

S. Ananthakrishnan Vs. the State of Madras

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Court : Chennai

Decided On : Oct-19-1951

Reported in : AIR1952Mad395; (1952)1MLJ208

Judge : Rajamannar, C.J. and ;Venkatarama Aiyar, J.

Acts : [Stamp Act, 1899](#) - Schedule - Articles 25 and 30; [Constitution of India](#) - Articles 12, 13, 14, 19(1), 265, 268, 269 and 276

Appeal No. : Civil Misc. Petn. No. 7894 of 1951

Appellant : S. Ananthakrishnan

Respondent : The State of Madras

Advocate for Def. : Adv. General for the State Counsel

Advocate for Pet/Ap. : K.V. Venkatasubramania Aiyar and ;P. Anandan Nambiar, Adv.

Disposition : Application dismissed

Judgement :

1.This is an application made under Article 226 of the Constitution. The petitioner is a Law Graduate of the Madras University. According to the statements made in his affidavit in support of the application, he has completed the prescribed term of apprenticeship and passed the Bar Council examinations in Practice and

Procedure and has complied with all the requirements prescribed under the rules framed by the Madras Bar Council under the Indian Bar Councils Act. He is an applicant to be admitted to the rolls of this High Court as an advocate thereof. His complaint and the relief which he seeks from this Court are thus set out in the following paragraphs in his affidavit:

"3. I am a citizen of India. Article 19(1)(g) of the [Constitution of India](#) secures to me the right to practise any profession. I am desirous of practising the profession of law, and with that view, I have applied to be enrolled as an Advocate of this Honourable Court.

4. Under Section 8 of the Act 1 will not be deemed to be entitled to practice the profession of law before the High Court unless I have been enrolled as an advocate thereof. The Madras Stamp Amendment Act of 1922, by Article 25 of Schedule I-A prescribes a fee of Rs. 625 for enrolment as an Advocate

5. I desire to bring to the consideration of this Honourable Court the question whether the right to practise any profession secured to me under Article 19(1)(g) of the Constitution, can be subjected to restrictions other than those prescribed in clause 6 of the same article, and whether that provision of the Madras Stamp Amendment Act of 1922, prescribing a fee of Rs. 625 could be sustained at all in view of the provisions of the [Constitution of India](#), particularly Article 19(1)(g) read with Article 13(1). I submit, however, that whatever might have been the legality or propriety of the impugned provisions prior to the coming into force of the Constitution, the same could not be maintained inasmuch as they seek to regulate enrolment not only by professional qualification or merit but also by consideration as to payment of fees. * * * *

7. It is, therefore, just and necessary that this Honourable Court should be pleased to make an order declaring that Article 25 of Schedule I-A of the Madras Stamp Amendment Act, 1922, is void, ineffective and inoperative, and I be entitled to be enrolled as an Advocate of this Honourable Court, the said article notwithstanding; and to pass such other order or orders as this Honourable Court may in the circumstances deem fit to pass."

2. The material provisions relating to the enrolment of legal practitioners as advocates of the High Court are as follows. So far as the Chartered High Courts are concerned, one of the clauses of the Letters Patent (Clause 9 in the Letters Patent granted to this Court) authorised and empowered the said High Court "to approve, admit and enrol such and so many advocates, vakeels and attorneys, as to the said High Court shall seem meet." Such Advocates and Attorneys were authorised to appear for the suitors of the said High Court, and

"to plead or to act, or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine and subject to such rules and directions,"

By another clause (clause 10 of the Madras Letters Patent) it was provided that "No person whatsoever but such Advocates, Vakeels or Attorneys shall be allowed to act or to plead for or on behalf of any suitor in the said High Court, except that any suitor shall be allowed to appear, plead or act on his own behalf, or on behalf of a co-suitor."

As regards a High Court established by Royal Charter, Section 41 of the Legal Practitioners Act of 1879, provided that such a High Court may from time to time with the previous sanction of the Provincial Government make rules as to the qualifications and admission of proper persons to be advocates of the Court, and subject to such rules may enrol such and so many advocates as it thinks fit.

3. The Indian Bar Councils Act of 1926, contains provisions regarding the admission and enrolment of advocates. Section 8(1) says that:

"No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the Advocates of the High Court maintained under this Act."

Sub-section (2) of the same section enjoins the High Court to prepare and maintain a roll of advocates. The proviso is important for the purpose of this application. It runs thus:

"Provided that such persons shall have paid in respect of enrolment the stamp duty, if any under the Indian, Stamp Act 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in Clause (a) and in other cases such amount as may be prescribed."

4. Section 3 of the Indian Stamp Act II of 1899, enacts that the instruments mentioned in Schedule I shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor subject to exceptions with which we are not concerned. Item 30 of Schedule I is as follows:

"Entry as an advocate, vakeel or attorney on the roll of any High Court (under the Indian Bar Councils Act, 1926) or in exercise of the powers conferred on such Court by Letters Patent or by the Legal Practitioners Act 1884 (a) in the case of an advocate or vakil--five hundred rupees (b) in the case of an attorney--two hundred and fifty rupees.

Exemption: Entry of an Advocate, Vakeel or Attorney on the roll of any High Court when he has previously been enrolled in a High Court."

By the Madras Stamp (Amendment) Act VI (6) of 1922, the duty was increased from Rs. 500 to Rs. 625 in the case of advocates and in the case of attorneys to Rs. 312-8-0.

5. The entire argument of Mr. K.V. Venkatasubramania Aiyar, learned counsel for the petitioner was built upon Article 19(1)(g) which declares the right of every citizen "to practise any profession or to carry on any occupation, trade or business". Clause (6) of the same article no doubt indicates that the exercise of this right may be curtailed by the imposition of reasonable restrictions in the interests of the general public. It also saves laws prescribing professional or technical Qualifications necessary for practising any profession or carrying on any occupation, trade or business. But petitioner's counsel contended that the payment of the stamp duty cannot be said to be a qualification necessary for practising the profession. He further contended that the levy of this duty cannot amount to a reasonable restriction on the exercise of the right.

6. Learned counsel did not deny the power of the State to impose taxes. He even conceded that a citizen could not claim exemption from the taxing power of the State simply because he was exercising one of the fundamental rights guaranteed to him by the Constitution for instance, a citizen could not claim exemption from income-tax simply because the tax is levied on the income derived by practising a profession or carrying on a trade. But he contended that the taxing power of a State could not be used to impose a monetary exaction by way of a condition precedent to the exercise of a fundamental right, though there may be cases in which a system of licensing can be justified and a nominal fee for the grant of a licence may be collected, provided the monetary exaction was a legitimate licence fee and not a tax intended for the augmentation of revenue in the guise of a licence fee. The basic proposition developed in his argument was this that the freedom guaranteed by our Constitution cannot be subjected to advance restraint by the plenary taxing power of the State. For this proposition he sought support mainly in decisions of the Supreme Court of the United States.

7. The first decision on which he relied is that in '*Grosjean v. American Press Co.*', (1936) 297 U S 233:80 Law Ed. 660. The impugned provision in that case was contained in an Act of the Legislature of Louisiana which ran as follows:

"That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licences levied and assessed in this State, pay a licence tax for the privilege of engaging in such business in this State of two per cent (2 per cent) of the gross receipts of such business," The Act required everyone subject to the tax to file a sworn report every three months showing the amount and the gross receipts from the business and the resulting tax must be paid when the report was filed. Failure to file the report or pay the tax constituted a misdemeanour punishable with fine or imprisonment or both. The validity of the Act was assailed as violating the Constitution in that it abridged the freedom of the

Press in contravention of the due process clause contained in Clause (1) of the fourteenth amendment. The first amendment provided that Congress shall make no law abridging the freedom of speech or of the Press. Though this provision did not relate to the States, it was well established that the States were precluded likewise from abridging the freedom of speech or of the press by force of the due process clause of the fourteenth amendment.

Mr. Justice Sutherland delivered the opinion of the Court. He reviewed the history and circumstances which led to the adoption of the abridgment clause of the first amendment which expressed one of those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions". The object of the constitutional provisions contained in the first and the fourteenth amendment was to prevent previous restraints on publication. Liberty of the Press meant principally although not exclusively immunity from previous restraints or censorship. The reasons given for the conclusion of the Court that the tax in question was unconstitutional under the due process clause, because it abridged the freedom of the Press are best given in the words of the learned Judge himself: "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the Government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the Press.....

The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because in the light of its present setting it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free Press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves.....The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalising the publishers and curtailing the circulation of a selected group of newspapers."

8. I do not understand this case as an authority for the proposition advanced by learned counsel for the petitioner. It will be noticed that the tax was not imposed in advance. The payment of the tax was not a condition precedent to the publication of the Journal. Periodical reports had to be filed and along with them the tax was payable according to the receipts. As I understand it, the decision in that case really rested on the circumstance that there was an ulterior bad motive behind the enactment. It was a deliberate and calculated device to penalise a certain group of newspapers. As pointed out in 'Courtney M. Mabey v. White Plains Publishing Co', 327 U. S. 178: 90 Law Ed 607 in the 'Grosjean Case', (1936) 297 U. S. 233; 80 Law Ed 660.

"The payment was singled out for special taxation and the tax was graduated in accordance with volume of circulation."

In my opinion the 'Grosjean Case', (1936 297 U S 233: 80 Law Ed 660) is not in point here. I doubt if the Court which decided 'GHOSJEAN'S Case', would have held a non-discriminatory tax on advertisements as such unconstitutional. Even if such a decision was possible on an interpretation of the American Constitution, I do not think it would have application to a case arising under our Constitution, because Article 269 of our Constitution mentions among the duties and taxes which shall be levied and collected by the Government of India and assigned to the States "taxes on the sale or purchase of newspapers and on advertisements published therein".

9. The next set of cases relied on by learned counsel for the petitioner deals with the freedom of religion guaranteed by the American Constitution. In 'Jones v. Opelika', (1942) 86 Law Ed 1691: 316 U S 584 the majority of the Judges of the Supreme Court held that a State may without violation of the constitutional guarantees of freedom of religion and freedom of speech and Press exact a reasonable and non-discriminatory licence free from religious adherents engaged in the sale of religious books and pamphlets through the ordinary methods used in commercial canvassing. The 'ratio decidendi' of the decision of the Court is contained in the opinion delivered by Mr. Justice Reed and is thus expressed:

"When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing."

Chief Justice Stone and Mr. Justice Murphy delivered dissenting opinions in which Mr. Justice Black and Mr. Justice Douglas concurred. The Chief Justice understood the purpose of the ordinances to be suppression of the distribution of religious literature. He said: "The taxes are insupportable either as a tax on the dissemination of ideas or as a tax on the collection of funds for religious purposes. For on its face a flat licence tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws.....Freedom of

Press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce.....In its potency as a prior restraint on publication the flat licence tax falls short only of outright censorship or suppression." Mr. Justice Murphy in his dissenting opinion observed:

"But whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone and not for personal profit. As such they place a burden on freedom of speech, freedom of the press and the exercise of religion even if the question of amount is laid aside.....The exercise without commercial motives, of freedom of speech, freedom of the Press, or freedom of worship are not proper sources of taxation for general revenue purposes."

Mr. Justice Black who also dissented tersely put his point of view thus: "The opinion of the Court sanctions- a device which in our opinion suppresses or tends to suppress the free exercise of a religion practised by a minority group.....Certainly our democratic form of Government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the

religious views of minorities however unpopular and unorthodox those views may be." (10) The majority view which prevailed in 'Jones v. Opelika', (1942) 316 U S 584: 86 Law Ed 1691 was overruled shortly after that decision in 'Murdock v. Pennsylvania', (1943) 319 U S 105: 87 Law Ed 1292. In that case the impugned ordinance provided that all persons canvassing for or soliciting orders for goods, paintings, pictures, or merchandise of any kind shall be required to procure from the Burgess a license to transact the said business and shall pay certain sums according to the time for which the said licence shall be granted. The rates were: for one day 11/2 dollars, for one week 7 dollars, for 2 weeks 12 dollars and for 3 weeks 20 dollars. The person who impugned the ordinance were members of a sect known as Jehovah's witnesses. They went about from door to door distributing literature and soliciting people to purchase certain religious books and pamphlets. Mr. Justice Douglas delivered the opinion of the Court. His approach to the discussion of the question is significant. After referring to the first Amendment which the Fourteenth Amendment makes applicable to the States and which declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press, observed,

"It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the licence tax imposed by this Ordinance is in substance just that."

After dealing with the religious practice of Jehovah's witnesses and their type of evangelism, the learned Judge rejected the contention that when a religious sect uses ordinary commercial methods of sales of articles to raise propoganda funds, it is proper for the State to charge reasonable fees for the privileges of canvassing and said:

"But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise."

Considerable reliance was placed by petitioner's learned counsel on the following passage in the opinion of the Court:

"We do not mean to say that religious groups and the Press are free from all financial burdens of Government. See 'Grosjean v. American Press CO', (1936) 297 U S 233: 30 L Ed 660. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeanette is a fiat licence tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoymentIn all of these cases the issuance of the permit or licence is dependent on the payment of a licence tax. And the licence tax is fixed in amount and unrelated to the scope of the activities of petitioners or to . their realised revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat licence tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the first amendment."

11. Reed and Frankfurter JJ. delivered dissenting opinions. Mr. Justice Frankfurter very forcibly put forth the opposite view. He said:

"Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right.....It is certainly true that the protection afforded the freedom of the press by the first amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspapers publishing for bearing the burdens-of taxation or imposed upon them in such ways as to enroach on the essential scope of free press."

According to the learned Judge, the question really turned on the nature of the condition imposed and the extent to which it hinders or restricts the exercise of the privilege. He very lucidly draws the distinction between the use and the abuse of the power to tax. The fact that the power can be perverted does not mean that

every exercise of the power is a perversion of the power, If a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a legislature cannot directly suppress or control, of course, it is bad. But if it does not, it is irrelevant that some other tax would have that effect. The learned Judge posed the ultimate question thus: "The ultimate question in determining the constitutionality of a tax measure is -- has the State given something for which it can ask a return."

and answers the question: "There can be no doubt that these petitioners, like all who use the streets, have received the benefits of Government." He found that the taxes in question did not actually cramp the activities pursued by the petitioners to promote their religious beliefs. He was therefore of opinion that the ordinance was valid.

In 'Follett v. McCormick', (1944) 321 U S 573: 88 Law Ed. 938, the principle laid down in 'Murdock's Case', (1943) 319 U S 105: 87 Law Ed. 1292, was applied and an ordinance levying a licence tax on the occupation of a book agent from a distributor of religious literature was declared to be unconstitutional as the guarantee of religious freedom precluded any exaction from a person who was engaged in spreading his religious beliefs by the distribution of religious literature although such person's activities were confined to his residential town and he depended for his livelihood on contributions expected in return for the literature distributed. Mr. Justice Douglas who delivered the leading judgment observed 'inter alia' after referring to 'Jones v. Opelika'. (1942) 316 U S 584: 86 Law Ed. 1691 and 'Murdock v. Pennsylvania', (1943) 319 U S 105 ; 87 Law Ed. 1292, thus:

"In those cases members of Jehovah's witnesses had also been found guilty of 'peddling' or 'selling' literature within the meaning of the local ordinances. But since they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants. "Freedom of press, freedom of speech, freedom of religion are in a preferred position." (Murdock v. Pennsylvania'). We emphasised that the 'inherent vice and evil' of the flat licence tax is that 'it restrains in advance those constitutional

liberties' and 'inevitably tends to suppress their exercise."

12. So far as I am able to follow the reasoning of the dissenting judgments in 'Jones v. Opelika', (1942) 316 U S 584: 86 Law Ed. 1691, which was practically adopted as the opinion of the Court in the subsequent 'Murdock'S Case', (1943) 319 U S 105: 87 Law Ed. 1292, it is thus: that the freedom of religion guaranteed by the First and the Fourteenth amendments cannot in any manner be curtailed or abridged by any law which imposes a monetary levy on the exercise of that freedom. The exemption is not only from the plenary taxing power which when abused may even destroy the very exercise of the right; the exemption is also "from the operation of the licensing power of the State and liability even to a nominal fee. The political history of the United States, from its origins in the founding by the Pilgrim Fathers had not a little to do with the views of the Supreme Court on the subject of religious freedom. Though there is no necessary inconsistency between the taxing power & the exercise of the fundamental rights, nevertheless, in the case of religious freedom, it looks as if an exception is made and the exercise of this freedom is deemed to be outside the purview of the power of taxation.

13. All the cases referred to us demonstrate amply the distinction drawn over and over again by the Supreme Court between the exercise of religious freedom and the exercise of secular rights. Sometimes the lines drawn between God and the pocket book are too fine, but that such lines are accepted is clear from the following passage in the judgment of Mr. Justice Murphy in 'FOLLET v. Mc CORMICK', (1944) 321 U S 573: 88 Law Ed. 938, at p. 942: "There is an obvious difference between taxing commercial property and investments undertaken for profit, whatever use is made of the income, and lading a tax directly on an activity that is essentially religious in purpose and character or on an exercise of the privilege of free speech and free publication." In 'Lovell v. Griffin', (1938) 303 U S 444: 82 Law Ed. 949, a Municipal Ordinance prohibiting the distribution without a permit of circulars and books advertising, or literature of any kind, whether delivered free or sold was held to be invalid on its face as infringing the constitutional freedom of the press. This case also related to Jehovah's witnesses who followed the practice of distributing pamphlets of a religious nature. Chief

Justice Hughes who delivered the opinion of the Court said: "We think that the ordinance is invalid on its face. Whatever the motive induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to licence and censorship."

In 'Valentine v. Chrestensen', (1942)' 316 U S 52: 86 Law Ed. 1262, the Supreme Court upheld the constitutionalists of a Municipal regulation prohibiting the distribution in city streets of handbills bearing on one side a protest against action taken by public officials and on the other advertising matter, where the affixing of the protest to the advertising circular was with the intent and for the purpose of evading the prohibition of a city ordinance forbidding distribution in the City's streets of commercial and business advertising matter. The learned Judges were clear that the Constitution imposes no restraint on Government as respects purely commercial advertising.

14. Mr. Venkatasumbramania Ayyar argued with considerable force that the exercise of a fundamental right guaranteed by the Constitution cannot be made subject to an advance tax, because the general taxing power is plenary in nature and cannot be controlled by Courts. He referred to the well known dictum of Marshall, C. J. that "the power to tax is the power to destroy" and argued that if advance taxation is permitted, it may result in the total destruction of the right itself. He cited to us 'ME Cray v. United States', (1904) 195 U S 27: 49 Law Ed. 78, for the proposition that the motives or purposes of the legislature in enacting a tax are not open to judicial enquiry and the Court has no jurisdiction to enquire into the reasonableness of the rate of tax. In that case artificially coloured oleo-margarine was subject to a higher rate of taxation than oleo-margarine not so coloured. It was held that though the effect of the tax may be to suppress the manufacture of the article that circumstance did not render it invalid and any implied constitutional prohibition which might prevent the destruction of fundamental rights which it is the duty of every free Government to safeguard could not be invoked to invalidate the said taxation. Though the point was not decided, Mr. Justice White who delivered the opinion of the Court was willing to concede that if by the perverted exercise of the power of taxation, so great an abuse was manifest as to destroy fundamental rights which no free Government could constitutionally violate then it would be the

duty of the judiciary to hold such acts to be void.

15. Mr. Venkatasubramania Aiyar referred us to three decisions of the American Supreme Court which held certain Acts of States to be invalid on the ground that they encroached on the field of the Congress and vice versa. But I do not find them very relevant to a discussion of the questions arising in this case except possibly as instances of the general rule that what cannot be done directly cannot be done indirectly. I shall refer briefly to these three cases. In 'Child Labour Tax Case', (1922) 66 Law Ed. 817, the Congress made a law imposing a tax of ten per cent, of the net profits of the year upon an employer who knowingly employed during any portion of the taxable year a child within a particular prescribed age limit which was held to be invalid as being an attempt by the Congress to use the so-called tax as a penalty for the employment of child labour in the States which under the Constitution was exclusively a matter for the State Legislature. As Chief Justice Taft remarked the tax in question was "a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the State Government under the Federal Constitution."

In 'Panhandle Oil Co. v. State Of Mississippi On Relation of R.H. Knox', (1928) 277 U S 218: 72 Law Ed. 857, the State of Mississippi imposed a tax on a gasoline sold to the Federal Government for the use of its Coast Guard Fleet and its Veteran's hospital. The tax was held to be unconstitutional because it interfered with the rights of United States which had been empowered to operate the fleet and the hospital.

"The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions." (Per Butler J.) In 'Ingels v. Morf', (1937) 300 U S 290: 81 Law Ed. 653. a State exaction which burdened and interfered with interstate commerce was declared to be unconstitutional. The state of California passed a statute imposing a permit fee for the movement from without the State over its highways of motor vehicles for the purpose of selling or offering them for sale. It was sought to be justified as intending to reimburse the state for the added expense which it may incur for the administration and enforcement of the Act, and

the expense of policing the highways. But the amount of the fee was shown to greatly exceed these expenses. It was therefore held that the permit fee unduly interfered with the right of interstate commerce. It was held that to justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear, either from the statute itself or from the use of the money collected that it is demanded as reimbursement for the expense of providing facilities or of enforcing regulations of the commerce which are within the State's constitutional powers.

16. As I said before, none of these cases is directly in point. The stamp duty levied on the entry in the roll is not in 'pari materia' with the permit fee or the other taxes with which these cases were concerned.

17. Learned counsel for the petitioner cited to us 'Bradwell v. Illinois', (1873) 83 U S 644: 21 Law Ed. 442. In that case the Supreme Court of Illinois refused to grant the plaintiff (Myra Bradwell) a license to practice law in the Courts of that State on the ground that females were not eligible under the laws of that state. It was held that the refusal did not violate any provisions of the Constitution. The ground of the decision was that the right to practise law in the State Courts was neither a privilege nor any immunity of a citizen of the United States within the meaning of the first section of the fourteenth article of the Amendment of the Constitution. Mr. Justice Miller who delivered the opinion of the Court pointed out that the right to admission to practise in the Courts of a State in no sense depends on the citizenship of the United States and has never been made to depend on such citizenship at all. Mention was made of the fact that many prominent and distinguished lawyers had been admitted to practise in the State and in the Federal Courts who were not citizens either of the United States or of any state. No doubt, reference was made to the opinion of the Court in the Slaughter House cases recently delivered in support of the proposition that the right to control and regulate the granting of licenses to practise law in the Courts of a State was one of the powers which are not transferred for its protection to the Federal Government. But we are not really concerned with this aspect of the case.

Mr. Venkatasubramania Aiyar contended that this decision should no longer be deemed to be good law having regard to the change in the attitude of the Supreme Court in construing the fourteenth amendment. There is great force in the contention, because there can be no doubt that it was the construction put forward in Mr. Justice Field's dissenting opinion that subsequently prevailed, Mr. Justice Sutherland speaking for the Court in a later case, 'James C. Colgate v. Erwin M. Harvey (1935) 296 U S 404:80 Law Ed 299 said that the right of a citizen of the United States to engage in business or to transact any lawful business is a privilege attributable to his national citizenship. But so far as I have been able to see there has been no disapproval of this decision either in subsequent decisions of the Supreme Court or even in recognised text books on American Constitutional law. How the principle underlying this decision applies to the case before us will be considered later on.

18. 'Re Summers', 375 U S 561:89 Law Ed 1795 also deals with lawyers, but it is not of much assistance to us. A state Court (Illionois) refused an application for admission to the Bar on the ground that the applicant, because of a conscientious belief in non-violence, could not take in good faith the required oath to support the state constitution, where such support is construed to include willingness to serve in the state militia when required. It was held that the refusal was proper and did not violate the freedom of religion which the Fourteenth Amendment secured against the state action. The decision in this case was based to a large extent on two earlier cases, namely, 'United States of America v. Rosika Schwimmer', (1929) 279 U S 644:73 Law Ed 889 and 'United States v. Macintosh', (1931) 283 U S 605: 75 Law Ed 1302 in which it had been held that an alien who refused to pledge military service was not entitled to be admitted to citizenship of the United State as of right. The authority of this decision 'Re Summers', 375 U S 561:89 Law Ed 1795 must be deemed to have disappeared with the subsequent decision of the Court in 'Girouard v. United States', (1946) 328 U S 61:90 L E 1084 which overruled the two decisions on which it was based.

19. Mr. Venkatasubramania Aiyar's argument in brief was that any exaction by way of a tax or otherwise as a condition to the exercise of any of the freedoms guaranteed by the constitution would be unconstitutional. A Citizen cannot, be

compelled to purchase for a price what has been granted to him by the constitution. Whether it be called a privilege tax or a license tax or a franchise tax or occupational tax, if the right to practise a profession is to depend on the payment of a tax, then, it would amount to an abridgment, if not, a total denial of that right. In proper cases the State may introduce a system of licensing in the interests of the general public and incidentally charge a fee for the license which may be granted; but if the license fee is too excessive to be really considered as a license fee and partakes of the nature of plenary taxation, there would be an infringement of the freedom guaranteed by constitution,

20. The learned Advocate General sought to meet the petitioner's case by taking his stand on the position that here was a tax which the State was empowered to levy and once it is found that the State was competent and within its powers in imposing the tax, there could be no question of any infringement of fundamental rights, though incidentally the enjoyment of such fundamental rights may be more or less affected. He refused to accept the distinction drawn by petitioner's counsel between taxation prior to and as condition of the exercise of the right and subsequent taxation on the exercise of the right. He analysed the cases relied on by the petitioner's learned counsel to show that this distinction was not considered material in any of the decisions relied on. 'Grosjean Case', (1936) 297 U S 233:80 Law Ed 660 really dealt with a tax on advertisements and would not have been held to have been invalid as such but for the fact that the Court knew that the dominant purpose of the ordinance was not the realisation of revenue but the suppression of certain newspapers. The Court found in that case that it was not an ordinary ease of tax but had a long history of hostile misuse of state power behind it. The cases dealing with Jehovah's witnesses which revealed the swing of the pendulum in the view of the Supreme Court on the scope and extent of religious freedom turned on the peculiar history of that country and an anxiety to safeguard against religious persecution of any sort whatever.

21. The learned Advocate General contended that the American Supreme Court did not recognise an unrestricted privilege to engage in a business as guaranteed by the Constitution and on this point it appeared to me that even Mr. Venkatasubramania Aiyar was willing to confess that occupational freedom was

not so well established in the United States as the freedom of speech and freedom of religion. In 'Nebbia v. New York', (1934) 291 U S 502:78 Law Ed 940 it was held that a State statute establishing a milk control board with power to fix the minimum and maximum retail prices of milk and making it unlawful for any milk dealer to sell or buy milk at a price less or more than that fixed by the Board was valid and did not violate the due process clause of the Fourteenth Amendment. The Court observed (there was no dissent): "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited, and the right to conduct a business, or to pursue a calling may be conditioned."

In 'Federal C.C. v. Pottsville Broadcasting Co.', (1940) 309 U S 134:84 Law Ed 656 the Court had to deal with the scheme for the regulation of Radio Broadcasting contained in the Federal Communications Act, 1934, as amended in 1937. Apprehending that in the absence of Government Control, the public interest might be subordinated to monopolistic domination in the broadcasting field, the Congress provided for a system of permits and licenses. The Communications Commission was entrusted with the power of granting or refusing licenses, which could not however be granted for longer than three years. In granting or withholding permits for the construction of stations, and in granting, denying, or revoking licences for the operation of stations, public convenience, interest or necessity was to be the guiding factor in the exercise of the Commission's discretion. The learned Advocate-General also cited to us reports of the decisions of the State Supreme Court in which it has been assumed that the State has got a right to say who should enter a particular trade and under what conditions. Even under our constitution, the State can impose conditions and prescribe professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, (see Article 19(6)).

22. It was therefore contended by the learned Advocate General that the State could make a law making it incumbent on a person who desired to practise in particular Courts of the land to be enrolled as advocates of that Court. If so much is conceded, then the next step is to recognise that it is the entry of enrolment that is the subject of the stamp levy.

23-24. Much was not said at the Bar as to what exactly is comprised in the right to practise a profession guaranteed under Article 19(1)(g). Taking the profession of law, what does this right, consist in? Is the effect of Article 19(1) to confer on every person who may be otherwise qualified the right to practise in any Court in the land? I see nothing in Article 19(1)(g) to justify the conclusion that this Court or any other High Court or Supreme Court cannot lay down rules for the admission of advocates who alone will be permitted to represent the suitors before them. On the other hand, the clauses in the Letters Patent granted to the Chartered High Courts to which reference was made earlier on in this judgment clearly confer on the High Courts the power to virtually prevent even qualified persons other than the advocates on their rolls to plead and act before them on behalf of suitors. This power of the High Courts has been continued under Article 225 of the Constitution. The Bar Councils Act recognises this right and lays down that only the persons enrolled as advocates of a particular High Court have certain rights of audience. It was not contended before us that all these provisions were invalid. Though Mr, Venkatasubramania Aiyar would not concede in so many terms, he was not willing to challenge the power of the State to make it compulsory that every lawyer should obtain a license before he could be allowed to practise before the Courts of the land. But he contended that there could not be an advance plenary tax on which the right to practise would depend.

25. I do not consider that the stamp duty levied under Article 30 of Schedule I of the Indian Stamp Act or Article 25A of the Act as amended in Madras is of the same nature as the license tax or privilege tax examples of which are to be found in some of the American cases e. g. 'Grosjean's Case', (1936) 297 U S 233:80 L E 660 and "Murdoch's Case', (1943) 319 U S 105:87 L E 1292. It is not a periodical and recurring levy depending on the practise of the profession or on which the practice of the profession depends. Besides acting and pleading in Courts there are many ways in which a lawyer can pursue his profession and he is free to so practise his profession. If any one wants the additional privilege of being entitled as of right to act and plead in the High Court he has got to be enrolled in the rolls of that Court. Enrolment consists in making an entry in the roll. So far it was not suggested there was anything unconstitutional. It is at this point the legislature says that the particular entry should bear a stamp duty. It was not denied that this

entry would be an instrument as defined in the Indian Stamp Act. It was not contended that this Court could go into the question as to what is the proper stamp duty leviable. It was not alleged--and there is no evidence to lead us to suppose--that the purpose of this stamp duty was to destroy the practice of the profession of law and that it was prompted by improper motives.

26. I do not think it necessary in this case to answer the very large and important question as to how far there could be taxation which would virtually destroy any of the fundamental rights. Is the power of taxation subject to the exercise of fundamental rights or is the exercise of fundamental rights subject to the power of taxation? The petitioner's learned counsel said that they were mutually restrictive of each other. I think it is sufficient for the purpose of this case to say that even assuming a tax otherwise lawfully levied can be held to be an unreasonable restriction on the exercise of any of the freedoms guaranteed by Article 19, it cannot be said in this case that the imposition of the stamp duty is not a reasonable restriction and not in the interests of the general public.

27. It must be admitted that the State has got power to augment its revenues by the imposition of taxes. Taxes must in great or less degree affect the full enjoyment of rights like the right of property. Let me give an instance. Article 19(1)(f) confers on a citizen a right inter alia to dispose of property. But the Stamp Act imposes a duty on every disposition of property. As a citizen cannot lawfully dispose of his property by conveyance except on payment of the prescribed stamp duty, it may be said that to that extent there will be a restriction on the exercise of his freedom of disposition. But surely it cannot be contended that the levy of stamp duty on conveyances is unconstitutional. I am inclined to think that so long as the monetary exaction is, in the opinion of the Court, reasonable, it cannot be said that it is invalid as being unconstitutional. Suppose, for instance, the stamp duty levied on a conveyance of property amounts to 99 per cent of its value then it may become the duty of this Court to hold that there is an unreasonable restriction on the exercise of the right of disposition. There is no material in this case before us to hold that the stamp duty in question is so excessive or oppressive as to be unreasonable.

28. I agree with the learned Advocate General that the American decisions do not proceed on a distinction between what I may call advance taxation and taxation subsequent to the exercise of any fundamental right. In 'Grosjean'S Case', (1936) 297 U S 233: 80 Law Ed 660 the licence tax was levied periodically after the publication of the journal and depend on its circulation. Nevertheless, the Court held that the ordinance imposing such licence tax was unconstitutional.

29. I agree with the learned Counsel for the petitioner that any system of permits which eventually depends on the discretion of executive authorities would be bad when the system curtails any fundamental right. But in the case before us, it was not suggested that it is in anybody's discretion to enrol or not to enrol a person otherwise qualified for being enrolled. There is neither discrimination nor any possibility of the exercise of naked arbitrary power. The practice of the profession is not dependent on the will and pleasure of any official.

30. After consideration of the arguments of counsel and the authorities cited to us, and an examination of the provisions of our Constitution, which after all should govern the decision of this case, I have come to the following conclusion. The right to plead and act on behalf of suitors in a Court is not a right flowing from citizenship. The reasoning in 'Bradwell v. Illinois', (1873) 83 U S 644: 21 Law Ed 442 is to this extent not bad law even to this day. It is not only a citizen who is entitled to be enrolled as an advocate of this Court. Even a foreigner, if he fulfils the prescribed qualifications and requirements, can be enrolled as such. The exclusive right to represent suitors in Court which an advocate possesses is really in the nature of a privilege, though the fact that it is a privilege does not imply that on the conferment of the privilege, there can be discrimination. Article 14 is a sufficient safeguard against any unequal treatment. The charge of a fee by way of levy of stamp duty for such privilege cannot be invalid as unconstitutional.

31. Even if the right to act and plead is deemed to be a right comprised in the right to practise the profession guaranteed under Article 19(1)(g), there is nothing in the Constitution to exempt such right wholly from the taxing power of the State, (I use the word "State" in its larger definition under Article 12. Article 265 which says "no tax shall be levied or collected except by authority of Jaw" does not provide for any

exemptions. Arts. 268, 269 and 276 and a number of entries in the three lists in the seventh Schedule clearly indicate the scope of the taxing power as extending even to rights covered by Article 19(1). (Vide entry 92 of List J "Taxes on the sale or purchase of newspapers and on advertisements published therein"; entry 49 of List II "taxes on lands and buildings"; entry 54 of the same list "Taxes on the sale or purchase of goods other than newspapers"; entry 60 of the same list "taxes on profession, trades, callings and employment". The right to levy stamp duty in respect of documents is specifically enumerated both in List I and List II.

32. The question then is: how to reconcile the fundamental rights guaranteed under Article 19 and the power to tax contained in several provisions of the Constitution? One way is to hold that a tax otherwise valid does not become invalid merely because it abridged any of the fundamental rights. This way is really not a way of reconciliation; it practically makes the fundamental rights entirely subject to the power of taxation. The other way is to hold any taxation of the exercise of the fundamental right which aims at unduly abridging or destroying such right is unconstitutional (vide 'Grosjean's Case', (1936) 297 U S 233: 80 Law Ed 660). But if the taxation is only for legitimate revenue purpose, then, it is not invalid merely because it may adversely affect any of the fundamental rights. This way of reconciling would lead room for judicial review in exceptional cases and a power in the Court to declare a particular instance of taxation as unconstitutional.

33. In this case, it is not even suggested that the object of levying the stamp duty on the enrolment entry is to deliberately abridge or destroy the right to carry on the legal profession. It was also not suggested that the stamp duty is so excessive and oppressive as to virtually abridge, or destroy such right. It must therefore be held that the stamp duty leviable in this case is proper and constitutional.

34. The application is therefore dismissed. There will be no order as to costs.

35. Venkatarama Ayyar, J.: The petitioner, Anantha Krishnan, is a law graduate of the Madras University. He has completed his term of apprenticeship and has otherwise qualified himself to be admitted as an advocate of this Court. Under the law he has to pay a stamp duty before his name can be entered on the rolls of advocates of this Court. The Indian Stamp Act (II of 1899) Article 30 of Schedule I

prescribes a stamp duty of Rs. 500 for enrolment and under the Madras Act III (3) of 1922, Article 25(a), it has been fixed at Rs. 625.

36. The petitioner contends that as a citizen he has a fundamental right to carry on business as an advocate, that the stamp duty imposed a condition on the exercise of that right and that it is, therefore, illegal. He accordingly prays that the provision in the Stamp Act be declared void and that he be enrolled as an advocate without reference thereto.

36a. The contentions of Mr. K.V. Venkatasubramania Iyer, the learned advocate, who argued in support of the petition may be summed up thus:

(37) Under the Constitution the fundamental rights conferred by Part III, are supreme, that neither Parliament nor the legislatures of the States have the power to enact any law taking away or abridging those rights; that the Stamp Act is a measure of taxation; that the power to tax being the power to destroy, it cannot be exercised over fundamental rights and that the levy of stamp duty is, therefore, illegal. It was also further urged that any previous restraint on the exercise of fundamental rights must be held to be void as amounting to a prohibition of the rights.

38. The learned Advocate General on the other hand contends that the Constitution does not exempt fundamental rights from the operation of taxation laws, that the provisions of Part III, should be so construed as to effectuate the other parts of the Constitution as well, that the theory of a previous restraint has no application to a measure of taxation and that the Stamp Act is valid.

39. The substantial point, therefore, which arises for determination in this case is in what relation do the fundamental rights of a citizen under Part III, stand towards the powers of taxation possessed by the State? The question is one of considerable importance as there are other provisions in the Stamp Act which impose duties on the other fundamental rights recognised in Part III and if the contention of the petitioner is well founded they will also have to be declared invalid. There are, for example, provisions in the Stamp Act prescribing stamp duty on sales, gifts, settlements, mortgages, trusts, leases and other conveyance of

immovable property. Stamp duties are also prescribed on transfers of other properties. All these taxes must be held to be invalid as being opposed to Article 19(1)(f) of the Constitution which recognises a fundamental right to acquire, hold and dispose of property. There are provisions prescribing stamp duties on deeds of partnership and Articles of Association of a company and these also must be held to be invalid as opposed to the right to form associations or unions conferred by Article 19(1)(c). The question thus raised is one involving far reaching consequences and being 'res integra' it has to be determined on a consideration of the relevant provisions of the Constitution and the conclusions to be drawn therefrom.

It must be mentioned that Mr. K.V. Venkatasubramania Iyer, the learned advocate, for the petitioner while he contended, that a profession tax is illegal conceded that it would be lawful to levy licence fee and income-tax on professions. It may be useful to note the distinction between profession tax on the one hand and licence fee and income-tax on the other. When a person embarks on business the law may require him to take out a licence and charge a fee therefor. The idea behind the licence system is that the State has a right to control trade in the interests of the public and for that purpose impose suitable restrictions on the conduct of the business. The licence is a symbol of State regulation and the licence fee is intended to cover expenses which the State has to incur in maintaining an establishment for the purpose of regulating the trade. It is conceded by the learned advocate for the petitioner that licensing of trades including the profession of law is valid and a reasonable fee can be charged for the issue of a licence. But as no contention has been urged that the stamp duty in question is in the nature of licence fee his aspect of the matter requires no further consideration. Then there is the income-tax and that is levied in accordance with the provisions of the Income-tax Act on incomes actually earned. The learned advocate for the petitioner concedes that such a tax would be lawful and does not infringe the fundamental rights because what is guaranteed under Part III is freedom of trade and not freedom from taxation of profits made in that trade. The profession tax differs from the licence fee in that it is a fiscal measure intended to bring revenue and not merely to regulate trade. It differs from income-tax in that it is not a levy on incomes earned but is a tax on the carrying on of a profession itself even before

any income could be earned. That being the true position of profession tax, the petitioner contends that it is an invasion of his fundamental right to carry on a profession under Article 19(1)(g). It is indisputable that the rights conferred by Part III are & were intended to be in a favoured position.

Discarding the theory of parliamentary supremacy of British Jurisprudence, the framers of our Constitution deliberately adopted the American view that the subjects should be protected against the tyranny of legislative majorities and for achieving that purpose they guaranteed certain rights set out in Part III and forbade legislation in derogation of those rights. Article 13(1) is particularly important. Article 13(1) enacts that all laws in force in the territory of India immediately before the commencement of this Constitution in so far as they are inconsistent with the provisions of fundamental rights shall be void, and Article 13(2) prohibits making of any laws which will take away or abridge the fundamental rights. Thus legislation past and future must give way before fundamental rights. In this connection Article 33 is also important. Under that article Parliament can pass legislation restricting or abrogating rights conferred in Part III so far as armed forces are concerned. The intention as expressed in these provisions is obviously that apart from Article 33, the legislatures should not have the power to abridge or abrogate fundamental rights. Article 32 also provides a special right of direct recourse to the Supreme Court in case of violation of fundamental rights. These provisions clearly put the fundamental rights in a preferred position.

40. But what follows from this? Does the favoured position granted to the fundamental rights carry with it any immunity from taxation? The right to levy tax is an incident of sovereignty and the legislatures as sovereign bodies have plenary powers of taxation subject only to such limitations as may be prescribed by the Constitution and nowhere in the Constitution do we find any prohibition against taxation of fundamental rights. Part III does not contain any such inhibition. On the other hand, there are provisions in Part XII of the Constitution, which clearly recognise the existence of such powers. Article 269(1) provides that certain duties and taxes shall be levied and collected by the Government of India and assigned to the States in the manner provided and one of such taxes is "taxes other than

stamp duties on transactions in stock-exchanges and future markets". (Section 269(1)(e)), Article 276 is very important for this purpose. Article 276(1) enacts that no law of the Legislature of a State in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income. Article 276(3) provides that the power of the State Legislature to impose profession tax shall not be construed aa in any way limiting the power of the Parliament to impose taxes on incomes. Here is a plain distinction made between profession tax and tax on income earned in the profession and provision is made for imposition of both classes of taxes. Then turning to the 7th schedule we find in the Union List No. 1 item No. 90. "Taxes other than stamp duties on transactions in stock-exchanges and future markets"; and in the State List No. 2 entry No. 60. "Taxes on professions, trades, callings and employments". These provisions establish beyond all doubt that it was the intention of the Legislature to confer on the appropriate Legislative bodies power to impose profession tax.

41. As against this the learned advocate for the petitioner urges that the fundamental rights are under the Constitution in a paramount position, that' under Article 13 the Legislatures of the country have no power to abrogate or abridge them, that the power to tax is the power to destroy and that, therefore, part 12 is inoperative in respect of the rights conferred under Part III. I am unable to agree. Article 13 on which this argument is mainly founded does not support such a wide contention. It applies in terms only to laws in force before the commencement of the Constitution and to laws to be enacted by the States, that is, in future. It is only those two classes of laws that are declared void as against the provisions of Part III. It does not apply to the Constitution itself. It does not enact that the other portions of the Constitution should be void as against the provisions in Part III and it would be surprising if it did, seeing that all of them are parts of one organic whole. Article 13, therefore, cannot be read so as to render any portion of the Constitution invalid. This conclusion is also in accordance with the principle adopted in interpretation of statutes that they should be so construed as to give effect and operation to all portions thereof and that a construction which renders any portion of them inoperative should be avoided. For these reasons I must hold that the operation of Part 12 is not cut down by Part III and that the fundamental rights are within the powers of the taxation by the State.

42. It is contended that to recognise a power to tax fundamental rights would "e to concede a power to destroy them because there could be no limit to the power of the state to impose taxes and the power could be exercised in such a manner as to destroy them altogether. Re-liance is placed on the well known observations of Marshall C.J. in 'Maculloch v. Mary Land', 4 U S P 316: 4 L Ed 579. There, the State of Mary Land passed a law imposing heavy taxes on the activities of the Bank of United States which had been chartered by the Congress. The question of the validity of this law came up before the Supreme Court. It was held that the Congress had an implied power to charter banks and that under the Constitution the Congressional powers were supreme. The question then arose as to whether consistently with these conclusions the power in the States to tax the bank could be recognised.

Negating such a power Marshall C. J. observed as follows:

"That the power to tax involves the power to destroy; that .the power to destroy may defeat and render useless the power to create; and that there is a plain repugnance in conferring on one Government a power to control the constitutional measures of another, which other with respect to those very measures is declared to be supreme over that which exerts the control are propositions not to be denied."

It is doubtful if these observations made in deciding questions of jurisdiction between two independent sovereign bodies would have any application in construing the powers conferred by the Constitution on one and the same body. But apart from this, later decisions of the American Courts have explained these observations as limited to cases where there is no legislative competence over the subject-matter of taxation. Thus in 'Knowlton v. Moore', (1900) 178 U S 41: 44 Law Ed. 969, the Court after quoting the dictum that the power to tax is the power to destroy explained it in following terms:

"This principle is pertinent only when there is no power to tax a particular subject and has no relation to a case where such right exists....."

and again

"But this reasoning has no application to a lawful tax; for if it had, there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful and therefore no taxation whatever could be levied."

These observations were quoted with approval in 'Mackay v. The United States', (1904) 195 U S 27: 49 L Ed 78 and it was observed: "As quite recently pointed out by this Court in 'KNOWLTON v. MOORE', (1900) 178 U S 41: 44 Law Ed 969 the often quoted statements of Chief Justice Marshall in 'McCulloch v. Maryland', 4 US 316: 4 Law Ed 579 that the power to tax is the power to destroy affords no support whatever to the proposition that where there is a lawful power to impose a tax, its imposition may be treated as without the power because of the destructive effect of the exertion of the authority."

43. On the finding that the powers of taxation extend over fundamental rights it will follow that the principle of the decision in 'McCulloch v. Maryland', 4 U S 316: 4 Law Ed. 579, cannot apply to this case. For the same reason, decisions dealing with taxation in relation to interstate commerce must also be held inapplicable to the present issue;

44. The decision in 'Mackay v. The United States', (1904) 195 U S 27: 49 Law Ed 78 is also of interest in that it held that fundamental rights are proper subjects of taxation unless they are exempted in the Constitution. The Congress had imposed a tax on the manufacture and sale of oleo-margarine and one of the grounds on which its validity was challenged was that it violated the freedom of trade guaranteed under due process clause in the Fifth amendment: In rejecting this contention the Court observed as follows:

"And the same considerations dispose of the contention based upon the due process clause of the 5th amendment. That provision, as we have previously said does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution." In this connection the following observations occurring in 'Murdock v. Pennsylvania', (1943) 319 U S 105: 87 Law Ed. 1292, are relevant. In criticising the view of the majority that the sale of the religious literature

was an exercise of religion and that was, therefore, protected under Amendment No. 14, Reed, J. observed as follows:

"Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income-taxes, ad valorem taxes even occupational taxes are presumably valid save only a licence tax on sales of religious books....."

and again

"It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First amendment." Frankfurter, J. observed:

"Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment, of course, protects the right to publish a newspaper or a magazine or a book. But the crucial question is how much protection does the amendment give, and against what is the right to be protected? It is certainly true that the protection afforded the freedom of the press by the first amendment does not include exemption from all taxation..... Nor as I have indicated can a tax be invalidated because the exercise of a constitutional privilege is conditioned upon its

payment....."

and again

"The petitioners say they are immune as much from a flat occupation tax as from a licensing fee purporting explicitly to cover only the costs of regulation. They rightly reject any distinction between that occupation tax and such a licensing fee. There is no constitutional difference between a so-called regulatory fee and an imposition for purposes of revenue."

These passages occur in the minority judgments. A similar observation occurs also in 'Jones v. Opelika', (1942) 316 U S 584: 86 Law Ed. 1691, where Reed, J. observed:

"The Constitution draws no line between a payment from gross receipts or a net income-tax and a suitably calculated occupational licence."

As will be pointed out the Judges who took a different view went on a different point. The learned Advocate General has also drawn our attention to the following passages in the judgment of the Supreme Court in 'Ramjilal v. Income-Tax Officer, Mohendar Garh' 1951-14 S C J 203, at p. 208, "In our opinion the protection against imposition and collection of taxes save by authority of law directly comes from Article 265 and is not secured by Clause (1) of Article 31....."

and again

"In the view we have taken, namely, that the protection against the imposition or collection of taxes save by authority of law is secured by Article 265 and not by Article 31(1), the questions urged by Dr. Tek Chand do not really arise."

Thus there is abundant authority for the proposition that fundamental rights are not immune from taxation.

45. It now remains to deal with the contention of the petitioner that a previous restraint on the exercise of a fundamental right is void and that, therefore, the imposition of a tax as a condition precedent to the exercise of the profession is illegal and opposed to Article 19(1) of the Constitution. Reliance was placed on a number of American authorities as supporting this proposition but they are decisions on the three freedoms, freedom in the exercise of religion, freedom of speech & freedom of the Press, enumerated in amendment No. 1 which have latterly been interpreted as comprised in the due process clause in the 14th amendment. But there is vast difference between those three freedoms and the other freedoms relating to property or trade; Under the English law, a person may not be prevented from speaking or writing what he will on the ground that if permitted to speak or write he might commit a tort or an offence. The remedy is only to proceed against him for any breach of the law 'which he might commit in his speech or writing. The law is thus stated by' Black-stone in his Commentaries:

"The liberty of the Press is indeed essential to the nature of a free State; but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he published what is improper, mischievous or illegal he must take the consequence of his own temerity." (4 B1. Com. 151, 152).

46. Thus freedom of speech and freedom of the press came to be Understood as meaning absence of previous restraint or censorship .Vide Dicey's Law of the Constitution, (9th Ed., Chapter 6). When amendment No. 1 provided for freedom of speech and freedom of press it merely embodied this principle which had been well settled in England and American Courts accordingly construed the first amendment and the due process clause in the ,l"4th amendment as requiring that there should be no previous restraint or censorship. Vide 'Near v. Minnesota Exreal Olson', (1931) 283 U S 697: 75 Law Ed. 1357; 'Lovel v. Griffin', (1938) 303 U S 444: 82 Law Ed. 949; 'Schneider v. Irvington', (1939) 308 US 147:84 Law Ed. 155 and 'Cantwell v. Connecticut', (1940) 310 U S 296: 84 Law Ed. 1213.

47. But these freedoms differ by their very nature considerably from freedoms relating to property or trade. While a censorship in the case of the former is tantamount to a prohibition it is otherwise when it relates to property or trade. To apply the theory of previous restraint to the freedom of trade or profession is to ignore the reason behind the rule. "Cessant Ratione Legis, Cessut Ipsa Lex." In America where as already mentioned freedom of trade is one of the liberties recognised in the 5th and 14th amendments, licensing of trades and levying of licence tax have been accepted as valid and constitutional. Whether licence is issued for the first time or it is renewed, it is a case of imposing a condition before a trade could be carried on and if the principle of previous restraint is to be held applicable the imposition of the tax must be held illegal. In this connection the case in 'Murdock v. Pennsylvania', (1943) 319 U S 105: 87 Law Ed. 1292, which is relied on by the petitioner is instructive. There the city of Jeannettg had enacted a law that persons who canvass or solicit business within the city must obtain licence before so doing, and penalties were prescribed for breach of the law. Certain persons belonging to a militant religious sect called Jehovah's witnesses

distributed religious books for price and they were charged under the Act for not taking out a licence. They pleaded that they were not engaged in commercial activities but were carrying on evangelistic work and that they were protected by the 14th amendment. The facts in 'Jones v. Opelika', (1942) 316 U S 584: 86 Law Ed. 1691, were precisely the same. In both these decisions there was a sharp difference of opinion among the Judges and all of them acted on the view that if the activities of Jehovah's witnesses were commercial in character the levy of the tax being an occupation tax would be valid. It was not suggested that as an occupation tax it would infringe the fundamental right to trade under the 14th amendment. The point on which the Judges differed was whether the activities were commercial or religious. The Judges who held that the tax was unconstitutional proceeded on the view that there was no commercial activity but merely exercise of religions and in that view they applied the principle that previous restraint was illegal. This is what Douglas, J. who delivered the majority judgment in 'Murdock v. Pennsylvania', (1943) 319 U S 105: 87 Law Ed. 1292, observed: "As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets."

I may observe at this stage that considerable emphasis was laid by the-advocate for the petitioner on the further observations of Douglas, J. that: "the State may not impose a charge for the enjoyment of a right granted by the Federal Constitution."

But this remark must be taken along with, the observations at page 1300 'freedom of press, freedom of speech and freedom of religion are in a preferred position' and the finding of fact that the acts in question amounted to exercise of religious and not commercial activities. It is, therefore, amply established that under the American law the theory of previous restraint is applied only to the three freedoms mentioned in the amendment No. 1 and not to freedom of trade or occupation.

48. It was suggested by the learned advocate for the petitioner that in this respect the Indian Constitution proceeds further than the American law because all the

seven freedoms are conferred by the same Article 19; that they stand on the same footing and that, therefore, the considerations applicable to them should be the same. But Article 19 does not enunciate a general rule that previous restraint is unconstitutional; that rule was evolved in Courts "With reference to only to freedom of speech and freedom of press having regard to the nature of those rights; and it cannot be applied as an absolute rule of law with reference to freedom of trade or right to hold property and indeed to any of the freedoms mentioned in Article 19.

49. Though I have discussed the scope of this theory of previous restraint with reference to the authorities cited before us, in my opinion, the question does not really arise for determination if it should be held that the Stamp Act is a measure of taxation. The power to tax is an attribute of sovereignty; it carries with it the power to determine when and how the tax shall be levied and it is no objection to its validity that it is levied before the commencement of the trade and not after. The theory of previous restraint has no application to laws of taxation.

50. The result then is that the Stamp Act being a measure of taxation must be held to be constitutional and valid.

51. There is one other aspect of the matter which may require consideration hereafter. Has the Legislature power to impose tax on the fundamental rights without any limit whatsoever? The law undoubtedly is that the sovereign power of taxation is absolute, that it could be exercised up to any limit, that the determination of that limit is for the legislature and that it knows of no limitations except what are prescribed by the Constitution. The laws fixing taxes cannot be questioned in the Courts on the ground that the tax is heavy & oppressive and this principle has been applied to Stamp Act as well.

52. In 'Patton v. Brady', (1902) 184 U S 608: 46 Law Ed. 713, the contention that the tax was excessive was rejected and it was remarked;

"that it is no part of the function of a Court to enquire into the reasonableness of the exercise, either as respects the amount or property on which it is imposed."

'Treat v. White', (1901) 181 U S 264: 45 Law Ed. 853, is another stamp duty case in which it was held that it was not within the province of the Court to examine the propriety of the tax. The following passage from Cooley on Constitutional law may be quoted in this context:

"The power to tax is an incident of sovereignty and is co-extensive with the subjects to which the sovereignty extends. It is unlimited in its range acknowledging in its very nature no limits so that security against its abuse is to be found only in the responsibility of the legislature which imposes the tax to the constituency who are to pay it." But it is open to argument that when the Constitution which confers the power of taxation also confers certain fundamental rights the former should be so exercised as not to destroy the latter. The contention that the power to tax is the power to destroy has been rejected in so far as it seeks to negative any power to tax fundamental rights but it does not follow that it should be rejected in so far as it seeks to impose a limitation upon that power, that it should not be exercised so as to destroy them. As already pointed out there is a difference between profession tax and income-tax. The power of levying a tax on income is absolute and if the legislature chooses to levy a tax of fifteen annas in the rupee on that income Courts will have no jurisdiction to declare it unconstitutional on the ground that it is unreasonable. But a right to carry on business is a fundamental right protected by the Constitution and it stands to reason that a tax on such a right should not be such as to destroy it -- as for example --a professional tax equal or nearly equal to the income earned in the previous year. It might well be contended that there is in such cases a limitation on the powers of taxation, implicit in the Constitution itself, that it should not be exercised in such a manner as to take away with one hand what has been given by the other. If this is the correct position it will follow that while the levy of income-tax cannot be questioned in Courts the levy of profession tax might be challenged on the ground that it is so unreasonable and excessive as to be prohibitive of the right to carry on trade. Any question whether a tax in a particular case is so unreasonable as to amount to a destruction of the rights will, of course, be a matter for determination by Courts, in the same manner as questions of reasonableness of restrictions under Article 19, Sub-clause 3 to 5.

53. There is support for this view in the American authorities which were cited before us. Thus in 'Jones v. Opelika', (1942) 316 US 584:86 Law Ed. 1691, in upholding the tax imposed on Jehovah's witnesses Reed, J. who delivered the opinion of the majority observed as follows:

"Consequently there is not before us the question of the power to levy fees objectionable in their effect because of their size upon the constitutionally protected rights of free speech, press or exercise of religion."

In 'Murdock v. Pennsylvania', (1943)' 319 US 105: 87 Law Ed. 1292, Frankfurter, J. who was for holding that the tax was valid observed as follows:

"No claim is made that the effect of these , taxes either separately or cumulatively has been or is likely to be to restrict the petitioners' religious propaganda activities in any degree. Counsel expressly disclaim any such contention."

and again

"No complaint is made against the size of the taxes. If an appropriate claim indicating that the taxes were oppressive in their effect upon the petitioners' activities had been made the issues here would be very different. No such claim has been made and it would be gratuitous to consider its merits." The decision in 'Grosjean v. American Press CO.', (1936) 297 U S 233: 80 Law Ed. 660, would seem to be based on the same principle because it was not a case of a duty to be paid in advance but a tax of two per cent, on gross receipts to be paid by newspapers having a circulation of more than 2,000 per week and this payment was to be in addition to the other taxes and licence fees. The real object of this legislation would appear to have been to crush newspapers hostile to Senator Huey Long. The Supreme Court held that the tax was intended & calculated to prevent circulation of the papers and was, therefore bad There are observations in 'Macray v. The United states', (1904) 195 U S 27: 49 Law Ed. 78, tending in the same direction.

54. Thus notwithstanding the recognition of the rule that powers of taxation are absolute subject only to limitations contained in the Constitution, these passages

would seem to recognise the principle that in the case of "constitutionally protected rights" the reasonableness of the tax and whether it is calculated to destroy the rights are matters open to judicial review.

55. No question has been raised in this case that the duty is such as to destroy the right and it is, therefore, unnecessary to consider it further.

56. In the result, I agree with my Lord the Chief Justice that this application should be rejected without costs.

57. We certify that this case involves a substantial question of law as to the interpretation of the Constitution and in particular Article 19.

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