

**(1973) 11 KL CK 0003**  
**In the High Court Of Kerala**  
**Case No : O.P. No. 1236 of 1971**

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|-----------------------------------------------------|------------|
| Trichur Wholesale Cooperative Consumers Stores Ltd. | APPELLANT  |
| Vs                                                  |            |
| Commissioner, Trichur Municipality and another      | RESPONDENT |

**Date of Decision :** 19-11-1973

**Acts Referred:**

Constitution of India, 1950 — Article 245, 246, 276, 276(2), 277  
General Clauses Act, 1897 — Section 7  
Government of India Act, 1935 — Section 143(2)

**Citation :** (1973) KLJ 965

**Hon'ble Judges :** V.P. Gopalan Nambiyar, J; George Vadakkal, J

**Bench :** Division Bench

**Advocate :** M.C. Sen, for the Appellant; M.B. Kurup, V.M. Prabhakaran Nair Jose, K. Kochupappu, Government Pleader (for State), for the Respondent

**Final Decision :** Allowed

## Judgement

V.P. Gopalan Nambiyar, J.—The Trichur Whole sale Cooperative Consumers" Stores Ltd., has challenged the levy of profession tax under S. 96(b), 97, 98 and 110 of the Kerala Municipalities Act, read with S. 150 and R. 19(1) of Schedule II of the same. Under these provisions, the tax has been imposed on the petitioner at Rs. 7100/- for the half year ending 31st March 1970, and at Rs. 5700/- for the half year ending 30-9-1970. Exs. P1 and P2 are the notices in respect of the same. The petitioner has prayed to declare the proviso to R. 19(1) of Part I of Schedule II of the Kerala Municipalities Act as ultra vires of the legislative powers of the State, and to issue a writ of certiorari, quashing Exs. P1 and P2. The ground of challenge taken by the petitioner is that under Art. 276 of the Constitution the ceiling set for imposition of profession tax is Rs. 250/- per year, subject, under the proviso to Clause (2), to the right to continue to levy at a rate exceeding Rs. 250/- if levy at the said higher rate, was in force in the State, or any municipality" in the financial year immediately preceding the commencement of the Constitution. Art. 276 of the Constitution may for the sake of convenience be extracted:

276 (1). Notwithstanding anything in Art. 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.

(2) 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:

Provided that if in the financial year immediately preceding the commencement of this Constitution there was in force in the case of any State or any such municipality, board or authority a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded two hundred and fifty rupees per annum, such tax may continue to be levied until provision to the contrary is made by Parliament by law, and any law so made by Parliament may be made either generally or in relation to any specified States, municipalities, boards or authorities.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments.

2. The Cochin Municipal Act 1113 M.E. governed the petitioner till 7 its repeal by the Kerala Municipalities Act. By S. 3, Clause (viii), the Cochin Act defined a "Company" as not including a Cooperative Society registered under the Cochin Cooperative Societies" Act. S. 72 of the Act which authorised, inter alia a tax on professions and other sources of income, contained the proviso that a tax on Companies under Clause (b) of the Section or on profession under Clause (c) shall not be levied on any Cooperative Society registered under the Cochin Cooperative Societies Act. By reason of S. 86, profession tax is to be assessed in accordance with the rates shown in Schedule II. The last item of Schedule II is as follows:

#### SCHEDULE - E Class XII

It is plain from the above provisions that they authorised the levy of profession tax at a rate in excess of Rs. 250/- per year; and that Societies registered under the Cochin Cooperative Societies" Act were left out of its purview.

3. The Kerala Municipalities Act, by S. 2, repealed the Cochin Act. S. 3(9) of the Kerala Act defines a "Company" so as to include a cooperative society registered or deemed to be registered under the law for the time being in force. Under R. 19(1) of Schedule II and the rates specified therein, the profession tax Cannot be imposed under the Kerala Act at the rate exceeding Rs. 250/- per year. The

proviso to R. 19(1) of Part I of Schedule II of the Kerala Act reads:

Provided that if in the financial year immediately preceding the commencement of the Constitution of India any municipality was imposing profession tax at a rate higher than two hundred and fifty rupees per annum and continued to levy the tax at such higher rate immediately before the commencement of this Act. such municipality may continue to levy profession tax at such rate.

4. In *Harrisons and Crossfield Ltd., Quilon and Others Vs. Commissioner, Quilon Municipality and Others*, a Division Bench of this Court had occasion to consider the validity of S. 2 of the Profession tax (Validation and Reassessment) Act No. XIV of 1958 which validated assessments to profession tax at rates exceeding Rs. 250/- per year. The question considered was whether the permission under the Constitution to continue levy of profession tax I on income includes authority to enact the fresh rules that empower profession tax being charged beyond the limits imposed by Art. 276(2). The question was answered thus:

The inevitable consequence of our interpretation is that though the several municipalities in the Travancore area of this State enjoy the benefits of the enactment authorising the levy of larger profession tax, which was operative in the last financial year prior to the inauguration of the Constitution, there is after January 26, 1950, no enacting power in the State Legislature either to amend the machinery parts of such legislation, or to fill the gaps therein so as to continue the levy under new rules beyond the constitutional limitation. In that view Act No. XIV of 1958 is beyond the competence of the State Legislature as it seeks to fill the gaps brought about by the repealment of the Travancore Income Tax Act, and the position is not different so far as the notification of February 15, 1956, is concerned, as the delegated authority under the Act is as well bound by the constitutional limitation.

The decision was confirmed on appeal by the Supreme Court in *The Commissioner, Quilon Municipality and Another Vs. M/s. Harrisons and Crossfield Ltd., Quilon*, . Before the Supreme Court's decision, a Full Bench of this Court had occasion to consider the question in *The Commissioner, Quilon Municipality, Quilon Vs. Harrisons and Crosfields Ltd., Quilon*, . It was held that the amendments introduced and validated by Act XIV of 1958 are amendments which go beyond merely formal alternations. They did not merely preserve the old tax, but roped in the entire profits of the assessee from the whole of the Indian Union. It was held that the change introduced by the impugned Act was opposed to Art. 276(2) and cannot be sustained.

5. The proviso to Art. 276(2) only directs that the tax on profession etc. at the rate exceeding Rs. 250/- may "continue to be levied until provision is made by Parliament by law". The expression "continue to be levied" which occurs also in Art. 277 of the Constitution, and its precursor, namely, S. 143(2) of the Government of India Act 1935, came up for judicial interpretation before the Supreme Court. Speaking with respect to S. 143(2) of the Government of India

Act 1935 it was observed by the Supreme Court in Rama Krishna Ramanath Vs. The Janpad Sabha, Gondia, : -

In the context the relevant words of the sub-section could only mean "may continue to be levied if so desired by the Provincial Legislature" which is indicated by or is implicit in the use of the expression "may" in the clause "may be continued until provision to the contrary is made by the Federal Legislature". This would therefore posit a limited legislative power in the Province to indicate or express a desire to continue or not to continue the levy. If in the exercise of this limited power the Province desires to discontinue the tax and effects a repeal of the relevant statute the repeal would be effective. Of course, in the absence of legislation indicating a desire to discontinue the tax, the effect of the provision of the Constitution would be to enable the continuance of the power to levy the tax but this does not alter the fact that the provision by its implication confers a limited legislative power to desire or not to desire the continuance of the levy subject to the overriding power of the Central Legislature to put an end to its continuance and it is on the basis of the existence of this limited legislative power that the right of the Provincial Legislature to repeal the taxation provision under the Act of 1920 could be rested. Suppose for instance, a Provincial Legislature desires the continuance of the tax but considers the rate too high and wishes it to be reduced and passes an enactment for that purpose, it cannot be that the legislation is incompetent and that the State Government must permit the local authority to levy tax at the same rate as prevailed on April 1, 1937, if the latter desired the continuance of the tax. If such a legislation were enacted to achieve a reduction of the rate of the duty, its legislative competence must obviously be traceable to the power contained in the words "may continue to be levied" in S. 143(2) of the Government of India Act. If we are right so far it would follow that in the exercise of this limited legislative power the Provincial Legislature would also have a right to legislate for the continuance of the tax provided, if of course, the other conditions of S. 143(2) are satisfied, viz. (1) that the tax was one which was lawfully levied by a local authority for the purposes of a local area at the commencement of Part III of the Government of India Act, (2) that the identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purposes for which the utilisation is to take place continue to be the same, and (3) the rate of the tax is not enhanced nor "its incidence in any manner altered, so that it continues to be same tax. If as we have held earlier there is a limited legislative power in the Province to enact a law with reference to the tax levy so as to continue it, the validity of the Act of 1949 which manifested the legislative intent to continue the tax without any break the legal continuity being established by the retrospective operation of the provision, has to be upheld.

This exposition of the meaning of the words "continue to be levied" was affirmed in two later decisions The Town Municipal Committee, Amravati Vs. Ramchandra Vasudeo Chimote and Another, , and C. Rajagopalachari Vs. Corporation of Madras, . In the earlier of the decisions it was observed:

If, as is admitted, the sole object sought to be achieved by this provision for "continuance" is to avoid dislocation of the finances of the State and local authorities, by depriving them of the revenues which they were deriving at the commencement of the Constitution, it would mean that the intention was to permit the existing range of the taxes to be continued, not that the Article conferred on them authority to expand the range of their taxation by subjecting new items to taxation or by increasing the rates of duties.

Reference was then made to the Rama Krishna Ramanath Vs. The Janpad Sabha, Gondia, , and the exposition in that case of the meaning of the expression "continue to be levied" and the limited legislative power conferred by the Section. It was then observed:

8. Dealing next with the import of the words "may continue to be levied" the same was summarised in these terms: (1) The tax must be one which was lawfully levied by a local authority for the purpose of a local area, (2) the identity of the body that collects the tax, the area for whose benefit the tax is to be utilised and the purposes for which the utilisation is to take place continue to be the same, and (3) the rate of the tax is not enhanced nor its incidence in any manner altered, so that it continues to be the same tax. It is obvious that if these tests were applied the submission on behalf of the appellant cannot be accepted.

In the later decision in C. Rajagopalachari Vs. Corporation of Madras, analysing the circumstances, and the nature of the levy impugned, the Court agreed with the submission of Counsel for the appellant that what was imposed by the impugned provision was in effect a new levy, a levy of tax which was not legally in existence on 31-3-1937, Observed the Court:

If the statutory charge to profession tax imposed on pensioners by the Act of 1919, was lifted by the Act of 1936, and the tax again came into operation only on 1st April, 1937, it would follow that there was no "levy of the tax" "immediately before" the commencement of Part III of the Government of India Act, 1935, so as to bring it within the saving in S. 143 (2) of that Act. Besides, the two circumstances viz. that residence within the city for a specified period was made a condition of the liability to the tax, as well as the increase in the rates would both serve to emphasise that the levy was a new one, with a different texture and not a continuance of the tax which was levied just prior to April 1, 1937.

We consider that the same content and meaning should be given to the expression "continue to be levied" in the proviso to Art. 276(2) of the Constitution, as in Art. 277, as expounded in the above decisions. Being so, it is clear that there is no power to change the rate of tax that was being levied at the relevant period referred to in the proviso to Art. 276(2); or even to alter the nature and the incidence of the tax, or to substitute a new levy for the old. We need not pause to consider whether after the repeal of the Cochin Act and the

reenactment of the Kerala Act, there could be a "continuance" of the levy at all within the proviso to Art. 276 of the Constitution. Assuming that this could be done, we are satisfied that the tax imposed by the Kerala Act is not the same in its nature or incidence as the one that was imposed by the Cochin Act. Therefore, we think, there is no "continuance of the levy" within the meaning of the proviso to Art. 276(2). Under the Cochin Act, the tax could not be imposed on Cooperative Societies, both by reason of the definition of the term "Company" under S. 3(viii), as well as by the operation of the proviso to S. 72. Under the Kerala Act, the provisions are fundamentally different. By reason of the provisions of S. 3(9) read with S. 110 of the Kerala Municipalities Act, the tax can be levied on cooperative societies. The Kerala Act therefore cannot be said to have merely preserved the old tax. It widened the range and ambit of the tax under the Cochin Act, and even its incidence and operation.

6. But Counsel for the Respondent - Municipality advanced an ingenious argument that on the language of S. 3(viii) and the proviso to S. 17(2) of the Cochin Municipal Act, only Societies registered under the Cochin Cooperative Societies Act would qualify for the exemption, and a society like the petitioner, registered under the Travancore Cochin Act, cannot claim the said benefit. The contention requires to be examined.

7. The Travancore - Cochin Cooperative Societies Act 1951, repealed the Cochin Act. The Travancore - Cochin Act came into force on 29-7-1950 and the petitioner Society was registered under that Act in 1963. S. 2(g) of that Act defines "Registered Society" as one registered or deemed to be registered under this Act. Under S. 91, existing societies registered under the repealed Acts are deemed to be registered under the Travancore Cochin Act. S. 97 repeals the Cochin Act of 1113 and the Travancore Act of 1112.

8. In the light of the above provisions, if the Cochin Municipal Act were to be resurrected for the limited purpose of seeing whether the impugned levy was only a "continuance" of the levy imposed by it, or a fresh one, Counsel for the petitioner contended that S. 3(viii) and S. 72 would have to be understood as taking in those societies registered under the Travancore - Cochin Act also, by reason of the provisions of S. 7 of the General Clauses Act. Counsel for the Respondent - Municipality on the other hand, rather ingeniously contended that S. 7 of the General Clauses Act can have application only in the absence of any indication of an intention to the contrary, and that there was sufficient indication of a contrary intention. He stressed that S. 3(viii) of the Cochin Act, before excluding registered societies has referred to Companies formed under Acts of Parliament, or Royal charter, or Letters Patent, or Acts of the Legislature of a British possession or under the Cochin Companies Act, or Indian Companies Act, but has chosen to limit the exclusion only to Societies registered under the Cochin Cooperative Societies Act. We are not impressed by this argument. From the enumeration of Companies formed under various enactments as included in the definition, we are not prepared to read the exclusion as limited to those

registered under the Cochin Act. We think the exclusion would get transmuted, so as to cover Societies registered under the Travancore - Cochin Act by the operation of S. 7 of the General Clauses Act, and that there is no sufficient manifestation of a contrary intention.

9. Counsel for the Municipality argued that the State Legislature's power to legislate under Entry 60 of List II of Schedule VII was supreme. But the Legislative power is "subject to the provisions of the Constitution" (vide Art. 245), and therefore to Art. 276(2) and the proviso thereto.

10. The result is, the nature and the incidence of the tax imposed by the Kerala Municipal Act is different from the one imposed by the Cochin Act. We think that the taxation under the Kerala Act cannot be saved as a "continuance" of the levy under the Cochin Act, within the meaning of the proviso to Art. 276(2). In *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, it was ruled that a law which contravenes the proviso to Art. 276(2), is, to that extent void.

11. Our attention was called to the decision in *Tata Oil Mills Company Ltd. v. Commissioner, Ernakulam Municipality* (1964 KLJ 450). Vaidialingam J. of this Court, (as he then was) had occasion to consider the legality of the imposition of profession tax by certain municipalities in relation to the proviso to Art. 276(2). We do not think that the decision, read as a whole, in any way runs counter to the principles laid down in the decisions we have referred to earlier. The learned Judge while discussing the *Rama Krishna Ramanath Vs. The Janpad Sabha, Gondia*, stated that taxes and fees imposed under the various provisions which had been repealed can be considered to be continued under the new Act also. (See Para. 30). In Para. 31 of the judgment, the learned Judge stated that there had been a continuation of the levy and assessment at the rates prescribed by the various enactments which had been repealed by S. 2 of the Kerala Act XIV of 1961. As we stated earlier, we need not pronounce on the question as to whether after the Cochin Act has been repealed and replaced by a different enactment, there can still be a "continuance" of the levy under the repealed Act. We express no opinion on the same. As the profession tax on the petitioner has been imposed by virtue of the provisions of S. 3(9), and 110 of the Kerala Municipalities Act, read with R. 19(1) of Part I of Schedule II thereof, at rates which contravene the proviso to Art. 276(2) of the Constitution, and as the same cannot be regarded as a "continuance" under Art. 276, we declare the levy of profession tax on the petitioner as unconstitutional and void. This writ petition is allowed, and Exs. P1 and P2 demand notices are quashed. There will be no order as to costs.