
(1978) 09 PAT CK 0015

In the Patna High Court

Case No : Civil Writ Jur. Case No. 294 of 1978

India Mica and Micanite Industries Ltd.

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 22-09-1978

Acts Referred:

Bihar Excise (Amendment and Validation) Second Ordinance, 1977 — Section 2, 3

Citation : AIR 1980 Patna 32

Hon'ble Judges : P.S. Sahay, J; Hari Lal Agrawal, J

Bench : Division Bench

Advocate : Balbhadra Pd. Singh, Rameshwar Prasad No. 2 and Upendra Prasad, for the Appellant; K.D. Chatterjee, General, S.B.N. Singh, Govt. Pleader No. 2 and Basant Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Hari Lal Agrawal, J.—This is the second trip of the petitioner to this Court in order to be relieved from the burden of the levy of certain fee under the Bihar and Orissa Excise Act, 1915. On the earlier occasion in C.W.J.C. No. 887 of 1965, it had challenged the imposition of fee on denatured spirit on the ground that it was not backed by the element of service. It failed in this court, but succeeded in the Supreme Court which remanded the case back to this Court with certain directions (see Indian Mica Micanite Industries Vs. The State of Bihar and Others, . On remand the petitioner succeeded and this court ordered the respondent to forbear from realising the fee and further directed to refund the amounts already realised from the petitioner. The State Government, however, instead of refunding the amounts in question, came out with an Ordinance purporting to validate the imposition in question with retrospective effect and thereby purporting to nullify the decision of this Court. The petitioner now challenges the validity of this Ordinance. The facts are interesting and may be noticed in brief for the proper appreciation of this question.

2. The Ordinance under challenge is the Bihar Excise (Amendment and

Validation) Second Ordinance 1977 (Bihar Ordinance No. 236 of 1977) promulgated by the Governor of Bihar on 22nd Dec, 1977, thereby, also repealing an earlier Ordinance promulgated for the same purpose, namely, Bihar Ordinance No. 223 of 1977.

Now to the facts:

3. The petitioner is a consumer of denatured spirit and purchases the same from the wholesalers or manufacturers for the purpose of manufacturing micanite. u/s 90 of the Bihar and Orissa Excise Act, the then provincial Government and the Board of Revenue framed various rules known as the Bihar and Orissa Excise Rules. Rule 111 related to levying of licence fee. The fee for the licence to possess denatured spirit in 1919 was only Rs. 2/- per annum, irrespective of the quantity to be possessed by any person. On 10th September 1937, the rule was amended and the fee was made ad quantum at the rate of eight annas per bluk gallon. By a notification of 24th March 1952, this was raised to Rupees 2/- and then to 55 paise per litre and thereafter to 75 paise per litre.

4. In C.W.J.C. No. 887 of 1965, the petitioner challenged the order of the Board of Revenue fixing the rate of fee of 55 paise per litre on the main ground that the fee was in essence, tax or duty which the State Govt. could not constitutionally levy in respect of alcoholic liquor not fit for human consumption, inasmuch as it was a subject falling in the Union List in entry No. 84 (a).

Chief Justice Narasimham who delivered the Judgment for the Bench on the 14th October, 1966, dismissed the application holding that the impugned levy was, in essence, a fee, and not a tax and that there was proper element of quid pro quo for grant of the said privilege of storing denatured spirit in large quantity without any risk of prosecution. In other words, it was held that there was sufficient co-relationship between the privilege granted or the services rendered to the licensee and permit-holder, on the one hand, and the impugned levy on him, on the other, inasmuch as the Excise Department had to maintain an elaborate staff for the purpose of ensuring that denaturation was done properly by the manufacturer and its subsequent possession by the dealers and the licensees or the permit-holders was not a misuse.

5. The petitioner then took the matter to the Supreme Court on a certificate. The Supreme Court allowed the appeal and remanded the case back for a fresh decision after giving a further opportunity to the State Government "to place material before that Court to show that the value of the services rendered by the State has reasonable co-relationship with the fees charged", with liberty to the petitioner to rebut the same. The Supreme Court, however, observed that prima facie the levy appeared to be excessive even if the State could be said to be rendering some service to the licensee.

6. After remand, the case was placed before a Bench consisting of S.N.P. Singh and K.B.N. Singh, JJ. (as they then were). An affidavit was filed on behalf of the respondents stating certain facts in support of their case that there was a co-

relationship between the fee realised and the services rendered by the State, but this Court did not feel satisfied that there was a correlationship between the fee realised and the services rendered and, accordingly, by their judgment dated 30th August 1973 allowed the application holding that the levy was unjustified. A writ of mandamus was accordingly, issued on the respondents not to impose levy under the impugned rule and also directing them to refund the amount already realised from the petitioner. Admittedly the respondents did not refund the amounts, so much so that the petitioner also went on paying the fees. The petitioner then moved the member, Board of Revenue, Bihar, in the year 1975 in Case No. 473 of 1975, and the Board of Revenue by its order dated 11th May 1976 directed the State to refund the sum of Rs. 1,97,379-48 representing the payments made by the petitioner as licence fee during the pendency of the writ application, i e. from 11-10-1965 to 1-3-1976 within a period of three months, but refused to make any such order for the periods earlier to that. For the refund of the amount disallowed by the Board, a separate writ application (C.W.J.C. No. 2142 of 1976) has been filed by the petitioner which is pending. No payment, however, was made by the respondents in spite of the above order of the Board of Revenue, although further realisations from April 1976 were agreed to be stayed.

7. The petitioner thus having failed to get any redress, filed the present writ application. The petitioner has alleged that the respondents did not forbear from realising the licence fee from it, and inasmuch as denatured spirit as a raw material for manufacturing micanite was essential, it was obliged to pay the same even after the orders parsed by this Court. The petitioner also filed an application u/s 11 of the Contempt of Courts Act, 1971 on 19th July 1977 (M.J.C. No. 141 of 1977) for the committal of the respondent-State and the Commissioner of Excise. A rule was issued by this Court on that application on 12-8-1977. In the show cause of the Commissioner of Excise in the contempt proceeding on 21-9-1977, in essence, his plea is that the claim of the petitioner could not be disposed of on account of the pendency of C.W.J.C. No. 2142 of 1976 and certain verification needed on account of the conflicting claims made from time to time by the petitioner. Rather till then, willingness to pay has been indicated. It is, therefore, obvious that the State Government changed its mind thereafter and came with the Ordinance, namely, Ordinance No. 223 of 1977 on 3rd November 1977, followed by the Ordinance No. 236 of 1977, purporting to validate the imposition of fees from retrospective effect. The petitioner, accordingly, filed the present writ application on 7-2-1978, challenging the vires of the Ordinance.

8. The Ordinance consists of only four sections, the last section being simply a "Repeal and Saving" provision. Its preamble, inter alia, says that it had been thought fit to amend the Bihar and Orissa Excise Act and to validate the levy of certain fees as "it has come to light that various unscrupulous persons have from time to time attempted to modify the contents of "denatured spirit" and utilised it for the purpose of human consumption resulting in serious injury including

death" which required strict supervision and control in respect of all activities connected with it and that "circumstances exist which render it necessary to validate levy of certain fees....." The Ordinance substituted another section in place of the existing Section 22 of the Bihar and Orissa Excise Act. But the only change that has been brought about is the addition of a new clause, namely, Clause (f) bringing in "denatured spirit" within the fold of exclusive privilege and reads as follows:

"Of manufacturing, storing, using, possessing, exporting, importing including wholesale or retail sale of liquor which after manufacture is denatured to render it unfit for human consumption and is thereby termed as denatured spirit and any other intoxicant."

Section 3 of the Ordinance reads as follows:

"Notwithstanding anything to the contrary contained in any decree, judgment or order of any Court, the fee fixed, levied and realised or purported to be fixed, levied and realised under Sub-section (7) of Section 90 of the Act read with Section 22 of the Bihar and Orissa Excise Act, 1915 (Bihar and Orissa Act II of 1915), shall be deemed to have been validly fixed, levied, and realised as if the Ordinance were in force on the day on which such fee was fixed, levied and realised or purported to be fixed, levied and realised and shall not be called in question merely on the ground that such fee was excessive or disproportionate or unrelated to services rendered and all licences granted therefore shall be deemed to be exclusive privilege within the meaning of Section 22 of the said Act."

9. There is no manner of doubt that one of the objects of the Excise Act is to raise revenue for the State. There are provisions in the Excise Acts of all the States, including the Act of our own State, authorising the State to raise revenue in the shape of excise duty, licence fee and extra money for the grant of exclusive rights contemplated u/s 22 of the Bihar and Orissa Act, referred to above. However, after the coming into force of the Constitution, any impost under the Excise Act has to be justified with reference to some entry in the legislative List.

10. Before I proceed to discuss the various contentions advanced on behalf of learned counsel appearing for both sides, in order to narrow down the discussion and shorten my judgment, at the outset I must notice some of the propositions which have since been firmly established by the Supreme Court, namely, (a) A legislature has no authority for trenching upon the judicial power, but it has certainly got the power to nullify a judicial decision by changing the law retrospectively and thereby removing the basis of the decision rendered by the High Court, Such a course cannot be considered as an encroachment upon the judicial power (see *Tirath Ram Rajindra Nath, Lucknow Vs. State of U.P. and Another*,

When a Legislature sets out to validate a tax declared by a Court to be illegally

collected under an ineffective or an invalid law, the cause for the ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax; for, if it does not, the action must ever remain ineffective and illegal. In this connection it may further be noted that in spite of the legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind, for that is tantamount to reversing the decision in purported exercise of judicial power which the Legislature does not possess or exercise. A Court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances (see *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*,

(b) Where an entry is in general terms in List II, and part of that entry is in specific terms in List I the entry in List I takes effect notwithstanding the entry in List II, inter alia, on the principle that the general entry in List II is subject to the special entry in List I (see *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*,

(c) There is no fundamental right to do trade or business in intoxicants. The State, in its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants. In all its manifestations, this right is vested in the State (see *Balsara's Case AIR 1951 SC 318*), *Cooverjee's case (AIR 1954 SC 220)* *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, *The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong*, *Nagendra Nath's case (AIR 1958 SC 398)* and *Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others*, which have all been noticed in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, .

11. The above discussion at once leads us to notice the relevant entries in List II (State List), namely, entries 8, 51 (a) and 66, which are as follows:

Entry 8. "Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

Entry 51 "Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. :--

(a) alcoholic liquors for human consumption.

(b) xx xx"

Entry 66 "Fees in respect of any of the matters in this List, but not including fees taken in any court."

From a perusal of the above entries, it would appear that each entry deals with different situations. Whereas entry 8 confers exclusive privilege to the State

Government with regard to the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, entry 51 authorises it to impose duties of excise and countervailing duties on alcoholic liquors for human consumption manufactured or produced in the State. Entry 66, on the other hand, authorises for imposition of fees in respect of any of the matters in List II.

In this connection entry 84 (a) of the Union List (List I) may also be seen which is as follows:

Entry No. 84. "Duties of excise on tobacco and other goods manufactured or produced in India except--

(a) alcoholic liquors for human consumption;

(b) xx xx"

The above entry, therefore, makes it quite clear that right to levy excise duty on "alcoholic liquors for human consumption" was given to the State legislatures and there is no manner of conflict between the areas of operation of the Union and the States, and in any event, the impost in this case is supported by the State on the ground that it is an excise duty. We have seen that on the earlier occasion, the State Government sought to defend the impost under entry 66, and in view of the long line of decisions referred to by the Supreme Court in the petitioner's case itself *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, and again in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, that the levy of fee must be backed by the element of service, i.e. the theory of *quid pro quo*, the State Government failed to justify the said imposition and accordingly it was struck down. The State Government, therefore, had no escape unless it took recourse to its legislative powers, the power to levy fees under entry 66 having proved a failure. They could seek equally no relief under entry 51 (a) as it authorised the State Legislature to impose excise duty only on liquors fit for human consumption and denatured spirit being not fit for human consumption the only succour for the State, therefore, was to fall on entry No. 66. Section 22 of the Act as it stood could not provide any relief as it created exclusive privilege only with respect to (1) country liquor, and (2) intoxicating drugs. Denatured spirit could not be brought in either of the two items and, therefore, if I may say so, in their ingenuity, they thought to derive fresh power u/s 22 of the Act by bringing denatured spirit also within its ambit. The State perhaps could not wait for an amendment by the Legislature on account of the contempt case. Therefore, they took recourse to an Ordinance and brought in the amendment.

12. By the proposed amendment, i.e. by bringing denatured spirit under the fold of Section 22 of the Act, which now authorises the State Government to grant exclusive privilege of manufacture, storage, sale etc. of denatured spirit as well, that power the State exercised with retrospective effect, and thereby validated the levy of the fees in question, notwithstanding the judgment of this Court *inter partes*. The amending Ordinance thus supplied the base for the imposition and

effectively nullified the said judgment of this Court.

13. Now let us also examine some of the provisions of the Bihar and Orissa Excise Act in this connection. "Denature" as a verb has been defined in Section 2 (b) of the Act as follows:

"to mix spirit with one or more denaturants in such manner as may be prescribed by rule made in this behalf under Clause (c) of Section 90, and "denatured spirit" means spirit so mixed."

Then "intoxicant" has been defined in Section 2 (12) as "any liquor or intoxicating drug". "Intoxicating drug" has been defined in Section 2 (13) and "liquor" in Section 2 (14), which reads as follows:

"Liquor" includes all liquids consisting of or containing alcohol, such as spirits of wine, spirit, wine, fermented tari, pachwai and beer, and also unfermented tari, and also any other substance which the State Government may, by notification, declare to be liquor for the purpose of this Act."

In this connection it will be also useful to refer to the definition of "spirit" defined in Clause 19 of Section 2, meaning as "any liquor containing alcohol obtained by distillation, whether it is denatured or not".

14. The expression "foreign liquor" should not be misunderstood as an imported liquor and it can be manufactured within the State under a licence. Foreign liquor is allowed to enter the State only on payment of certain duty. The essential difference is in the base from which the two categories of liquors are manufactured. Notification No. 47-F dated the 15th Jan., 1919 declares denatured spirit within the category of "foreign liquor."

15. Mr. Balabhadra Pd. Singh, learned counsel appearing for the petitioner, did not dispute the propositions of law enumerated by me in para 10 above, but he attacked the Ordinance mainly on two grounds; firstly, that denatured spirit could not be introduced in Section 20 of the Act as it was not fit for human consumption and, therefore, its inclusion in the present Act by Section 2 of the Ordinance suffers from the vice of legislative incompetence and secondly, retrospective validation of the imposition was nothing but a colourable device to merely nullify a judgment debt and the State had no authority for withholding payment of any excess amount paid or realised. I now proceed to consider both the above grounds one by one.

Ground No. 1:

16. In support of his first contention, learned counsel first referred to entry 84 (a) of List I to show that the right to impose duty of excise was excluded from the Union List only with respect to such alcoholic liquors which were fit for human consumption, and inasmuch as denatured spirit was not fit for human consumption, there was no right in the State Government to make any impost with respect to the same--

There is an apparent fallacy in the argument of the learned counsel for the simple reason, as already indicated in the very beginning, that here it is not a case of imposition of any duty of excise under Entry 51 (a), but the grant of exclusive privilege under Entry 8. Of course, this could not be done u/s 22 as it originally stood as that contemplated the grant of exclusive privilege of manufacture and sale etc. of country liquor or intoxicating drugs only, and not anything else. Denatured spirit could not be covered either "within the definition of "country liquor" or "intoxicating drugs". From the declaration made under Notification No. 470-F dated the 15th Jan., 1919, issued by the State Government, it appears that denatured spirit is deemed to be included in "foreign liquor". It was further contended on reference to certain provisions of the Act and the rules that the powers so far as with respect to denatured spirit was concerned, it was merely regulatory.

Two decisions were also cited on behalf of the petitioner in support of the contention, namely, (a) Sheopat Rai v. State of Uttar Pradesh (1973 Tax LR 2271) (All) and Laxmikant Sahu v. Superintendent of Excise, Bihar (1968 SCD 14). In both the cases, the concerned State Governments wanted to settle foreign liquor shops by auction by deriving powers in that behalf by enforcement of the amending Ordinances. On reference to the various provisions of their Excise Acts and the corresponding rules framed thereunder, it was found that the auction money for settling the foreign liquor shops was, in essence, a tax, and not a fee, which was not authorised under the law. The ratio of neither of the cases could have any application to the facts of the present case, as it is nobody's case that the impost in question was made as an incidence of "tax". Laxmikant Sahu's case was considered by the Supreme Court in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, where it was observed that the ratio of this case was based on the concession of the counsel. It was not contended before us in fact, could it be so contended that "foreign liquor" would not fall within the mischief of the definition of "liquor". The Supreme Court in Balsara's case AIR 1951 SC 318, while holding that the State has power to regulate a trade like the trade in intoxicants, on reference to a large number of statutes, both Indian and foreign, also held that the word "liquor" was wide enough to cover not only alcoholic liquors used for beverage purposes, but also foreign liquor. It was for this end in view that an amendment of Section 22 was thought necessary by the State Government to derive powers with respect to denatured spirit to bring it within the pale of exclusive privilege so as to part with this privilege on such considerations as it might think proper.

17. A question, however, still arises as to whether the State Government was competent to make the amendment as challenged by the learned counsel. It has already been seen that one of the dominant purposes of the Excise Act is to augment the revenue of the State Exchequer in the shape of excise duty, licence fee and extra money for the grant of exclusive rights. The only embargo on this right is that it has to be justified with reference to some entry in the legislative list. In my judgment, Entry 8 of List II is wide enough and denatured spirit could

be brought within the pale of State Legislature. Section 2 of the Ordinance which amends Section 22 of the Excise Act, in the manner seen above, therefore, in my opinion, does not suffer from any vice of unconstitutionality. Once this position is arrived at, then there can be no difficulty in holding that the State Government under the legislative authority could make a law with a retrospective effect. Ground No. 2:

18. My answer to the first question raised by the learned counsel for the petitioner by itself cuts at the root of the second ground of attack, namely that the provision of Section 3 of the Ordinance amounts to nullify a judgment debt as it is well settled that once there is a legislative competence to validate any imposition, then the validity can be given a retrospective effect and the legislature is competent to validate the imposition by supplying the base for the imposition in question and thereby fill up the lacuna in the principal Act. In this connection I may refer to some of the authorities which were cited by the learned Advocate-General. They are AIR 1941 16 (Federal Court) *Piare Dusadh v. Emperor* (AIR 1944 FC 1), *West Ramnad Electric Distribution Co. Ltd. Vs. State of Madras*, *Jaora Sugar Mills (P) Ltd. Vs. State of Madhya Pradesh and Others*, *Udai Ram Sharma v. Union of India* AIR 1968 SC 1138, *Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others*, and *Tirath Ram Rajindra Nath, Lucknow Vs. State of U.P. and Another*, .

19. It is not necessary to discuss in any detail the principles enunciated in the two cases of the Federal Court as the question has engaged the attention of the Supreme Court in a number of cases by now. The Supreme Court has noticed the two cases of the Federal Court as well as the earlier cases decided by it by that time in *Udai Ram Sharma's case* (AIR 1968 SC 1138). This case arose out of a proceeding for acquisition of land for Rourkela Plant. Originally a declaration u/s 4(1) of the Land Acquisition Act was issued and thereafter notifications were issued u/s 6, from time to time acquiring lands in different instalments out of the lands mentioned in the declaration under Sec. 4, Some of the owners of the lands challenged the validity of the notifications u/s 6 and the High Court accepted the same. The State Government then went to the Supreme Court, and in *State of Madhya Pradesh and Others Vs. Vishnu Prasad Sharma and Others*, the Supreme Court held that once a declaration u/s 6 was issued, the notification u/s 4(1) was exhausted. Thereafter an Ordinance was promulgated by the President of India purporting inter alia to amend Section 6 of the principal Act by enabling different declarations to be made from time to time in respect of different parcels of land covered by the same notification u/s 4. The Ordinance also purported to validate all acquisitions of land made or purporting to be made under the principal Act before the commencement of the Ordinance notwithstanding any judgment, decree or order of any Court to the contrary, which was later on made an Act of the Parliament (Act 18 of 1967). When this Act was challenged, it was held by the Supreme Court that it was open to the Parliament to adopt either course, for example i.e. to provide expressly for the retrospective operation of the provisions of the amending Act, or to lay down

that no acquisition purporting to have been made and no action taken before the validating Ordinance, shall be deemed to be invalid or ever to have become invalid because inter alia of the making of more than one declaration u/s 6 of the Land Acquisition Act. It was further observed that the Parliament is competent to validate such actions and transactions, its power in that behalf being only circumscribed by the appropriate entry in the list of the Seventh Schedule and the fundamental rights set forth in Part III of the Constitution. The provisions of the amending Act, therefore, being within the legislative competence of the Parliament, the provisions thereof were binding on all courts of law, notwithstanding the judgments, orders or decrees to the contrary rendered or made in the past.

I have already noticed *Tirath Ram Rajindra Nath, Lucknow Vs. State of U.P. and Another*, This was a case under the U.P. Sales Tax Act. Section 3 of the U.P. Sales Tax Act, 1948, purported to impose multi-point sales tax on the sale of certain goods, Section 3-A, on the other hand, empowered the Government to levy a sales tax on some of the goods "at such single-point in the series of sales by successive dealers" as may be prescribed by the State Government. A notification issued under this power imposed sales-tax on the turnover of the sale of bricks at the point of sale by the manufacturer. When this notification was challenged before the Allahabad High Court during the pendency of the case, the Governor of U.P. issued an Amendment and Validation Ordinance purporting to amend Section 3-A with retrospective effect and also to validate the assessments made and the tax recovered under the notifications. This Ordinance sought to substitute the words "at such single point in the series of sales by successive dealers as the State Government may specify" by the words "at such single point of sale as the State Government may specify". In spite of the amendment, the Court held that the Ordinance was ineffective to save the notifications. Thereafter the U.P. Legislature passed an Amendment and Validation Act, 1970, empowering the State Government by a notification in the Official Gazette to declare that the turnover in respect of any goods or class of goods shall not be liable to tax except at such single point of sale as the State Government may specify. Under this Act, the assessments made were sought to be validated and the tax recovered protected. A Full Bench of the Allahabad High Court in *Krishna Brick Field v. State of U.P.* (1971 Tax LR 1057) held that the above provision was unconstitutional. Thereafter the U.P. Government made further amendment to the Act validating the imposition, fully discussed in the Supreme Court report, thereby nullifying the effect of the judicial decision by changing the law retrospectively, and the Supreme Court refused to strike down the Amending Act holding that the amendment was within the legislative competence of the U.P. Government.

20. Learned counsel for the petitioner also cited a number of authorities in support of his proposition, and they are (1) *Janapada Sabha, Chhindwara v. Central Provinces Syndicate Ltd.*, (2) *State of Mysore v. D. Cawasji & Co.*, (3) *State of Tamil Nadu v. M. Rayappa Gounder* and (4) *Ashoka Marketing Ltd. v.*

State of Bihar, all reported in the same volume, namely, Janapada Sabha Chhindwara Vs. The Central Provinces Syndicate Ltd. and Another, and 946 respectively, and (5) Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others,

In the first and the third cases, the concerned State Legislatures sought to validate certain levies of cess and entertainment-tax respectively by merely purporting to validate the impositions without removing the defect in the law, i.e. providing the base and removing the lacuna in the Acts. In these circumstances it was said by the Supreme Court that the purported validation in the absence of proper amendment of the Act itself was of no avail.

In the second case State of Mysore and Others Vs. D. Cawasji and Company and Others, the State of Mysore framed rules regulating the sale of "excise privileges" in respect of toddy and one of them was "shop-rent" thereby charging certain money as payment for the exclusive privilege of selling toddy from certain shons. When it was challenged, the Supreme Court held that "shop-rent" was not an excise revenue within the meaning of Entry 51 of List II of the Schedule to the Mysore Act as it had no relation to the production or manufacture of toddy.

The last case of this volume, namely, Ashoka Marketing Ltd. Vs. State of Bihar and Another, was from this Court. This was a case under the Bihar Sales Tax Act. The Superintendent of Sales Tax had brought to tax an additional amount of Rs. 7,67,702-13-0 being the railway freight paid in respect of the goods supplied by the assessee. This, however, was knocked down by the appellate authority. Thereafter the Bihar Sales Tax Act, 1947, was repealed and replaced by 1959 Act. In this Act, Section 20A was introduced by Act 20 of 1962. By this amendment, the State Government wanted to retain (forfeit) the sales-tax on the railway freight which had become refundable under the said order of assessment. The Supreme Court held that there was no power in the State Government to legislate in respect of recovery of an amount collected by a dealer which in law he was not entitled to collect. It is obvious that what was attempted by the State Government in this case was to retain money which it was not otherwise entitled to do.

In Madan Mohan Pathak and Another Vs. Union of India (UOI) and Others, the Life Insurance Corporation had entered into a settlement with its Class III and IV employees in regard to payment of certain bonus for the year 1975-76. By a Modification of Settlement Act (72 of 1976), the debt due to the said employees was purported to be transferred to the Corporation itself without however providing for any compensation. In this circumstance, it was held by the Supreme Court that the Act was violative of Article 31(2) of the Constitution since it did not provide for payment of any compensation at all for the compulsory acquisition of these debts. It is difficult to appreciate as to how the principle enunciated in this case would have any application to the present case.

In the case of Sales Tax Officer, Special Circle, Ernakulam and Another Vs. The Tata Oil Mills Co. Ltd., which was also cited by Mr. Singh, the State of Kerala wanted to retain the amounts realised from a dealer in excess of what was due as tax. Following the decision in Ashoka Marketing's case (supra), the Validation Act in question was held to be invalid. None of the above cases, therefore, lend support to the case of the petitioner, and they are entirely distinguishable on their own facts.

At this stage I feel it desirable to discuss Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, already noticed in para 10 earlier, in some detail, as, if I may say so with respect, in this case the principle relevant for the present case has been enunciated in a very builed (?) (bold) terms. This case was cited in the first instance by Mr. Balbhadra Pd. Singh, but the learned Advocate-General utilised it in support of his stand. In this case the Broach Borough Municipality constituted u/s 8 of the Bombay Municipal Boroughs Act had imposed a purported "rate" on lands and buildings at a certain percentage of capital value belonging to the petitioner. The petitioner, accordingly, had filed writ petitions challenging the same in the Gujarat High Court. During the pendency of these writ petitions, the Supreme Court in the case of Patel Gordhandas Hargovindas Vs. Municipal Commissioner, Ahmedabad, declared the imposition as ultra vires. This led the Gujarat Legislature to pass the Gujarat Imposition of Taxes by Municipality (Validation) Act, 1953. The petitioner then filed a second writ petition challenging the validity of the Validation Act on various grounds, thereby (sic) removing the lacuna in the Act on which the imposition was held to be invalid from retrospective effect and validating all impositions made under the Act as it stood before the amendment.

The Supreme Court held that before the amendment, the legislature had not authorised levy of a tax directly on lands and buildings as units of taxation, but had authorised the levy of a "rate", and the rules framed u/s 73 of the Act in question did not answer the description of the impost under the Act as the word "rate" had acquired a special meaning in legislative practice and, therefore, in order to remove this illegality the legislature exercised its power of re-defining "rate" so as to equate it to a "tax" thereby giving new meaning to the expression "rate". It was further held that the exercise of powers by the legislature was valid because the legislature did possess a power to levy a tax on lands and buildings based on capital value thereof, and in validating the levy on that basis, the implication of the use of the word "rate" could be effectively removed and the tax on lands and buildings imposed instead.

21. The learned Advocate-General leaned heavily on Har Shankar's case and contended that the levy in question under challenge was, in essence a fee or price for parting with the exclusive privilege of the State of storing denatured spirit, and this power was fully covered by virtue of Entry 8 of List II. In my considered opinion, the contention is well founded.

In Har Shankar's case, the Supreme Court noticed almost all the earlier cases on

the subject right from Balsara's case and reiterated its view that there is no fundamental right to do trade or business in intoxicants and the State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting, there can be no effective regulation of various forms of activities in relation to intoxicants.

22. Having given my all anxious considerations to the entire facts and circumstances giving rise to the promulgation of the Ordinance and having examined the mass of authorities cited at the bar on the subject I find it unable to hold that the provisions of the impugned Ordinance are invalid and suffer from any vice of unconstitutionality, or for that matter any legislative incompetence. In my judgment, Entry 8 (List II) gives ample power to the State Legislature in respect to the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, irrespective of the fact whether it is country made or foreign. The Governor was, therefore, fully competent to amend Section 22 of the Bihar and Orissa Excise Act by Section 2 of the impugned Ordinance and thereby conferring exclusive privilege to the State Government in relation to denatured spirit also, and once this is done, then it could be applied with retrospective effect. The inevitable result and consequence that has to follow on these events taking place is that the levy of fee on the purchase of denatured spirit stands fully protected and the petitioner now does not remain entitled any more to claim the advantage and benefits derived under the previous judgment of this Court, and thus the petitioner fails in its long drawn struggle for its emancipation from the levy of fees in question; perhaps for such an occasion it was said that "there is no worse torture than the torture of laws".

23. In the result, this application must fail and is, accordingly, dismissed. In the circumstances, however, I shall leave the parties to bear their own costs.

P. S. Sahay, J.

24. I agree.