

(1980) 03 CAL CK 0015

In the Calcutta High Court

Case No : F.M.A. No. 781 of 1974 and F.M.A. No. 876-77 of 1977

State of West Bengal and Others

APPELLANT

Vs

Jagmohan Lal Gupta and Others

RESPONDENT

Date of Decision : 06-03-1980

Acts Referred:

BENGAL EXCISE ACT, 1909 — Section 86
Constitution of India, 1950 — Article 131A, 19, 213, 301, 303

Citation : (1980) 45 STC 418

Hon'ble Judges : R.K. Sharma, J;M.M. Dutt, J

Bench : Division Bench

Advocate : Arun P. Chatterjee and S. Dutt, for the Appellant;R.C. Deb, for the Respondent

Final Decision : Allowed

Judgement

M.M. Dutt, J.—The only question that is involved in all these appeals relates to the constitutional validity of the Bengal Finance (Sales Tax) (Amendment) Ordinance, 1980.

2. The respondents, except respondent No. 1 in F.M.A. No. 781 of 1974, carry on the business of retail vend of country liquor under excise licences. Section 6(1) of the Bengal Finance (Sales Tax) Act, 1941, exempts payment of tax on the sale of goods specified in the first column of Schedule I to the Act. Entry 25 of Schedule I specified certain intoxicants including country liquor. Section 3(5) of the West Bengal Taxation Laws (Amendment) Act, 1972, omitted entry 25 from Schedule I. The effect of such omission was that sale of country liquor became chargeable to sales tax. The respondents felt aggrieved by the imposition of tax on the sale of country liquor by the impugned provision of Section 3(5) of the West Bengal Taxation Laws (Amendment) Act, 1972. They filed writ petitions in this court and obtained rules nisi out of which these appeals arise. It was the common case of the respondents that gross profits earned by the licensees from the sale of the country liquor varied between 5.7 per cent and 7.8 per cent. The

imposition of sales tax at 6 per cent would render their business so unprofitable that it would not be possible for them to carry on such business. It was contended by them that the imposition of sales tax impeded the free flow of trade contrary to the provision of Article 301 of the Constitution. Further, it was contended that Section 3(5) was ultra vires the provision of Article 304(b) of the Constitution inasmuch as the requirement of that provision was not complied with.

3. The contentions of the respondents were upheld by the learned Judge who heard C.R.No. 6862(W) of 1972 Calcutta Country Spirit Opium and Drug Association Ltd. v. State of West Bengal [1974J 34 S.T.C. 161 (cal) out of which the said F.M.A.No. 781 of 1974 arises. It was held by him that imposition of tax on the sale of country liquor by Section 3(5) of the West Bengal Taxation Laws (Amendment) Act, 1972, directly restricted the freedom of trade and, as the requirement of Article 304(b) of the Constitution was not admittedly complied with, Section 3(5) was ultra vires Article 304(b). Accordingly, by his judgment, the learned Judge made the said rule absolute. In the other two Rules, namely, C.R. No. 7414(W) of 1972 and C.R. No. 7228(W) of 1972, out of which F.M.A. No. 876 of 1977 and F.M.A. No. 877 of 1977 respectively arise, the said judgment was followed and relied on and these rules were also made absolute. Hence, these three appeals by the taxing authorities.

4. Part XIII of the Constitution deals with trade, commerce and intercourse within the territory of India. Article 301 provides that subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free. Article 304(b) is as follows:

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 purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

5. During the pendency of the appeals in this Court, the Governor of West Bengal promulgated the impugned Ordinance being, the Bengal Finance (Sales Tax) (Amendment) Ordinance, 1980 (West Bengal Ordinance No. 4 of 1980), published in the Calcutta Gazette, Extraordinary, dated 8th January, 1980, after obtaining the instructions of the President under the proviso to Clause (1) of Article 213 of the Constitution. By paragraph 2 of the Ordinance, entry, 25 of Schedule I of the Bengal Finance (Sales Tax) Act, 1941, has been omitted with retrospective effect from 7th August, 1972.

6. It is contended by Mr. Arun Prakash Chatterjee, the learned senior standing counsel appearing on behalf of the appellants, that the only ground upon which

Section 3(5) of the West Bengal Taxation Laws (Amendment) Act, 1972, has been held by the learned Judge to be ultra vires the provision of Article 304(b) of the Constitution is no longer available after the promulgation of the impugned Ordinance whereby entry 25 of Schedule I of the Bengal Finance (Sales Tax) Act, 1941, has been omitted with effect from 7th August, 1972, after obtaining the prior sanction of the President of India as required by the proviso to Article 304(b) of the Constitution. There can be no doubt that the requirement of the proviso to Article 304(b) has been complied with, but that is not the only requirement of that article. The further condition that has to be fulfilled is that the restrictions sought to be imposed on the freedom of trade, commerce or intercourse must be reasonable restrictions. In view of the fact that the gross profits of the dealers in country liquor vary between 5.7 per cent and 7.8 per cent, as found by the learned Judge, it is difficult to hold that the imposition of sales tax at the rate of 6 per cent is a reasonable restriction unless the dealers can pass on the tax to their customers. Our attention has been drawn by Mr. Chatterjee to the introduction of "explanation II" to Section 86 of the Bengal Excise Act, 1909, by paragraph 7 of the Bengal Excise (Amendment) Ordinance, 1974 (West Bengal Ordinance No. 4 of 1974), which was published in the Calcutta Gazette, Extraordinary, dated 6th June, 1974. Explanation II, inter alia, provides that the price of an intoxicant shall be deemed to have always been exclusive of any tax, surcharge, additional surcharge or any other impost on sale or purchase of such intoxicant levied under any law for the time being in force. It is contended on behalf of the appellants that in view of explanation II, a dealer in country liquor is entitled to pass on the tax to his customers both past and present. Though explanation II has been introduced with retrospective effect, it is impracticable to realise sales tax from customers in respect of sales of intoxicants effected prior to the enactment of explanation II. But that is a different matter. We are now concerned with the constitutional validity of the West Bengal Ordinance No. 4 of 1980.

7. It is, however, contended by Mr. Chatterjee that even assuming that imposition of tax on sales of country liquor puts an unreasonable restriction on the freedom of the alleged trade or business in country liquor, still the respondents are debarred from challenging the vires of the impugned Ordinance on the ground that by such imposition it contravenes the provision of Article 304(b) of the Constitution. He submits that the so-called trade or business in country liquor is *res extra commercium* and does not fall within the category of trade or commerce as mentioned in Article 301 or Article 304(b) of the Constitution. In support of his contention, Mr. Chatterjee has placed reliance on the decisions of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . and *Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others*, . In the *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , it has been held by the Supreme Court, after reviewing all the earlier decisions on the point, that there is no fundamental right to do trade or business in intoxicants:, and that the State,

under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession. In this connection, we may refer to the following observation of Das, C.J., in *The State of Bombay Vs. R.M.D. Chamarbaugwala*, which has been relied on in the *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, ...

We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Article 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word "trade", "business", or "intercourse". We are, however, clearly of the opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Articles 19(1)(g) and 301 could not possibly have been to guarantee or declare freedom of gambling. Gambling activities from their very nature and in essence are extra commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(1)(g) and 301 of our Constitution.

8. After referring to the above observation, it has been held in the *Har Skankar's* case A.I.R. 1975 S.C 1121. that the reasons mentioned by Das, C.J., for holding that there can be no fundamental right to do trade or business in an activity like gambling apply with equal force to the alleged right to trade in liquor and those reasons may not be brushed aside by restricting them to gambling operations. The same view has also been taken in the *Sat Pal's* case A.I.R. 1979 S.C. 1550.

9. Mr. R.C. Deb, the learned Advocate appearing on behalf of the respondents, submits that what has been laid down in the *Har Shankar's* case A.I.R. 1975 S.C 1121. and in the *Sat Pal's* case A.I.R. 1979 S.C. 1550, referred to above, is that as nobody has a fundamental right to carry on the trade or business in liquor, the Government is entitled to impose restriction as a regulatory measure. It is contended by him that there is a fundamental difference between imposition of restriction as a regulatory measure and where such imposition is made for fiscal purpose. As there is no fundamental right to carry on trade or business in liquor, one cannot complain against any regulatory measure that may be taken by the Government. But imposition of tax on the sale of country liquor for fiscal purpose, as has been made by the impugned Ordinance interfering with the freedom of trade or business of the respondents in country liquor, comes under the protection afforded by Article 304(b) of the Constitution. He submits that in the aforesaid Supreme Court decisions import duty was imposed on intoxicants for the purpose of controlling or regulating the trade or business in intoxicants and not for fiscal purpose and so it was held that the constitutional validity of such imposition could not be challenged. Accordingly, it is contended by him that although the respondents have no fundamental right to carry on the trade or business in country liquor, yet they are entitled to seek the protection of Article

304(b) of the Constitution as the impugned Ordinance has imposed an unreasonable restriction on the freedom of trade or business in country liquor.

10. It is true that both in the *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . and in the *Sat Pal's case* A.I.R. 1979 S.C. 1550, import duty was imposed on intoxicants as a regulatory measure, but at the same time, in the *Har Shankar's case* A.I.R. 1975 S.C 1121, the alleged trade or business in liquor has been equated with gambling activities. In *State of Bombay v. R.M.D. Chamarbaugwala* A I.E. 1957 S.C. 699, gambling activities have been held to be extra commercium and not protected either by Article 19(1)(g) or Article 301 of the Constitution. Thus, it follows that liquor is also extra commercium. It is unthinkable that liquor will be extra commercium for the purpose of Article 19(1)(g) and res commercium for the purpose of Article 301 or 304(b) of the Constitution. "Liquor" not being an article of trade or commerce, there cannot be a lawful trade or business in liquor as contemplated by Article 19(1)(g) or Article 301 of the Constitution, although the forms in which it is being dealt with by persons under licences from the Government may resemble trade or business. In our view, in order to avail of the protection of Article 301 or Article 304(b) of the Constitution, the commodity in which the right to trade, business or intercourse is claimed should be the subject-matter of lawful trading activities. The view which we take finds support from a Full Bench decision of the Kerala High Court in *Kochan Velayudhan Vs. State of Kerala*, . It has been held In that Full Bench case that the protection afforded by Article 301 is confined to trading activities. "Liquor" is not a legitimate article of trade and freedom of trade in liquor is not protected by Article 301. In the circumstances, the respondents are not entitled to challenge the constitutional validity of the impugned Ordinance being the West Bengal Ordinance No. 4 of 1980 on the ground that it offends against the provision of Article 304(b) of the Constitution.

11. Before we part with these cases we may dispose of another contention made on behalf of the respondents. It is said that if liquor is extra commercium, the sale of it cannot be a sale within the meaning of the Bengal Finance (Sales Tax) Act, 1941, and so no tax can be imposed on sales of liquor under the said Act. We are unable to accept the contention. Trade or business in liquor may not be trade or business as contemplated by Article 19(1)(g) or Article 301 of the Constitution, but sale of liquor having all the incidents of "sale" within the meaning of Clause (g) of Section 2 of the said Act, we do not find any reason why such sale cannot be chargeable to sales tax. This contention, therefore, fails. No other point has been urged on behalf of either party.

12. For the reasons aforesaid, the judgments appealed from are set aside and the rules nisi are discharged. The appeals are allowed, but there will be no order for costs.

13. Leave to appeal to the Supreme Court under Article 131-A of the Constitution is prayed for on behalf of the respondents, but refused. There will, however, be stay of operation of this judgment for a period of four weeks from date.

R.K. Sharma, J.

I agree.