

(1956) 05 AHC CK 0022

In the Allahabad High Court

Case No : Civil Miscellaneous Application No. 52 of 1956

Vishwanath Agarwal

APPELLANT

Vs

State of Uttar Pradesh, Lucknow

RESPONDENT

Date of Decision : 01-05-1956

Acts Referred:

Constitution of India, 1950 — Article 123, 174, 213, 245

Citation : AIR 1956 All 557 : (1956) 26 AWR 570

Hon'ble Judges : Kidwai, J;Agarwala, J

Bench : Division Bench

Advocate : N. Banerji, R.K. Srivastava, Ram Jee and K.L. Saxena, for the Appellant; B.K. Dhaon and K.L. Misra, for the Respondent

Final Decision : Dismissed

Judgement

Kidwai, J.—I have had the advantage of reading the judgment prepared by my learned brother and I concur in the order proposed by him. In view of the Full discussion of the facts and the law contained in that judgment it is hardly necessary for me to add anything. I would, however, like to emphasise that though the Court may inquire into the fact of the Governor's satisfaction, it cannot inquire into the reasons for that satisfaction or into the sufficiency of those reasons.

2. In the present case there is no evidence to show that the Governor was not in fact satisfied. The material contained in the counter affidavit (the correctness of which is not disputed) indicates that the Governor was satisfied after mature and prolonged deliberation of the necessity for an amendment of the Sales Tax Act in order to meet the revenue requirements of the State.

At first the necessity was not immediate since correspondence was going on between the State Government and the Union Government with regard to the matter and there was no reason to suppose that that correspondence would lead to no result. As the 1st of April came nearer and nearer the Governor became

satisfied of the need for immediate action. There is no reason to suppose that this was anything but bona fide satisfaction.

3. The 1st of April was an essential date because the financial year as well as the year under the Sales Tax Act begins on that date. Although an amending Act, when it came, might have given the tax retrospective effect, it is easy to visualise the difficulties to which such a course would have given rise--difficulties relating to the maintenance of accounts by the persons to be taxed, and difficulties relating to persons called upon to pay the tax recouping themselves from persons who should have paid them. Moreover it cannot be said that the Governor acted unreasonably in preferring to issue an Ordinance rather than to wait for an enactment which would give retrospective effect to taxation provisions.

4. It is true that when the satisfaction originated in the mind of the Governor both the Houses of the Legislature were in Session. That, however, does not mean that the measure could be proceeded with by Legislative enactment. If any legislation were to be undertaken the Bill passed would, in view of the provisions of the Essential Goods (Declaration and Regulation of Tax on Sale & Purchase) Act, 1952, have to be reserved for the consideration of the President-.

It was already known that, although the question had been before the Union Government for several months, no conclusion had been arrived at (sic) was not unreasonable to suppose that in these circumstances the assent of the President was not (sic) to be obtained before the 1st of April even (sic) a Bill was hurried through the Legislature. The (sic) alternative, therefore, was the utilisation of the Governor's power to issue an Ordinance.

5. Mr. Banerji appealed to us in the name "democratic principle" to confine within very (sic) limits the Ordinance making power of the Governor. It is true that the basis of our Constitution is democratic but the framers of the Constitution, with all their democratic bias, felt it necessary to vest reserve powers in various functionaries, including the Governor, to be utilized when it was considered by these functionaries to be necessary.

As my learned brother has pointed out it is for the Courts to give effect to such provisions and not to do away with, or whittle down, the powers so conferred by a process of construction. Of course, if the functionary concerned acts in excess of the powers conferred upon him, the High Courts will refuse to uphold his action but that is the limit of the function assigned by the Constitution to High Courts.

6. Much of the affidavit and the counter-affidavit and the arguments of the petitioner's learned counsel were concerned with the merits, or demerits, of the taxation made possible by the Ordinance. It is, therefore, necessary to point out that the Court is not concerned at all with this question; it has only to decide whether the Ordinance was a valid measure or not.

Agarwala, J.

7. This is a petition under Article 226 of the Constitution. The petitioner is a citizen of India residing in Lucknow and is the Proprietor of a small Cottage Industry known as Lucknow Fancy Case Manufacturing Company. He challenges the validity of the U. P. Ordinance No. IX (9) of 1956, promulgated on 31-3-1956, and prays that the opposite party, the State of Uttar Pradesh, be directed to withdraw it or that it may be declared to be null and void.

8. By the aforesaid Ordinance the existing U. P. Sales Tax Act (Act 15 of 1948) has been amended in various respects. Under the aforesaid Act certain articles, such as salt, foodgrains, books, magazines and kerosene oil were exempt from the liability to sales tax. The minimum limit of turnover on which a dealer was liable for sales tax was Rs. 15,000/-. Under the Ordinance all these goods have been made liable to sales tax and the minimum limit has been reduced to Rs. 10,000/-. Certain other amendments have also been made by the Ordinance but it is not necessary to detail them.

9. The Ordinance was promulgated under the powers vested in the Governor under Article 213 of the Constitution which runs as follows:

"Power of Governor to promulgate Ordinance during recess of Legislature: (1) If at any time, except When the Legislative Assembly of a State is in session, or where there is a Legislature Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President promulgate any such Ordinance if-

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance-

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by

the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor."

10. The circumstances in which the Ordinance came to be promulgated have been narrated on behalf of the State of Uttar Pradesh and there is no dispute about the salient facts in the counter affidavit.

11. The need for the development of the country brought with it the necessity of increased revenue for which the main available source was taxation and recourse was to be had to a wider application of the sales tax. The State of Uttar Pradesh considered that the existing sales tax law shall be amended in two directions--the articles exempted from sales tax should be subjected to the tax, and the lower limit may be still further reduced.

The exempted articles were, however, essential goods not liable to sales tax by reason of a central enactment known as the Essential Goods (Declaration and Regulation of Tax on Sale or Purchase) Act, 1952. These goods could be subjected to tax by a State legislature either if the said Act were repealed or the President permitted a bill to be introduced in the State Legislature or consented to the Act of the Legislature or gave instructions for the promulgation of an Ordinance.

12. The State of Uttar Pradesh, therefore, conveyed its intention to amend the U. P. Sales Tax to the Government of India and a request was made in October, 1955, that necessary steps for the repeal of the Essential Goods Act, 1952 may be taken as early as possible.

By a confidential letter written early in February 1956, it was further made clear to the Government of India that the revenue requirements of the State Government made it necessary that the consent of the President should be available to the sales tax legislation in the State, if the Essential Goods Act, 1952, aforesaid was not being repealed.

13. The U. P. Government considered it "desirable" that the change in the sales tax contemplated should be effective from 1-4-1956. But as the consent "of the President to the proposed change in the sales tax legislation of the State was not available even up to 15-3-1956, it was then considered that the only alternative method of imposing the tax from the 1st of April was an Ordinance, and accordingly, the Government of India was demi-officially addressed on 15-3-1956, for favour of the "instruction" of the President for the promulgation of the Ordinance under Article 213 of the Constitution and a draft of the Ordinance was enclosed. It was pointed out that in the circumstances, the proposal was to introduce an Ordinance with effect from 1-4-1956.

14. The instructions were formally asked for on 23-3-1956. The first instructions of the President contained in the letter dated 29-3-1956, to the Secretary to the

Government, Legislative Department were a proposal for a modification in respect of certain goods, that is, coal, cotton, hides and skins, iron and steel, jute and oil-seeds for the purpose of bringing the tax on these articles in conformity with the report which the Taxation Enquiry Commission appointed by the Central Government had submitted. The U. P. Government thereupon pointed out that while it might be necessary that a tax on these goods would be in accordance with the aforesaid recommendations, it was not possible to do so immediately till the dealers were registered.

15. Ultimately on 31-3-1956, instructions were received on behalf of the President that the Ordinance could be issued as proposed by the U. P. Government and a suggestion was made that the necessary provision for bringing taxation on the goods aforesaid in accordance with the recommendations of the Taxation Enquiry Commission should be made at the time the Bill to replace the Ordinance was presented to the Legislature.

16. Thereupon the Governor of U. P. promulgated the Ordinance in question on 31-3-1956, in accordance with the instructions of the President under the powers vested in him by Article 213.

17. It is pointed out by the State Government in the counter-affidavit filed on their behalf that there was a deficit of more than Rupees nine crores in the budget estimates and it could be met only by increase in the yield of taxation and an indication had been given by the Finance Minister in his budget speech before the promulgation of the Ordinance that legislation for fresh taxation will be later on introduced.

18. In the State of Uttar Pradesh there are two Houses of Legislature--the Legislative Assembly and the Legislative Council. Both Houses commenced their sittings in the present session on 26-2-1956. Both continued to sit till 23-3-1956. The Assembly was adjourned till the 2nd of April when it recommenced its sittings, but the Council was prorogued on 24-3-1956, and was resummoned on 16-4-1956. Thus though the Assembly was in session (adjournment does not terminate a session) on the date of the promulgation of the Ordinance, the Council was not.

19. It is in the light of these facts which are not disputed that we have to judge the validity of the Ordinance in question.

20. The power vested in the Governor of a State to promulgate Ordinance under Article 213 of the Constitution can be exercised by him under certain condition. These conditions may be enumerated, so far as we are concerned with them in the present case, as follows:

(1) That the Governor must be satisfied that circumstances exist which rendered it necessary, for him to take immediate action.

(2) That he must be so satisfied and the Ordinance must be promulgated at a time when the Legislature is not in session, that is where there is only one House

of the Legislature, that House is not in session and where there are two Houses of the Legislature, when one or both of the House is or are not in session.

(3) That the Ordinance shall not be promulgated without instructions from the President the circumstances mentioned in Sub-clauses, (a) to (d) of Clause (1) of Article 213.

21. The first point raised on behalf of the petitioner is that circumstances did not (sic) which rendered it necessary for the Governor take immediate action and therefore he could not be said to have been satisfied that such circumstances existed.

It is pointed out that not only must the Governor be satisfied that action was necessary but that he must be satisfied that immediate action was necessary and further not only must he (sic) satisfied that circumstances exist which rendere it "desirable" for him to take immediate action but that he must be satisfied that circumstances exist which rendered it necessary for him to take immediate action. Emphasis is laid upon the words "immediate" and "necessary" occurring in Clause (1) of Article 213 and it is pointed out in this connection that in the counter-affidavit filed on behalf of the State it was merely stated that it was desirable that the change in the sales tax contemplated should be effective from 1-4-1956, and that therefore it was not necessary that the change should take place from that date and it is further pointed out that the necessity for the change in the Sales Tax Act was felt as early as February 1956 and that therefore there was no necessity of issuing an Ordinance and the Legislature which was then in session should have been approached for the necessary enactment.

22. Article 213 speaks of the satisfaction of the Governor, the words in the Article being "the Governor is satisfied". The satisfaction of the Governor is his own satisfaction and not of the Court or of any other reasonable person. It is subjective satisfaction and the Court is, therefore, not entitled to enquire into the reasons for that satisfaction or into the sufficiency of those reasons. This proposition is well settled.

23. In *Liversidge v. Sir John Anderson* 1942 AC 206 (A) para (1) of Regulation 18-B, Defence (General) Regulations, 1939 was to be construed. The Regulation ran as follows:

"If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation of instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained."

It was held that

"where the Secretary of State, acting in good faith, makes an order in which he recites that he has reasonable cause to believe a person to be of hostile -

associations and that by reason thereof it is necessary to exercise control over him and directs that that person be detained, a court of law cannot enquire whether in fact the Secretary of State had reasonable grounds for his belief and that the matter is one for the executive discretion of the Secretary of State."

24. In AIR 1945 48 (Privy Council) , the action of the Governor-General in promulgating an Ordinance u/s 72. Government of India Act, 1935, was in question. Section 72 empowered the Governor-General to issue an Ordinance in cases of emergency. The Privy Council observed that if the Governor-General

"acts bona fide and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists..... The question whether an emergency existed at the time when the Ordinance was made and promulgated is the matter of which the Governor-General is the sole judge."

25. In Durgadas v. Rex 1949 All 148 (C), a Full Bench of this Court had to consider Section 3(1), XT, P. Maintenance of Public Order (Temporary) Act (Act 4 of 1947). It was held that u/s 3(1) of the Act satisfaction has to be subjective satisfaction of the Provincial Government and an objective test could not be applied to it and that it is not open to the Court to question the reasonableness or otherwise of the satisfaction of that authority.

26. In Jnan Prosanna v. Province of West Bengal AIR 1949 Cal 1 (FB) (D), with reference to an Ordinance promulgated by the Governor u/s 88(1), Government of India Act which is similar to Article 213 of the Constitution, it was contended that no circumstances existed which rendered it necessary for the Governor to take immediate action by promulgating the Ordinance. It was held by the Full Bench of the Calcutta High Court that

"the Court cannot go into the Question whether such circumstances exist as to render it necessary for the Governor to promulgate the Ordinance. The satisfaction must be the satisfaction of the Governor and there is nothing to suggest that the Courts would be entitled to question the grounds upon which the Governor was satisfied."

27. Lastly in Lakhi Narayan Das v. Province of Bihar AIR 1950 FC 59 (E), where Section 88(1), Government of India Act was under consideration, the Federal Court observed that

"the language of Section 88(1) shows clearly that it is the Governor and the Governor alone who has got to satisfy himself as to the existence of circumstances necessitating the promulgation of an Ordinance. The existence of such necessity is not a justiciable matter which the Courts could be called upon to determine by applying an objective test."

28. I am, therefore, of opinion that it is not open to the petitioner to contend that circumstances did not exist which rendered it necessary for the Governor to take immediate action. No doubt, the question whether the Governor was in fact satisfied or not as to the existence of circumstances mentioned in Article 213 is a

justiciable issue.

But the statement in the Ordinance in question "whereas the Governor is satisfied that circumstances exist which render it necessary immediately to amend the U. P. Sales Tax Act, 1948" is presumptive proof of the factum of satisfaction. The presumption can be rebutted but the burden is very heavy and has not been discharged in the present case.

29. It has been next contended that the satisfaction of the Governor originated at a time when the two Houses of the Legislature were in session. It is conceded on behalf of the State that as far back as 15-3-1956, the President had been approached for sending instructions regarding the proposed Ordinance when both the Houses of Legislature were in session. But on the date on which the Ordinance was promulgated, viz., 31-3-1956, one of the Houses of Legislature was not in session

The satisfaction of the Governor was still in existence because that is exactly what is stated by him in the Ordinance issued on that date. The mere fact that satisfaction had also come into existence earlier is immaterial. All that Article 213 requires is that the satisfaction of the Governor must exist at the time mentioned in the Article, namely, when either both or one of the Houses of Legislature are or is not in session.

On the 31st March on which date the recital in the Ordinance was made about the satisfaction of the Governor, one of the Houses of Legislature was not in session and, therefore, the condition regarding the satisfaction at the proper time was fulfilled.

30. The third contention advanced on behalf of the petitioner is that the action of the Governor in promulgating the Ordinance was not bona fide but was a colourable and fraudulent exercise of the power vested in him under the Article.

It is alleged that the prorogation of the Legislative Council on 24-3-1956, was done fraudulently with a view to enable the Governor to promulgate the Ordinance on the 31st March, and it is pointed out in this connection that the Council was shortly thereafter resummoned on the 16th April. It is suggested that the Council could have very easily been kept in session till the 31st March or till such time thereafter as a bill on the lines of the Ordinance was placed before the Houses of the Legislature and got enacted by them.

31. No evidence has been adduced before us to show that the council was prorogued mala fide with a view merely to give power to the Governor to promulgate the Ordinance in question. It was pointed out by the learned Advocate-General that it had been usual in the past to prorogue the Council soon after the budget had been passed.

32. Under Article 174 of the Constitution the Governor is authorised to prorogue the Council at any time that he thinks fit and by proroguing the Council on the 24th of March the Governor acted within his jurisdiction and the mere fact that

the Ordinance was promulgated on 31-3-1956 cannot lead to the necessary inference that the action of the Governor in proroguing the Council a few days earlier was actuated by the desire to create an opportunity of exercising the power to promulgate the Ordinance.

33. It should be remembered that the general presumption is in favour of good faith of an officer when he exercises the power vested in him. The presumption applies with all the greater force to a dignitary so high as the Governor of a State who is charged by the Constitution with the duty of seeing that the provisions of the Constitution are faithfully observed.

34. Assuming however that the assembly was prorogued deliberately with a view to enable the Governor to promulgate the Ordinance in question, even so the exercise of the power by the Governor cannot be dubbed as fraudulent, colourable or mala fide.

35. As was observed in *In Re: Kalyanam Veerabhadrayya*, in considering the power of the Governor to promulgate Ordinance u/s 88, Government of India Act, 1935:

"It is open to the Governor to prorogue the legislature at any time he pleases. There is nothing wrong in the Governor proroguing the Assembly and the Council with a view to enable him to issue an Ordinance u/s 88. It is a well-known fact that the Legislature, which is democratically constituted, is very slow to move in the matter of legislation, having regard to the rules of procedure laid down in that behalf, and if urgent action is necessary, at any rate, when His Excellency the Governor has reasons to believe that immediate action is necessary, it will be more expedient to have resort to the power of issuing an Ordinance u/s 88 rather than approach the Legislature for the necessary legislation."

Recourse to the ordinance making power may be very necessary when new taxation is proposed as was the case in the present instance. It may be that if a bill were brought in the Houses of the legislature for the imposition of new taxes on articles which could be bought and sold in the market, speculators would have appeared on the scene said there might be black marketing and cornering of goods to the detriment of the common man as also to the State revenue.

An Act with retrospective operation can no doubt be passed. But one can very easily imagine that this procedure might result not only in the evasion of payment of the tax but also in creating difficulties and hardships of various kinds. So long as the power to prorogue the Legislature and to promulgate an Ordinance is exercised bona fide in the interest of the State itself, there is no violation of the provisions of the Constitution.

36. It should always be remembered as Chief Justice Marshall once said, that "it is the Constitution which we are interpreting and not an ordinary statute". Constitution is not to be construed in a narrow and pedantic sense.

37. As the Privy Council observed in AIR 1935 158 (Privy Council) .

"In interpreting a constituent or organic Statute, that construction most beneficial? to the Widest amplitude of its powers must be adopted."

A Constitution is enacted for a State's welfare and good government. It must be so interpreted as to advance the very objects for which it is brought into existence and to ensure the harmonious working of the different organs of the State for the ultimate good of Its citizens.

38. In my opinion, the validity of the Ordinance in question is not open to challenge on any of the grounds suggested on behalf of the petitioner.

39. There is no force in this petition. I would dismiss it with costs.

By The Court:

40. This petition is dismissed with costs which we assess at Rs. 200/-.