
Emperor Vs Saver Manuel Dantes

Criminal Reference No. 75 of 1940

Court: Bombay High Court

Date of Decision: July 1, 1940

Acts Referred:

Bombay Abkari Act, 1878 & Section 14B#Criminal Procedure Code, 1898 (CrPC) & Section 432

Citation: AIR 1940 Bom 307 : (1940) 42 BOMLR 791

Hon'ble Judges: Wassoodew, J; Sen, J; N.J. Wadia, J; John Beaumont, J

Bench: Full Bench

Judgement

John Beaumont, Kt., C.J.

This is a reference made by the Presidency Magistrate, 4th Court, u/s 432 of the Criminal Procedure Code,

which entitles him to refer any question of law arising in the hearing of a case before him. The facts giving rise to the reference are as follows.

2. On July 17, 1939, the Government of Bombay issued a Notification under Sub-section (2) of Section 14B of the Bombay Abkari Act, 1878,

prohibiting the possession by any person in the area specified, which was in substance the Town and Island of Bombay, without a permit or a

license issued by an Abkari Officer, of any intoxicant specified in the schedule thereto in excess of the amount therein mentioned. On April 11,

1940, a full bench of this Court held that the said Notification was "" ultra vires and of no effect,"" the basis of the decision being that u/s 14B of the

Bombay Abkari Act Government could not prohibit the possession of intoxicants by the public generally. On the same day, but after the Court's

decision had been pronounced, the Governor of Bombay, being the then legislative authority in Bombay, passed Bombay Act VI of 1940

amending the Bombay Abkari Act. The material Sections of that Act, which we will refer to as "" the Amending Act,"" are Sections 6 and 7.

Section 6 amends Section 14B of the Bombay Abkari Act, and in order to appreciate the amendment it is necessary to state the terms of Section

14B, which were as follows:

(1) No person not being a licensed manufacturer or vendor of any intoxicant of hemp and no licensed vendor except as authorised by his license

shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government u/s 17 may declare to be

the limit of retail sale, except under a permit from the Collector:

Provided that nothing in Sub-section (i) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or

warehouseman as such, or purchased by any person for his bona fide private consumption and not for sale.

(2) Notwithstanding anything contained in Sub-section (1) the Provincial Government may by notification in the Official Gazette prohibit the

possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or

subject to such conditions as it may prescribe.

3. By Section 6 of the Amending Act the proviso to Sub-section (1) was deleted. One object of the proviso would seem to have been to facilitate

import and export into and from the Port of Bombay by enabling warehouse-keepers and rail-Way companies on the docks to possess any

quantity of foreign liquor, and it is difficult to see what object the legislature had in deleting the proviso except to destroy, or at any rate render very

difficult, import and export into and from the Port of Bombay. Then Sub-section (2) of Section 14B was amended by enabling the Prohibition to

extend to "" any individual or a class or body of individuals or the public generally,"" thus removing, in the case of notifications issued under the

Amending Act, the ground upon which this Court had held the Notification of July 17, 1939, to be invalid.

4. Section 7 of the Amending Act provided that the amendments to the preamble and the provisions of the Act should have effect from the date on

which the said preamble and the said provisions were respectively enacted, and then proceeds in these terms: "" and any rule, order or notification

made or issued under the said Act"" (i.e. the Abkari Act) ""before the commencement of this Act shall be deemed to have been made or issued

under the said Act as amended by this Act.

5. On April 19, 1940, the accused in the case before the learned Magistrate giving rise to this reference arrived at Dadar Station on the B. B. & C.

I. Railway and was found to be in possession of a bottle of country liquor containing admittedly less than the limit fixed by the Provincial

Government u/s 14B(l) of the Bombay Abkari Act. He was charged u/s 43(1) (a) of the Bombay Abkari Act with being in possession of an

intoxicant in contravention of a rule or order made under the Act. The only order which he is alleged to have broken is that contained in the said

Notification of July 17, 1939, and the learned Magistrate has submitted to this Court the two following questions:

First Question: (a) Has the Provincial Legislature power, under item 31 of List II of the 7th Schedule to the Government of India Act, 1935, or

otherwise, to pass a law of which the object is to introduce a Policy of total Prohibition in the Province of Bombay or in certain areas thereof; and

(6) whether Section 3 and Section 6(b) of Bombay Act VI of 1940 are intra vires, in particular with regard to total prohibition of possession of

liquor and of intoxicating drugs.

Second Question: In the event of the first question being answered in the affirmative, whether there is in existence any effective Notification u/s

14B(2) of the Bombay Abkari Act, 1878, absolutely prohibiting the possession of intoxicants by persons generally in the City of Bombay; in other

words; whether Notification No. 374/39/(c), "dated July 17, 1939, which was declared by the High Court to be ultra vires and of no effect, is to

be considered as in force by virtue of Section 7 of the Bombay Act VI of 1940.

6. In our view the first question does not really arise in connection with the prosecution. It is admitted that the accused has not infringed any

provision of the Abkari Act; he is alleged to have infringed the provisions of the said Notification of July 17, 1939, and the only question, therefore,

which arises, is whether that Notification is valid and in force. No doubt the notification might be invalid by reason either of a defect in the

Notification itself or of some invalidity in the Act under which it was passed, but it is only in that indirect sense that the validity of the Act can be

called in question. We propose, therefore, to confine ourselves to the second question.

7. Two objections are taken to the Notification itself: first, that it does not fall within the ambit of Section 7 of the Amending Act, and, secondly,

that, it, it does so fall, the Notification having been declared by this Court to be of no effect, the accused cannot be convicted under it.

8. The first point is one of construction of the Amending Act, and in dealing with it we have to bear in mind the rule that the Court leans strongly

against a construction which gives to an Act retrospective action because, as stated in Maxwell's "Interpretation of Statutes", 8th Edn., p. 5, "it

manifestly shocks one's sense of justice that an act legal at the time of doing it, shall be made unlawful by some new enactment." If the Notification

in question falls within the scope of Section 7, it would render illegal acts committed before the Act was passed and which were legal when

committed. The present accused no doubt does not fall within that category, but others might. In our opinion Section 7 of the Amending Act does

not embrace the Notification of July 17, 1939. We think that the only notifications which fall within the Section are notifications effective at the date

of the passing of the Amending Act. We cannot suppose that the Section was intended to affect the construction of notifications already rescinded,

still less of a notification which had been declared invalid, and therefore had never had any effect, and was a mere nullity. This view is supported by

the preamble to the Amending Act, which recites that it is expedient to amend the Abkari Act so as to remove doubts as to the validity of certain

notifications issued under the Act; there was no doubt whatever about the validity of the Notification of July 17, 1939, since it had been declared

invalid. In our view, therefore, Section 7 of the Act does not apply to the Notification in question.

9. Upon the second point, if Section 7 does apply to the Notification in question, it has not, in our opinion, the effect of reviving that Notification. It

was argued by the learned Advocate General that the declaration of this Court having been made in favour of another accused, the present

accused cannot take advantage of it, since the judgment of this Court is not a judgment in rem within Section 41 of the Indian Evidence Act. But

the Notification having been held by this Court to be invalid, it is invalid according "to the law in force in this Province, and everybody can act upon

that view of the law. There having been no appeal from the decision of this Court, the only manner in which the law as declared by this Court could

be altered would be by an Act of the legislature. The legislature could no doubt have enacted that notwithstanding the decision of this Court the

Notification in question should be treated as being still in force, and as having been issued under the original Act as amended. But the legislature

has not done that. All it has done is to say that the Notification shall be deemed to have been issued under the Bombay Abkari Act as amended.

That is to say, the original Notification is not revived, or deemed to have been passed on a different date to that on which it was passed; it is

merely deemed to have been passed under a law different from that which in fact existed at its date. Such a provision cannot revive a Notification

which is a nullity; the most it can do is to challenge the grounds on which the Notification was held to be invalid. But an order of the Court is valid,

although the reasons upon which it is based no longer apply; there may well be other grounds of invalidity. In our opinion, the Notification in

question having been held by this Court to be of no effect, and not having been revived, no one can be convicted under it.

10. That really disposes of the whole reference. But as the question as to the validity of the Notification, on the assumption that it has been revived

and is to be treated as passed under the original Act as amended by the Amending Act, has been argued, and as the learned Advocate General

has asked us to indicate our views upon the subject, we proceed to do so. But it must be understood that our views on this point are not intended

to form part of our decision, and must be regarded as obiter only.

11. The learned Magistrate expressed the view that the Provincial Legislature had no power to prohibit the possession of intoxicants in this

Province, and that view has been pressed upon us by Sir Jamshedji Kanga for the accused. The right of the Provincial Legislature to legislate on

the subject is derived from Section 100 of the Government of India Act, 1935, and item 31 in List II of the 7th Schedule. The effect of those

provisions is to enable the Provincial Legislature, subject to the right of the Central Legislature to make laws in respect of the matters enumerated

in List I, to make laws relating to intoxicating liquors and narcotic drugs, that is to say (in the words of item 31), the production, manufacture,

possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs. The learned Magistrate was of opinion that the

words of item 31 have a positive import and do not cover prohibition. The argument is that the Provincial Government is given control of the

matters enumerated in item "31, and that prohibition destroys the subject-matter of control. We are not in agreement with that view. It seems to us

clear that a right to legislate as to possession of intoxicating liquors must necessarily involve a right to prohibit possession. We have not in fact to

deal with total Prohibition, because the Notification now in question does not prohibit possession throughout the whole Province; it only enforces

Prohibition within the Town and Island of Bombay. We see no reason to doubt that the Provincial Legislature has power so to limit possession,

provided that in so doing it does not encroach upon the legislative powers of the Central Legislature. Now, under item 19 of List I of the 7th

Schedule, which contains the subjects on which the Central Government can legislate, is included "" import and export across customs frontiers as

defined by the Federal Government."" By a Notification of April 1, 1937, the Federal Government for the purpose of item 19 in List I has defined

the "" customs frontier "" as "" the frontier, whether one or more than one, whether sea or land, whether exterior or interior, of British India."" It is,

therefore, clear in our view that the Central Legislature is the authority to legislate in respect of import and export of intoxicants across the sea

frontier of Bombay, and the powers of the Provincial Legislature under item 31 in List II must be exercised subject to this right of the Central

Legislature. It is settled that in cases of conflict between the items in List I and List II it is the duty of the Court to endeavour to reconcile those

items before having recourse to the non-obstante clause under which the powers of the Central Legislature must prevail in the event of an

irreconcilable conflict. We see no difficulty in reconciling the two items now in question by holding that the Provincial Legislature has no power to

legislate in respect of possession of intoxicants in such a way as to encroach upon the right to import and export across the customs frontiers. No

question arises in this case as to the validity of the prohibition contained in Section 14B (1) of the Bombay Abkari Act, because admittedly the

accused did not fall with such prohibition, though it is obvious that that Section makes it virtually impossible to import or export intoxicants without

obtaining a license from the Provincial Government, which may or may not be granted.

12. Turning to Section 14B (2) as amended, the power to prohibit any individual or a class or body of individuals or the public generally from

possessing intoxicants would seem to us to be valid, but the power must not be exercised so as to encroach upon the rights of the Central

Government. The Notification of July 17, 1939, if effective, in prohibiting possession by any person in Bombay, would in our view render import

and export across the sea frontier of Bombay impossible without breaking the law or obtaining a license which the Provincial Government is under

no obligation to grant. It is impossible to land goods on the docks of Bombay, if no one in Bombay is entitled to be in possession of such goods.

The learned Advocate General has contended strenuously that the Amending Act does not deal, or purport to deal, with import and export across

customs frontiers, and the mere fact that one consequence of the Act may be to discourage, or even prevent, such import and export does not

deprive the Provincial Legislature of the power conferred upon it by the Government of India Act, and he relies on Attorney-General of Manitoba

v. Manitoba License Holders' Association. [1902] A.C. 73 No doubt any legislation which restricts possession or consumption of intoxicants is

likely to have a prejudicial effect upon the customs revenue of the Central Government, and we agree that that fact would not prevent the

Provincial Government from exercising the power conferred upon it by item 31. But, as we have pointed out, the power of the Provincial

Government to legislate as to possession is a qualified, and not an absolute, power; it is subject to the rights of the Central Government. The

absolute prohibition against possession goes much further than merely incidentally diminishing the revenue of the Central Government; it destroys,

indirectly no doubt, but none the less effectively, the right to import and export intoxicants across the sea frontier of Bombay; and Bombay is the

principal port of British India.

13. If, therefore, we were at liberty to consider the validity of the Notification of July 17, 1939, on the basis that it is still in force and was passed

under the Bombay Abkari Act as amended by the Amending Act, we should still be of opinion that the Notification was invalid, because it goes

beyond the powers of the Provincial Legislature.

14. We answer the questions propounded by the learned Magistrate by saying that in our opinion there is not in existence any effective Notification

u/s 14B (2) of the Bombay Abkari Act, 1878, prohibiting the possession of intoxicants by persons generally in the City of Bombay.