

1949

Nov. 25.

## MISS KISHORI SHETTY

v.

THE KING.

[SIR HARILAL KANIA C. J., SIR FAZL ALI,  
PATANJALI SASTRI, MEHR CHAND MAHAJAN and  
MUKHERJEA JJ.]

*Government of India Act, 1935, s. 100; Sch. VII, List I, item 19, List II, item 31—Provincial Legislature—Legislation restricting or prohibiting possession of foreign liquor—Validity—Conflict with Federal power to make laws regulating import and export—Doctrine of pith and substance—Bombay Abkari Act (V of 1878 as amended in 1947), s. 14-B.*

Under item 19 of List I of the Seventh Schedule to the Government of India Act, 1935, the Federal Legislature has power to make laws in respect to "import and export across customs frontiers", and under item 31 of List II of the said Schedule the Provincial Legislatures have power to make laws in respect to "intoxicating liquors and narcotics, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs." The appellant who was convicted under s. 14-B of the Bombay Abkari Act of 1878 as amended by the Bombay Abkari (Amendment) Act of 1947 for having in her possession a quantity of foreign liquor in excess of the limit prescribed by the notification issued under the Act, contended that the said section as amended in 1947, in so far as it purported to restrict or prohibit the possession of foreign liquors was a direct encroachment on the field assigned to the Federal Legislature under item 19 of List I and was consequently *ultra vires* the Provincial Legislature and invalid:

*Held*, that the power given to the Provincial Legislature under item 31 of List II was expressed in unqualified terms which in their natural and ordinary sense were apt to cover such an enactment as s. 14-B in its amended form; there was nothing in the Federal Legislative List and more particularly in item 19 of that List which necessitated the cutting down of the full meaning of item 31 by excluding foreign liquors from its purview; and s. 14-B was not therefore *ultra vires* and the conviction of the appellant was not illegal.

*Bhola Prasad v. King-Emperor* [1942] F.C.R. 17 and *Prafulla Kumar Mukherjee and Others v. Bank of Commerce Ltd.* [1947] F.C.R. 28 referred to.

*Emperor v. Dantes* (I.L.R. 1940 Bom. 777) disapproved.

APPEAL from a judgment of the High Court of Judicature at Bombay : Case No. XXVII of 1949.

This was an appeal from the judgment of Chagla C. J. and Gajendragadkar J. of the Bombay High Court dated 11th August, 1949, in Criminal Appeal No. 255 of 1949 confirming the conviction of the appellant by the Presidency Magistrate, 5th Court, Dadar, Bombay, in Case No. 5861-P of 1948 of an offence under s. 14-B of the Bombay Abkari Act of 1878.

*Shiv Prasad Sinha* (*Sri Narain Andley* with him) for the appellant.

*C. K. Daphlary*, *Advocate-General*, Bombay, (*Pritam Singh Saifeer* with him) for the respondent.

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PATANJALI SASTRI J.—This is an appeal from a judgment of the High Court of Judicature at Bombay dismissing an appeal from a conviction and sentence by the Presidency Magistrate, Fifth Court, Bombay, for an offence under the Bombay Abkari Act (V of 1878).

The appellant was charged with having in her possession, in contravention of the Act, a quantity of foreign liquor (White Label Scotch Whisky) in excess of the limit permitted under a Government notification dated 20th July, 1948, issued under the Act, and she was convicted and sentenced to a term of three months' rigorous imprisonment and a fine of Rs. 500 or in default to a further term of 6 weeks' rigorous imprisonment. On appeal to the High Court her main contention was that the Provincial Legislature had no power under the Government of India Act, 1935, to legislate with respect to the possession of foreign liquors, and that s. 14-B of the Bombay Abkari Act as amended by the Bombay Abkari (Amendment) Act (XXIX of 1947) in so far as it purported to restrict or prohibit the possession of such liquors was void and inoperative. These and other contentions raised on her behalf were rejected and the conviction and sentence were confirmed, but in view of the constitutional question involved a certificate under s. 205 (1) of the Constitution Act was granted. The appellant has

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accordingly brought this appeal to have that question determined by this Court.

To appreciate the arguments advanced on behalf of the appellant it is necessary to give a brief account of the history of the Bombay Abkari Act. It was enacted in 1878 to "consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of liquor and of intoxicating drugs in the Presidency of Bombay". The Act was amended from time to time and, after the Constitution Act came into force, certain adaptations and modifications were made by the Government of India (Adaptation of Indian Laws) Order, 1937, to bring its provisions into accord with those of the Constitution Act as provided for in s. 293 thereof. One of such modifications was the substitution of new definitions of the expressions "to import" and "to export". Whereas these expressions previously meant simply the bringing into and taking out of the Presidency of Bombay, under the new cl. (10) of s. 3 they mean respectively the bringing in- to and taking out of the Presidency "otherwise than across a customs frontier as defined by the Central Government". This modification had to be made because under the Constitution Act the exclusive power to legislate with respect to import and export across such frontiers was in the Federal Legislature. Further amendments in the Act were effected in 1940 with a view to supersede a pronouncement by a Special Bench of the High Court in *Chinubhai Lalbhai v. Emperor* <sup>(1)</sup>, that the Provincial Government had no power under s. 14-B to prohibit the possession of intoxicants as there was nothing in the Act, as it appeared to them, to suggest that total prohibition as a measure of social reform was contemplated by the Legislature. The Bombay Abkari (Amendment) Act, 1940, was accordingly passed by the Governor of Bombay who had assumed legislative powers by a proclamation under s. 93 of the Constitution Act. Besides inserting in the preamble to the original Act words making it clear that it was part of the object of the Act to enforce the

(1) I.L.R. 1940 Bom. 587.

policy of prohibition, it effected two important amendments in s. 14-B, which, before the amendments, stood thus:—

“14-B. (1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor except as authorised by his licence shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the provincial Government under s. 17 may declare to be the limit of retail sale, except under a permit from the Collector :

Provided that nothing in sub-s. (1) 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-s. (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.”

The amending Act deleted the proviso to sub-s. (1) and substituted in sub-s. (2) the words “any individual or a class or body of individuals or the public generally” for the words “any person or class of persons”. That Act was repealed but the amendments aforesaid were re-enacted by the Bombay Abkari (Amendment) Act, 1947, which was passed by the Provincial Legislature after the lapse of the Governor’s Proclamation under s. 93. The appellant attacks the validity of these amendments and, in particular, the deletion of the proviso to sub-s. (1), contending that the Provincial Legislature has no power to restrict or prohibit the possession of intoxicants imported from foreign countries.

Now, under s. 100 of the Constitution Act the Provincial Legislature has, subject to the other sub-sections of that section, the exclusive power to make

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laws with respect to matters enumerated in List II in the Seventh Schedule. Item 31 of that List comprises "Intoxicating liquors and narcotic drugs, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors, opium and other narcotic drugs" subject to certain reservations not material here. *Prima facie*, the offending provisions are within this legislative power. But counsel for the appellant drew attention to Item 19 of List I which covers "Import and export across customs frontiers as defined by the Dominion Government", and argued that if "intoxicating liquors" in Item 31 of List II were held to include also liquors imported from abroad, then the Provincial Legislature, by prohibiting possession of such liquors by all persons, whether private consumers, common carriers or warehousemen, could defeat the power of the Federal Legislature to regulate imports of foreign liquors across the sea or land frontiers of British India which are customs frontiers as defined by the Central Government and thus seriously jeopardise an important source of central customs revenue. As under s. 100 of the Constitution Act the Provincial legislative powers under List II were subject to the exclusive powers of the Federal Legislature in List I, the Bombay Act to the extent to which it trespassed upon the subject of Item 19 of the latter List must, it was submitted, be regarded as a nullity. We are unable to accede to this contention. As pointed out by this Court in *Bhola Prasad v. King-Emperor*<sup>(1)</sup> the legislative power given to the Provinces under Item 31 of List II is expressed in wide and unqualified terms which in their natural and ordinary sense are apt to cover such an enactment as s. 14-B in its amended form, and we see nothing in the Federal Legislative List and more particularly in Item 19 to lead us to cut down the full meaning of the Provincial entry by excluding foreign liquors from its purview. There is, in our view, no irreconcilable conflict here such as would necessitate recourse to the principle of Federal supremacy laid down in s. 100 of the Constitution Act. Section 14-B does not purport to restrict or prohibit

(1) [1942] F.C.R. 17.

dealings in liquor in respect of its importation or exportation across the sea or land frontiers of British India. It purports to deal with the *possession* of intoxicating liquors which, in the absence of limiting words, must include foreign liquors. It is far-fetched, in our opinion, to suggest that, in so far as the provision covers foreign liquors, it is legislation with respect to import of liquors into British India by sea or land.

Reference was also made in this connection to the newly inserted part of the preamble to the Abkari Act as to the necessity of prohibiting, among other things, the "import" of liquor and to the provisions in the Act relating to "import" and "export" of intoxicants, as showing that the Act was and purported to be a direct encroachment on the Federal field. But, as already pointed out, the Government of India (Adaptation of Indian Laws) Order, 1937, has brought those provisions into accord with Item 19 of the Federal Legislative List by substituting new definitions in cl. (10) of s. 3, and no question of conflict could therefore arise in regard to those matters. It may be that a general adoption of the policy of prohibition by the Provinces will lead to a fall in the import of foreign liquors and to a consequential diminution of the Central customs revenue, but where the Constitution Act has given to the Provinces legislative power with respect to a certain matter in clear and unambiguous terms, the Court should not deny it to them or impose limitations on its exercise, on such extraneous considerations. It is now well settled that if an enactment according to its true nature, its pith and substance, clearly falls within one of the matters assigned to the Provincial Legislature, it is valid notwithstanding its incidental encroachment on a Federal subject: *Prafulla Kumar Mukherjee and Others v. Bank of Commerce Ltd., Khulna*<sup>(1)</sup>.

Reliance was placed by learned counsel on certain observations made *obiter* in *Emperor v. Dantes*<sup>(2)</sup> where the learned Chief Justice delivering the judgment of a Special Bench expressed the view that, whilst the Provincial legislative power under Item 31 extended to

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prohibiting possession of intoxicating liquors, "absolute" prohibition was beyond the powers of the Provincial Legislature, as "it destroys, indirectly, no doubt, but none the less effectively, the right to import and export intoxicants across the sea frontier of Bombay". He saw "no difficulty in reconciling the two items (Item 31 of List II and Item 19 of List I) 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". He did not, however, pause to indicate how the Provincial Legislature could limit possession at all without encroaching in that sense on the Federal power under Item 19. Apparently the learned Chief Justice thought that the test of validity was the degree of encroachment. This view cannot be accepted as correct. It has been pointed out by their Lordships of the Judicial Committee in the *Khulna Bank Case*<sup>(1)</sup> already referred to, that, whilst the extent of the encroachment by the Provincial Legislature is important for determining what is the pith and substance of the impugned Act, its validity cannot be determined "by discriminating between degrees of invasion".

For the reasons indicated we hold that s. 14-B of the Bombay Abkari Act as amended by Bombay Act No. XXIX of 1947 is valid and dismiss the appeal.

*Appeal dismissed.*

Agent for the appellant: *Rajinder Narain.*

Agent for the respondent: *Ranjit Singh Narula.*

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(1) [1947] F.C.R. 28 P.C.