

out either on lease or licence, for the purpose of residence or business, with all appurtenant amenities including storage, watch and ward facilities, canteens, refreshment rooms, etc. In the said case, the assessee had claimed depreciation in respect of the building and other amenities pertaining to the period in which the building was in the process of preparation for being leased, as above. It was held by a Bench of the Gujarat High Court that the assessee would be entitled to claim depreciation for the said period. The facts of the present case though not absolutely akin, are quite similar as the respondent-assessee after purchase of the building at Chandigarh had installed electrical fittings to run the unit. As already noticed, the respondent was able to shift his business into the said building within a few months. There is thus no difficulty in holding that during this transitory period, the building purchased by the assessee had been "used".

(8) As a result of the above discussion, we answer the question referred to this Court in the affirmative, i.e., in favour of the respondent-assessee and against the Revenue. In the circumstances of the case, there shall be no order as to costs of this Reference.

**N.K.S.**

*Before S. S. Sandhwalia, C.J. & D. S. Tewatia, J.*

**DEWAN MODERN BREWERIES LTD.,—Petitioner.**

*versus*

**STATE OF HARYANA and others,—Respondent.**

*Civil Writ Petition No. 921 of 1979.*

April 27, 1982.

*Constitution of India, 1950—Articles 301, 304, 305, 366 and 372—Punjab Excise Act (1 of 1914)—Sections 31, 32—Punjab Excise Fiscal (Haryana Amendment) Orders, 1968, 1969 and 1974—Fiscal orders issued under Excise Act imposing export duty at a certain rate already existing at the time of coming into force of the Constitution—Such duty enhanced by amendment by the impugned orders—Such orders—Whether "existing laws" in terms of Article 366 so as to be protected by of Article 372—Massive enhancement*

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*of duty on a rectified spirit—Whether violative of Article 301—Such enhancement—Whether protected by Articles 304 and 305.*

*Held*, that the Punjab Excise Fiscal (Haryana Amendment) Orders, 1968, 1969 and 1974 have been issued by way of amendment to the Punjab Excise Fiscal Orders, 1932, which was issued under Sections 31 and 32 of the Punjab Excise Act, 1914. Admittedly the Excise Act and the Punjab Excise Fiscal Orders, 1932 were pre-constitutional legislation, but the rate of the export duty has been enhanced by the impugned Fiscal Orders of 1968, 1969 and 1974. It cannot however be said that because the Excise Act and the original Punjab Excise Fiscal Order of 1932 are pre-constitutional laws, therefore, the subsequent post-constitution amendment in the latter must also be deemed to be of the same character. By Article 366 (10) of the Constitution of India, 1950, the expression "existing laws" means any law, ordinance, 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 laws" within the meaning of Article 366 of the Constitution would, therefore mean the Punjab Excise Fiscal Order, 1932 and as such it has necessarily to be held that the impugned Fiscal Orders of 1968, 1969 and 1974 are not pre-constitution "existing laws" which are protected or saved by virtue of Article 372 of the Constitution.

(Paras 7 and 8).

*Held*, that Article 301 of the Constitution is couched in terms of the widest amplitude and the freedom of trade so declared is against the imposition of barriers or obstructions within the State as well as inter-State and all restrictions or impediments which directly and immediately impede or hamper the free flow of trade, commerce and intercourse fall within the prohibition of Article 301 and subject to the other provisions of the Constitution may be regarded as void. It seems to follow, therefore, that a massive enhancement of export duty would directly impede or hamper the free flow of trade betwixt the States. As such the impugned enhancement of export duty is plainly violative of Article 301.

(Para 7).

*Held*, that admittedly no Presidential order as envisaged under Article 305 of the Constitution has been made with reference to the impugned Fiscal Orders. Further more, Clause (a) of Article 304 is also not attracted to the case as the impugned Fiscal Orders have not been promulgated by virtue of Clause (b) thereof. It is also patent that there is no public interest within the specialised meaning in this clause which could sanctify the enhancement of the export duty. As such it has necessarily to be held that the impugned Fiscal Orders are not protected by virtue of Articles 304 and 305 of the Constitution.

(Para 8).

*Petition under Articles 226/227 of the Constitution of India praying that this petition be accepted, records of the case called for and :—*

- (a) *Fiscal Order 1-A of the Punjab Excise Fiscal Orders, 1932 be struck down as ultra-vires of the Punjab Excise Act, 1914;*
- (b) *Notifications Annexures P-1 to P-3, dated 30th September, 1968, 25th March, 1969 and 1st of April, 1974 respectively be struck down on the grounds mentioned in the petition ;*
- (c) *the respondents be directed to refund the sum of Rs. 19980 recovered from the petitioner on export of 1980 proofliters of rectified spirit ;*
- (d) *service of advance notices of motion dispensed with and the costs of the petition awarded to the petitioner.*

*It is further prayed that pending the decision of this petition the petitioner be allowed to lift from Haryana the rectified spirit without payment of the said Duty. The petitioner is ready and willing to furnish Bank Guarantee for the sum involved.*

*Bhagirath Dass, Advocate with Romesh Kumar and A. K. Jaswal, for the Petitioner.*

*Harbhagwan Singh, A. G. with B. S. Pawar, A.A.G.*

*Rajdeep Tobaria, for K. S. Kundu, for respondent No. 3, for the Respondent.*

#### JUDGMENT

*S. S. Sandhwalia, C.J.*

(1) Whether the geometric enhancement of export duty on rectified spirit by the Punjab Excise Fiscal (Haryana Amendment) Orders of 1968, 1969 and 1974 subsequent to the coming into force of the Constitution violates the guaranteed freedom of trade and commerce within the country is the meaningful question which has come to the fore in this reference to the Division Bench.

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2. The petitioner M/s. Dewan Modern Breweries Ltd., is a public limited company with its registered office at Jammu. The petitioner-company manufactures Indian made foreign liquor in its distillery at Jammu for which rectified spirit is the raw material and it is averred that because of the paucity of this material in the State of Jammu and Kashmir it has to import the same from the distilleries in Punjab, Haryana, Uttar Pradesh or other States manufacturing rectified spirit. Prior to the enforcement of the constitution by virtue of the Punjab Excise Fiscal Orders 1932 issued under the Punjab Excise Act, an export duty of annas -/2/- per London Proof Gallon was levied on rectified spirit. This worked out to a paltry duty of paise 3 per proof litre but thereafter there has been a geometric rise in the quantum of this export duty by which the petitioner-company claims to be aggrieved. On the 30th of September, 1968,—*vide* Punjab Excise Fiscal (Haryana Amendment) Order, 1968 (copy annexure P. 1) this duty was enhanced to paise 25 per litre. Later by a similar Fiscal Order dated the 25th of March, 1969 (annexure P. 2) it was again enhanced to paise 50 per litre with effect from 1st of April, 1969. Yet again on the 1st of April, 1974,—*vide* Punjab Excise Fiscal (Haryana Second Amendment) Order, 1974 (annexure P. 3) another hundred per cent increase in the duty was imposed by levying it at the rate of Re. 1/- per litre.

3. On the 11th of January, 1979, the petitioner-company purchased 19,980 proof litres of rectified spirit from the Panipat Co-operative Distillery, Panipat, and was consequently obliged to pay a sum of Rs. 19980 as export duty at the rate of Re. 1 per proof litre as prescribed in annexure P. 3 above. The petitioner-company assailed the levy of the enhanced export duty as hindering the free flow of trade and thus violative of Article 301 of the Constitution of India as also of Articles 19(1)(g), 31, 265 and 305. It is pointed out that the assent of the President for the promulgation of the impugned Fiscal Orders, annexures P. 1 to P. 3 was not obtained as required under Article 305 of the Constitution of India.

4. Apart from challenging the enhancement of the export duty the petitioner-company also assails the very jurisdiction of the respondent state to levy export duty at all on the ground that rectified spirit is not an excisable article because under section 3 of the Punjab Excise Act it is not alcoholic liquor for human consumption. It is submitted that rectified spirit does not even remotely

come within the ambit of the prescribed definition under section 3(6)(a) of the Act.

5. In the return filed on behalf of the respondent-State the broad factual ground is not disputed. The gravamen of the legal stand, however, is that the impugned amending Fiscal Orders have been issued under sections 31 and 32 of the Punjab Excise Act and are by way of amendment of the Punjab Excise Fiscal Orders 1932 which are both pre-Constitution laws and are, therefore, saved by the provisions of Article 372 of the Constitution from the challenge of unconstitutionality. It has been averred that the Punjab Excise Act 1914 (hereinafter called the Act) is an existing law within clause (10) of Article 366 and, therefore, immune from constitutional challenge. Further Order 1-A of the Punjab Excise Fiscal Orders 1932, when originally promulgated was applicable within the then State of Punjab and rectified spirit was liquor in terms of the definition thereof under the said Act. The levy of export duty was originally valid and even its later enhancement could not be assailed. It has been further averred that the impugned amending Fiscal Orders are not violative of Article 301 and in any case are saved by the provisions of Article 305. The petitioner's stand that the export duty if at all could only be levied by an Act of Parliament is controverted on the ground that this would be applicable only to post-Constitution laws and not to pre-Constitution laws. Any violation of the rights under Articles 19(1)(g), 31, 265, 301 and 305 has been denied.

6. In the context of rectified spirit being an excisable article the stand of the respondent-State is that the definition under clause (6) of section 3 has to be read along with clause (14) and, therefore, it would come well within the ambit of alcoholic liquor for human consumption.

7. To appreciate the rival contentions it seems apt to briefly delineate the legislative history against which they have to be evaluated. Admittedly the Punjab Excise Act 1914 is pre-Constitution legislation having come into force on the 1st of February, 1914. Section 3 thereof precisely defines various terms and phrases employed in the Act. Sections 31 and 32 contained in Chapter V deal with duties and fees and provide for the imposition of duty on excisable articles and the manner in which such duty may be levied. By virtue of the power conferred by these provisions the Punjab Excise Fiscal Orders 1932

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were issued prescribing in detail the rates of duty leviable in respect of liquor and spirit removed from any other distilleries licenced in Punjab or when imported into the said State. Later by a notification dated the 28th of November, 1938, Order 1-A was added to the aforesaid Fiscal Orders as under:—

“1-A. A manufacture and export duty of two annas per London Proof gallon shall be levied on all duty paid or under bond issues of country spirit, rectified spirit and Indian-made foreign spirit other than denatured spirits to any other State.”

The impugned Fiscal Amendment Orders, 1968, 1969 and 1974 have substituted an enhanced duty in the aforesaid provision and therefore are the primary subject-matter of challenge.

8. Now in the submitted factual basis and the rival stands of the parties, it is plain that the issue which first arises at the very threshold is whether the impugned Fiscal Amendment Orders (annexures P/1, P/2 and P/3) are “existing laws” within the meaning of Article 366(10) and Article 372 of the Constitution of India. As already noticed, the primary stand of the respondent-State is that because the Act and the original Punjab Excise Fiscal Orders 1932 are pre-Constitution laws, therefore, the subsequent post-Constitution amendments in the latter must also be deemed to be of the same character. That there may be something to be said for this view, is manifest from the minority opinion of Hidayatullah, J. (as the learned Chief Justice then was), in *Kalyani Stores v. State of Orissa and others*, (1). However, within this jurisdiction, the matter is concluded by the majority opinion to the contrary therein. In the *Kalyani Stores’ case* (supra) also, under Section 27 of the Bihar and Orissa Excise Act, 1915, a notification was issued in 1937 imposing a duty of Rs. 40 per London Proof Gallon on Indian manufactured foreign liquor imported into the State from the other parts of India. However, by a subsequent impugned notification of March 31, 1961, the said duty was enhanced from Rs. 40 to Rs. 70 per L.P. Gallon. It was this enhancement which was the subject-matter of challenge by the appellants. The identical issue, therefore, arose before their Lordships whether the subsequent notification was

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

existing law and thus saved by Article 372 of the Constitution. This was negated with the following unequivocal observations:—

“... 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 and 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.”

In view of the aforesaid authoritative enunciation, which in a way is on all fours with the present case, it has necessarily to be held that the impugned Fiscal Orders are not pre-Constitution existing laws which are protected or saved by virtue of Article 372 of the Constitution.

9. Once the aforesaid finding is arrived at what next falls for consideration is whether the imposition or geometric enhancement of export duty by the State Government would violate the guaranteed trade, commerce and intercourse within the country under Article 301 of the Constitution. In *The State of Madras v. N. K. Nataraja Mudaliar*, (2) Shah, J., in his leading judgment construed the true import of Article 301 as under :—

“This Article is couched in terms of the widest amplitude; trade, commerce and intercourse are thereby declared free and unhampered throughout the territory of India. The freedom of trade so declared is against the imposition of barriers or obstructions within the State as well as inter-State: all restrictions which directly and immediately affect the movement of trade and declared by Article 301 to be ineffective.”

And again,

“.... It must be taken as settled law that the restrictions or impediments which directly and immediately impede or hamper the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301 and subject to the other provisions of the Constitution they may be regarded as void.”

In the light of the above, it seems to follow that a massive enhancement of export duty would directly impede or hamper the free flow of trade betwixt the States. Apart from principle, herein also, the ratio of *Kalyani Stores' case* (supra), seems to be equally attracted. Therein, in the converse, a massive enhancement of import duty was unequivocally held to be violative of Article 301. If that be so, with regard to the in-flow of liquor into the State, the position would be identical with regard to its out-flow as well. Indeed, it was not even argued on behalf of the respondent-State that the position would be in any way different with regard to export from that of import. It must, therefore, be held that the impugned enhancement of export duty is thus plainly violative of Article 301.

8. All that now remains in this context is whether Articles 304 and 305 of the Constitution in any way protect the State action. As regards the latter Article, it was conceded before us and indeed is hardly in dispute at all that no Presidential Order in this context has been made. Adverting to Article 304, it seems to be plain that clause (a) thereof is not at all attracted. It has not even been pleaded on behalf of the respondent-State that the impugned amending Fiscal Orders had been promulgated by virtue of Clause (b) thereof. Apart from pleadings, the learned Advocate General, Haryana, could point to no public interest within its specialised meaning in this clause which could sanctify the enhancement of the export duty. The measure appears to be one purely for the augmentation of revenue. Even in this context, the observations in *Kalyani Stores' case* (supra), appears to me as concluding the matter. It was observed therein as under:—

“.....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 the 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....."

In view of the above, it has necessarily to be held that Articles 304 and 305 are not at all attracted to the situation.

In fairness to Mr. Harbhagwan Singh, the learned Advocate General, Haryana, I must notice his reference to *Automobile Transport Rajasthan Ltd. etc. v. State of Rajasthan and others*, (3) and *Sat Pal & Co. v. Lt. Governor of Delhi*, (4). These cases are plainly distinguishable and in no way run counter to the authoritative observations in *Kalyani Stores' case* (supra). It is true that in *M/s. Sat Pal and Co. etc. v. Lt. Governor of Delhi and others*, (supra) their Lordships whilst painstakingly distinguishing the said case have made a passing observation expressing a veiled doubt, whether the said case still holds the field. The learned Advocate General, however, could not bring to our notice any subsequent case of their Lordships overruling the view in *Kalyani Stores' case* (supra), which being by a larger Bench has, therefore, to be necessarily followed within this jurisdiction.

9. In the light of the foregoing discussion, it must be concluded in this respect that the impugned Fiscal Amendment Orders of 1968, 1969 and 1974 (annexures P/1, P/2 and P/3) are violative of Article 301 of the Constitution of India.

9-A. In view of the above, I must pointedly notice that Mr. Bhagirath Das, learned counsel for the petitioner, with his illimitable candour had stated that if his stand on the aforesaid context is accepted (as it has been), then he would not wish to press his

(3) A.I.R. 1962 S.C. 1406.

(4) A.I.R. 1979 S.C. 1550.

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challenge to the trifling imposition of the export duty of two annas per L.P. Gallon on rectified spirit by the notification of February 28, 1938. Consequently, the question—whether rectified spirit is an alcoholic liquor for human consumption and thus an excisable article under Section 3(6) of the Act on which any duty could at all be levied is rendered wholly academic and I, therefore, do not propose to advert to the same.

10. The writ petition is, therefore, allowed and the impugned Orders, namely, the Punjab Excise Fiscal (Haryana Amendment) Order, 1968 the Punjab Excise Fiscal (Haryana First Amendment) Order, 1969 and the Punjab Excise Fiscal (Haryana Second Amendment) Order, 1974, are hereby quashed. As a necessary consequence, the petitioner would be entitled to the refund of the export duty paid by him under the said Fiscal Orders only. This, however, would not affect the validity and enforceability of the earlier notification No. 4518 Ex. dated November 28, 1938, inserting Order 1-A in the Punjab Fiscal Orders, 1932, which remains operative.

11. In view of somewhat intricate questions involved, we leave the parties to bear their own costs.

D. S. Tewatia, J.—I agree.

N.K.S.

Before S. S. Sandhawalia, C.J. & M. R. Sharma, J.

JAGDISH RAI MONGHA and others,—*Petitioners.*

*versus*

STATE OF PUNJAB and others.—*Respondents.*

*Civil Writ Petition No. 2856 of 1980.*

May 17, 1982.

*Punjab Town Improvement Act (4 of 1922)—Sections 72-F and 103—Improvement Trust dissolved by Government acting under Section 103—Such dissolution inevitably resulting in removal of Trust*