

State of Mysore and Others

Vs

M/s. D. Cawasji and Company and Others

And

State of Mysore

Vs

M. Govindappa and Others

Civil Appeal Nos. 179-235 of 1969 and 130-133 of 1970

(J. C. Shah, A. N. Grover, G. K. Mitter, A. N. Ray, K. S. Hegde JJ)

18.11.1970

JUDGMENT

SHAH, J. –

1. Under the Mysore Excise Act, 1901, the Government of the State was authorised to grant exclusive privilege of selling by retail Indian-made liquor on such conditions and for such period as the government deemed fit, and to levy duty on manufacture and sale of alcoholic liquor. In exercise of that power the Government of Mysore framed rules regulating sale of "excise privileges". In the Note to Rule 23 in respect of toddy, "tree-tax", "tree-rent" and "shop-rent" were chargeable at the rate of 9 pies per rupee.

2. Under the Act, the exclusive privilege of retail vending of toddy in different areas was sold by auction. Every licensee had to secure toddy by tapping toddy-yielding trees either in Government groves assigned to his shops or trees of private ownership. The licensee was required to pay to the State "tree-tax" at the prescribed rates for the number of trees tapped by him. When he tapped trees belonging to the Government he had to pay, in addition, "tree-rent" to the State. Consideration paid by the licensee to the State for the exclusive privilege of retail vending of toddy or arrack or beer was popularly known as "shop-rent". In the notifications inviting bids or tenders for the exclusive privilege of retail vending of toddy arrack, and beer it was stipulated that education cess shall be paid in accordance with Condition 23 of the General Conditions applicable to all excise licences.

3. Originally the Government used to charge "shop-rent", "tree-tax" and "tree-rent" separately. But in 1907, a notification was issued abolishing separate levies of "tree-tax" and "tree-rent". The Mysore Revenue Manual (1938 Ed.), Vol. I at p. 334, read as follows :

"Formerly, the local cess was being levied on the following items :

#(i) x x x##

(ii) Toddy - both date Bagani,

#(iii) x x x##

But in the marginal note, dated G.O. (F.I. 9243-54 S.R. 145-06-1, dated 16th June, 1907), the following directions have been given :

(a) The separate levy of local cess on tree-tax is abolished and the cess at present levied merged in the main item, the rates of tree-tax on the various kinds of trees being as follows :

#x x x x##

(b) Levy of local cess on toddy shop rental is also abolished;

(c) The cess on tree-rent is merged in the main item itself.

N.B. 1/17th of the tree-tax, the shop rental and tree-rent collected should be credited to Local Funds, in lieu of the one-anna cess formerly levied on these items.

(Vide also Article 41 - Mysore Accounts Code, Vol. 1)."

After the merger of a part of the Bellary District pursuant to the setting up of the State of Andhra in 1953 the Mysore Excise Act, 1901, was extended to the Bellary Area so merged in 1955.

4. The Mysore Excise Act, 1901, was repealed and replaced by the Mysore Excise Act, 1965. But no substantial alteration was made in the scheme of levy of excise revenue under the new Act.

5. Under the Mysore Elementary Education Act, 1941 and education cess was levied as a percentage inter alia of excise revenue. The Mysore Elementary Education Act, 1941, was not extended to the Bellary Area and the excise contractors in that area were not liable to pay education cess. The Mysore Elementary Education Act, 1941, was replaced by the Mysore Compulsory Education Act, 1961. By section 25 of that Act Chapters VI and VII of the 1941 Act were repealed and the rest of the 1941 Act continued to remain in force in the old Mysore Area. Accordingly Section 9 of the 1941 Act which occurred in Chapter III under which education cess was levied remained in operation. Section 9(1) of the Mysore Elementary Education Act, 1941, as amended by the Elementary education (Amendment) Act, 1944 read as follows :

"The Government may for carrying out the purpose of this Act, levy throughout or in any part of Mysore, an education cess on any or all of such items of State revenue or of tax levied under any Act, or rule constituting Local Bodies in Mysore and at such rates as are specified in the Schedule to this Act."

After the Mysore elementary Education (Amendment) Act, 1955, the relevant provision of the Schedule read as follows :

#Items on which cess Maximum rate may be levied of levyAll items of land revenue, forestrevenue, and excise revenue, on 9 pies in the rupee.which education cess is now beinglevied.##

The Government of Mysore levied the "education cess" from excise contractions in the old Mysore Area of the new State of Mysore. From time to time large amounts were collected by the

Government of Mysore.

6. A large number of excise contractors moved petitions under Article 226 of the Constitution before the High Court of Mysore challenging the levy of "education cess" on "shop-rent" in respect of toddy, arrack and beer and on "tree-tax" and "tree-rent". They claimed a declaration that they were not liable to pay the "education cess" and an injunction restraining the State from levying and collecting the education cess and also for an order refunding the amount already collected.

7. It appears that even after the notification of 1907 merging the "tree-tax" and "tree-rent" with the "shop-rent" was issued, the State was in fact collecting the education cess from the excise contractors. In the view of the High Court under the Schedule as amended by the Mysore Elementary Education (Amendment) Act, 1955, liability to pay education cess arose in respect of all items of excise revenue on which education cess was being levied and since no education cess was being lawfully levied in the year 1955 and for a long time before the year, the liability to pay education cess did not arise. They held that the expression "now being levied" used in the Schedule as amended meant "now being lawfully levied". By virtue of Article 265 of the Constitution no tax could they observed by levied or collected except by authority of law : if there was no authority of law, collection of the education cess under the amended Schedule could not authorise collection of the education cess. The High Court observed that the Schedule to the Education Act was amended after the commencement of the Constitution and it was reasonable to impute to the State Legislature not merely knowledge of, but also anxiety to comply with Article 265 of the Constitution, and that was clear from the fact that neither the original Education Act not the Amending Act of 1955 contained any provisions for validating any levy or collection made without the authority of law. Accordingly the High Court held that the State was incompetent to levy the education cess because it did not fall within the charging provision. After expressing that opinion the High Court proceeded to interpret the Schedule and held that the Education Act does not impose the charge of education cess on Arrack shop-rent, today "shop-rent" and beer "shop-rent", "tree-tax" and "tree-rent" and that "shop-rent" is not a duty of excise and hence education cess cannot be levied on Arrack "shop-rent", toddy "shop-rent" or beer "shop-rent". The High Court also held that the excise contractors may question the validity of the levy of education cess on "shop-rent", "tree-tax" and "tree-rent"; even if they had agreed to pay education cess on those items. The High Court declared the levy of education cess on toddy, Arrack and beer "shop-rent", "tree-tax" and "tree-rent" as invalid. The State of Mysore has appealed to this Court with certificate granted by the High Court.

8. Mr. Chagla contended that under List II, Entry 8 the State Legislature is competent to legislate for levy of cess in respect of "intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors". Legislative power normally includes all incidental and subsidiary powers, but the power to tax is neither incidental nor subsidiary to the power to legislate on a matter or topic : *M. P. V. Sundararamier and Co. v. The state of Andhra Pradesh and Another.* ((1958) SCR 1422 : AIR 1958 SC 468; 1958 SCJ 459) Entries in Lists I and II in Schedule VII dealing with certain specific topics do not grant power to levy tax on transactions relating to those topics. Power to tax must be derived from a specific taxing entry. Tax could therefore not be levied on intoxicating liquors relying upon Entry 8, List II.

Entry 51, List II authorises the State Legislature to legislate for "Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but

#x x x.###

9. The taxing power in respect of alcoholic liquors for human consumption is therefore circumscribed : it may only be levied as excise duty, that is a duty levied on the manufacture and production of alcoholic liquors, *R. C. Jall v. Union of India*. ((1962) Supp 3 SCR 436; AIR 1962 SC 1281)

10 Mr. Chagla for the State urged that the High Court was in error in holding that "shop-rent" was not excise revenue. But this question is concluded by a judgment of this Court. In *M/s. Guruswamy and Company v. State of Mysore and Others*, ((1967) 1 SCR 548) this Court held that the Mysore State Legislature was incompetent to levy health-cess on the items of the State excise revenue. The Court further held the levy of health cess could only be made if it be shown that the duty had been levied on goods which had been produced or manufactured, the taxable event being production or manufacture of goods. The Court observed that the essential characteristics of an excise duty was uniformity of incidence, and that the duty must be closely related to production or manufacture of goods. It did not matter if the levy was made not at the moment of production or manufacture but at a later stage. If a duty had been levied on an excisable article, but the duty was collected from a retailer it did not necessarily cease to be an excise duty. If a levy was made for the privilege of selling an excisable article and the excisable article had already borne the duty and the duty had been paid, there must be clear terms in the charging section to indicate that what being levied for the purpose of the privilege of sale was in fact a duty of excise. The Court further held that a payment for the exclusive privilege of selling toddy from certain shops was called "shop-rent". The licensee paid what he considered to be equivalent to the value of the right and it had no relation to the production or manufacture of toddy, and that the "shop-rent" was not excise duty within the meaning of Entry 51 of List II of the Constitution. We are bound by this judgment. "Shop-rent" is accordingly not excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act, 1941 and no education cess could be levied on "shop-rent".

11. Mr. Chagla however contended that in event the State is entitled to levy "tree-tax and "tree-rent" at the rates prescribed. It is unnecessary for the purpose of this case to determine whether "tree-tax" and "tree-rent" are excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act. Granting that "tree-tax" and "tree-rent" are excise revenues, those imposts ceased to be levied separately after the year 1907 : they merged in "shop-rent" and a fixed percentage was regarded as local cess and diverted to the Local Bodies. If under the order of 1955 and before that date education cess on "tree-tax" and "tree-rent" was not being levied lawfully, liability to pay "tree-tax" and "tree-rent" could not be enforced by the State against the excise contractors.

12. Mr. Chagla also urged that even if education cess on "shop-rent" is not within the competence of the State Legislature under Entry 51, List II, it is still a tax on "luxuries" within the meaning of Entry 62 of List II and a cess may be levied thereon. The argument is, in our judgment, misconceived. Education cess is not levied as an independent cess : It is levied as a cess on all items of land revenue, forest revenue and excise revenue. The "shop-rent" collected under the terms of the auction not being land revenue, forest revenue or excise revenue, the question whether education cess could be levied by the State Legislature under Entry 62 of List II does not fall to be determined before us. Counsel also urged that under the terms of the auction the excise contractors had agreed to pay education cess. But the liability to pay cess is statutory : if the statute does not effectuate the levy, no liability may arise for payment of the cess merely from the conditions of the auction.

13. Counsel for the State informed us that since the judgment of the High Court the Schedule has been amended by the State Legislature, but he did not very properly ask us to determine the question whether under the amended Schedule the cess is leviable. We express no opinion on the question whether the State is competent to levy the cess after amendment of the Schedule to the Mysore Elementary Education Act, 1941. It will be open to the State to agitate the question if hereafter the education cess is sought to be levied under the authority of the amended Schedule.

14. The appeals therefore fail and are dismissed with costs. There will be one hearing fee.

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