EAST INDIA HOTELS LTD. SRINAGAR AND ANR. ETC. ETC.

v.

STATE OF JAMMU AND KASHMIR AND ANR. ETC. ETC.

JULY 12, 1994

[KULDIP SINGH AND K. RAMASWAMY, JJ.]

Constitution of India—Entry 62 list II of Seventh Schedule—Jammu & Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980—Sections 2(c), 2(j)3 and 13—Constitutional validity—Levy of tax on amenities and services—Whether within legislative competence of State Legislature—Held, Yes.

Constitution of India—Article 370 (1)—Constitution (Application to Jammu & Kashmir) Order 1954—Residuary power—Legislative competence of J & K Legislature to enact laws on any subject which come within list II, Seventh Schedule.

Jammu & Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980—Constitutional Validity of.

The constitutional validity of the Jammu & Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980 had been challenged on the ground that the levy of tax was on the gross receipts of the 'hotel keeper' and as such it was a tax on "income" which could only be imposed by the Parliament under Entry 82 list I Schedule VII Constitution of India. The question for consideration was whether the Jammu & Kashmir State Legislature had the legislative competence to enact the Jammu & Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980. High Court answered the question in the affirmative. These appeals had been filed against the judgment of the High Court. In the writ petition under Article 32 of the Constitution of India the validity of the Act had been challenged on the same grounds.

Dismissing the appeals/writ petitions, this Court

HELD: 1.1. For the reasons and the conclusions reached by the Constitution Bench of this Court in *Express Hotels Pvt. Ltd.* **v.** *State of Gujarat and Anr.,* **[1989] 2 SCR 893, the challenge to the validity of the Jammu and Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980, on the ground of legislative competence has to be rejected. It was held in that case that the concept of a tax on 'luxuries' in Entry 62, List II cannot be limited**

A merely to tax things tangible and corporeal in their aspect as 'luxuries'. The entry encompasses all the manifestations or emanations, the notion of 'luxuries' can fairly and reasonably be said to comprehend. The element of extravagance or indulgence that differentiates 'luxuries' from 'necessity' can not be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities. The question is B whether the quality or standards of lodging accommodation in hotels can be called luxurious by contemporary standards by reason of the higher standards of charges payable for the accommodation. Legislature has chosen to identify the luxury by the statutory standards prescribed by it. According to the legislative assumption, price does become evidence of the special quality C on the basis of which 'luxuries' could be distinguished and that some special quality is attributable to goods and services through the means of the price. Quality and price, in the legislative assessment, can be assumed to have a logical inter-relationship. This cannot be held to suffer from the vice of irrationality. [426-A, H, 427-A-C]

D *Express Hotels Pvt. Ltd.* v. *State of Gujarat & Anr.*, [1989] 2 SCR 893, relied on.

1.2. By the Presidential Order, made under Article 370 (1) of the Con- E stitution of India, called the Constitution (Application to Jammu & Kashmir) Order, 1954, the provisions of the Constitution of India were extended and made applicable to the State of Jammu & Kashmir with several exceptions and modifications. The words "notwithstanding anything in clauses (2) & (3)" occurring in clause (1), and clauses 2, 3 and 4 of Article 246 were omitted. Article 248 and Entry 97 of List I, List II and List III (Concurrent F List) of the Seventh Schedule were also omitted. Thus the Parliament was vested with the power to make laws in respect of Jammu and Kashmir with respect to the matters enumerated in Entries 1 to 96 of List I Schedule VII. The residuary power was retained by the State of Jammu & Kashmir. It is thus obvious that except the legislation relating to Entries 1 to 96 of List I the G legislature of Jammu and Kashmir can legislate on every other matter. The Jammu & Kashmir Legislature has, therefore, the legislative competence to enact laws on any subject which comes within list II Schedule VII by virtue of the residuary power it has been given by the Presidential order. In this case, the name J & K Hotel (Amenities and Services) Tariff Taxation Act would also be a legislation under Entry 62 List II and as such within the com- H petence of the Jammu and Kashmir Legislature. [428-B-D, F]

CIVIL APPELLATE/ORIGINAL JURISDICTION : Civil Appeal A
Nos. 3069 & 3070 (NCT) of 1981 etc. etc.

From the Judgment and Order dated 7.9.81 of the Jammu & Kashmir High Court in W.P. Nos. 286 & 343 of 1980.

Ms. Purnima Bhat, Anant Palli, Atul Sharma, Mahesh Agarwal, E.C. B
Agrawal, Ms. Rina Agarwal for the Appellants/Petitioners. In C.A. No. 188/92 & W.P.Nos. 1071/83, 8809-10/82 & 1142/84.

H.N. Salve for the Appellant in C.A.Nos. 3069-3070/81.

Vineet Kumar for the Appellant in C.A.No. 29/82. C

Vimal Dave for the Appellant in C.A. No. 92/83.

A.K. Tiwari, E.M.S. Anam and S.K. Bhattacharya for the Appellants in C.A. No. 3341/88.

D

R.P. Bhatt and Ashok Mathur for the Respondnet in C.A.Nos. 29/82, 3069-70/81, 188/82.

The Judgment of the Court was delivered by

KULDIP SINGH, J. The question for consideration is whether the E
Jammu & Kashmir State Legislature has the legislative competence to enact the Jammu & Kashmir Hotel (Amenities and Services) Tariff Taxation Act, 1980 (that Act). A Division Bench of the Jammu & Kashmir High Court answered the question in the affirmative. These appeals are against the judgment of the High Court. In the writ petitions under Article 32 of F
the Constitution of India the validity of the Act has been challenged on the same grounds as was done by the appellants before the High Court.

The preamble to the Act seeks to provide for the levy of tax on the amenities and services in a hotel in the State. Section 2 is the definition clause and defines, *inter alia*, the expressions "amenities and services" and G
"hotel" occurring in clauses C and J respectively which are as follows:-

> "(c) "Amenity and Service" includes lodging, boarding, massaging, bathing, hair dressing, and beauty parlour facilities and providing entertainment and other facilities, whether charged/chargeable jointly or separately; H

A (j) "Hotel" means any premises or part of premises including a hut, house-boat, tent, guest house, rest house or a club occupied by resident or casual visitors with or without board, service and amenities in consideration of a tariff and includes a restaurant excluding the portion used as a bar for service or supply of liquor as defined in Jammu and Kashmir Excise Act, Svt. 1958, attached B or annexed thereto."

Section 3 read with Schedule annexed to the Act are the charging provisions which provide:

"SCHEDULE

C

	Rate of Tariff	Rate of Tax
A.	Resident Visitors	
1.	Upto Rupees 100 a day	5%
2.	Rs. 101 to Rs. 200 a day	8%
3.	Rs. 201 to Rs. 300 a day	12%
4.	Rs. 301 and above a day	15%
B.	Casual (Non-resident) Visitors full amount of tariff	8%"

D

E

Section 13 of the Act which provides for collection of taxes by the assessee is as under:-

F "13. Collection of tax by the assessee—(1) A registered hotel keeper is authorised to charge the tax due on tariff under the provisions of this Act.

(2) Notwithstanding anything contained in Sub-Section (1) -

G (a) if any persons other than a registered hotel keeper collects any amount by way of tax leviable under this Act, or

(b) if any registered hotel keeper collects tax in excess of the amount chargeable under this Act,

H such person or such registered hotel keeper, as the case may be,

> shall pay such sum to the Government within the period of thirty days from the expiry of each quarter and the provisions of Sub-Section (1) of Section 12 and the provisions of this Act, relating to recovery shall apply to the recovery of such sum."

The remaining Sections of the Act refer to the returns to be filed by every "hotel keeper" and "person" liable to pay tax under the Act, the assessment and collection of tax, the imposition of penalty, the payment of tax and penalty, appeals, revisions etc. etc.

The main contention raised by the appellants before the High Court was that the levy of tax is on the gross receipts of the 'hotel keeper' and as such it is a tax on "income" which could only be imposed by the Parliament under Entry 82 List I Schedule VII Constitution of India. The High Court referred to Section 13 of the Act which authorised the 'hotel keeper' to charge the tax due from the customers. It further noticed that the taxing event under the Act is not the receipt of gross income by a 'hotel keeper' but is in fact the provision of amenities and services by him to his customers. The gross income of a 'hotel keeper' has been merely used as a measure to quantify the tax payable under the Act. Interpreting the relevant provisions of the Act the High Court found that the tax is leviable irrespective of the consideration whether the 'hotel keeper' earns any income in the sense of the Income Tax Act. All that is necessary is the occupancy of the hotel by the customers and their availing the amenities and services envisaged under the Act. On appreciation of all these factors the High Court came to the conclusion that the levy, being on amenities and services provided by the 'hotel keeper' to his customers, it was not a tax on income and as such was within the legislative competence of the State Legislature.

It is not necessary for us to go into the merits of the controversy raised before the High Court because the matter is no longer *res-integra.* The constitutional validity of The Gujarat Tax on Luxuries (Hotels and Lodging Houses) Act, 1977, Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act, 1981. The Karnataka Tax on Luxuries (Hotels and Lodging Houses) Act, 1979 and The West Bengal Entertainments and Luxuries (Hotels and Restaurants) Tax Act, 1972 which are legislations similar to the Act, was challenged before this Court in *Express Hotels Pvt. Ltd.* v. *State of Gujarat & Anr.,* [1989] 2 SCR 893, on the ground that the imposition of tax on "luxury" was beyond the legislative competence of the State Legislatures under Entry 62 List II of VIIth Schedule to the Constitution of India. This Court dismissed the writ petitions of the Hotel owners and upheld the validity of the State legislations. All the four taxing statutes before this Court in *Express Hotels* case (supra) were analogous to the Act and the scheme of the legislations was substantially similar. The following contentions, *inter alia*, were raised before this Court in *Express Hotels* case (supra):-

> "(a) The Taxation-Entry 62 of List II providing for taxes on "luxuries" contemplates, and takes within its sweep, a tax on goods and articles in their aspect and character as luxuries and does not include "services" or "activities". The levy on the services for lodging provided at the hotels, is, therefore, beyond the scope of Entry 62 List II.
>
> (c) The real criterion distinguishing "luxury" is the special attribute or quality of the commodity or the services, as the case may be, and not the price-factor simpliciter. The essential distinguishing attribute is a qualitative one. Distinction based purely on the quantitative difference in the price is not a rational criterion to identify "luxuries". The impost based on the mere criterion of price which has no relation to the concept of luxuries, is *ultra-vires* the State power under Entry 62 List II.
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> (d) The scheme of the Act in so far as it makes the price and not quality, the sole basis for identification of the subject of the tax, makes no distinction between the components of the services which include both necessities and comforts, as distinguishable, from 'luxuries'. Levy on such composite subject-matter is bad."

M.N. Venkatchaliah, J. (as the Learned CJI then was) speaking for the Constitution Bench rejected the contentions on the following reasoning:-

> "The concept of a tax on 'luxuries' in Entry 62 List II cannot be limited merely to tax things tangible and corporeal in their aspect as 'luxuries'. It is true that while frugal or simple good and medicine may be classified as necessities; articles such as jewellery, perfume, intoxicating liquor, tobacco etc. could be called articles of luxury. But the legislative entry cannot be exhausted by these cases, illustrative of the concept. The entry encompasses all the manifestations or emanations, the notion of 'luxuries' can fairly and reasonably be said to comprehend. The element of extravagance

or indulgence that differentiates 'luxury' from 'necessity' can not be confined to goods and articles. There can be elements of extravagance or indulgence in the quality of services and activities............. We are presently concerned with the question whether the quality or standards of lodging accommodation in hotels can be called luxurious by contemporary standards by reason of the higher standards of charges payable for the accommodation. Legislature has chosen to identify the luxury by the statutory standards prescribed by it, According to the legislative assumption, price does become evidence of the special quality on the basis of which 'luxuries' could be distinguished and that some special quality is attributable to goods and services through the means of the price. Quality and price, in the legislative assessment, can be assumed to have a logical inter-relationship. This cannot be held to suffer from the vice of irrationality."

The provisions of the Act are similar to the legislations of the four States mentioned above and the scheme of the Act is also substantially the same. Therefore, for the reasons and the conclusions reached by the Constitution Bench of this Court in *Express Hotels* case the challenge to the validity of the Act on the ground of legislative competence has to be rejected.

We may briefly notice the constitutional provisions under which the legislature of the State of Jammu & Kashmir has the competence to legislate the Act. Article 370 of the Constitution of India, to the extent relevant, is as under :—

"Temporary provisions with respect to the State of Jammu and Kashmir (1) Notwithstanding anything in this Constitution,-

(b) the power of Parliament to make laws for the said State shall be limited to -

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

A (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify."

By the Presidential Order, made under Article 370(1) called the Constitution (Application to Jammu & Kashmir) Order 1954, the
B provisions of the Constitution of India were extended and made applicable to the State of Jammu & Kashmir with several exceptions and modifications. The words "notwithstanding anything in clauses (2) & (3)" occurring in clause (1), and clauses 2, 3 and 4 of Article 246 were omitted. Article 248 and Entry 97 of List I, List II and List III (Concurrent List) of the
C VIIth Schedule were also omitted. Thus the Parliament was vested with the power to make laws in respect of Jammu & Kashmir with respect to the matters enumerated In Entries 1 to 96 of List I Schedule VII. The residuary power was retained by the State of Jammu & Kashmir. It is thus obvious that except the legislation relating to Entries 1 to 96 of List I the legislature of Jammu & Kashmir can legislate on every other matter. Section 5 of the
D Jammu & Kashmir Constitution reads as under:—

"Extent of executive and legislative power of the State. The executive and legislative power of the State extends to all matter except those with respect to which Parliament has power to make laws
E for the State under the provisions of the Constitution of India."

The Jammu & Kashmir Legislature has, therefore, the legislative competence to enact laws on any subject which comes within List II Schedule VII by virtue of the residuary power it has been given by the Presidential Order mentioned above. The Constitution Bench in *Express Hotels* case has
F held that the four legislations dealt with therein were under Entry 62 List II Schedule VII Constitution of India. On similar reasoning the Act would also be a legislation under the same Entry 62, and as such within the competence of the Jammu & Kashmir Legislature. We also agree with the reasoning and the conclusions reached by the High Court. There is no
G force in the contention that the Act is a legislation under Entry 82 List I Schedule VII Constitution of India. We, therefore, see no ground to interfere with the Divisions Bench judgment of the High Court. The appeals/writ petitions are dismissed. No costs.

A.G. Petitions dismissed.