

SATPAL & CO. ETC.

v.

LT. GOVERNOR OF DELHI AND ORS.

April 12, 1979

[D. A. DESAI AND A. P. SEN, JJ.]

Punjab Excise (Delhi Amendment) Ordinance, 1979 empowering the Government under the Punjab Excise Act, to levy "special duty" on the import of country liquor into Delhi and the Delhi Fiscal Duty Order, 1979 levying "special duty"—Validity of.

Powers of Parliament to legislate exclusively for Union Territory of Delhi, a part of the Territory of India not included in a State—Constitution of India Articles 246 to 248 and Entry 97 of the Union List.

Right to trade in intoxicants—Whether a fundamental right—Constitution of India Article 14, 19(1)(g) and 301.

Retrospective Legislation is valid in case of intoxicants—Constitution of India Art. 47.

While implementing the provisions of the Punjab Excise Act, 1914 as in force in the Union Territory of Delhi, the concerned authority used to hold auction for grant of licence in Form L-10 for selling country liquor and at one such auction held on 29th March 1978, the petitioners' bids were accepted and they were granted licences in Form L-10 for the period 1st April 1978 to 31st March 1979. The licence included a condition to sell a bottle of 750 ml. of country liquor at Rs. 15/- which was *inter alia* made up of excise duty (styled as still-head duty) at the rate of Rs. 10.23 and profit of licensee at the rate of Rs. 2/-. In W.P. 716/78, validity of the levy of 'still head duty' was challenged by certain petitioners *inter alia* on the ground that it was nothing but countervailing duty and in the absence of manufacture of liquor in Delhi, countervailing duty on the import of liquor cannot be constitutionally levied. This contention found favour with a learned single judge of the Delhi High Court and a number of Letters Patent Appeals were filed against that Judgment.

During the pendency of these appeals President of India promulgated an Ordinance purporting to amend the Punjab Excise Act, 1914, styled as Punjab Excise (Delhi Amendment) Ordinance, 1979 with retrospective effect, conferring power on the Government under the provisions of the Act to levy 'special duty' on the import of country liquor in Delhi at rates not exceeding that set out in Schedule I-A which was introduced in the Act by the Ordinance.

Pursuant to the Ordinance amending the Principal Act, the Delhi Fiscal Duty Order, 1979 was issued levying special duty at the rates set out in the order on import of country liquor into Delhi. Some of the petitioners questioned the validity generally of the Ordinance and specifically of the impost of special duty in Civil Writ No. 16/79. A Division Bench of the Delhi High Court heard the Letters Patent Appeals and the Writ Petition No. 116/79 and by a common judgment held the ordinance as well as the impost of the special duty thereunder valid, dismissed the Writ Petition and allowed the Letters Patent Appeals.

A Dismissing the special leave petitions, the Court

HELD : 1. Scheme underlying distribution of Legislative power in Part XI Chapter I and especially Articles 246 and 248 is that except the matters specifically enumerated in List II (State List) in the Seventh Schedule, Parliament's plenary power to legislate extends to all conceivable matters which can be topic of legislation, and even this limitation on its power vanishes when Parliament

B legislates for part of the territory of India not included in a State. The three dimensional picture becomes complete, viz. (i) to select topic for legislation (ii) enactment of legislation on the topic and (iii) to impose tax in respect of such subject matter of legislation by reference to Art. 248 which confers power to make any law with respect to any matter not enumerated in Lists II and III including the power to impose tax not mentioned in either of those lists. Under Art. 246 (4) Parliament has power to make laws with respect to any matter for any part of the territory of India, not included in a State notwithstanding that such matter is a matter enumerated in the State List. Power of Parliament thus to legislate with respect to any matter for Delhi, territory not included in a State is unabridged or unfettered by the entries in the State List. Further residuary power of legislation including the power to levy tax is conferred on Parliament by the combined operation of Articles 246(4), 248(1) and (2) and Entry 97 in the Union List. That power is untrammelled by the limitations prescribed by Article 246(2) and (3) and Entry 51 of State List and is plenary and absolute subject only to such restrictions as imposed by the Constitution.

[659 G-H, 660 A-C]

· *Mithan Lal v. State of Delhi*, [1959] SCR 445 @ 451; referred to.

E 2. While legislating for the Union Territories the Parliament unhampered by Articles 246(2) and (3) but enriched by Article 248(1) and (2) could legislate on any of the topics either in the List I and III or in List II or in exercise of the residuary power under Entry 97. There is nothing in the Constitution to prevent Parliament from combining its powers under one or other Entry with its power under Entry 97. Parliament can rely on the powers under specified Entries 1 to 96 List I and supplement them with the powers under Entry 97 List I and Article 24 or even the powers under Entries in the concurrent list. There is no dearth of legislative competence of Parliament to enact legislation for a territory not included in a State because the power to legislate takes within its sweep matters included in all the three lists and added to it is the residuary power on matters not specifically included in any entry in any of the three lists. [661 D-G]

G If exercise or countervailing duty could be levied on country liquor manufactured or imported into Delhi, Parliament would not lack competence to levy the same only because levy of such duty on alcoholic liquors for human consumption is within the competence of a State. As country liquor is not manufactured in Delhi, the Parliament could not under Entry 51 of the State List levy either excise or countervailing duty on it. Merely because Parliament could not levy countervailing duty on country liquor imported into Delhi because country liquor is not manufactured in Delhi it does not exhaust the power of Parliament to levy some other duty on the import of liquor if it is otherwise constitutionally permissible. [660 D-F]

Union of India v. H. S. Dhillon, [1972] 2 SCR 33; followed.

3. With the advancement of society, expanding horizons of scientific and technical knowledge, probe into the mystery of creation, it is impossible to conceive that every imaginable head of legislation within human comprehension and within the foreseeable future could have been within the contemplation of the founding fathers and was, therefore, specifically enumerated in one or the other of the three Lists, meaning thereby that three Lists were exhaustive of Governmental action and activity. Demands of welfare State, hopes and aspirations and expectations in a developing society and the complex world situation with inter-dependence and hostility amongst nations may necessitate legislation on some such topics that even for visionary they could not have been within the contemplation of the founding fathers. Complex modern governmental administration in a federal set up providing distribution of legislative power coupled with power of judicial review may raise such situations that a subject of legislation may not squarely fall in any specific entry in List I or II. Simultaneously on correct appraisal it may not be covered by any entry in List II though apparently or on a superficial view it may be covered by an entry in List II. In such a situation Parliament would have power to legislate on the subject in exercise of residuary power under Entry 97, List I and it would not be proper to unduly circumscribe, corrode or whittle down this power by a process of interpretation by saying that subject of legislation was present to the mind of the framers of the Constitution because apparently it falls in one of the entries in List II and thereby deny power to legislate under Entry 97. The history of freedom struggle demonstrates in unequivocal terms the importance of residuary power of legislation being conferred on Parliament. Accordingly, once the power of Parliament to legislate on a topic is not expressly taken away by any constitutional provision, it remains intact under Entry 97 of List I.

[662 G-H, 663 A-D]

Undoubtedly excise and countervailing duties on alcoholic liquors for human consumption were within the contemplation of the framers of the Constitution. That is a specific topic of legislation in List II. It does not exhaust a conceivable levy that can be legitimately imposed on such items if otherwise they could be legally imposed on such items by reference to constitutional power to levy the same. And Entry 97 is a complete answer to the contention. [663 D-E]

His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala, [1973] Suppl. S.C.R. 1; explained and discussed.

I. C. Golaknath v. State of Punjab, [1967] 2 SCR 672; referred to.

Union of India v. H. S. Dhillon, [1972] 2 SCR 33, affirmed.

4. Terminal tax is entirely different from the special duty sought to be imposed by the impugned Ordinance. The impost is on entry of country liquor into Delhi to be recovered by the Delhi Administration for its own use. Delhi Administration and Delhi Municipal Administration are entirely different, and, therefore, it cannot be said that Entry 52 excludes the power of the Parliament to levy tax on import of country liquor in Delhi. [663 F-G]

5. If on the same subject the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure. More so when Special Duty levied by Parliament and the terminal tax imposed by the Municipal Administration on the import of liquor in Delhi can be traced to independent source of power. [664 A-B]

A *Avinder Singh and Ors. v. State of Punjab and Ors.* [1979] 1 SCR 845; followed.

6. The idea conveyed by the expression "colourable legislation" is that although apparently a legislature in passing a statute purported to be within the limits of its powers, yet in substance and in reality it transgressed those powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. Applying this test it is difficult to say that the impugned impost is either a camouflage or a colourable legislation. [664 G-H]

Merely because a statute was found to be invalid on the ground of legislative competence that does not permanently inhibit the legislature from re-enacting the statute if the power to enact the same is properly traced and established. In such a situation it would not be correct to say that the subsequent legislation would be merely a colourable legislation or a camouflage to re-enact the invalidated previous legislation. [665 E-F]

K. C. Gajapati Narayan Deo v. State of Orissa, [1954] SCR 1, *Maharana Sri Jayvant Singhji Ranmal Singhji etc. v. State of Gujarat*, [1962] Suppl. 2 SCR 411 @ 440, *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*, [1964] 2 SCR 608, *Prithvi Cotton Mills Ltd. and Ors. v. Broach Borough Municipality and Ors.*, [1970] 1 SCR 388; referred to.

D 7. The expression 'excisable article' which alone can be the subject matter of levy special duty is merely descriptive of the goods subject to charge. It is only an identifying mark, a tag, which would attract special duty. If liquor was manufactured in Delhi it would be an excisable article. It is that article on which, if manufactured in Delhi excise duty could be levied which when imported would provide the taxing event for the levy of special duty because in the absence of manufacture in Delhi countervailing duty cannot be imposed upon it. The expression is used for identifying the subject-matter of impost and nothing more need be read into it. [666D-E]

F 8. There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers, has right to prohibit absolutely every form of activity in relation to intoxicants its manufacture, storage, export import, sale and possession. In all their manifestations these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. [666 H. 667 A]

G If there is no fundamental right to carry on trade or business in liquor, there is no question of its abridgement by any restriction which can be styled as unreasonable. The State under its regulatory power has a right to control or even to prohibit absolutely every form of activity in relation to intoxicants apart from anything else, its import too. This power of control is question of society's right to self-protection and it rests upon the right of the State to act for the health, moral and welfare of the people. Liquor traffic is a source of pauperism and crime. Such an impost, therefore, is one in the public interest for preserving public health and public moral and is not one as infringing the interstate freedom of trade and commerce. All taxes are imposed in public interest.

[667 F-H. 668 A-B]

H In the instant case the Preamble to the impugned Ordinance clearly recites that the special duty on the importation of country liquor into Delhi an endeavour towards bringing about prohibition of consumption of alcoholic drinks, and,

therefore, it is a step in the direction of safeguarding public health and with a view to realising the goal fixed in Article 47 of the Constitution. It is a fiscal measure and the one safeguarding public health and even public morals because it is well recognised that liquor trade is instinct with injury to individual and community and has serious side-effects recognized everywhere in every age. Not to control alcohol business is to abdicate the right to rule for the good of the people. [669 B, G-H, 670 A]

Har Shanker and Ors. etc. v. Dy. Excise and Taxation Commissioner and Ors. [1975] 3 SCR 254, *State of Bombay v. R.M.D. Chamarbaughwala*, [1957] SCR 874; *P. N. Kaushal and Ors. v. Union of India and Ors.*, [1978] 3 SCC 558; applied.

Crowley v. Christansen, 54 Law Ed. 620; quoted with approval.

P. N. Kaushal and Ors. v. Union of India and Ors., [1979] 1 SCR 122; referred to.

9. There is no substance in the contention that the retrospectivity of the Ordinance is illegal and invalid. The argument overlooks the twin objects sought to be achieved by the measure namely, validating an import which was found to be invalid on the ground that it was countervailing duty which could not have been legitimately imposed and also the object to safeguard public health and public moral [670 B-D]

Prithvi Cotton Mills Ltd. and Anr. v. Broach Borough Municipality and Ors., [1970] 1 SCR 388; applied.

10. The altruistic grievance of the petitioner by proxy for consumers strikes as hollow because even with the impost the petitioners' profit of Rs. 2/- per bottle is guaranteed and they are in no way adversely affected by the impost because the levy is passed on to consumers, except for the detention of their money for a day or two when they pay in advance while taking the bottles from the Warehouse and recovers it when they sell the bottle and this detention of their money for a period of two days is a triviality and is a part of any business. [670 E-F]

CIVIL APPELLATE JURISDICTION : Special Leave Petitions (Civil) Nos. 2585-2594/79.

From the Judgment and Order dated 9-3-1979 of the Delhi High Court in Civil Writ Petition Nos. 116-122 and 135-137/79.

V. S. Desai (In SLP 2585), *L. N. Sinha* (In SLP. 2586), *L. M. Singhvi* (In SLP 2587), *P.P. Rao* (In SLP 2588), *R. C. Verma*, *Y. K. Sabharwal*, *D. P. Mukherjee*, (In SLP 2589-94) and *A. K. Ganguli* (In all the S.L.Ps.) for the Petitioners.

Soli J. Sorabjee, 'Addl. Sol. Genl. *R. K. Bhatt* and *R. N. Sachthey* for the Respondent.

A The Order of the Court was delivered by DESAI, J. Law touching manufacture, import, use or consumption of liquor (as understood in common parlance) is recently vigorously assailed with almost afflicted sentimentalism that even though we have dismissed this batch of Special Leave Petitions on 23rd March, 1979, in fairness to petitioners on whose behalf all possible contentions that can be formulated by research and dialectics were advanced with eloquence and devoid of inebriation likely to be caused by the subject-matter of dispute, we propose shortly to state our reasons for dismissal of the petitions.

B To illumine the contours of controversy events preceding the promulgation of the Ordinance amending the Punjab Excise Act, 1914 ('Act' for short), as in force in the Union Territory of Delhi ('Delhi' for short) styled as Punjab Excise (Delhi Amendment) Ordinance, 1979 ('Ordinance' for short) may be stated. Punjab Excise Act, 1914 has been extended to Delhi. While implementing the provisions of the Act, the concerned authority used to hold auction for grant of licence in Form L-10 for selling country liquor and at one such auction held on 29th March 1978 the petitioners' bids were accepted and they were granted licences in Form L-10 for the period 1st April 1978 to 31st March 1979. The licence included a condition to sell a bottle of 750 ml. of country liquor at Rs. 15/- which was, *inter alia*, made up of excise duty at the rate of Rs. 10.23 and profit of licensee at the rate of Rs. 2/-. This excise duty was styled as 'still head duty' for obvious reasons. In Writ Petition No. 716/78 filed in the High Court of Delhi by certain petitioners, validity of the levy of 'still head duty' was challenged *inter alia* on the ground that it was nothing but countervailing duty and in the absence of manufacture of liquor in Delhi, countervailing duty on the import of liquor cannot be constitutionally levied. This contention found favour with a learned single Judge of the Delhi High Court and a number of Letters Patent Appeals were filed against that judgment which were pending in the High Court. In the mean time on 20th January 1979 the President of India, promulgated the Ordinance purporting to amend the Punjab Excise Act with retrospective effect and conferring power on the Government under the provisions of the Act to levy special duty on the import of country liquor in Delhi at rates not exceeding that set out in Schedule I-A which was introduced in the Act by the Ordinance Pursuant to the Ordinance amending the principal Act, the Delhi Fiscal Duty Order, 1979, was issued levying special duty at the rates set out in the order on import of country liquor into Delhi. Some of the petitioners questioned the validity generally of the Ordinance and specifically of the import of special duty in Civil Writ No. 116/79. A Division Bench of the Delhi

High Court heard the Letters Patent Appeals against the judgment of the learned single Judge of the Delhi High Court as well as the aforementioned writ petition and by a common judgment held the Ordinance as well as the impost thereunder valid and dismissed the writ petition and allowed the Letters Patent Appeals setting aside the judgment of the learned single Judge. This bunch of petitions is filed against the judgment of the Delhi High Court in Civil Writ No. 116/79 and allied writ petitions and the Letters Patent Appeals.

The cardinal question around which the various facts of controversy rotates turns upon the competence of Parliament to enact legislation under challenge which would directly impinge upon the competence of the President to issue the impugned Ordinance. Article 123 of the Constitution enables the President to issue an Ordinance in the circumstances thereunder mentioned and the power to issue Ordinance is co-extensive with the legislative power of Parliament *vide* Article 123(3). The question, therefore, is whether Parliament had the power to impose special duty on the import of country liquor in Delhi.

In order to avoid the slightest confusion it must be reiterated that the power of Parliament to legislate for Delhi is in question. Article 246(1) confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. Sub-article (3) confers similar power on the Legislature of any State with respect to any of the matters enumerated in List II. Sub-article (2) confers power both on Parliament and the State Legislature to make laws with respect to any of the matters enumerated in List III (Concurrent List). Sub-article (4) reads as under :—

“Parliament has power to make laws with respect to any matter for any part of the Territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List”.

Article 248(1) provides that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. In other words, residuary power of legislation is conferred on Parliament Sub-article (2) of Article 248 is material and may be extracted :

“(2). Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists”.

A Entry 84 in the Union List reads as under :

“84. Duties of excise on tobacco and other goods manufactured or produced in India except :—

- B** (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry”.

C Entry 97 of the Union List reads as under :

“97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists”.

D Entry 51 in the State List reads as under :

“51. 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 :

- E** (a) alcoholic liquors for human consumption;
- (b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry”.

F Entry 52 is as under :

“52. Taxes on the entry of goods into a local area for consumption, use or sale therein”.

G The relevant provisions of the impugned Ordinance may also be extracted for convenience of reference. The Ordinance in its Preamble states that by reason of certain excisable articles not being manufactured or produced in Delhi, one such being country liquor, countervailing duty is not leviable on such articles which are imported into Delhi, and proceeds to define duty in clause 5(a) of s. 3 as under :

H “(5a). “duty” means the excise duty or countervailing duty or, as the case may be, special duty;”

Clause (c) was added to clause (6) of s. 3 specifying the words "any spirit". Clause (18a) was added specifying thereunder the definition of 'special duty' which reads as under :

"(18A). "Special duty" means a tax on the import of any excisable article being an article on which countervailing duty as is mentioned in entry 51 of List II in the Seventh Schedule to the Constitution is not imposable on the ground merely that such article is not being manufactured or produced in the territory to which this Act extends".

Section 31 was amended enabling the Government to levy over and above excise duty a countervailing duty or special duty at such rate or rates not exceeding the rates set forth in Schedule IA which was also added by the Ordinance.

The contention is that Entry 51 in the State List enables the State Legislature to levy duty of excise or countervailing duty on alcoholic liquors for human consumption and that the almost corresponding Entry 84 of the Union List denies power to Parliament to levy duty of excise on alcoholic liquors for human consumption. Proceeding further it was said that initially countervailing duty was levied on the country liquor imported in Delhi and when it was found that as country liquor was not manufactured in Delhi countervailing duty could not be levied upon it, an attempt was made to levy the same duty by a camouflage of changing the name and that in pith and substance the Ordinance levies countervailing duty which Parliament had no power to levy particularly because country liquor on which duty is levied is not manufactured in Delhi.

It is an admitted position that country liquor, the subject-matter of impost, is not manufactured in Delhi. It is again an admitted position that as country liquor is not manufactured in Delhi, countervailing duty as is commonly understood could not be levied upon its import in Delhi. The question is : does that exhaust the power of Parliament to levy a duty on the import of country liquor into Delhi ?

Scheme underlying distribution of legislative powers in Part XI, Chapter I and especially Articles 246 and 248 is that except the matters specifically enumerated in List II (State List) in the Seventh Schedule, Parliament's plenary power to legislate extends to all conceivable matters which can be topic of legislation, and even this limitation on its power vanishes when Parliament legislates for part of the territory of India not included in a State. The three dimensional picture becomes complete, viz., (i) to select topic for legislation; (ii) enactment of legislation on the topic; and (iii) to impose tax in respect

A of such subject-matter of legislation, by reference to Art. 248 which confers power to make any law with respect to any matter not enumerated in Lists II and III including the power to impose tax not mentioned in either of those Lists. Under Article 246(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. Power of Parliament thus to legislate with respect to any matter for Delhi, territory not included in a State, is unabridged or unfettered by the entries in the State List. Further, residuary power of legislation including the power to levy tax is conferred on Parliament by the combined operation of Articles 246(4), 248(1) & (2) and Entry 97 in the Union List. That power is untrammelled by the limitations prescribed by Articles 246(2) and (3) and Entry 51 of State List and is plenary and absolute subject only to such restrictions as are imposed by the Constitution and we find none such which is material to the present question (*vide Mithan Lal v. State of Delhi*) (1).

D Accordingly, if excise or countervailing duty could be levied on country liquor manufactured or imported into Delhi, albeit other conditions for the levy of such duty being fulfilled, Parliament would not lack competence to levy the same only because levy of such duty on alcoholic liquors for human consumption is within the competence of a State. But it must be confessed that as country liquor is not manufactured in Delhi, the Parliament could not under Entry 51 of the State List levy either excise or countervailing duty on it. Merely because Parliament could not levy countervailing duty on country liquor imported into Delhi because country liquor is not manufactured in Delhi, it does not exhaust the power of Parliament to levy some other duty on the import of liquor if it is otherwise constitutionally permissible

G It was, however, said that Entry 51 in State List being a specific entry providing for levy of duty either on manufacture or import of country liquor and there being no other specific entry enabling to levy special duty it is inconceivable that the framers of the Constitution should have left some such levy on the import of country liquor in respect of Delhi under residuary entry. In other words, it was said that where there is a specific entry the legislation must squarely fall within the entry and correspondingly it must be assumed that it would not be covered by the residuary entry. In fact the argument went so far that before resort could be had to the residuary Entry 97 the Court in

its exploration to ascertain under which Entry the legislation falls, must proceed from the beginning and in its journey till Entry 97 if it falls somewhere, removing the camouflage under which the legislation is sought to be taken out from the specific entry, it would not be proper to say that the legislation is covered by the residuary entry. Whenever legislative competence is in question attempt of the Courts is to find out whether the legislation squarely falls in one or the other entry. If a particular legislation is covered by any specific entry well and good. If it does not, the second question would be : is it beyond the legislative competence of Parliament ? In undertaking this exercise it is quite often known that a legislation may be covered by more than one entry because an analysis has shown that the entries are overlapping. If the legislation may fall in one entry partly and part of it may be covered by the residuary entry, the legislation would none-the-less be immune from the attack on the ground of legislative competence. This was the approach adopted by a 7 Judges Bench of this Court in *Union of India v. H. S. Dhillon*(¹) wherein while examining the constitutional validity of the amended Wealth Tax Act which included the capital value of agricultural land for the purpose of computing net wealth, the controversy was whether the impugned Act was a law with respect to entry, including Entry 49 in the List II or was it one under Entry 86 read with Entry 97 or Entry 97 itself of the List I. Repelling the contention of legislative incompetence this Court held that there is nothing in the Constitution to prevent Parliament from combining its powers under one or other Entry with its power under Entry 97. The terse observation is that this Court knows no principle which debars Parliament from relying on the powers under the specified entries 1 to 96, List I and supplement them with the powers under Entry 97, List I and Article 248 or even the powers under entries in the Concurrent List. This authoritative pronouncement would answer the contention that while legislating for the Union Territories the Parliament unhampered by Articles 246(2) and (3) but enriched by Article 248(1) and (2) could legislate on any of the topics either in the List I or in List II or in exercise of the residuary power under Entry 97. There is thus no dearth of legislative competence of Parliament to enact legislation for a territory not included in a State because the power to legislate takes within its sweep matters included in all the three Lists and added to it is the residuary power on matters not specifically included in any entry in any of the three Lists.

It was, however, said that the observations in *Dhillon's case* (*supra*) are no more good law in view of the opinion of Judges constituting

(1) [1972] 2 S.C.R. 33.

- A** majority in *His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala*⁽¹⁾. The controversy in *Kesavananda Bharati's* case was about the power of the Parliament to amend the Constitution and a contention being the spill over from *I.C. Golaknath v. State of Punjab*⁽²⁾ was that apart from Article 368, Entry 97 of List I would confer power on Parliament to amend the Constitution. After pointing out that when all the three Lists were exhaustively drawn up it is difficult to believe that an important power would be kept hidden in Entry 97 of the Union List leaving to the off chance of the courts locating that power in that entry, it was said that if a subject of legislation was present to the minds of the framers of the Constitution, it could not have been left to be found by the Courts in the residuary powers. Mr. Scervai's commentary at p. 1264 on Constitutional Law of India, 2nd Edn., was pressed into service wherein it is observed that *a fortiori* if a subject of legislative power was prominently present to the minds of the framers of our Constitution, they would not have left it to be found by Courts in the residuary power. Proceeding ahead it was submitted that while enacting Entry 51 in List II the subject of levying duty on import of alcoholic liquor was present to the minds of the framers of the Constitution and, therefore, it is futile to search that power in the residuary Entry. The observations in *Kesavananda's* case (supra) have to be kept in focus in the context of the controversy whether Article 368 confers specific power of amendment of the Constitution and it was sought to be brushed aside by saying that it merely provided procedure for amendment of the Constitution and, therefore, the power for amendment must be located in the residuary Entry 97 of the Union List. The position here is materially different.

- F** With the advancement of society, expanding horizons of scientific and technical knowledge, probe into the mystery of creation, it is impossible to conceive that every imaginable head of legislation within human comprehension and within the foreseeable future could have been within the contemplation of the founding fathers and was, therefore, specifically enumerated in one or the other of three Lists, meaning thereby that three Lists were exhaustive of Governmental action and activity. Demands of welfare State, hopes and aspirations and expectations in a developing society and the complex world situation with inter-dependence and hostility amongst nations may necessitate legislation on some such topics that even for visionary they could not have been within the contemplation of the founding fathers. Complex modern governmental administration in a federal set up pro-

(1) [1973] Suppl. S.C.R. 1.

(2) [1967] 2 S.C.R. 672.

viding distribution of legislative powers coupled with power of judicial review may raise such situations that a subject of legislation may not squarely fall in any specific entry in List I or III. Simultaneously on correct appraisal it may not be covered by any entry in List II though apparently or on a superficial view it may be covered by an entry in List II. In such a situation Parliament would have power to legislate on the subject in exercise of residuary power under Entry 97, List I and it would not be proper to unduly circumscribe, corrode or whittle down this power by saying that subject of legislation was present to the mind of the framers of the Constitution because apparently it falls in one of the entries in List II and thereby deny power to legislate under Entry 97. The history of freedom struggle demonstrates in unequivocal terms the importance of residuary power of legislation being conferred on Parliament. Therefore, the scope and ambit of Entry 97 need not be whittled down or circumscribed by a process of interpretation. In any case majority decision in *Dhillon's case* (*supra*) is neither overruled nor departed from in *Kesavananda's case* (*supra*). Accordingly, once the power of Parliament to legislate on a topic is not expressly taken away by any constitutional provision, it remains intact under Entry 97 of List I.

Undoubtedly, excise and countervailing duties on alcoholic liquors for human consumption were within the contemplation of the framers of the Constitution. That is a specific topic of legislation in List II. It does not exhaust all conceivable levy that can be legitimately imposed on such items if otherwise they could be legally levied by reference to constitutional power to levy the same. And Entry 97 is a complete answer to the contention.

It was incidentally urged that Entry 52 in the State List which enables the levying of taxes on entry of goods in local area for consumption, use or sale therein was also within the contemplation of the founding fathers and that power under Entry 52 having been exercised by the Delhi Municipal Administration in the form of terminal tax the same cannot be arrogated by Parliament to itself. Terminal tax is entirely different from the special duty sought to be imposed by the impugned Ordinance. The impost is on entry of country liquor into Delhi to be recovered by the Delhi Administration for its own use. Delhi Administration and Delhi Municipal Administration are entirely different, and therefore, it cannot be said that Entry 52 excludes the power of the Parliament to levy tax on import of country liquor in Delhi.

Incidentally, the argument is that the taxing event being the import of liquor in Delhi it is exposed to double taxation, namely, the special

- A** duty levied by Parliament and the terminal tax imposed by the Municipal Administration and that is impermissible. This has merely to be mentioned to be rejected in view of the decision of this Court in *Avinder Singh & Ors. v. State of Punjab & Ors.*,⁽¹⁾ wherein it was observed that if on the same subject the legislature chooses to levy tax twice over there is no inherent invalidity in the fiscal adventure save wherever prohibitions exist.
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- C** It was next contended that what is sought to be done by the impugned Ordinance is to circumvent the decision of the learned single Judge of the High Court which invalidated the levy of countervailing duty and that at best it is a colourable legislation and that in pith and substance it is re-introduction of countervailing duty under a different nomenclature and hence unsustainable. If by a legislation tax is sought to be imposed in exercise of certain legislative power which under judicial review is found to be wanting, it does not prohibit the legislature from exercising the same power if it can be traced to provisions of the Constitution. Merely because an incorrect exercise of legislative power under a misconception of power itself is once invalidated that very legislative power if it is traceable to provisions in the Constitution cannot be struck down on the ground that it is a colourable legislation or a mere camouflage. Undoubtedly initially countervailing duty was levied but it was found that as country liquor was not manufactured in Delhi legally it was impermissible to levy countervailing duty. This is admitted in the Preamble of the Ordinance itself. It was a constitutional error to have levied such a duty and the same was pointed out. Now, if the very duty could be levied under the power which is available it can never be said that it is a colourable exercise of power or that the new impost is a camouflage for the old one. What is colourable legislation was explained by this Court in *K. C. Gajapati Narayan Deo v. State of Orissa*,⁽²⁾ and it was re-affirmed in *Maharana Shri Jayvant Singhji Ranmal Singhji etc. v. State of Gujarat*.⁽³⁾ This Court said that the idea conveyed by the expression "colourable legislation" is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed those powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise. Applying this test it is difficult to say that the impugned impost is either a camouflage or a colourable legislation. Conditions for levy of countervailing duty may not be satisfied. That
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(1) [1979] 1 S.C.C. 137. (2) [1954] S.C.R. 1.

(3) [1962] Suppl. 2 S.C.R. 411 at 440.

does not debar the Parliament from levying tax on import of country liquor if it has otherwise power to do so. It would be too trite a saying that if countervailing duty cannot be imposed there would be no power to impose duty in any form on the import of country liquor into a territory where that country liquor is not manufactured. In fact, where particular pre-requisites for levying a tax are not satisfied and it is so pointed out by a Court of law, the legislature would not lack power to levy that tax if it could be traced to the provisions of the Constitution. In such a situation Legislature has power to set at naught the judgment of the court by resort to appropriate power. This is well settled by the decision of this Court in *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*,⁽¹⁾ where the word 'rate' as used in Bombay Municipal Boroughs Act, 1925, came up for interpretation and it was held that it can be imposed on the annual letting value of the property but not on the capital value of the property. The legislature stepped in by enacting Gujarat Imposition of Tax by Municipalities (Validation) Act, 1963, providing in s. 3 thereof assessment and collection of rate on lands and buildings on the basis of capital value or a percentage of the capital value and declaring the past levy to be valid by further providing that tax on lands and buildings may be imposed either on the basis of annual letting value or on the basis of capital value. When the amending and validating Act was questioned in *Prithvi Cotton Mills Ltd. & Anr. v. Broach Borough Municipality & Ors.*,⁽²⁾ this Court observed that the legislature exercised its undoubted powers of redefining 'rate' so as to equate it to a tax on capital value and convert the tax purported to be collected as a 'rate' into a tax on lands and buildings, and thus got rid of the judgment in *Patel Gordhandas's* case, (supra). It would thus follow that merely because a statute was found to be invalid on the ground of legislative competence that does not permanently inhibit the Legislature from re-enacting the statute if the power to enact the same is properly traced and established. In such a situation it would not be correct to say that the subsequent legislation would be merely a colourable legislation or a camouflage to re-enact the invalidated previous legislation.

In passing it was mentioned that there is inherent evidence to show that the fresh impost was nothing but the invalidated countervailing duty under a guise of different nomenclature. It was said that special duty can be levied under the Act amended by the Ordinance only on the import of any 'excisable article' being an article on which countervailing duty as is mentioned in Entry 51 of List, 2, Seventh Schedule to the Constitution is not imposable on the ground merely that such

(1) [1964] 2 S.C.R. 608.

(2) [1970] 1 S.C.R. 388.

- ▲ article is not being manufactured or produced in the territory to which the Act is extended. Reference was then made to the definition of 'excisable article' in s. 3 of the Act. Excisable article has been defined to mean (a) an alcoholic liquor for human consumption, or (b) any intoxicating drug, or (c) spirit, the last being added by the impugned Ordinance. Apart from the definition, it was urged that excisable article in common parlance or by judicial interpretation has been understood to mean article on which excise is levied, or leviable. Proceeding further it was said that as country liquor was not manufactured in Delhi, excise could not be levied on it nor countervailing duty could be imposed on its import though that very liquor where manufactured may be an excisable article in that area. It was, therefore, said that subject-matter of impost being an excisable article, meaning if manufactured in Delhi excise could be levied on it, the special duty is nothing but invalidated countervailing duty on excisable article. There is no merit in this submission because the expression 'excisable article' which alone can be the subject-matter of levy of special duty is merely descriptive of the goods subject to charge. It is only an identifying mark, a tag, which would attract special duty. If liquor was manufactured in Delhi it would be an excisable article. It is that article on which, if manufactured in Delhi, excise could be levied which when imported would provide the taxing event for the levy of special duty because in the absence of manufacture in Delhi countervailing duty cannot be imposed upon it. The expression is used for identifying the subject-matter of impost and nothing more need be read into it.

The next important contention was that this impost imposed unreasonable restrictions on the freedom of inter-State trade, commerce

- ◀ and intercourse guaranteed by Article 301 or the freedom to carry on trade or business in liquor is a fundamental right under Article 19(1) being not in public interest, the enactment is constitutionally invalid. That raises the oft repeated vexed question whether right to carry on trade or business in liquor is a fundamental right under Article 19(1)(g) and the same considerations would apply for acting under Article 301.
- ◀ This question has cropped up before the Court at regular intervals but it would be sufficient to take note of two decisions to dispose of the contention. In *Har Shankar & Ors. etc. v. Dy. Excise & Taxation Commissioner & Ors.*⁽¹⁾ after referring to *Crowley v. Christansen*,⁽²⁾ and several cases of this Court it was in terms stated that there is no fundamental right to do trade or business in intoxicants. The State

(1) [1975] 3 S.C.R. 254.

(2) 54 Law. Ed. 620.

under its regulatory powers, has right to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants. In reaching this conclusion the Court took note of an important observation made in the *State of Bombay v. R. M. D. Chamarbaugwala*,⁽¹⁾ which may be extracted as under :

▲ B C D E F G H

“We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Art. 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word 'trade', 'business', or 'intercourse'. We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art. 19(1)(g) or Art. 301 of our Constitution”.

After extracting these observations this Court observed in *Har Shankar's* case (supra) that the reasons mentioned by Das, C. J. for holding that there can be no fundamental right to do trade or business in an activity like gambling apply with equal force to the alleged right to trade in liquor and those reasons may not be brushed aside by restricting them to gambling operations.

Recently, in *P. N. Kaushal & Ors. v. Union of India & Ors.*,⁽²⁾ after an exhaustive review of all previous decisions, this conclusion was affirmed that there is no fundamental right to trade or business in nauseous drinks which includes liquor. If there is no fundamental right to carry on trade or business in liquor, there is no question of its abridgement by any restriction which can be styled as unreasonable. In fact, as stated in *Har Shankar's* case, (supra) the State under its regulatory power has a right to control or even to prohibit absolutely every form of activity in relation to intoxicants apart from anything else, its import

(1) [1957] S.C.R. 874.

(2) [1978] 3 S.C.C. 558.

- A** too. This power of control is question of society's right to self-protection and it rests upon the right of the State to act for the health, moral and welfare of the people. Liquor traffic is a source of pauperism and crime. In this background it is now too late in the day to entertain an argument that imposition of tax on the import of liquor which serves the double purpose of restraining its use by making it costly and prohibiting its use on the ground that it trenches upon the manufacturers slowly and gradually to restrict its manufacture directly impinging upon its unrestricted consumption. Such an impost, therefore, can be said to be one in the public interest for preserving public health and public morals and cannot be said to be one as infringing the inter-State freedom of trade and commerce. Mr. Rao, who appeared for some of the petitioners specifically submitted that this question is no more *res-integra* in view of the decision of a Constitution Bench of this Court in *Kalyani Stores v. The State of Orissa & Ors.*⁽¹⁾ In that case the validity of a Notification enhancing the duty on the import of foreign liquors from Rs. 40/- to Rs. 70/- per L.P. Gallon was questioned on the ground that it interferes with freedom of inter-State trade and commerce guaranteed by Article 301. This challenge was upheld by the majority decision observing that—

- E** “the notification levying duty at the enhanced rate is purely a fiscal measure and cannot be said to be a reasonable restriction on the freedom of trade in the public interest... Without entering upon an exhaustive categorisation of what may be deemed “required in the public interest”, it may be said that restrictions which may validly be imposed under Art. 304(b) are those which seek to protect public health, safety, morals and property within the territory”.

- F** Since *Kalyani Stores* case (supra) judicial opinion on the vexed question of right to carry on trade or business in intoxicating drinks has undergone a sea change culminating into *Har Shankar's* case (supra) which again is a decision of 5 Judges Constitution Bench of this Court. Unfortunately the judgment in *Kalyani Stores* case is not referred to in *Har Shankar's* case. However, the undisputed position that now emerges is that there is no fundamental right to do trade or business in intoxicants. Once that latter pronouncement is unambiguous and incontrovertible a regulatory measure imposing a tax cannot be questioned on the ground of unreasonableness or want to public interest because one must not lose sight of the well accepted legal proposition that all taxes are imposed in public interest. Even apart from this, the majority judgment in *Kalyani Stores* case (supra) clearly recognises the test of

(1) [1966] 1 S.C.R. 865.

reasonable restrictions to be judged in the light of the purpose for which the restriction is imposed, i.e. as may be required in the public interest and restrictions that may validly be imposed under Article 304(b) are those which seek to protect public health, safety, morals and property within the territory. The Preamble to the impugned Ordinance clearly recites that the special duty on the importation of country liquor into Delhi is an endeavour towards bringing about prohibition of consumption of alcoholic drinks, and, therefore, it is a step in the direction of safeguarding public health.

Incidentally, however, it was stated that when the Minister piloted the Bill replacing the Ordinance it was in terms said that the Act replacing the Ordinance was purely a fiscal measure and had nothing to do with the prohibition. In the same breath it was stated that the Government was committed to total prohibition and would sincerely try to achieve this objective. Opinion of the Minister would be hardly relevant in examining the object and purpose behind enacting a certain legislation. Provision in Punjab Excise Act, 1914, conferring power on the State to direct closure of liquor shops on certain days in a week, month or year was challenged as one not of a regulatory character but introduced with the avowed object of enforcing prohibition and a contention was raised that way back in 1914 the then rulers could not have thought of enforcing prohibition through the provisions of the Punjab Act which was specifically enacted for the purpose of collecting revenue from liquor vendors and indirectly from liquor consumers. This Court in *P. N. Kaushal's* case (*supra*) while repelling this contention observed as under :—

“In short, while the imperial masters were concerned about the revenues they could make from the liquor trade they were not indifferent to the social control of this business which, if left unbridled, was fraught with danger to health, morals, public order and the flow of life without stress or distress. Indeed, even collection of revenue was intertwined with orderly milieu; and these twin objects are reflected in the scheme and provisions of the Act”.

The present levy under the amended provisions of the Act in its application to Delhi could certainly be said to be one enacted both with the object of regulating the trade or business in intoxicants and with a view to realising the goal fixed in Article 47 of the Constitution. Therefore, one can look upon this measure both as a fiscal measure and the one safeguarding public health and even public morals because it is

A well recognised that liquor trade is instinct with injury to individual and community and has serious side-effects recognised everywhere in every age. [Not to control alcohol business is to abdicate the right to rule for the good of the people] [see *P. N. Kaushal's* case (*supra*)].

B In this very breath it was, however, contended that if this Ordinance was promulgated with a view to advancing the policy of prohibition enunciated in Art. 47 it could only be prospective and not retrospective because one cannot introduce prohibition retrospectively. This argument overlooks the twin objects sought to be achieved by the measure, namely, validating an import which was found to be invalid on the ground that it was countervailing duty which could not have been legitimately imposed, and also a measure to safeguard public health and public morals. These twin objects underlying the measure would clearly permit its being retrospective because retrospective validation of impost has been recognised in a number of decisions (see *Prithvi Cotton Mills* case) (*supra*). Therefore, there is no substance in the contention that the retrospectivity of the Ordinance is illegal and invalid.

C Having given the matter our anxious consideration not swayed in any manner by moral, religious, ethical or extraneous preachers' considerations the altruistic grievance of the petitioners by proxy for consumers strikes as hollow, because even with the impost the petitioners' profit of Rs. 2/- per bottle is guaranteed and they are in no way adversely affected by the impost because the levy is passed on to consumers. For years the impugned levy was paid as countervailing duty. Then a loophole appeared which is sought to be plugged by a valid legislation. And even with this turmoil the licensee in L-10 Form having country liquor vend is assured of this profit of Rs. 2/- per bottle. The entire impost is passed on to the shoulder of consumers except for the detention of his money for a day or two when he pays in advance while taking the bottles from the Warehouse and recovers it when he sells the bottle and this detention of his money for a period of two days is a triviality which need not detain any one. It is a part of any business. Therefore, we see no substance in these petitions.

G

V.D.K.

Petitions dismissed.

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