

(1969) 07 KL CK 0022

In the High Court Of Kerala

Case No : O.P. No's. 1132, 1498, 1535 and 1599 of 1969

P. Ramachandran

APPELLANT

Vs

State of Kerala and others

RESPONDENT

Date of Decision : 21-07-1969

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 276, 301

Citation : (1970) KLJ 748

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : V. Bhaskaran Nambiar, C.R. Natarajan, M.K. Ananthakrishnan, H. Sivaraman and M. Venugopal in O.P. No. 1132/69 and M/s. K.S. Sebastian, V.C. Jumes and P.V. Cherian in O.P's 1498, 1535 and 1599 of 1959, for the Appellant;

Judgement

K.K. Mathew, J.—The points for consideration in these writ petitions are the same and so they are disposed of by this common judgment. When the petitioners applied for renewal of their F. L. I. Licences, for the year commencing from 1-4-1969, paying Rs. 5,000/- as renewal fee, the respondents insisted that the petitioners should pay Rs. 15,000/- as renewal fee for each of the Licences.

2. The petitioners contend that they are not bound to pay anything more than Rs. 5,000/- as fee for renewal, that the provision of Act XVI of 1969, by which the fee was enhanced from Rs. 5,000/- to Rs. 15,000/- is bad, and that though the levy is styled as Luxury Tax and imposed in the shape of licence fee, really the tax is not luxury tax a but a tax or fee for obtaining licence for the privilege of selling foreign liquor. In other words, they contend that though the legislature has purported to impose a luxury tax, it is not a tax on luxury but a fee for obtaining licence for sale of foreign liquor, and that treated as a licence fee, the fee is bad, as it is not supported by quid pro quo, and as it exceeds Rs. 250/- the maximum payable under Art. 276 of the Constitution.

3. The relevant part of Sec. 18 as amended by Act XVI of 1969 runs as follows:

18(2). The luxury tax on liquor, or intoxicating drugs shall be levied,--

(i) in the case of any liquor, in the form of a fee for licence for the sale of the liquor and in the form of a gallon age fee or vending fee, or in any one of such forms; and

(ii) in the case of an intoxicating drug in the form of a fee for licence for the sale of the intoxicating drug,

(3) The duty of excise under sub-section (1) and the luxury tax under sub-section (2) shall be levied at such rates as may be fixed by the Govt., from time to time, by notification in the Gazette, not exceeding the rates specified below:--

(2) Luxury Tax:--

(a) When levied in the form of fee for licence for sale of foreign liquor--

(i) for licence for sale of foreign liquor in wholesale Rs. 15,000/- for a year or part thereof.

Entry 62 in List II of the Seventh Schedule is.

Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

A tax on luxury is a tax on an object of luxury. In the Encyclopedia Britannica, 14th Edn, Vol. 14, page 507, the general nature of a luxury tax is given as follows:

The imposition of taxes on articles which are deemed to be luxuries may spring from one of two motives, or frequently, from a combination of both. In the first place, the tax may be intended to restrict the expenditure of money in certain directions. Here it forms a part of sumptuary legislation designed to repress the ostentation and extravagance of private persons.... In the second place, luxury taxes are imposed for revenue purposes as a method of taxation of the rich or as a tax on that part of the expenditure of all classes that is regarded either as socially undesirable or as a superfluity over and above all necessary expenditure and therefore a specially appropriate object of taxation.....In modern times there has been a strong tendency for Governments to place taxes on certain classes of expenditure which fall rather within the category of what Marshall has termed "conventional necessities" than of what are ordinarily regarded as luxuries. Most expenditure upon alcohol, tobacco, articles of silk, entertainments, private motor-cars etc. is clearly superfluous in the sense that a large part of it is in excess of what is required for economic efficiency and personal well-being.

4. In *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona*, Cantonment, , the Supreme Court has to consider the question whether a tax levied on each show of a film in a theatre is a tax on entertainment or whether it is a tax on trade, business or calling. The Supreme Court held that the tax being

a tax on a each show, it is a tax on entertainment. The Court in considering the scope of the corresponding Entry in the Government of India Act, 1935, said:

The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax. It is true that economists regard an entertainment tax as a tax on expenditure and, indeed when the tax is imposed on the receiver of the entertainment, it does become a tax on expenditure, but there is no warrant for holding that entry go contemplate only a tax on moneys spent on luxuries, entertainments or amusement. The entry, as we have said, contemplates a law with respect to these matters regarded as objects and a law which imposed tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment.....

The Court further said that the tax cannot be regarded as a tax imposed on the privilege of carrying on any trade, business or calling as the tax is imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment and the tax can only be regarded as a tax on entertainment. If there is no show, the Court said, there is no tax. The Court then added:

A lawyer has to pay a tax or fee to take out a licence irrespective of whether or not he actually practices. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so.

A luxury tax therefore must be a tax on objects of luxuries. It might be a tax on money spent on luxuries. The tax here, is not on any object, it is not imposed on any object as luxury. The tax is not on foreign liquor as an object when stocked, bought or sold. It is well-settled that a taxing statute must pass the test of the equality clause of the Constitution. See *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, . A uniform licence fee of rupees fifteen thousand, if treated as luxury tax, will fly in the face of Art. 14. A licensee who stocks or sells, say thousand bottles of foreign liquor in a year cannot be treated in the same manner as a licensee who stocks or sells only 100 bottles. If the tax is regarded as a tax on foreign liquor as luxury, the tax must be geared to the quantity or value of the liquor stocked, sold or bought. In fact Sec. 18(2) makes it clear that the tax is on liquor. Sec. 18 (2) (a) speaks of a gallonage fee or vending fee. If the tax really is a tax on an object as luxury, there must be some relation the tax and the object taxed either in value or in measurement. A classification on the basis of value or measurement is absolutely essential. In other words, the point is that if the levy is a tax on luxury, it must be upon an object as luxury, and a uniform levy unrelated to the value, quantity or measurement of the object, will be violative of Art. 14. If the levy is considered as a tax or fee for the privilege of carrying on a wholesale trade in foreign liquor,

then it is not a luxury tax, for the privilege of carrying on the trade cannot be regarded as a luxury: Foreign liquor may be regarded as luxury, but not the privilege of engaging in the business of its sale.

5. In *Shinda Brothers v. Deputy Commissioner, Raichur* AIR 1966 S.C. 1512, the question which arose for consideration was whether the shop rent or kist payable under the Mysore Excise Act (Act 5 of 1961), for obtaining the exclusive privilege of selling toddy or arrack from certain shops by bidding at auction in pursuance of government notifications, was excise duty. The Supreme Court held by a majority that the taxable event is not the manufacture or production of goods, and that the levy is in respect of the business of carrying on the sale of toddy. The Court said that there is no connection between the levy and the manufacture or production of the goods, and therefore, the duty cannot be an excise duty. Bachawat J., in his separate but concurring judgment stated that in determining whether the tax is a duty of excise, several tests may be suggested:

Is the tax levied on the manufacturer or producer? Is it levied with reference to the value, quantity, weight or volume of the goods? Does it affect the goods as subjects of manufacture or production ? Is it a levy at the stage of or in connection with the manufacture or production ? None of these tests is conclusive or decisive.

Though the case has no direct bearing on the question under consideration, I think, the view of the majority lends strength to the conclusion reached here.

6. In *T.K. Abraham and Others Vs. State of Travancore-Cochin*, this Court was concerned with the question whether a licence fee for stocking tobacco can be regarded as luxury tax. The fee there, was geared to the quantity of tobacco stocked. The Court, therefore, sustained the fee as luxury tax. This decision was followed in *Appu Menon v. State of Kerala* 1966 KLT 700 without noting the distinction that the levy in *T. K. Abraham's* case was geared to the quantum of tobacco, stocked and cannot, therefore, be regarded as an authority governing the question in issue here. In the appeal from the decision in *T.K. Abraham and Others Vs. State of Travancore-Cochin*, , the Supreme Court did not decide the question whether the fee can be justified as a luxury tax.

7. I do not think that the characterisation by the legislature that the levy in question is a luxury tax is conclusive upon the court.

A court is entitled to look into the real nature of the tax, notwithstanding the label given to it by the legislature. If the court finds that the label is a camouflage or a cloak to conceal the real nature of the levy, the court can pierce the veil to see its real character. I cannot regard the levy of Rs. 15,000/- as fee for obtaining the licence for sale of foreign liquor as a luxury tax. If the levy is treated as a fee simpliciter, the state must prove that it is supported by *quid pro quo*. No such proof has been attempted.

8. Mr. Sebastian, appearing for the petitioners in some of these cases, contended

that exaction of an exorbitant fee of Rs. 15,000/- is violative of the freedom of trade and commerce guaranteed under Art. 301 of the Constitution of India, and in support of the contention, he placed reliance upon the rulings of the Supreme Court in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and *Automobile Transports Ltd. v. State of Rajasthan*. In these cases, the Supreme Court said that taxation may operate as restriction upon the freedom of trade and commerce guaranteed by Art. 301 of the Constitution and that whether a particular tax restrict freedom of trade and commerce directly and immediately is a question to be decided on the facts and circumstances of the particular case. In *State of Madras v. Nataraja Mudaliar* AIR 1969 S.C. 147 the Supreme Court said that the freedom of trade guaranteed by Art. 301 is against the imposition of barriers or obstructions within the State as well as inter-state, that all restrictions which directly and immediately affect the movement of trade are declared by Art. 301 to be ineffective. The Court also said that it must be taken as settled law that the restrictions or impediments which directly and immediately impede or hamper the free flow of trade, commerce and intercourse fall within the prohibition imposed by Art. 301 and that a tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so.

I am not sure whether the restrictions on trade or business imposed in the shape of a fee for obtaining a licence for carrying it on could be regarded as a restriction on the freedom of trade or commerce, within the prohibition of Art. 301. Article 19(1)(g) guarantees to every citizen the fundamental right to carry on any trade or business: and an unreasonable restriction upon that right by the imposition of an exorbitant fee might be void. It is perhaps difficult to state the exact relation between the two Articles. In *The State of Bombay Vs. R.M.D. Chamarbaugwala*, , the Supreme Court suggested that the distinction between the two Articles was the emphasis on the individual and geographical aspects. Das C.J., said:

The scheme of our Constitution.....is to protect the freedom of each individual citizen to carry on his trade or business. This it does by Art. 19 (1) (g).....Our Constitution also proclaims by Art. 301 the freedom of trade, commerce and intercourse throughout the territory of India..... The underlying idea in making trade, commerce and intercourse, with, as well as, within the States free undoubtedly was to emphasis the unity of India and to ensure that no barriers might be set up to break up the national unity.

The majority in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, has held that the distinction is not so simple. They said that it is not correct to say that while Art. 19(1)(g) guaranteed an individual's right to carry on his trade, Art. 301 guaranteed a free flow of the volume of trade against geographical barriers. Art. 301, according to the majority, also aimed at the freedom of the individual from restrictions, not necessarily geographical--but since regulatory measures were outside the purview of Act. 301, the scope of the

two provisions was not identical. In short, according to the majority view if the impugned law is merely regulatory, its reasonableness will have to be determined under Act. 19(1) (g) before it can be held to be valid; but so far as Art. 301 is concerned, no complaint can, *prima facie*, be made under that Article unless, of course, it is a colourable exercise of the regulatory power, aimed at the restriction of the free flow of trade, commerce and intercourse. But if the freedom of trade, commerce and intercourse is violated by a non-regulatory law, the individual who is affected may have his remedy in a Court of law.

At one time it was thought that if the flow of the total volume of trade between one point and another is not affected, there was no restriction on the freedom of trade and commerce: but in *Commonwealth of Australia v. Bank of New South Wales* 1950 A.C. 235 the Privy Council said:

Linked with the contention last discussed was another which their Lordships do not find it easy to formulate. It was urged that, if the same volume of trade flowed from State to State before as after the interference with the individual trader, and it might be, the forcible acquisition of his goods, then the freedom of trade among the State remained unimpaired. In the first place, this view seems to be in direct conflict with the decisions in the James cases (*James v. State of South Australia* 40 C.L.R. 1., and *James v. the Commonwealth*--1936 A. C. 578, and *James v. Cowan*--1932 A. C. 542;) for there the section was infringed though it was not the passage of dried fruit in general, but the passage of the dried fruit of James, from State to State that was impeded. Secondly, the test of total volume is unreal and unpracticable for it is unpredictable whether by interference with the individual flow the total volume will be affected, and it is incalculable what might have been the total volume but for the individual interference. Thirdly, whether or not it might be possible, if trade and commerce stood alone, to give some meaning to this concept of freedom, in, s. 92 "trade and commerce" are joined with "intercourse", and it has not been suggested what freedom of intercourse among the States is protected except the freedom of an individual citizen of one State to cross its frontier into another State or to have such dealings with citizens of another State as his lawful occasions may require.

In the above case, the Privy Council was concerned with the question whether prohibition of banking business by all banks, except the Bank of New South Wales, affected the freedom of trade, commerce and intercourse. The Privy Council said that a simple prohibition to carry on the banking business by the other Banks would offend Section 92 of the Australian Constitution. The Privy Council said:

Difficult as the application of these general propositions must be in the infinite variety of situations that in peace or in war confront a nation, it appears to their Lordships that this further guidance may be given. In the recent case of *Australian National Airways Proprietary Ltd. v. The Commonwealth* (71 C.L.R. 29, 61), the learned Chief Justice used those words: "I venture to repeat what I said

in the former case viz., in the Milk's case (62 C. L. R. 116, 127): "One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is "directed against" inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents its. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade, notwithstanding s. 92". With this statement, which both repeats the general proposition and precisely states that simple prohibition is not regulation, their Lordships agree.

The question whether the imposition of a fee of Rs. 15,000/- would operate as an unreasonable restriction upon the fundamental right to carry on a ttoth, and would violate 19(1)(g), and whether it would be a direct impediment of the freedom of trade, commerce and intercourse, and so prohibited by Art. 301 of the Constitution are matters on which I do not propose to express an opinion without further consideration. My conclusion on the first point is sufficient for deciding this case. I would, therefore, declare that the petitioners are entitled to get renewals of their F.L.I. licences on payment of Rs. 5,000/-. The petitioners do not challenge their liability to pay Rs. 5,000/- as fee for renewals of the licences. The writ petitions are disposed of as above, I make no order as to costs.