M. K. Papiah & Sons

Vs

The Excise Commissioner and Another

Civil Appeals Nos. 1883-1886 of 1969

(K. K. Mathew, V. R. Krishna Iyer, P. K.Goswami, JJ)

20.02.1975

JUDGMENT

MATHEW, J. -

1. The appellant was an excise contractor. He secured the privilege of vending arrack in retail in certain taluks in the State of Karnataka for a period of 18 months beginning from December 28, 1967 and ending on June 30, 1969. He purchased arrack from the Government at a price of 17 paise per litre and the Government collected besides the sale price of arrack, excise duty, health cess and education cess. The Government also collected sales tax on the sale price of arrack, on excise duty, on health cess and on education cess for the period from December 28, 1967 to January 31, 1968 and made similar demands for the month of February, 1968 also. The appellant and other excise contractors filed writ petitions in the High Court of Karnataka challenging the validity of the levy and collection of excise duty, education cess, health cess and sales tax. The High Court accepted some of the contentions of the appellant, granted him reliefs on that basis but rejected the other prayers. The appellant has filed these appeals on the basis of certificates granted by the High Court against the order.

2. The contentions raised by Counsel for the appellant before this Court were : that no excise duty can be levied on a licensee in respect of the quantity of arrack purchased by him from Government depots, that the power to fix the rate of excise duty conferred under Section 22 of the Mysore Excise Act of 1965 on the Government was bad for the reason that it was an abdication by the State Legislature of its essential legislative function and that no sales tax could be levied on the price for sale of arrack since Section 19 of the Mysore Sales Tax Act, 1957 under which the tax was levied was beyond the legislative competence of the State Legislature.

3. Section 22 of the Mysore Excise Act, 1965 (hereinafter referred to as 'the Act') provides for levy of excise duty at such rate or rates as the government may prescribe on excisable articles manufactured or produced in the State under any licence or permit granted under the Act. Section 23 of the Act deals with the method of levying excise duties.

4. The first contention of the appellant was that Sections 16, 22 and 23 of the Act read with Mysore Excise (Distillery and Warehouse) Rules, 1967 and with Mysore Excise (Excise Duties) Rules, 1968, enables levy of excise duty only when arrack is issued from a distillery or warehouse or other place of storage established or licensed under the Act and since the government depot from which he purchased arrack does not come under the above category, no excise duty can be levied.

5. The High Court found that though Sections 22 and 23 of the Act and Rule 2 of the Mysore Excise

(Excise Duties) Rules, 1968, do not expressly state that excise duty levied at the stage of issue of liquor from the government depot should be collected from the issuer or from the person to whom it is issued, it is obvious that excise duty cannot be collected from the State Government which issues liquor from its depots and that the only person from whom it can be collected is the licensee, to whom the State Government issues liquor from its depots.

6. The material portion of Section 16 of the Act provides that the Excise Commissioner may, with the previous sanction of the State Government, establish or license a warehouse wherein intoxicants may be deposited and kept without payment of duty and that without the sanction of the State Government no intoxicant shall be removed from any distillery, brewery, warehouse or other place of storage established or licensed under the Act unless the duty, if any imposed under the Act has been paid or a bond has been executed for the payment thereof.

7. It is clear from the return filed before the High Court that the Government purchases arrack from the distillers and keeps it in the warehouse established or licensed under Section 16 and that any removal or arrack after the purchase of the same will attract the liability to pay excise duty. The appellant, however, contended that it is only the Excise Commissioner who is competent to establish or license a warehouse wherein intoxicants may be deposited and kept under clause (e) of Section 16 and therefore it is not a warehouse established or licensed by the State Government.

8. We see no force in this contention. Section 23 provides that excise duty shall be levied on the excisable article issued from a warehouse also. We see no reason to think that a warehouse established or licensed under Section 16(e) is not warehouse within the meaning of that expression in Section 23.

9. The second contention raised by the appellant was that Section 22 of the Act provides for delegation of the power to fix the rates of excise duty to the Government by making rules and since no guidance has been furnished to the government by the Act for fixing the rate there was abdication of essential legislative function by the Legislature and therefore the section is bad.

10. The High Court after referring to the preamble of the Act said that it was the policy of the Act both to raise revenue and to discourage consumption of liquor by making the price of liquor sufficiently high, and that that would serve as a guidance to fix the rates of excise duty, that the rates fixed will be such as would keep the balance between these somewhat conflicting objects so as to serve the purpose of each. The Court further said that if the rate of excise duty is too low, not only will the revenue from excise duties suffer but also there will be increase in the consumption of liquor; but if the rate of excise duty on liquor is too high, it is likely to encourage the production and consumption of illicit liquor and consequently the control and regulation of liquor as well as the revenue from excise duty may be affected adversely. The Court therefore held that the need to arrive at such rates of excise duty as will serve the twin objects of the policy underlying the Act operates as guidance for determination of the rates of excise duty.

11. We are not certain whether the preamble of the Act gives any guidance for fixing the rate of excise duty. But that does not mean that the Legislature here has no control over the delegate. The legislative control over delegated legislation may take many forms.

12. In Corporation of Calcutta v. Liberty Cinema ((1966) 2 SCR 477 : AIR 1965 SC 1107), the validity of Section 548(2) of the Calcutta Municipal Act, 1951, which empowered the Corporation to levy fees "at such rates may from time to time be fixed by the Corporation" was challenged on

the ground of excessive delegation as it provided no guidance for the fixation of the amount. The majority upheld the provision relying on the decision in Banarsi Das v. State of M. P. (1959 SCR 427 : AIR 1958 SC 909) holding that the fixation of rates of rates of tax not being an essential legislative function, could be validly delegated to a non-legislative body, but observed that when it was left to such a body, the Legislature must provide guidance for such fixation. The Court found the guidance in the monetary needs of the Corporation for carrying out the functions entrusted to it under the Act.

13. In Municipal Board, Hapur v. Raghuvendra Kripal ((1966) 1 SCR 950 : AIR 1966 SC 693) the validity of the U. P. Municipalities Act, 1916, was involved. The Act had empowered the municipalities to fix the rate of tax and after having enumerated the kinds of taxes to be levied, prescribed an elaborate procedure for such a levy and also provided for the sanction of the Government. Section 135(3) of the Act raised a conclusive presumption that the procedure prescribed had been gone through on a certain notification being issued by the Government in that regard. This provision, it was contended, was ultra vires because there was an abdication of essential legislative functions by the Legislature with respect to the imposition of tax inasmuch as the State Government was given the power to condone the breaches of the Act and to set at naught the Act itself. This, it was contended, was an indirect exempting or dispensing power. Hidayatullah J. speaking for the majority, said that regard being had to the democratic set up of the municipalities which need the proceeds of these taxes for their own administration, it is proper to leave to these municipalities the power to impose and collect these taxes. He further said that apart from the fact that the Board was a representative body of the local population on whom the tax was levied, there were other safeguards by way of checks and controls by Government which could veto the action of the Board in case it did not carry out the mandate of the Legislature.

14. In Devi Dass Gopal Krishnan v. State of Punjab ((1967) 3 SCR 557 : AIR 1967 SC 1895 : (1967) 20 STC 430) the question was whether Section 5 of the East Punjab General Sales Tax Act, 1948, which empowered the State Government to fix sales tax at such rates as it thought fit was bad. The Court struck down the section on the ground that the Legislature did not lay down any policy or guidance to the Executive in the matter of fixation of rates. Subba Rao, C.J., speaking for the Court, pointed out that the needs of the State and the purposes of the Act would not provide sufficient guidance for the fixation of rates of tax. He pointed out the danger inherent in the process of delegation :

> An overburdened Legislature or one controlled by a powerful Executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the Executive; it may confer an arbitrary power on the Executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation.

In Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills ((1968) 3 SCR 251 : AIR 1968 SC 1232), the main question was about the constitutionality of delegation of taxing powers to municipal corporations. The Delhi Municipal Corporation Act (66 of 1957) by Section 113(2) had empowered the Corporation to levy certain optional taxes. Under Section 150, power was given to the Corporation to define the maximum rate of tax to be levied, the classes of persons and the description of articles and property to be taxed, the systems of assessment to be adopted and

the exemptions, if any, to be granted. The majority of the Court held the delegation to be valid. Wanchoo, C.J. observed that there were sufficient guidance, checks and safeguards in the Act which prevented excessive delegation. The learned Chief justice observed that statements in certain cases to the effect that the power to fix rates of taxes is not an essential legislative function were too broad and that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation.

According to the learned Chief Justice, the fact that delegation was made to an elected body responsible to the people including those who paid taxes provided a great check on the elected councillors imposing unreasonable rates of tax. He then said :

> The guidance may take the form of providing maximum rates of tax up to which a local body may be given the discretion to make its choice, or it may take the form of providing for consultation with the people of the local area and then fixing the rates after such consultation. It may also take the form of subjecting the rate to be fixed by the local body to the approval of Government which acts as a watch-dog on the actions of the local body in this matter on behalf of the Legislature. There may be other ways in which guidance may be provided.

15. In Sita Ram Bishambhar Dayal v. State of U. P. ((1972) 2 SCR 141 : (1972) 4 SCC 485 : 1974 SCC (Tax) 294) Section 3-D(1) of the U.P. Sales Tax Act, 1948, had provided for levying taxes at such rates as may be prescribed by the State Government not exceeding the maximum prescribed therein. Hegde, J., in speaking for the Court, observed : [SCC p. 487 para 5, SCC (Tax) p. 296]

However much one might deplore the "New Despotism" of the Executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely necessary for the Legislatures to entrust more and more powers to the Executive. Text book doctrines evolved in the 19th century have become out of date.

16. In this case, we think that Section 71 of the Act which provides for the rule-making power imposes the necessary check upon the wide power given to the government to fix the rate. Sub-section (4) of that section provides :

> Every rule made under this section shall be laid as soon as may be after it is made, before each House of the State Legislature while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule (it ?) shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

17. The appellant submitted that Section 71(4) does not provide a guarantee for legislative control over delegated legislation. The argument was that the rules would come into force as soon as they are framed and that the power of the Legislature to annul the rules subsequently cannot be regarded as sufficient control over delegated legislation.

18. That laying of rules before the Legislature is control over delegated legislation is implied in the speech of Lord Thankerton in the House of Lords in Minister of Health v. King (1931 AC 524)

where he said :

> In this case, as in similar cases that have come before the courts, Parliament has delegated its legislative function to a Minister of the Crown, but in this case Parliament has retained no specific control over the exercise of the function by the Minister, such as a condition that the order should be laid before Parliament and might be annulled by a resolution of either House within a limited period.

19. In Institute of Patent Agents v. Joseph Lockwood (1894 AC 347) Lord Watson said :

The Legislature retained so far a check that it required that the regulations which they framed should be laid upon the table of both Houses; and of course these regulations could have been annulled by an unfavourable resolution upon a motion made in either House.

20. In Bernard Schwartz's "An introduction to American Administrative Law" it is stated :

> In Britain, Parliamentary control over delegated legislation is exercised through the various forms of 'laying' prescribed in enabling Acts. Through them, the Legislature is enabled at least in theory to exercise a continuing supervision over administrative rules and regulations.

21. As Dean Landis pointed out, the English techniques for laying the rules before the Houses have several virtues. "For one thing, they bring the legislative into close and constant contact with the administrative" (See Landis "The Administrative Process", p. 77 (1938))

22. The Legislature may also retain its control over its delegate by exercising its power of repeal. This was the basis on which the Privy Council in Cobb & Co. v. Kropp ((1967) a AC 141 (PC) upheld the validity of delegation of the power to fix rates to the Commissioner of Transport in that case. The question there was whether the Queensland Legislature had legislative authority under the impugned Acts to invest the Commissioner for Transport with power to impose and levy licence and permit fees. It was not disputed before their Lordships that fees imposed are to be regarded as constituting taxation. Accordingly, it was contended that the Legislature had abdicated its exclusive power of levying taxation. The Privy Council held that Queensland Legislature was entitled to use any agent or machinery that it considered appropriate for carrying out the object and the purposes of the Acts and to use the Commissioner for Transport as its instrument to fix and recover the licence and permit fees, provided it preserved its own capacity intact and retained perfect control over him; that as it could at any time repeal the legislation and withdraw such authority and discretion as it had vested in him, it had not assigned, transferred or abrogated its responsibilities in favour of a newly created legislative authority and that, accordingly, the two Acts were valid. Lord Morris of Borth-y-Gest said :

> What they (the Legislature) created by the passing of the Transport Acts could not reasonably be described as a new legislative power or separate legislative body armed with general legislative authority (see R. v. Burah ((1878) 3 AC 889). Nor did the Queensland Legislature 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence' (see In re the Initiative and Referendum Act (1919 AC 935, 945).

23. The point to be emphasized - and this is rather crucial -is the statement of their Lordships that the Legislature preserved its capacity intact and retained perfect control over the Commissioner for

Transport inasmuch as it could at any time repeal the legislation and withdraw the authority and discretion it had vested in him, and therefore, the Legislature did not abdicate its functions.

24. We, therefore, think that the power to fix the rate of excise duty conferred on the government by Section 22 of the Act is valid. The dilution of parliamentary watch-dogging of delegated legislation may be deplored but, in the compulsions and complexities of modern life, cannot be helped.

25. The last contention raised by the appellant was that Section 19 of the Karnataka Sales Tax Act, 1957 is invalid as it purports to levy sales tax upon the sale of arrack made by the Government to licensees.

The appellant submitted that the definition of 'dealer' in Section 2 of that Act excludes the Government of Mysore and that by virtue of the provisions in Section 5(3) of that Act, no tax could be levied on the sale of arrack by government to the appellant. We see no merit in this contention. Section 19 of the Act reads :

> 19. State Government entitled to collect tax as registered dealers. Not withstanding anything contained in this Act the Government of Mysore shall, in respect of any sale of goods effected by them, be entitled to collect by way of tax any amount which a registered dealer effecting such sale would have been entitled to collect by way of tax under this Act.

26. This section makes it clear that notwithstanding anything contained in that Act, the Government shall in respect of any sale of goods effected by it be entitled to collect by way of tax any amount which a registered dealer effecting such sale would have been entitled to collect by way of tax under the Act. The section is clear that the Government could collect the tax on the sale made by it as if it were a registered dealer, notwithstanding anything contained in Section 2 or Section 5. The section itself creates a right in the State to recover and an obligation on the purchaser from the State to pay the amount. Any imposition of liability or obligation in respect of sale or purchase of goods will be covered by Entry 54 of List II of the Seventh Schedule of the Constitution.

27. We do not think that Section 19 is ultra vires the powers of the Legislature.

28. We therefore dismiss the appeals but make no order as to costs.

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