(2004) 08 MAD CK 0115

In the Madras High Court

Case No : Cont. P. No''s. 17 and 30 to 32 of 2004, W.P. No''s. 2040, 2910, 3457 to 3461, 3585 to 3589, 3615 to 3619 and 4371 of 2004 and W.P.M.P. No''s. 2280, 3428, 3740, 4064 to 4068, 4212 to 4216, 4262, 4266 and 5146 of 2004

A. Varadharajan APPELLANT

Vs

A. Krishnankutty Nair and Others RESPONDENT

Date of Decision : 30-08-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 50
Tamil Nadu Liquor (Retail Vending) Rules, 1989 — Rule 14

Citation : (2004) 4 CTC 327 : (2004) 4 MLJ 370

Hon'ble Judges : B. Subhashan Reddy, C.J;M. Thanikachalam, J

Bench : Division Bench

Advocate : R. Muthukumaraswamy, A.A.G. Assisted by V. Raghupathy, Government Pleader, V. Bharathidasan, K.M. Vijayan, for La Law, in W.P. No. 2040/2004, Nalini Chidambaram, for J. Pothiraj, in W.P. Nos. 2910, 3457 to 3461 and 3585 to 3589 of 2004, M. Baskar in W.P. No. 4371 of 2004, J. Pothiraj, in W.P. Nos. 3615 to 3619 of 2004, for the Appellant; K.K. Venugopal, for N.R. Chandran, General, for the Respondent

Final Decision : Dismissed

Judgement

B. Subhashan Reddy, C.J.—These matters relate to retail vending of I.M.F.L. (Indian Made Foreign Liquor) in the State of Tamil Nadu. Block Period licenses introduced by G.O. Ms. Nos. 113, 115 and 120, dated 22.6.2001 had been the source of litigation since 2001. Firstly, it was the increase of shops from 6000 to 7000, which was upheld by judgment dated 21.12.2001 in R.Selvaraj v. Government of T.N. etc. and Others., 2002 WLR 586 and nextly it was when the Block Period system was sought to be given a go-by by issuance of G.O. Nos. 128, 129 and 130, dated 8.7.2002, whereby the number of shops were further increased and the recategorisation was made for levy of privilege fee along with other changes including the introduction of lot system by cancelling the Block Period licenses, which was the subject matter of litigation in The Secretary to

Government of Tamil Nadu, Etc. And Another v. K. Vinayakamoorthy and others, 2002 (3) CTC 257 : 2002 (3) L.W. 317. All changes were upheld in the above judgment excepting the introduction of lot system, that too only where the Block Period licensees were sought to be displaced subject to their payment of privilege fee by 31.7.2002. The same was appealed against in the Supreme Court. But by order dated 9.9.2002 in The Secretary to Government of Tamil Nadu and Another v. K. Vinayagamurthy, 2002 (3) CTC 696 (S.L.P. No. 14735 of 2002 & batch), the appeals were dismissed making a slight modification in the order of this Court that instead of issuing a Mandamus to renew the licenses, it was modified to that of Mandamus to consider the grant of renewals. Then, there was a spate of writ petitions complaining that the renewals were not made in spite of remittance of privilege fee and that even privilege fee was not accepted, to defeat the claims of the Block Period licensees. By order dated 25.9.2002 in K. Ramanathan v. The State of Tamil Nadu and Others, (W.P. No.34090 of 2002 and batch), a direction was issued to renew the licences of 4, 632 applications on receipt of balance of privilege amount if tendered by 30.9.2002. That was appealed against in the Supreme Court and by order dated 13.11.2002 in State of Tamil Nadu and Ors v. K. Ramanathan, 2002 (10) JT 534, (S.L.P. No. 19277 of 2002), the Supreme Court held as follows:

"All the existing licensees (the previous licensees) for the block period who had remitted the whole year''s licence fee by 31st of July, 2002, as well as all of them, who were granted licence for a period of six weeks subsequent to the impugned order of the High Court dated 2 5.9.2002 and in pursuance of the order of this Court dated 3.10.2002 on payment of the proportionate licence fee will be granted licence for the balance period of the Excise Year 2002-2003 culminating on 15th September, 2003. By way of clarification, we hold that those of licensees who dropped out, even though applied for pursuant to the High Court''s order dated 25.9.2002 as well as those of the licensees who had participated in the fresh lot in accordance with the new Excise Policy will not be entitled to get advantage of this order. It is further clarified that all those licensees who might have deposited the whole year''s fee though were granted licence for a period of six weeks pursuant to the order dated 3.10.2002 will also be entitled to get the licence for the balance period of the Excise Year.

We would also observe that it will be open for any of the existing licensees as well as the new allottees on the basis of the draw of lots to opt out if they find the continuance of the privilege to be onerous in any area where the number of shops exceeds the number of notified shops on account of adjustment required to be made. The appeal stands disposed of on aforesaid terms."

Pursuant to the above judgment of the Supreme Court, the renewals were made for the Excise Year 2002-2003. For the Excise Year 2003-2004, G.O. Ms. No. 244, dated 4.10.2003 was issued introducing a new system of selection basing on the merit while sparing 284 Block Period licensees for entitlement according to the then policy in G.O. Ms, Nos. 113, 115 and 120, dated 22.6.2001. Writ Petitions were filed challenging the same and meanwhile, Ordinance No.8 of 2003 was promulgated repealing Tamil Nadu liquor Vending Rules introducing Sub-sections 1-B and Clauses (A), (B) and (C) after Sub-section 1-A in Section 17-C of the Tamil Nadu Prohibition Act granting exclusive privilege for retail vending to TASMAC which was also empowered to appoint cooperative societies as its agent. The same was challenged and meanwhile, the Ordinance was replaced by an Act (Act 31 of 2003) and that Act was challenged in W.P. No. 30158 of 2003 and batch. The licences for 2002-2003 were to expire, according to the said Act, by 28.11.2003 and then this Court, by way of an interim Order dated 27/28.11.2003 passed the following order:

"3. We are mainly going on the balance of convenience factor. In the event of writs being allowed, then the entire Government staff have to be withdrawn and the shops, which are established, have to be taken off. On the other hand, if a modified interim order is passed enabling such of the licensees, who are claiming renewal of licenses as of right, to operate then there should not be any difficulty in restoring the shops to the Government in the event of dismissal of the writ petitions. Such persons shall only include 284 (who had remitted the privilege amount before 31.7.2002) and 595 (who had remitted the amount within 30.9.2002), and their contentions that they are entitled for the renewal of licenses for the remaining block period have got to be considered and adjudicated upon. The other licensees, prima facie, have no such right to continue, as they were granted licenses only for one year i.e., 2002-2003."

But this was challenged by the Government in the Supreme Court and the Supreme Court by order dated 3.12.2003 in SLP No.23026 of 2003 passed the following order.

"Issue notice. Notice on the prayer for interim relief also.

Shri Venugopal, learned Senior Advocate states that only Tamil Nadu State Marketing Corporation Limited would carry on the retail vending of Indian made foreign liquor in the State of Tamil Nadu under the Ordinance hereinafter.

In view of this statement, we suspend the operation of the order under challenge in this special leave petition.

This Order shall cease to have effect as and when any judgment is delivered by the High Court. We further clarify that this order shall not be construed by the High Court as an expression of opinion on merits by this Court. The same shall not come in the way of the High Court to decide the matter on merit in any way."

Then the writ petitions were finally heard and disposed of on 29.12.2003.

2. Several contentions were raised questioning the validity of the Act including the deprivation of the right of the 595 (Page 35 of the Judgment) licenses but this Court, while upholding the Act, only set aside the deprivation of so far as 284 Block Period licensees are concerned and issued directions to renew their licences for the Excise Year 2003-2004 holding that the Amending Act scuttles

the vested right of those licensees. The said judgment was challenged by the Government in the Supreme Court and sought for the stay and the stay has not been granted. Thereafter, The Tamil Nadu Prohibition (Amendment) Ordinance, 2004 was issued introducing a non-obstante clause with retrospective effect as if no licence has been issued with any right of renewal and that such licences issued shall cease to be valid on the expiry of 28.11.2003. This Ordinance was replaced by Tamil Nadu Prohibition (Amendment) Act (Act 2 of 2004). This is the subject matter of challenge in these appeals.

3. Mrs. Nalini Chidambaram, learned Senior Counsel, appeared for some of the petitioners, while Mr. K.M. Vijayan, learned Senior Counsel, appeared for others. Mr. K.K. Venugopal, learned Senior Counsel, appeared for the respondent Government. Attacking the validity of the Act 2 of 2004, hereinafter referred to as the Act, Mrs. Nalini Chidambaram has coined the word, "vexatious legislation", while Mr. K.M. Vijayan made a comment that the Act is hit by "legislative res judicata". The contentions of the learned Senior Counsel for the petitioners are that repeatedly the Acts were being amended setting aside the judicial judgments of this Court and in that context, the Act is vexatious and inasmuch as Rule 14 was already repealed by G.O. Nos. 128, 129 and 130, dated 8.7.2002, the question of further repealing does not arise and in that way, there is a legislative res judicata. The learned senior counsel for the petitioners further argued that there cannot be any alteration of facts and the Block Period licensees, who are 284 in number and whose case was upheld by this Court in the judgment dated 29.12.2003 in A. Varadharajan v. State of Tamil Nadu and others, 2004 (1) LW 436, are entitled for renewal as of right and those accrued rights cannot be divested by a retrospective legislation and that too when such a legislative action in Act No. 31 of 2003 has been set at naught by this Court and which became final because of non-grant of stay by the Supreme Court and that there being no constitutional sanction for any further amendment, even terming as retrospective in nature, the Act is unconstitutional as it nullifies the judicial judgment of this Court thus encroaching upon the judicial power of the State infracting the constitutional scheme.

4. Countering the argument of the learned senior counsel for the petitioners, Mr. K.K. Venugopal, learned Senior Counsel appearing for the respondent Government, has submitted that Act 2 of 2004 does not scuttle the judgment of this Court and by introducing the amendment with retrospective effect, the basis of the judgment dated 29.12.2003 (supra) is removed. The argument of Mr. K.K. Venugopal, is that the earlier orders recognizing the rights of the Block Period licensees were based upon the existence of Rule 14 of the Rules, which was introduced by G.O. Ms. Nos. 113, 115 and 120, dated 22.6.2001 and now the Act 2 of 2004 has repealed the same with retrospective effect from 22.6.2001 and as such, the Amending Act is constitutionally valid.

He submitted that the legislature has got plenary right of legislating both prospectively and retrospectively and merely because a judgment, which was rendered on the then existing legal position has been repealed, it does not tantamount to setting aside the judgment and it has only to be understood that the basis of the judgment earlier rendered is taken away by repealing the Rule with retrospective effect and that the Amending Act is constitutionally valid.

Mr. K.K. Venugopal has cited the judgments rendered in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , State of M.P. and Others Vs. Nandlal Jaiswal and Others, , State of Himachal Pradesh and another Vs. Kailash Chand Mahajan and others, , State of Tamil Nadu Vs. M/s. Arooran Sugars Ltd., and Bakhtawar Trust and Others Vs. M.D. Narayan and Others, in support of his proposition.

5. In Har Shankar v. Dy.Excise and Taxation Commissioner (referred supra), a Constitution Bench of the Supreme Court was dealing with the liability to pay the licence fee for retail vending. It was held that after the auctions were held, the highest bidders were bound by the conditions enumerated therein and their pleas to exempt them from the payment of the amounts cannot be countenanced. The earlier judgments holding that there is no fundamental right to trade in liquor and that State can either impose prohibition or monopolise the liquor trade, were approved.

6. In Nandlal Jaiswa''s case (referred supra), two-Judge Bench of the Supreme Court held that there is no fundamental right for a citizen to trade in liquor but when the State decides to grant privilege of vending liquor, then Article 14 of Constitution is applicable, but Courts should be slow to interfere with the policy laid down by the State Government for grant of licence for manufacture and sale of liquor and the State''s action should not be struck down unless it appears to be patently arbitrary, irrational or mala fide.

7. In Kailash Chand Mahajan''s case (referred supra), the Supreme Court held that while Constitutional Courts may make a scrutiny regarding the validity of the legislation in the context of legislative competence and also Part III of Constitution, no legislation can be scrutinized from the point of view that it came to be passed with mala fide intention and that by long established practice, which has received approbation through authorities of Supreme Court, it has always refrained from attributing mala fides to the legislature. The Supreme Court has in fact held that such a thing is unknown to law.

8. Har Shankar''s case (supra) and Nandlal JaiswaVs case (supra) deal with the nature of right in liquor trade. The judgment in Kailash Chand Mahajan''s case (supra) lays down that there cannot be mala fide attributed to legislation. Liquor trade is not a fundamental right and that is a well settled law by now. In fact, that is not the question for adjudication now.

Of course, mala fides may not be attributed to legislative acts but legislative acts can be scrutinized on the touchstone of arbitrariness, which is an aspect of Article 14 of Indian Constitution. We will only consider the impugned legislation on that count. In that context, the judgment rendered by the Supreme Court in

Arooran Sugars'' case (supra) and Bakhtwar Trust (supra) are relevant for consideration.

9. Reading both the judgments in detail, the legal principles which are deducible are to the following effect:

(a) the legislature has got power to legislate an Act either prospectively or retrospectively;

(b) even if an judgment is rendered, a law can be brought to remove the basis of the judgment;

(c) Acts some times can take away even the vested rights;

(d) But taking away the vested rights should not result in arbitrariness.

In the light of the above legal principles, we shall now test the validity of the impugned amendment.

10. Section IV-C(1-A) was introduced in Tamil Nadu Prohibition Act, 1937, by State Act 31 of 2003 by which, for the first time, a retail vending right was created in TASMAC. The same was brought into force on 26.10.2003 and before that date, there was no retail vending by TASMAC. The rights of retail vending were given to the private individuals and, in some cases, to co-operative societies. TASMAC was the wholesaler in the liquor trade. Section 22-D, which was introduced by the above Amending Act containing a non-obstante clause, by which the earlier licence was discontinued beyond 28.11.2003, was held to be an affront to the judicial verdict given earlier. The said judgment rendered on 29.12.2003 in A. Varadharajan v. State of Tamil Nadu, 2004 (1) LW 436, has been holding the field as on the date of the enactment of the impugned Act 2 of 2004. By the impugned Act 2 of 2004, it cannot be said that any defect pointed out in the earlier judgment in A. Varadharajan''s Case (supra) is rectified. However, Mr. K.K. Venugopal, learned Senior Counsel appearing for the State, has submitted that the basis of the earlier judgment was Rule 14 of the Rules and as Rule 14 was repealed with effect from 22.6,2001, the basis of the earlier judgment was taken away and as such there is no encroachment over judicial power. But Rule 14 was already repealed by G.O.No. 130, dated 8.7.2002 which was interpreted as being only prospective after the expiry of Excise Year 2004 and that judgment had become final. Further, when the licences were issued under Rule 14 for the Excise Year 2001-2002 and were renewed for the Excise Year 2002-2003, it cannot be deemed that there was no such licence issued. A legal provision may disappear by amendment but the actual facts cannot be erased. We do not say that there is no power for retrospective amendment. But we can definitely say that in the instant case there is no scope for invocation of such power.

We do not feel any difficulty in holding that the impugned Act is a colourable piece of legislation and does not improve upon the Act 31 of 2003, which was interpreted to be an encroachment on the judicial power.

11. In the result, the impugned Act 2 of 2004 is held to be unconstitutional and thus void. May be because of the impending legislation or the earlier judgment in A. Varadharajan''s case (supra), effect was not given and by that, it cannot be called as contemptuous. Hence, the Contempt Petitions are dismissed. In view of the fact that TASMAC has set up the retail shops all over the State of Tamil Nadu and the Excise Year 2003-2004 is coming to an end shortly in another three months, we are not inclined to grant any direction for the renewal of lease of 284 licensees. Instead, we leave it to the petitioners to sue the Government, if they so desire, for compensation/damages, by whatever name called. The Writ Petitions are disposed of accordingly. No costs. Consequently, W.P.M.Ps. are closed.

