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In those circumstances, the trial under s. 339 was held to be bad. We are not concerned in the present case with s. 339. What we have to decide is whether a pardon under s. 337(1) of the Code of Criminal Procedure can be granted in the case of an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code. To that there can be only one answer on the terms of s. 337(1), namely, that no pardon can be granted for an offence of this nature. Therefore, as the present proceedings before the magistrate are only for an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code, Mehra cannot be examined as an approver in that court. There is no force in these appeals and they are hereby dismissed.

Appeals dismissed.

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December 2

CHATURBHAI M. PATEL

v.

THE UNION OF INDIA AND OTHERS

(JAFER IMAM, S. K. DAS, J. L. KAPUR, A. K. SARKAR,
and M. HIDAYATULLAH, JJ.)

Legislative Competence—Validity of enactment—Competence of Central Legislature—Levy of excise duty on tobacco—Pith and substance of legislation—Central Excises and Salt Act, 1944 (I of 1944), ss. 6, 8, Rules—Government of India Act, 1935 (26 Geo. V. Ch. 2), s. 100, Sch. 7, List I, Entry 45, List II, Entries 27, 29.

The petitioner who was doing business in tobacco was charged with the contravention of Rules 151(C) and 226 of the Central Excise Rules, 1944, framed under the Central Excises and Salt Act, 1944. The Collector finding the charges to be proved ordered confiscation of the goods found in the petitioner's warehouse and levied duty thereon in lieu of confiscation and also imposed a penalty of Rs. 2,000. The petitioner challenged the validity of the orders on the grounds, *inter alia*, that ss. 6 and 8 of the Act and the Rules made thereunder were beyond the legislative competence of the Central legislature in view of the fact that though the provisions of the Act which provided for the levy of excise duties might fall within item 45 of List I read with s. 100 of the Government of India Act, 1935, the Act in question would also be covered by items 27 and 29, of List II, as the possession and trade in tobacco were also regulated, and would, to that extent, be *ultra vires*.

Held, that the various provisions of the Central Excises and Salt Act, 1944, and the Rules made thereunder were essentially connected with the levying and collection of excise duty and in its true nature and character the Act remained one under item 45 of List I and that the incidental trenching upon the provincial field of items 27 or 29 of List II would not affect its constitutionality.

It is within the competence of the Central legislature to provide for matters which may otherwise fall within the competence of the Provincial Legislature if they are necessarily incidental to effective legislation by the Central legislature on a subject of legislation expressly within its power.

State of Rajasthan v. G. Chawla, A.I.R. 1959 S.C. 544, and *Cooverjee Bharucha v. The Excise Commissioner of Ajmer*, [1954] S.C.R. 873, followed.

Attorney-General for Canada v. Attorney-General for British Columbia, [1930] A.C. 111 and *Attorney-General for Canada v. Attorney-General for Quebec*, [1947] A.C. 33, relied on.

ORIGINAL JURISDICTION : Petition No. 9 of 1957.

Petition under Article 32 of the Constitution of India for enforcement of fundamental rights.

B. D. Sharma, for the petitioner.

C. K. Daphtary, Solicitor-General of India *R. H. Dhebar* and *T. M. Sen*, for the respondents.

1959. December 2. The Judgment of the Court was delivered by

KAPUR J.—The petitioner was a wholesale and retail dealer in tobacco at Banaras and also owned a private bonded warehouse for tobacco and held licences for the same. In this petition he challenges the legality of certain orders passed by the Collector of Excise, Allahabad, which on appeal were confirmed and revisions against those orders were dismissed by the Central Government. The petitioner's warehouse was checked by Inspector Das who on finding some irregularity sealed the warehouse on December 8, 1953, and subsequently took possession of all the registers and stock cards. On December 22, 1953, 11½ bags of *kandi* i.e. "stems of tobacco", which were found in the petitioner's warehouse, were removed from the warehouse by the Inspector and stored in some other

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place. Against those orders the petitioner made certain representations to the Collector and some correspondence passed. On June 15, 1954, the Collector, Central Excise, issued a notice to the petitioner to show cause why a penalty should not be imposed on him for the contravention of Rules 151(C) and 226 of the Central Excise Rules, 1944, and why the bags of *kandi* should not be confiscated. The petitioner showed cause, the Collector heard the petitioner who had also filed written arguments. Finding the charges against the petitioner proved, the Collector ordered confiscation of the bags of *kandi*, imposed a fine of Rs. 150 and the duty leviable thereon in lieu of confiscation. He further imposed a penalty of Rs. 2,000 under rr. 151(C) and 226 of the Central Excise Rules. The appeal taken to the Central Board of Revenue was dismissed as the petitioner refused to deposit the penalty of Rs. 2,000 and a revision to the Central Board of Revenue was also dismissed for the same reason. This is one of the orders which is challenged by the petitioner.

On July 29, 1954, the Collector called upon the petitioner to produce another surety as the previous surety Mohammad Satar was not prepared to act as such. The petitioner states that he thereupon furnished two bonds in Form B-4 and B-5 for Rs. 7,000 and Rs. 10,000 respectively. As there was a sum of Rs. 15, 263-8-0 due from him (the petitioner) as Excise duty, 373 Mds. of tobacco were attached by the Excise Department and sold by auction for Rs. 6,878-5-0 thus leaving a balance of Rs. 8,385-3-0. As the Department made demands for the recovery of this balance of duty the petitioner filed a civil suit in the court of the First Additional Civil Judge, Banaras, who issued an ad-interim injunction against the Department restraining it to recover the amount. On January 25, 1956, the Superintendent of Excise called upon the petitioner to deposit a cash security of Rs. 10,000 otherwise his licence would be treated as cancelled under r. 181(1) of the Central Excise Rules. The petitioner demurred to this and as the outstanding amount of excise duty was not paid the Deputy

Collector ordered on February 13, 1956, that till the deposit was made the petitioner's licence shall remain inoperative. The petitioner took an appeal against this order to the Central Board of Revenue which was dismissed. The petitioner also filed a petition under Art. 226 in the Punjab High Court which was also dismissed and a revision against the order of the Deputy Collector making the licence inoperative was dismissed by the Central Board of Revenue on December 20, 1956. This is the second order which is challenged.

The present petition was filed on January 21, 1957, in which the petitioner prayed (1) that the provisions of ss. 6, 8, 9 and 10 of the Central Excises and Salt Act, 1944, Act 1 of 1944 (which for the sake of convenience will hereinafter be termed the Act) and the rr. 140 to 148, 150, 171 to 181, 215 and 226 of the Central Excise Rules made under the Act be declared *ultra vires* and to issue a writ of *certiorari* or any other writ to quash the orders passed by the Collector as confirmed on appeal and revision by the Central Board of Revenue and the Central Government respectively. These orders have already been referred to. (2) For a writ of *mandamus* directing the respondents not to interfere with the fundamental right of the petitioner to carry on trade in tobacco or to store tobacco; (3) directing the respondents to return the goods confiscated by them.

For the petitioner three points were raised: (1) that ss. 6 and 8 of the Act and the Rules made thereunder were beyond the legislative competence of the Central legislature under the Constitution Act of 1935; (2) even if they were within the legislative competence they impose excessive and unreasonable restraint on the fundamental right of the petitioner to trade in tobacco and they were not in the interest of the general public and therefore were not saved by Art. 19(6); (3) orders passed were *ultra vires* the Act and the Rules made thereunder.

Before we proceed to consider the arguments raised on behalf of the petitioner, it is necessary to examine

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the scheme of the Act. Its scope as given in the preamble is :—

“to consolidate and amend the law relating to central duties of excise on goods manufactured or produced in British India and to salt.”

Section 2 of the Act gives the definitions. Chapter II provides for levy and collection of duty. The two main sections, i.e., 6 and 8 fall under this Chapter. Section 6 provides for certain operations to be subject to licences and when quoted it runs as follows :

S. 6 “The Central Government may, by notification in the official Gazette, provide that, from such date as may be specified in the notification, no person shall, except under the authority and in accordance with the terms and conditions of a licence granted under this Act engage in—

(a) the production or manufacture or any process of the production or manufacture of any specified excisable goods or of saltpetre or of any specified component parts or ingredients of such goods or of specified containers of such goods, or

(b) the wholesale purchase or sale (whether on his own account or as a broker or commission agent) or the storage of any excisable goods specified in this behalf in part A of the Second Schedule.”

Section 8 imposes restriction on possession of excisable goods. It is as follows :

“From such date as may be specified in this behalf by the Central Government by notification in the official Gazette, no person shall, except as provided by rules made under this Act, have in his possession any excisable goods specified in this behalf in Part B of the Second Schedule in excess of such quantity as may be prescribed for the purpose of this section as the maximum amount of such goods or of any variety of such goods which may be possessed at any one time by such a person.”

Section 9 deals with offences and penalties. Section 10 gives to the court the power to order forfeiture. Section 11 makes provision for recovery of duties due to

Government. Chapter VI deals with adjudication of confiscation and penalties specifying the powers of the Collector of Central Excise and appeals against such orders and revision to the Central Government. Chapter VII contains supplementary provisions; s. 37 therein empowers the Central Government to make rules and in the Schedule the rates or duties leviable on each class of goods are given and tobacco falls in item 9.

The question is, as to whether the Act falls within item No. 45 of List I read with s. 100 of the Government of India Act. It was contended on behalf of the petitioner that even though the imposition of excise duties may fall under item No. 45 of List I of the Constitution Act it is a serious encroachment on the territory covered by items 27 and 29 of List II of that Act. The argument raised was that although the Act imposes duty of excise within item 45 of List I and that was one of its objects, it also regulates trade or commerce and therefore falls within the above-mentioned items of List II and would, to that extent, be *ultra vires*. It was contended that the pith and substance of a statute may cover two fields and in support relied upon the following observation of Mahajan, C.J., in *Cooverjee B. Bharucha v. The Excise Commissioner and The Chief Commissioner Ajmer & Ors.* ⁽¹⁾:

“The pith and substance of the regulation is that it raises excise revenue by imposing duties on liquor and intoxicating drugs by different methods and it also regulates the import, export, transport, manufacture, sale and possession of intoxicating liquors.”

But that case did not raise the question of legislative competence; the point for decision was whether the statute there impugned, infringed the right to carry on trade in liquor and also whether the auction money was a fee or a tax. It was in that connection that the observation above quoted was made.

It was also argued that if the purpose and object of the Act is levying of duty of excise then it could not provide for regulation of trade and reliance was

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(1) [1954] S.C.R. 873, 877, 884.

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placed on *King v. Barger* ⁽¹⁾ where by a majority it was held that the question in substance was not an exercise of the power of taxation and if it was, the statute would be invalid as being in contravention of s. 55 of the Constitution Act of Australia. The minority, however, was of the opinion that the reserved powers of the States are those which remain after full effect was given to the powers granted to the Commonwealth.

In support of the argument that the Act did not only relate to levying of excise duties but also regulated trade, reference was made to rr. 174 to 182 of the Central Excise Rules which relate to licensing. Particular reliance was placed on r. 176(2) imposing a licence fee which in the case of tobacco is as much as Rs. 100. Reference was also made to r. 181 which deals with revocation and suspension of licences and empowers the Licensing Department to revoke or suspend a licence under certain circumstances. The rule is as follows :—

R. 181 “(1) Any licence granted under these Rules may be revoked or suspended by the licensing authority if the holder, or any person in his employ, is found to have committed a breach of the conditions thereof, or any of the provisions of the Act or these Rules (or has been convicted of an offence under s. 161, read with s. 109 or with s. 116 of the Indian Penal Code).

(2)

(3)”

Counsel then drew our attention to r. 182 which relates to matches only but which places limitation on the issue of licences for the manufacture of matches.

The next set of Rules which were relied upon were rr. 140 to 148 in regard to warehousing and then our attention was drawn to rr. 210 to 215 relating to penalties, confiscation and appeals. In regard to the latter set of Rules it was submitted that they laid down no procedure and did not make any provision for issuing of notice to licensees or hearing them or their witnesses before imposing penalties. From all this

(1) (1908) 6 C.L.R. 41.

the conclusion which counsel wished us to draw was that the Act read with Rules shows that the pith and substance is not merely levying an excise duty but the possession of and trade in tobacco was also regulated and therefore the subject matter of the Act did not fall exclusively in the legislative field covered by List I but it trenched upon the provincial field of legislation and must be held to fall under List II also.

In every case where the legislative competence of a legislature in regard to a particular enactment is challenged with reference to the entries in the various lists it is necessary to examine the pith and substance of the Act and if the matter comes substantially within an item in the Central List it is not deemed to come within an entry in the Provincial list even though "the classes of subjects looked at singly overlap in many respects". It is within the competence of the Central legislature to provide for matters which may otherwise fall within the competence of the Provincial legislature if they are necessarily incidental to effective legislation by the Central legislature on a subject of legislation expressly within its power. *Attorney-General for Canada v. Attorney-General for British Columbia* ⁽¹⁾; *Attorney-General for Canada v. Attorney-General for Quebec* ⁽²⁾. In *Gallagher v. Lynn* ⁽³⁾ it was held that if the true nature and character of an Act is to protect the health of the inhabitants then even though it may incidentally affect trade, it is not enacted "in respect of" trade. Moreover it is a fundamental principle of constitutional law that everything necessary to the exercise of a power is included in the grant of the power. *Edward Mills Co. Ltd. v. The State of Ajmer* ⁽⁴⁾.

The item which falls for consideration in the present case is No. 45 of List I which is as follows :

"Duties of excise 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 ; non-narcotic drugs ;

(1) [1930] A.C. 111, 118.

(2) [1947] A.C. 33, 43.

(3) [1937] A.C. 863.

(4) [1955] 1 S.C.R. 735, 749.

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(c) medical and toilet preparations containing alcohol, or any substance included in sub-paragraph (b) of this entry."

The other items which have to be considered are items Nos. 27, 29 and 31 of List II which are as follows :—

Item 27. "Trade and commerce within the Province; markets and fairs; money lending and money lenders."

Item 29. "Production, supply and distribution of goods; development of industries, subject to the provisions in List I with respect to the development of certain industries under Federal control."

The question for decision is whether the Act in question is a law with respect to the matters enumerated in item 45 of List I or to the matters enumerated in items 27 and 29 of List II. In other words does it, in pith and substance, relate to duties of excise on tobacco as contained in item 45 or it falls within the boundaries of items 27 and 29 of the provincial list and if it falls within the former, is its validity affected by its incidental trespass into the territory reserved for provincial legislation. In the interpretation of the scope of these items the widest possible amplitude must be given to the words used and each general word must be held to extend to ancillary or subsidiary matters which can fairly be said to be comprehended in it. *United Provinces v. Mst. Atiqa Begum & Ors.* (1); *Navinchandra Mafatlal v. The Commissioner of Income-tax* (2); *The State of Madras v. Gannon Dunkerley & Co.* (3). In *Subramanyan Chettiar v. Muthuswamy Goundan* (4) Sir Maurice Gwyer, C.J., dealing with items in the Lists observed :

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because

(1) [1940] F.C.R. 111.

(2) [1955] 1 S.C.R. 829, 833, 836.

(3) [1959] S.C.R. 379, 391, 393.

(4) [1940] F.C.R. 188, 201.

the Legislature enacting them may appear to have legislated in a forbidden sphere."

We agree as did the Privy Council in *Prafulla Kumar Mukherjee and Ors. v. Bank of Commerce Ltd.* ⁽¹⁾ and this Court did in *State of Rajasthan v. G. Chawla* ⁽²⁾ that this passage correctly describes the ground on which the rule is founded and in our opinion it is a correct method of interpreting the words of the various items in the Lists read with s. 100 of the Constitution Act. Hidayatullah, J., in *State of Rajasthan v. G. Chawla* ⁽²⁾ said at p. 546 :—

"It is equally well-settled that the power to legislate on a topic of legislation carries with it the power to legislate on an ancillary matter which can be said to be reasonably included in the power given."

We now proceed to determine the true nature and character or the pith and substance of the Act. It is a fiscal measure to levy and realise duty on tobacco. The method of realising duty must be left to the wisdom of the legislature taking each individual trade and its peculiarities and difficulties which arise in that matter. Various provisions of the Act and the Rules show that the authorities are on the track of the movement of tobacco from the time it is grown to the time it is manufactured and sold in the market and the various provisions of the Act and the Rules made thereunder have been considered necessary for effectuating the purpose of the Act. Rules made under the Act also are directed for achieving the same objective. Chapter IV in the Rules deals with unmanufactured products. Rule 15 therein requires the growers to make a declaration in respect of all land upon which tobacco is to be grown. Rule 17 which requires curing to be done on the declared and approved premises is also a step in the same direction. Under Rule 18 a security can be demanded from a grower and curer. Rules 19, 20 and 21 deal with liability to duty, exemption from duty of certain kinds of tobacco for personal use, books to be kept by growers and curers and the

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(1) [1947] L.R. 74 I.A. 23, 41.

(2) A.I.R. 1959 S.C. 544.

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manner of keeping the entries in the books. Rule 31 deals with transport of tobacco from the grower to the premises of a curer and from the premises of a curer to a public or a private warehouse. Chapter V of the rules deals with manufactured tobacco and how that is to be kept in warehouses. Similarly at every stage whether the tobacco is in unmanufactured stage or manufactured stage provisions have been made in the Rules to keep a watch over the movement of tobacco. All these Rules show that the object of the Act is to make collection of excise duties on tobacco effective and the levying of fees is only a collection of money for the upkeep of supervision over the movement of tobacco for the purpose of excise duty. The system of licensing of bonded warehouses was always considered to be a part of effective control of evasion of tax in England and Parliament must be deemed to have contemplated the inclusion of this power. Besides, the levying of licence fees is itself a form of taxation. *Cooverji B. Bharucha v. The Excise Commissioner of Ajmer* ⁽¹⁾ and would in this case be within the legislative competence of the Central legislature whose powers of taxation should not be restricted so as to exclude the raising of revenue by imposing licensing fees.

In the *State of Madras v. Gannon Dunkerley & Co.* ⁽²⁾ the following passage from the *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)* ⁽³⁾:

“In any investigation of the constitutional powers of these great Dominion legislatures, it is not proper that a Court should deny to such a legislature the right of solving taxation problems unfettered by *a priori* legal categories which often derive from the exercise of legislative power in the same constitutional writ”

was quoted with approval by Venkatarama Aiyar, J., and if it is only a fee, its constitutionality cannot be challenged because of item 69 relating to fees on matters in List I. Counsel for the petitioner relied upon r. 181. This rule may have an indirect effect of depriving an owner of a bonded warehouse from the

(1) [1954] S.C.R. 873, 877, 822. (2) [1959] S.C.R. 379, 391, 393.

(3) (1936-37) 56 C.L.R. 337, 379.

privilege of keeping such a warehouse but that does not mean that the object and purpose of the Act is not imposition, collection and realisation of duty of excise. This rule is a means of making the realisation of duty effective and necessarily incidental to effectual legislation for collection of duties. *Attorney-General for Canada v. Attorney-General for British Columbia* (1). Looking at the scheme of the Act, its object and purpose, its true nature and character and the pith and substance the conclusion is inevitable that the Act was within the legislative competence of the Central legislature and although there may be certain matters otherwise within the legislative competence of the provincial legislature they are necessarily incidental to effective legislation by the Central legislature. The various provisions of the Act and the Rules made thereunder were, in our opinion, essentially connected with the levying & collection of excise duty and in its true nature and character the Act remains one that falls under item 45 of List I and the incidental trenching upon the provincial field of items 27 or 29 would not affect its constitutionality because the extent of invasion of the provincial field may be a circumstance to determine the true pith and substance but once that question is determined the Act, in our opinion, would fall on the side of Central field and not that of the provincial field. *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd.* (2).

It was then contended that the restrictions imposed were unreasonable and therefore not saved by Art. 19(6). The basis of this argument was that there is no procedure laid down in the provisions for levying penalties nor any provision made for notice or the taking of evidence and power of confiscation was given to persons who could not be termed unbiased. If the tribunal is to act judicially it must confirm to the principles of natural justice of *audi alteram partem* and there is no dispute that in the instant case there was no breach of this rule. Not only this, there is a right of appeal and a revision is also provided and both these remedies the petitioner availed himself of. The

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(1) [1930] A.C. 111, 118.

(2) [1947] L.R. 74 I.A. 23, 41.

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argument of unreasonable restriction because of this ground must also fail.

Lastly, it was contended that the two main orders passed were *ultra vires* because in the first case the petitioner was asked to deposit the penalty before his appeal or revision could be heard and reliance was placed on *Himmatlal Harilal Mehta v. The State of Madhya Pradesh* (1). But it is difficult to see how that case applies. There was no illegal imposition on the petitioner nor is it shown that anything was threatened to be realised without the authority of law. In regard to the second order Mohammad Satar had ceased to be the petitioner's surety and therefore in terms of the proviso to r. 140 of the Excise Rules which was as follows :—

“Provided that in the event of death, insolvency or inefficiency of the surety or where the amount of the bond is inadequate, the collector may in his discretion demand a fresh bond; and may, if the security furnished for a bond is not adequate, demand additional security.”

The Collector was acting within his powers if he asked for the deposit of cash security of Rs. 10,000. This is not a matter with which we can, in the circumstances of this case, interfere. It was also urged that the orders passed were *mala fide* but no such allegation was made in the petition nor is it shown as to why the orders are *mala fide*.

In our opinion this petition is without substance and is therefore dismissed with costs.

Petition dismissed.