
(1984) 04 CAL CK 0007
In the Calcutta High Court
Case No : Appeal No. 31 of 1984

State of West Bengal

APPELLANT

Vs

Anal Chowdhury

RESPONDENT

Date of Decision : 02-04-1984

Acts Referred:

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

Citation : (1985) 151 ITR 790

Hon'ble Judges : Satish Chandra, C.J.; Suhas Chandra Sen, J

Bench : Division Bench

Advocate : R.N. Bajoria and S.C. Ukil, for the Appellant; Tapen Kumar Pal and R.N. Kar, for the Respondent

Judgement

Satish Chandra, C.J.—The State of West Bengal appeals against the judgment of a learned single judge declaring that the West Bengal Entertainment-cum-Amusements Tax Act, 1982, violated Article 301 of the Constitution and was on that ground ultra vires and void.

2. The aforesaid Act imposed an annual tax of Rs. 50 per television set, on the holder of the television set. The learned judge below held that television was a form of intercourse within the meaning of Article 301 of the Constitution. The impugned tax impeded the intercourse and thus infringed the free intercourse throughout the territory of India guaranteed by Article 301. The Act was not saved by Article 304.

3. At the hearing before the learned single judge, counsel for the parties made their submissions on other points of challenge, namely, that the State legislature lacked competence to enact this statute and that Article 19(1)(a) of the Constitution was violated. The learned judge, however, chose not to express any opinion on the points. To avoid remand and delay, we have heard the learned counsel on all the points.

4. Mr. T. K. Pal, learned counsel for the writ petitioner respondent, submitted

that--

(1) The impugned statute was in pith and substance, covered by Entry 31 of List I to the Seventh Schedule, and not by Entry 62 of List II. Hence, the State Legislature was not competent to enact it.

(2) The statute violated the commerce clause enshrined in Article 301 of the Constitution and was void for transgressing its constitutional limitation on legislative power.

(3) The Act infringed the fundamental right guaranteed by Article 19(1)(a) of the Constitution.

1. Legislative competence.

For the writ petitioner, it was submitted that the subject-matter of the statute is covered by Entry 31 of List I which says :

"31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication."

5. Learned counsel submitted that television was a form of communication like wireless broadcasting. It is a public utility service. Since it is covered by Entry 31 of List I, Parliament had exclusive jurisdiction to legislate on the topic of television. The State Legislature was incompetent.

6. In the alternative, it was submitted that Entry 62 which provides :

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

was not attracted.

7. Article 246 confers power to make laws with respect to matters enumerated in the three lists appended, to the Seventh Schedule. The various entries in the three lists are not powers of legislation, but fields or the subject-matter of legislation (1) and (2).

(1) The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, ; (2) Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others, .

The language of these entries should be given the widest amplitude. General words used in them include and extend to all ancillary or subsidiary matters. Navinchandra Mafatlal Vs. The Commissioner of Income Tax, Bombay City, , Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, and Chaturbhai M. Patel Vs. Union of India (UOI) and Others, .

8. It is well settled that the entries in the three lists of the Seventh Schedule are of two distinct categories. In the first category are entries relating to matters of general legislation. The second category consists of entries conferring powers of

taxation. This scheme obtains in each of the three lists.

9. In *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, , the Supreme Court held :

"In List I, Entries I to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus Entry 22 in List I is "Railways", and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea or air, taxes on railway fares and freights". If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries ; import and export across customs frontiers". If these expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that list form another group and they deal with taxes. Entry 18, for example, is "Land" and Entry 45 is "Land revenue". Entry 23 is "Regulation of mines" and Entry 50 is "Taxes on mineral rights". The above analysis--and it is not exhaustive of the entries in the Lists--leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, Clauses (1) and (2) and of Entry 97 in List I of the Constitution."

10. The position was summed up in para 55 of *M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another*, by observing that under the scheme of the Entries in the Lists, taxation is regarded as a distinct matter and is separately set out.

11. Similarly in *State of Mysore and Others Vs. D. Cawasji and Company and Others*, and *The Bar Council of Uttar Pradesh Vs. The State of U.P. and Another*, , the Supreme Court held that the Entries in the Lists dealing with certain specific topics did not grant power to levy tax. Power to tax must be derived from a specific taxing entry.

12. To recapitulate, Entry 31 of the Union List reads:

"31. Posts and telegraphs, telephones; wireless, broadcasting and other like forms of communication."

13. This is a general Entry. It does not confer power of taxation. Even if the petitioner's submission that television is a public utility service covered by this

Entry 31 be accepted, it will not automatically exclude the power of the State legislature to make laws for taxation even on matters mentioned in Entry 31. The taxation power of the State legislature will depend upon matters enumerated in the entries of the State List. The first limb of the submission has no merit.

14. This brings us to the question if the impugned Statute is with respect to matters enumerated in Entry 62 of List II, Schedule VII.

15. Entry 62 says:

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

16. The State legislature has thus power to make laws to levy tax on luxuries which in turn includes entertainment, amusements, betting and gambling.

17. Learned counsel for the writ petitioner submitted that the impugned Act specifically says that the tax levied on television sets, is entertainment and amusements tax. He emphasised that though the impugned Act is a verbatim copy of the Maharashtra Luxury-cum-Entertainment and Amusements Tax on Holders of Television Sets Act (19 of 1982), it did not use the word "luxury" anywhere, neither in the title nor in Section 4 which is the charging provision. There was deliberate omission of the word "luxury". Therefore, the State counsel cannot now turn round and say that the impugned Act levies tax on luxury.

18. It is by now well settled that while considering constitutional validity, what matters is not the name of the Act but its real nature, its pith and substance. *Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others*, and *Thakur Amar Singhji Vs. State of Rajasthan*, . In *Om Prakash Puri v. State of W.B.* [1975] Tax LR 1894 , it was observed by this court that the pith and substance of the Act being luxury, the name given to the tax (namely, entertainment tax) was immaterial.

19. It is equally well settled that when the validity of the exercise of power is in issue, it will be referable to jurisdiction which confers validity upon it and not to a jurisdiction under which it would be nugatory, though the section is not referred to or a different or a wrong section of different provision was mentioned. *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, and *Municipal Corporation of the City of Ahmedabad Vs. Ben Hiraben Manilal*, .

20. In our opinion, even though the term "luxury" has not been used in the provisions of the Act, yet it is open to the learned counsel to submit that in pith and substance, the impugned Act levies tax on luxury within the meaning of Entry 62 of the State List.

21. Having cleared the deck of the preliminaries, let us now examine the provisions of the Act. The impugned Act is entitled "The West Bengal Entertainment-cum-Amusements Tax Act, 1982." It came into force on April 1, 1983. The preamble to the Act states :

"Whereas it is expedient to provide for the levy and collection of entertainment-cum-amusement tax on and from the holders of television sets in West Bengal for raising additional resources for the benefit of the State....."

22. Section 4 is the charging provision. It reads :

"4. Subject to the other provisions elsewhere contained in this Act, there shall be levied and collected on and from every holder of a television set or sets an entertainment-cum-amusement tax at the rate of rupees fifty for each year per television set, held or possessed by him :

Provided that if the holder of a television set or sets becomes liable to pay the tax after the 30th day of June during a year, he shall be liable to pay during that year one-half of the amount of tax as specified above."

23. The phrase "holder of a television set" is defined in Section 2(a) to mean a person in whose name a licence is issued in respect of any television set under the Indian Wireless Telegraphy Act, 1933, and includes a person, who is, for the time being found in possession of any television set irrespective of its size or whether it is a black and white set or a colour set and irrespective of the fact whether the person holds such licence or not.

24. Section 6 provides for exemption. Under it, no tax shall be leviable in respect of any television set owned and used by the Central Government or any State Government or other mentioned authorities or educational institutions, etc. No tax shall be leviable in respect of any closed circuit television set.

25. Section 6(5) permits refund in case the holder of a television set claims and satisfies that he had not used the set throughout the year for which the tax was paid.

26. The provisions of the Act seek to levy an annual tax on the holder of a television set, i.e., on the owner or possessor of a television set. The levy is on the person. The taxable event is owning or possessing a television set. The television set hence is the subject of the impost. Its ownership or possession creates the liability to pay the tax.

27. Mr. T. K. Pal submitted that in its true nature and character, the tax was on the telecast programme received by the television set. The television set is used for receiving the programme telecast by the various television centres. The tax is on the use of the television set and not on the television set as an article or goods. Hence, it cannot be taxed as luxury. Learned counsel emphasised that the fact that the tax is on the use of the television set, is clear from Section 6(5) whereunder a person is entitled to refund of the tax if he satisfies the authority that he had not used the set throughout the year.

28. The charging provision of the Act is clear. It creates liability on the fact of ownership or possession of the set, its user or non-user being immaterial. Section 6(5) relates to the mode of collection. It provides a measure of

exemption or refund of tax paid. It has no material bearing to the creation of the liability of the tax. On the other hand, it affirms the liability, but gives a locus poenitentiae for refund on proof of certain facts.

29. In our opinion, the tax is on the television set leviable on its holder.

30. It is well settled that the primary guide for determining the nature of the tax is the charging section. Identification of the subject-matter of a tax is to be found in the charging section, i.e., the section which creates the liability to pay tax, as distinguished from the mode of assessment and the machinery by which it is assessed. (See AIR 1949 81 (Federal Court)). In the same decision, the Federal Court ruled that the intrinsic character of a tax is not to be determined by the mode of measurement or the standard of calculation prescribed for assessing the amount of tax. This decision of the Federal Court was approved by the Supreme Court in *Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others*, .

31. The Supreme Court held that once it is held that the legislature has the power to legislate over a particular subject, its competence is not to be limited by the manner in which the power is exercised. See *Madurai District Central Co-operative Bank Ltd. v. Third ITO [1915] 101 ITR 24*, *Hari Krishna Bhargav Vs. union of india (UOI) and Another*, .

32. Hence, the fact that the Act contemplates refund in certain situations is not material or relevant for determining the subject-matter of the levy.

33. The next question is whether the tax on the ownership or possession of a television set is a tax on luxury within the meaning of Entry 62, List II. The interpretation of the term "luxury" as occurring in Entry 62 came up for consideration before the Supreme Court in *A.B. Abdul Kadir and Others Vs. State of Kerala*, . There, the levy of tax was on tobacco. H. R. Khanna J., speaking in respect of Entry 62, held (para. 12) :

"According to that entry, the State Legislatures can make laws in respect of "taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". Question, therefore, arises as to whether tobacco can be considered to be an article of luxury. The word "luxury" in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word "luxury" is something which conduces enjoyment over and above the necessities of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well off. According to *Encyclopaedia Britannica*, luxury tax is "a tax on commodities or services that

are considered to be luxuries rather than necessities. Modern examples are taxes levied on the purchase of jewellery, perfume and tobacco." It has further been said :

"In the 19th and 20th centuries, increased taxes have been placed on private expenditure upon alcohol, tobacco, entertainment and automobiles. Such expenditure is superfluous in the sense that a large part of it may be said to be in excess of what is required for economic efficiency and personal well-being, although the expenditure affects large numbers of people.""

34. It will be seen that in the context of Entry 62, the term "luxury" has not been used in the sense of pertaining to the exclusive preserve of the rich. It was emphasised that the fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature being an article of luxury. In other words, the term "luxury" has been used in Entry 62 to identify things which are other than the necessities of life, which are superfluous and not indispensable or which are taken to with a view to enjoy, amuse or entertain ourselves.

35. Applying this test, it is self-evident that a television set is not, from any point of view, a necessity of life. It is something which is not indispensable.

36. The precise question whether the tax on a television set is a tax on luxury came up for consideration before the Bombay High Court in *Mumbai Grahak Panchayat v. State of Maharashtra* [1983] Tax LR 2770. It was held that the test by which the question as to whether a particular article is a luxury or not must be determined is whether the expenditure on that article is in excess of what is required for economic and personal well-being. The court went on to hold (at p. 2778):

"It may, no doubt, be possible to say that even persons belonging to the middle class do manage to acquire a T. V. set, but merely on such consideration, a T.V. set does not become an article which can be described as indispensable and which is required for the economic and personal well being of the persons concerned. In a State with a per capita income of Rs. 2,200 per year, where a large part of the population has its basic needs unfulfilled and somehow manages to eke out a living, it is difficult to see why a T.V., set which is acquired by an extremely small proportion of people, could not be called an article of luxury."

37. We find ourselves in agreement with this view. In the State of West Bengal, the per capita income is not very much different: and the same principle applies.

38. It was submitted that television is one of the official media of the Government. It is used as a channel of communication between the Government and the people. It is a public utility service. It cannot be considered as a luxury.

39. As is clear from the preamble and the charging section, the tax is on the article known as television set. It is not a tax on the public utility service of telecasting programme of education or information. The receipt of telecast

programme does not create the liability to pay the impugned tax. The tax remains on the article called television set. The television set is not usable merely for receiving the programmes telecast by the television centres. Some such sets can equally or even exclusively be used along with video cassettes, recorders or players. Therefore, the submission that the television set cannot be considered as a luxury because it is used to receive the programme telecast by the Government is not sound. It is necessary to keep in mind that the validity of a taxing statute depends upon the nature of the tax levied and normally this is to be ascertained from the charging provision. Considering the matter from this angle it cannot be gainsaid that the impugned statute levies tax on the article known as the television set and not on the activity of telecasting programmes. It is a tax on luxuries.

40. Since we are of the opinion that the impugned statute levies tax on luxuries, it is not necessary to consider the further question whether the tax is on entertainment and amusement within the meaning of Entry 62.

41. Article 19(1)(a) of the Constitution :

The next submission of the learned counsel for the writ petitioner was that the impugned tax is an infringement of the petitioner's right to acquire information as a part of his right under Article 19(1)(a) as being an unreasonable restriction. The submission is misconceived.

42. In the *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, , it was held that the direct operation of the Act upon the fundamental right forms the real test. Indirect or ancillary effect is immaterial and irrelevant, *Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others*, (a decision relied on by the writ petitioner) accepts this test. In that case, the newsprint policy of 1972-73 was challenged. The court held :

"The effect and consequence of the impugned policy upon the newspapers is directly controlling the growth and circulation of newspapers..."

43. Here, the petitioner has furnished no material or evidence to show in what way has the imposition of tax directly affected the petitioner's freedom of speech and expression. The fact that the petitioner has to pay an annual tax for using the television set is at best an indirect or a remote effect. It is not a restriction on the fundamental right under Article 19(1)(a).

44. This submission was considered by the Bombay High Court in *Mumbai Grahak Panchayat's case* [1983] Tax LR 2770. It was observed :

"(Paragraph 45). It is difficult for us to see the relevance of Article 19(1)(a) of the Constitution in the context of the present Act. If there is an independent power of taxation as provided by Entry 62 in List II of Schedule VII, then merely because that tax is levied on an article which is used for entertainment and amusements and can also be used in order to acquire certain information, such power cannot be challenged on the ground that it impinges on Article 19(1)(a) of

the Constitution. It is also well known that when a statute is challenged on the ground that it interferes with or amounts to unreasonable restriction on a right under article 19, such statute must be one which directly interferes with a fundamental right. (See Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others,) and the possible indirect and remote effects of a legislation upon any particular fundamental right cannot be said to constitute a restriction on that right. (See Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others,)."

45. We have no hesitation in rejecting this submission.

46. Article 301 of the Constitution:

Learned counsel for the appellant-State challenged the finding of the learned single judge that the impugned Act violated the provision of Article 301 of the Constitution. Article 301 states :

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

47. The learned single judge held (p. 809 et seq):

1. Intercourse has been separately mentioned in Article 301 alongside the word "commerce" and it must therefore necessarily refer to intercourse which is not commercial in nature.

2. That the transmission of information inter-State is a form of intercourse.

3. The television can be brought within the meaning of the word "intercourse" as used in Article 301 of the Constitution.

4. By the impugned Act, tax is not actually sought to be imposed upon a television set but upon the programme which is telecast through the set.

5. The tax sought to be imposed by the Act is to augment the State's revenue. As such, it cannot be said to be in public interest.

6. The Act affects the freedom of intercourse through the media of television guaranteed under Article 301 of the Constitution.

7. The Act is not saved by Article 304 of the Constitution.

48. The crucial finding is that the tax is on the programme that is telecast through the set. We are unable to agree with this finding. To recapitulate, the subject-matter of tax is to be gathered from the charging provision. It does not depend upon an indirect or remote effect of the levy. We have already held that the tax is on the holder of the television set. It is not on the activity of telecasting of the programme. It is, hence, incorrect to say that the Act affects the freedom of intercourse through the media of television.

49. Assuming that the tax is on the programme, it is difficult to agree that the

impugned tax impedes the free intercourse of the telecast programme of television. For the writ petitioner, it was submitted that the telecast of the television programme is effected by means of energy manifestation produced at the point of reception in one State which are generated and controlled at the sending point in another State. He emphasised that the intercourse of the transmission is complete only when a television set is operated and the programme seen on the television set. Till then the telecast continues to remain in motion or in suspended animation. For this, the learned counsel placed reliance on a decision of the Supreme Court of U.S.A. in Fisher's case [1935] 80 LAW ED 956.

50. It is true that there are some observations in that decision with respect to radio broadcasting. They are not material for the point under consideration. Even so, we do not agree that the telecast of the programme remains in a state of suspension until the television set is opened and operated so that the programme must be received by it. In our view, the transmission of the telecast begins and ends virtually at the same moment of time because it travels through the atmosphere or ether with the speed of electricity. It reaches the given parts of the country within a fraction of a second of its transmission. Its intercourse or completion does not depend upon the operation of the television set. If the television set is not operated at the right time, the person owning or possessing the set is sure to lose the programme. In order to receive the telecast programme, the television set has to be operated at the right time. The impugned tax has no relevance, much less a restriction on the movement or intercourse of the programme.

51. It is by now well settled that under Article 301, there should be direct and immediate restriction on the very movement of the goods. An indirect or remote effect is immaterial. See *Atiabari Tea Co., Ltd. Vs. The State of Assam and Others*, and *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others*, . The impugned tax does not directly impede the free intercourse of the programme.

52. We did not hear learned counsel for the writ petitioner to submit that if the impugned tax was held to be on the television set, then also it violates Article 301. The learned single judge did not go to that extent.

53. The learned single judge has held that the tax sought to be imposed by the Act is to augment the State revenues and as such it cannot be for public interest. He observed (at p. 811) :

"If the tax was imposed, e.g., to promote the television industry in West Bengal or to provide free television sets to educational institutions, or even if a part of the tax was utilised for such purpose, then it could be said that the tax was in public interest."

54. The power of taxation is one of the attributes of internal sovereignty of the State, just like the power of eminent domain whereunder the State can acquire

private property for public purposes.

55. Latham C.J. defined a tax :

"A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not a payment for services rendered." Mathews v. Chickory Marketing Board, 60 CLR 263 .

56. This observation was approved by the Supreme Court in The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., . In that case, Mukherjea J. held that a tax is a public impost without reference to services rendered. The power of taxation is primarily to augment the revenues of the State. It is presumed to be in the public interest. In State of Madras v. Nataraja Mudaliar [1968] 22 STC 376 ; AIR 1969 SC 147, it was held (p. 387):

"There is also no doubt that exercise of the power to tax may normally be presumed to be in the public interest."

57. This observation was approved in A.B. Abdul Kadir and Others Vs. State of Kerala, . It was further observed in Abdul Kadir's case that the above observations, though made in the context of Article 302, have equal relevance under Article 304.

58. It is not necessary that every tax must be compensatory in nature, else it will infringe Article 301. In The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others, , it was held that even where an Act imposes a tax directly on the very movement of the goods, it will not violate Article 301, if it was compensatory or regulatory in nature. If a tax does not restrict movement directly, it need not be compensatory or regulatory. It will be outside the purview of Article 301. The impugned tax on the television set was in no way a restriction on its free intercourse. It need not pass the test of a compensatory or a regulatory tax.

59. After completion of the arguments, our attention was drawn to the West Bengal Tax Laws (Amendment) Act, 1983. Section 8 of this Act drastically amends the West Bengal Entertainment-cum-Amusements Tax Act, 1982. It seeks to add the word "luxury". It seeks to impose tax separately on black and white and colour television sets and on video cassette recorder or video cassette player. On the latter, an annual tax of Rs. 1,000 is proposed. Section 1(2) of this Amendment Act provides that provision of the Act, inter alia, of Section 8 shall come into force on such date as the State Government may by notification appoint. We were not told whether Section 8 seeking to amend the impugned Act has yet come into force or not. Moreover, no arguments were addressed to us on the validity or on the vires of the amendments. We, therefore, may not be taken to have expressed any opinion thereon.

60. In the result, the appeal succeeds and is allowed. The judgment of the learned single judge is set aside. The writ petition is dismissed. There will,

however, be no order as to costs.