FREEDOM OF TRADE AND COMMERCE

- IRSHAD AHMAD DAR[1]

The great problem of any federal structure is to prevent the growth of local and regional interests which are not conducive to the interest of the nation as a whole. In order to avoid such commercial rivalries and jealousies among the units, the framer of the federal constitution takes it as absolutely necessary to incorporate a free trade clause which would ensure the economic unity within the country. Generally speaking, trade means buying and selling of goods while the term commerce includes all forms of transportation such as by land, air or water. In other words, organised activities with a view to earning profits are termed trade or commerce. However, right to trade definitely not mean right to commit crime. Therefore, activities like hiring out criminal to commit murder, selling obscene pictures or trafficking of human being cannot properly enter into the concept of trade and commerce. Nevertheless, there are certain issues, regarding the nature and scope of the terms trade and commerce; which have created difficulties for the court because of several variables. In one hand, precedent serve as a binding source of law and judges generally apply it whereas; on the other hand some judges try to follow the sociological school of thought and therefore attempt to harmonise the individual interest with the interest of the contemporary society. Further, if one analyses, the Realist jurisprudential thought, he will easily find out how social status, background and experiences of the judges influence the judgments.

This paper seeks to analyse the scope of free trade and commerce in India. In this regard, the conditions prevalent in the pre-independence era as well as the present position have been discussed in the light of the constitution and the decisions of the Supreme Court of India. Further, for the purpose of comparison, Australian Constitution has been referred as the free trade clause in the Indian Constitution has been borrowed almost verbatim from the Australian Constitution.

Freedom Of Trade And Commerce Under Australian Constitution

The legislative power of the Commonwealth relating to trade and commerce is contained in Sections 51(i) and 98 which lays down the Parliament has power to make laws with respect to trade and commerce with other countries and among the States and it extends to navigation and shipping and railway property of any State respectively subject to the other provisions of the Constitution. In this context Sections 99 and 100 provided that the law relating to trade and commerce shall not give preference to any State or part thereof and the Commonwealth shall not curtailed the right of a State or the residents to the use of water or river for the purpose of navigation or irrigation. In addition to this general legislative power relating to trade and

[1] Student, LL.B 3rd Year, University of Kashmir

commerce the constitution contains legislative power with respect to certain specific subjects of trade and commerce such as currency and coinage, banking, insurance, bills of exchange etc. These apart, there is a free trade clause under Section 92 which provides that "on the imposition of uniform duties of customs, trade, commerce and intercourse among the States whether by means of internal carriage or ocean navigation, shall be absolutely free"

So, Section 92 added the word "intercourse" along with trade and commerce which are present in Section 51(i). Intercourse includes commercial as well as non-commercial intercourse. Once the act of the inter-state trade, commerce or intercourse has begun, the protection of Sec. 92 came into operation and continues till the completion of the act. However, the difficulty arises in determination of the commencement and completion of the act.

Scope of Section 92

The cases on Section 92 have evolved two dimensions of choice namely individual right theory and free trade theory. That is, formulating the principles which delimit the concept of freedom and applying those principles to factual situations. Much of the early litigations were dominated by the first kind of choice like in W and A Mc Arthur Ltd. vs. Queensland, a Queensland statute fixing maximum price for goods was declared invalid as the law purported to operate on a contract of sale, which required goods to move inter-state. In this case individual right theory was adopted, though there was some reference to the possibility of a state favouring its own industries against those of another state by fixing prices to give a local advantage. On the other hand, the decision given by Justice Evatt in the case of Milk Board (NSW) vs. Metropolitan Cream Pvt. Ltd. supported free trade theory. In this case, a scheme for marketing of milk was held valid even though it expropriated the milk for the purpose of controlling both inter-state and intra-state trade and fixed the price at which milk from another state was to be sold. In fact, till the end of 1930s, the decisions tended to conform to free trade theory.

But the Bank Nationalization case and Hughes and Vales case conforms to the re-emergence of individual right view. Justice Dixon was the supporter of individual right theory and during that time number of legislations which had a considerable economic or practical effect on inter-state trade was upheld as indirectly affecting that trade only. Consequently, the restriction placed on the production of margarine was held valid and importation from abroad of an aircraft was held valid as inter-state trade began after importation of aircraft. However, Justice Barwick who succeeded Justice Dixon stated that the object of Sec. 92 was to preserve the common market of Australia being hampered by the State action and the right of the individual to trade and move inter-state was derived from this object. Thus, in his theory, both the free trade approach and individual right approach appear to merge.

There is yet another shift in the interpretation of Section 92 when Justice Mason, Justice Stephen and Justice Jacobs have mentioned factors like the nature of the regulation, the mischief it was designed to remedy, the goal it seeks to achieve and the effect that legislation has on the relevant inter-state trade that have to be taken into account in determining the reasonableness of a regulation. Later on, in Uebergang vs. Australian Wheat Board, Justice Murphy was of the opinion that the Commonwealth Parliament has sufficient power to override or negate any State legislation inimical to national commerce.

In short, Section 92 was undoubtedly intended to achieve a degree of economic unity and a common market. But this doctrine of free trade could not be considered in isolation without taking into consideration the right of the individual. Individual right was not the object of Section 92 but it can be regarded as a means to achieve the object declared by Section 92 i.e; freedom of trade and commerce among the States.