

(1987) 03 MP CK 0025

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1879 of 1983

R.C. Pandey

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 02-03-1987

Acts Referred:

Advocates Act, 1961 — Section 15(2), 6(2), 7(2)(1)

Constitution of India, 1950 — Article 19(1), 265

Madhya Pradesh Adhivakta Kalyan Nidhi Adhiniyam, 1982 — Section 19, 19(3)

Citation : AIR 1988 MP 60 : (1987) ILR (MP) 335 : (1987) JLJ 442 : (1987) 32 MPLJ 486

Hon'ble Judges : N.D. Ojha, C.J; Faizanuddin, J

Bench : Division Bench

Advocate : Y.S. Dharmadhikari, Amicus Curiae, for the Appellant; M.V. Tamaskar, A.A.G. and R.P. Varma, for the Respondent

Final Decision : Dismissed

Judgement

N.D. OJHA, C.J.

The petitioner is a Advocate practising at Jabalpur. By this w(sic) petition, he has challenged the constitution(sic) validity of the M.P. Adhivakta Kalyan Nid(sic) Adhiniyam, 1982 (hereinafter referred to (sic) the Adhiniyam). He has also made a pray(sic) that affixing any Adhivakta. Kalyan stam(sic) contemplated by the impugned Adhiniyam(Sic) be prohibited by a suitable writ ordirection(sic)

We have heard the petitioner who has (sic)ppeared in person, Shri M. V. Tamaskar, rned Addl. Advocate General for (sic)spondent No. 1 and Shri R. P. Verma for respondents 2 and 3. We have also heard Shri (sic)S. Dharmadhikari who, as requested by the Court on an earlier occasion, assisted the court as an amicus curiae.

For the petitioner, it has been urged (sic)at the State Legislature was not competent (sic)enact the impugned adhiniyam, particularly (sic)so far as it

related to the filing of (sic) memorandum of appearance or Vakalatnama (sic) an Advocate practising in the High Court. (sic) reliance in support of this submission was (sic) placed on entry 78 of List I of Seventh schedule to the Constitution.

Before dealing with the submission (sic) made on behalf of the petitioner, it would, in (sic) my opinion, be useful to give the substance (sic) of the impugned Adhiniyam. Section 2 of the (sic) Adhiniyam, contains definitions. The term (Sic) "Advocate" has been defined in Sub-section (a) of 2 and according to the definition, it means (sic) a person whose name has been entered in the (sic) State roll of Advocates prepared and (Sic) maintained by the Bar Council, of M.P. u/s 17 (Sic) of the Adhiniyam, and who is a member of a (Aic) Bar Association. Sub-sec, (c) of Section 2 defines (sic) "Bar Council" and it means the Bar Council of (sic) P. constituted u/s 3 of the Advocates Act, (sic) 61. "Fund" according to Section 2(f) means (sic) "Advocates' Welfare Fund constituted u/s 3. (sic) "Junior Advocate" according to Section 2(g) means (sic) "Advocate who was enrolled as an Advocate (sic) by the Bar Council not more than 5 years (sic) ago. Sub-sec, (b) of Section 2 defines the term (sic) "Member of the fund" and this term means an (sic) advocate as defined in Clause (a) of Section 3 of the Act (sic) speaks about Advocate's Welfare Fund. It (sic) contemplates that with effect from the date (sic) of establishment of Trustee Committee under Sub-section (1) of Section 4, there shall be constituted (sic) a fund called the Advocates' Welfare Fund (sic) and the various clauses of Sub-section (2) of Section 3, (sic) provide for the sources to constitute the (sic) "Advocates' Welfare Fund. Section 4 deals with (sic) establishment of Trustee Committee, whereas 5 provides for disqualification for being a (sic) member of the Trustee Committee. Sections 6, 7, (sic), 8 are not relevant for purposes of the (Sic) decision of this writ petition. Section 9 contemplates (sic) that the fund shall vest in and be held and applied by the Trustee Committee subject to the provisions and for purpose of this Act and that the Trustee Committee shall administer the fund through the Secretary. Sections 10 to 14 are not relevant for purposes of the present writ petition. Section 15 deals with preparation of schemes by the Trustee Committee. Since considerable emphasis has been placed during the course of arguments on behalf of the respondents on Section 15, the same is reproduced below :

"15. Preparation of scheme by the Trustee Committee-

(i) The Trustee Committee, in consultation of the Bar Council of Madhya Pradesh, may prepare scheme for-

(i) the group insurance of the advocates;

(ii) granting gratuity and/or retirement benefits to the advocates enrolled as participating members for such schemes;

(iii) the financial aid to the junior advocates by way of stipend on nominal interest payable in easy instalments or for giving guarantee for facilitating advance of such loan to the junior advocates by a financing institution;

(iv) medical insurance of the advocates;

(v) facilitating house building loans to the advocates; and

(vi) such other welfare or benefits to the advocates as it deems fit

(2) The scheme shall be submitted to the State Government which shall publish it and thereafter shall lay it on the table of the Legislative Assembly for ten days.

(3) On such publication, the provisions of the scheme shall form part of this Act."

Section 16 deals" with recognition and registration of Bar Association, whereas Section 17, with the duties of Bar Association, Ch. VI of the Adhiniyam containing Sections 18 to 22, deals with stamp and their distribution. Section 18 provides for printing of Madhya Pradesh Adhivakta Kalyan Nidhi Stamps.

Section 19 of the Adhiniyam, the provisions of which have been mainly challenged, contemplates that memo of appearance which term includes Vakalatnama and any other authorisation under O. III of the First Schedule to the Civil P.C. by whatever name called for acting or pleading before a Court, filed in a subordinate Court and in the High Court, shall bear the Mtdhya Pradesh Adhivakta Kalyan Stamp of Re. one and Rs. five respectively which shall not be accepted unless so stamped.

Section 21 provides that the net proceeds received from the distribution and sale of the Madhya Pradesh Adhivakat Kalyan Nidhi Stamps, shall be contributed by the Bar Council to the Madhya Pradesh Adhivakta Kalyan Nidhi.

The other sections of the Adhimyam need not be referred to, they being not necessary for the decision of the present writ petition.

The competence of the State Legislature, as regards the stamps being affixed on memo of appearance or Vakalatnama filed by Advocate in a subordinate Court, could not be seriously challenged in view of entries 11-a, 26 and 47 of List III of the Seventh Schedule to the Constitution. However, in regard to requirement of stamps aforesaid being affixed on memo of appearance or Vakalatanama to be filed by Advocates in the High Court, it has been urged for the petitioner that in view of entries 78 and 96 of List I of the Seventh Schedule to the Constitution, the State Legislature did not have legislative competence to enact the impugned Adhimyam. Entry 78 reads as under :

"Constitution and organisation (including vacation) of the High Courts except provisions as to officers and servants of High Court; persons entitled to practice before the "High Court"."

Entry 96, on the other hand, reads as under :

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

It was urged that since the provision of the impugned Adhiniyam has a bearing

on the right of an Advocate to practice before the High Court, it comes within the purview of the words "persons entitled to practice before the High Courts" contained in entry 78 and since the amount in the form of stamps contemplated by Sections 18 and 19 is to be collected from the Advocate and since even If the amounts so collected may be treated not as tax, but as fees, in view of entry 96 of List I, it is only the Parliament which can legislate in regard to fees in respect of a matter covered by entry 78. Reliance in support of this submission has been placed on *The Bar Council of Uttar Pradesh Vs. The State of U.P. and Another*, . In that case, it was held that the power to legislate in regard to persons entitled to practice before the Supreme Court and the High Courts is altogether excluded from entry 26 in List HI and is made the exclusive field for Parliament. The Parliament has the exclusive power under entry 77 and entry 78 in List I to prescribe, inter alia, the qualifications and conditions on the fulfilment of which persons would be entitled to practise before the Supreme Court or the High Courts. Any fee which may be payable by such persons before they can claim to be entitled to practise would fall under entry 96 of that List. It was further pointed out that although the Advocates Act relates to legal practitioners, in its pith and substance, it is an enactment dealing with qualifications, enrolment, right to practise and discipline of the advocates. Emphasis has been placed on behalf of the petitioner on the observations made in para 11 of the report to the effect that power to legislate in regard to persons entitled to practice before the Supreme Court and the High Courts is altogether excluded from entry 26 in List III.

Reliance was also placed on an earlier decision of the Supreme Court in *O.N. Mohindroo Vs. The Bar Council of Delhi and Others*, . There again it was held that entries 77 and 78 in List I, apart from dealing with the constitution and organisation of the Supreme Court and High Courts, also deal with persons entitled to practice in the Supreme Court and the High Courts and that this part of the two entries shows that to the extent that the persons entitled to practice before the Supreme Court and the High Courts are concerned, the power to legislate in regard to them is carved out from the general power relating to the professions in entry 26 in List III and is made the exclusive field for Parliament. Barring those entitled to practice in the Supreme Court and the High Courts, the power to legislate with respect to the rest of the practitioners would still seem to be retained under entry 26 of List III.

Reliance for the respondents has been placed on entry 23 of List III of the Seventh Schedule to the Constitution which reads as under :

"23. Social Security and social insurance; employment and unemployment."

After taking into consideration the various submissions made before us, we are of the opinion that keeping in view the nature of the provisions contained in the impugned Adhiniyam particularly in Section 15 thereof which have already been referred to above, it is a case where the appropriate entry applicable would be entry 23 of List III of the Seventh Schedule to the Constitution. The enactment,

not only in substance, but even on the plain language thereof, is one which deals with social security and social insurance of Advocate. For the purpose of securing administration of justice, particularly in adversary system, a strong socially secure class of Advocates is necessary.

Entry 78, in our opinion, deals generally with the question of "persons entitled to practise before the High Courts." As regards social security and social insurance, the specific entry is 23 of List III of the seventh Schedule. Since entry 23 is in List III, viz. in the concurrent list, source of power to legislate in regard to social security and social insurance even of the Parliament can be traced to entry 23 of List III. As has been pointed out by the Supreme Court itself the case of *The Bar Council of Uttar Pradesh Vs. The State of U.P. and Another*, in para 14 of the report, *Advocates Act*, even though relates to Legal Practitioners, in its pith and substance, it is an enactment dealing with qualifications, enrolment, right to practise and discipline of the Advocates. The scope of entry 23 of List III of the Seventh Schedule to the Constitution did not fall for consideration before the Supreme Court either in the aforesaid case or even in the earlier case of *O.N. Mohindroo Vs. The Bar Council of Delhi and Others*. On the plain language of the two entries, it is apparent that whereas entry 78 of List I deals with the subject generally, entry 23 of List III deals specifically with the subject of social security and social insurance.

In *The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others*, it was held that the rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and judges, but springs from the common understanding of men and women that when the same persons give two directions, one covering a large number of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these, while as regards all the rest, the earlier direction should have effect.

In *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, it was held as under : --

"In view of the provisions of An. 254, the power of Parliament to legislate in regard to matters in List III which are dealt with by Clause (2), is supreme. The Parliament has exclusive power to legislate with respect to matters in List I. The State Legislature has Exclusive power to legislate with respect to matters in List II. But this is subject to the provisions of Clause (1) (leaving out for the moment the reference to Clause (2)). The power of Parliament to legislate with respect to matters included in List I is supreme notwithstanding anything contained in Clause (3) (again leaving out of consideration the provisions of Clause (2)). Now what is the meaning of the words "notwithstanding" in Clause (1) and "subject to" in Clause (3)? They mean that 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. This is also on the principle that the "special" excludes the "general" and the general entry in List II is subject to the special

entry in List I. For instance, though house accommodation and rent control might fall within either the State List or the Concurrent List, entry 3 in List I of Seventh Schedule carves out the subject of rent control and house accommodation in cantonments from the general subject of house accommodation and rent control. (See *Indu Bhushan Bose Vs. Rama Sundari Debi and Another*, . Furthermore, the word "notwithstanding" in Clause (1) also means that if it is not possible to reconcile the two entries, the entry in List I will prevail. But before that happens, attempt should be made to decide in which list a particular legislation falls. For deciding under which entry a particular legislation falls, the theory of "pith and substance" has been evolved by the Courts. If in pith and substance, a legislation falls within one List or the other but some portion of the subject-matter of that legislation incidentally trenches upon and might come to fall under another List, the Act as a whole, would be valid notwithstanding such incidental trenching. These principles have been laid down in a number of decisions."

In *The South India Corporation (P) Ltd. Vs. The Secretary, Board of Revenue Trivandrum and Another*, , it was held that it is settled law that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply. The Constitution gives a separate treatment to the subject of finance and Article 227 saves the existing taxes etc. levied by States, if the conditions mentioned therein are complied with. While Article 372 says all pre-Constitution valid laws. Article 227 is confined only to taxes, duties cesses or fees lawfully levied immediately before the Constitution. Therefore, Article 372 cannot be construed in such a way as to enlarge the scope of the saving of taxes, duties, cases or fees. To state it differently, Article 372 must be read subject to Article 277. The same view was taken in *C. Rajagopalachari Vs. Corporation of Madras*, in para 17 of the report.

In *Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others*, after dealing with several decisions on the point, it was held as under :

"As regards the second ground, the contention that Parliament having made the requisite declarations in Section 2 of the Industries (Development and Regulation) Act, 1951 declaring "drugs and pharmaceuticals" to be a scheduled industry, being item 22 of Schedule I thereof, the State Legislature was denuded of its competence to enact the impugned provisions under entry 8, List II, cannot be accepted In *Ishwari Khetan Sugar Mills (P) Ltd. and Others Vs. State of Uttar Pradesh and Others*, , this Court held that the legislative power of the State under entry 24, List II is eroded only to the extent of control assumed by the Union by reason of a declaration made by Parliament in respect of a "declared industry" as spelt out by a legislative enactment under entry 52. List I and the field occupied by such enactment is the measure of erosion. But subject to such erosion, on the remainder the State Legislature will still have power to legislate in respect of a declared industry without, in any way trenching upon the occupied field. Now, the impugned Act, in pith and substance, is not a legislation under

entry 24. List II and, therefore, the question really does not arise."

In view of the law laid down by the Supreme Court in the aforesaid cases and in view of the fact that on the face of it, entry 23 of List III of Seventh Schedule to the Constitution is a specific entry on the point of social security and social insurance even in regard to Advocates, this would prevail over the general entry 78 of List I in so far as legislation on the question of social security and social insurance is concerned. We are aware that there are certain provisions found in the Advocates Act touching upon the subject of social security and social insurance, e.g. Sections 6(2), 7(2)(1) and 15(2)(g) of the Advocates Act. The source of power to legislate in regard to these sections can legitimately be traced to entry 23 of List III of the Seventh Schedule to the Constitution, the same being in the Concurrent List.

In this view of the matter, it is not possible to hold that in enacting the Adhiniyam the State Legislature has, in any way trespassed upon the legislative field assigned exclusively to the Parliament under entry 78 of List I of the Seventh Schedule to the Constitution. The Adhiniyam deals with the special subject covered by entry 23 of List III. In this connection, it will also be useful to keep in mind the following observations of the Supreme Court in *All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others*, .

"This Court has, in several cases, adopted the principle of reading down the provision of the statute. The reading down of a provision of a statute puts into operation the principle that so far as it is reasonably possible to do so, the legislation should be construed as being within its power. It has the principal effect that where an Act is expressed in language of a generality which makes it capable, if read literally, of applying to matters beyond the relevant legislative power, the Court will construe it in a more limited sense so as to keep it within power."

Some arguments were advanced in regard to the nature of the levy contemplated by the impugned Act, namely, the stamps to be affixed on the memorandum of appearance or Vakalatnama. In our opinion, even on a plain reading of the provisions contained in this behalf, it is not possible to take the view that the levy is, in the nature of tax it is apparently a fee. In this connection, it was urged on behalf of the petitioner that for a fee, the element of quid pro quo is very essential and since the Act does not contemplate any service to each one of the Advocates who are required to affix stamps on the memorandum of appearance or Vakalatnama as the case may be, the enactment cannot be said to pass the test of quid pro quo. We find it difficult to agree with this submission either. It is now well settled that levy of fee would be valid even if the service rendered is to persons belonging to a class and it is not necessary that such service should be rendered to each individual of that class. It is also well settled that service to be rendered to justify levy of fee must not necessarily be service to be rendered immediately. In this connection reference may be made to *Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and*

Others, and Gasket Radiators Pvt. Ltd. v. Employees" State Insurance Corporation AIR 1965 SC 790. On a plain reading of the impugned enactment, there seems to be no doubt that the service to be rendered is to the Advocates as a class coming within the purview of the provisions of the enactment.

Lastly it was urged that so far as Section 19(3) of the Adhiniyam in concerned which provides that no Court shall accept a memorandum of appearance unless it is stamped in the manner stated in the Act, it is a provision which curtails the right of an Advocate to practise before the High Court and is consequently liable to be struck down inasmuch as such a provision could be made only by the Parliament in exercise of power conferred on it by entry 78 of List I. In our opinion, the said Sub-section (3) of Section 19 only deals with the method of recovery of the fee and it does not purport to place any restriction on the right of an Advocate to practise in the High Court. The provisions of Sub-section (3) of Section 19 have to be read in this sense, as contemplated by the Supreme Court in All Saints High School, Hyderabad and Others Vs. Government of Andhra Pradesh and Others, . If Sub-section (3) of Section 19 of the Adhiniyam is read as to contain a provision for the method of recovery, it would not be invalid on the principle of law enunciated in Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, .

In view of the foregoing discussion, we are of the opinion that there is no substance in this writ petition which is liable to be dismissed.

Before parting with the case, however, it is our duty to express our gratitude for the valuable assistance rendered to us in the decision of the case by Shri Y. S. Dharmadhikari, a Senior Advocate of this Court who has, on our request, appeared as an amicus curiae.

In the result, this petition fails and is dismissed. In the circumstances of the case, there shall be no order as to costs.