HIGH COURT OF GUJARAT *(D.B.)*

VALLEY NOOR MOHOMAD
V/S
STATE OF GUJARAT

Date of Decision: 18 April 1972

Citation: 1972 LawSuit(Guj) 33

Hon'ble Judges: J B Mehta, S H Sheth

Eq. Citations: 1974 AIR(Guj) 31, 1973 GLR 10

Case Type: Special Civil Application

Case No: 913 of 1970

Subject: Constitution

Acts Referred:
Constitution Of India Art 302, Art 304, Art 255(c), Art 14, Art 301
Bombay Essential Commodities And Cattle (Control) Act, 1958 Sec 7, Sec 4(2)(j), Sec 4

Final Decision: Petition allowed

Advocates: K S Nanavati, I M Nanavati, G T Nanavati, R P Bhatt, Bhaishanker Kanga, Girdharlal

Reference Cases:
Cases Referred in (+): **25**

Judgement Text:-

S H Sheth, J

[1] The petitioner No. 2 is an association of persons who are running salvage farms. The petitioner No. 1 is the president of that association. The petitioner No. 2 association has been registered under the Bombay Non-Trading Corporations Act, 1959. Its members have been running salvage farms at village Kakoshi and other places in Mehsana District. At their salvage farms, they receive drought buffaloes, treat them for a period of time and make them milch buffaloes. When drought buffaloes become milch buffaloes, after receiving treatment at the salvage farms, they are returned to their owners. Drought buffaloes are received at these salvage farms even from outside the State of Gujarat-more particularly from Bombay. The owners of the salvage farms charge the owners of such buffaloes only for their labour and service. They neither purchase nor sell the buffaloes.

[2] In 1958, the Bombay Essential Commodities and Cattle (Control) Act, 1958 was enacted by the Bombay Legislature, inter alia, to provide for maintenance and movement of cattle. It applies amongst others to buffaloes. Under the said Act, the Government of Gujarat has made the Gujarat Cattle (Export Control) Order, 1961 (hereinafter referred to as the Control Order). Under the said Control Order anyone who wants to export (out of the territory of Gujarat State) cattle has to obtain a permit from the authority or officer specified in the Control Order and has to pay a fee for obtaining such a permit. The said order, in the first instance, prescribed a licensing j/ee of rupees five per head of cattle but later on increased it to rupees twenty per head of cattle. The petitioners, being aggrieved by the levy of this licensing fee, have filed this petition in which they have raised contentions to challenge the validity of the Control Order. Mr. K. S. Nanavati has raised before us the following four contentions :-(l) Clauses 3 and 4 of the Gujarat Cattle (Export Control) Order, 1961, are ultra vires Article 301 of the Constitution and are not saved by Article 304-more particularly so because Article 304 does not protect delegated legislation (prescribing a licensing fee at the rate of rupees twenty per cattle head for issuance of an export permit) and they do not satisfy the test of reasonableness. The license fee levied for issuance of an export permit is in the nature of a tax and it, therefore, violates Article 301 of the Constitution.

(2) Clauses 3 and 4 violate Article 19(l)(g) and are not saved by Article 19(6).

(4) Clauses 3 and 4 violate Article 14 in as much as no distinction has been made between the owners of salvage farms on the one hand and the dealers in cattle on the other hand.

(4) Sub-clause (3) of clause 4 is ultra vires sec. 4(2)(j) of the Bombay Essential Commodities and Cattle (Control) Act, 1958, under which it has been made.

[3] In order to appreciate contentions which Mr. K. S. Nanavati has raised before us, it is necessary to consider the scheme of the Bombay Essential Commodities and Cattle (Control) Act, 1958 (hereinafter referred to as the Act) in so far as it relates to cattle. It has been enacted for the purpose of controlling and regulating the production, movement, supply and distribution of, and trade and commerce in certain commodities and the maintenance and movement of cattle. We are examining the scheme of the Act only in so far as it relates to control and regulation and the maintenance and movement of cattle. The preamble to the Act, inter alia, states that it has been enacted "for the maintenance, licensing and movement of cattle, and the licensing of dealers in.....cattle, and for certain other purposes". It is quite clear from the preamble that, so far as cattle are concerned, the Act refers to more than one matter in relation to them. Sec. 4 confers upon the State Government powers to make orders providing for several matters specified in it. Clause (b) of sub-sec. 4 empowers the State Government to make an order "for regulating the maintenance, movement, supply and distribution of, or trade and commerce in cattle." Clauses (e), (f) and (g) of sub-sec. (2) of sec. 4 also relate to cattle. Clause (e) empowers the State Government to make an order "for controlling the price at which..... cattle may be bought or sold". Clause (f) empowers the State Government to make an order "for regulating by licence, permit or otherwise the movement, transport, distribution, disposal, acquisition, use and keeping of cattle". Clause (g) empowers the State Government to make an order providing "for collecting any information or statistics with a view to regulating or prohibiting any of the matters aforesaid". Clause (j) of sub-sec. (2) of sec. 4 confers upon the State Government power to make an order in order to provide "for any incidental and supplementary matters". Sec. 6 provides for further delegation of powers to the State Government in the following terms :- "The State Government may by notified order direct that the power to make orders under sec. 4 shall be exercisable also by such officer or authority and in relation to such matters and subject to such conditions, if any, as may be specified in the order." Sec. 7 provides for "effect of orders consistent with other enactment." It states as follows :- "Any order made or deemed to be made under sec. 4 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act, or any instrument having effect by virtue of any enactment other than this

Act". Sec. 8 lays down an important guideline in the matter of administering the provisions of the Act and states as follows :- "Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the general interest of the public". Sec. 9 provides for the imposition of penalties for violation or breach of any of the provisions of the Act or of the orders made under sec. 4. The Schedule to the Act is divided into two parts; Part I specifies essential commodities to which the Act applies; "Bricks used for building purposes" is the only commodity which is listed in Part I as the essential commodity. Part II lists up the cattle to which the Act applies. At serial No. 6 in Part II of the Schedule to the Act buffaloes have been mentioned. So far as the Act is concerned, with the ultimate object of maintaining the cattle wealth in the State of Gujarat, the State Government has been empowered to take any of the measures specified therein by making orders under the Act. The State Government, within the meaning of sec. 4, can provide by making orders for regulating the maintenance, movement, supply and distribution of, or trade and commerce in cattle. It can also provide, by making an order thereunder, for controlling the price of cattle which may be bought or sold. Similarly, it can regulate by licence, permit or otherwise the movement, transport, distribution, disposal, acquisition, use and keeping of cattle, and also for collecting any information or statistics for the purpose of effectively enforcing the orders which it may make for any of the aforesaid purposes. It is, therefore, clear that the Act empowers the State Government to provide, by an order or orders made under the Act, for several purposes relating to the maintenance and movement of cattle.

[4] Under the Act, the Government of Gujarat has made Gujarat Cattle (Export Control) Order, 1961. It was published in the Official Gazette on October 9, 1961. On November 9, 1962, an "order" was made by which clauses 3 and 4 of the Control Order were amended. The said amendment is not very material for the purposes of this case. On March 12, 1969, a notification" was issued by which sub-clause (2) of clause 4 of the Control Order was further amended. Clause 2 of the Control Order, inter alia, defines the expression "export" so as to mean "to take or cause to be taken out of the State of Gujarat otherwise than across a customs frontier". Clause 3 prohibits export of cattle from any place in the State of Gujarat except under a permit issued under clause 4 and except in accordance with the terms and conditions of such permit. Clause 4 provides for issue of permits. Sub-clause (1) thereof provides for issue of a permit in a case where a "person desires to export any cattle for a limited period not exceeding four months" and for a specified purpose. When an application for issuing such a permit is made, the person obtaining the permit is required to fulfil the condition that the cattle

exported shall be brought back to the State of Gujarat before the expiry of the period specified in such a permit. Sub-clause (2) provides for the issue of a permit in any other case. Sub-clause (3) is amended by the notification dated 12th March 1969 and it levies a fee of Rs. 20/- per head of cattle for issuing a permit under sub-clause (2). Clause 5 provides for consequences in case of failure on the part of a person to bring back the cattle into the State of Gujarat after he has exported them under a permit issued for a limited period under sub-clause (1) of clause 4. The scheme of the Control Order is that the export of cattle outside the territory of the State of Gujarat is prohibited, except under a permit issued by the appropriate authority. A permit for exporting cattle for a limited period on the condition that they will be brought back within the territory of the State of Gujarat before the expiry of the said period is not subject to payment of any license fee. In all other cases, a permit can be obtained for exporting cattle only on payment of Rs. 20/ - per head of cattle. Any one who exports cattle for a limited period under a permit issued under sub-clause (1) of clause 4 is deemed to have exported cattle without a permit if he fails to bring back the cattle within the State of Gujarat before the expiry of the period specified in the permit. Sub-clause (3) of clause 4, in the first instance, prescribed a fee of five rupees per head of cattle for issuing a permit under sub-clause (2) of clause 4. By the notification issued on March 12, 1969, the amount of fee was raised from Rs. 5/- to Rs. 20/-. We have examined the scheme of the Act and the Control Order made thereunder. We now proceed to examine the first contention raised by Mr. K. S. Nanavati.

[5] Mr. K. S. Nanavati has relied upon the decision of this Court in Laljimal Premsukhdas v. B. K. Kombrabail, Div. Superintendent, Western Railway. VI G.L.R. 282. In that case, the constitutional validity of Gujarat Groundnut (Transport Control) Order, 1964, made by the Government of Gujarat, under Rule 125 of the Defence of India Rules, 1962, was challenged on the ground that it contravened Article 301 and that it was not saved by Article 302 of the Constitution. A Division Bench of this High Court, of which my learned brother was a member, after having reviewed the case law bearing on the subject, amongst others made reference to two decisions of the Supreme Court. One of the decisions was in Atiabari Tea Co. Ltd. and Khaverbari Tea Co. Ltd. v. The State of Assam and others. A.I.R. 1961 S.C. 232. Having examined the principles laid down in that decision of the Supreme Court, this Court held that the freedom of trade enshrined in Article 301 includes a free flow or movement of goods. In order to determine whether the free flow or movement of goods was impeded the test which was evolved was whether a restriction was imposed on trade or its movement. The second decision of the Supreme Court upon which reliance was placed was in

Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan and others. A.I.R. 1962 S.C. 1406. The principle which this High Court applied on the strength of the aforesaid decision of the Supreme Court was that regulatory measures or measures imposing compensatory taxes for the use of trading facilities are not hit by Article 301. In the light of these principles, it examined the nature and character of the Gujarat Groundnut (Transport Control) Order and held that the said order hit the trade in oil directly by prohibiting the traders from transporting oil beyond the barriers of the State of Gujarat and that therefore, it had a direct and immediate impact upon movement of oil from the State. Therefore, in the opinion of this High Court, it was a total prohibition of movement of oil beyond the barriers of the State of Gujarat. The second finding which it recorded upon the examination of the provisions of the order impugned therein was that absolute and unregulated discretion was conferred upon the permit issuing authority in the matter of issue of export permits. Therefore, this Court reached the conclusion that the Gujarat Groundnut (Transport Control) Order was ultra vires Article 301. This decision is based upon the findings recorded on the examination of the provisions of the said order. It, therefore, cannot per se govern the instant case. The value of such a precedent cannot be described in better words than those which have been quoted in Freightlines & Construction Holding Ltd. v. State of New South Wales and another. (1968) A.C. 625 at p. 680 :-

> "Any decision that a statute is constitutional or unconstitutional, however it may have been reached, is necessarily one of law and is, in the absence of special circumstances, of binding authority. Where such a decision has been reached simply by process of construction and comparison no difficulty arises about the binding authority of the decision in subsequent cases. Where, however, the decision has depended in part upon findings of fact there is room for argument. Where the facts which have entered into the decision were ascertained by judicial notice there would seem to be no sound reason for not according the decision the same authority as if it had depended upon nothing more than a comparison between the challenged legislation and the Constitution because the only matters of which judicial notice can be taken are those considered too notorious to require proof, that is, matters beyond controversy, Where, however, the facts which have entered into the decision have been ascertained from evidence there is more room for doubt whether the decision so reached has building authority except in cases where precisely the same facts are established. This problem, like the more fundamental problem of the place of evidence in

constitutional cases, is not a matter for unnecessary generalization, because it is possible to envisage cases where a decision based upon findings of fact could properly be called into question, but to deal with the case in hand. I am not in doubt that if after taking evidence in an action the court has decided that a State law leaves trade, commerce and intercourse among the States absolutely free and so does not contravene sec. 92, its decision on that point of law so long as it stands puts the matter at rest. Where a decision concerning validity has been reached upon findings of fact it would, of course, be open to the court to consider the matter again upon the representation that the significant facts are no longer as they were, but this is another matter which need not be considered here".

Since the decision of this High Court in Laljimal 's case (supra) is based upon the findings recorded on the provisions of the Order impugned therein, we can make use only of a general principle evolved thereunder for the purpose of determining the true scope and effect of the Control Order. It is, therefore, necessary to notice the principles which govern the decision in cases of this kind. The concept of freedom of trade has been correctly illustrated by Griffith, CJ. in Duncan v. State of Queensland (1916) 22 C.L.R. 556 in the following terms :-

"But the word "free" does not mean extra legend, any mote than freedom means anarchy. We boast of being an absolutely free people, but that does not mean that we are not subject to law."

Sec. 92 of The Commonwealth of Australia Constitution Act, 1900-is similar to Article 301 of our Constitution. Sec. 92 provides that "trade, commerce and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free" Article 301 provides as under :- "Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free". The language used in sec. 92 of the Commonwealth of Australia Constitution Act is stronger than the language used in Article 301. It will, therefore, be necessary to refer to the Privy Council decision in Freightlines case (supra). While construing the absolute freedom of trade within the meaning of sec. 92

of the Australian Constitution Act, the Privy Council has laid down the following principles :-

"The distinction is clear between laws interfering with the freedom to effect the very transaction or to carry out the very activity which constitutes inter-state trade, commerce or intercourse and laws imposing upon those engaged in such transactions or activities rules of proper conduct or other restraints so that it is done in a due and orderly manner without invading the rights or prejudicing the interests of others and, where a use is made of services or privileges enjoyed as of common right, without abusing them or disregarding the just claims of the public as represented by the State to any recompense or reparation that ought in fairness to be made,"

The American phrase is that "inter-state commerce must pay its way" and it has been accepted by the Privy Council. "Those who pay them are not unfree, they merely pay the price of freedom." A distinction of much importance must be maintained between impositions upon things which are only incidental to or consequential upon carrying on the activity, as for instance a tax on the occupation of premises, a 'pay roll' tax, a profits tax, and imposition upon thing itself "If the inter-state trade is protected from the ordinary incidents of competitive business" it is "not an immunity from interference," but it is "a specially privileged position". The State, while it regulates trade, is entitled to exact a compensatory payment in order to re-imbrues itself the cost of regulation. It is a charge for "the facility" offered, The charge should obviously be reasonable in the sense that it is commensurate with the actual cost of maintenance and that it does not impose a prohibitory burden. "There is admittedly a framework within which the freedom operates". "This framework partly consists of rules (and charges therefore) of strictly regulatory nature, and partly consists of charges for facilities (e.g. railways and wharves)". "The framework within which the trader's freedom operates is nowhere indicated with any precision or at all. Its extent is a matter of inference and common sense". Therefore, consistent with the freedom of trade, there can be a regulatory charge or a charge for providing facilities. The concept of absolute freedom of trade incorporated in sec. 92 of the Australian Constitution Act was not so construed as to exclude regulations and regulatory charges. In Atiabari Tea Co.'s case (supra), the

Supreme Court has examined the constitutional validity of Assam Taxation (on Goods carried by Roads and Inland Waterways) Act, 1954. It was contended before the Supreme Court that the said Assam Act was violative of Article 301. While examining the challenge made to the said Assam Act, the Supreme Court examined the concept of freedom of trade incorporated in Article 301. The following are the principles which it has laid down in that behalf: "The makers of the Constitution were fully conscious that economic unity was absolutely essential for the stability and progress of the federal polity which had been adopted by the Constitution for the governance of the country". Part XIII of the Constitution, therefore, was enacted with the object of avoiding the possibility of emergence of regional interests. Therefore, the guarantee of freedom of trade, commerce and inter-course contained in Article 301 "is not a declaration of a mere platitude, or the expression of a pious hope of a declaratory character; it is not also a mere statement of a directive principle of State policy; it embodies and enshrines a principle of paramount importance that the economic unity of the country will provide the main sustaining force for the stability and progress of the political and cultural unity of the country." It is in that light that the concept of freedom of trade enshrined in Article 301 was construed. "Article 301 applies not only to inter-State trade, commerce and intercourse but also (to) intra-State trade, commerce and intercourse." The language of the Article clearly indicates that "trade and commerce whose freedom is guaranteed has to move freely also from one place to another in the same State" Referring to the freedom of trade, the Supreme Court posed the question : "Freedom from what ?" Answering that question, it has been laid down that "the freedom of trade guaranteed by Article 301 is freedom from all restrictions except those which are provided by the other Articles in Part XIII. What these restrictions denote may raise a larger issue. "The freedom of trade" includes movement of trade which is of the very essence of all trade and is its integral part. If the transport of the movement of goods is taxed solely on the basis that the goods are thus carried or transported that, in our opinion, directly affects the freedom of trade as contemplated by Article 301. If the movement, transport or the carrying of goods is allowed to be impeded, obstructed or hampered by taxation without satisfying the requirements of Part XIII the freedom of trade on which so much emphasis is laid by Article 301 would turn to be illusory. When Article 301 provides that trade shall be free throughout the territory of India primarily it is the movement part of the trade that it has in

mind and the movement or the transport part of trade must be free subject of course to limitations and exceptions provided by the other Articles of Part XIII". It has been observed in that decision that while interpreting the provisions of the Constitution the principle to be borne in mind is that the relevant provision "has to be read not in vacuo but as occurring in a single complex instrument in which one part may throw light on another". While recording the final conclusion, this is what the Supreme Court has stated:- ".....it would be reasonable and proper to hold that restrictions freedom from which is guaranteed by Article 301, would be such restrictions as directly and immediately restrict or impede the free flow or movement of trade. Taxes may and do amount to restrictions; but it is only such taxes as directly and immediately restrict trade that would fall within the purview of Article 301. The argument that all taxes should be governed by Article 301 whether or not their impact on trade is immediate or mediate, direct or remote, adopts, in our opinion, an extreme approach which cannot be upheld." The test which the Supreme Court has laid down forjudging whether a particular provision of law amounts to restriction on the freedom of trade is whether it produces an immediate and direct impact upon the freedom of trade or whether it produces indirect and remote effect.

[6] A Similar question arose before the Supreme Court in Automobile Transport (Rajasthan) Ltd. v. State of Raj asthan & others. A.I.R. 1962 S.C. 1406. In that case validity of Secs. 4, 8 and 11 of the Rajasthan Motor Vehicles Taxation Act, 1951 was challenged on the ground that they offended Article 301. The concept of freedom of trade enshrined in Article 301 was thereupon examined. While doing so, the Supreme Court took notice of its own decision in Atiabari Tea Co. (supra). It has substantially approved that decision. It is observed in that decision that the power of levying tax is essentially for the very existence of Government, its exercise may be controlled by constitutional provisions made in that behalf." A general proposition that "the power to tax is outside the purview of any constitutional limitation" has been rejected by the Supreme Court. The following is the principle which it has laid down :-"Such regulatory measures as do not impede the freedom of trade, commerce and intercourse and compensatory taxes for the use of trading facilities are not hit by the freedom declared by Article 301. They are excluded from the purview of the provisions of Part XIII of the Constitution for the simple reason that they do not hamper trade, commerce and intercourse but rather facilitate them". They clarified the ratio of the decision in Atiabari

Tea Co. case (supra) in the following words :-"The interpretation which was accepted by the majority in the Atiabari Tea Co. case (1961) 1 S.C.R. 809 (A.I.R. 1961 S.C. 232) is correct, but subject to this classification. Regulatory measures or measures imposing compensatory taxes for the use of trading facilities do not come within the purview of the restrictions contemplated by Article 301 and such measures need not comply with the requirements of the proviso to Article 304(b) of the Constitution". The working test which it has laid down for deciding whether "a tax is compensatory or not is to enquire whether the trades people are having the use of certain facilities for the better conduct of their business and paying not patently much more than what is required for providing the facilities. It would be impossible to judge to the compensatory nature of a tax by a meticulous test, and in the nature of things that cannot be done". His Lordship Justice Subba Rao has delivered in that case a separate but concurring judgment. The observations, which His Lordship has made in paragraph 35 of the judgment, must be quoted :- "Restrictions obstruct the freedom, whereas regulations promote it. Police regulations, though they may superficially appear to restrict the freedom of movement, in fact provide the necessary conditions for the free movement. Regulations such as provision for lighting, speed, good condition of vehicles, timings, rule of the road and similar others, really facilitate the freedom of movement rather than retard it. So too, licensing system with compensatory fees would not be restrictions but regulatory provisions; for without it, the necessary lines of communication, such as roads, waterways and airways, cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one." While judging whether a particular provision is regulatory in character, what is necessary to be considered is the effect and substance of such a provision and not its form. If a law directly and immediately imposes tax for general revenue purpose on the movement of trade, it would be violating the freedom. On the other hand if the impact is indirect and remote, it would be unobjectionable. The court will have to ascertain whether the impugned law in a given case directly affects the said movement or indirectly and remotely affects it. The limitation which is sought to be placed "must be real, direct and immediate, but not fanciful, indirect or remote." The court has to find out whether, while placing such a limitation, the Legislature exercised what is called by the American constitutional expert as "commerce power" or "the State Police Power." If a law directly and immediately imposes a limitation on the freedom of movement of trade, it is a restriction to the extent of the impediment imposed. In such a case it must satisfy the requirement of Article 302. His Lordship has summarised the following propositions : "(1) Article 301 declares a right of free movement of trade without any obstructions by way of barriers, inter-State or intra-State or other impediments operating as such barriers. (2) The said freedom is not impeded, but, on

the other hand, promoted, by regulations creating conditions for the free movement of trade, such as, police regulations, provision for services, maintenance of roads, provision for aerodromes, wharfs, etc. with or without compensation. (3) Parliament may by law impose restrictions on such freedom in the public interest; and the said law can be made by virtue of any entry with respect whereof Parliament has power to make a law. (4) The State also, in exercise of its legislative power, may impose similar restrictions, subject to the two conditions laid down in Article 304(b) and subject to the proviso mentioned therein. (5) Neither Parliament nor the State Legislature can make a law giving preference to one State over another or making discrimination between one State and another, by virtue of any entry in the Lists, infringing the said freedom. (6) This ban is lifted in the case of Parliament for the purpose of dealing with situations arising out of scarcity of goods in any part of the territory of India and also in the case of a State under Article 304(b) subject to the conditions mentioned therein. And (7) the State can impose a non-discriminatory tax on goods, imported from other States or the Union territory to which similar goods manufactured or produced in that State are subject. This decision is an authority for applying the test whether the power exercised by the Legislature is commerce power or State Police Power. While determining the nature of power, it is open under the authority of the said decision to apply the test of pith and substance.

[7] In State of Mysore v. H. Sanjeeviah, A.I.R. 1967 S. C, 1189 a similar question arose in relation to the constitutional validity of Mysore Forest Act, 1960. The principles and test laid down by the Supreme Court in the aforesaid decision were applied to that case. In The District Collector of Hyderabad and others v. Ibrahim & Co. etc. A.I.R. 1970 S.C. 1275 the Supreme Court was examining the constitutional validity of an Order- G. 0. M. No. 2976, issued by the Andhra Pradesh Government, on December 30, 1964. That order imposed a restriction on freedom of trade, commerce and intercourse. It was in that connection that the scope and ambit of Article 301 came to be examined by the Supreme Court. The freedom of trade under Australian Constitution and the freedom of trade under our Constitution have been distinguished. It has been laid down that the freedom declared by Article 301 is in widest terms and applies to all forms of trade, commerce and intercourse, but it is subject to certain restrictions specified in Articles 302 to 305. In The State of Kerala v. A. B. Abdul Kadir & others, A.I.R. 1970 S.C. 1912 the Supreme Court, while considering the constitutional validity of Kerala Luxury Tax on Tobacco (Validation) Act, 1964, again considered the principles laid down by it in the aforesaid two cases (1) Atiabari Tea Co. case (supra) and (2) Automobile Transport (Rajasthan) Ltd. case (supra) and observed as under : "Imposition of a duty or tax in

every case would not be tantamount per se to an infringement of Article 301. Only such restrictions or impediments which directly or immediately impede the free flow of trade, commerce and intercourse fall within the prohibition imposed by Article 301. A tax may in certain cases directly and immediately restrict or hamper the flow of trade, but every imposition of tax does not do so. Every case must be judged on its own facts and in its own setting of time and circumstance".

[8] In Mohd. Faruk v. State of Madhya Pradesh and others, A.I.R. 1970 S.C. 93 the Supreme Court was considering the provisions of Madhya Pradesh Municipal Corporation Act, 1956. It was contended that in so far as the bye-laws made under that Act related to slaughter of bulls and bullocks, they were violative of Articles 19(i)(g). It has been laid down that if a law requires that an act which is inherently dangerous, noxious or injurious to public interest, health or safety or which is likely to prove a nuisance to the community, shall be done under a permit or licence of an executive authority, it is not per se unreasonable and no person can claim a licence or permit to do that act as of right. Where the law providing for grant of a licence or a permit confers discretion upon an administrative authority regulated by rules or principles, express or implied, and exercisable in consonance with rules of natural justice, it will be presumed to impose a reasonable restriction. Where, however, power is entrusted to an administrative agency to grant or withhold a permit or licence in its uncontrolled discretion, the law ex facie infringes the fundamental right under Article 19(1). In Nazeeria Motor Service v. State of Andhra Pradesh and another A.I.R. 1970 S.C. 1864 the Supreme Court was considering the validity of Andhra Pradesh Motor Vehicle (Taxation of Passengers and Goods) Amendment and Validation Act, 1961. It was, inter alia, challenged on the ground that it offended Articles 19 and 14 of the Constitution. It has been held therein that the imposition of tax by that Act did not amount to infringement of Article 19(l)(g) The fact that on account of the policy of the tax profits of private businessmen would be greatly reduced and that, therefore, provision of Article 19(l)(g) would be infringed was turned down. In that case, the motor vehicles plying in the Telangana region of Andhra Pradesh were exempted from payment of tax under a different Act altogether. It was Andhra Pradesh Act X of 1958. Since the exemption was made available under a different enactment, the validity of the exemption, it was held by the Supreme Court, could not be challenged. No discrimination arose when taxes were imposed under two different sets of laws in different States or geographical areas, as held by the Supreme Court. In the light of the aforesaid principles, we must now examine, firstly, the challenge based on Articles 19 and 14 of the Constitution. In Criminal Appeal No. 562 of 1969, decided by a Division Bench of this court on June 15,

1971 (of which I was a member) (Bachumia Hamidkhan v. State, XIII G.L.R. 693) the very same question arose for the consideration of this Court. In that case, clauses 3 and 4 of the Control Order were challenged on the ground that they violated Articles 19 and 14 of the Constitution. The challenge was two-fold. It was contended that the impugned order did not contain any guidelines to govern the discretion of the appropriate authority in issuing export permits. Secondly, it was contended that there was no corrective machinery provided by the impugned order, for the purpose of examining the correctness or otherwise of the decision of the permit issuing authority to refuse export permits. A number of decisions were cited before that Division Bench. In the light of the principles laid down by the Supreme Court and after examining various provisions of the Control Order, it has been held that the Control Order contains sufficient guidelines to govern the discretion of the permit issuing authority and those guidelines also operate as a check on the exercise of power by him. So far as the contention relating to the absence of corrective machinery is concerned, it has been held that power has been conferred upon the Collector-a responsible officer of high rank-and the fact that he holds a responsible office ensures a reasonable exercise of power by him. In support of the first proposition, reliance has been placed upon the decision of the Supreme Court in Harishanker Bagla v. M. P. State. A.I.R. 1954 S.C. 465. In support of the second proposition, reliance has been placed upon two decisions; one of the Supreme Court in C. Lingam v. Government of India A.I.R. 1971 S.C. 474-and the other of this High Court in Jayantilal Parshotamdas v. State of Gujarat. XI G.L.R. 403. In addition to what has 'been laid down in that unreported decision, there is one more provision in the Act on which reliance can be placed.. It is sec. 8. It furnishes an important guideline to the permit issuing authority, who is required, while implementing the provisions of the Act, to interfere with ordinary avocation of life and enjoyment of property as little as may be consistent with the general interest of the public.

[9] Measures taken to save the community from the pernicious activity leading to the denial to the community of enjoyment of its cattle wealth must, in our opinion, be regarded as reasonable restriction upon an individual calling on that activity. So far as the Act and the Control Order made thereunder are concerned, they aim at preventing short supply of cattle to the community. If the Act was not passed and the Control Order was not made, the community would be starved of its cattle wealth and live-stock. Enjoyment of its cattle wealth by the community cannot be made to depend upon price fluctuations. If the prices go up, there would be greater sales and greater exports leading to the short supply of cattle wealth to the community. Basic needs of the community cannot be apron-stringed to the rule of demand and supply which works in

its full rigour in a laissez faire economy. Absence of control or regulation of such activities is likely to produce a curse for the community. Public welfare cannot rest upon the shaky and oscillating foundation of impermissible fuctutations in market of a commodity leading to the commodity being drained off. In our opinion, therefore, the Control Order has been made in the interest of public welfare and is a purely regulatory measure. For the reasons recorded in the aforesaid unreported judgment of this court and also in light of the provisions of sec. 8 of the Act, clauses 3 and 4 of the Control Order are not hit by Article 19(l)(g) and Article 14 of the Constitution.

[10] So far as challenge on the basis of Article 301 is concerned, in the light of the principles enunciated by the Supreme Court, to which we have made reference, we have to decide whether the Control Order has been made by the subordinate Legislature with statutory sanction in exercise of its commerce power or in exercise of its police power, whether it is regulatory in character and whether it produces a direct and immediate impact on inter-State trade. The principal object of this legislation, as stated above, is to save the community from short supply of its cattle wealth. Its object is to maintain, preserve and increase the live-stock available to the community. The Control Order prevents the cattle wealth from being drained off and prevents the community from being deprived of its enjoyment. Unless we think in terms of returning to laissez-faire economy, such regulations, in the interest of the society and community, must be regarded as a part of commerce and trade. It is the very substratum of its freedom. Absence of such regulations will lead to disorder, avoidable shortages, economic sufferings, and widely contrasted conditions of living for different sections of society. Upon examination of the scheme of the Act and the Control Order and adjudicating upon them in the light of the principles laid down by the Supreme Court, we are clearly of the opinion that the Control Order is purely regulatory in character. It, therefore, does not infringe the freedom of trade guaranteed by Article 301 of the Constitution. It is, therefore, not hit by the said Article.

[11] In this view of the matter, it is not necessary for us to examine whether it is protected by Article 304. Since, however, on the assumption that the Control Order is hit by Article 301, arguments have been advanced to show that it is not protected by Article 304(b). We, proceed to examine the contentions raised by Mr. K. S. Nanavati in that behalf. Article 304 provides that "Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law.....(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with oriental that State as may be required in the public interest : Prove Hat no Bill or amendment for the purposes of clause (b) shall

be introduced or moved in the Legislature of a State without the previous sanction of the President". The first argument advanced by Mr. K. S. Nanavati is that previous sanction of the President for moving the Bill in the Legislature within the meaning of the proviso to clause (b) Article 304 was not obtained in the instant case. In the affidavit-in-reply filed on behalf of the State Government, it has been stated that the Bombay Essential Commodities and Cattle (Control) Act, 1 8, has received the assent of the President after its enactment. The question is whether the assent of the President, after its enactment, can cure the infirmity arising out of want of previous section of the President. The answer is furnished by clause (c) of Article 255. It provides as follows :- "No Act of Parliament or of the Legislature of a State and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given.....(c) where the recommendation or previous sanction required was that of the President, by the President". In our opinion, this irregularity, alleged by Mr. K. S. Nanavati, is cured by clause (c) of Article 255. In Jawaharmal v. State of Rajasthan, A.I.R. 1966 S.C. 764 it has been laid down that, in case of laws to which Article 255 applies, the assent of the President given even after the Act has been passed, serves to cure the infirmity arising from the initial non-compliance with the provisions of Article 304(b). In other words, an Act passed without obtaining the previous sanction of the President does not become void by reason of the said infirminty. It may remain unenforceable until the assent is secured. Assuming that such a law is otherwise valid its validity cannot be challenged only on the ground that the previous sanction of the President was not obtained if it was assented to by him after its enactment. The argument advanced by Mr. K. S. Nanavati on the basis of want of previous sanction of the President must, therefore, be rejected.

[12] The second argument which Mr. K. S. Nanavati has raised is that the Control order is a delegated legislation and that, therefore, Article 304 does not apply to it. In his submission, Article 304 applies to a case where ".....the Legislature of a State may by law..... impose such reasonable restrictions.,.....".

> The expression "by law" does not, according to him, include an order made under a legislative enactment. There is a decision of the Supreme Court, which answers the argument raised by Mr. K. S. Nanavati. In Maharaja Kothari v. Delimitation Commission and others, A.I.R. 1967 S.C. 669 it has been laid down that orders, once published in Gazette, have the same effect as if they are law made by Parliament itself under Article 327. Therefore, in connection with the word "law" used in Delimitation Commission Act, 1962, it

was argued in that case that the order issued under sec. 9 of that Act was not a law itself, though it had the force of law. Answering that argument, it has been laid down that though an order made either under sec. 8 or sec. 9 of that Act and published under sec. 10 is not a part of an Act of Parliament its effect is the same". Where a general order is issued even by an executive authority which confers power exercisable under a statute, and which thereby in substance modifies or adds to the statute, such conferment of powers must be regarded as having the force of law". It was, therefore, held- in that case that "the order" issued under Secs. 8 and 9 of the Delimitation Commission Act and published under sec. 10 thereof were a complete set of rules having the force of law. They were themselves the law. The principles laid down in that decision govern the facts of this case. The expression "by law" used in Article 304 means not only a legislative enactment but also statutory rules and orders made thereunder. It is much more so in the instant case, in view of the provisions of sec. 7 of the Act, which reads as under:- '- Any order made under sec. 4 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act, or any instrument having effect by virtue of any enactment other than this Act". The argument raised by Mr. K. S. Nanavati must therefore be rejected. Mr. K. S. Nanavati has tried to place reliance upon the decision of the Supreme Court in State of Mysore v. H. Sanjeeviah, A.I.R. 1967 S.C. 1189 (supra). There it has been laid down that "Article 304 which is an exception to Article 301 has no application to this case because that Article saves certain laws from the operation of Article 301 if the law is passed by the Legislature of a State. The provisos to Rule 2 are not made by the Legislature of the State; they are made by the executive Government in exercise of delegated authority. The rules have the force of law, but when made did not become part of the Act: (see sec. 77 of the Mysore Forest Act)." That decision cannot help Mr. K. S. Nanavati in making good his contention because in exercise of the powers conferred by sec. 37 of the Mysore Forest Act, the Government of Mysore had framed rules to regulate the "transit of timber, firewood, charcoal and bamboos from all lands." By rule 2, it had provided that" no person shall import forest produce into, export forest produce from, or move forest produce within, any of the areas specified in Schedule 'A' unless such forest produce is accompanied by a permit prescribed in rule 3". The State of Mysore issued a notification adding two provisos to Rule 2. The said provisos were challenged on the ground that they infringed the guarantee of

freedom of trade under Article 304. The fact of the said case disclose that the said provisos prohibited in absolute terms the transportation of forest produce between 10.00 p.m. and sunrise and prohibited it in qualified terms between sunset and 10.00 p.m. They were construed as prohibitory and not regulatory and were struck down because they were ultra vires sec. 37 of the Mysore Forest Act, 1900 and Article 301 and were not saved by Article 304(b). This contention raised by Mr. K. S. Nanavati on the basis of Article 304, therefore, fails and is rejected.

[13] The only contention which now remains to be dealt with is whether what the State Government has been charging for issuing a permit is a fee or a tax. Our Constitution contemplates fees for services rendered, licence fees and taxes. It has been contended by Mr. K. S. Nanavati that, in the instant case, there are no special services to be rendered to those who pay fees for obtaining permits for export of cattle. Therefore, in his submission, it is a tax and not a fee and, therefore, cannot be levied. In Special Civil Applications Nos. 457 and 458 of 1965, decided on October 23, 1969, (Shantilal Chhotalal v. Vaikunthalal M. Bhatt), by of Division Bench of this court, of which I was a member, a similar question arose. Relying upon the decision of the Supreme Court in The Corporation of Calcutta and another v. Liberty Cinema, A.I.R. 1965 S.C. 1107 it has been laid down that the licence fee constitutes a distinct category altogether and does not fall within the compass of fees for services rendered. In the case of licence fee, it is not necessary for the State Government to establish an element of quid pro quo. In the instant case, what the State Government has been charging is a fee for issuing a permit for export of cattle. It is, in our opinion, a licence fee. Though it is not necessary to establish an element of quid pro quo in the case of a licence fee, it should be commensurate in nature as held in several decisions to which we have earlier referred. Broadly speaking, licence fees can be levied for re-imbursement of the cost of administering the scheme of control under an Act under which they are levied. In the instant case, licence fee has been levied under subclauses (3) and (4) of clause 4 of the Control Order for issuing an export permit. It can be levied for re-imbursement of the cost of administering the scheme of control introduced by the Control Order. In George Walkem Shannon and others v. L. M. D. P. Board and another, A.I.R. 1939 P. C. 36- while interpreting sec. 92 of the British North America Act, the Privy Council has laid down that in case of a licence fee, there is no objection if it brings in some revenue. This is what the Privy Council has stated in that case :- "It cannot be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of

revenue". However, in the instant case the licence fee has not been levied by the Act. In the instant case, it has been levied under the Control Order. Sec. 4 of the Act empowers the State Government to issue orders in respect of several matters enumerated therein and further empowers it to provide "for any incidental and supplementary matters, including in particular any search of premises, vehicles and vessels, the seizure by a person authorised to make such search of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being or is about to be committed, and of any vehicle, vessels or animal which he has reason to believe has been, is being or is about to be used for carrying such articles, the grant or issue of licences, permits or other documents, and the charging of fees therefore". The State Government, by clause 4 of the Control Order, has prescribed a licence fee at the rate of Rs. 20/- per head of cattle for issuing an export permit, in exercise of its power to provide for incidental and supplementary matters. Now, the Act confers upon the State Government power to control and regulate several matters relating to cattle by making orders under sec. 4. The Control Order only deals with one of the several matters specified in the Act. It relates to control on export of cattle outside the State of Gujarat. Such an order can certainly contain incidental and supplementary provisions for making the export control effective and for reimbursing the cost of administering the export control scheme. Any fees which are levied and collected under the Control Order, therefore, must be for the purposes provided by it. It cannot provide for levy and collection of a fee which is unconnected with and unrelated to the regulation of cattle export with which alone the Control Order deals. It is, therefore, necessary to see what has been done by the State Government in the instant case. In the affidavit-in-reply filed on behalf of the State Government, it has been stated that the income derived from the fee collected by it under sub-clause (3) of clause 4 of the Control Order is applied to several purposes. They have been enumerated in the affidavit-in-reply. They are as under :- (1) supply of fodder to battle in need of it; (2) establishment and maintenance of artificial insemination centres to increase cattle wealth; (3) establishment and maintenance of cattle breeding centres to improve the live-stock; (4) implementation of intensive cattle development programme; (5) increase in productivity of cattle in Gujarat; (6) implementation of cattle feeding scheme; (7) introduction of cattle disease control; (8) introduction of rural dairy extension programme; and (9) implementation of cattle marketing programme. It is clear from these enumerations made in the affidavit-in-reply that the State Government has undertaken extensive schemes and programmes to maintain, improve and increase the cattle wealth in Gujarat State, These schemes and programmes benefit the entire community in general and cattle owners in particular. If the entire cattle owning community receives benefits of these extensive schemes, we

see no reason why tin cost of these schemes and programmes should be recovered only from cattle exporters. Cattle exporters must pay for administering the scheme of cattle export control, which is the only purpose and object of the Control Order but they cannot be made to pay for administering all sorts of schemes and programmes undertaken by the State Government for the improvement, increase and maintenance of cattle wealth in Gujarat. In our opinion, therefore, the licence fee of Rs. 20/ - per head of cattle has not been levied only for the purpose of implementing the Control Order and running the administration connected therewith but it has been levied for other purposes unconnected with and unrelated to the Control Order. This has been done by the State Government under the guise of "incidental and supplementary matters". In the light of admitted facts, levy of Rs. 20/- per head of cattle for issuing an export permit is not a provision incidental or supplementary to export control under the Control Order but is an independent provision introduced for the purpose of collecting revenue. The power conferred upon the State Government to provide for "incidental and supplementary matters" has, therefore, been used for a collateral purpose because the revenue derived from licence fee for issuing export permits is expended for many other purposes than the purpose for administering the export control scheme. It cannot be collected for other purposes specified in the Act because, firstly, the Control Order does not provide for any of them and, secondly, because they are incapable of implementation at this stage unless the State Government issues orders in respect of them under sec. 4 of the Act. The levy of Rs. 20/-, in our opinion, therefore, is not an incidental and supplementary provision. The State Government, therefore, in providing for it has exceeded its powers and it is ultra vires clause (j) of sub-sec. (2) of sec. 4 of the Act. However, Mr. K. S. Nanavati has confined his challenge only to the amending notification issued on March 12, 1969 by which the fee of Rs. 5/- per head of cattle has been enhanced to Rs. 20/-. The said amending notification, therefore, in our opinion, is ultra vires clause (j) of sub-sec. (2) of sec. 4 of the Act. In Vaghela Dahyabhai v. State of Gujarat, XI G.L.R. 386 this High Court has laid down that the power conferred by legislation to do a particular thing must be exercised for doing that very thing and cannot be used for any other collateral purpose. To impose a licence fee, to collect revenue and then to apply it to purposes other than one for enforcing which it has been levied amounts to imposition of a tax. In the name of a licence fee, such a tax cannot be imposed. It has been held in Nagar Mahapalika, Varanasi v. Durga Das A.I.R. 1968 S.C. 1119-that in the guise of-a license fee, a tax cannot be imposed. In the Indian Mica and Micanite Industries ltd. v. The State of Bihar and others-A.I.R. 1971 S.C. 1182-a somewhat similar question arose in relation to Bihar and Orissa Excise Act, 1915. It has been laid down therein that the

fee which is levied must have a reasonable co-relationship of the general character (though not with arithmetical exactitude) with the service rendered by the Government. The co-relationship between the services rendered, and the fee levied is essentially a question of fact. The State in maintaining an elaborate staff to prevent the licensees from converting denatured spirit into potable alcohol and to prevent avoidance of payment of heavy duties, it has been observed by the Supreme Court, renders little or no service to the licensees but only protects its own interest. There is one more reason why the levy of Rs, 20/- is ultra vires the powers of the State Government. Clause (j) of sub-sec. (2) of sec. 4 of the Act empowers the State Government inter alia, to charge fees. It, therefore, cannot charge, in the name of fees, anything else. If the Legislature had intended to empower the State Government to levy a tax in the name of fees for the purpose of collecting revenue to implement certain schemes, it would have certainly laid down the procedure for the Government to follow before levying the tax in the name of fees. Since no such procedure has been prescribed for the levy of a tax and since the State Government has been empowered by the Legislature only to charge fees, it cannot, in the name of charging fees, charge a tax for implementing the schemes unconnected with and unrelated to the scheme of the Control Order. A Similar view has been taken by a Division Bench of this High Court in Dalpatbhai Hemchandv. Chanasama Municipality, VIII G.L.R. 225. Our finding, therefore, is that the State Government, in the name of charging a licence fee of Rs. 20/-, has been charging a tax and it is ultra vires its powers, for the reasons stated above. On the last ground, therefore, the amending notification, issued by the State Government on March 12, 1969, must be struck down.

[14] In the result, we allow the petition and declare that the amending notification, issued by the State Government on March 12, 1969, under the Bombay Essential Commodities and Cattle (Control) Act, 1958, is ultra vires its powers under the Bombay Essential Commodities and Cattle (Control) Act, 1958, and is, therefore, void. We issue a writ of mandamus directing the State Government to desist and forbear from implementing and enforcing the aforesaid amending notification. The State Government shall carry out its undertaking given to this Court on October 12, 1970. Rule is made absolute to the aforesaid extent with no order as to costs.

Petition allowed.