

M. K. Paplah & Sons vs The Excise Commissioner & Anr on 20 February, 1975

Equivalent citations: 1975 AIR 1007, 1975 SCR (3) 607, AIR 1975 SUPREME COURT 1007, 1975 TAX. L. R. 1523, 1976 (1) SCJ 184, 1975 3 SCR 607, 35 STC 537, 1975 (1) SCC 492, 1975 SCC (TAX) 128, ILR 1976 KANT 879

Author: Kuttyil Kurien Mathew

Bench: Kuttyil Kurien Mathew, V.R. Krishnaiyer, P.K. Goswami

PETITIONER:

M. K. PAPLAH & SONS

Vs.

RESPONDENT:

THE EXCISE COMMISSIONER & ANR.

DATE OF JUDGMENT 20/02/1975

BENCH:

MATHEW, KUTTYIL KURIEN

BENCH:

MATHEW, KUTTYIL KURIEN

KRISHNAIYER, V.R.

GOSWAMI, P.K.

CITATION:

1975 AIR 1007

1975 SCR (3) 607

1975 SCC (1) 492

ACT:

Mysre Excise Act, 1965. Sections 16, 22 and 23 read with Mysore Excise (Distillery and Warehouse) Rules, 1967 and with Mysore Excise (Excise Duties) Rules, 1968-Excise duty. levy of Removal of arrack from Government warehouses after the purchase of the same, if attracts liability to pay excise duty.

Mysore Excise Act, 1965, Secs. 22 and 71- Delegation of power to fix rates of excise duty to Government by making rules-Legislature, if has abdicated its essential legislative function-Rule-making power, whether provides the necessary check.

Karnataka Sales Tax Act. 1957. Secs. 2, 5 and 19-Levy of sales tax upon sale of arrack made by Government to licensees-Imposition of liability to rates tax, if covered by Entry 54, List II, Schedule VII of the Constitution.

HEADNOTE:

The appellant, an excise contractor secured the privilege of vending arrack in retail in certain taluks in the State of Karnataka for a period of 18 months beginning from 28-12-1967 and ending on 30-6-69. He purchased attack 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. 'rho Government also collected sales tax on the sale price of attacks on excise duty. on health cess and on education cess for the period from 28-12-1967 to 31-1-1968 and made similar demands for the month of February. 1968 also. The appellant and other excise contractors filed writ petitions in the High Court at 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.

It was contended for the appellant (i) that no excise duty can be levied on a licensee in respect of the quantity of arrack purchased by him from Government depots, (ii) that the. power to fix the rate of excise duty conferred under s.. 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 (iii) that no sales tax could be levied on the price for sale of arrack since S. 19 of the Mysore Sales Tax Act, 1957 under which the tax was levied was beyond the legislative competence of the state legislature.

Rejecting the contentions and dismissing the appeals,

HELD : (i) It is clear from the return filed before the High Court that the Government purchases arrack from the distillers and keeps it in the warehouses established or licensed under s. 16 and that any removal of arrack after the purchase of the same will attract the liability to pay excise duty. Section 23 provides that excise duty shall be levied on the excisable article issued from a warehouse also. It cannot be said that a warehouse established or licensed under S. 16(e) is not warehouse within the meaning of that expression in s. 23. [609G-610A]

(ii) The High Court held that the preamble of the Act would serve as a guidance to fix the rates of excise duty. It cannot be said with certainty that 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. In this case, a. 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. The laying of rules before the legislature provides control over delegated legislation. Again the legislature may also retain its control over its delegate by exercising its power of repeal the power to fix the rate of excise duty conferred on the Government by s. 22 is valid. [6140E-F; 614 E-F]

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Corporation of Calcutta & Anr. v. Liberty Cinema, [1965] 2. S.C-R 477, Batwrsi Das v. State of Madhya Pradesh, [1959] S.C.R. 427, Municipal Board, Hapur v. Raghuvendra Kripal [1966] 1 S.C.R. 1950, Devi Dass Gopal Krishan v. State of Punjab, [1967] 3 S.C.R- 557, Municipal Corporation of Delhi v. Birla Cotton Spinding and Weaving Mills, [1968] 3 S.C.R. 251, Sita Ram Bisliambhar Dayal v. State of U.P. [1972] 2 S.C.R. 141, Minister of Health v. The King, [1931] A.C. 524, Institute of Patent Agents v. Joseph Lockwood, [1894] A.C. 347 and Cobb & Co. v. Kropp, [1967] 1 A.C. 141 (P.C.), referred to.

(iii) Section 19 of the Karnataka Sales Tax Act. 1957. makes it clear that notwithstanding anything contained in this Act of 1957, 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 s. 2 or & 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. Section 19 is therefore, not ultra vires the powers of the legislature. [615A-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 1883 to 1886 of 1969.

From the judgment & Order dated the 12th July, 1968 of the Mysore High Court in W.P. Nos. 949, 955, 956 and 958 of 1968.

K. Srinivasan and Vineet Kumar, for the appellants. H. B. Datar (In C.A. No. 1883/69) and M. Veerappa, for the respondents.

The Judgment of the Court was delivered by MATHEW, J. 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 28-12-1967 and ending on 30-6-1969. 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 28-12-1967 to 31-1-1968 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. 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 s. 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 S. 19 of the Mysore Sales Tax Act, 1957 under which the tax was levied was beyond the legislative competence of the state legislature.

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.

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.

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.

The material portion of s. 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.

It is clear from the return filed before the High Court that the Government purchase arrack from the distillers and keeps it in the warehouse established or licensed under s. 16 and that any removal of arrack after the purchase of the same will attract the liability to pay excise duty shall be levied on the excisable article issued from a ware-Excise Commissioner who is competent to establish or license a

warehouse wherein intoxicants may be deposited and kept under clause (e) of s. 16 and therefore it is not a warehouse established or licensed by the State Government. We see no force in this contention. Section 23 provides that excise duty shall be levied on the excisable article issued from a ware-

house also. We see no reason to think that a warehouse established or licensed under s. 16(e) is not warehouse within the meaning of that expression in S. 23. The second contention raised by the appellant was that S. 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 there- fore the section is bad.

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 Rely 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 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.

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.

In Corporation of Calcutta & Anr. v. Liberty Cinema(1), the validity of S. 548(2) of the Calcutta Municipal Act, 1951, which empowered the Corporation to levy fees "at such rates as 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 Madhya Pradesh (2) holding that the fixation 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.

In Municipal Board, Hapur v. Raghuvendra Kripal(2) the validity 1916, was involved. Ile Act had to fix the rate of tax and after having of the U.P. Municipalities Act, empowered the municipalities enumerated the kinds of taxes to be levied, prescribed an elaborate (1) [1965] 2,S.C.R.477. (2) [1959] S.C.R. 427. (3) [1966] 1 S.C.R. 950 procedure for such a levy and also provided for the sanction of the Government., Section 135 (3) of the Act raised a conclusive prerumption 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 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.

In *Devi Dass Gopal Krishnan v. State of Punjab*(1) the question was whether s. 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*(1), the main question was about the constitutionality of delegation of taxing powers to municipal corporations. The Delhi Municipal Corporation Act (66 of 1957) by s. 113(2) had empowered the Corporation to levy certain optional taxes. Under s. 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 (1) [1967]3, S.C.R. 557.

(2) [1968] 3, S.C.R. 251 .

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 watchdog 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."

In *Sita Ram Bisharnbhar Dayal v. State of U.P.*(1) s. 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 :

"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."

In this case, we think that s. 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 (1) [1972] 2, S.C.R. 141.

be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

The appellant submitted that s. 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. 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. The King*(1) 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 'aid before Parliament and might be annulled by a resolution of either House within a limited period."

In *Institute of Patent Agents v. Joseph Lockwood* (2) 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."

In Bernard Schewartz'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."

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."(3). 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*(4) 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 (1) [1931] A.C. 524. (2) [1894] A.C. 347. (3) see Landis, "The Administrative Process", 77 (1938). (4) [1967] 1, A.C. 141 (P. C.).

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 sovereign power to levy taxes, nor had it renounced or abdicated 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 A. C. 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) A.C. 945 at 945)."

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 T port inasmuch as it could at any time repeal the legislation and with draw the authority and discretion it had vested in him, and, therefore the legislature did not abdicate its functions. We, therefore, think that the power to fix the rate of excise duty conferred on the government by s. 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. The last contention raised by the appellant was that s. 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 s. 2 of the Act excludes the Government of Mysore and that by virtue of the provisions in s. 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.-Notwithstanding 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."

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 = 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, not withstanding anything contained in s. 2 or s. 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 If of the Seventh Schedule of the Constitution.

We do not think that s. 19 is ultra vires the powers of the, legislature.

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

V.M.K.

Appeals dismissed.