has been infringed, though that also appears to have been pleaded in the writ petitions.

3. u/s 17 of the Abkari Act an excise duty or luxury tax or both may be levied by the Government on the import, export, transport, manufacture, etc. of liquor; and u/s 18 the mode of imposition and the rates of such levies are provided. Then u/s 18A provision is made for the grant of exclusive or other privilege of manufacture or supply by wholesale and sale by retail of liquor to any person or persons on such condition and for such term as the Government may deem fit in consideration for a rental. The Government may fix the rental by auction, negotiation or any other method, from time to time, and collect the same in addition to the duty or tax leviable under sections 17 and 18. u/s 20 the tax, duty or rental may be fanned out to licencees. Section 24 makes provision for the forms and conditions of the licences; and section 25 provides that the licencees may be required to execute counterpart agreements in conformity with the tenor of the licences and to give securities for the performance of the agreements. Then comes section 28, which provides for the recovery of duties, taxes, fines, fees and all amounts due to the Government by a grantee of a privilege or by any farmer or by any person on account of any contract relating to abkari revenue under the Revenue Recovery Act as if the amounts are arrears of land revenue.

4. Both sides admit that the trade in liquor was considered to be a close preserve of the State; and that it was treated practically as property belonging to the State. Even before the British took over the administration in India, the supply of

alcoholic drink was regulated by the farming system; and under the system the monopoly of manufacture and sale of liquor in a particular area was granted in return for the payment of a lump sum. After the British took over the administration, the system of farming out was continued with modifications. This is evident from publications like the Malabar District Gazetteer and Excise and Temperance in Madras, a Note on Excise Policy prepared under instructions of the Madras Government; and that the same was the practice in the erstwhile Cochin and the Travancore States is evident from the Cochin State Manual and the Travancore State Manual.

5. The argument of the counsel of the appellants is that until the decision of the Supreme Court in *Krishan Kumar Narula v. State of Jammu & Kashmir* (A.I.R. 1967 S.C. 1468) holding that the right to carry on trade in liquor was a fundamental right it was treated only as property belonging to the State, which the State could dispose of in any manner by farming it out for rental. The argument proceeds that it was realised for the first time only in that decision that such fundamental right existed and thereafter alone the position changed.

6. This argument does not appear to be justified, because Subba Rao C.J. himself, who spoke for the Court in the said decision, says that the fundamental right was recognised even earlier, viz., when the Constitution came into force; and it was recognised even by Mahajan C.J. in *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, which was followed by Mathew J.

7. Before we discuss this question further, we would remind that in a case like this, where the validity of a statute is questioned, it has to be remembered "that a statute has to be read so as to make it valid and, if possible, an interpretation leading to contrary position should be avoided" (vide *The Corporation of Calcutta and Another Vs. Liberty Cinema,*).

8. Now that it is clear that the liquor trade is one which the appellants have a fundamental right to enter, the State can justify its action of farming out either by claiming that the monopoly created by it is protected by Art. 19 (6) (ii) or by claiming that it is a reasonable restriction under Art. 19(6). If the monopoly created by the State is in its own favour, then the State will not have to justify such action as reasonable at all in a court of law, and no objection can be taken to it on the ground that it is an infringement of the right guaranteed under Art. 19(1)(g). This is the effect of Art. 19(6)(ii); and this position is established by the decision of the Supreme Court in *Saghir Ahmad Vs. The State of U.P. and Others*, . The Supreme Court has again considered the question in *Akadasi Padhan Vs. State of Orissa*, and has held that the monopoly, so created must be carried on by the State by its officers or by a corporation owned and controlled by itself or through its agents. The Supreme Court has said that the limitations imposed by the requirement that the trade must be carried on by the State or by a corporation owned or controlled by the State cannot be widened and must be strictly construed; and agency can be permitted only in respect of trades or

businesses where it appears to be inevitable and where it works within the well recognised limits of agency.

9. In the light of the aforesaid principles laid down by the Supreme Court, can it be said that the bidders at auction like the appellants are agents of the State? Mathew J. has answered the question in the negative; and we would endorse this view. The appellants and other renters conduct the trade in their own right and they do not carry on the trade on behalf of the State. They suffer the loss if loss results; and they keep the profit if the trade yields profits. There are of course some restrictions like the price at which liquor has to be sold the hours during which the shop can be kept open, etc. But, such restrictions will not justify our holding that the appellants are agents of the State coming within the recognised limits of agency. Therefore, the monopoly created by the State is not protected by Art. 19(6)(ii).

10. Now we will examine the other aspect, namely, whether the farming out can be justified as a reasonable restriction coming within Art. (9)(6). Mahajan C.L. has said in Coovarjee's case already referred to that although every citizen has a fundamental right to carry on trade in liquor, the restrictions that may be imposed on the right can be much more drastic and stringent than in other trades. The learned Chief Justice has quoted a passage from the judgment of Field J. in *Crowley v. Christensen* (1899 (34) Law Bd. 620) to the effect that the sale of liquor may even be completely prohibited on grounds of public expediency and public morality, since the injury that results if liquors are taken in excess to health, morals, etc. may be great. Considering the question further Mahajan C.J. has said that elimination and exclusion from business is inherent in the nature of liquor business, and it will hardly be proper to apply to such a business principles applicable to trades which all could carry, and that provisions of the abkari regulation cannot be attacked merely on the ground that they created a monopoly. It has been held by the Supreme Court in *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, that the restrictions may amount, in certain circumstances, to prohibition even in less harmful trades. It therefore follows that in a trade like the liquor trade restrictions amounting even to complete prohibition of the trade by the citizens may only be reasonable.

11. At this stage, the argument of the counsel of the appellants may be elaborated a little further. The counsel contend that the purpose of imposing restrictions is to control or regulate the trade; that such power exercised to control or regulate is the police power of the State; and that the police power cannot be used to raise revenue for the State. In other words, the contention is that revenue can be raised only by using for the taxing power of the State or its power to levy fee. The rental in these cases is revenue; and unless the State can justify the Collection either as a tax or as fee, it cannot be justified as the result or outcome of a regulation, control or a reasonable restriction--that, in short, is the argument.

12. In Cooverjee's case one of the questions considered by Mahajan C.J. was

whether the levy of any duty or fee for the purpose of raising revenue for the State by holding auction sales of the right to vend liquor could be upheld; and another question was whether the grant of monopoly in the trade to a few individuals could also be justified. One of the sentences in the passage extracted by Mahajan C.J. from the Judgment of Field J. in *Crowley v. Christensen* is:

The police power of the state is fully competent to regulate the business--to mitigate its evils or to suppress it entirely.

Thereafter, Mahajan C.J. himself adds:

One of the purposes of the regulation is to raise revenue.....Revenue is also collected by the grant of contracts to carry on trade in liquors and these are sold by auction.

The effect of these two passages is:

The police power of the State is fully competent to regulate the business": and "One of the purposes of the regulation is to raise revenue."

Mr. M.I. Joseph argues that Mahajan C.J. was not considering the question of fundamental rights, and therefore, the learned Chief Justice could not have meant this result. We do not agree. The meaning of Mahajan C.J. is clear and is not open to any doubt.

13. In *The State of Assam Vs. A.N. Kidwai*, Commissioner of Hills Division and Appeals, Shillong, the Supreme Court has again held that "no person has any absolute right to sell liquor and that the purpose of the Act and the rules is to control and restrict the consumption of intoxicating liquors, such control and restriction being obviously necessary for the preservation of public health and morals, and to raise revenue". (The underlining is ours). This also shows that the control and restriction are intended not only for the preservation of public health and morals but also for raising revenue. This passage has been quoted and explained by Subba Rao C.J. in *Krishan Kumar Narula*'s case already referred to. It is after quoting this passage, and not disapproving of it, that the learned Chief Justice has held that every citizen has a fundamental right to enter "the liquor trade. It is thus clear that by controlling the trade revenue can also be raised, or one of the purposes of control is to raise revenue. The contention of the counsel of the appellants on this ground cannot therefore be upheld.

14. The next serious contention urged is that the rental is neither a fee nor an excise duty, so that it can only be a tax. If it is tax, the argument proceeds, it is not justified by any Entry in List II of the Seventh Schedule of the Constitution. It appears to be fairly clear that the rental is not a fee, because there is no quid pro quo for the renters, which is the sine quo non of fee. The Government Pleader has sought to justify it as a luxury tax; and Mathew J. has doubted the correctness of this contention. We do not also feel convinced that country liquor can be considered to be a luxury. Of course, whether it is a luxury depends on the social habits, the economic position, the general purchasing power, etc. of

the people at a particular time. The counsel of the appellants have drawn our attention to *D. Cawasji & Co. v. State of Mysore* (A.I.R. 1969 Mys. 23) holding that the rental of liquor shops is not an excise duty and not a tax. The Supreme Court has also held in *Shinde Brothers etc. Vs. Deputy Commissioner and Others, etc.*, that the rental in such cases is not excise duty. The distinction between a tax and a fee under the Constitution has been pointed out in cases like *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, and *The Corporation of Calcutta v. Liberty Cinema* (AIR 1967 S.C. 1107). In List II of the Seventh Schedule the general legislative powers are found in Entries I to 33 and the taxing powers are found in Entries 45 to 63. The last Entry in this List authorises the State Legislature to levy a fee on any of the matters mentioned in the other Entries excepting court-fee which is provided for separately. It is also well established that tax is a compulsory exaction by the State for public purposes without any quid pro quo, while fee involves a quid pro quo to the person who pays it.

15. However, this contention of the counsel need not be considered in any detail; and whether the rental is a tax or a fee need not also be considered in these cases. Our learned brother Mathew J. has not decided this question either. Even in Cooverjee's case Mahajan C.J. has not decided this question. The learned Chief Justice observes that since the State has authority to raise revenue by using its power of control, the question whether rental is a tax or a fee need not be considered. We are of opinion that on the authority of the Supreme Court in Cooverjee's case we need not also decide this question in these cases. We have already held, following the Supreme Court again, that the State has power to raise revenue by using its power to control; and that is enough for disposing of this question.

16. There is yet another way of looking at the question. Art. 298 of the Constitution enables the executive authority of a State to carry on any business or trade. Entry 21 in List III of the Seventh Schedule is:

Commercial and industrial monopolies, combines and trusts.

It is clear that under this Entry the State can legislate to bring about or establish commercial and industrial monopolies, combines and trusts. What the State has done in the cases before us is to create a trade monopoly in liquor and pass it on to chosen individuals--the highest bidders in public auction--in particular areas. This action of the State can be justified if the same can be sustained as a reasonable restriction on the fundamental right of the citizen to enter the liquor trade. Of course, as we have already stated, since the monopoly is not in favour of the State, it cannot be sustained under Art. 19(6)(ii). But, it can certainly be sustained if the restriction, control or regulation imposed on the trade is reasonable in the circumstances of the case. Again, as we have already pointed out, the liquor trade is not a normal harmless trade which every citizen can carry on without any control. It is a trade which, in the general interest of the public

and in the interest of public morality, health and well being, has to be controlled. We have also indicated that such control may amount even to complete prohibition. The creation of monopolies and passing them on to chosen individuals is only short of complete prohibition; and then it can only be a reasonable restriction as contemplated by Art. 19 (6). Thus, the monopoly can be justified under Entry 21 of List III and Art. 298 of the Constitution.

17. There is a Division Bench ruling of this Court in *P. Ramachandran v. State of Kerala* (Writ Appeal Nos. 160, 161 and 162 of 1967). Persons who obtained licences to vend foreign liquor questioned section 18A of the Abkari Act; and the Division Bench has held that since the appellants before them were persons who had applied for and obtained licences in pursuance of the very same provision, they could not be heard to contend that sections 18-A and 24 of the Abkari Act were violative of either Art. 19 or Art. 14 of the Constitution. Mathew J. has followed this Division Bench ruling; and we feel that the appellants in these cases, who are similarly situated as the appellants in those writ appeals, cannot also question the validity of section 17A.

18. This line of reasoning is challenged by the counsel of the appellants. Their arguments is that a fundamental right cannot be waived and therefore, the fact that the appellants bid at the auction and also conducted the trade for some time paying some instalments of the kist will not preclude them from questioning the constitutional validity of section 18A. The counsel draw our attention to the decision of the Supreme Court in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, . Mr. V.K.K. Menon points out that this decision was not noted by Mathew and argues that it would have made a great difference and would have even made our learned brother take a different view on the question. That case arose under the Taxation on Income (Investigation Commission) Act; and S.R. Das C.J. for himself and for Kapur J. has held that the fundamental right under Art. 14 cannot be waived. However, the learned Chief Justice has refrained from expressing any opinion on the question whether the fundamental right under Art. 19 and other Articles of the Constitution can be waived. In the same decision Bhagwati J. and Subha Rao J. have held that no fundamental right can be waived. The other learned Judge, S.K. Das J., has held that where a right guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the rights of others, it can be waived, provided that such waiver does not contravene public policy or public morals. In another case arising under the same Taxation on Income (Investigation Commission) Act in *Gopal Das Mohta v. Union of India* (A.I.R. 1955 S.C. 1) the Supreme Court has rejected an assessee's claim that some of the provisions of the said Act were ultra vires on the short ground that the assessee had the benefit of a settlement u/s 8A of the Act and having had that benefit, he could not thereafter question the validity of the same Act. The counsel argue that in *Gopal Das Mohta's* case the Supreme Court was considering only the scope of Art. 32 of the Constitution and did not consider the question of waiver: that question was considered only in *Basheshar Nath's* case.

The question whether a fundamental right other than the one under Art. 14 can be waived is not even now beyond dispute. What appears from the decision in Basheshar Nath's case is that the fundamental right under Art. 14 cannot be waived. That the position in Gopal Das Mohta's case was different from the position in Basheshar Nath's case will be apparent if the facts are properly appreciated. In the former

Because of his (the assessee's) request for a settlement no assessment was made against him by following the whole of the procedure of the income tax Act.

In the latter the Government referred the case to the Investigation Commission before the Constitution was promulgated and the Commission in its last sitting on May 19, 1954, when it heard arguments (after 26th January 1950), announced its view regarding the amount that escaped assessment. The Commission also threw out a hint that "should the assessee accept the said finding he would be granted the benefit of a settlement"; and "in the circumstances the assessee had no other alternative than to make the best of the bad job by proposing a settlement under S. 8A." The application for settlement by the assessee u/s 8A in the aforesaid circumstances was not considered to be a bar by the Supreme Court to question the constitutionality of the provisions of the Act. At this stage one more sentence from the judgment of Mahajan C.J. in Gopal Das Mohta's case will elucidate the position thoroughly. The learned Chief Justice says after the passage extracted by us above:

In this situation unless and until the petitioner (the assessee) can establish that his consent was improperly procured and that he is not bound thereby he cannot complain that any of his fundamental rights has been contravened.....

Thus, the two cases dealt with two different situations. In the cases before us the appellants had the benefit of the monopoly by excluding others from the trade; and therefore, Gopal Das Mohta's case applies to these cases.

19. Our learned brother has referred to five American decisions in *United Fuel Gas Co. v. Kentucky R. Commission* (275 U.S. 300), *Monamotor Oil Co. v. Johnson* (292 U.S. 86), *Booth fisheries Co. v. Industrial Commission* (271 U.S. 208), *Frost v. Corporation Commission* (278 U.S. 515) and *North-Dakota-Montana Wheat Growers' Association v. United States* (291 U.S. 672) on the question and has followed them. They all hold that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. The counsel of the appellants urge that these American decisions cannot be imported en bloc for interpreting our Constitution, especially in view of the observation in Basheshar Nath's case that, at any rate, the fundamental right under Art. 14 cannot be waived. We do not propose to express any final opinion on the question whether these American decisions can be followed, though we are inclined to think that these decisions lay down only a healthy principle subject, probably, to the exception that it may not apply to the fundamental right under Art. 14 of our

Constitution. However, we are of the firm opinion that in these cases the appellants are not entitled to impugn the validity of section 18A of the Abkari Act. They bid at the auction and obtained the exclusive privilege or monopoly of the trade in particular areas. Others who had the fundamental right to enter the trade in competition with the appellants were excluded by the auction; and the appellants had the benefit of such exclusion--such monopoly. Having had that benefit, they cannot thereafter refuse to be bound by the liability, taking advantage of the constitutional invalidity, if any, of section 18A, under which alone they enjoyed the privileges or the benefit of the monopoly. To borrow the happy expression of Kunhi Raman C.J. in *P.K. Krishnankutty v. State of Travancore-Cochin* (A.I.R. 1952 T.C. 287) the question is not of any infringement of a fundamental right, but is one "of a fundamental obligation arising out of a formal contract" entered into by the appellants with the State. Having taken the benefit of the contracts--the monopoly of the trade, the appellants cannot repudiate the liability of the contracts alone. Probably, the position might have been different or better if the appellants did not enter the trade--did not run the business--even after executing the agreements, and questioned the validity of the Abkari Act. There is no question of taking only the benefit and discarding the liability under the contracts.

20. This is our answer to the other question also raised by the counsel of the appellants that both parties were under a mistake when they entered into the contracts and therefore, the contracts are liable to be repudiated at the instance of any of the contracting parties. The contracts have to be avoided as a whole; and there cannot be a partial avoidance which results in that one party retains the benefit and rejects the liability. We may also point out in this connection that it is not correct to say that the parties were under a mistake, because after the promulgation of the Constitution every citizen had a fundamental right to enter the liquor trade and it is not as if the decision of Subba Rao C.J. in *Krishna Kumar Narula's* case created the fundamental right for the first time. The argument that none was aware of the right before that decision does not also merit serious consideration, because Mahajan C.J. himself appears to have recognised this right in *Cooverjee's* case. In other words, that case proceeded as if such fundamental right existed.

21. In some of the cases disposed of by Mathew J. there were no formal contracts executed by the auction purchasers. On that basis Mr. K. Sudhakaran has argued that the arrears due from those persons cannot be collected on the basis of a contractual liability. Now that we have held that section 18A is not ultra vires the Constitution, this argument has no force. Moreover, even if no contracts were entered into in pursuance of the auctions, as soon as the hammer fell there were concluded contracts between the highest bidders and the State. And the highest bidders became liable too when they started running the trade; and the amounts which they are liable to pay can be collected as arrears of revenue, even in the absence of formal contracts. Mr. Sudhakaran draws our attention to the decision of the Supreme Court in *K.F. Chowdhry v. State of Madhya Pradesh*

(1967 S.C. 208). More particularly, he draws our attention to the following passage

The second consequence which follows from these decisions is that if the contract between Government and another person is not in full compliance with Article 299 (1) it would be no contract at all and could not be enforced either by the Government or by the other person as a contract.

Article 299(1) lays down that all contracts made in the exercise of the executive power, inter alia, of a State shall be expressed to be made by the Governor of the State; and the argument is that, in the light of the passage extracted above, the contracts in these cases cannot be enforced by the Government in the absence of formal deeds of contract. This contention has no merit, because the discussion of Wanchoo J. in the same case shows that in *Union of India v. A.L. Rallia Ram* (A.I.R. 1963 S.C. 1655) the Supreme Court held that so long as all the requirements of section 175 (3) of the Government of India Act of 1935 (the same as Art 299(1)) were fulfilled, the section did not necessarily require the execution of a formal document. Wanchoo J. has also observed that what was said in that case applied to the case before him. The result is that the "full compliance" contemplated by the passage extracted is only such compliance as contemplated by the earlier decision which was approved by Wanchoo J. Otherwise, the effect of the decision of Wanchoo J. will be that the absence of a formal document of contract will make the contract between a State and another a nullity, a result directly against the decision of the Supreme Court in the earlier case, which was approved by Wanchoo J, himself. The discussion hereinbefore shows that the decision of Mathew J. is correct. The decision is confirmed and the appeals are dismissed. And the parties are directed to suffer their respective costs.