

PETITIONER:
KALYANI STORES

Vs.

RESPONDENT:
THE STATE OF ORISSA AND OTHERS

DATE OF JUDGMENT:
21/09/1965

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
HIDAYATULLAH, M.
SIKRI, S.M.

CITATION:
1966 AIR 1686 1966 SCR (1) 865
CITATOR INFO :
F 1967 SC1189 (7)
E 1970 SC1912 (5,8,9)
D 1976 SC 182 (5)
RF 1976 SC2020 (9)
R 1977 SC1459 (8)
C 1979 SC1550 (17)
D 1981 SC 463 (33,34)
R 1985 SC1211 (41)
RF 1986 SC1522 (5,6,7)
R 1989 SC2015 (8)
F 1990 SC 781 (75)
F 1990 SC 820 (31)
RF 1991 SC 735 (20)

ACT:
Bihar & Orissa Excise Act, 1915, S. 27--Countervailing duty-
Nature of-Whether can only be imposed on imported goods when
similar goods manufactured or produced in the State-Validity
of levy before and after the constitution came into force.
Constitution of India, Articles 301 to 305--Scope of-Whether
combination of Act and notification issued under it
constitute existing law under Articles 305 and 372.

HEADNOTE:
In a petition under Article 226, the appellant challenged
the imposition of a duty of excise on 'foreign liquor'
imported into the State which had been levied at Rs. 40/-
per L.P. Gallon until March 31, 1961, by virtue of a
notification issued in 1937 under s. 27 of the Bihar and
Orissa Excise Act, 1915, and which had been enhanced w.e.f.
1st April 1961 by a fresh notification.
It was contended on behalf of the appellant that since no
'foreign liquor' was manufactured within the State and
consequently no excise duty was being levied on any
locally manufactured 'foreign liquor', countervailing duty
could not be charged on such liquor brought from outside
the State; that the imposition was in violation of Articles 301,
303 and 304 of the Constitution; that even if the original
countervailing duty of Rs. 40/- could be held to be leviable,

the enhancement of the existing duty made (the imposition a new tax which could not be levied if there was no corresponding duty on locally manufactured goods of the same kind. The petition was dismissed by the High Court.

On appeal to this Court,

HELD (per majority)

(i) The notification dated March 31, 1961, enhancing the duty on 'foreign liquor' by Rs. 30/- per gallon was invalid as it infringed the guarantee of freedom of trade etc. under Art. 301. [874 H]

A restriction on the freedom of trade, commerce and intercourse throughout the territory of India declared by Art. 301 cannot be justified unless it falls within Article 304. Exercise of power under Article 304(a) can be effective only if the tax or duty imposed on goods imported from other States and the tax or duty imposed on similar goods manufactured or produced in that State are such that there is no discrimination. As no foreign liquor was produced or manufactured within the State, the protection of Article 304 was not available in the present case. [872 F, G]

Power to levy countervailing duties under Entry 51 List 11 is meant to be exercised for the purposes of equalising the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. Therefore countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties; are being levied.

[869 H- 870 A] pCI/65-12

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(ii) Although no 'foreign liquor' was manufactured within the State, the State could continue to levy duty at the rate of Rs. 40/- per gallon prescribed by the notification of 1937 even after the Constitution came into force because that notification, and the provisions of s. 27 of the Bihar and Orissa Excise Act under which it was issued, constituted an existing law or a law in force that was protected by Articles 305 and 372. But the notification of March 1961, which enhanced the duty by Rs. 30/- and altered the existing law could be valid only if it complied with the constitutional requirements. Existing law within the meaning of Art 305 was the provision in s.27 of Act 2 of 1915 authorising the State Government to issue a notification, and the notification issued in exercise of that authority. A fresh notification issued after the Constitution could be valid only if it complied with the constitutional requirements. [872 H 873 C]

The Bangalore W.C. & 5 Mills Co. v. The Bangalore Corporation A.I.R. 1962 S.C. 562 and 1263; distinguished.

(per Hidayatullah, J. dissenting)

The Bihar and Orissa Excise Act, 1915 was valid under the Government of India Act, 1935 and in view of cl. (3) of the Adaptation of Laws Order, 1937, could not be questioned in a court of law. By reason of Art. 372 of the Constitution, the Act must be deemed to be valid even today. The absence of manufacture of foreign liquor within the State is of no significance because section 27 is saved. The law which was saved was not a combination of the Act and the notification but the Act (particularly s. 27) itself. What was done under its authority in the past and what was being done today was equally valid. The notification of 1961 arrived its force from s. 27. which is a valid enactment, even as the notification of 1937 did before from the same section and the new notification could not be said to run against

any constitutional provision. If the duty at Rs. 40/- could be sustained the duty at Rs. 70/- must also be valid, for the same reasons apply. [893 G, H]

Articles 301 and 304 (a) could not come into play in the present case. Article 304(a) imposes no ban but lifts the but imposed by Articles 301 and 303 subject to one condition. That Article is enabling and prospective and is available in respect of other taxes such as Sales Tax, etc. imposed by the State legislature. The power to levy excise and countervailing duties is conferred on the State legislature by Entry 51 of List 11, and if Article 301 stands in the way, the protection of Article 305 is available. 'The Bihar, and Orissa Excise Act was sustained by Articles 305 and 37'- independently of Art. 304(a). [883 C, E]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 20 of i 964. Appeal by Special leave from the judgment and order dated the October 29. 1962 of the Orissa High Court in O.J.C. No. 241 of 1961.

Santosh Chatterjee and D. V. Misra, for the appellant.

N. S. Bindra, and R. N. Sachthey, for the respondents.

C. B. Agarwala O. P. Rana, for the intervener.

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The Judgment of Gajendragadkar C.J., Wanchoo Shah and Sikri, JJ. was delivered by Shah J., Hidayatullah, J. delivered a dissenting Opinion.

Shah, J. The appellants-Kalyani Stores-deal in liquor at Rourkela, District of Sundergarh in the State of Orissa. The appellants held a licence as retail vendors for "all types of foreign liquor" under the Bihar and Orissa Excise Act, 1915 The expression "foreign liquor, apparently includes Ale, Beer, Port. Cider and other fermented liquors, cordials, mixtures and other preparations containing spirit, perfumed spirit and all sorts of wines whether manufactured in India or abroad. Under the Bihar & Orissa Excise Act, 1915 by a notification issued in 1937 under s. 27 a duty of Rs. 40/- per L.P. Gallon was imposed and realised by the State of Orissa on foreign liquor of Indian manufacture imported into State of Orissa from other parts of India. For the year April 1. 1960 to March 31, 1961 duty was levied on "foreign liquor" imported by the appellants at the rate fixed in the notification issued in 1937. On March 31, 1961 In exercise of the powers conferred by s. 90 of the Bihar & Orissa. Excise Act 2 of 1915 the Board of Revenue enhanced the duty with effect from April 1, 1961 in respect of "foreign liquors" from Rs. 40/- to Rs. 70/- per L.P. Gallon, and also raised duty in respect of other excisable articles. The licence held by the was :In due course renewed from April 1, 1961 to March 31, 1962. On November 14, 1961 the Sub-Inspector of Excise, Panposh called upon the appellants to pay the difference at the rate of Rs. 30/per L.P. Gallon in respect of the stocks of liquor found in the shop of the appellants on April 1, 1961 and to pay duty at the rate of Rs. 70/- per L.P. Gallon in respect of fresh stocks received after April 1, 1961. The appellants challenged the legality of this levy by a petition under Art. 226 of the Constitution filed before the High Court of Orissa. The appellants contented inter alia that the State could levy under s. 27 of the Bihar and Orissa Act duty on excisable articles produced or manufactured in the State and a countervailing duty on excisable articles imported into the

State, imposed with a view to equalize the burden on the imported articles with the burden on manufactured articles in the State, but no countervailing duty on liquor imported could be levied if there was in the year of licence no liquor, similar to the imported liquor, manufactured within the State, and as there was no distillery in the State manufacturing "foreign liquor" the levy of countervailing duty. was without authority of law. The High Court dismissed the petition holding that under Entry 51, List 11, in Sch. VII of the Constitution, the State Legislature had the power to legislate for levying

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duties of excise on alcoholic liquors for human consumption manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India, and it was admitted that the rate of duty on liquor produced in Orissa levied by the State of Orissa was identical with the countervailing duty required to be paid on imported liquor, the impugned notification was not invalid. With special leave granted by this Court, the appellants have appealed to this Court.

The Bihar & Orissa Excise Act 2 of 1915 was enacted with the object, amongst others, to control the import, export, transport, manufacture, possession and sale of certain kinds of liquor and intoxicating drugs. Section 27 of the Act as amended by the Adaptation Order, 1950, provides :

"An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on--

(a) any excisable article imported, or
Explanation.-

The appellants submit that the levy of duty at the rate of Rs. 70/per L.P. Gallon under the notification dated March 31, 1961, is without authority of law, in that it contravenes Entry 51 List II, Sch. VII of the Constitution. The argument presented in this laconic form is founded on what is contended is the true character of countervailing duties. We may observe that the challenge was restricted to the raising of the duty by the notification dated March 31, 1961 : the appellants did not challenge before the High Court the notification issued in 1937. The validity of the levy at the rate of Rs. 40/- per L.P. Gallon before the Constitution is therefore not under consideration in this appeal. Power of the Legislature to legislate for imposition of duties on excisable articles manufactured within the State and to impose countervailing duties upon excisable articles imported into the State is not denied. It is said however that the expression "countervailing duty" means a duty levied on similar articles imported from outside the State, with a view to equalise the burden of taxation on articles produced or manufactured within the State and articles imported, and a countervailing duty on imported articles cannot be levied by the State unless articles similar to those imported are produced or manufactured in the State and an excise duty is levied thereon.

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The High Court has observed in its judgment that it was admitted that the rate of duty on liquor produced in Orissa levied by the State Government was identical with the countervailing duty required to be paid on imported foreign liquor. Counsel for the appellants says that it was not

admitted by the appellants that at the material time foreign liquor was manufactured or produced within the State of Orissa. The High Court has apparently not stated that "foreign liquor" was manufactured within the State of Orissa at the material time. From the affidavits filed in this Court by the parties it is clear that no "foreign liquor" was being produced in the State at the material time; nor was any such liquor produced at any time after the Constitution was brought into force. Counsel for the State has, therefore, very fairly not supported this part of the reasoning of the High Court.

This brings us to the consideration of the meaning of the expression "countervailing duties" used in Entry 51, List 11 of the Seventh Schedule to the Constitution. The expression "countervailing duties" has not been defined in the Constitution or the Bihar & Orissa Act 2 of 1915. We have, therefore, to depend upon its etymological sense and the context in which it has been used in Entry 51. In its etymological sense, it means to counter-balance; to avail against with equal force or virtue; to compensate for something or serve as an equivalent of or substitute for: see Black's Law Dictionary, 4th Edn. 421. This would suggest that a countervailing duty is imposed for the purpose of counterbalancing or to avail against something with equal force or to compensate for something as an equivalent. Entry 51 in List 11 of the Seventh Schedule to the Constitution gives power to the State Legislature to impose duties of excise on alcoholic liquors for human consumption where the goods are manufactured or produced in the State. It also gives power to levy countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India. The fact that countervailing duties may be imposed at the same or lower rates suggests that they are meant to counterbalance the duties of excise imposed on goods manufactured in the State. They may be imposed at the same rate as excise duties or at a lower rate, presumably to equalise the burden after taking into account the cost of transport from the place of manufacture to the taxing State. It seems, therefore, that countervailing duties are meant to equalise the burden on alcoholic liquors imported from outside the State and the burden placed by excise duties on alcoholic liquors manufactured or produced in the State. If no alcoholic liquors similar to those imported into the State are produced or manufac-

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tured, the right to impose counterbalancing duties of excise levied on the goods manufactured in the State will not arise. It may, therefore, be accepted that countervailing duties can only be levied if similar goods are actually produced or manufactured in the State on which excise duties are being levied.

But the Bihar and Orissa Act 2 of 1915 was enacted by the appropriate legislature in 1915 and by virtue of Art. 372 of the Constitution it was a law in force and continues to remain in force until altered, repeated or amended by a competent legislature or by a competent authority, and therefore countervailing duty on imported foreign liquor could be levied by the State Government as it was levied before the Constitution, unless there is something to the contrary to be found therein. It is admitted that the Government of Orissa continued to levy a duty of Rs. 40 per L.P. Gallon under Act 2 of 1915 even after Constitution came into force. By the notification of 1961 the duty was enhanced from Rs. 40 per L.P. Gallon to Rs. 70 per L.P.

Gallon. Levy at the rate prescribed under the notification of 1937 in operation immediately before the Constitution remained effective until it was lawfully altered. The only contention raised in the High Court in support of the plea of invalidity of the levy in its entirety based on the nature of countervailing-duty cannot prevail for a part of the duty was already being levied before the Constitution came into force, and the appellants by their petition did not challenge in the High Court the validity of that levy before the 26th January, 1950. The duty of Rs. 70 per L.P. Gallon may be broken up into two parts, Rs. 40 per L.P. Gallon which was in force before the Constitution came into force, and which continued to be levied thereafter, and Rs. 30 which was the added levy in 1961. The contention based on the nature of countervailing duty cannot in the face of Art. 305, to which we shall presently refer prevail in as far as it is levied under the notification issued in 1937. though the enhancement of Rs. 30 in 1961 after the Constitution came into force may be open to challenge. The argument of counsel for the appellants that the levy of duty at the rate of Rs. 70 per L.P. Gallon in its entirety is invalid must therefore fail.

Whether the enhancement of the levy by notification dated March 31, 1961 insofar as it enhanced the levy from Rs. 40 to Rs. 70 per L.P. Gallon infringes any constitutional prohibitions may be considered. By s. 27 of Act 2 of 1915 the State Government is given the power to impose a countervailing duty at the rate or rates as the State-Government may direct. Before the Constitution, duty was imposed at the rate of Rs. 40 per L.P. Gallon on foreign liquors. The imposition remained in operation

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till the date on which the Constitution was brought into force, and has not been challenged in the petition. The Act merely authorised the levy of duty as may be fixed by the Government. To effectuate the power to levy the duty authorised, the rate of duty must be fixed by notification by the State Government. In 1937 the power was exercised by issuing a notification under S. 27 authorising the levy of duty at the rate of Rs. 40 per L.P. Gallon. Section 27 of the Act authorised the imposition of excise and countervailing duties : the section however did not by its own force impose liability to pay any specific duties. To complete the levy the State Government had to issue a notification levying the duty and prescribing the rates thereof. By the notification dated March 31, 1961 that law was altered and the duty was raised to Rs. 70 per L.P. Gallon. Till the enactment of the Constitution the existing law relating to the levy of countervailing duty on excisable articles was contained in s. 27 supplemented by the notification issued by the Government of Orissa in 1937. By the notification dated March 31, 1961, the rate of levy was altered, and the validity of the altered rate of duty has to be adjudged in the light of the provisions of the Constitution.

The validity of the imposition of the new rate of Rs. 70 per L.P. Gallon may be examined in the light of the restrictions imposed by the Constitution on the legislative power. By Art. 301 of the Constitution, subject to the other provisions of Part XIII, trade, commerce, and intercourse throughout the territory of India is to be free. By Art. 303 no power is conferred upon the State Legislature to make any law giving or to authorise the giving of, any preference to one State over another, or to make, or authorise the making of, any discrimination between one State and another,

by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule. The material part of Art. 304 is as follows:

"Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law--

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

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with

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or within that State as may be required in the public interests

Provided that

Articles 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;

Article 304 is in terms prospective : it authorises the State Government to legislate notwithstanding anything in article 301 or 303 to impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods imported and goods manufactured or produced or to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest. The notification levying duty at the enhanced rate is purely a fiscal measure and cannot be said to be a reasonable restriction on the freedom of trade in the public interest. Article 301 has declared freedom of trade, commerce and intercourse throughout the territory of India, and restriction on that freedom may only be justified if it falls within Art. 304. Reasonableness of the restriction would have to be adjudged in the light of the purpose for which the restriction is imposed, that is "as may be required in the public interest". Without entering upon an exhaustive categorization of what may be deemed "required in the public interest", it may be said that restrictions which may validly be imposed under Art. 304 (b) are those which seek- to protect public health, safety, morals and property within the territory. Exercise of the power under Art. 304(a) can only be effective if the tax or duty is imposed on goods imported from other States and the tax or duty imposed on similar goods manufactured or produced in that State are such that there is no discrimination against imported goods. As no foreign liquor is produced or manufactured in the State of Orissa the power to legislate given by Art. 304 is not available and the restriction which is declared on the freedom of trade, commerce or intercourse by Art. 301 of the Constitution remains unfettered.

Mr. Bindra appearing on behalf of the State of Orissa contended that the Legislature having empowered the State Government by s. 27 to levy duty at a rate which may be prescribed, the notification dated March 31, 1961, enhancing the tax derived its validity from the Act itself and did not amount to any law modifying the existing law. Therefore, it was said, the levy of duty at

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the enhanced rate was supported by the power conferred by s. 27 which was "existing law". This argument cannot, in our view, be sustained. By Art. 366 (10) unless the context otherwise requires, the expression "existing law" means 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. Existing law within the meaning of Art. 305 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 notification of March 31, 1961, which imposed an additional burden may therefore be valid only if it complies with the constitutional requirements.

The decision in *The Bangalore Woollen, Cotton and Silk Mills Company Ltd., Bangalore and another v. The Corporation of the City of Bangalore*, (1) on which reliance was placed by Mr. Bindra does not assist his contention. In that case by resolution dated March 31, 1954, the Municipal Corporation of Bangalore purporting to act under the authority conferred by s. 98 of the City of Bangalore Municipal Corporation Act 69 of 1949 resolved to levy octroi duty on cotton and wool. The authority of the Municipal Corporation to levy the tax was challenged. It was held by a Division Bench of this Court in *Bangalore Woollen, Cotton and Silk Mills v. Bangalore Corporation* (2) that the Legislature had laid down the powers of the Municipal Corporation to tax animals and goods, brought within the Octroi limits and had enumerated certain articles and animals in Part V of Sch. III and by class VIII read with s. 97 had authorised the Corporation to impose a tax on other articles or goods. This power in the view of the Court was granted by conditional legislation and was not liable to be struck down on the score of excessive delegation. The question whether the imposition of the octroi duty offended Arts. 276 and 301 was then referred to a larger Bench and the Court held in *The Bangalore Woollen, Cotton and Silk's Mills Co. Ltd. Bangalore's case* (1) that the combined effect of ss. 97 and 130 and Part V of Sch. III including class VIII is that the words of a general nature used by the Legislature had the same effect as if all articles were intended to be included, and the impugned octroi duty did not contravene the provisions of Arts. 276 and 301 of the Constitution. It was urged on behalf of the tax-payers that the source

(1) A.I.R. 1962 S.C. 562.

(2) A.I.R. 1962 S.C. 1263.

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of the authority to levy octroi duty on cotton and wool was the resolution of the Municipal Corporation, which was in the nature of subordinate legislation, which amended or altered the existing law. This contention was rejected. The Court in that case held that the combined effect of ss. 97, 130 and Part V of Sch. III including class VIII in the City of Bangalore Municipal Corporation Act was that all articles were intended to be included in the parent statute. It is implicit in the reasoning that there was no alteration or modification of the existing law, by the resolution of the Corporation. The decision of that case turned entirely upon the interpretation of the special Provisions the like of which are not found in the Bihar & Orissa Act 2 of 1915. In the present case, it is clear that under the existing law duty had been imposed in exercise of the power contained in

ss. 27, 28 and 90 of the Act and the notifications issued from time to time before the Constitution was enacted, and that law was altered by the notification dated March 31, 1961. It is not the case of the State that in exercise of any pre-existing conditional legislation, duty at enhanced rate was made leviable on foreign liquor. The sole authority for the levy of the duty at the enhanced rate is the notification of the State Government dated March 31, 1961. That notification infringes the guarantee of freedom under Art. 301, and may be saved only if it falls within the exceptions contained in Arts. 302, 303 and 304. Articles 302 and 303 are apparently not attracted and have not been relied upon, and the notification does not comply with the requirements of the Constitution contained in Art. 304 cls. (a) & (b). The notification dated March 31, 1961, enhancing the levy by Rs. 30 per L.P. Gallon must, therefore, be regarded as invalid. That however does not affect the validity and the enforceability of the earlier notification issued in 1937 which must remain operative in view of Art. 305. That Article specifically protects existing law and as the levy of countervailing duty at Rs. 40 per L.P. Gallon was an existing law it is protected under Art. 305. In fact this position was not challenged by the appellants in their writ petition.

The appeal is therefore, partially allowed, and it is declared that the notification dated March 31, 1961, enhancing duty on foreign liquor at the rate of Rs. 30 per L.-P. Gallon is invalid as offending Art. 304 of the Constitution and is therefore unenforceable. The right of the State to enforce the liability against the appellants to pay duty at the rate prescribed in the earlier notification which held the field, remains however unaffected. In view of the

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divided success of the parties, there will be no order as to costs in this Court and the High Court.

Hidayatullah, J. The appellant is a firm which deals in liquor at Rourkela in the Orissa State. It challenges in to to the imposition of a duty of excise on foreign liquor levied at first at Rs. 40 per London proof gallon and from April 1, 1961, at Rs. 70 under s. 27 of the Bihar and Orissa Excise Act, 1915. The original duty at Rs. 40 was fixed by a notification issued in 1937 and it was enhanced by a notification issued on March 31, 1961. The appellant on being asked to pay the difference in respect of stocks held in its shop filed a petition under Art. 226 of the Constitution challenging the enhancement of the duty as well as the duty at the original rate.

Section 27 of the Bihar & Orissa Act (Act 11 of 1915), for our purpose, reads as follows :

"27. Power to impose duty on import, export, transport and manufacture-

(1) An excise duty or a countervailing duty, as the case may be at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on-

- (a) any excisable article imported, or
- (b) any excisable article exported, or
- (c) any excisable article transported, or
- (d) any excisable article (other than tari) manufactured under any license granted in respect of clause (a) of Section 13, or
- (e)
- (f) any excisable article manufactured in

any distillery or brewery licensed, established, authorised, or continued under this Act.

Explanation-

2)

(3) Notwithstanding anything contained in subsection (1)--

(1) duty shall not be imposed thereunder on any article which has been imported into (India) and was

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liable, on such importation, to duty under the Indian

Tariff Act, 1894 or the Sea Customs Act, 1878, if-

(a) the duty as aforesaid has been already paid, or

(b) a bond has been executed for the payment of such duty.

The argument is that since foreign liquor is not manufactured in the State of Orissa and no duty of excise as such can be levied on locally manufactured foreign liquor, a countervailing duty cannot be charged on foreign liquor brought from an extra-State point in India. It is also contended that this impost offends Arts. 301, 303 and 304 of the Constitution and is a colourable piece of legislation because countervailing duties of excise can only be levied when corresponding products can be subjected to an equal or more excise duty. It is submitted that the whole of the duty must fail as contrary to the intendment of the Constitution. It is also argued that even if the original countervailing duty at the rate of Rs. 40 per London proof gallon could be said to be leviable by virtue of Arts. 305 and 372 of the Constitution which preserve existing laws or the laws in force, the enhancement of the existing duty makes the imposition a new tax and such notification cannot be made if there, is no possibility of the levy of corresponding duty on locally manufactured goods of the same kind.

The Constitution divides the subject of duties of excise between the Union and the States. What the division is, may be seen by comparing Entry 84 of List 1 with Entry 51 of List 11.

Entry 84 of List 1

Duties of excises on tobacco and other goods manufactured or produced in India except-

(a) alcoholic liquors for human consumption ;

(b) opium Indian hemp and other narcotic drugs and narcotics, but including medical and toilet preparations containing alcohol or any substance included in sub-paragraph (b) this entry.

Entry 51 of List If

Duties of excise on the following goods manufactured or produced in the State and countervailings duties at the same or lower rates on similar goods manufactured or produced elsewhere in India :-

(a) alcoholic liquors for human consumption.

(b) opium Indian hemp other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

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It is to be noticed that the power to levy duties of excise on alcoholic liquors for human consumption, with which we

are presently concerned, is given to the States. Entry 51 goes a little further and allows the levy of countervailing duties at the same or at lower rates on similar goods manufactured or produced elsewhere in India. A duty of excise is a tax on production and as the Legislatures of the States are not authorized to legislate beyond the States such duty can only be levied in respect of goods produced within the State. The Entry, however, allows the State to levy a countervailing duty at the same or a lower rate on goods produced or manufactured in India and brought into the State from outside. Three questions arise. First there is the -general question : must a countervailing duty be only imposed on imported articles when articles similar to those are produced or manufactured within the State on which excise duty is levied ? If the answer to this question is in the negative there is an end to all dispute for then the old law, the old notification and new notification must be above reproach. The next two questions are narrower than first. They are : (a) was the imposition and collection of the countervailing duty at Rs. 40 per London proof gallon valid and (b) is the notification enhancing the duty of excise and the countervailing duty to Rs. 70 per London proof gallon beyond the powers of the State Government ?

A countervailing duty is not defined in the Act. In the Concise Oxford Dictionary "countervailing duty" is stated to be :

" a countervailing duty-one put on imports that are bounty-fed to give home goods an equal chance".

This brings out the true character of a countervailing duty. It is imposed to make incidence of excise duty equal. How these countervailing duties came to exist in India is a matter on which something may be said before the challenge to the legality of the imposition may be considered.

The Bihar & Orissa Excise Act was passed on January 19, 1916. It was thus passed under the Government of India Act, 1915. Section 27 as originally passed opened with the words " A duty at such rate or rates..... instead of the words "An excise duty or a countervailing duty as the case may be at such rate or rates..... which are now to be found there. The original Act made no difference between excisable articles manufactured locally and those imported into the Province. The clauses of S. 27 which have retained their original form and which have been quoted by me above, when read with the former opening words

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clearly indicate this. In the Devolution Rules (Part 11 dealing with the Provincial subjects) under the Government of India Act, Item 16 read as follows :

"16. Excise, that is to say, the control of production, manufacture, possession, transport, purchase and sale of alcoholic liquor and intoxicating, drugs, and the levying of excise duties and license fees on or in relation to such articles, but excluding, in the case of opium, Control of cultivation, manufacture and sale for export."

This may be compared with preamble to the Bihar & Orissa Excise Act', 1915, as it originally stood :

"Whereas it is expedient to amend and re-enact the law in the Province of Bihar and Orissa relating to the import, export, transport, manufacture, possession, and sale of certain kinds of liquor and intoxicating drugs;

And whereas the previous sanction of the Governor General has been obtained, under section 5 of the Indian Councils Act, 1892, to the passing of this Act;

It is hereby enacted as follows :-"

The word "excise" was also given the same wide meaning in entry 16. It included not only the control of production but also the control of purchase and sale of alcoholic liquor and the levying of excise duty in relation to the articles without indicating the place of their manufacture, that is to say, that they should be manufactured within the Province.

When the Government of India Act, 1935, was in the process of being drafted the White Paper proposals introduced a new scheme for division of resources available under the head of excise duties. It was recommended that the federating units should be allotted a share of the yield of excise duty on goods produced, other than those specifically assigned to the Provinces. This was given effect to by including in the Government of India Act 1935 two entries which were Entry No. 45 of List 1 (which corresponded to Entry 84 of List 1 of the present Constitution) and Entry 40 in List 11 (which corresponded to Entry 51 of List 11 of the present Constitution). When the Government of India Act 1935 was passed it was possible for the first time to impose countervailing duties. The intention was that taxation in the matter of excisable goods should be uniform in India and one Province should not try to take advantage of another Province by exporting excise free goods, thus making them bounty. By this means

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duties of excise on all goods of the Same kind could be kept uniform. But the Excise Acts in India, including the Bihar and Orissa Act, were not harmonious with the constitutional provision. They made no distinction between duties of excise levied on goods produced locally and duties of excise levied on goods which were imported into or transported within the Province. They would have, after the enactment of the Government of India Act, 1935, been rendered ultra vires if the duty was unequal in such a way as to make it more on imported goods unless they were amended suitably. Instead of amending them by the ordinary legislative process which would have been cumbersome and slow, recourse was taken to the power to adapt laws given by s. 293 of the Government of India Act, 1935. It provided

"293. Adaptation of existing Indian laws & c. His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British 'India, or in any part of British India, shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bring the provisions of that law into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section.

In this section the expression "law" does not include an Act of Parliament, but includes any ordinance, order, bye law, rule or regulation having in British India the force of law."

Thus by an Order-in-Council, which was called the Government of India (Adaptation of Indian Laws) Order, 1937 S. 27 of the Bihar & Orissa Excise Act was adapted to read as we find it today. The opening words were altered to mention countervailing duties also. This adaptation was made, not only in the Bihar and Orissa Act but every Excise and Abkari Act in the rest of India and was intended to bring all Excise Acts into accord with the distribution of legislative powers is indicated in s. 293.

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In all those Acts, previously a duty was leviable not only on excisable goods produced in the Province but also imported from outside. The duties could be at different rates. After the Adaptation of Laws Order the duty was leviable on excisable goods but a countervailing duty at the same or lower rates was leviable on goods imported from outside. The duties of excise on imported goods became countervailing duties. The adaptation was effective as a valid law beyond the challenge of courts by virtue of cl. (3) of the order which read :

"3. The Indian laws mentioned in the Schedule to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect."

Where, therefore, the rate of duty on imported goods was more than the rate of duty on the locally produced goods the duty was protanto cut down. The Adaptation of Laws Order came into force on April 1, 1937 when Part II of the Government of India Act, 1935 commenced and the notification imposing uniform excise and countervailing duties was then issued. The same Act has continued till today and although the Government of India Act, 1935, is repealed, the scheme of division of excise duties is today the same as it was under that Act.

Now the argument is that the Bihar and Orissa Act is affected by the Entries and by the fact that there is no foreign liquor manufactured in the State. Historically the Bihar & Orissa Act continued to have force and effect by the authority of the Government of India Act, 1935, the Order-in-Council and the Adaptation of Laws Order. The existence of countervailing duty was not made dependent upon the manufacture of foreign liquor in the State. The Bihar & Orissa Act which provided for countervailing duty in anticipation of the production in the State was valid because it had force and effect by the combined operation of these provisions.

The Constitution today permits the levy of excise duty on locally produced excisable goods as well as countervailing duties on excisable goods produced outside the State and brought into the State. Existing laws are preserved by Art. 372 which reads

"372. Continuance in force of existing laws and their adaptation.

(1)Notwithstanding the repeal by this Constitution of the enactments referred to in article 395 but subject

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to the other provisions of this Constitution,

all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed-

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause."

As the Bihar and Orissa Act continues to be valid it authorises that excisable goods produced in the State will bear countervailing duty. The two duties are not the same and countervailing duties are not conditioned by the manufacture of the goods of the same kind in the State. It is not stated that duties on foreign liquor brought into the States cannot be placed under the present Act simply because goods of the same kind are not produced in the State.

The history of legislation shows that adaptation was sufficient to bring the Bihar and Orissa Act in line with the requirements of the Constitution Act of 1935. The adaptation made the Act valid vis-a-vis the Government of India Act, 1935. When the Act was valid, the notification issued in 1937 was also valid. The Excise Acts, as adapted, continued to be law under the Government of India Act, 1935. The present Constitution has made no change either in the distribution of legislative power or the entries and has further said in Art. 372 that all existing laws continue to be of full force and effect. The imposition of countervail-
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ing duty at Rs. 40 per London proof gallon continued to be valid.

The next question is whether the original duty alone would be sustained or also the enhanced duty which was introduced in 1961. In my judgment, if the old duty at the old rate is sustainable there is no reason why the absence of production of foreign liquor in the State would make any difference to the enhancement of the duty to Rs. 70 per London proof gallon. So long as the Act is valid, and that is beyond doubt, the notification can be changed. The duty could always be made less and there is no reason why it could not be made more provided the imposition of duty on locally produced goods was not made lower. If production of foreign liquor is not a condition precedent to the validity of the Act because of historical reasons there is no bar to the validity of the notification which takes its force from the

valid Act. The Constitution preserved certain taxes by Art. 276. There the rate or incidence of the tax could not be changed for every change made the tax a new tax. This is not the case under Art. 372 which upholds the Act. The notification takes its validity from the Act.

I have attempted to show that the Act was valid under the Government of India Act, 1935, because the Adaptation of Laws Order could not be questioned in a court of law and by reason of Art. 372 the Act must be deemed to be valid even today. The absence of manufacture of foreign liquor in the State thus makes no difference to the validity of the duty imposed and it can make no difference to the duty if reduced or increased by notification so long as it is not more than duty on locally produced goods. I do not, therefore, find it necessary to say whether countervailing duties can only be imposed on imported articles when articles similar to those are produced or manufactured within the State on which ordinary excise duty is levied. That question I leave open because the Act being valid for other reasons, it is hardly necessary to decide the larger issue.

Finally, I find it sufficient to say that Art. 301 or 304(a) cannot come into play. These articles read:

"301. Freedom of trade, commerce and intercourse.

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

"304. Restrictions on trade, commerce and intercourse among States.

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Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law-

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

(b).

I fail to see what Art. 304(a) has to do with this matter. Article 304(a) imposes no ban but lifts the ban imposed by Arts. 301 and 303 subject to one condition. That article is enabling and prospective. It is available in respect of other taxes such as Sales tax etc imposed by the State Legislature. In the matter of excise duties the State Legislature has competence even apart from Art. 304(a) because the power to impose duties of excise on alcoholic liquors for human consumption produced in the State and countervailing duties on similar liquors produced outside the State in India is already conferred by the legislative list. The Bihar & Orissa Excise Act does not stand in need of support from Art. 304(a). If Art. 301 stands in the way there is Art. 305 which read previously :

"305. 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 provide."

The amendment of Art. 305 by the Constitution (4th Amendment) Act 1955 does not alter the net position. The President has not made any order and so Arts. 301 and 303 do not apply. Article 304(a) is an exception to Arts. 301 and 303 and is not needed here in view of the power in the State Legislature by Entry 51 of List 11. The Bihar & Orissa Act is, therefore, sustained by Arts. 305 and 372 independently

of Art. 304(a).

I am, therefore, of opinion that s. 27 of the Bihar and Orissa Exercise Act, 1915, was and is a valid enactment. At no time since it was enacted, could it be challenged and it cannot be challenged today. I do not think that the law which is saved is a combination of the Act and the notification. Existing law is defined to include a law and each law viewed separately is saved. The Bihar and Orissa Act (particularly s. 27) is a law and it is saved by itself. What was done under its authority in the past and what is being done today is equally valid. The notification of 1961 derives its force from S. 27, which is a valid enactment, even as the notification of 1937 did before from the same section, and

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the new notification cannot be said to run against any constitutional provision. If the duty at Rs. 40 can be sustained the duty at Rs. 70 must also be valid, for the same reasons apply. I would, therefore, dismiss the appeal with costs.

BY THE COURT

In accordance with the opinion of the majority, this appeal is partially allowed. There will be no order as to costs in this Court and the High Court.

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