

(1962) 12 KAR CK 0002

In the Karnataka High Court

Case No : C.C. No. 13137/61, Criminal Revision Petition No's. 187 and 150 of 1962

G.K. Thammanna

APPELLANT

Vs

The Assistant Commercial Tax Officer, Second Circle,
Bangalore and Another

RESPONDENT

Date of Decision : 07-12-1962

Acts Referred:

Mysore Sales Tax Act, 1957 — Section 13 (2), 13 (3) (b), 5 (1)
Mysore Sales Tax Rules, 1948 — Rule 6 (1)

Citation : (1963) 14 STC 711

Hon'ble Judges : T.K. Tukol, J;M. Sadasivayya, J

Bench : Division Bench

Advocate : B.V. Katageri, for the Appellant; D.M. Chandrasekhar, High Court Government Pleader, for the Respondent

Judgement

Tukol, J.—These are two revision petitions by an assessee challenging the orders passed by the Additional First Class Magistrate, Bangalore, direction the issue of warrants u/s 13(3)(b) of the Mysore Sales Tax Act for recovery of amounts due from him in regard to arrears of sales tax as if the amounts were fine imposed by him on the assessee.

2. The facts leading to the present proceedings are not in dispute. The petitioner is a dealer in potatoes. He was assessed to sales tax for the assessment years 1958-59 and 1959-60 u/s 5(1) of the Mysore Sales Tax Act, 1957, as amended by Act No. IX of 1958. The Commercial Tax Officer served a notice u/s 13(2) of the Act on the petitioner on 4th April, 1962, requiring him to pay all the arrears of tax along with penalty on or before 16th April, 1962. On the petitioner's failure to pay the same within the aforesaid date, the Commercial Tax Officer filed two petitions before the First Class Magistrate, Bangalore City, u/s 13(3)(b) of the Act praying for recovery of the same as if it were a fine imposed on the assessee. The assessee filed objections contending that Amending Act No. IX of 1958, by which the rate of sales tax was fixed at 1 per cent. on the total turnover

of sales of potatoes, was ultra vires as the Amending Bill had been introduced in the State Legislature without the prior sanction of the President. It was also contended that rule 6(1) was invalid as it authorised the levy of tax only on sales and was therefore inconsistent with the provisions contained in section 5(1) of the Act. The learned Magistrate rejected both these contentions on the ground that it was not open to an assessee to question the validity of assessment of any tax or other amounts made under the Act in view of the provisions contained in section 32 of the Mysore Sales Tax Act, 1957, and directed issue of warrants for the recovery of the sums due from the assessee.

3. The petitioner has reiterated those contentions before this Court. The learned Advocate for the petitioner has contended that the provisions contained in section 2 of the Mysore Sales Tax Act, 1958 (Amending Act) which amended section 5 of the Mysore Sales Tax Act, 1957, was unconstitutional as the Amending Act had been introduced in the Legislature of the State without the previous sanction of the President as required by the proviso to Article 304(b) of the Constitution. He further contended that it was not competent for the Magistrate to issue a warrant for recovery of the tax as Article 265 of the Constitution prohibited the collection of any tax except by authority of law. As against these contentions, it was submitted for the State that the levy of sales tax was not a direct and immediate restriction on the freedom of trade and therefore the introduction of the Bill did not require the previous sanction of the President as contemplated by the proviso to Article 304(b) of the Constitution. It was further submitted that the Amending Bill which was finally passed as Act No. IX of 1958 effected a reduction in the rate of existing taxes and did not therefore impose any new restriction.

4. Before considering the merits of these contentions, it is necessary to note that the Mysore Sales Tax Act, 1957 (Act No. XXV of 1957) had received the assent of the President on the 29th day of September, 1957, and had therefore been validly enacted. Section 5(1) of that Act, which is the material provision, reads as follows :

"5. Levy of tax on sale or purchase of goods. - (1) Every dealer shall pay for each year tax on his total turnover at the rate of two per cent. of such turnover :

Provided that if and to the extent to which such turnover relates to pulses or to articles made of gold or silver, the tax shall be calculated at the rate of one per cent. of such turnover."

It is common ground that under this provision the tax on total turnover of sales of potatoes was at the rate of two per cent. Section 2 of the Amending Act No. IX of 1958 effected an amendment to the proviso of sub-section (1) by substituting for the word "pulses" the words "garlic, gur, onion, potatoes, pulses and their products, sweet potatoes and turmeric." The effect of this amendment was that the tax to be collected from every dealer in potatoes on his total turnover was to be calculated at the rate of one per cent. instead of at two per cent. It is conceded for the State Government that the Amending Bill had been introduced

in the State Legislature without the previous sanction of the President.

5. It cannot be disputed that the State Legislature is competent to legislate under Entry No. 54 of the II List of the Seventh Schedule in regard to "taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of List I." We are not concerned with Entry 92A of List I which empowers the Parliament to legislate on the subject of "taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce." The learned Advocate for the petitioner contended that the State Legislature was not competent to levy sales tax on potatoes in view of Entry 33(b) of List III. This entry provides for concurrent powers of legislation on "trade and commerce in, and the production, supply and distribution of foodstuffs, including edible oil seeds and oils." It was urged that the sale of potatoes would fall in the category of trade in foodstuffs and that the State Legislature was not competent to levy tax on foodstuffs unless the prior assent of the President was obtained for the introduction of the Bill. This argument has no substance. It is no doubt true that potatoes would fall under the category of foodstuffs but Entry 33 of List III has no relation, whatsoever, to the subject of taxation mentioned in Entry 54 of List II. The word "goods" (occurring in this latter Article) has been defined by Article 366(12) of the Constitution according to which "goods" includes "all materials, commodities and articles." So "potatoes" would fall within the category of commodities within the ambit of "goods" the sale or purchase of which can be taxed. While Entry 33 of List III relates to the power of general legislation on the subject specified therein, Entry 54 of List II relates to taxation on the sale of goods and is a distinct matter for the purpose of legislative competence. We have therefore no hesitation in rejection this contention as of no substance.

6. The main contention of the petitioner is that the amendment is ultra vires the State Legislature as the previous sanction of the President had not been obtained for the introduction of the Amending Bill as required by the proviso to Article 304(b) of the Constitution. The relevant portion of Article 304 reads as follows :

"304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may be law -

(a) * * *

(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."

Article 301 declares that

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

What is the concept and extent of "freedom" declared by this Article has been the subject-matter of numerous decisions of the Supreme Court. In *Saghir Ahmad Vs. The State of U.P. and Others*, , their Lordships merely indicated the different views that are possible to be taken in respect of Articles 301 and 19(1) (g) of the Constitution without expressing any final opinion on those points. The meaning of the word "free" occurring in Article 301 came up for consideration in *P.P. Kutti Keya and Others Vs. The State of Madras and Others*, , in which their Lordships quoted the following passage from pages 277 to 278 of the Australian Constitution by Nicholas (2nd Edition) :

"The restriction of freedom may occur at any stage of the inter-State journey The section does not refer only to restriction at the frontier, so long as the law relates to a passage across the frontier. It refers to one operating against transference from one State to another at whatever point the burden or restriction is imposed. It may be before or after the actual movement from one State to another."

Article 301 of our Constitution is based on section 92 of the Commonwealth of Australia Constitution, 1900, though it is of wider import. The Privy Council had to consider the scope of section 92 in the *Commonwealth of Australia v. Bank of New South Wales* ([1950] A.C. 235). Lord Porter speaking for the Judicial Committee of the Privy Council observed :

"..... "But the word "free" does not mean extra legem any more than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law," and through all the subsequent cases in which section 92 has been discussed, the problem has been to define the qualification of that which in the Constitution is left unqualified. In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted : (1) that regulation of trade, commerce and intercourse among the States is compatible with its absolute freedom, and (2) that section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. In the application of these general propositions, in determining whether an enactment is regulatory or something more, or whether a restriction is direct or only remote or incidental, there cannot fail to be differences of opinion. The problem to be solved will often be not so much legal as political, social, or economic, yet it must be solved by a Court of law"

The Supreme Court referred to this decision in detail in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, and emphasised the special feature of the provisions incorporated in Part XIII of the Indian Constitution.

"..... Our Constitution also proclaims by Article 301 the freedom of trade, commerce and intercourse throughout the territory of India subject to the provisions of Articles 302, 305 which permit the imposition of reasonable

restriction by Parliament and the State Legislatures.

The underlying idea in making trade, commerce and intercourse with, as well as within the States free undoubtedly was to emphasise the unity of India and to ensure that no barriers might be set up to break up the national unity."

7. Their Lordships of the Supreme Court considered exhaustively the concept and the mode of freedom declared by Article 301 and the nature of the permissible restrictions on such freedom in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, . In the former case, the vires of the Assam Taxation (on Goods Carried by Roads or Inland Waterways) Act (Act No. XIII of 1954) was considered by their Lordships in the light of the provisions contained in Part XIII of the Constitution. The particular ground of attack was that that Act violated the provisions of Article 301 of the Constitution and was not saved by the provisions of Article 304(b). Their Lordships held that the content of "freedom" provided for by Article 301 was larger than the "freedom" contemplated by section 297 of the Government of India Act of 1935, and that it included the movement of trade which is of the very essence of all trade and is its integral part. In their Lordships' opinion, restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. It is only taxes as directly and immediately restrict the trade that would contravene the freedom guaranteed by the Article. "In determining the limits of the width and amplitude of the freedom guaranteed by Article 301, a rational and workable test to apply would be : Does the impugned restriction operate directly or immediately on trade or its movement ?" A careful study of the decision in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, discloses that three different views were expressed about the content and amplitude of the provisions contained in Part XIII of the Constitution. One of the views was that taxation simpliciter was not within the terms of Article 301 and that a tax on movement of goods or passengers did not necessarily connote impediment or restriction in the matter of trade or commerce. The other view was that the freedom contemplated by Article 301 was inclusive of all activities which constitute commerce and intercourse and not merely restrictions on the movement aspect. Both these views were considered in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , but neither of them was approved. The majority decision in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , which was approved in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , is set out in paragraphs 51, 52 and 53 of that judgment and the relevant portions may be extracted with advantage :

"..... We think it would be reasonable and proper to hold that restrictions, freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and

immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld. If the said argument is accepted it would mean, for instance, that even a legislative enactment prescribing the minimum wages to industrial employees may fall under Part XIII because in an economic sense an additional wage bill may indirectly affect trade or commerce. * * *

Our conclusion, therefore, is that when Article 301 provides that trade shall be free throughout the territory of India it means that the flow of trade shall run smooth and unhampered by any restriction either at the boundaries of the States or at any other points inside the States themselves. It is the free movement or the transport of goods from one part of the country to the other that is intended to be saved, and if any Act imposes any direct restrictions on the very movement of such goods it attracts the provisions of Article 301, and its validity can be sustained only if it satisfies the requirements of Article 302 or Article 304 of Part XIII."

This majority view was accepted in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, subject to one clarification indicated in paragraph 17 of the judgment in that case :-

"..... Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution."

8. In this connection, we may usefully refer to certain portions of the concurring judgment delivered by Mr. Justice Subba Rao in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, in which his Lordship discussed how every taxing legislation may have some repercussion on the declared freedom and how an indiscriminate insistence on the necessity of prior sanction by the President in all such legislation is likely to reduce the Legislature of a State to the position of a handmaid of the Central Executive. In paragraph 36 of the judgment his Lordship observed :-

"The Constitution confers on the Parliament and the State Legislatures extensive powers to make laws in respect of various matters. A glance at the entries in the Lists of the Seventh Schedule to the Constitution would show that every law so made may have some repercussion on the declared freedom. Property tax, profession tax, sales tax, excise duty and other taxes may all have an indirect effect on the free flow of trade. So too, laws, other than those of taxation, made by virtue of different entries in the Lists, may remotely affect trade. Should it be held that any law which may have such repercussion must either be passed by the Parliament or by the State Legislature with the previous consent of the President, there would be an end of provincial autonomy, for in that event, with

some exceptions, all the said laws should either be made by the Parliament or by the State Legislature with the consent of the Central Executive Government. By so construing, we would be making the Legislature of a State elected on an adult franchise the handmaid of the Central Executive. We would be rewriting the Constitution and introducing by side wind autocracy in the field of legislation allotted to the States while our Constitution has provided meticulously for democracy. Therefore, any construction which may bring about such an unexpected result shall be avoided unless the Constitution compels us by express words to do so."

His Lordship then considered in paragraph 39 of the judgment the meaning of the word "restrictions" used in Article 302 of the Constitution and discussed what kind of limitation imposed by a taxing enactment would amount to a restriction on the declared freedom :-

".... Of all the doctrines evolved, in my view, the doctrine of "direct and immediate effect" on the freedom would be a reasonable solvent to the difficult situation that might arise under our Constitution. If a law, whatever may have been its source, directly and immediately affects the free movement of trade, it would be restriction on the said freedom. But a law which may have only indirect and remote repercussions on the said freedom cannot be considered to be a restriction on it. Taking the illustration from taxation law, a law may impose a tax on the movement of goods or persons by a motor-vehicle; it directly operates as a restriction on the free movement of trade, except when it is compensatory or regulatory. On the other hand, a law may tax a vehicle, as property, or the garage wherein the vehicle used for conveyance is kept. The said law may have indirect repercussion on the movement, but the said law is not one directly imposing restrictions on the free movement. In this context two difficulties may have to be faced : firstly, though a law purporting to impose a tax on a property or a motor-vehicle, as the case may be, may in fact and in reality impose a tax on the movement itself; secondly, a law may not be on the movement of trade, but on the property itself, but the burden may be so high that it may indirectly affect the free flow of trade. In the former case, the Court may have to scrutinize the provisions of a particular statute to ascertain whether the tax is on the movement. If the provisions disclose a tax on the movement, it will be a restriction within the meaning of Article 302. In the latter case, if the provisions show that the tax is on property, the reasonableness of the tax may have to be tested against the provisions of Article 19 of the Constitution. The question whether a law imposes a restriction or not depends on the question whether the said law imposes directly and immediately a limitation on the freedom of movement of trade. If it does, the extent of the impediment relates to the question of degree rather than to the nature of it. If it is a restriction, it must satisfy the conditions laid down in Article 302 of the Constitution."

9. Judged in the light of what has been stated above, section 5 as amended, which is the charging section, cannot be regarded as an infringement on the

freedom of trade. Prior to the amendment the tax on the turnover of sales of potatoes was at the rate of two per cent. By the amendment of 1958 potatoes are included in the proviso. The effect of such inclusion is that the rate of tax on the annual total turnover on the sales of potatoes was reduced to one per cent. only. The amendment, instead of imposing any additional restriction by way of enhanced taxation, gives relief by reducing the percentage of tax. The main allegation that it contravened the freedom declared by Article 301 has been found to be without any substance. The amendment is therefore entirely within Entry 54 of the State List. An amendment falling entirely within Entry 54 of the State List effected by the Bihar Annual Finance Act, 1950, to the Bihar Sales Tax Act, 1947, was held to be legal, not requiring the assent of the President (vide *Motipur Zamindari Company (Private) Ltd. v. The State of Bihar and Another* ((1962) 13 S.T.C. 1). The Travancore-Cochin High Court has also held that rule 7(1)(k) and rule 20(2) of the Travancore-Cochin General Sales Tax Rule, which do not impose any direct and immediate restrictions on the freedom of trade, would not be hit by Article 301 (vide *A. V. Fernandez v. State* ((1955) 6 S.T.C. 22 : AIR 1955 T.C. 126).

10. On a careful consideration of the relevant provisions of the Constitution and the decisions referred to above, we have no hesitation in holding that the amendment does not contravene any of the provisions in Part XIII of the Constitution and as such the introduction of the Bill effecting the amendment did not require the prior sanction of the President.

11. In the result, we hold that there is no substance in any of the contentions raised by the petitioner. The petitions are accordingly dismissed with costs.

12. Petitions dismissed.