

RAM KRISHNA RAMNATH AGARWAL  
OF KAMPTEE

1950

March 14

v.

SECRETARY, MUNICIPAL COMMITTEE,  
KAMPTEE.

UNION OF INDIA AND GOVERNMENT OF  
MADHYA PRADESH: INTERVENERS.

[SHRI HABILAL KANIA C.J., SAIYID FAZL ALI,  
PATANJALI SASTRI, MEHR CHAND MAHAJAN,  
MUKHERJEA, and S.R. DAS JJ.]

*Government of India Act, 1935, ss. 100, 143, 292; Sch. VII List I, Entry 45; List II, Entry 49—Central Excises and Salt Act (I of 1944), ss. 2, 3—Central Provinces Municipalities Act (II of 1922), s. 66 (1) (e)—Import of tobacco within municipality for manufacturing bidis—Tobacco liable to Central excise duty—Levy of octroi duty by municipality—Legality.*

Section 66 (1) (e) of the Central Provinces Municipalities Act, 1922, empowered municipalities within the Province to levy an octroi duty on goods brought within their limits for sale, consumption or use within those limits. Section 3 of the Central Excises and Salt Act, 1944, an Act of the Central Legislature, provided that there shall be levied and collected duties of excise on all excisable goods other than salt which were produced or manufactured in British India, and included tobacco in the list of excisable goods. The question being whether a municipality situated in the Central Provinces could levy octroi duty on tobacco brought within its limits for the purpose of manufacturing bidis, in view of the exclusive power of the Central Government to levy excise duty under Entry 45 of List I of the Seventh Schedule to the Government of India Act, 1935, and the provisions of s. 3 of the Central Excises and Salt Act:

*Held*, that excise duty and octroi were taxes essentially different in their nature and the power of the Province to levy octroi was not inconsistent with the power of the Centre to levy excise duty on the same goods, and a municipality could therefore validly levy an octroi duty on such tobacco under s. 66(1)(e) of the Central Provinces Municipalities Act of 1922.

*Held further*, that there was nothing in the Central Excises and Salt Act or its provisions contrary to the provisions of s. 66(1) (e) of the Central Provinces Municipalities Act or to the levy of octroi duty under the same and s. 143 of the Government of India Act, therefore, preserved the right of the municipality to levy octroi duty under the Act of 1922.

*Province of Madras v. Boddu Paidanna and Sons* [1942] F.C.R. 90, *Governor-General in Council v. Province of Madras* [1942] F.C.R. 129, *In re the Central Provinces and Berar Act No. XIV of 1938*,

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[1939] F.C.R. 80, *Miss Kishori Shetty v. The King* [1949] F.C.R. 650 referred to.

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*Administrator, Lahore Municipality v. Daulat Ram* [1942] F.C.R. 31 distinguished.

Judgment of the High Court of Nagpur affirmed.

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APPEAL from the High Court of Judicature at Nagpur: Case No. III of 1948.

This was an appeal from a judgment and order of the High Court of Nagpur (Mis. Civil No. 158 of 1946) dated 9th April, 1948, made on a reference under s. 83 (2) of the Central Provinces Municipalities Act (II of 1922) by the Extra Assistant Commissioner, Nagpur. The facts of the case and the arguments of counsel appear in the judgment.

*T. J. Kedar* and *B. B. Tawakley* (*Sri Narain Andley* with them) for the appellant.

*Lobo*, for the respondent.

*M. C. Setalvad*, *Attorney-General of India*, (*S. M. Sikri* with him) for the Union of India.

1950. March, 14. The Judgment of the Court was delivered by

*Kania C. J.*

KANIA C. J.—This is an appeal from the judgment and order of the High Court at Nagpur, made on a reference under Section 83 (2) of the Central Provinces Municipalities Act II of 1922, by the Extra Assistant Commissioner, Nagpur. The appellant is a trader in Kamptee who manufactures *bidis*. On the 30th of November, 1945, he brought to Kamptee from outside tobacco to make *bidis*. A declaration form signed on his behalf stated that the 254 bags of tobacco liable to octroi duty, which had that day arrived at octroi post No. 3, had been brought for use and consumption within the limits of the Municipality. He however put on record his protest against the recovery of the duty which was fixed at Rs. 1,128-2-0. Against the order claiming the amount, the appellant filed an appeal to the Extra Assistant Commissioner with revenue appellate powers, Nagpur. He contended that the municipality claimed to levy the duty under Section 66 (1) (e) of the Municipal Act, but they had

no right to do so as under Section 3 of the Central Excises and Salt Act, 1944, that excise duty was levied on tobacco by the Central Government and the levy of the octroi duty on the tobacco in question was covered by the excise duty and therefore not permissible. The Appellate Assistant Commissioner in making the reference to the Nagpur High Court expressed his opinion that the appellant's contention that as the *bidis* were not sold within the municipal limits, duty was not leviable, was unsound. He however thought that because under Section 3 of the Excise Act, excise duty was levied by the Central Government the levy of the octroi duty was not in consonance with Section 100 of the Government of India Act, 1935, and was *ultra vires* the Provincial Government. The High Court rejected the appellant's contention and disagreed with the view of the Appellate Commissioner. The High Court however granted a certificate under Section 205(1) of the Constitution Act and the appellant has come in appeal to this Court.

The Central Provinces Municipalities Act was passed in 1922 and the relevant notifications fixing the rates of octroi duty were issued in 1928. No question about the validity of the Act when passed, or of the notifications issued in pursuance thereof has been raised before us. The argument on behalf of the appellant is that as under the Central Excises and Salt Act, I of 1944, tobacco became excisable goods under Item 9 in Schedule I to that Act and continued to be so till it got converted into *bidis*, the Central Government alone was entitled to levy excise duty on it till then. According to the definition of 'manufacture' in the Excise Act that duty could be levied at any stage in the manufacture of *bidis* and therefore any tax imposed, while tobacco was being converted into *bidis*, was excise duty. Legislation in connection with excise duty is within the exclusive province of the Central Legislature as shown by Entry 45 of List I in Schedule VII of the Constitution Act. The impost of octroi duty in pursuance of the Municipal Act, before tobacco was made into *bidis*, is it was argued in conflict with the legislative powers of the Centre. In this

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connection our attention was drawn to *Administrator, Lahore Municipality v. Daulat Ram Kapur*<sup>(1)</sup>, in which it was held that the levy of octroi duty on salt was not within the powers of the Provincial legislature. It was argued therefore that under Section 100 of the Government of India Act, octroi duty levied on tobacco under the legislative powers of the Provincial Government was invalid. The only way to reconcile the two Entries, namely, Entry 45 in List I and Entry 49 in List II of the Seventh Schedule, was to read the words "for consumption or use" in Entry 49 as meaning "for consumption or use *except for manufacture of excisable articles*". So read, the levy of octroi duty on the facts of this case was invalid. In reply to the argument that Section 292 of the Government of India Act kept alive the old Provincial legislation, namely, the Central Provinces Municipalities Act, and the right to levy octroi duty was saved under Section 143 of the Constitution Act, it was urged on behalf of the appellant that the provisions of the Excise Act were contrary to the right to levy octroi duty and as that Act was passed in 1944 the right to levy octroi duty saved by Section 143 of the Constitution Act had lapsed. It was argued that although there was no express provision in the Excise Act to that effect, the definition of "excisable goods" and "manufacture" read with Entry 9 in Schedule I and the charging Section 3 in the Act led to that conclusion. It is clear that both parts of this argument are thus based on the plea that the impost of any duty at any stage before *bidis* are manufactured is excise duty and therefore the levy of octroi duty is illegal.

Section 66 (1) (e) of the Central Provinces Municipalities Act, 1922, runs as follows:—

"an octroi on animals, or goods brought within the limits of the municipality for sale, consumption or use within those limits;"

The words "excisable goods" and "manufacture" are defined in Section 2 of the Central Excises and Salt Act, 1944, as follows:—

(1) [1942] F.C.R. 31.

2. (d) "excisable goods" means goods specified in the First Schedule as being subject to a duty of excise and includes salt;<sup>3</sup>

2. (f) "manufacture" includes any process incidental or ancillary to the completion of a manufactured product; and

(i) in relation to tobacco includes the preparation of cigarettes, cigars, cherots, *bidis*, cigarette or pipe or hokkah tobacco, chewing tobacco or snuff; and

(ii) .....

Section 3 of the Excise Act runs as follows:—

"There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in British India, and a duty on salt manufactured in, or imported by land into any part of British India as, and at the rates, set forth in the First Schedule....."

Entry 9 to the First Schedule of the Excise Act is in these terms:—

"9. TOBACCO, CURED—

'Tobacco' means any form of tobacco, whether cured or uncured, and whether manufactured or not, and includes the leaf, stalks and stem of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth;"

(Then follows a list of various articles into which tobacco can be converted, like *bidis*, cigarettes, snuff, etc. with different rates of duty mentioned against each article.)

Sections 143 and 292 of the Government of India Act, 1935, run as follows:—

"143. (1) Nothing in the foregoing provisions of this Chapter affects any duties or taxes levied in any Federated State otherwise than by virtue of an Act of the Federal Legislature applying in the State.

(2) Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act

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were being lawfully levied by any Provincial Government, municipality or other local authority or body for the purposes of the Province, municipality, district or other local area under a law in force on the first day of January, nineteen hundred and thirty-five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature”.

“292. Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority”.

Section 143 can be considered in two ways. If the Government of India Act did not bring the particular impost of tax by the Provincial Government within the legislative powers of the Centre, by reason of the inclusion of such tax in List I of the Seventh Schedule, the pre-existing right of the Provincial Government to levy such tax remained unaffected. If so, Section 143 of the Government of India Act did not affect such legislation and the same continued to be valid and operative under Section 292 of the Constitution Act. If however the levy of such tax by the Provincial Government was a subject which was within the exclusive legislative power of the Centre by reason of such tax being included in List I of the Seventh Schedule, the levy of such tax under the Provincial legislation continued to be valid until the Central Legislature passed an Act the provisions whereof were contrary to the provisions of the Provincial legislature or to the levy of a tax under the Provincial Act. Examining next the contentions of the appellant it seems clear that octroi duty as levied by the respondent comes within the exact wording of Entry 49 of List II of the Seventh Schedule to the Constitution Act. *Prima facie*, therefore, there is no reason to

consider the levy of the octroi duty under the Provincial legislation invalid. Such levy remained unaffected by reason of Section 292 of the Constitution Act. The argument of the appellant is that the levy of the octroi duty being at a stage after the excisable article, viz., tobacco, came into existence and became liable to excise duty under the Excise Act, the levy of octroi duty before *bidis* were made from tobacco, is invalid. In support of this argument the definition of 'excisable goods', 'manufacture' and the Entry 9 in the Schedule to that Act were relied upon. The error underlying the argument of the appellant is the assumption that any impost of tax from the time tobacco came into existence till the same was converted into *bidis* is necessarily excise duty.

The Federal Court had to consider the distinction between the duty of excise and a tax on sale in *The Province of Madras v. Boddu Paidanna and Sons*(<sup>1</sup>). It is there observed as follows:—"Plainly, a tax levied on the first sale must, in the nature of things, be a tax on the sale by the manufacturer or producer; but it is levied upon him *qua* seller and not *qua* manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit.....If the tax-payer who pays a sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be overlapping in one sense, but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. There is, in theory, nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence, no matter what happens to it afterwards, whether it be sold, consumed, destroyed, or given away..... It is the fact of manufacture which attracts the duty even though it may be collected latter. - In the case of a sales tax, the liability to tax arises on the occasion of a sale and a sale has no necessary connection with manufacture or production". The Court further observed that in the Constitution Act the whole

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(1) [1942] F.C.R. 90.

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of the taxing power in this particular sphere (power to impose duties of excise) is expressly apportioned between the Centre and the Provinces, to the one being assigned the power to impose duties of excise, to the other taxes on the sale of goods. It is natural enough, when considering the ambit of an express power in relation to an unspecified residuary power, to give a broad interpretation to the former at the expense of the latter. The case however is different where as in the Constitution Act there are two complementary powers, each expressed in precise and definite terms. There can be no reason in such a case for giving a broader interpretation to one power rather than to the other; and there is certainly no reason for extending the meaning of the expression "duties of excise" at the expense of the Provincial power to levy taxes on the sale of goods.

In *The Governor-General in Council v. The Province of Madras*<sup>(1)</sup>, the Judicial Committee approved of the distinction drawn in this case between the excise duty and a tax on sale. There the question arose in respect of tax on the sale of excisable goods. Their Lordships observed as follows:—"An exhaustive discussion of this subject (namely, the meaning of the term 'duty of excise') from which their Lordships have obtained valuable assistance is to be found in the judgment of the Federal Court in *Re The Central Provinces and Berar Act No. XIV of 1938*<sup>(2)</sup>. Consistently with this decision their Lordships are of opinion that a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods not on sales or the proceeds of sale of goods. Here, again, their Lordships find themselves in complete accord with the reasoning and conclusions of the Federal Court in *Boddu Paidanna case*<sup>(3)</sup>. The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and

(1) [1942] F.C.R. 129.

(3) [1942] F.C.R. 90.

(2) [1939] F.C.R. 80.

distinct imposts. If in fact they overlap, that may be because the taxing authority, imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself. That this is so is clearly exemplified in those excepted cases in which the Provincial, not the Federal, legislature has power to impose a duty of excise. In such cases there appears to be no reason why the Provincial legislature should not impose a duty of excise in respect of the commodity manufactured and then a tax on first or other sales of the same commodity. Whether or not such a course is followed appears to be merely a matter of administrative convenience. So, by parity of reasoning, may the Federal Legislature impose a duty of excise on the manufacture of excisable goods and the Provincial legislature impose a tax on the sale of the same goods when manufactured."

This discussion clearly shows that the relevant question is what is the nature of the tax. Excise duty is a tax on manufactured goods. Octroi duty is a tax levied on the entry of goods within a particular area. Under the Excise Act, tobacco becomes excisable goods within the meaning of Item 9 in the Schedule. The subsequent use of such manufactured goods in making different articles only affects the rate of tax. Therefore, tobacco becomes subject to excise duty when it reaches the stage of manufacture mentioned in Item 9 of the Schedule to the Excise Act. Even before it is converted into *bidis* or any other article mentioned in the entry it has become excisable goods and liable to pay excise duty. The levy of such duty is therefore not in conflict with the levy of an impost on the entry of the goods within a certain area.

It was argued that under the rules framed by the Government under the Central Excises and Salt Act, 1944, Government retained control over the movement of the

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goods from the beginning till the end. This argument is not of assistance in determining the nature of the octroi tax. As Government has to collect excise duty and the rate of duty varies in respect of different shapes in which the excisable goods are ultimately converted, there is nothing unnatural in the Government keeping a control and note of the articles till the manufactured article becomes a commodity, and is mixed up with the commodities used by the people at large. The argument that Entry 49 in List II being in conflict with Entry 45 in List I of Schedule Seven to the Constitution Act, Entry 49 should be read as "for consumption or use, except for manufacture of goods", in our opinion, is unsound. In the first place, the approach to the question itself is wrong. When a particular legislation falls within the exact words of an Entry in the Provincial List, under section 100 it is valid and no question of reconciliation arises. A similar argument advanced in regard to a supposed conflict between Entry 19 of List I and Entry 31 of List II was rejected by us in Case No. 27 of 1949: *Miss Kishori Shetty v. The King*<sup>(1)</sup>. In the present case, if the question of the validity of the Provincial legislation arises, on the interpretation of Entry 49 in List II, it appears that the answer must be in favour of the validity of the legislation. The decision in *Administrator, Lahore Municipality v. Daulat Ram Kapur*<sup>(2)</sup> does not help the appellant because in that case Entry 47 in List I is only "salt". A comparison with Entry 45 in List I shows distinctly that Entry 45 is limited to excise duty and is not wide enough to cover tobacco or other goods generally for all purposes of legislation. The observations in that case therefore are not helpful to the appellant.

On the second part of the contention the appellant can succeed only if he establishes that the provisions of the Excise Act are *contrary* to the levy and recovery of duty under the Provincial Act of 1922. There is no express provision in the Excise Act contrary to the provisions of the Municipal Act. Unless, therefore, it is necessarily implied under the Excise Act, the levy of

(1) [1949] F.C.R. 650.

(2) [1942] F.C.R. 31.

the octroi duty under the Municipal Act continues to be valid. On this point again the appellants' argument is that the levy of a duty at any stage of the manufacture of *bidis* out of tobacco would be the levy of the excise duty and therefore those provisions were contrary to the provisions permitting the levy of the octroi duty. We have already discussed and rejected in the first part of the judgment this contention. It is wrong to think that two independent imposts arising from two different sets of circumstances were not permitted in law. In our opinion, therefore, there is nothing in the Excise Act to make its provisions contrary to the provisions of Section 66 (1) (e) of the Central Provinces Municipalities Act or to the levy of octroi duty under the same. The appeal therefore fails and is dismissed with costs.

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*Appeal dismissed.*

Agent for the appellants: *Rajinder Narain.*

Agent for the respondent: *S. P. Varma.*

Agent for the Union of India: *P. A. Mehta.*

BHAWANIPORE BANKING CORPORATION, LTD.

v.

GOURI SHANKAR SHARMA

[SHRI HARILAL KANIA C.J., SAIYID FAZL ALI,  
PATANJALI SASTRI, MEHR CHAND MAHAJAN,  
MUKHERJEA and S. R. DAS JJ.]

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*Limitation Act (IX of 1908), Art. 152, cls. 2 and 3—Execution of decree—Limitation—Starting point—"Where there has been a review", meaning of—Application for re-opening decree under s. 36, Bengal Money-lenders Act dismissed for default and appeal from order of dismissal—Whether give fresh starting for limitation for execution of decree—Interpretation of Art. 152, cls. 2 and 3.*

A preliminary decree on a mortgage was passed *ex parte* on the 21st August, 1940. The judgment debtor made an application under s. 36 of the Bengal Money-lenders Act for re-opening the