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**(1957) 11 KL CK 0015**  
**In the High Court Of Kerala**  
**Case No : O.P. No's. 2, 6 and 7 of 1955 (E)**

T.K. Abraham and Others

APPELLANT

Vs

State of Travancore-Cochin

RESPONDENT

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**Date of Decision :** 08-11-1957

**Acts Referred:**

Constitution of India, 1950 — Article 14, 19, 19(1), 245, 276(2)

**Citation :** AIR 1958 Ker 129

**Hon'ble Judges :** Koshi, C.J;Vaidialingam, J;M.S. Menon, J

**Bench :** Full Bench

**Advocate :** P. Govinda Menon, V.K.K. Menon, C.S. Padmanabha Iyer and A.G. Titus, for the Appellant; K.V. Surianarayana Iyer, General, for the Respondent

**Final Decision :** Dismissed

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## Judgement

M.S. Menon, J.—The petitioners are Stockists or "A" Class licensees under the Rules framed in exercise of the powers conferred by Section 31 of the Travancore Tobacco Act, I of 1087, and published in the Travancore-Cochin Government Gazette (Extra-ordinary) dated the 25th January 1951.

2. Rule 14 of the Rules provides that "the vend of tobacco of all kinds is prohibited throughout the State, except under a licence"; Rule 15 that the "licence for the vend of tobacco shall be of the following descriptions :--

"(i) Stockist or "A" Class license

(ii) Wholesale or "B" Class license and

(iii) Retail or "C" Class license"; and Rule 16 (1) and (11):

(1) Holders of Stockist or "A" Class licensees shall be entitled to purchase tobacco from any dealer within or without the State without any quantitative restriction. This class of licensees shall sell only to other "A" Class licensees or to "B" Class licensees.

(ii) The annual fee for these licenses shall be as follows: --

Variety of tobacco stocked

Maximum quantity

Minimum fee prescribed

Fee payable for stocking additional quantities.

Cds.

Rs.

A.

Jaffna tobacco.

100

1500

Rs. 1000 for additional quantity of 100 Cds. or fraction thereof.

B.

Tobacco produced in India (unmanufactured.) ... ..

100

1000

Rs. 750 ? do?

C.

Beedi or/and Beedi tobacco. ...

25

1000

Rs. 750 for additional quantity of 25 can dies or fraction thereof.

D.

Tobacco preparation of all kinds. ...

To the value of Rs. 20,000

1000

Rs, 750 for additional quantity to the value of Rs 20,000 or fraction thereof.

N. B. :--For the purpose of calculating Stockist license fee in respect of tobacco preparations the cost price of the article will be taken into account. The license fees will be realised only for the quantities brought in from outside the State."

3. The Travancore Tobacco Act, 1 of 1087, was continued in force by virtue of Section 3 (1) of the United State of Travancore and Cochin Administration and Application of Laws Act, 1125 (which replaced Ordinance No. 1 of 1124), and Article 372(1) of the Constitution of India. Section 3 (1) of the Act provides :

"Subject to the provisions of this Act, subject also to any alterations, amendments or repeals effected by the legislature of the United State or other competent authority before the commencement of this Act, the existing laws of Travancore shall, until altered, amended or repealed by the Legislature of the United State or other competent authority, continue to be in force mutatis mutandis in that portion of the territories of the United State which before the appointed day formed the territory of the State of Travancore."

and

"Article 372 (1): Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority."

4. The material portion of Section 31 of the Travancore Tobacco Act 1 of 1087 under which the Rules were framed reads as follows :

"Our Dewan may, with Our sanction, from time to time by Notification in the Gazette, make Rules consistent with this Act,--

(a) permitting absolutely or subject to the payment of any duty or fee or to any other conditions, and regulating, within the whole or any specified part of Travancore, the cultivation, manufacture, possession, transport, import, export, and sale of tobacco."

5. Sub-section (2) of Section 3 of the United State of Travancore and Cochin Administration and Application of Laws Act, 1125, provides :

"All references in any of the existing laws of Travancore to His Highness the Maharaja of Travancore or the Government or the Dewan or a Minister shall be construed as references to the Raj Pramukh or the Government of the United State or the Minister concerned of the United State, as the case may be."

The opening words of the Notification published in the Government Gazette (Extraordinary) dated 25th January 1951 are :

"In exercise of the powers conferred by Section 31 of the Travancore Tobacco Act 1 of 1087 as continued in force by the Travancore-Cochin Administration and Application of Laws Act 6 of 1125 and in supersession of all previous Notifications and Rules on the subject the following rules are prescribed under sanction of His Highness the Raj Pramukh for regulating the import, export, sale, transport possession, disposal of things confiscated and the grant of reward under the said Act and for generally carrying out the provisions thereof."

It is not contended that the provisions of Section 31 of the Travancore Tobacco Act, 1 of 1087, read with Sub-section (2) of Section 3 of the United State of Travancore and Cochin Administration and Application of Laws Act, 1125, had not been complied with in making the Rules concerned.

6. The first contention urged before us is that the provision represents an absolute delegation of legislative power, that is, of the power to legislate on matters of principle and even to impose taxation, that such a delegation was bad at the time it was made and that even if it be considered as valid at its inception, it cannot possibly survive the Constitution. As pointed out by Dr. Corwin :

"At least three distinct ideas have contributed to the development of the principle that legislative power cannot be delegated. One is the doctrine of separation of powers : Why go to the trouble of separating the three powers of Government if they can straightway remerge on their own motion? The second is the concept of due process of law, which precludes the transfer of regulatory functions to private persons. Lastly, there is the maxim of agency "Delegata potestas non potest delegare," which John Locke borrowed and formulated as a dogma of political science". (Constitution of the United States of America, page 73).

7. It is difficult to hold, especially in view of the words "with Our sanction" in Section 31 that there has been an absolute delegation of legislative power. Even assuming -- without deciding -- that there was such a delegation, we do not see any justifiable reason for holding that the Maharaja of Travancore had not the right to so delegate his powers. He was an absolute Ruler and the inhibition against the delegation of legislative power whether it be founded on the doctrine of separation of powers or the concept of due process of law or the theory of agency and the maxim, delegata potesta non potest delegare, had no application to him,

8. In *In re, Article 143 of the Constitution of India and Delhi Laws Act (1912) etc In Re: The Delhi Laws Act, 1912, the Ajmer-Merwara (Extension of Laws) Act, 1947 and the Part C States (Laws) Act, 1950*, , the leading case on the delegation of legislative power, Kania C. J. said:

"The important question underlying the three questions submitted for the Court's consideration is what is described as the delegation of legislative powers. A legislative body which is sovereign like an autocratic ruler has power to do anything. It may, like a Ruler, by an individual decision, direct that a certain person may be put to death or a certain property may be taken over by the State, A body of such character may have power to nominate someone who can exercise all its powers and make all its decisions. This is possible to be done because there is no authority or tribunal which can question the right of power of the authority to do so."

9. The questions referred by the President of India under Article 143 of the Constitution for the opinion of the Supreme Court were :

"(1) Was Section 7 of the Delhi Laws Act, 1912, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?

(2) Was the Ajmer Merwara (Extension of Laws) Act, 1947, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Legislature which passed the said Act?

(3) Is Section 2 of the Part C States (Laws) Act, 1950, or any of the provisions thereof and in what particular or particulars or to what extent ultra vires the Parliament?"

The three Acts were selected in order to raise the question of delegation in respect of the three main stages in the constitutional development of India. As pointed out by Patanjali Sastri J., a written constitution was available at all material times, in 1912, in 1947 and in 1950. He said :

"It is now a common place of constitutional law that a legislature created by a written constitution must act within the ambit of its powers as defined by the constitution and subject to the limitations prescribed thereby, and that every legislative act done contrary to the provisions of the constitution is void. In England no such problem can arise as there is no constitutional limitation on the powers of Parliament which, in the eye of the law, is sovereign and supreme. It can, by its ordinary legislative procedure, alter the Constitution, so that no proceedings passed by it can be challenged on constitutional grounds in a Court of law. But India, at all material times,--in 1912, 1947 and 1950 when the impugned enactments were passed--had a written constitution, and it is undoubtedly the function of the Courts to keep the Indian legislatures within the constitutional bounds. Hence, the proper approach to questions of constitutional validity is to look to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted."

10. We entertain no doubt that the Maharaja of Travancore on the basis of the sovereignty which he claimed and exercised was fully competent to delegate all or any of his powers to such person or authority as he deemed fit in his sole and untrammelled discretion and that Section 31, even if it amounted to a delegation of legislative power was valid at the time it was made, Such being one view it is unnecessary to consider whether Section 31 really represents a delegation of legislative power or only the lesser and unexceptionable power of subsidiary legislation, and that question is not considered in this judgment.

11. The further question which arises for consideration is whether the continuance of the delegated power is in any way hit by the provisions of the Constitution. The articles to which our attention has been drawn are Arts. 14 and 19 (1) (g). Article 14 provides :

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

In *Kathi Raning Rawat Vs. The State of Saurashtra*, Das J., said :

"It is now well established that while Article 14 forbids class legislation it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."

and in *V.M. Syed Mohammad and Company Vs. The State of Andhra*,

"The appellant's grievance is that the impugned Act singles out for taxing purchasers of certain specified commodities only but leaves out purchasers of all other commodities. The principle underlying the equal protection clause of the Constitution has been dealt with and explained in *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, , and several subsequent cases and need not be reiterated. It is well settled that the guarantee of equal protection of laws does not require that the same law should be made applicable to all persons. Article 14, it has been said, does not forbid classification for legislative purposes, provided that such classification is based on some differentia having a reasonable relation to the object and purpose of the law in question."

Judged by the test laid down by the Supreme Court there can be no doubt that the levy imposed by the Travancore Tobacco Act, 1 of 1957, and the rules framed thereunder do not violate the equality guaranteed by Article 14 of the Constitution.

12. Article 19(1)(g) provides that all citizens shall have the right "to practise any profession, or to carry on any occupation, trade or business" and Clause (6) that nothing in Sub-clause (g) "shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions, on the exercise of the right conferred by the said Sub-clause."

13. In *S. Ananthakrishnan Vs. The State of Madras*, , *Rajamannar C. T.* dealt with the problem of reconciling the fundamental rights guaranteed under Article 19 and the power of taxation conferred by the Constitution as follows:

"The question then is: how to reconcile the fundamental rights guaranteed under Article 19 and the power to tax contained in several provisions of the Constitution? One way is to hold that a tax otherwise valid does not become invalid merely because it abridged any of the fundamental rights. This way is really not a way of reconciliation; it practically makes the fundamental rights entirely subject to the power of taxation. The other way is to hold any taxation of the exercise of the fundamental right which aims at unduly abridging or destroying such rights is unconstitutional (vide *Grosjean v. American Press Co.* (1936) 297 US 233) (El). But if the taxation is only for legitimate revenue

purpose, then, it is not invalid merely because it may adversely affect any of the fundamental rights. This way of reconciling would leave room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional."

We are in respectful agreement with this view and hold that the levy with which we are concerned is no more than a reasonable impost] for legitimate revenue purposes and does not violate Article 19(1)(g) of the Constitution.

14. In *V. Guruviah Naidu and Brothers Vs. The State of Madras and Another*, , *Rajagopala Ayyangar J.*, dealing with the taxing power and Article 19(6), said :

"Taxation is the supreme function of the State, the exercise of a power which is necessary for the very existence and maintenance of the State. In the words of Cooley :

"It is unlimited in its range, acknowledging in its very nature no limits so that security against its abuse is to be found only in the responsibility of the legislation which imposes the tax to the constituency who are to pay.;"

and

"The restraints imposed by taxation are wholly beyond the scope of Article 19(6) and therefore not subject to the tests of a valid legislation under that provision."

15. According to the Advocate General there is no fundamental right at all to carry on a trade in a commodity like tobacco. In *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, it was urged that every person had a natural right to carry on a trade in intoxicating liquors and that the State had no right to create a monopoly in them. Mahajan C. J., quoted the following passage (among others) from *Crowley v. Christensen*, (1890) 137 US 86 (H):

"The police power of the State is fully competent to regulate the business -- to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only";

and said :

"These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner."

16. The enactment concerned in the above case was the Ajmer Excise

Regulation, I of 1915, and two of the prayers made and negatived were for a writ or direction :

"(a) not to levy any duty or fee for the purpose of raising revenues for the benefit of the State by holding auction sales; and

(b) not to grant monopoly in the trade to a selected few individuals, but to grant licences freely on application."

17. Tobacco is almost as deleterious as liquor and one of the earliest and more famous inditelements is in Robert Burton's Anatomy of Melancholy where in dealing with its common abuse by most men he said :

"tis a plague, a mischief, a violent purger of goods, lands, health, helish, devilish, and damned tobacco, the ruin and overthrow of body and soul."

18. In State of Bombay v. R.M.D. Chamarbangawala AIR 1957 SC 69S (I), the Supreme Court had to deal with a question as to whether there can be a fundamental right in carrying on a "business" of gambling. The Court said:

"We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject matter of a fundamental right guaranteed by Article 19(1)(g)."

19. The second contention urged before us is that the licence fee is an excise duty coming under Entry 84 of the Union List :

"Duties of excise on tobacco and other goods manufactured or produced in India except-

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry"

and that it was saved only by Article 277 of the Constitution :

"Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law."



20. "Taxes", Ho adopt Professor Jensen's definition, "are compulsory contributions exacted by governments from private individuals and groups for meeting the costs of public services" and it is common ground that that licence fee with which we are concerned is essentially a tax imposed for the purpose of augmenting the general revenues of the State. It is also agreed that if the said levy comes within the ambit of Entry 84 of the Union List "provision to the contrary" as contemplated by Article 277 was as a matter of fact made by Parliament when the Central Excise and Salt Act, 1944, was extended to the State with effect from 1-4-1950 by the Finance Act, 1950, and that the Travancore Tobacco Act, 1 of 1087, ceased to be operative from that date,

21. The only question, therefore, that has to be considered is whether the tax concerned amounts to an excise duty within the meaning of Entry 84 of the Union List There is an exhaustive discussion of the meaning of the term "duty of excise" in *In re C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* AIR 1939 1 (Federal Court) Gwyer C. J., said in that case that at the date of the Government of India Act, 1935 :

"the only kind of excise duties which were known in India by that name were duties collected from manufacturers or producers, and usually payable on the issue of the excisable articles from the place of manufacture or production";

and that :

"it seems a not unreasonable inference that Parliament intended the expression "duties of excise" in the Constitution Act to be understood in the sense in which up to that time it had always in fact been used in India, where indeed excise duties of any other kind were unknown."

22. The decision was cited before the Privy Council in AIR 1945 98 (Privy Council) Their Lordships said that they had obtained valuable assistance from that decision and that consistently with it they are of opinion :

"that a duty of excise is primarily a duty levied upon a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax upon goods not upon sales or the proceeds of sale of goods."

23. The levy with which we are concerned is certainly not "a duty levied upon a manufacturer or producer in respect of a commodity manufactured or produced" and following the Federal Court and the Privy Council we must hold that the said levy does not represent a duty of excise coming within the ambit of Entry 84 of the Union List.

24. The third and last contention is that the levy comes under Entry 60 of the State List :

"Taxes on professions, trades, callings and employments";

and that it is governed by the provisions of Article 276(2) of the Constitution :

"The total amount payable in respect of any one person to the State or to any one municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum."

It is agreed that the proviso to Clause (2) is not attracted, and that if the levy amounts to a tax on a profession, trade, calling or employment, the levy will have to be restricted to a sum of Rs. 250 per annum.

25. The only question for consideration, therefore, is whether the levy does represent a tax on a profession, trade, calling or employment. The "base" of a tax -- the object or objects to which the tax applies, such as the "sales value" of tangible property or the "net income" of an individual -- provides the chief element of distinction between the various tax forms obtaining in modern communities. The base of a profession tax, that is, of the taxes under Entry 60 of the State List, is either the occupation itself or the income derived therefrom. That is why the Taxation Enquiry Commission (1953-1954) says :

"Basic to the levy of the profession tax is a classification of the assessee according to profession or income or both."

26. It is because a profession tax may savour of a levy on income that Clause (1) of Article 276 takes care to say :

"Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income".

The base, as we understand it, of the levy impugned is neither an occupation nor the income derived therefrom; but the commodity concerned, namely, the tobacco stocked by the licensee. In other words, the tax with which we are concerned is a tax not on an occupation or its income but a tax on a commodity.

27. According to the learned Advocate General the levy with which we are concerned is a luxury tax, a tax coming under Entry 62 of the State List :

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

and we are inclined to agree with him. In the absence of a specific statutory definition, what is a luxury will always be a matter of opinion, whether we define it in terms of the price paid or the nature of the article itself. There can be no doubt, however, that tobacco has invariably been considered an article of luxury throughout the world and that the Indian Taxation Enquiry Commission (1924-25) was right when they said that it is "a typical instance of 1 a conventional luxury whose use goes down to the poorest classes" in this country.

28. The imposition of taxes on articles which are deemed to be luxuries may

spring from either the desire to restrict the expenditure of money in certain directions or to tax the rich or that part of the expenditure of all classes that is regarded as a superfluity or as socially undesirable. Both the motives have apparently played their part in the taxation of tobacco in the State of Travancore.

29. Since the introduction by the Government of a Central excise duty on tobacco with effect from the 1st April 1943 the provincial governments which were levying duties on tobacco under special Acts gave up their taxes and were being compensated for their loss of revenue. The Finance Commission recommended that the arrangements for compensation should be terminated and that the States should be left free to levy their own taxes on tobacco. Those recommendations were accepted by the Government of India and the arrangements to pay compensation ceased to be operative from April 1953. It is clear from this that the Finance Commission did not consider the tobacco duties levied by the States as something beyond their competence.

30. That the Taxation Enquiry Commission (1953-54) did not consider the duties levied under the Travancore Tobacco Act, I of 1087, as either an excise duty or as a profession tax is clear from their Report. They proceeded on the basis that the tobacco duties represented one of the miscellaneous taxes which a State was entitled to levy.

31. They summarised the position of tobacco duties in the country at the time of their report as follows :

"At present, six States, viz., Andhra, Madhya Pradesh, Madras, Punjab, Pepsu and Travancore-Cochin levy tobacco duties under special Acts.

In Andhra and in Madras, the tax on the sale of tobacco is levied under the Madras Tobacco (Taxation of Sales and Registration) Act, 1953, which came into force on 20th April 1953. The tax is levied at only one point and is on the sales of "taxed tobacco" which comprises cigarettes, cigars, cheroots, cigarette tobacco and pipe tobacco. No tax is levied on biris, snuff or chewing tobacco under this Act, though their sales are liable to the general sales tax.

On termination of its agreement with the Government of India, Madhya Pradesh has re-imposed the licence fees leviable under the Act of 1939 which was kept inoperative from 1st April 1943 to 30th April 1953,

In Punjab, the older vend fees were at first not revived but tobacco was made liable to the general sales tax. Recently, however, on account of large-scale smuggling from neighbouring States and evasion of sales tax, the Punjab Government has reintroduced the Tobacco Vend Fees Act in replacement of the sales tax on manufactured tobacco.

In Pepsu, the right to deal in manufactured tobacco has to be purchased in auction; so has the right to prepare manufactured tobacco, which includes bins and snuff.

In Travancore-Cochin, license fees continue to be levied on the sale of tobacco. There are three classes of licences..... "A" licence for stockists, "B" for wholesalers and (C) for retailers. Only A class licencees can import tobacco from outside the State; and they can sell only to other stockists or wholesalers. The licence fees for stockists varies from Rs. 1000 to 1500 for prescribed minimum quantities which are ; 100 khandies for raw tobacco, 25 khandies for biris, and the value of Rs. 20000 for other products. For additional quantities, Rs. 750 are charged for each 100 khandies or fraction thereof. The licence fee for wholesalers is Rs. 150, irrespective of the quantity dealt with, and for retailers, Rs. 5. The retailers are required to buy only from the B class licencees, i.e., wholesalers, and keep in stock not more than 10 lbs. of tobacco and tobacco products at a time. In the other States, tobacco and tobacco manufactures are made liable to the general sales tax. In a few States, chewing tobacco and hookah tobacco are exempted; while, in some, higher duties are levied on cigars, cheroots, and pipe tobacco." and said :

"The main question to be considered in relation to the sales tax or special taxes on tobacco and tobacco manufactures is their Incidence in relation to the Central excise duties. Several complaints have been received by us about the unduly heavy burden of the Central and State taxes on tobacco and tobacco manufactures. These goods are also liable to the octroi duties of municipalities in many instances. The need is obvious for ensuring proper co-ordination between the different taxes on tobacco levied by the Central Government, the States and the local authorities. We consider that such co-ordination would be best evolved through the machinery of the Inter-State Taxation Council to which we have already alluded."

(Volume II, pp. 123-126. The tables are omitted in the extract. For a history of tobacco legislation in Travancore, see the Travancore Manual, Volume III, pp. 495-600)

32. Our conclusion being that the levy is neither an excise duty nor an occupation tax but an item of luxury taxation coming within the ambit of Entry 62 of the State List, these petitions have to be dismissed.

33. The petitions are hereby dismissed. In the circumstances of the case, however, there will be no order as to costs.