
(1994) 11 AP CK 0033
In the Andhra Pradesh High Court
Case No : Writ Petition No. 14175 of 1991

M. Srinivas

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-11-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 19(1)(g), 21
Expenditure Tax Act, 1987 — Section 15, 2, 3, 31, 4

Citation : (1995) 83 TAXMAN 473

Hon'ble Judges : Maithli Sharan, J; M.N. Rao, J

Bench : Division Bench

Advocate : M.M. Firdos, Dr. M.V.K. Murthy and M.I. Swamy, for the Appellant;
S.R. Ashok, for the Respondent

Final Decision : Dismissed

Judgement

Rao, J.—The constitutionality of the amendments made to sections 2 to 5, 7 and 15 of the Expenditure-tax Act, 1987 ("the Act") by the Finance (No. 2) Act, 1991 is under challenge in this batch of writ petitions. Except in WP No. 14175 of 1991, the petitioners in the other writ petitions are hoteliers; in WP No. 14175 of 1991, the petitioner is a practising advocate. Because of commonality of questions involved for adjudication, we are inclined to dispose of all the writ petitions by this common judgment. The Act of 1987, as it stood prior to the Amendment Act of 1991, was enacted to provide for the levy of a tax on expenditure incurred in certain hotels. Section 3 laid down that the Act shall apply :

... in relation to any chargeable expenditure incurred in a hotel wherein, the room charges for any unit of residential accommodation at the time of the incurring of such expenditure are four hundred rupees or more per day per individual;

(2) where a composite charge is payable in respect of residential accommodation and food, the room charges included therein shall be determined in the

prescribed manner;

(3).....

It was provided by section 4 that the tax was 20 per cent of the chargeable expenditure. Section 5 contained the meaning of "chargeable expenditure". Section 7 provided that in respect of a hotel in relation to which chargeable expenditure was incurred, the hotelier was responsible for collection. Section 15 dealt with the penalty for failure to collect or pay the expenditure tax.

2. The constitutionality of the Act fell for consideration before a Constitution Bench of the Supreme Court in *Federation of Hotel and Restaurant Association of India, etc., Vs. Union of India (UOI) and Others*, . On three grounds the Act was attacked : (i) in its true nature and character it is not an Act relating to expenditure tax, but in pith and substance, it is a tax on luxuries falling within Entry 62 of List II of the Seventh Schedule or a tax envisaged in Entry 54 of List II and, therefore, clearly outside the legislative competence of the Union Parliament; (ii) it was violative of article 14 in that the classification of hotels for the purpose of imposition of tax was arbitrary and unintelligible without any rational nexus with the taxing policy; and (iii) the Act was violative of the fundamental right guaranteed under article 19(1) (g) as it imposed unreasonable and onerous restrictions on the petitioner-hoteliers to carry on their business. All the three contentions were negated by the Supreme Court.

3. By the amendments brought about by the Finance (No. 2) Act, 1991 with effect from 1-10-1991, the sweep of the Act was extended to encompass restaurants equipped with or having access to facilities for air-conditioning. Clause (9A) inserted by the Amendment Act in section 2 defines "restaurant" in the following terms :

"restaurant" means any premises, not being a restaurant situated in a hotel referred to in clause (7) of section 3 in which the business of sale of food or drink to the public is carried on and such premises, at the beginning of any month, are equipped with, or have access to, facilities for air-conditioning;

As a consequence of the insertion of clause (9A) in section 2, necessarily, sections 3 to 5 also had to be amended. The application of the Act in relation to any chargeable expenditure, by sub-section (2) of section 3, was extended to the expenditure incurred in a restaurant. The rate of tax in relation to the expenditure incurred in a restaurant is fifteen per cent as provided in clause (b) of section 4. It reads :

4. Charge of expenditure tax. ?Subject to the provisions of this Act, there shall be charge on and from :?

(a)....

(b) the 1st day of October, 1991, a tax at the rate of fifteen per cent of the chargeable expenditure incurred in a restaurant referred to in clause (2) of

section 3.

Section 5 explains what is meant by chargeable expenditure. Sub-section (2) of section 5 says that chargeable expenditure "in relation to a restaurant referred to in clause (2) of section 3 means any expenditure incurred in, or payments made to, a restaurant in connection with the provision of food and drinks by the restaurant, whether at the restaurant or outside, or by any other person in the restaurant, but does not include any expenditure referred to in sub-clauses (i) and (iv) of clause (1) ". Section 7 concerns with collection and recovery of expenditure tax. Subsection (1) deals with chargeable expenditure incurred in a hotel. Subsection (2) says:

(2) Where any chargeable expenditure is incurred in a restaurant referred to in clause (2) of section 3 in relation to any services specified in clause (2) of section 5 and where such services are,?

(a) provided by the restaurant, the person who carries on the business of such restaurant; and

(b) provided by the other person, such other person,

shall collect the expenditure-tax at the rate specified in clause (b) of section 4.

Sub-section (3) mandates that the tax collected during any calendar month in accordance with sub-sections (1) and (2) shall be paid to the credit of the Central Government by the 10th of the month immediately following the calendar month. Sub-section (4) lays down :

Any person responsible for collecting the tax, who fails to collect the tax in accordance with the provisions of sub-section (1) or sub-section (2) shall, notwithstanding such failure, be liable to pay tax to the credit of the Central Government in accordance with the provisions of sub-section (3).

Section 15 prescribes penalties for failure to collect or pay the tax.

4. M.V.K. Murthy, Man Mohan and Firdos, the learned counsels, advanced arguments on behalf of the petitioners.

Although, Shri Murthy, the learned counsel for the petitioners in WP Nos. 14573, 16207 of 1991 and 2362 of 1992, has advanced arguments, initially, that the Parliament has no legislative competence to enact the law in question; when his attention was drawn to the decision of the Supreme Court in the case of Federation of Hotel & Restaurant Association of India (supra), the argument was not seriously pressed. The main attack of Shri Murthy was based on article 14 of the Constitution. According to him, separate expenditure incurred in air-conditioned restaurants situated within the premises of a hotel where the daily room tariff for residential accommodation is not less than Rs. 400 per day is excluded, but air-conditioned restaurants unconnected with any hotel are brought within the sweep of the Act. There is no discernible rationality in this type of classification. The articles of food sold in restaurants are essential for

human existence and if they are subjected to tax, the same would be violative of article 21 : the right to life guaranteed under article 21 includes the right to live with dignity. Because of the excessive rate of tax, the petitioners would lose their business as the tax would act as disincentive to attract customers.

5. Shri Man Mohan, the learned counsel for the petitioner in WP No. 14490 of 1991, contention is that in pith and substance, the impugned amendments impose tax on food and drinks supplied in air-conditioned restaurants. Out of necessity commoners have to go to air-conditioned restaurants, especially in areas where ordinary hotels are not located, and they have to pay high charges for the food and drinks consumed because of the excessive nature of the tax. According to him, the impost is arbitrary and, therefore, has to be struck down as violative of article 14. He also contended that Hyderabad city, often times, experiences power failure and even then, customers who go to air-conditioned restaurants have to pay higher prices. From the point of view of safeguarding the health of the people, air-conditioned restaurants are necessary; the wide spread pollution is endangering human lives and the air-conditioned hotels and restaurants ensure a pollution-free atmosphere.

6. The petitioner in WP No. 14175 of 1991 is a young practising advocate, a bachelor living in a room taken on rent in Puthlibowli area of Hyderabad city. According to his affidavit filed in support of the writ petition, he went to Shanbagh Hotel, Basheer Bagh on 21-10-1991 and ordered food and also a parcel of four rotis. When he checked-up the bill, he found that the cost was increased by Rs. 4.60 and on enquiry, he was told that the addition was because of the expenditure tax imposed w.e.f. 1-10-1991. There are two portions in the hotel, one is air-conditioned and the other, an ordinary one and the food he consumed was in the ordinary section. Shri Firdos, appearing for the petitioner, says that collection of tax from customers who are not given the facility of air-conditioning is unreasonable.

7. Although Shri Murthy has not seriously pressed the contention relating to the Parliament's lack of legislative competence, since the other counsel has reiterated the same contention ,we are inclined to briefly advert to this.

8. As the tax is imposed and collected under the impugned provisions only in respect of sale of food and drinks served in air-conditioned restaurants, it amounts to tax imposed on sale or purchase of the same but not a tax on the expenditure incurred. In every case where a customer buys food or drinks in a restaurant he incurs expenditure; what is essential to be noted is that the expenditure incurred is incidental to the sale or purchase. As Entry 54 of List II speaks of taxes on the sale or purchase of goods, the impugned measures squarely fall within the sweep of this entry and, therefore, the Parliament cannot, in exercise to its residuary power under Entry 97 of List I, rob the State Legislature of its power to legislate.

This argument squarely applies to the principal Act enacted in 1987. As already

mentioned supra, the constitutionality of the 1987 Act was challenged before the Supreme Court in the case of Federation of Hotel & Restaurant Association of India (supra). A contention identical to the present one with greater elaboration was advanced before the Supreme Court by Shri N.A. Palkhiwala. The Supreme Court followed the earlier ruling in Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, wherein it was held (at page 119), while referring to the observations of Lord Loreburn in Attorney General for Ontario v. Attorney General for Canada [1912] AC 571 (PC) :

... we are unable to see why we should not, when dealing with a Central Act, enquire whether it is legislation in respect of any matter in List II for this is the only field regarding which there is a prohibition against Parliament. If a Central Act does not enter or invade these prohibited fields, there is no point in trying to decide as to under which entry or entries of List I and List III a Central Act would rightly fit in.

Stating that different aspects of the same matter may fall under different legislative powers, Venkatachaliah, J. (as he then was) in a separate judgment rendered by him on behalf of himself and three other Judges, expressed the view :

Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects.

Holding that the expenditure aspect of the transaction fell within the Union power and is clearly distinguishable from the legislative competence to impose a tax thereon, the contention based on want of legislative power was negated.

In view of this authoritative pronouncement on the question of legislative competence of the Parliament to enact a law imposing a tax on expenditure, we unhesitatingly reject the contention relating to the competence of the Parliament.

9. The second contention is based on article 14; air-conditioned restaurants unconnected with any hotel are brought within the sweep of the Act while the separate expenditure incurred in air-conditioned restaurants situated within the premises of a hotel where the daily room tariff for residential accommodation is more than Rs. 400 is excluded. This contention is based on a misapprehension. Even prior to the amendment in question such type of expenditure was brought to tax under the principal Act of 1987. Sub-section (1) of section 3 says that this Act shall apply in relation to any chargeable expenditure incurred in a hotel wherein the room charges for any unit of residential accommodation at the time of incurring of such expenditure are four hundred rupees or more per day per individual. This sub-section (1) has to be read in conjunction with section 5 which explains the meaning of "Chargeable expenditure". In relation to a hotel referred to in clause (1) of section 3, sub-section (1) of section 31, clause (d) of sub-

section (1) of section 5 says that the chargeable expenditure means "any other services at the hotel, either by the hotel or by any other person, by way of beauty parlour, health club, swimming pool or other services". The words "any other services at the hotel" take in their ambit the separate expenditure incurred in an air-conditioned restaurant located separately in the hotel premises. There is no exclusion of such separate expenditure from the purview of the Act. After the amendment, restaurants not situated in the class of hotels referred to in clause (i) of sub-section (1) of section 3 are brought within the sweep of the Act. From a reading of clause (9A) of section 2, section 3 and section 5, it is clear that in respect of hotels where the daily room tariff per individual is Rs. 400 and more, on any expenditure incurred in connection with room rent, food or drinks or catering contract or eating in a restaurant attached to the hotel even if the person is not staying in the hotel, expenditure tax is leviable.

Article 14 is, therefore, in no way violated.

10. We do not find any merit in the argument advanced for the petitioners that because of the impugned legislation the petitioners have lost their business; the number of customers had dwindled because of the increase in the rate as a consequence of the addition of expenditure tax. In the case of Federation of Hotel & Restaurant Association of India (supra), an identical contention was rejected observing :

... the mere excessiveness of a tax or even the circumstance that its imposition might tend towards the diminution of the earnings or profits of the persons of incidence does not, per se, and without more, constitute violation of the rights under article 19(1)) (g). (p. 126)

In passing we might mention that none of the petitioners has stated how much loss or reduction in profits was sustained by him because of the impugned legislation compared to the position in the previous years.

The arguments of Shri Murthy and Shri Man Mohan, that air-conditioned restaurants are necessary even for ordinary people in order to enjoy the facility of pollution-free atmosphere and if expenditure tax is levied, the persons who would otherwise enjoy that facility would be deprived of it and as the right to live guaranteed under Article 21 includes right to live with dignity and comfort, the impugned legislation is bad in law, in our considered view, are based upon imaginary and fanciful notions of the content of the right guaranteed under Article 21. By no stretch of reasoning can it be said that in our society air-conditioned restaurants but for the expenditure tax would have been within the reach of ordinary people. The object of the Act is to curb unproductive expenditure. It is the potentiality of the individuals to incur expenditure in air-conditioned restaurant that is brought to tax. It matters little whether at a particular point of time because of power failure the restaurant was not in a position to provide the facility of air-condition. People of higher economic status alone can afford to go to air-conditioned restaurants. The possibility of enjoying

air-condition facility even if such facility is not available by reason of power failure, is subjected to tax (sic). We, therefore, reject the contention of Shri Firdos, the learned counsel for the petitioner in WP No. 14178 of 1991, that the petitioner therein was unjustly sought to be burdened with an expenditure tax even though he consumed food in the non-air-conditioned section of the air-conditioned Hotel Shan Bagh. As the propensity to incur wasteful expenditure is sought to be curbed by the impugned legislation the hotel industry as such is not taxed but the enjoyment of potentiality/capacity to incur wasteful expenditure is brought within the purview of the tax net. As observed by Ranganathan, J. in his separate but concurring judgment in the case of Federation of Hotel & Restaurant Association of India (supra) :

... the object of a tax on luxury is to impose a tax on the enjoyment of certain types of benefits, facilities and advantages on which the Legislature wishes to impose a curb. The idea is to encourage society to cater better to the needs of those who cannot afford them.... (p. 139)

For these reasons, all the writ petitions fail and, accordingly, they are dismissed.