

State Vs. Philipose Philip

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Court : Kerala

Decided On : Nov-11-1953

Reported in : 1954CriLJ669

Judge : Koshi, C.J. and; M.S. Menon, J.

Appellant : State

Respondent : Philipose Philip

Judgement :

M.S. Menon, J.

1. By O. P. No. 93 of 1952 accused Nos. 1 and 2 In O. O. No. 156 of 1950 of the Division First Class Magistrate's Court, Kottayam, moved this Court for a withdrawal of the said case to this Court under Article 228 of the Constitution on the ground that the case involved substantial questions of law as to the interpretation of the Constitution. The prayer was allowed by Vithayathil, J. and the facts of the case and the questions that arise for consideration are set out as follows in his order dated the 4th August 1953:

This is a petition under Article 228 of the Constitution of India for withdrawing to this Court Calendar Case No. 256 of 1950 on the file of the Division First Class Magistrate's Court, Kottayam, on the ground that that case involves a substantial question of law as to the interpretation of the Constitution. The charges against the

petitioners are under Sections 14 and 73 of Act V of 1950. Section 14 of the Act makes it an offence to contravene any order notified by Government under Section 3 of the Act relating to production or manufacture of essential articles. Orders dated 21-11-1942 and 1-2-1943 are the notified orders alleged to have been contravened by the accused. The notification dated 21-11-1942 prohibits the transportation of paddy and rice between 10 p. m. and 6 a. m. except under a permit issued by officers authorised in that behalf. Notification dated 1-2-1943 prohibits the owner, manager or other person in charge of a rice mill from managing the business of hulling rice. The petitioner's case is that this notification is in violation of the fundamental right conferred under Article 19(1)(g) of the Constitution. It is also contended that it is in violation of Article 14 inasmuch as there is no such restriction in the erstwhile Cochin area. So far as the notification dated 21-11-1942, is concerned, it is contended that Section 3 of the Public Safety Measures Act under which it was issued is in conflict with Articles 301 and 304 of the Constitution. It is not disputed that the questions raised in this case are substantial questions of law as to the interpretation of the Constitution and that the determination of these questions is necessary for the disposal of the case.

(2) I therefore withdraw the case to this Court under Article 228 of the Constitution.

2. The notifications referred to in the order are as follows:

R. O. C. N. 3211/42/C. S. dated the 21st November 1942.

In exercise of the powers conferred by Rule 81 of the Defence of Travancore Rules, the Government of His Highness the Maharaja are pleased to prohibit the transportation of paddy and rice in the State between 10 p. m. and 6 a. m. except under a permit issued by-

(1) The Division Peishkar concerned or such other officer authorised by him in the case of transport within the same District; or

(2) the Food Grains Controller in the case of transports from one District to another.

'R. O. C. No. 2477/42/C. F. S. dated the 1st February 1943.

In exercise of the powers conferred by Rule 81 of the Defence of Travancore Rules, the Government of His Highness the Maharaja hereby order that with effect from the 15th February 1943, no owner, manager or other person in charge of a Rice Mill shall engage in the business of hulling of rice in any part of the State.

They were in force on the date of the alleged offence, namely 24-4-1950, by virtue of Section 73 of the Travancore-Cochin Public Safety Measures Act, 1950, which provides:

(1) The enactments mentioned in the Second Schedule are hereby repealed.

(2) All orders made or deemed to be made under the enactments referred to in Sub-section (1), and in force immediately prior to the commencement of this Act shall continue in force and be deemed to have been made and shall have effect as if they have been made under this Act, and all appointments made, licenses or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Act.

* * *

3. The first contention urged on behalf of the accused is that Section 3 of the Travancore-Cochin Public Safety Measures Act, 1950, is void and inoperative for lack of the Presidential sanction insisted upon by the proviso to Article 304(b) of the Constitution and as we are accepting the said contention it is unnecessary for us to consider the further position taken up by them before us, namely, that there has been a violation of Articles 14 and 19 as well. Article 304 occurs in Part XIII of the Constitution which consists of Articles 301 - 307 and is entitled 'Trade, Commerce and Intercourse within the Territory of India.' There is no doubt that this is one of the more difficult parts of the Constitution and there is considerable force in the criticism of Sir Iver Jennings:

The new generation of Australian lawyers would like to get rid of Section 92 of their Constitution, which seems to them to be more trouble than it is worth. It seems certain that in twenty years Indian lawyers will be able to point out that the

Australian lawyers do not know what trouble is. Part XIII exhibits the major defect of the Indian Constitution, a reluctance to trust the Legislatures combined with a reluctance to allow the courts to engage in judicious law-making through the interpretation of broad and general provisions.(Some Characteristics of the Indian Constitution).

4. The Articles material for the disposal of this case are Articles 301 and 304:

301. Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.' '301. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law-

(a) impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are, subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest.

Provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

and the arguments on behalf of the State were:

(1) that Article 304 deals only with interstate trade, commerce and intercourse and not with trade, commerce and intercourse confined to the limits of one State; and

(2) that even if trade, commerce and intercourse within two points in the same State come within the ambit of Article 304, the whole of Section 3 should not be declared 'ultra vires' of the Constitution, that there are separable portions of Section 3 which deal only with transport and manufacture and that those portions should be saved.

5. Point No. 1. The 'trade, commerce and intercourse' referred to in Article 304 is trade, commerce and intercourse 'with or within a State' and the freedom of trade,

commerce and intercourse enshrined in Article 301 is not a freedom of trade 'among the States' as in Sections 51(1) and 92 of the Commonwealth of Australian Constitution Act but 'throughout the territory of India'. The question as to whether the operation of Article 304 should be confined as contended by Mr. Shenoi on behalf of the State has been considered and negatived in a recent order by a Division Bench of this Court, - *George v. State of Travancore-Cochin* AIR, 1954 Trav-C 34 (A). There is a full discussion, of all the aspects of the case in that order and we do not think that any useful purpose will be served by our covering the ground afresh.

6. The question as to whether the words 'or within the State' mean only inter-State trade passing beyond the frontiers of the States or whether it also includes trade between two points within the same State, has been specifically and we think correctly, dealt with as follows in Mr. Basu's commentary on the Constitution, page 747:

'Or within the State'. - These words elucidate the words 'throughout the territory of India' in Article 301 meaning that the freedom of trade, declared in Article 301 is the freedom not only between one State and another, but also between different parts of the same State.

7. Mr. Nicholas in his Australian Constitution also seems to take the same view. After pointing out how the power of the Commonwealth Parliament does not extend to intra-State trade and how no section of the Australian Constitution has given rise 'to so much litigation or to so many and such persistent differences of judicial opinion' he deals with Part XIII of the Indian Constitution as follows ;

Sections 301 to 307 contain the provisions of the Constitution of India relating to freedom of trade, commerce and intercourse. The draftsmen would appear to have studied the decisions of Australian courts and of the Privy Council and to have sought to avoid Australian controversies while applying the section to Indian conditions. Section 301 provides that subject to other provisions trade, commerce and intercourse throughout the territory of India shall be free - a section almost identical with Section 92 of the 1891 draft of the Constitution of the commonwealth and 'not limited to inter-State dealings'. The underlining (here in ' ') is ours.

8. Point No. 2, The considerations to be borne in mind in deciding whether any portion of Section 3 can be saved or not can be summarised in the words of Crawford (Construction of Statutes, p. 216) as follows:

Simply because a statute happens to be unconstitutional, or invalid in part, does not necessarily mean that the part which is not invalid must also fail, not even though the statute be penal. It is only where the valid parts are so clearly dependent upon and so inseparably connected with the invalid parts that they cannot be separated without defeating the object of the Statute, that they too must fall with those parts which are invalid. It is also well to remember that separability is not dependent upon whether the various provisions are contained in the same section, for the division of a statute into sections is purely artificial. In determining separability, the test is whether the legislature has manifested an intention to deal with a part of the subject matter covered, irrespective of the rest of the subject matter; if such an intention is manifest the subject matter is separable. If the valid parts are complete in themselves and independent of the invalid parts and capable of being executed according to the intention of the legislature they must be sustained by the court notwithstanding partial invalidity. The invalid parts, however may be dropped only where the part which is retained is fully operative as a law. And where the invalid and the valid parts are independent & essentially and inseparably connected in substance, there is a strong presumption that the legislature would not have enacted one part without the other, and the entire statute will fall, A similar result will occur where all the provisions of an Act are connected as parts of a single scheme. In such a case, if the main object or purpose is invalid, those provisions which are incidental will also fall. But in any instance, there is a presumption that the legislature intended for the statute or Act to be effective in its entirety unless something in the Act indicates to the contrary.

In order to ascertain the intention of the legislature, the court may examine the entire statute, including the invalid as well as the valid portions, and resort to the usual principles of statutory construction. But where it is impossible to determine what part of a statute was intended by the legislature to be operative when certain of its provisions have been held invalid, the whole statute will fall.

and applying these considerations we have no doubt that the whole of Section 3 has to go and that no portion of it can be sustained.

It follows that we cannot but endorse the conclusion reached in - 'AIR 1954 Trav-C 34 (A):

The result is that Section 3 of the Public Safety Measures Act 1950 (Act V of 1950) has to be declared illegal and void.

and discharge accused Nos. 1 to 6 under Section 253 (2) of the Code of Criminal Procedure, 1898. Order accordingly.

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