

KOLUTHARA EXPORTS LTD.
v.
STATE OF KERALA AND ORS.

A

FEBRUARY 1, 2002

[S.P. BHARUCHA, C.J., SYED SHAH MOHAMMED QUADRI,
UMESH C. BANERJEE, S.N. VARIAVA AND
SHIVARAJ V. PATIL, JJ.]

B

Constitution of India—Articles 39, 41, Seventh Schedule, List III, Entry 23—Kerala Fishermen's Welfare Fund Act, 1985—Section 4(2) read with Section 2(d)—Fisherman's Welfare Fund Scheme—Contribution to—Welfare Fund Act requiring the dealer to contribute one per cent of sale proceeds to the fund—Validity of—Held, impost by way of contribution can be levied only when there exists the relationship of employer and employee between the contributor and the beneficiary under the Act and the scheme—The contribution envisaged under Section 4(2) of the Act is clearly outside the ambit of Entry 23 of List III—Thus, Section 4(2) of the Act is unconstitutional—However, amount of contribution already collected not liable to be refunded.

C

D

Words and Phrases:

“dealer”—Meaning of in the context of Section 2(d) of the Kerala Fishermen's Welfare Fund Act, 1985.

E

The issue involved in the present appeal was whether the provisions of Section 4(2) read with Section 2(d) of the Kerala Fishermen's Welfare Fund Act, 1985 requiring a dealer to contribute one per cent of sale proceeds towards the welfare fund scheme is constitutional.

F

Appellant-Company engaged in purchase and export of fish was served with a notice under Section 4(2) of the Act and order of assessment was passed. Appellant-Company filed a writ petition challenging the constitutional validity of the assessment order and Section 4(2) of the Act. High Court upheld the constitutional validity of the Section on the ground that there was very intimate nexus between the fisherman and an exporter of the marine products like the appellant and the employee-employer relationship was not necessary in such cases. Hence the present appeal

G

H

A which has been referred to the Constitution Bench since the question involved was touching the interpretation of the Constitution.

Allowing the appeal, the Court

B HELD : 1.1. Section 4(2) read with Section 2(d) of the Kerala Fishermen's Welfare Act, 1985 requiring a dealer to contribute one per cent of the sale proceeds to the welfare fund scheme is declared to be unconstitutional. Consequently, the order of High Court under challenge is set aside. However, the amount of contributions, already paid by persons falling under Section 4(2), will not be liable to be refunded to the dealers-contributors by the Board. [780-G; 785-C-E]

C 1.2. There can be no doubt that Entry 23 enables the State Legislature to enact a law in respect of social security and social insurance or dealing with employment and unemployment. But, the State cannot, in an Act under Entry 23 of List III, place the burden of an impost by way of contribution for giving effect to the Act and the scheme made thereunder for the social security and social welfare of a section of society upon a person who is not a member of such section of society nor an employer of a person who is a member of such section of society. The burden of such impost may be placed only when there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the scheme made thereunder. [783-D-E]

F 1.3. In the instant case, the only nexus between the categories of persons covered by the sweep of Section 2(d) of the Act, including the appellant, who carry on the business of buying or selling or processing fish or exporting fish (in raw or processed form) or fish products, including - (i) a commission agent, broker or any other mercantile agent and (ii) a non-resident dealer or an agent or a non-resident dealer or a local branch of a firm or company or association situated outside the State and the beneficiaries under the Act and the scheme - the fisherman - is that the former are the purchasers and the latter are the catchers and sellers of fish. Such a nexus, is not sufficient to burden a purchaser/exporter with the impost or levy of the contribution under Section 4(2) of the Act, which will clearly be outside the ambit of Entry 23 of List III of the Constitution and, therefore, lacking legislative competence. [784-H; 785-A-B]

H *Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation*

and Anr., [1985] 2 SCC 68 and *Mangalore Ganesh Beedi Works ect. etc. v. Union of India etc.*, [1974] 3 SCR 221, relied on. A

Regional Executive Kerala Fishermen's Welfare Fund Board v. Fancy Food and Anr., [1995] 4 SCC 341, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 12788 of 1996. B

From the Judgment and Order dated 22.8.96 of the Kerala High Court in O.P. No. 19806 of 1995.

V.R. Reddy and K.N. Bhat, A.K. Jain, Rajesh Jain, Rajesh Kumar, C.V. Francis, Ramesh Babu M.R., T.G. Narayanan Nair and K.R. Sasiprabhu for G. Prakash for the appearing parties. C

The Judgment of the Court was delivered by

SYED SHAH MOHAMMED QUADRI, J. This appeal arises from the judgment and order of a Division Bench of the High Court of Kerala at Ernakulam upholding the constitutional validity of Section 4(2) read with Section 2(d) of the Kerala Fishermen's Welfare Fund Act, 1985 (Act 30 of 1985) (as amended by Act 15 of 1987) (for short, 'the Act') in O.P. No. 19806 of 1995 and the batch by the common judgment dated August 22/23, 1996. D E

On September 25, 1997 when this appeal came up for hearing before a Bench of two learned Judges of this Court, it was noticed that a Bench of three learned Judges of this Court in *Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and Anr.*, [1985] 2 SCC 68 had taken the view that any contribution imposed by State Legislation under Entry 23 of the Concurrent List would not amount to either tax or fee, which was relied upon by the respondent-State and that the appellant placed reliance on decisions of the Constitution Bench of this Court in *The Corporation of Calcutta & Anr. v. Liberty Cinema*, AIR (1965) SC 1107 and *M/s. Hoechst Pharmaceuticals Ltd. & Anr. v. State of Bihar and Ors.*, AIR (1983) SC 1019. It was submitted that compulsory impost could be either by way of tax or fee and that the definition of 'taxation' as found in Article 366 (28) of the Constitution of India and the said cases were not considered in *Gasket Radiators (supra)*. The appeal was, therefore, referred to a Bench of three learned Judges. The Bench of three learned Judges opined that in *Gasket Radiators (supra)*, a F G H

A concept of impost in the form of compulsory contribution had been given birth to and whether such birth should further multiply was a question touching the interpretation of the Constitution and referred the appeal to a Constitution Bench of five Hon'ble Judges. That is how this appeal has come up before us.

B Mr. A.K. Jain, the learned counsel appearing for the appellant, contended that the appellant was a purchaser and exporter of fishes and there was no relationship of employer and employee between the appellant and the fishermen as such the Legislature cannot levy impost by way of contribution on it under Section 4(2) of the Act and that the impugned provision was bad for want of legislative competence.

C Mr. K.N. Bhat, the learned senior counsel appearing for the State of Kerala (respondent Nos. 1 and 2), has argued that the Act and the scheme framed thereunder are welfare legislation as postulated in Articles 39 and 41 of the Constitution for the benefit of the fishermen who are members of poor and downtrodden community. His further submission was that a legislation under Entry 23 of List III of the Seventh Schedule of the Constitution requiring one set of persons to pay contributions for the benefit of another set of persons, is valid and there need not be relationship of employer and employee between them. To sustain the validity of Section 4(2) of the Act he relied on the decisions of this Court in *Mangalore Ganesh Beedi Works etc. etc. v. Union of India etc.*, [1974] 3 SCR 221 and *Gasket Radiators (supra)*. He submitted that this Court in *Regional Executive, Kerala Fishermen's Welfare Fund Board v. Fancy Food & Anr.*, [1995] 4 SCC 341 had held that the appellant was a dealer and liable to pay contributions under the Act.

F Mr. V.R. Reddy, the learned senior counsel appearing for the Welfare Fund Board (respondent No. 3) while adopting the argument of Mr. Bhat, sought to justify the impost as fee but inasmuch as the learned Advocate-General of the State of Kerala had taken a stand before the High Court that the impost was neither tax nor fee we did not permit him to urge that contention.

G In view of the stand of the State that the impost under Section 4(2) of the Act is neither tax nor fee, it would not be necessary to consider the definition of 'taxation' in Article 366(28) of the Constitution and the decisions of this Court in *Corporation of Calcutta* and *M/s. Hoechst Pharmaceuticals Ltd. (supra)*.

The short but important question that arises is : whether the impugned A
impost levied under Section 4(2) read with Section 2(d) of the Act, is
unconstitutional for want of legislative competence of the State of Kerala.

To comprehend the nature and the extent of the impost, it will be useful
to refer to the relevant provisions of the Act. B

Section 2 defines various terms employed in the Act. Section 3 speaks
of Fishermen's Welfare Fund Scheme. Sub-section (1) of Section 3 of the
Act enables the Government to frame a scheme to be called 'the Kerala
Fishermen's Welfare Fund Scheme' (for short, 'the scheme') for the
establishment of a fund under the Act by name "the Kerala Fishermen's C
Welfare Fund" (for short, 'the fund') for the welfare of fishermen and directs
that soon after the framing of the scheme the fund shall be established in
accordance with the provisions of the Act and the scheme. Various items of
amounts which form constituents of the fund and are required to be credited
to the fund are enumerated in sub-section (2). Clause (a) of sub-section (2) D
refers to contributions required to be made under section 4 of the Act. Sub-
section (3) directs that the fund shall be vested in and administered by the
Board and sub-section (4) enumerates the objects of the fund. They are as
under :

"3. *Fishermen's Welfare Fund Scheme.*— E

(1) to (3) *** **

(4) The fund may be utilised for all or any of the following purposes,
namely :-

(a) to provide for distress relief to fishermen in times of natural
calamities; F

(b) for payment of financial assistance to fishermen who suffer
permanent or temporary disablement;

(c) for payment of loans or grants to fishermen to meet the
expenses for the marriage of children, or expenses in
connection with disease or death of dependants, or any
unexpected expenditure or the day to day expenditure during
loan months; G

(d) to provide for the fishermen and the members of their H

- A families,—
- (i) education, vocational training and part-time employment;
- (ii) social education centres including reading rooms and libraries;
- B (iii) sports, games and medical facilities;
- (iv) nutritious food for children; and
- (v) employment opportunities to the handicapped;
- C (e) for payment of financial assistance to fishermen who suffer loss of houses or fishing implements or any other damage due to natural calamities or other unexpected causes;
- (f) to provide old age assistance to fishermen;
- D (g) for the implementation of any other purpose specified in the scheme,”

Sub-section (5) says that every fisherman who is a member of a Fishermen’s Welfare Society constituted under Section 4 of the Kerala Fishermen Welfare Societies Act, 1980 (7 of 1981) shall be a member of the fund and sub-section (6) says that the scheme framed under sub-section (1) may provide for all or any of the matters specified in sub-section (4) and in the Schedule.

Section 4 of the Act contains the list of contributors to the fund. Sub-Section (2) of Section 4 which is impugned reads as under :

F “4. *Contribution to the Fund*—

(1) - (1A)*****

(2) A dealer shall contribute to the Fund, every year, one per cent of his sale proceeds in the year.”

G Clause (d) of Section 2 defines the term ‘dealer’ in the following terms:

“2. *Definitions*:—In this Act, unless the context otherwise requires, -

(a) to (c) *** ** *

H (d) “dealer” means any person who carries on, within the State of

Kerala, the business of buying or selling or processing fish or exporting fish (in raw or processed form) or fish products and includes, - (i) a commission agent, a broker or any other mercantile agent, by whatever name called; and (ii) a non-resident dealer or an agent of a non-resident dealer or a local branch of a firm or company or association situated outside the State of Kerala.”

Section 12 prescribes the mode for determination of contribution and Section 13 deals with provisional assessment and collection of advance contribution.

The appellant, a dealer under the Act, was served with a notice by the Board under Section 4(2) of the Act for the period 1988-89 to 1994-95 calling upon it to show cause why contribution under Section 4 (2) of the Act should not be demanded from it. It is alleged that without considering the objections, the order of assessment was passed against it on November 30, 1995. This prompted the appellant to challenge the validity of the assessment order and Section 4(2) of the Act, in the aforementioned writ petition in the High Court of Kerala at Ernakulam which was dismissed by the common judgment on August 22/23, 1996. It is against that order that the appellant is in appeal before this Court.

Having regard to the objects of the Act, the High Court opined that the fishermen are the ultimate beneficiaries of this benevolent legislation. They fight against the surging waves in the sea for catches of the fishes which after changing hands, reach the exporters for being exported to foreign countries. The fishermen are the backbone of the industry and without them the industry cannot exist and unless they are kept in good humour, the industry cannot flourish. Therefore, there is very intimate nexus between the fishermen and an exporter of the marine products like the appellant. The learned judges of the High Court also opined that the employee-employer relationship was not wanting in the cases.

The Statement of Objects and Reasons of the impugned Act shows that the fishermen belong to one of the weakest sections of our society. The reasons for their poor socio-economic condition are stated to be manifold. During off-season and lean months as well as on special occasions like marriage, death, religious and social functions etc., in the families, the poor fishermen are forced to borrow heavily from local money lenders or owners of craft at exorbitant rates of interest. They often fail to clear off the accumulated debts with the result, they are permanently indebted to the money lenders and also forced to sell away the fruits of their hard labour at the

A prices dictated by the money lenders. Due to the risky nature of their occupation they are prone to accidents. They are subjected to loss of houses and fishing implements due to natural calamities. There is need for providing adequate educational facilities and vocational training and for providing old age assistance to them.

B The Preamble to the Constitution records the resolve of the people of India to secure to all its citizens Justice, inter alia, social, economic and political. Part IV of the Constitution embodies the Directive Principles of State Policy which, though not enforceable by any court, are fundamental in the governance of the country. Article 39 enjoins that it shall be the duty of the State to apply those principles in making laws. Clauses (b), (c) and (e) respectively of Article 39 lay down that the State shall, in particular, direct its policy towards securing that the ownership and control of material resources of the community are so distributed as best to subserve the common good; that the operation of economic system does not result in concentration of wealth and means of production to the common detriment and that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength. Article 41 directs that the State shall, *within the limits of its economic capacity and development* (emphasis supplied), make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

F Keeping these constitutional objectives and the Statement of Objects and Reasons in mind it cannot but be said that the Act and the establishment of welfare fund thereunder for requirements of fishermen outlined in subsection (4) of Section 3 of the Act is a commendable legislation. It will be apt to refer to the observations of Alagiriswami, J. in his concurring opinion in *Mangalore Ganesh Beedi Works* (supra) :

G “Nobody can dispute the need for setting right those evils. But good intentions should not result in a legislation which would become ineffective and lead to a lot of fruitless litigation over the years.”

H Now advertent to the constitutional validity of the impugned provisions, it must be remembered that Part IV of the Constitution contains, as noticed above, fundamental principles in governance of the country. They indicate and determine the direction for the State but they are not legislative heads or the fields of legislation like the Entries in the Lists I, II and III of the Seventh

Schedule of the Constitution. When any statute of a State or any provision therein is questioned on the ground of lack of legislative competence, the State cannot claim legitimacy for enacting the impugned provisions with reference to the provisions in Part IV of the Constitution; the legislative competence must be demonstrated with reference to one or more of the Entries in Lists II and III of the Seventh Schedule of the Constitution. It is stated that the legislative competence is referable to Entry 23 of the Concurrent List, which may be extracted here :

“List III - Concurrent List—

23. Social security and social insurance; employment and unemployment.”

There can be no doubt that Entry 23 enables the State Legislature to enact a law in respect of social security and social insurance or dealing with employment and unemployment. The provisions of sub-section (4) of Section 3 of the Act (quoted above) postulate social security and welfare measures for the fishermen. The State can, therefore, justify its competence under this Entry. But, in our view, the State cannot, in an Act under Entry 23 of List III, place the burden of an impost by way of contribution for giving effect to the Act and the scheme made thereunder for the social security and social welfare of a section of society upon a person who is not a member of such section of society nor an employer of a person who is a member of such section of society. The burden of the impost may be placed only when there exists the relationship of employer and employee between the contributor and the beneficiary of the provisions of the Act and the scheme made thereunder.

The validity of Employees' State Insurance Act, 1948, in regard to special contribution of the employer under Chapter V-A of the said Act, was brought under challenge in appeal before a three-judge Bench of this Court in *Gasket Radiators* (supra). The Court held that the payment of contribution by an employer towards the premium of an employee's compulsory insurance under the Employees' State Insurance Act fell directly under Entries 23 and 24 of List III. It was also held that the contributions under the Act or contributions to provident fund or payments of other benefits to workers are neither taxes nor fees and that they fall within the ambit of Entries 23 and 24 of List III. We are in agreement with the observations of Chinnappa Reddy, J. who speaking for the Court observed :

A “In our understanding, Entries 23 and 24 of List III, of their own force, empower Parliament or the Legislature of a State to direct the payment by an employer of contributions of the nature of those contemplated by the Employees’ State Insurance Act for the benefit of the employees.”

B In *Mangalore Ganesh Beedi Works* (supra), the constitutional validity of Sections 3, 4, 2(g), 2(g)(h), 2(m), 26, 27 and 31 of the Beedi and Cigar Workers (Condition of Employment) Act, 1966 was assailed on the ground of lack of legislative competence in the Parliament to enact such a law. Having noticed the special feature of the industry of manufacture of beedi through various categories of workers, the said Act was passed by the C Parliament to provide for the welfare of workers in beedi and cigar establishments and to regulate the conditions of their work and for matters connected therewith. A Constitution Bench of this Court held that having regard to the true nature and character of the legislation meant for enforcing better conditions of labour amongst those who are engaged in the manufacture D of beedis and cigars, the said Act, in pith and substance, was for welfare of the labour falling within Entries 22, 23 and 24 of List III. It was pointed out that the said Act had fastened liability on the person who himself engaged labour or the person for whom or on whose behalf labour was engaged or the person who had ultimate control over the affairs of the establishment by E reason of advancement of money or of substantial interest in the control of the affairs of the establishment. Thus, it is clear that in that case the impugned legislation, while creating welfare scheme for beedi workers, levied impost by way of contributions on the employer or a person in the position of an employer.

F In *Regional Executive Kerala Fishermen’s Welfare Fund Board* (supra), the question before this Court was whether exporters of fish meat, carrying on business of buying processed fish and exporting the same, fell within the meaning of ‘dealer’ under Section 4(2) of the Act. The legislative competence of the State Legislature and the constitutional validity of Section 4(2) of the Act did not arise for the consideration of the Court in that case. That case, G therefore, does not advance the case of the respondents.

In the instant case, the only nexus between the categories of persons covered by the sweep of sub-section (d) of Section 2 of the Act, including the appellant, who carry on the business of buying or selling or processing H fish or exporting fish (in raw or processed form) or fish products, including

- (i) a commission agent, a broker or any other mercantile agent, by whatever name called, and (ii) a non-resident dealer or an agent or a non-resident dealer or a local branch of a firm or company or association situated outside the State of Kerala and the beneficiaries under the Act and the scheme - the fishermen - is that the former are the purchasers and the latter are the catchers and sellers of fish. Such a nexus, in our view, is not sufficient to burden a purchaser/exporter with the impost or levy of the contribution under Section 4(2) of the Act, which will clearly be outside the ambit of Entry 23 of List III of the Constitution and, therefore, lacking legislative competence.

For these reasons, Section 4(2) of the Act is declared to be unconstitutional. Consequently, the order under challenge is set aside. The writ petition shall stand allowed to that extent.

Mr. V.R. Reddy submitted that the amounts, credited to the welfare fund by dealers under Section 4(2) of the Act, had been expended by the Board for purposes of the Act and the scheme so this Court might be pleased to relieve the Board of the obligation to refund the amounts to the dealers-contributors. On hearing Mr. Jain and on careful consideration of the submission of Mr. Reddy, we direct that pursuant to the declaration of invalidity of Section 4(2) of the Act, the amount of contributions, already paid by persons falling under Section 4(2), will not be liable to be refunded to the dealers-contributors by the Board.

The appeal is allowed accordingly. In the circumstances of the case, we make no order as to costs.

S.V.K.I.

Appeal allowed.