1960

September 13.

THE BULLION AND GRAIN EXCHANGE LTD. AND OTHERS

v.

THE STATE OF PUNJAB

(S. K. DAS, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH and N. RAJAGOPALA AYYANGAR, JJ.)

Forward Contracts Tax—Validity of enactment—Legislative competence—Severability of valid portion—Punjab Forward Contracts Tax Act, 1951 (Punj. 7 of 1951), s. 2—Constitution of India, Seventh Schedule, List II, Entry 62.

The appellants, who were carrying on the business of commission agents in forward contracts, filed a petition before the High Court of Punjab under Art. 226 of the Constitution of India challenging the validity of the Punjab Forward Contracts Tax Act, 1951, on the ground that it was *ultra vires* the powers conferred upon the State Legislature. The Act provided for the levy of a tax on forward contracts which were defined, by s. 2, as agreements, oral or written, for sale of goods on a future date but on the basis of which actual delivery of goods was not made or taken but only the difference between the price of the goods agreed upon and that prevailing on the date mentioned in the agreement or any other date was paid or received by the parties. The High Court took the view that the Act was one to tax speculation in futures and fell within Entry 62 of the State List as an Act to impose taxes on betting and gambling.

Held, that as the definition of the expression "forward contract" in the Punjab Forward Contracts Tax Act, 1951, does not set out all the elements which are necessary to render a contract a wagering contract the legislature could not be considered to have contemplated wagering contracts in defining "forward contracts" in the way it did. The Act therefore does not fall within Entry 62, List II, Seventh Schedule of the Constitution, and is beyond the legislative competence of the State Legislature.

Held, further, that even if the definition could be considered to be wide enough to include certain contracts which may be wagering contracts because of the fact that the parties to the contract had no intention to deliver the goods, the portion of the Act which would then be valid is so thin and truncated that the entire Act should be held invalid.

R. M. D. Chamarbaugwala v. *The Union of India*, [1957] S. C. R. 930, relied on.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 123/55

Appeal by special leave from the judgment and order dated November 12, 1951, of the Punjab High Court in Writ Petition No. 116 of 1951.

N. C. Chatterjee, S. N. Andley, J. B. Dadachanji and *Rameshwar Nath*, for the appellants.

S. M. Sikri, Advocate-General for the State of Punjab, N. S. Bindra and *D. Gupta*, for the respondent.

1960. September 13. The Judgment of the Court was delivered by

Das Gupta J.

DAS GUPTA J.—This appeal is against the judgment of the High Court of Punjab rejecting the appellant's application under Art. 226 of the Constitution. In this application the appellants who had been carrying on the business of commission agents in Forward Contracts at Ludhiana alleged that the Punjab Forward Contracts Tax Act, 1951 (Punjab Act No. VII of 1951), was ultra vires the powers conferred upon the State Legislature and prayed for a declaration that the Act and the notification made and the rules promulgated thereunder by the respondent, State of Punjab, were void. There was a further prayer for directing the State of Punjab by a writ of mandamus or other appropriate writ to allow the petitioners to carry on the business of Forward Contracts or as commission agents in Forward Contracts unrestricted by the provisions of the above-mentioned Act and the rules thereunder and not to enforce the Act.

The respondent's case as made in para. 5 of its written-statement was that "the impugned Act is not ultra vires the State Legislature. It is a law with respect to the matters enumerated in Entry 62 of the State List read with Entry No. 7 of the Concurrent List of the 7th Schedule."

The High Court held that:—

"The impugned Act, is an Act to tax speculation in futures, at least so far as dealers such as the present applicants are concerned, falls within Item 62 of the State List as an Act to impose taxes on betting and gambling, and to that extent at least is valid."

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In this view the High Court rejected the application.

The only question for our decision is as regards the legislative competence of the State Legislature of Punjab to enact this statute. Though a reference under Entry 7 of the Concurrent List of the 7th Schedule of the Constitution was made in the respondent's written statement no reliance appears to have been placed on this entry in the High Court nor has it been relied on before us by the learned counsel appearing on behalf of the respondent and it is quite clear that the impugned Act cannot fall within Item 7 of the Concurrent List which is in these terms:— "Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land". It is common ground before us that the Act must be held to be within the legislative competence of the Punjab State Legislature only if in pith and substance it fell within Item 62 of the State List and if it did not so fall it must be held to be beyond the State Legislature's competence. Item 62 mentions "taxes on luxuries, including taxes on entertainment, amusements, betting and gambling."

If the impugned Act provides for a tax on betting and gambling then and then only it can come within Item 62. The Act provides for the levy of a tax on forward contracts and it has defined "forward contract" in s. 2 in these words: "Forward contract" means an agreement, oral or written, for sale of goods on a future date but on the basis of which actual delivery of goods is not made or taken but only the difference between the price of the goods agreed upon and that prevailing on the date mentioned in the agreement or any other date is paid or received by the parties". "Dealer" is defined in the same section to mean "any person, firm, Hindu Joint family or limited concern, including an arhti or "chamber" or association formed for the purpose of conducting business in forward contracts, who conducts such business in the course of trade in the State either on his own behalf or on behalf of any other person, arhti, "chamber" or association". "Sale" is defined to mean

"the final settlement in respect of an agreement to sell goods mentioned in a forward contract, and it shall be deemed to have been completed on the date originally fixed in the forward contract for this purpose or any other date on which the final settlement is made". Section 4 is the charging section and provides for a levy on the business in forward contracts of a dealer a tax at such rates as the Government may by notification direct. Section 5 lays down that every dealer shall be liable to pay tax under this Act as long as he continues his business in forward contracts. Section 6 prohibits any dealer from carrying on business in forward contracts unless he has been registered and possesses a registration certificate. Section 7 deals with the mode of payment of the tax and for submission of returns while s. 8 provides for assessment of the tax.

As the term "forward contract" has been defined in the statute itself we have to forget for the purpose of deciding the present question any other notion about what a "forward contract" means. For the purpose of this statute every agreement for sale of goods on a future date is not a "forward contract". It has to be an agreement for the sale of goods on a future date and has to satisfy two other conditions, viz., (1) actual delivery of the goods is not made on the basis of the agreement and (2) the difference between the price of the goods agreed upon and that prevailing on the date mentioned in the agreement or any other date is paid by the buyer or received by the seller. The test of a forward contract under this definition is that delivery of goods is not made or taken but only the difference between the price of the goods as agreed upon and that prevailing on some other date is paid. Is such a contract necessarily a wagering contract and therefore gambling?

When two parties enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time it may be that they never intended an actual transfer of goods at all, but they intended only to pay or receive the difference according as the market price should vary from the

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contract price. When such is the intention it has been held that that is not a commercial transaction but a wager on the rise or fall of the market, which comes within the connotation of "gambling". It is the fact that though in form an agreement for sale purports to contemplate delivery of the goods and the payment of the price, neither delivery nor payment of the price is contemplated by the parties and what is contemplated is merely the receipt and payment of the difference between the contract price and the price on a later day that makes the contract a wagering contract. In the definition of "forward contract" in the impugned Act there is no reference, directly or indirectly, to such an intention. It is only by reading for the words "actual delivery of goods is not made or taken" the words "actual delivery of goods is not to be made or taken" and by substituting for the words "is paid or received by the parties" the words "is to be paid or received by the parties" and also by omitting the words "on the basis of which" that the word "forward contract" as defined in the section can be held to refer to a wagering contract. This however we are not entitled to do. The reason why the Legislature did not use the words "to be made or taken" or "to be paid or received" in the definition clause is not far to seek. An agreement oral or written which in terms provides that actual delivery is not to be made or taken and that the entire price of the goods is not to be paid and only the difference between the price of the goods agreed upon and that prevailing on some other date would be paid would be hit by s. 30 of the Contract Act and would not be enforceable. Parties to a written agreement for sale of goods would therefore take good care to see that the terms do not provide that delivery should not be made but only the difference is to be paid. There might be an oral understanding between the parties that no delivery should be demanded or made, but that only difference should be paid. But it will be next to impossible for a tax being imposed on the proof of such intention, not expressed in the written contract. When the agreement for sale of goods is oral, but the parties

agree as between themselves that no delivery would be made, but difference in price would be paid, it would be equally impossible for a taxing authority to discover in which of the contracts such an agreement has been made. The dispute whether a particular contract is a wagering contract or not arises in civil courts generally when the contract of sale is sought to be enforced and one of the parties tries to avoid the contract by recourse to s. 30 of the Contract Act. When such a dispute comes before the Court, it becomes necessary to consider all the circumstances to see whether they warrant the legal inference that the parties never intended any actual delivery but intended only to pay or receive the difference according as the market price should vary from the contract price. It is therefore well nigh impossible for any taxing authority to brand a particular forward contract as a wagering contract; nor is it to be expected that any party on whom the tax is sought to be levied, will voluntarily disclose that in the particular contract or in a number of contracts, the intention was not to deliver the goods but only to pay or receive the difference in price. Aware of these difficulties in the practical application of a law to levy tax on wagering contracts, the legislature decided to levy tax on contracts for sale of goods in which actual delivery is not factually made or taken, whatever be the intention at the time when the agreement was made.

It appears clear therefore that the words "forward contract" as defined in the Act do not set out all the elements which are necessary to render a contract a wagering contract and so the impugned legislation to tax forward contracts as defined does not come within Entry 62.

The learned Advocate-General for the State of Punjab tried to convince us that even though the words used in defining forward contract may include contracts which do not amount to wagering contracts, they are wide enough to include certain contracts which may be wagering contracts because of the fact that the parties to the contract had no intention to

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deliver the goods. If the definition is wide enough to include contracts which are wagering contracts, he contends, the statute should not be struck down as a whole but should be held to be valid in respect only of such wagering contracts. On behalf of the appellants Mr. N. C. Chatterjee has drawn our attention to the provisions of registration of "dealers" in s. 6 and has argued that the very fact that the Legislature was calling upon persons dealing in "forward contracts" to register themselves and to prohibit dealing in forward contracts by non-registered dealers, justifies the conclusion that the Legislature was not thinking of wagering contracts at all. As against this it is proper to note that the Constitution itself contemplated taxation on "gambling" by State Legislatures. It is however one thing to tax gambling, and quite another thing for a Legislature to encourage gambling by asking persons to register themselves for this purpose. The definition of a "dealer" it has to be noticed includes "a limited concern, including, a Arhti, Chamber or association formed for the purpose of conducting business in forward contracts".

While it might happen in fact that an association would be formed for the purpose of conducting business in wagering contract, it is hardly likely that the Legislature would take upon itself the task of openly permitting and recognizing such associations. These, in our opinion, are good reasons for thinking that the Legislature did not contemplate wagering contracts at all in defining "forward contract" in the way it did.

Assuming however that the definition is wide enough to include wagering contracts, the question arises whether the portion of the Act which would then be valid is severable from the portion which would remain invalid. One of the rules approved by this Court in *R. M. D. Chamarbaugwala* v. *The Union of India* (1), for deciding this question was laid down in these words:—

"In determining whether the valid parts of a statute are separable from the invalid parts thereof, it

(1) [1957] S.C.R. 930.

is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute is invalid."

A second rule was that if

"the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety."

Applying either of these rules, we are bound to hold that the entire Act should in the present case be held invalid. It seems to us clear that if the Legislature had been conscious that taxation on all forward contracts was not within its legislative competence it would have at once seen that because of the difficulty of finding out which among the contracts for sale of goods on a future date are wagering contracts, it would not be worthwhile to enact any law for taxing wagering contracts only. It is equally clear that once the law is held to be invalid as regards forward contracts other than wagering contracts, what is left is "so thin and truncated as to be in substance different from what it was when it emerged out of the legislature". The respondent's contention that the statute should be held to be valid in respect of wagering contracts even though invalid as regards other forward contracts must therefore also be rejected.

Our conclusion therefore is that the impugned statute does not fall within Item 62 of the State List and that it is beyond the legislative competence of the State Legislature. The appellants were therefore entitled to appropriate reliefs as prayed for in their petition under Art. 226 of the Constitution.

We therefore allow this appeal, set aside the order of the High Court and direct that the petition under Art. 226 of the Constitution be allowed and declare that the Punjab Forward Contracts Tax Act No. VII of 1951 is void and unconstitutional as it is ultra vires the powers of the State Legislature, that the notification made under the rules promulgated by the

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respondent under this Act are also void and unconstitutional, and that a mandamus do issue directing the respondent to allow the petitioners to carry on the business of forward contracts or as commission agents for forward contracts unrestricted by the provisions of the said Punjab Forward Contracts Tax Act No. VII of 1951 and the rules thereunder and not to enforce the provisions of this Act and the rules.

The appellants will get their costs in this Court as also in the court below.

Appeal allowed.

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September 14.

NARAIN DAS

v.

THE STATE OF UTTAR PRADESH

(JAFER IMAM, A. K. SARKAR and RAGHUBAR DAYAL, JJ.)

Appeal—Forum—Single Judge of High Court exercising civil jurisdiction refusing to file complaint—Appeal, if lies to Supreme Court—Code of Criminal Procedure, 1898 (V of 1898), ss. 195 and 476-B.

During the pendency of a civil writ petition in the Allahabad High Court one N moved an application under s. 476, Code of Criminal Procedure, for making a complaint under s. 193, Indian Penal Code, against T. A single Judge who was seized of the case rejected the application. Thereupon N presented an appeal against the order of rejection of his application before the Supreme Court under s. 476-B, Code of Criminal Procedure.

Held, that the appeal did not lie to the Supreme Court but that it lay to the Appellate Bench of the High Court. The decrees of a single Judge of the High Court exercising civil jurisdiction were ordinarily appealable to the High Court under cl. 10 of the Letters Patent of the Allahabad High Court read with cl. 13 of the U. P. High Courts (Amalgamation) Order, 1948, and as such the Court constituted by the single Judge was a court subordinate to the Appellate Bench of the High Court within the meaning of s. 195(3) of the Code.

M. S. Sheriff v. *The State of Madras*, [1954] S.C.R. 1144, distinguished.