

PETITIONER:
STATE OF MYSORE

Vs.

RESPONDENT:
H. SANJEEVIAH

DATE OF JUDGMENT:
16/01/1967

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
RAO, K. SUBBA (CJ)
SIKRI, S.M.
RAMASWAMI, V.
VAIDYIALINGAM, C.A.

CITATION:
1967 AIR 1189 1967 SCR (2) 361
CITATOR INFO :
RF 1979 SC1459 (33)
RF 1981 SC 711 (11)
D 1982 SC1016 (9)
RF 1985 SC 660 (17)
R 1989 SC2015 (8)
RF 1990 SC 820 (31)

ACT:

Madras Forest Act (11 of 1900), s. 37--Power to make rules regulating transit of forest produce--Rule 2, provisos--These prohibiting removal of forest produce between 10 p.m. and sun-rise and conditionally permitting removal between sun-set and 10 p.m.--Such restrictions on Contractors whether prohibitory or regulatory--Whether within rule making power.

Constitution of India, Arts. 301, 304, 305--Freedom of trade--Proviso to Rule 2 framed under s. 37 of Madras Forest Act whether restrictive of such freedom, whether saved by Art. 304--Whether 'existing law' for the purpose of Art. 305.

HEADNOTE:

Section 37 of the Madras Forest Act, 1900, gave power to Government to make rules regulating the transit of forest produce. Rule framed thereunder prohibited the removal of forest produce without permit. After the promulgation of the Constitution in 1950 two provisos were added to the said rule the first of which prohibited the issue of permits allowing forest produce to be removed between sun-set and sunrise, while the second permitted such removal between sun-set and 10 p.m. on certain conditions. The respondent who was a forest contractor filed a writ petition in the High Court challenging the validity of the provisos on the ground that they were beyond the rule making power under s. 37 of the Madras Forest Act and were restrictive of his freedom of trade and commerce declared by Art. 301 of the Constitution. The petition was allowed and the State appealed.

HELD : (i) Power to impose restrictions of the nature

contemplated by the two provisos to r. 2 is not to be found in any of the clauses of sub-s. (2) of s. 37. By sub-s. (1) the State Government is invested with the power to regulate transport of forest produce "in transit by land or water." The power which the State Government may exercise is however power to regulate transport of forest produce, and not the power to prohibit or restrict transport. Prima facie, a rule which totally prohibits the movement of forest produce during the period between sun-set and sunrise is prohibitory or restrictive of the right to transport forest produce. A rule regulating transport in its essence permits transport, subject to certain conditions devised to promote transport: such a rule aims at making transport orderly so that it does not harm or endanger other persons following a similar vocation or the public, and enables transport to function for the public good. [364 G-H; 365 A]

Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan, [1963] 1 S.C.R. 491, relied on.

If the Provisos are in truth restrictive of the right of transport of the forest produce, however good the grounds apparently may be for restricting the transport of forest produce., they cannot on that account transform the power conferred by the provisos into a power merely regulatory. [365 H]

(ii) Article 301 in terms prohibits the imposition of any restriction on trade, commerce and intercourse throughout the territory of India and 361

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by the enactment of the two provisos clearly restriction is imposed on the freedom of trade. The provisos to the rule must therefore be deemed to be invalid as infringing the guarantee under Art. 301 of the freedom of trade commerce and intercourse. [366 C-D]

The provisos were not protected by Art. 305. Section 37 which conferred power to make rules was "existing law" within the meaning of that expression in Art. 305., but the rules made in exercise of that power after the Constitution cannot be deemed to be "existing law". The mere fact that there was authority in the State under a pre-Constitution Act to make rules which may impose restrictions on trade, commerce and intercourse, but which was not exercised, will not make the rule made in exercise of the authority after the Constitution "existing law" within the meaning of the Constitution. [366 G]

Kalvani Stores v. State of Orissa, A.I.R. (1966) S.C. 1686, relied on.

Kasi Prasad v. Sate of Orissa, A.I.R. (1963) Orissa 24, disapproved.

Article 304 which is an exception to Art. 301 had no application to the case because that Article saved certain laws from the operation of Art. 301 if the law was passed by the Legislature of a State,. The provisos to s. 2 were not made by the Legislature of the State; they were made by the Executive Government in exercise of delegated authority. Moreover they had not been shown to be reasonable restriction on the freedom of trade commerce and intercourse imposed in the public interest so as to satisfy the terms of Art. 304(b). [367 D-E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1010 of 1965. .

Appeal by special leave from the judgment and order dated

July 11, 1963 of the Mysore High Court in Writ Petition No. 1601 of 1962.

S. V. Gupte, Solicitor-General, R. Ganapathy Iyer and R. H. Dhebar, for the appellant.

G. R. Ethiarajulu Naidu, K. Rajendra Chaudhuri and K. R. Chaudhuri, for the respondent.

The Judgment of the Court was delivered by

Shah, J. By S. 37 of the Mysore Forest Act 11 of 1900 the State Government is authorized to make rules to regulate the "transit of . . . forest produce". In exercise of the powers conferred by S. 37 the State Government of Mysore has framed rules to regulate the "transit of timber, firewood, charcoal and bamboos from all lands." By r. 2 framed on October 13, 1952 it was provided that no person shall import forest produce into, export forest produce from, or move forest produce within, any of the areas specified in Sch. 'A' (hereinafter referred to as the Scheduled area), unless such forest produce is accompanied by a permit prescribed in r. 3. On April 15, 1959 the State of Mysore issued a notification adding a proviso to r. 2 which read as follows :

"Provided that no such permit shall authorise any person to transport forest produce between sun-set and sun-rise in any of the areas specified in Schedule "A".

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By another notification dated September 14, 1960, the State Government introduced the second proviso to r. 2 which read :

"Provided further that permission may be granted to timber merchants on their requisition to transport timber up to 10 P.M. (22 hrs.) under the following conditions :-

(i) the party who wishes to avail of the concessions should pay a cash deposit of Rs. 1,000 as security for due compliance with the timber transit rules as in force;

(ii) that the deposit may be forfeited to Government for breach of any of the conditions of the Timber Transit Rules."

The respondent who is a dealer in timber filed a petition under Art. 226 of the Constitution for an order quashing the two provisos to r. 2, on the grounds inter alia that the two provisos were beyond the rule-making authority conferred upon the State Government by s. 37 of the Mysore Forest Act 11 of 1900, and that in any event the provisos imposed unauthorised restrictions on the freedom of trade, commerce and intercourse. The High Court of Mysore held that by the provisos inserted in r. 2 the State Government had while seeking to regulate the transport of timber "stopped transport altogether", and in doing so the State Government acted in excess of the powers conferred upon it by s. 37 of the Act. The High Court also held that the two provisos were not saved by Art 305 of the Constitution and since the function of the two provisos was not regulatory but prohibitory, they were violative of Art. 301 of the Constitution and must be struck down as unconstitutional. With special leave granted by this Court, the State of Mysore has appealed to this Court.

Section 37(1) of the Mysore Forest Act 11 of 1900 provides

"The control of all rivers and their banks as regards the floating of timber, as well as the control of all forest produce in transit by land or water, is vested in the State Government which may make rules to

regulate the transit of any forest produce."

Sub-section (2) provides :

" Such rules may, among other matters,

(a).....

(b) prohibit the import, export, collection, or moving of forest produce without a pass from an officer authorised to issue the same, or otherwise than in accordance with the conditions of such pass;"

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By r. 2 which is framed in exercise of the power under s. 37 (2) (b), a person intending to transport forest produce must obtain a pass from an authorised officer. The rule so made is clearly regulatory, of the right to transport forest produce. But a restriction is imposed on the right to transport forest produce by the two provisos incorporated in the rule in 1959 & 1960. By the first proviso the holder of a pass is not authorised to transport forest produce between the hours of sun-set and sun-rise in any area specified in Sch. 'A', and by the second proviso it is provided that the restriction imposed by the first proviso may be relaxed between the hours of sun-set and 10 P.M. if the person wishing to avail of the concession makes a cash deposit of Rs. 1,000 as security for due compliance with the "timber transit rules". By the terms of the two provisos there is an absolute prohibition against transportation of forest produce between the hours of 10 P.M. and sun-rise, and a qualified prohibition between the hours of sun-set and 10 P.M. If a transporter of forest produce makes a cash deposit of Rs. 1,000 as security, he may be permitted to transport forest produce between the hours of sun-set and 10 P.M.

provisos were regulatory and not prohibitory. It was urged that every injunction in the form of a prohibition cannot be regarded as a restriction upon the right to transport, and reliance was placed upon the form of cls. (b), (j) and (1) of sub-s. (2) of s. 37. What is decisive in each case, it was submitted, is not the form of the rule, but the substance thereof, and that the provisos sought merely to regulate transport of forest produce. Clause (b) of S. 37(2) prohibits import, export, collection and movement of forest produce without a pass. The prohibition is, it is common ground, regulatory of the right to transport forest produce. Under cl. (j) rules may be made imposing prohibition against the closing up or obstruction of the channel, or banks of any river used for the transport of forest produce, and under cl. (1) rules may be made prohibiting absolutely or subject to conditions, the establishment of sawpits, or saw mills or any other sawing contrivance. But cls. (j) & (1) do not operate to prohibit or restrict the transport of any forest produce.

Power to impose restrictions of the nature contemplated by the G two provisos to r. 2 is not to be found in any of the clauses of subs. (2) of s. 37. By sub-s. (1) the State Government is invested with the power to regulate transport of forest produce "in transit by land or water." The power which the State Government may exercise is however power to regulate transport of forest produce, and not the power to prohibit or restrict transport. Prima facie, H a rule which totally prohibits the movement of forest produce during the period between sun-set and sun-rise is prohibitory or restrictive of the right to transport forest produce. A rule regulating trans-

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port in its essence permits transport, subject to certain

conditions, devised to promote transport : such a rule aims at making transport orderly so that it does not harm or endanger other persons following a similar vocation or the public, and enables transport to function for the public good. It was observed by one of us (Subba Rao, J.),, in Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan.(1)

"Restrictions obstruct the freedom, whereas regulations promote it. Police regulations, though they may superficially appear to restrict the freedom of movement, in fact provide the necessary conditions for the free movement. Regulations such as provision for lighting, speed, good conditions of vehicles, timings, rule of the road and similar others, really facilitate the freedom of movement rather than retard it. So too, licensing system with compensatory fees would not be restrictions but regulatory provisions: for without it, the necessary lines of communications, such as roads, water-ways and air-ways cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one. So too, regulations providing for necessary services to enable the free movement of traffic, whether charged or not cannot also be described as restrictions impeding the freedom."

It was asserted in the affidavit filed on behalf of the State in, reply to the petition that the restriction imposed by the rules on the freedom of citizens to transport timber, fire-wood, charcoal and bamboos is a reasonable restriction and in the public interest, i.e. to prevent unauthorised felling of trees and bamboos and smuggling them from the State forests. It was said that checking transport of the forest produce during nights would require enormous increase in the number of checking staff of the Forest Department, that such staff will have to work in two or three shifts every day if they have to check transport of forest produce during nights also, further that such staff will have to be equipped with lanterns and warm clothings if they have to work during nights, that persons who indulge in smuggling of timber find nights more convenient to avoid detection, and that smuggling of forest produce is a serious menace to preservation of forests in the State and safeguarding of the property of the State. Whether or not these are good grounds for imposing restrictions on transport of forest produce is not a matter with which we are concerned in dealing with the power of the State by rules to restrict the right to transport forest produce. The power conferred upon the State Government is merely "to regulate the transit" of forest produce and not to restrict it. If the provisos are in truth restrictive of the right to transport the forest produce, however, good the grounds apparently may be for restricting the transport of forest

(1) [1963] 1 S.C.R. 491, 549.

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produce, they cannot on that account transform the power conferred by the provisos into a power merely regulatory. The High Court was, therefore, in our view, right in holding that the two provisos to r. 2 are not regulatory in character, but are restrictive.

The alternative ground on which the High Court has decided against the State Government must also be sustained. Article 301 provides:

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

The provisos are undoubtedly restrictive of trade and commerce and on that account would prima facie be void, as derogating from the freedom declared by Art. 301. It has been held by this Court in Automobile Transport (Rajasthan) Ltd.'s case⁽¹⁾ that regulatory measures, which do not hamper trade, commerce and intercourse, but facilitates them, are not hit by Art. 301 of the Constitution. But it cannot be said of the two provisos, that they are in any sense regulatory. The plea that Art. 301 does not come to the aid of the respondent because of the reservation made in Art. 305 has, in our judgment, no substance. Article 305, insofar, as it is material, provides :

"Nothing in articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order otherwise direct;"

The expression "existing law" is defined in Art. 366(10) as meaning any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation. Undoubtedly the Forest Act was passed before the Constitution and it was brought into force before that date. Rule 2 (as it stood originally) was promulgated after the Constitution, but that, as already observed, was regulatory of the right to transport forest produce. Section 37 which conferred power to make rules was undoubtedly "existing law" within the meaning of that expression used in Art. 305, but the rules made in exercise of that power after the Constitution cannot be deemed to be "existing law". The mere fact that there was authority in the State under a pre-Constitution Act to make rules which may impose restrictions on trade, commerce and intercourse, but which was not exercised, will not make the rule made in exercise of the authority after the Constitution "existing law" within the meaning of the Constitution. This Court in *Kalvani Stores V. The State of Orissa* (2) held that a notification issued after the Con-

(1) [1963] 1 S.C R, 491, 549.

(2) A.1 R. 1966 S.C. 1686.

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situation imposing additional duty under the power reserved under S. 90 read with s. 27 of the Bihar & Orissa Act, 1915, was not existing law within the meaning of Art. 305 of the Constitution read with Art. 366(10) and the notification was invalid unless it complied with the requirements of Arts. 302, 303 or 304 of the Constitution. It was held by a majority of the Court that "existing law within the meaning was therefore the provision contained in S. 27 of the Bihar & Orissa Act 2 of 1915 authorising the State Government to issue a notification imposing a duty at the rate fixed thereby, and the notification issued pursuant thereto before the Constitution." The decision of the Orissa High Court in *Kasi Prasad v. State of Orissa*(1) in which it was held that rules framed in 1958 after the coming into force of the Constitution in exercise of the power conferred by s. 41 of the Orissa Forest Act, 1927, were existing law," and on that account not open to challenge because of Art. 305 of the Constitution, even though they violated the guarantee under Art. 301, cannot be regarded as correct.

Article 304 which is an exception to Art. 301 has no

application to this case, because that Article saves certain laws from the operation of Art. 301 if the law is passed by the Legislature of a State. The provisos to r. 2 are not made by the Legislature of the State; they are made by the executive Government in exercise of delegated authority. The rules have the force of law, but when made did not become part of the Act : (see s. 77 of the Mysore Forest Act). Again Art. 304(b) exempts from the operation of Art. 301 reasonable restrictions on the freedom of trade, commerce and intercourse with or within the State as may be required in the public interest. There is no evidence of an enquiry made by the State before the provisos were framed, and no case is made out that they are reasonable restrictions on the freedom of trade, commerce and intercourse imposed in the public interest. Article 301 in terms prohibits the imposition of any restriction on trade, commerce and intercourse throughout the territory of India, and by the enactment of the two provisos clearly a restriction is imposed upon the freedom of trade. The provisos to the rule enacted by the State Government must therefore be deemed to be invalid as infringing the guarantee under Art. 301 on the freedom of trade, commerce and intercourse.

The appeal fails and is dismissed with costs.

G.C. Appeal dismissed.

(1) A.I.R. 1963 Orissa, 24.

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