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Court : Andhra Pradesh

Decided On : Nov-01-2001

Reported in : 2002(2)ALT372; [2002]126STC418(AP)

Judge : S.R. Nayak and ;S. Ananda Reddy, JJ.

Acts : Constitution of India - Articles 14, 245, 246 and 246(3); Andhra Pradesh Tax on Luxuries in Hotels and Lodging Houses Act, 1987 - Sections 2, 3, and 5; Andhra Pradesh Tax on Luxuries in Hotels and Lodging Houses (Amendment) Act, 1996

Appeal No. : Writ Petition No. 22586 of 2001

Appellant : Rainbow Children's Medicare (P) Ltd.

Respondent : Deputy Commercial Tax Officer, Vigilance and Enforcement and Ors.

Advocate for Def. : Special Govt. Pleader for Taxes

Advocate for Pet/Ap. : S. Krishna Murthy, Adv.

Disposition : Writ petition dismissed

Judgement :
ORDER

S.R. Nayak, J.

1. In this writ petition, the petitioner has assailed the constitutional validity of the Andhra Pradesh Tax on Luxuries in Hotels and Lodging Houses Act, 1987 as amended by the Andhra Pradesh Tax on Luxuries in Hotels and Lodging Houses (Amendment) Act (Amendment Act 28 of 1996) in so far as it relates to the levy of luxuries tax on corporate hospitals.

2. The petitioner is Rainbow Children's Medicare (P) Limited, and it is a private limited company and is running a children's hospital established in the year 1998 with all modern medical equipments making use of the services of highly trained medical professionals. The main object of the petitioner, it is stated, is to provide paediatric and neo natal services to the people at large. It is also stated that the management of the hospital has made provision to render medical services to poor and needy by free/concessional services.

3. According to the petitioner, the Deputy Commercial Tax Officer, Vigilance and Enforcement, Hyderabad City Range, the first respondent herein, visited the hospital and instructed the Assistant Manager in-charge of the hospital to pay luxury tax under the Act and a report was sent to the Commercial Tax Officer, Jubilee Hills Circle, Hyderabad, the second respondent, in that regard. The second respondent deputed the Deputy Commercial Tax Officer, Jubilee Hills Circle, Hyderabad, the third respondent herein to inspect the petitioner's hospital and accordingly the third respondent visited the hospital and directed the petitioner to file information regarding the collections made towards charges for the various amenities and facilities provided in the hospital. In pursuance of the direction issued by the third respondent computed the liability of luxury tax at Rs. 70,687. Thereafterwards, according to the petitioner, the third respondent has been demanding payment of the determined luxury tax on pain of taking coercive action.

4. Under these circumstances the petitioner has filed this writ petition. The prayer reads :

'For the reasons stated in the accompanying affidavit, the petitioner herein prays that this honourable court may be pleased to issue a writ or order or direction particularly one in nature of writ of mandamus declaring the amendments made to Sections 2, 3 and 5 of the A.P. Tax on Luxuries Act, 1987 by Act No. 28 of 1996 in so far as they relate to the levy of luxury tax on corporate hospitals are beyond the legislative competence of the State Legislature and therefore unconstitutional or to pass such further order or orders as this honourable Court may deem fit and proper in the circumstances of the case.'

5. Sri S. Krishna Murthy, learned counsel for the petitioner would first contend that the Amendment Act is beyond the legislative competence of the State Legislature. Secondly the learned counsel placing reliance on the judgments of the Supreme Court in A.B. Abdul Kadir v. State of Kerala : [1976]2SCR690 and State of Himachal Pradesh v. Associated Hotels of India Ltd. [1972] 29 STC 474, would contend that provision for air-conditioned accommodation in the hospital is an indispensable necessity and therefore it can never be treated as luxury and if that is so the State Legislature inherently lacks the power to enact the law providing for taxation of air-conditioned accommodation in corporate hospital by virtue of the power granted under entry 62 of List II--State List, Seventh Schedule read with Article 246(3) of the Constitution. Thirdly Sri S. Krishna Murthy, learned counsel for the petitioner would contend that the impugned enactment is otherwise totally arbitrary and unreasonable and violative of Article 14 of the Constitution of India. The counsel would maintain that providing incubators and air-conditioned accommodation to the infants and children after they are born cannot be considered as luxury and therefore the Amendment Act is totally arbitrary and unreasonable.

6. By Amendment Act No. 28 of 1996 which came into force with effect from August 1, 1996, the following amendments were made to the Act :

(i) In Section 2, the following definitions were inserted :

'(cc) 'corporate hospital' means, hospital registered under the provisions of the Societies Registration Act which is in force in the State or the Companies Act, 1956 and where residential accommodation with or without board is provided for

cash or deferred payment to any person or his attendant for undergoing treatment..............(g) 'luxury provided in a hotel' means the accommodation for residence provided in a hotel including air-conditioning, television, radio, music, extra beds and the like but does not include the charges for food, drink and telephone calls.

(gg) 'luxury provided in a hospital' means the accommodation provided in a corporate hospital for any patient or his attendant including air-conditioning, television, radio, or any other service provided thereto in connection with the residence but does not include any charges for the medical services rendered in connection with the treatment or any amount charged for conducting any medical test or any medicines used by the hospital either for check up or treatment ; and

(ggg) 'luxuries' include luxuries provided in a hotel, and corporate hospital and any commodities as specified in the Schedule for enjoyment over and above the necessaries of life.'

(ii) The charging Section 3 has been amended providing for levy and collection of tax in respect of accommodation provided by the hospitals for their patients/attendants for their residence during their post-operative period. It reads :

'In the principal Act, in Section 3, in Sub-section (1) for the opening portion, the following shall be substituted, namely :--

'Subject to the provisions of the Act, there shall be levied and collected from every person residing in a hotel or a corporate hospital where the rate of charge in respect of any luxury provided in a hotel to him is Rs. 60 or more per day per person, a tax at the rate of ten per centum of such rate and from every person residing in a corporate hospital where the rate of charge in respect of any luxury provided in a corporate hospital to him is Rs. 500 or more per day, a tax at the rate of ten per centum of such rate ;'' (ii) in the proviso, for the words, 'customs of the hotel' the words 'customs of the hotel or corporate hospital' shall be substituted.

(iii) in Section 5 of the principal Act, Sub-section (1A) was added after Sub-section (1). It reads :

'(1A) Where no separate charges for luxury provided in a corporate hospital and for the medical services rendered are specified, but a consolidated payment is required to be made both for luxury provided and for the medical services rendered, the assessing authority may from time to time, after giving the proprietor an opportunity of being heard, fix a separate rate of charges for such luxury and for the medical services for the purpose of calculating tax under this Act.' Article 246 of the Constitution reads :

'Subject-matter of laws made by Parliament and by the Legislatures of States.--(1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the 'Union List').

(2) Notwithstanding anything in Clause (3), Parliament, and, subject to Clause (1), the Legislature of any State ...also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the 'Concurrent List').

(3) Subject to Clauses (1) and (2), the Legislature of any State...has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').

(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.'

7. Article 246 deals with the distribution of the legislative powers as between the Union and the State Legislatures, with reference to the different Lists in the Seventh Schedule. The gist of the article, in short is that the Union Parliament has full and exclusive power to legislate with respect to matters in List I and has also power to legislate with respect to matter in List III. The State Legislature, on the other hand, has exclusive power to legislate with respect to matters in List II, minus falling in Lists I and III and has concurrent power with respect to matters included in List III. Article 246 provides for the distribution, as between the Union

and the States, of the legislative power which is conferred by Article 245. It is true that since the legislative powers of the Legislatures of the Union and the States being limited by the provisions relating to distribution of powers and other mandatory limitations imposed by different provisions of the Constitution, a law passed without legislative competence is a nullity ab initio and nothing can be done to cure that law.

8. It is well-settled law that a law made by Parliament or State Legislature can be struck down by courts as unconstitutional only on two grounds and those two grounds are, viz., (1) lack of legislative competence, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. Entry 62 of List II provides for taxes on luxuries including taxes on entertainments, amusements, betting and gambling. The power of the State Legislature under Article 246(3) read with entry 62 of List II--State List, would clearly show that the State Legislature is competent to enact law on taxes on all kinds of luxuries or luxuries generally. Power to legislate on taxes on luxuries, as per entry 62 of List II--State List, is not restricted to certain entities like hotels, or clubs, etc., only. In other words, the State Legislature is competent to enact law providing taxation on all kinds of luxuries. If that is so, it cannot be said that the A.P. State Legislature lacks legislative competence under Article 245 read with Article 246 of the Constitution to enact a law in respect of luxuries provided in corporate hospitals.

9. The contention of the learned counsel for the petitioner that providing the incubators and air-condition to the infants and children and their attendants cannot be considered as luxury and these facilities are an indispensable necessity and not a luxury cannot be accepted.

10. In A.B. Abdul Kadir v. State of Kerala : [1976]2SCR690 , the Supreme Court dealing with a contention that the tax on the vending and stocking of tobacco cannot be considered to be luxury tax, as contemplated by entry 62 of List II of the Seventh Schedule to the Constitution, held :

'......According to that entry, the State Legislatures can make laws in respect of 'taxes on luxuries, including taxes on entertainments, amusements, betting and

gambling'. Question, therefore, arises as to whether tobacco can be considered to be an article of luxury. The word 'luxury' in the above context has not been used in the sense of something pertaining to the exclusive preserve of the rich. The fact that the use of an article is popular among the poor sections of the population would not detract from its description or nature of being an article of luxury. The connotation of the word 'luxury' is something which conduces enjoyment over and above the necessaries of life. It denotes something which is superfluous and not indispensable and to which we take with a view to enjoy, amuse or entertain ourselves. An expenditure on something which is in excess of what is required for economic and personal well-being would be expenditure on luxury although the expenditure may be of a nature which is incurred by a large number of people, including those not economically well off. According to 'Encyclopaedia Britannica', luxury tax is 'a tax on commodities or services that are considered to be luxuries rather than necessities'.....'.

11. It cannot be said that air-conditioned accommodation to the new born babies and the children and their attendants in a hospital is an absolute indispensable necessity. Be that as it may, in a given case, the question whether providing incubator and air-conditioned room to a newly born child is an indispensable necessity or not is always a question of fact. Therefore, an assessee under the Act can raise such plea before the assessing authority and contend that it is not liable to tax on the charges collected by it in providing incubators and the air-conditioned accommodation to the new born child because that was an absolute indispensable necessity and not a luxury. The contention of Sri S. Krishna Murthy, learned counsel for the petitioner, that the respondent-statutory authorities under the Act are abusing the provisions of the Act to impose tax on the petitioner's hospital even in respect of the charges collected by it for providing incubators and air-conditioned accommodation to the new born babies though such a provision was an absolute and indispensable necessity, even if it is true, is not a well-founded ground to assail the constitutional validity of a statute. Should it be noted that it is trite law that an enactment cannot be declared to be invalid solely on the ground that such an enactment is capable of being misused or abused. It is because every power is capable of being used as well as misused or abused. Every power is capable of being exercised arbitrarily, unreasonably and unfairly. Therefore,

simply because a power granted to an authority is capable of being misused or abused that circumstance can never be a valid ground to strike down a law enacted by a competent Legislature, which is otherwise valid. If a donee of the power under a statute abuses or misuses the power or such a power is exercised arbitrarily and irrationally, the affected person can always invoke jurisdiction of the Constitutional courts seeking judicial review of such action and seeking appropriate redressal to the injury suffered by him/her or it or resort to private law review remedies like declaration, injunction and for damages. Further, no enactment can be struck down by the Constitutional courts just saying that in the. opinion of the court it is arbitrary or unreasonable. Although non-arbitrariness, reasonableness and fairness are postulates of Article 14 of the Constitution, when an enactment is sought to be struck down on the ground of arbitrariness and unreasonableness, the reviewing court should find some or other constitutional infirmity in addition to those grounds before invalidating the enactment. An enactment cannot be struck down merely on the ground that the court thinks it is unjustified and unwise. The Supreme Court in State of Andhra Pradesh v. McDowell & Co. : [1996]3SCR721 has observed :

'...No court in the United Kingdom can strike down an Act made by the Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the Federal Government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of the Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by the Parliament or the Legislatures can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness--concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe

curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the Legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of. Article 19(1), it can be struck down only if it is found not saved by any of the Clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety [See Council of Civil Services Union v. Minister for the Civil Services 1985 AC 374 ; (1984) 3 All ER 935 ; (1984) 3 WLR 1174 which decision has been accepted by this Court as well]. The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. [See the opinions of Lords Lowry and Ackner in R. v. Secretary of State for the Home Departments Ex parte Brind 1991 AC 696 at 766-767 and 762; (1991) 1 All ER 720]. It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it thinks it unreasonable, unnecessary or unwarranted.'

12. In S. Bharat Kumar v. Government of Andhra Pradesh : 2000(6)ALD217 , a division Bench of this Court speaking through one of us (S.R. Nayak, J.), has observed in para 27 as follows :

'27. It is trite law that mandamus is the proper relief to be asked for where the petitioner seeks a declaration that an 'Act' or 'Ordinance' is unconstitutional and a consequential direction restraining the State and its officers or the concerned statutory authorities, as the case may be, from interfering or giving effect to the provisions of such unconstitutional law. It is also trite law that the presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles and limits, whether it is a pre-constitution or post-constitution law. This position is well-settled by the judgments of the apex Court in Chiranjit Lal Chowdhuri v. Union of India [1950] SCR 869. In Madhu Limaye v. Sub-Divisional Magistrate : 1971 CriLJ1720 and in Cf Rao Bahadur v. State of U.P. [1953] SCR 1188, the Supreme Court held that the burden of proving all the facts which are requisite for the constitutional invalidity is upon the person who challenges the same. However, it is not to state that by reason of the presumption in considering the validity of the impugned law, the court will be restricted to the pleadings only. The court would be free to satisfy itself whether under any provision of the Constitution the impugned law can be sustained having due regard to the circumstances in which such law was enacted, as opined by the Supreme Court in Burrakur Coal Co. Ltd. v. Union of India : [1962]1SCR44 , Hamdard Dawakhana v. Union of India : 1960 CriLJ671 . For the same reason, the court should, if possible, make such a progressive and/ or narrow construction of the impugned statute as would sustain its constitutional validity, as opined by the Supreme Court in Sunil Batra v. Delhi Administration, AIR 1978 SC 1675. The Supreme Court in Naresh Shridhar Mirajkar v. State of Maharashtra 0044/1966 : [1966]3SCR744 , has opined that the court should not cover grounds or make observations on points not directly involved in that proceeding, thereby meaning that unless a point arises for consideration and decision out of the pleadings of the parties, the court shall not express its opinion on such point. It is well-settled by the judgments of the Supreme Court in Diamond Sugar Mills v. State of Uttar Pradesh : [1961]3SCR242 , Navinchandra Mafatlal v. Commissioner of Income-tax

: [1954]26ITR758(SC) and in Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India : 1991 CriLJ1391 , that when the vires of an enactment is challenged, and there is any difficulty in ascertaining the limits of a Legislature's power, the difficulty must be resolved, so far as possible, in favour of the legislative body, putting the most liberal construction upon the relevant legislative entry so that it may have the widest amplitude, and looking at the substance of the legislation.'

Further, in the same judgment, the division Bench in para (40) has observed as under :

'.....It is true that it will become the duty of the Constitutional courts under our Constitution to declare a law enacted by the Parliament or the State Legislature as unconstitutional when the Parliament or the State Legislature has assumed to enact a law which is void, either from want of constitutional power to enact it, or because the constitutional norms or conditions have not been observed, or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution or any other substantive constitutional provisions. It is needless to state that Legislature and judiciary are co-ordinate organs of the State, of equal dignity and status under the constitutional, scheme. It is permissible for the constitutional courts to declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. The court while declaring a law as invalid or unconstitutional is only enforcing the legislative will and the limits imposed by the Constitution on the law-making bodies. No court can declare a statute unconstitutional and void, solely on the ground of unjust and harsh provisions, or because it is supposed to violate some natural, social, political or economic rights of the citizen, unless it can be shown that such injustice is, in fact, prohibited or such rights guaranteed or protected by the Constitution. Strictly speaking, the courts are not guardians of all kinds of rights of the people of the State, unless those rights are secured and protected by some constitutional provisions which comes within the judicial cognizance. In 'A Treatise on the Constitutional Limitations' by Thomas M. Cooley, it is stated that the court cannot run a race of opinions upon points of right, reason, and expediency with the law-making power, and that any legislative act which

does not encroach upon the power apportioned to the other organs of the State, being prima facie valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the constitution itself, and the case shown to come within them. In the same Treatise, it is also stated that the courts are not at liberty to declare statutes void because of their apparent injustice and impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental rights of republican Government, unless it shall be found that those rights are placed beyond legislative encroachment by the Constitution nor are the courts at liberty to declare an enactment unconstitutional, because in their opinion it is opposed to a spirit supposed to pervade the Constitution, but not expressed in words or discernible from the context. It is not permissible to limit the legislative power of the Legislatures by judicial interposition, except so far as the expressed words a written Constitution gives that authority to the court. In 'A Treatise on the Constitutional Limitations' by Thomas M. Cooley, it is aptly stated that the law-making power of the State recognizes no restraints, and is bound by none except such as or imposed by the Constitution itself placing reliance on the opinion handed down in Sill v. Village of Corning 15 NY 303.

13. In the premise of the above noticed well-settled position in law, none of the grounds urged by Sri S. Krishna Murthy, learned counsel for the petitioner while assailing the constitutional validity of the Amendment Act No. 28 of 1996 in so far as it relates to the levy of luxury tax on 'corporate hospitals' deserves our acceptance. The writ petition is devoid of merit. In the result, we uphold the constitutional validity of the Andhra Pradesh Tax on Luxuries in Hotels and Lodging Houses Act, 1987 as amended by Andhra Pradesh Tax on Luxuries in Hotels and Lodging Houses (Amendment) Act (Amendment Act No. 28 of 1996) in so far as it relates to levy of luxuries tax on corporate hospitals and consequently dismiss the writ petition with no order as to costs.

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