

(2001) 06 KL CK 0016

In the High Court Of Kerala

Case No : W.A. No's. 1510 of 1997-A, 1511 of 1997-B and 2303 of 1997 and 1088 of 1998

State of Kerala and Another

APPELLANT

Vs

I.T.C. Limited and Others

RESPONDENT

Date of Decision : 18-06-2001

Acts Referred:

Central Sales Tax Act, 1956 — Section 15
Constitution of India, 1950 — Article 286, 286(3), 301, 304, 366(29A)
Kerala Tax on Luxuries in Hotels and Lodging Houses Act, 1976 — Section 2, 4A

Citation : (2002) 127 STC 409

Hon'ble Judges : K.K. Usha, C.J.;Kurian Joseph, J

Bench : Division Bench

Advocate : Anil B. Divan, No. 1 in W.A. No. 1511 of 1997, V.V. Asokan, Government Pleader for the Appellant in W.A. Nos. 1510 and 1511 of 1997, Anil B. Divan, in W.A. No. 1088 of 1998, Anil B. Divan and Antony Dominic, in W.A. No 2303 of 1997, for the appearing parties; V.V. Asokan, Government Pleader for the respondent Nos. 1 to 3 in W.A. No. 2303 of 1997 and 1088 of 1998, Antony Dominic, respondent Nos 1 and 2 in W.A. No 1510 of 1997, K. Ramakumar, SCGSC for respondent No. 3 in W.A. No. 1510 of 1997 and respondent No. 2 in W.A. Nos. 1511 and 2303 of 1997 and 1088 of 1998 and Anil B. Divan (Sr.), for the respondent No. 1 in W.A. No. 1511 of 1997, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Usha, C.J.

1. These appeals arise out of a common judgment in O.P. Nos. 5278 and 5716 of 1994 (Hallmark Tobacco Co. Ltd. v. State of Kerala [1998] 108 STC 539 (ker)).

2. The challenge in the original petitions was against the provisions of the Kerala Finance Act, 1994 to the extent it had amended Kerala Tax on Luxuries in Hotels and Lodging Houses Act, 1976. A new definition clause, namely, Section 2(ee) for the term "luxury" was introduced and Section 4A was added as an additional charging provision. Other consequential amendments were made in the Act as

well as in the Rules. The amended provisions made cigarettes liable to luxury tax at the rate of 5 per cent on the value of the commodity charged, received or receivable at the point of supply. Section 4A further postulates that though the tax was payable by the person who uses or consumes the same it has to be collected by the stockists.

3. O.P. Nos. 5278 and 5716 of 1994 were filed by I.T.C. Limited and Hallmark Tobacco Co. Ltd. respectively challenging the above provisions on various grounds. It was contended by the petitioners that the impugned legislation is bad for legislative incompetency and that the provisions are violative of articles 301, 304, 269, 286, 265, 245, 246, etc. It was also contended that the amended provisions are violative of articles 19(1)(g) and 14 of the Constitution. The learned single Judge held that the impugned provisions are violative of articles 301 and 304 of the Constitution and declared the same as unconstitutional, ultra vires and void. All other contentions raised by the petitioners were rejected. The learned single Judge found that the impugned Act is not void for want of legislative competence of the State.

4. Writ Appeals Nos. 1510 and 1511 of 1997 are filed by the State challenging the finding of the learned single Judge that the provisions of the impugned Act are violative of articles 301 and 304 of the Constitution. Writ Appeals 2303 of 1997 and 1088 of 1998 are at the instance of the petitioners and the challenge therein is to the extent of rejection of their contentions against validity of the statute on other grounds by the learned single Judge.

5. The petitioners in the original petitions are dealers carrying on business and trade in manufacture, production, distribution and sale of cigarettes. They challenged the levy of luxury tax on cigarettes at 5 per cent on manufacturers and importers of cigarettes, which was imposed for the first time under the Kerala Finance Bill, 1994 introduced on March 28, 1994. Section 4A of the impugned Act authorising the levy and collection of luxury tax which was under challenge in the original petitions, reads as follows :

"4A. Collection of luxury tax on certain commodities.?

(1) The luxury tax in respect of a commodity included in the Schedule shall be at the rate specified against it calculated on the basis of the value of the commodity, under whatever head it is charged, received or receivable at the point of supply and be payable by the person who uses or consumes the same.

(2) The luxury tax shall be collected by the stockist and paid, within such period and in such manner as may be prescribed, into the Government treasury.

(3) Where a luxury tax is collected by a stockist at the point of first supply in the State, whether by way of sale or otherwise, no luxury tax under this Act shall be collected at any successive point of supply.

(4) The provisions of this Act shall, in so far as they relate to the assessment, levy and collection of tax in respect of a commodity included in the Schedule,

including inspection, search and inspection apply with the substitution of the word "stockist", for the word "proprietor" wherever it occurs."

What is levied under Sub-section (1) of Section 4A is "luxury tax" in respect of a commodity included in the Schedule. The Schedule referred to in Sub-section (1) is as follows :

"THE SCHEDULE

Serial number	Description of Commodity	Rate of luxury tax per cent
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(1)	(2)	(3)
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1	Cigarette	5."
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6. Cigarette is classified as a luxury item coming within the definition of the word "luxury" under clause (ee) of Section 2 meaning a commodity or service that ministers comfort or pleasure. Luxury tax was levied on the basis of the value of the commodity at the point of supply and payable by the person who uses or consumes the same. Luxury tax has to be collected by the stockist and paid to the Government treasury. A person who, for the purpose of business, manufactures, produces, brings, or causes to be brought in the State a commodity included in the Schedule or to whom it is dispatched from any place outside the State for supply within the State or who supplies such commodity within the State, whether by way of sale or otherwise, would come within the definition of "stockist" under clause (k) of Section 2. Luxury tax is to be collected by such a stockist at the point of first supply in the State whether by way of sale or otherwise.

7. On the question of legislative competence, the learned single Judge has taken the view that the impugned Act would come under entry 62, List II of the Seventh Schedule to the Constitution and therefore the Legislature has competence to enact the same. We will first consider the attack made by writ petitioners in their appeals on this view of the learned single Judge. It is their contention that the impugned Act is ultra vires Article 286 of the Constitution of India read with Article 466(29A)(f) read with Section 15 of the Central Sales Tax Act, 1956 ("CST Act 1956"). According to these appellants, the learned single Judge having held that on a true interpretation of the impugned Act, what is authorised is to levy tax on the sale or purchase of goods as contained in clause (29A) of Article 466 it ought to have held that the same was subject to rigours of Article 286 read with Section 15 of the CST Act, 1956. The contention is that the learned single Judge has erred in holding that since the impugned Act would come under entry 62 of List II as also entry 54 of List II, it was not required to comply with the discipline of Article 286 read with Section 15 of the CST Act, 1956. If the impugned tax was a tax on sale or purchase of goods coming under entry 54 of List II, no tax in excess of 4 per cent could be levied on goods of special importance on inter-State trade or commerce. We do not find much merit in this contention.

Clause (3) of Article 286 reads as follows :

"(3) Any law of a State shall, in so far as it imposes, or authorises the imposition of,--

(a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce ; or

(b) a tax on the sale or purchase of goods, being a tax of the nature referred to in sub-clause (b), sub-clause (c) or sub-clause (d) of clause (29A) of Article 466,

be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

As mentioned earlier, the contention raised by the party-appellants is that the impugned Act is ultra vires of Article 286 of the Constitution read with Article 466(29A)(f) read with Section 15 of the CST Act. Sub-clause (f) of clause (29A) of Article 466 is not taken in by sub-clause (b) of clause (3) of Article 286. Therefore, the above contention is not justified at all. According to us, the impugned Act will not be hit by sub-clause (a) of clause (3) of Article 286 also since it would come under entry 62 of List II of the Seventh Schedule. The entry reads as follows :

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

Under the impugned Act tax is directly imposed on luxuries. By applying the dictum laid down by the Supreme Court in *A.B. Abdul Kadir and Others Vs. State of Kerala*, there cannot be any dispute on the question that the impugned Act would come under entry 62 of List II. Even if it can be contended that the impugned enactment imposes tax on the sale or purchase of tobacco that is declared as goods, we are of the view that it will not in any manner affect the legislative competence of the State Legislature. If the impugned statute is found in substance coming under entry 62 and it incidentally trenches upon a topic coming under entry 54 it will not make it any the less a legislation coming under entry 62. This principle has been established by the apex Court as early as in *A.S. Krishna Vs. State of Madras*, . Apart from the above, the pleadings in the case would clearly show that the contentions put forward by the party-appellants is based on sub-clause (f) of clause (29A) of Article 466 of the Constitution, referring to a deemed sale. As mentioned earlier, Article 286(3)(b) does not take in sub-clause (f) of clause (29A) of Article 466. We, therefore, find no merit in the contention of the party-appellants regarding legislative competence.

8. Now, we will come to the contention raised by the State in its appeals challenging the findings of the learned single Judge that the impugned provisions are violative of articles 301 and 304 of the Constitution. According to the petitioners, the impugned Act would impede the freedom of trade, commerce and intercourse throughout the country and therefore it is violative of Article 401 of the Constitution. Since no previous sanction of the President was obtained as

contemplated under the proviso, it cannot be saved by sub-clause (b) of Article 404.

9. Article 401, which comes under Part XIII of the Constitution, provides that subject to other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free. Article 404 provides that, notwithstanding anything in Article 401 or Article 403, the Legislature of a State may by law impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced, and impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in public interest. The article further provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President. It is, therefore, clear that State can impose reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in public interest only after obtaining previous sanction of the President. Admittedly, no prior sanction has been obtained nor was there a subsequent sanction in the present case.

10. We will now examine whether Section 4A read with Schedule and Section 2(k) would constitute a direct and immediate restriction on the flow of trade and commerce of cigarette from outside the State to the State or within the State. Luxury tax is payable on cigarette at the rate of 5 per cent on the total value of the goods dispatched or supplied. It is leviable on the point of supply of the goods involved in the business or trade. Even though the tax is payable by the person who uses or consumes the cigarette, it has to be collected by the stockists and paid it in Government treasury. The stockist is a person who is engaged in the business or trade. He may manufacture, produce or bring or cause to be brought cigarette into the State, He may be a person to whom cigarette is dispatched from any place outside the State for supply within the State and also a person who supplies cigarettes within the State whether by way of sale or otherwise. The above would clearly show that the levy of tax has a direct and immediate impact on the free movement of goods in the course of inter-State trade and commerce.

11. We will now refer to some of the landmark decisions of the apex Court on the principles to be followed while examining the issue as to whether an impugned legislation is violative of Article 401 of the Constitution. In *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , the majority took the view that when Article 401 provided that trade, commerce and intercourse shall be free within the Territory of India, it was the movement or transport part of the trade that must be free. It was further held that it would be reasonable and proper to hold that restrictions and freedom from which it is guaranteed under Article 401 would be such restrictions as directly and immediately restrict or impede the free-flow

or movement of trade. It is only such tax as directly and immediately restricts trade that would fall within the purview of Article 401. The argument that Article 401 should govern all taxes whether or not their impact on trade is immediate or mediate, direct or remote is an extreme approach, which cannot be upheld. The challenge in the above case was against the provisions contained under the Assam Taxation (on Goods carried by Roads or Inland Waterways) Act, 1954, which levied tax on certain goods carried by road or inland waterways in the State of Assam. The appellants were companies, which carried on the trade of tea in Assam and in West Bengal. They carried their tea to the market in Calcutta from where the tea is sold for consumption or export outside India. The principal ground of attack was that the Act was violative of the provisions of Article 401 of the Constitution and was not saved by provisions of Article 404(b). The Supreme Court after examining the different provisions of the enactment came to the following conclusion :

"This Act has been passed by the Assam Legislature under entry 56 in List II and naturally it purports to be (levy ?) a tax on goods carried by roads or by inland waterways. It is thus obvious that the purpose and object of the Act is to collect taxes on goods solely on the ground that they are carried by road or by inland waterways within the area of the State. That being so the restriction placed by the Act on the free movement of the goods is writ large on its face. It may be that one of the objects in passing the Act was to enable the State Government to raise money to keep its roads and waterways in repairs ; but that object may and can be effectively achieved by adopting another course of legislation ; if the said object is intended to be achieved by levying a tax on the carriage of goods it can be so done only by satisfying the requirements of Article 404(b). It is common ground that before the Bill was introduced or moved in the State Legislature the previous sanction of the President has not been obtained ; nor has the said infirmity been cured by recourse to Article 255 of the Constitution. Therefore we do not see how the validity of the tax can be sustained..... We are dealing in the present case with an Act passed by the State Legislature which imposes a restriction in the form of taxation on the carriage or movement of goods, and we hold that such a restriction can be imposed by the State Legislature only if the relevant Act is passed in the manner prescribed by Article 404(b)."

It was held that the Act has put a direct restriction on the freeflow of trade and since in doing so, it has not complied with the provisions of Article 404(b), it must be declared as void. In *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, there was a further consideration of this principle by a Constitutional Bench. While agreeing with the majority view in *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, , it was clarified that regulatory measures or measures imposing compensatory tax for the use of trading facilities do not come within the purview of restrictions contemplated by Article 401 and such measures need not comply with the requirement of proviso to Article 404(b) of the Constitution, On the facts of the above case, it was held that the taxes

imposed under the Rajasthan Motor Vehicles Taxation Act, are compensatory taxes which do not hinder the freedom of trade, commerce and intercourse assured by Article 401 and hence, the Act does not violate the provisions of that article.

12. In *A.B. Abdul Kadir and Others Vs. State of Kerala*, , the question whether the provisions of the Luxury Tax on Tobacco (Validation) Act (9 of 1964) would violate Article 401 of the Constitution of India was considered by the apex Court. It was held that the rules to the effect that it was imperative for A class licensees to pay the licence fee in advance before they could bring tobacco within the taxable territory would directly impede the free-flow of trade and as such was violative of Article 401 of the Constitution. But the legislation was found saved under clause (b) and the proviso thereunder of Article 404. In the present case, admittedly, the State cannot protect the legislation under the umbrella of clause (b) read with the proviso under Article 404 of the Constitution as no Presidential sanction had been obtained.

13. An attempt was made on behalf of the State to contend that the tax imposed is regulatory or compensatory in nature and therefore not hit by Article 401 of the Constitution. We do not find any merit in this contention also. The test to be applied for deciding whether the tax is compensatory or not has been laid down in *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, , as follows :

".....It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge the compensatory nature of a tax by a meticulous test and in the nature of things that cannot be done.

.....If a statute fixes a charge for a convenience or service provided by the State or an agency of the State, and imposes it upon those who choose to avail themselves of the service or convenience, the freedom of trade and commerce may well be considered unimpaired. In such a case the imposition assumes the character of remuneration or consideration charged in respect of an advantage sought and received."

14. There is no material placed before the court in this case to show that the luxury tax is imposed as a charge for a convenience or service provided by the State on those who choose to avail the service or convenience. We are, therefore, of the view that the impugned tax cannot be described as regulatory or compensatory in nature.

15. We, therefore, agree with the view taken by the learned single Judge that the impugned provisions u/s 4A of the Kerala Tax on Luxuries Act, 1976 and Schedule thereto as amended by the Kerala Finance Bill, 1994 are unconstitutional being violative of Article 401 of the Constitution even though the

contention against the legislative competence has to be rejected.

In the result, all the four writ appeals stand dismissed.

Order on C.M.P. No. 4053 of 1997 in W.A. No. 1510 of 1997-A dismissed.

Order on C.M.P. No. 4054 of 1997 in W.A. No. 1511 of 1997-B dismissed.