NAGPUR HIGH COURT

Chhotabhai Jethabhai Patel and Co

Vs

Union of India

Misc. Petn. No. 1625 of 1951

(R. Kaushalendra Rao and Deo, JJ.)

23.11.1951

JUDGMENT

R. Kaushalendra Rao ,J .

1. The order in this case will govern miscellaneous petitions Nos. 1628, 1629, 1630, 1631, 1634, 1635, 1645, 1646, 1651 and 1652, all of 1951.

2. The petitioner moves the Court under Article 226 of the Constitution for an order or writ cuashing and setting aside a demand on it by the third respondent for payment of a sum of Rs. 1,04,555-14-0. The demand is dated the 4th June 1951 and calls upon the petitioner to pay the sum within 10 days from the date of demand.

3. The circumstances in which the demand came to be made may now be given. The petitioner is a firm of tobacco merchants and manufacturers of 'biris.' The firm has a private warehouse licensed under Rule 140 of the Central Excise Rules at Sagar in Madhya Pradesh. On or about the 28th February 1951 the petitioner stored a large quantity of tobacco in the said house on which excise duty had not been paid.

4. On the introduction in Parliament of Bill No. 13 of 1951 on the 28th February 1951 the petitioner paid the requisite duty on the tobacco stored by it under the declared provision read with Sections 3 and 1 of the Provisional Collection of Taxes Act, 1931 (16 of 1931.) The petitioner cleared the tobacco from the warehouse between the 1st March 1951 and the 28th April 1951 ana obtained clearance certificates issued by the 3rd respondent.

5. By the Finance Act of 1951 (Act No. 23 of 1951), the rate of duty payable on unmanufactured tobacco, Item No. 5 - which is the relevant provision here - was increased to 14 annas per 1b. Though the Act became law on the 28th April 1951, by Section 6 (2) the rates introduced by the Act are deemed to have had effect on and from the 1st day of March 1951.

6. So Section 7 (2) directs :

"(a) refunds shall be made of all duties collected which would not have been collected if the amendments had come into force on that day, and (b) recoveries shall be made of all duties which have not been collected but which would have been collected if the amendments had so come into force."

7. The petitioner apprehending that the second respondent might make a demand on behalf of the first respondent for payment of the excess duty that became payable in respect of tobacco cleared from the warehouse by it addressed a letter to the second respondent requesting him to give it a hearing in the matter before any demand was made for the differential duty. The second respondent by his letter, dated the 31st May 1951, said that he was entitled to make the demand on the petitioner for payment of the differential duty and said that if the petitioner had any more grievances in the matter it might represent them for his consideration.

8. By the letter dated the 8th June 1951, the petitioner pointed out to the second respondent that his interpretation of Section 7 (2) was incorrect and that for the reason set out in the said letter he was not entitled to demand the differential duty. The complaint of the petitioner is that while correspondence was going on with the second respondent the third respondent issued the demand dated the 4th June 1951.

9. At this stage it would be convenient to deal with two points raised on behalf of the respondents.

10. According to the respondents there is a material suppression of fact by the petitioner and so the petition is liable to be rejected 'in limine' without going into the merits of the case. The suppression alleged is that in paragraph 7 the petitioner asserted that the second respondent failed to give any reply to the request of the petitioner that it should be granted a hearing before any such demand was made upon it. The assertion, it is contended, is false. The petitioner failed to refer to the clear assurance by the second respondent in his letter, dated the 30th May 1951 that he would be willing to consider any representation on behalf of the petitioner. This argument proceeds on a misunderstanding. The gravamen of the complaint of the petitioner is not that the second respondent refused to give a hearing but) that he refused to give a hearing 'before the making of a demand.' As actually the demand was made on the 4th June 1951. without hearing the petitioner it cannot be said that in making the statement in paragraph 6 the petitioner was guilty of any deliberate suppression of a material fact.

11. The learned Counsel for the respondents contended that as there is a specific remedy provided in Act 1 of 1944 the petitioner could not invoke the power under Article 226 before exhausting the remedy provided under the Act. The Counsel referred to Section 35 of the Act. If the the respondents were proceeding under the Act then the argument would have been proper and the petitioner could be left to the remedy given by the Act. But the demand is challenged by the petitioner as being wholly without jurisdiction. The challenge of the petitioner is directed against the validity of Section 7 (2) itself. Even if the section be valid, according to the petitioner the case is not within Section 7 (2). Further, the petitioner questions the very authority and jurisdiction of the third respondent to make the demand. According to the contention the demand is not one made under the Act but is wholly outside it.
If these contentions be correct the petitioner cannot be limited to the remedy available to it for

any decision or order passed under' the Act.

12. There is no substance in the argument that the duty to be collected under Section 7 (2) is not a duty of excise but is a direct tax. The learned Counsel relied upon two decisions arising under the Constitution of Canada, *'Attorney-General For British Columbia V. Kingcome Navigation Co*[1]*.'.* and *'Atlantic Smoke Shops Ltd. V. Conlon*[2]*',* The decisions in Canada turn upon the distinction between direct tax and an indirect tax. Definitions formulated in such context cannot be conclusive on a question which arises under our Constitution: See *'The Province Of Madras V. Messrs Boddu Paidanna And Sons*[3]*',* In cases arising under the Constitution of 1935, their Lordships of the Privy Council observed in *'Governor-General In Council V. Province Of Madras*[4]*',*

> "the duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity."

There is nothing in the present Constitution which would warrant a departure from that view in construing entry 84 of the Union List.

13. The tax under consideration is a tax levied under Section 3 of the Central Excise Act, 1944. It is the rate of the same tax which is increased retrospectively. If Parliament has the power to enact a law retrospectively, the nature of the tax is not altered by the mere fact that the rate is increased retrospectively.

14. The learned Counsel for the petitioner contended that the tax levied under Sub-section (2) of Section 7 can only be levied and collected on tobacco produced or manufactured after the 1st March 1951. As the tobacco in the instant case was all produced before the 1st March 1951 the petitioner contended that the provision would not apply to the case. This argument proceeds on the assumption that the excise duty is a tax on the process of production or manufacture. 'The tax operates on goods in existence.' It is not concerned with the process but with the product. It is therefore no answer to a demand for an excise duty that the excisable goods were produced prior to the enactment levying an excise duty. The Income-tax Act is a well-known example of a charge being made in respect of income earned the previous year.

15. Jayakar, J., observed in the first Sales Tax Case, *In Re : 'Central Provinces And Berar Sales Of Motor Spirit And Lubricants Taxation*[5] referring to the corresponding entry in the Constitution of 1935 (No. 45, List I), 'that the duty is not "on" the "manufacture or production", but "on" the "goods" manufactured or produced. The words "manufactured or produced" in Entry No. 45 (List I) are descriptive of the goods and are not mentioned as the basis of incidence.' To the same effect are the observations of Sulaiman, J., at page 78 of the report.

16. Under a constitutional system which permits the Union to levy a duty of excise and the units to impose a tax on the sale of goods the line between the two is drawn at the point the goods leave the producer or the manufacturer. The Union is on the right side of the line so long as the tax is on the goods with the producer or the manufacturer. The effect in law of Section 7 (2) is that the rates introduced by Schedule I in the Act are related back to a period anterior to the goods leaving the producer or the manufacturer. So, the Union Government cannot be said to be

taxing the goods at a stage not warranted under the Constitution.

17. The question then is whether the Union has the power to enact a retrospective provision.

18. It is true that the Courts are averse to construe a statute so as to give it a retrospective effect unless there be no escape from such a construction either because of express words or necessary implication. But what is a canon of construction is not to be confused with a constitutional limitation on retrospective legislation.

19. Having regard to the principle of the decision in '*United Provinces V. Atiqa Begum*[6]*',* it can hardly be doubted that Parliament, unless it infringes some provision in the Constitution, has the competence to enact law retrospectively.

20. *Relying On 'Coolidge V. Long*[7]*',* the learned counsel for the petitioner contended that completed transactions could not be hit even by retrospective legislation. The decision cannot assist the petitioner. The cited case was concerned with an inheritance tax. Succession was complete under an irrevocable deed of trust executed prior to the taking effect of the statute which imposed the tax on property passing on death. When the declaration of trust was executed no statute was in effect under which succession to the trust property could have been subject to a tax like the one under the impugned statute. The Court held that the deed was a contract within the meaning of the contract clause of the Constitution. The statute in question was therefore held to be repugnant to the clause providing against imp AIR ment of obligations under a contract and the due process clause of the 14th Amendment.

21. Even in America retrospective fiscal legislation is not 'per se' bad : see *'Stockdale V. Atlantic Ins. Co*[8]*. 'Billings V. United States*[9]*', 'Brushaber V. Union P.R. Co*[10]*.',* and '*Lynch V. Hornby*[11]*',*

22. If retrospective legislation is held to be unconstitutional in the United States it is for the reason that the impugned law infringed some provision in the Constitution itself, as for example. either the contract clause (Article 1, Section 10) as in *Coolidge V. Long', (Supra P. 605)* or the due process clause in the 5th Amendment as in '*Blodgett V. Holden*[12]*',* See also '*League V. Texes*[13]*',*

23. Even we are not unfamiliar in this country with legislations imposing a tax
retrospectively. Two examples will suffice. The examples are of validation of defective impositions. But validation was possible because of the power to impose the tax retrospectively.

24. In the '*Firm Of Radhakisan Jaikishan V. Municipal Committee, Khandwa*[14]*',* the Privy Council held that the tax on ginning and pressing of cotton imposed by the Khandwa, Municipality was not valid. In 1938 the Provincial Legislature enacted C.P. Act 8 of 1938 to render the tax valid from the date of the original imposition. This Act was held by the Court to be inoperative : see '*Firm Radhakishan V. Municipal Committee, Khandwa*[15]*',* Then another Act, C.P. Act 16 of 1941, was passed to give effect to the tax from the date of the original imposition and make it validly recoverable.

25. In '*District Board, Sialkot V. Sultan Muhammad Khan*'[16]*,* a tax purporting to be one on professions imposed by the District Board of Sialkot was held to be invalid. After the decision

the Punjab District Boards (Tax Validating) Act, 1927 (III of 1927) was enacted to give effect to the tax from the date of the original imposition. See '*Ganpat Rai V. District Board, Sargodha*[17]', and '*Bukkan Singh V. District Board, Ludhiana*[18]',

26. The legislatures operating under the Constitution are endowed with plenary powers. Any limitations, restrictions or prohibitions on legislative competence must therefore be found in the Constitution itself. There is no restriction on legislative power with respect to taxing laws such as the one provided against penal laws in Article 20. In the absence of any provision against retrospective fiscal legislation it is not for the Court to imply any such restriction. The Court is not concerned with the wisdom, expediency or hardship or any supposed injustice of the legislation. These are matters which are left to the wisdom and the discretion of those entrusted with the task of legislation. The learned counsel for the petitioner submitted that these considerations must give way if the tax imposed by an Act is prohibitive. Counsel referred to '*Attorney-General For Alberta V. Attorney-General For Canada*'[19],

27. The petitioner did not allege nor is there anything to show that the impugned provision results in a tax which is prohibitive. In the case cited a bill entitled an Act respecting the taxation of Banks enacted by a Province in Canada was regarded not in any true sense taxation but a plan to prevent the operation within the Province of those banking institutions which had been called into existence and given the necessary power to conduct their business by the Parliament of Canada. In short, the measure in question was a colourable device to achieve a purpose not within the competence of the Provincial Legislature. There is nothing to show that such is the case here. Nor is there anything to show that the impugned provision was enacted otherwise than in the exercise of the legitimate power to tax or that it was calculated to achieve any object not warranted by the Constitution.

28. At the hearing one more contention based on Article 19(1)(f) was raised for the petitioner. Counsel urged that the Court should decline to give effect to Section

7(2)(b) on the ground of unreasonableness. It is unreasonable that the tax-payer should be asked to pay additional duty in respect of goods already cleared after payment of the duty. Counsel placed reliance upon '*Khagendra V. District Magistrate Of West Dinajpur*[20]', and '*Subodh Gopal V. Behari Lal*'[21]. as examples of cases where the Court declared a statute 'ultra vires' on the ground of unreasonableness.

29. The contention that it is unreasonable to demand duty in respect of goods on which the duty has already been paid cannot be accepted. It is pertinent to refer to '*Patton V. Brady*[22]', That case was concerned with tobacco on which excise duty had already been paid. After the payment of duty the tobacco was sold to the plaintiff. While it was in his hands the impugned Act was passed doubling the current rate of duty. The impugned Act imposed a special duty on all tobacco which had paid the excise duty in force at the date of the Act and was at the date held and intended for sale. The point raised was that the legislature having once excised an article could not excise it a second time. The contention was rejected in the following words :

> "But why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the government has ceased.

> They are, as said in Cooley on Taxation, p. 1 : 'The enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government and for all public needs,' and so long as there exist public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the state is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order 'to provide for the common defence' and 'promote' the general welfare."

30. In the two cases cited for the petitioner the Court was concerned with Clause (5) of Article 19. The freedoms guaranteed under Clauses (d) and (f) were in question in '*Khagendra V. D.M. Of W. Dinajpur', 55 Cal Wn 53 (Supra)* and *'Subodh Gopal V. Behri Lal', 55 Cal Wn 433* (supra) respectively. Both the freedoms were subject to reasonable restrictions as may be imposed by the law made by the State. In a case falling under Clause (5) of Art, 19 it is undoubtedly for the Court to determine whether the restrictions imposed by the legislature are reasonable or not. But. that clause has no application here.

31. Legislation cannot be considered unreasonable merely because it imposes a tax retrospectively. Retroactive legislation to prevent loss of revenue by transactions between the date of the bill and its enactment is familiar to many countries. It is not necessary to encumber this judgment by citing instances. They are found collected in U. S. Reports (Lawyers edition), Vol. 72, p. 650. It cannot be said that the right of the petitioner to acquire, hold and dispose of property is in any way affected merely because he is subjected retrospectively to a tax in respect of his goods. The impugned
provision does not come within the mischief sought to be guarded against in Article 19(5) Apart from the Constitution the Court cannot derive any power to interdict an act of the legislature from any extraneous doctrine of unreasonableness.

32. The challenge to the Finance Act based on. the failure to comply with Article 117(1) was abandoned in view of Article 255. We hold that Section 7(2) of the Act is valid.

33. The learned counsel for the petitioner contended that even if Section 7(2) be valid, it cannot be construed to apply to a case where the goods liable to be taxed have already been removed under a clearance certificate. The learned counsel tried to reinforce this argument by reference to Rule 9A of the Central Excise Rules. Under that rule the rate of duty and the tariff valuation (if any) applicable to goods cleared on payment of duty shall be the rate and valuation (if any) in force on the date on which duty is paid, or if the goods are cleared from a factory or a warehouse, on the date of the actual removal of such goods from such factory or warehouse.

34. But the result of the enactment of Section 7(2) is that though the Finance Act increased the rates on the 28th April 1951 'they shall be deemed to have had effect from the 1st day of March 1951. The meaning of the word 'deemed' is explained by their Lordships of the Privy Council in '*Commissioner Of Income-Tax Bombay Presidency V. Bombay Trust Corporation. Ltd*[23].', Though the rates in Schedule I were not in fact in force on the 1st day of March 1951, as a result of the enactment of Sub-Section (2) on the 28th April 1951 the rates must in the eye of law be

now considered to have been in force from the 1st day of March 1951. That being so, the duty payable at the time at which the goods were removed by the petitioner was the duty payable under the Finance Act of 1951.

35. If Section 7(2) were intended only to apply to goods not yet, removed from the warehouse Parliament need scarcely have taken the trouble to enact the provision. A case of alteration of duty while the goods are in the warehouse is already covered by Rule 159. Under that rule the goods which are in the warehouse are liable to re-assessment in accordance with any alteration in the rate of duty applicable to them. It must therefore be held that the operation of Section 7(2) is not dependent on the fact whether the goods are in the warehouse or whether they have already been cleared and removed from the warehouse. Clause (b) of Section 7(2) enables the Government to collect all duties which have not been collected but which would have been collected had the amendment come into force at the date of collection. That being so, the case of the petitioner cannot be said to be outside the provision. The petitioner relied upon the decision in '*Attorney-General V. Smith And Cocks*[24]*',* The decision turned on the words, "the person acting in the administration of such estate and effects". The words were construed as not applying to a person who had once acted by taking out probate or letters of administration. So it was held that an executor could not be asked to deliver a further affidavit about the value of the estate after it had been fully administered. Having regard to the words in Section 7(2) the cited decision is of no assistance.

36. But the question remains whether, even if the Act be valid and the case is within the Act. the demand is properly made. Article 265 of the Constitution provides that no tax shall be levied or collected except by authority of law. So, not only the levy but also the collection of the tax must be sanctioned by law. The charging section (S. 3(1)) in the Excise Act, 1944, provides;

> "There shall be levied and 'collected in such manner as may be prescribed' duties of excise.....'.
>
> 'Prescribed' means prescribed by rules under the Act. An examination of the rules reveals that apart from Rule 10 or Rule 160 there is no power or authority to collect the duty in respect of excisable goods which have already been removed from the warehouse. Neither Rule 10 nor rule 160 can assist the respondents.

37. Rule 7 provides that every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods at such time and place and to such person as may be designated in, or under the authority of these Rules. Rule 140, so far as it is material here, provides for the licensing of private warehouses for the storage of excisable goods on which duty has not been paid. under Rule 141 goods received at a warehouse are assessed to duty prior to entry into the warehouse, and the amount of duty leviable thereon is noted in the warehouse register. Rule 144 prohibits the removal of any goods from any warehouse except on payment of duty. The scheme of the rules is that all duty is collected before the goods are removed from a warehouse except in a case falling under Rule 10 or Rule 160.

38. The learned counsel for the respondents relied upon Rule 159. Having regard to the context and collocation that rule must be held to contemplate the continued existence of the goods in the warehouse. There is no rule at all to cover a case of the kind created by Sub-Section (2) of

Section 7 under which the Union Government is empowered to collect duties which have not been collected but which would have been collected and, as we hold, even after the goods have been cleared and removed from the warehouse. The Collector or the Central Excise Officers are empowered to exercise powers conferred by the rules and if the rules have not provided, as we hold they have not, to cover a case of this kind, they cannot proceed to collect a tax, though it has been properly levied and is payable to the Government.

39. Reference was made during the hearing to section 11 of the Excise Act which is to the effect that if the amount payable to the Central Government is not recovered by deduction from any monies at the disposal of an officer empowered by the Central Board of Revenue he may prepare a certificate signed by him under the latter part of the section and send it to the Collector of the district for recovery of it as an arrear of land revenue. In spite of a pointed enquiry by us the respondents have not been able to show that the Central Board of Revenue has empowered either the second or the third respondent to recover the sum due to the Central Government by reason of Section 7(2). It is therefore needless to consider whether section 11 can avail the respondents.

40. The petitioner has specifically challenged the authority of the third respondent to make the demand. It is not open to any servant of the State to take upon himself the duty of executing the law as in this case by demanding a tax it is therefore incumbent upon the third respondent to show that he was authorized under law to make the demand he did.

41. The learned Counsel for the respondents contended that a direction or order under Article 226 should not issue to prohibit what is but an executive act. Relying on '*Chabot V. Lord Morpeth*[25]*',* he submitted that a writ of prohibition does not issue against a ministerial act.

42. The power of the Court under Article 226 is not restricted by any of the technical limitations governing the issue of the well-known writs under the common law. As has been held by us more than once, the Court is empowered under Article 226 of the Constitution to issue, apart from the well-known writs, orders or directions for the enforcement of fundamental rights or for any other purpose. See *'The Firm Of Danteshwari Transport Co. V. The R. T. A., Nagpur*[26]*'.* and *'New Motor Transport Co. Drug V. R. T. A., Raipur*[27]*',* Even executive acts are not outside the scope of the power of the Court under Article 226. See '*Hiralal V. State Of M.P*[28]*. 'Ahmed Hossain V. State Of M.P*[29]*',* and *'Jeshingbhai V. Emperor*[30]*',* When a right of a citizen is infringed or his liberty or property is put in peril by the executive in disregard of the law, for the Court to refuse redress to the citizen under Article 226, merely on the ground that the order or direction is sought against an executive act is to render the power under that article largely otiose.

43. At the risk of his property being put in peril the petitioner is asked to comply with a demand in violation of a principle enshrined in the Constitution (Article 265). As the principle is considered to be of sufficient importance to merit an express provision in the Constitution it is but proper for the Court to prevent its infringement. The case therefore calls for the exercise of the undoubted power of the Court under Article 226.

44. After the hearing, the learned Counsel for the respondents invited our attention to the order of the Board of Revenue, dated the 1st September 1944, issued under Rule 233 directing Range Officers to issue notices of demand. Rule 233 empowers the Board to issue written instructions providing for any supplemental matters arising out of the rules. But as we read the rules they do

not except under Rules 10 or 160 as already explained earlier provide for a demand of the tax after the goods leave the warehouse. Unless a matter is dealt with by the rules it cannot be said to arise out of the rules. There is nothing to supplement in such a case. The power under Rule 233 is supplementary not residuary. So the order of the Board is of no avail to the respondent.

45. In the result we hold that respondent No. 3 was not under law authorized to make the demand he did on the 4th June 1951. That demand is accordingly quashed. As we
have held that Section 7 (2) is valid and governs the case, none of the respondents is in any way prohibited from collecting the tax in accordance with law. Respondent No. 1 will pay the costs of the paper book and also the costs of the petitioner.
Demand quashed.

Cases Referred.

[1]1934 A C 45
[2]1943 Ac 550
[3]1942 Fcr 90 At P. 103
[4]1945 Fcr 179
[5] Act No. Xiv Of 1938, 1939', Fcr 18 At P. 106
[6]1940 Fcr 110 At Pp. 132, 133, 148, 149, 178
[7](1931) 282 Us 582
[8](1874) 22 Law Ed 348 At P. 351
[9](1914) 232 Us 261 At P. 282
[10](1916) 240 Us 1 At P.
[11](1918) 247 Us 339 At P. 343
[12](1927) 275 Us 142 At P. 147
[13](1902) 184 Us 158 At P. 161
[14] Pc Appeals Nos. 3 And 4 Of 1931, D/-2-3-1937 (Pc)
[15]1940 Nag Lj 638
[16]9 Lah 340
[17] AIR 1932 Lah 87
[18]14 Lah 230
[19]1939 Ac 11
[20]55 Cal Wn 53
[21]55 Cal Wn 433
[22](1902) 184 Us 608
[23]54 Bom 216 At P. 223
[24]1893-62 Lj Qb 288
[25] (1844) 117 Er 528
[26] Misc. Petn. No. 5 Of 1950, D/-25-8-1950 (Nag)
[27] Misc. Petn. No. 225 Of 1951, D/-29-5-1951 (Nag)
[28] Misc. Petn. No. 30 Of 1950, D/-19-2-1951
[29] AIR 1951 Nag 138 At P. 141
[30] AIR 1950 Bom 363 Fb