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FREEDOM OF TRADE AND COMMERCE: STUDY OF ARTICLE 301 OF INDIAN CONSTITUTION

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Abstract

Article 301 is part of family of articles enshrined in part XIII of Indian Constitution. This part deals with trade and commerce. Taken from Australian law, this article is still shrouded in vagueness and much confusion. This paper tries to understand the root cause of such vagueness and confusion. It analyses the various interpretation of section 92 of Australian constitution to understand the origins of the article 301. Various case laws have also been studied in order to understand the current stance and scope of article 301.

Objective of study

One of the most amazing ability of Indian Constitution is its ability to grow with the needs of the citizens. It evolves and so does its interpretation. Hence the objective of this study is to understand the scope of article 301, i.e. to know the extend of freedom provided in Indian Constitution under freedom of trade and commerce.

Introduction

Article 301 of the Indian Constitution provides that the trade, commerce and intercourse in the country should be free throughout the country. However, the wide amplitude of the freedom granted by Article 301 is limited by restrictions imposed on it under Articles 302-305.

The intention behind the framing of article 301 was desire to create India as one single economic unit

without barriers on internal trade. This was highly important as only economic unity and integration of the country provided the main sustaining force for the stability and progress of the political and cultural unity of our nation state. The Constitutional framers were well aware that the State legislatures would be subjected to local and regional pulls and in order to ensure that the vested interest would not hamper the economic integrity of India, they had inserted Article 301-305 to the Indian Constitutional provision. They were also cautious of the fact that internal trade should not be entangled in the political controversies of the vested interests.

The provisions regarding the freedom of trade, commerce and intercourse were adopted from the Constitution of Australia. According to Section 92 of the Australian Constitution, there should be freedom of trade, commerce and intercourse which may be carried out by ocean navigation or internal carriage. Hence, interpretation of article 301 is heavily based on interpretation of section 92 of Australian constitution.

While India had borrowed this provision, it also made sure to include the provision that the free flow of goods is allowed not only between different States but also within a State as well. Thus, in the Indian Constitution Inter-State trade as well as Intra-State trade is allowed in the country.

Articles from part XIII of Indian Constitution

Article 301- Freedom of trade, commerce and intercourse Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

Article 302- Power of Parliament to impose restrictions on trade, commerce and intercourse Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

Article 303- Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce

(1) Notwithstanding anything in Article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorizing the giving of, any preference to one State over another, or making, or authorizing the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorizing the giving of, any preference or making, or authorizing the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India

Article 304- Restrictions on trade, commerce and intercourse among States Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest: Provided that no Bill or amendment for the purposes of clause shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

Article 305- Saving of existing laws and laws providing for State monopolies Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may be order otherwise direct; and nothing in Article 301 shall affect the operation of any law made before the commencement of the Constitution (Fourth Amendment) Act, 1955 , in so far as it relates to, or prevent Parliament or the Legislature of a State from making any law relating to, any such matter as is referred to in sub clause (ii) of clause (6) of Article 19.

Article 306- Power of certain States in Part B of the First Schedule to impose restrictions on trade and commerce Rep by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule.

Meaning of ‘trade, commerce and intercourse’

In trade, goods and services are exchanged between the buyer and the seller and it also includes the transportation of these goods. In commerce, the focus is more towards the element of transmission of goods as well as that of men and animals. Thus, in commerce, the element of profit is not the primary concern. The word “intercourse” was included to remove any ambiguity about the intention of the Constitution makers and thus it has been used to express the intention that, free flow of goods throughout the country is part of the freedom under Article 301 of the Indian Constitution. Trade and commerce also includes intangibles like goodwill, trademark, copyright etc.

Yet, not every exchange with the elements of trade can be considered to be a trade. For example, gambling, prostitution, trafficking of drugs etc. cannot be considered as trade and hence any act against them would not be considered to be violation of freedom of trade and commerce. The Supreme Court has expressed that any illegal activity which is against moral values of masses would not be considered under trade and commerce. However, it later changed its proposition, stating, 'trade or business' would depend upon, and vary with, the general standards of morality accepted at a particular point of time in the country.

The words trade and commerce have been broadly interpreted. In most of the cases, the accent has been on the movement aspect. For example, in the *Atiabari Tea Co. v. State of Assam* case¹, the court emphasized : "whatever else it (Art.301) may or may not include, it certainly includes movement of trade which is of the very essence of all trade and is its integral part," and, further, that "primarily it is the movement part of the trade" which Article 301 has in its mind, that "the movement or the transport of the trade must be free," and that "it is the free movement or the transport of goods from one part of the country to the other that is intended to be saved."

However, movement of goods does not confine the definition of trade. It extends to transactions linked with merchandise or flow of goods, the promotion of buying and selling, advances, borrowings, discounting bills and mercantile documents, banking and other forums of supply of funds. Money lending and trade financing also constitutes trade.

Meaning of 'free'

The objective of article 301 is freedom of free flow of trade and commerce. However, 'free' in article 301 does not mean absolute freedom, parliament can still regulate trade and commerce. As has been observed by the supreme court: "there is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and laws imposing on those engaged therein rules of proper conduct or other restraints directed to the due and orderly manner of carrying out the activities."² Regulation of hours, equipment, weight, size of load, lights, traffic laws are some examples of regulatory laws which are not hit by Article 301. Regulations like rules of traffic facilitate freedom of trade and commerce whereas restrictions impede that freedom. A tax levied by Parliament on

¹ Supreme court, 26 September, 1960. Bench: B S Shah, K Dasgupta, K Wanchoo, P Gajendragadkar

² *Atiabari tea co. v state of Assam*

interstate sale would have offended Art. 301 as such a tax, in its essence, encumbers movement of trade or commerce because by its very definition an interstate sale is one which occasions movement of goods from one state to another. Nevertheless, it was held valid because of Art. 302.

Throughout the territory of India

Throughout the territory of India includes trade and commerce not only between states but also within a state. Therefore, it means freedom of trade commerce and intercourse is there within the state and/or outside the state and/or any part within the territory of India.

Inter-relation between article 301 and article 19(1)(g)

Article 19(1)(g), a fundamental right, confers on the citizens the right to practice any profession or carry on any occupation, trade or business. The question of inter-relationship between Articles 19(1)(g) and 301 is somewhat uncertain.

One view is that while Article 19(1)(g) deals with the right of the individuals, Article 301 provides safeguards for the carrying on trade as a whole distinguished from an individual's right to do the same. This view is hardly tenable. Article 301 is based on section 92 of the Australian constitution which has been held to compromise rights of the individual as well, and the same should be the position in India. In actual practice, the view has never been enforced and individuals have challenged legislation on the ground of its effect on their right to carry on trade and commerce. The supreme court has denounced the theory that Article 301 guarantees freedom "in abstract and not of the individuals."

A difference between Arts. 19(1)(g) and 301, it has been said, is that Art. 301 could be invoked only when an individual, is prevented from sending his goods across the state, or from one point to another in the same state, while Art. 19(1)(g) can be invoked when the complaint is with regard to the right of an individual to carry on business unrelated to, or irrespective of, the movement of goods, i.e., while Art. 301 contemplates the right of trade in motion, Art. 19(1)(g) secures the right at rest.

Art. 301 covers many interferences with trade and commerce which may not ordinarily come within Art. 19(1)(g), Freedom of trade and commerce is a wider concept than that of an individual's freedom to trade guaranteed by Art. 19(1)(g).

Art. 19(1)(g) can be taken advantage of by a citizen, while Art. 301 can be invoked by a citizen as well as a non-citizen. Also, while Art. 19(1)(g) is not available to a corporate person, Art.301 may be invoked by a corporation and even by a state on complaints of discrimination or preference which are outlawed by Art. 303, discussed below.

In emergency, Art. 19(1)(g) is suspended and so courts may take recourse to Art. 301 to adjudge the validity of a restriction on commerce.

In certain situations, only one of the two may be relevant, as for example when there is no direct burden on a trade but it may be a restriction in terms of Art. 19(1)(g) read with Art. 19(6). In some other situations, both provisions may become applicable and it may be possible to invoke them both. Art. 301 is a mandatory provision and a law contravening the same is ultra vires, but it is not a fundamental right and hence is not enforceable under Article 32. But if the right under Article 19(1)(g) is also infringed, then Article 32 petition may lie.³

The doctrine of Dixon

As stated previously, interpretation of article 301 depends heavily on interpretation of section 92 of Australian constitution. Hence Dixon doctrine which is a validity test for any legislation in restriction or regulation of trade is basically an Australian test. So, to understand this doctrine we require to understand the interpretation of section 92 of Australian Constitution predating *Cole v Whitfield*⁴. Sir Owen Dixon led the High Court to develop the doctrine that, unless the law under challenge directly and immediately restricted an activity of interstate trade and commerce, section 92 would not be breached⁵. The Dixon doctrine set precedent in *Commonwealth v Bank of New South Wales*, best known as the *Bank Nationalisation case*⁶. Hence, under this test, the legislation has to answer- “does the impugned restrictions operate directly or immediately on trade or its movement?”. What is prohibited is a tax whose direct effect is to hinder the movement of trade. Hence, it can be understood that restrictions having impact which is indirect or remote on the free flow or movement of trade would be permissible.

³ Written by: Raghvendra Singh Raghuvanshi - III Yr, NLIU, Bhopal- Are Trade, Commerce and Intercourse Free?

⁴ (1988) 165 CLR 360

⁵ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Commonwealth v Bank of New South Wales* [1950] AC 235; *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55.

⁶ *Commonwealth v Bank of New South Wales* [1950] AC 235 ('Bank Nationalisation'). Please note that this case should not be confused with a case decided years later by the Supreme Court of India, which is known by the same abbreviated name (*Cooper v Union of India* AIR 1970 SC 564 ('Bank Nationalisation')) but which bears no relation to Art 301.

Cole v Whitfield

Dixon doctrine is today considered outdated as Cole v Whitfield has caused High Court of Australia to re-interpret section 92. This reinterpretation has swept away all the confusion previously caused by the vague language of the constitution.

Facts- Mr. David Whitfield was charged with the unlawful possession of undersized crayfish. While he lived in Tasmania, the crayfish had been purchased in South Australia and then shipped to Tasmania.

In SA, the crayfish were of a legal size. However, they were not under Tasmanian laws.

Mr. Robert Cole, an inspector, charged Whitfield with breaching the Sea Fisheries Regulations 1962 (Tas).

Whitfield argued that section 92 of the Constitution protected his rights by enforcing a freedom of interstate trade

To give a slight background to this case, I would like to specify that sea fisheries regulations 1962 is an act which aims to conserve aqua life. Regulation 31(1)(d) of the Sea Fisheries Regulations 1962 (Tas) declared that no person “shall take, buy, sell, offer or expose for sale, or have in his possession, or under his control,” a male crayfish below 11 cm in size, or a female crayfish below 10.5 cm, “whether or not the fish was taken in the State fishing waters”. In South Australia, from where the crayfish were purchased, the size specified under regulation act differed.

Judgement- The freedom guaranteed to interstate trade and commerce under section 92 is freedom from **discriminatory burden of a protectionist** kind. The limitation on the size of the crayfish sold or possessed in Tasmania was a burden on interstate trade and commerce in crayfish, but no discriminatory protectionist purpose appeared on the face of the law. The Court looked to the purpose of the Tasmanian regulations and found that their objectives were to encourage conservation. The laws applied to all crayfish and were not of a protectionist nature. Hence, the regulations were not in breach of Section 92.

With respect to Commonwealth laws, the Court stated that commonwealth laws under section 51(i) will not ordinarily be discriminatory if they apply to all transactions of a given kind within the reach of Parliament.

Cole v Whitfield has given better and clear test for validity of any legislation act regulating or restricting any respect of trade and commerce. The reason I specially included this case law is due to

the fact that India relies on the interpretation of Australia of section 92 of Australian constitution for article 301 and this case law gives the most updated version of interpretation of section 92 by High Court of Australia.

Atiabari Tea Co., Ltd. v. The State of Assam and Others

Facts- A tax levied by the State of Assam on the carriage of tea by road or inland waterways was held bad for the transport or movement of goods is taxed solely on the basis that the goods are thus carried or transported, and thus "directly affects the freedom of trade as contemplated by Art. 301."

Judgement- The Supreme Court took the view that the freedom guaranteed by Art. 301 would become illusory if the movement, transport, or the carrying of goods were allowed to be impeded, obstructed or hampered by the taxation without satisfying the requirements of Art. 302 to 304.

The court did not take into consideration the quantum of tax burden which by no means was excessive. Simply because the tax was levied on 'movement' of goods, from one place to another, it was held to offend Art. 301.

The view propounded in Atiabari was bound to have great adverse effect upon the financial autonomy of the states. It would have rendered their taxing power under entries 56 and 57, List II.

Automobile Transport v. Rajasthan

Facts- The State of Rajasthan had levied a tax on motor vehicles (Rs. 60 on a motor car and Rs. 2000 on a goods vehicle per year) used within the state in any public place or kept for use in the state. The validity of the tax was challenged.

Taking the view that freedom of trade and commerce under Art. 301 should not unduly cripple state autonomy, and that it should be consistent with an orderly society, the Supreme Court now ruled that regulatory measures and compensatory taxes for the use of trading facilities were not hit by Art. 301 as these did not hamper, but rather facilitated, trade, commerce and intercourse.

Issue- A working test to decide whether a tax is compensatory or not would be 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? A tax does not cease to be compensatory because the precise or specific amount collected is not actually used in providing

facilities.

The concept of compensatory tax evolved in this case was something new as in *Atiabari*, the court had dismissed the argument that the money realized through the tax would be used to improve roads and waterways rather curtly by saying that there were other ways, apart from the tax in question, to realize the money, and that if the said object was intended to be achieved by levying a tax on the carriage of goods, the same could be done only by satisfying Art. 304(b)

Judgement- The court ruled that the tax was not hit by Art. 301, as it was a compensatory tax having been levied for use of the roads provided for and maintained by the state.

Thus, to this extent, the majority view in *Atiabari* was now overruled by *Automobile*.

Since then the concept of regulatory and compensatory taxes has become established in India with reference to entries 56 and 57, List II, and the concept has been applied in several cases, and progressively the courts have liberalised the concept so as to permit state taxation at a higher level.

Bolani Iron Ores v. State of Orissa

A compensatory tax is levied to raise revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic. The Supreme Court held that taxation under entry 57, List II, cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads. The regulatory and compensatory nature of the tax is that taxing power should be used to impose taxes on motor vehicles which use the roads in the state or are kept for use thereon.

Conclusion

The amount of freedom may not be absolute, but it is obvious that the restrictions have been continuously fought against in courts. Supreme Court has stated “it is evident that restrictions contemplated by it must bear a reasonable nexus with the need to serve the public interest.”⁷ However, it is felt that interpretation of the article 301 is not up to par. Any restriction made by state legislative

⁷ *Prag Ice & Oil Mills v. India*,

body seems to require assent of president and hence state does not seem to have much power to even regulate trade and commerce. Yet, part XIII which deals with trade and commerce is subject to various exceptions making the scope of freedom much slimmer. Finally, I would like to say that, the vagueness Atiabari Tea case and Automobile Transport case has become less yet there is a lot of work that is required in this particular area.

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