

(1960) 03 KL CK 0006
In the High Court Of Kerala
Case No : O. P. No"s. 731, etc. of 1959

Kesavan

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 15-03-1960

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 19(1)(g), 19(6), 207
States Reorganisation Act, 1956 — Section 5

Citation : (1960) KLJ 717

Hon'ble Judges : T.C. Raghavan, J;M.A. Ansari, J

Bench : Division Bench

Advocate : K. Velayudhan Nair, V.S. Moothathu, M.K. Abdulla, V.V. Narayanan, K.J. Joseph, K.V. Kuriakose, N.D.P. Nambudiripad and O.T. Silvester, for the Appellant;

Final Decision : Dismissed

Judgement

M.A. Ansari, J.—This group of sixteen petitions are under Art. 226, and challenges the constitutionality of the General Sales Tax (Amendment) Act, No. XIV of 1959, whereby sales of toddy have been charged with the tax, and three amendments made in the General Sales Tax Act, No. XI of 1125. Firstly a new clause (j-3) has been added to Section 2 of Act No. XI of 1125 and runs as follows:

(J-3) "toddy" means the fermented or unfermented juice drawn from cocoanut, palmyra, date or any other kind of palm tree, but shall not include juice drawn into receptacles freshly coated internally with lime or otherwise treated so as to prevent any fermentation.

The next is in Section 4 where the words "other than toddy, arrack" been substituted, and the Section now reads as follows :---

The provisions of this Act shall not apply to the sale of electrical energy and any goods other than toddy, arrack and foreign liquor on which duty is or may be

levied under the Travancore-Cochin Prohibition Act, 1950, or the Madras Prohibition Act, 1937, as in force in the Malabar District referred to sub-section (2) of Section 5 of the States Re-organisation Act, 1956, or the Travancore or Cochin Opium Act or the Opium Act, 1878 (Central Act I of 1878).

2. The last addition is to schedule I of Act No. XI of 1125 where the words "other than toddy" have been put after wine and liquors" in column (2) of item (1). Because of these amendments the vendors of toddy have now become liable to pay the sales tax of two naya paise per rupee u/s 3(1)(b) of Act No. XI of 1125 which provides:

The tax shall be calculated at the rates specified in column (3) of schedule 1 for every rupee in the turnover relating to the goods noted against them in column (2) thereof and as the rate of two naya paise for every rupee in the turnover relating to all other goods.

3. All the writ petitioners are licence holders of shops selling toddy and complain that Act No. XIV of 1959 has infringed their constitutional rights under Article 19(1)(g) and is not saved by clause 6 of Art. 19, since it does not reasonably restrict, in the interest of the general public, the exercise of their rights conferred by sub-clause (g). The next objection to the constitutionality of the new enactment is that it also infringes the petitioners' freedom of trade, commerce and intercourse under Art. 301 and it has been passed without the previous sanction of the President to the bill, thus failing to comply with the requirement of the proviso to Art. 304(b). That requirement is as follows:--

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

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

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

4. The third objection to the constitutionality of the legislation is that it offends Art. 207, for the Bill was not recommended by the Governor. If one were to summarise these constitutional objections one would be reduced to one complaint of the petitioners' right, and freedom to carry their trade being interfered with, because of the absence of the President's earlier sanction, the Governor's recommendation and reasonable restrictions in the interest of the general public. It is further clear that, should the State's power to tax be found not controllable by clause (6) of Art. 19, in the sense that its exercise need not be justified as being in reasonable restriction of the freedom, a further point would still require adjudication. That question is how far the exercise of such a right to tax must be justified as reasonably restricting the freedom to trade commerce and intercourse through the territory of India under Art. 301. In other

words, the point for decision is whether the guarantee of no tax being leviable except by the authority of law under Art. 265, require any enactment concerning taxation of trade to be with the President's earlier assent and in reasonable restriction of the right and the freedom to carry the trade. In addition to the aforesaid points two other objections were urged before us. They are that:

(1) The State having granted the petitioners the licences estopped from levying any fresh tax by subsequent amendment and substantially reducing the benefits under the earlier licences;

(2) Toddy being agricultural or horticultural produce, the prices for the sales of such a commodity would be agricultural income and excluded from the turnover as defined by Section 3 of Act No. XI of 1125.

5. We would deal first with these objections as the decisions concerning them can be briefly stated. It is clear that where the Legislature be supreme, (and the States legislative authority concerning items of list 2 of the Seventh Schedule to our Constitution is conceded to be such) limitations beyond those of the ruling instrument would not control its exercise of the powers. It follows that a taxing statute covered by item 54 of list 2 of the Seventh Schedule cannot be challenged on the grounds of its contravening rules of estoppel, or of contracts, or being contrary to an earlier undertaking of another Act. The legality of the new amendment to Act No. XI of 1125 therefore would not be affected by an equitable estoppel against the State Government, nor by its contractual obligation of not circumscribing the benefits conferred by the earlier licences. The next objection concerning incomes from the sales of toddy being agricultural, because they arise from interests in immovables and therefore not forming part of the petitioners' turnover, should not be entertained. No such objections have been raised in the writ petitions, and apart from such omissions how far prices obtained by writ petitioners, who merely tap trees under licences would be their agricultural incomes is doubtful in view of *T. Sultan Ahamed Rowther v State of Madras* (5 S. T. C. 166) and *Commissioner of Income Tax v Yogappa Nadar* (I. L. R. 50 Mad. 923).

6. There thus remains the challenge to the constitutionality of the amendment, and we would first deal with the ground of the amendment being violative of the petitioners' fundamental rights to carry trade under Art. 19 (1) (g). Apart from decisions, it cannot be disputed that the power to tax is a distinct head of States' rights and should not be confused, with other powers. It follows that limitations on other powers would neither be relevant, nor control the exercise of the power to tax. For example the requirement of compensation for the exercise of the right of eminent domain would not control the power to levy tax, nor of what the American Constitutional lawyers call police powers. It equally follows that the limitations on the State's right to restrict or regulate the several freedoms of Art. 19 would not extend to the power to tax. It is true that Art. 265 requires no tax being levied except according to law and any enactment being violative of Art. 19 would not be law. Nevertheless the two powers should not be

confused and what is intended to control the exercise of a distinct, separate and different power should not be extended to the other. That appears to us to be the inevitable consequence of the States having several powers. It further follows that the exercise of one power should not be such as to destroy what is conferred by the Constitution and the different powers must be harmoniously exercised. Therefore taxing statutes need not be justified as reasonably restricting the right and the freedom to trade in the interest of the general public. This appears to us to be the true position and we would now cite decisions in support of this view. In *Ananthakrishnan v State of Madras* (A.I.R. 1952 Mad. 395 405) the levy of stamp duty under the Stamp Act on the enrolment of an advocate was impeached as an unconstitutional invasion of the fundamental right to practise a profession under Art. 19(1) (g) and while rejecting the contention, Venkitarama Ayyar J. observed as follows:

Does the favoured position granted to the fundamental rights carry with it any immunity from taxation? The right to levy tax is an incident of sovereignty and the legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be described by the Constitution and nowhere in the Constitution do we find any prohibition against taxation of fundamental rights. Part III does not contain any such inhibition. On the other hand, there are provisions in Part XII of the Constitution, which clearly recognise the existence of such powers.

The same learned Judge later observed:--

But a right to carry on business is a Fundamental Right protected by the Constitution, and it stands to reason that a tax on such a right should not be such as to destroy it.:.

It might well be contended that there is in such cases a limitation on the powers of taxation, implicit in the Constitution itself, that it should not be exercised in such a manner as to take away with one hand what has been given by the other. Any question whether a tax in a particular case is so unreasonable as to amount to a destruction of the rights will, of course, be a matter for determination by courts, in the same manner as questions of reasonableness of restrictions under Art. 19.

7. We are further fortified by the decision in *Atma Ram Budhia v State of Bihar* (I. L. R. 31 Pat 493) where it was held that the question of the application of Art. 19 of the Constitution did not arise if the legislation be not directly in respect of the rights mentioned in the Article, but by operation of the statute incidentally or remotely some of the rights therein be affected or infringed. Moreover the compulsory licensing under the Madras General Sales Tax Act concerning certain commodities like hides was challenged in *Guruviah Naidu & Brothers v State of Madras* (8 S. T. C. 690 716 & 717) as unreasonable restriction on the freedom to trade and Rajagopala Ayyangar J. in the case says:

Taxation is the supreme function of the State, the exercise of a power which is

necessary for the very existence and maintenance of the State. In the words of Cooley, "It is unlimited in its range, acknowledging in its very nature no limits so that security against its abuse is to be found only in the responsibility of the legislation which imposes the tax to the constituency who are to pay. We are not now concerned with the limitations on this plenary power but will only point out that the test of its being a reasonable restriction on the right to trade is certainly not one of these limitations. The restraints imposed by taxation are wholly beyond the scope of Article 19(6) and therefore not subject to the tests of a valid legislation under that provision. The saving in Article 31, sub-clause (5)(b)(i) placing out of the purview of the main article the deprivation of property which taxes entail and which was put in only by way of abundant caution, is a pointer establishing the plenitude of the taxing power. It is precisely for this reason that the validity of the Sales Tax Act is not challenged, notwithstanding that, it might in particular cases be so burdensome to the business or trade as to render the carrying it on not worthwhile. If the Sales Tax Act is valid notwithstanding its economic effect, it is because tax-laws are not to be judged by the standard of reasonableness set out in Article 19(6).

8. This being the position, the objections concerning the petitioners' rights under Art. 19(1)(g) having been infringed would fail, unless the writ petitioners establish that under the new amendment, the tax is so unreasonable as to destroy their carrying the trade. Their learned Advocate has argued that they have paid licence fee, auction sums, and find it impossible to collect the tax from their customers, as persons consuming toddy hardly purchase toddy worth more than few annas. We think these grounds do not make the new tax so unreasonable and heavy as to be destructive of the petitioners' right to carry trade; for it is well-known that the sales tax is indirect and falls on the consumer, with the result that the dealers do not bear the burden, and the complaint of their other expenses being heavy becomes irrelevant. Nor do we see how the difficulty of collection would make the tax unreasonable, there being always persons who could be charged the tax on the bulk of commodity they consume. In conclusion we would also mention that as the new amendment levies tax and not fee, the authority holding excessive fee to be violative of Art. 19 is not available to the petitioners. Therefore the first objection fails.

9. That brings us to the second objection which rests on the proviso to Art. 304(b); and the petitioners' learned Advocate had strongly urged that the approval in *Damodaran v State of Kerala* (1959 K. L. J. 651) of the distinction between right under Art. 19 (1) (g) and the freedom under Art. 301 of the Constitution was not correct. In the case, the learned Judges have followed the distinction given in *Moti Lal and Others Vs. The Government of the State of Uttar Pradesh and Others*, that the rights under Art. 19 (1) (g) means the right at rest whereas under Art. 301 it means the freedom in motion. The petitioner's learned Advocate has attacked the distinction drawn in the aforesaid case and also in *Bapubhai Ratanchand Shah and Others Vs. State of Bombay and Another*, , *Haji Usman Haji Mohammad Vs. State*, and *Automobile Transport Ltd. v State* (A.I.R.

1958 Raj. 114), because, should the freedom under Art. 301 be held to denote some movement, such rights of his clients, who are selling toddy in shops, could not be reasonably held to have been infringed by the impugned legislation. Now it is clear that the distinction between rights at rest and in motion is not correct for a citizen selling goods while sitting would be enjoying the right under Art. 19 which can be reasonably regulated in the public interest, whereas should he be vending his goods from door to door or from village to village, he would be exercising the freedom under Art. 301 and any bill seeking reasonably to restrict the right must be introduced with the President's assent. We think the better distinction is between the right of citizen as individual and the freedom to trade itself. We find it in *Sagir Ahamed v Government of U. P.* (A.I.R. 1954 All. 257(288)) where Chathurvedi J. says:

Article 19(1)(g) refers to the individual right and Art. 301 refers to trade as a whole and not the right of any individual.

The same is drawn in *Kutti Keeva v State of Madras* (A.I.R. 1954 Mad. 621) in these words:

It is suggested that Art. 19(1)(g) views the matter from the point of view of the citizen whereas Article 301 views it from the point of view of trade.

Chagla C. J. also adopts it in *Bapudhai v State of Bombay* (A.I.R. 1956 Bom. 21(26)) where the learned Chief Justice says:

Article 19(1) provides for right of individual citizens. Part XIII deals with trade and commerce as such, which as has been pointed out, means the free passage of goods.

Finally Das C. J. in *State of Bombay v Chamarbaugwala* (A.I.R. 1957 S.C. 694(713)) observes:---

Article 19 (1) (g) and 301, it is pointed out, are two facets of the same thing--the freedom of trade. Article 19 (1) (g) looks at the matter from the point of view of the individual citizens and protects their individual right to carry on their trade or business. Article 301 looks at the matter from the point of view of the country; trade and commerce as a whole, as distinct from the individual interests of the citizens and it relates to trade, commerce or intercourse both with and within the state.

10. It follows that Art. 301 would be infringed only where the freedom of trade be directly circumscribed by restriction, and as the tax in the petitions before us is levied on individuals on their sale turnover, there is no regulation directed against the freedom to trade. It further follows that the freedom under Art. 301 is not infringed by the legislation, and the proviso to Art. 304(b) would not be attracted.

11. That apart, we think that the pith and substance of the legislation should also be looked into when determining how far the objection concerning the failure to

comply with the proviso to Art. 304(b) is justified. In *Attorney-General of Manitoba v Manitoba Licence Holders' Association* (1902 Appeal Cases 73) the Act for the suppression of the liquor traffic in Manitoba was held to be within the powers of the provincial legislature, notwithstanding that in its practical working, it would interfere with Dominion revenue, as its subject was and it dealt with it as a matter of merely local nature. Again a milk Act by the Parliament of Northern Ireland was challenged in *Gallagher v Lynn* (1937 Appeal Cases 863 at p. 870) but it was held to be valid because it was for protecting the health of inhabitants from the danger of an unregulated supply of milk, though it precluded persons whose premises were outside Northern Ireland from obtaining licences for sale of certain grades of milks. While so deciding, Lord Atkin says at p. 870:--

These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the "true nature and character of the legislation"; *Russel v The Queen* (7 Appeal Cases 839) "the pith and substance of the legislation". If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field.

Our Supreme Court in *State of Bombay v F. N. Balsara* (A.I.R. 1951 S. C. 318) has stated the principle in these words:--

The validity of an Act is not affected if it incidentally trenches on matters outside the authorised field, therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the legislature which enacted it, then it cannot be held to be invalid, merely because it incidentally encroaches on matters which have been assigned to another legislature.

12. Coming to some decisions on the point by High Courts, *The Behar Finance Act, 1950*, had charged a tax on all passengers and goods carried by motor vehicles and in *Atma Rama Budhia v State of Bihar* (I. L. R. 31 Patna 493) it was challenged among other things for contravening the proviso to Art. 304. It was however held that Part XIII of the Constitution had no application as the Act did not profess to impose any restriction whatsoever on inter-State trade with or within the State. The legislation in *H. P. Barua v State of Assam* (A.I.R. 1955 Assam 249) levied tax on goods carried by road and inland waters in the State of Assam and was impugned on the ground among others of contravening Art. 301. The learned Judges, however, held that mere imposition of tax on transport or carriage of goods and passengers contemplated by entry 56 of List II of the Seventh Schedule did not amount to interfere with the freedom of trade and commerce. Lastly a Division Bench of this Court has in *Parameswaran Nair v Sub-*

Magistrate (1958 K. L. T. 631 =1938 K. L. J. 413) applied the doctrine to the Vehicles Taxation Act, XIV of 1950, which authorised collection of tax from vehicles using the public roads in the state. The learned Judges held that as no trade or commerce was sought to be taxed, the Act was valid. They further held that no question of the Act imposing any reasonable restrictions on the freedom of trade, commerce or intercourse arose, and therefore proviso to Art. 304 had no application.

13. After considering the aforesaid decisions, we think the correct view is that imposing a tax on trade would not infringe the freedom under Article 301 unless the legislation be intended to restrict the freedom. No such intention can be attributed, or fairly inferred from, the enactment impugned which is an amendment and is passed under item 54 of list II with a view to charge what had been earlier exempted. Therefore this objection to its constitutionality also fails. As regards the third part of the objection, the reason for not accepting the absence of Governor's recommendation as fatal is obvious. Article 207 forms part of the legislative procedure in financial matters, and courts are precluded by Article 212 from enquiring into any alleged irregularity of such procedure. Therefore this head of the complaint against the constitutionality of the Act is not accepted. For these reasons we hold that the petitions should be dismissed with costs. Counsel fee is fixed at Rs. 50 in each petition.