
(2002) 04 RAJ CK 0105

In the Rajasthan High Court

Case No : Civil Writ Petition No. 5096 of 2000

Allied Domeeq Spirits and Wine

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 30-04-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 265
Rajasthan Excise Act, 1950 — Section 9A(3), 9A(4)
Rajasthan Excise Rules, 1956 — Rule 68(14), 69(2)

Citation : (2003) 2 RLW 824 : (2002) 3 WLC 542

Hon'ble Judges : Shiv Kumar Sharma, J; F.C. Bansal, J

Bench : Division Bench

Advocate : Paras Kuhad, Amit Bansal, Sunil Nath, Shalini Sheron and Shikha Chaturvedi, for the Appellant; M. Rafiq, A.A.G., R.B. Mathur and L.M. Bhardwaj, for the Respondent

Judgement

Sharma, J.—Common prayer of the petitioner company in the instant writ petitions is as under -

(a) to declare that the Rajasthan Excise Amendment Rules 1998 and Section 31 of the Rajasthan Excise Act 1950 are ultra vires, invalid and not enforceable.

(b) to declare that item No. 14 which prescribes fee for permission to manufacture/bottle IMFL/Beer on franchise agreement and Rule 69(2)(b) which prescribes fee for licence to bottle foreign liquor in case of manufacture of brands of other unit under franchise arrangement is ultravires, invalid, void and unenforceable.

(c) to quash the demand raised by the respondents vide their letters dated October 30, 2000 and March 29, 2001.

(d) to restrain the respondents from imposing any further levy in further under Rule 69(2)(b) and 68(14) of the Rajasthan Excise Rules.

2. Rule 69(2)(b) of the Rajasthan Excise Rules 1956 (for short 1956 Rules) after

being amended vide Notification No. F.4C18) FD/Ex/98 dated 9.7.1998 authorised the Respondents to levy higher fees-

-for license to bottle foreign liquor in case of manufacturing of, brands of other units under franchise arrangement in terms of Rule 69(2)(b).

-for permission to manufacture/bottle Indian Made Foreign Liquor (IMFL)/Beer on franchise operations in terms of Rule 68(14).

3. As per the averments of the writ petitions the petitioner company is a subsidiary of Allied Domeeq U.K. and not an independent entity by itself. It is just an extension of Allied Domeeq Group in India. For better protection of the trademarks in India vis-a-vis third parties, a Trademark User Agreement was entered into between the petitioner company and Allied Domeeq U.K. whereby it was granted the right to use the trademarks Teachers," "Long John" and "Old Smuggler". The respondents have erroneously construed the agreement to be Franchise Agreement. The brands are bottled by the petitioner company for its own unit and to be sold in its own name and not for another unit therefore the impugned demand notice are completely illegal, arbitrary and ultravires the Rules.

4. The petitioner company also pleaded that the aforequoted amendment made in Rules 69 of 1956 Rules with respect to fee for permission to manufacture/ bottle IMFL/Beer on Franchise arrangement and fee for license to bottle foreign liquor in case of manufacturing of brands of another unit under franchise arrangement is ultravires and contrary to the provision of Article 265 and 14 of the Constitution of India. The imposition of levy and demand and collection of fee in the manner stated above in case of manufacture of IMFL/Beer under franchise arrangement. Whether it is for other unit or not is ultravires, illegal, improper, unjust arbitrary and discriminatory. Further contention of the petitioner company is that Section 31 of the Rajasthan Excise, Act 1950 (for short 1950 Act) purports to be a charging section. By virtue of Article 265 of the Constitution, it is well settled that a compulsory taxation in the nature of a fee can only be, levied under the authority of law. Compulsory taxation has to be levied directly by the Legislature and a delegate acting pursuant to a legislative mandate, can only prescribe the procedure for collection of such levies. The levy as such can not be prescribed by way of Rule in as much as the levy reflects the essential part of legislature can not be delegated and can be exercised only by a sovereign legislative body. Thus in so far as Section 31 seeks to empower the said authority to prescribe by way of rules, the rate at which the statutory fee to be levied is violative of Article 14 and 265 of the Constitution. Section 31 is also unconstitutional on the ground that it does not spell out any guidelines to exercise the power to levy a fiscal charge. Levy of fee for bottling of alcoholic liquors meant for human consumption with the aid of Entry 66 of List II of Ten Schedule to the Constitution is clearly unconstitutional as far as excise duty is concerned. The petitioner company is already paying the said charge on all manufacturing operation in respect of alcoholic liquors. Rule 68 having provided for payment of lump sum regulatory provided for payment of lump sum

regulatory fee in the manner aforesaid, there can be no rational justification for levy of second ad-valorem basis and the quantum whereon is linked with the kind of alcoholic bottle, is clearly outside the scope of regulatory fee and for all purposes it is in the nature of tax levied in the guise of fees.

5. Both the writ petitions stood admitted and the respondents filed detailed written statements raising preliminary objections to the maintainability of the petitions. The preliminary objections are as under -

(i) Equally efficacious alternative remedy of appeal u/s 9-A is available to the petitioner company.

(ii) The writ petitions involve several questions of fact which are of intricate and complicated nature and cannot be properly gone into under Article 226 of the Constitution of India.

6. At the outset we propose to address ourselves on these preliminary objections. Right from 1953 till today, the principle of not issuing a prerogative writ when alternative remedy was available, has been the subject matter of discussion before the Apex Court and the various High Court.

7. The State of Bombay v. The United Motors (India) (1), was the case wherein the Constitution Bench of Hon''ble Supreme Court propounded that principle of not issuing a prerogative writ when alternative remedy was available shall not be applicable where a party seeks relief on the ground of breach of his fundamental right. In Himmat Lal Hari Lal Mehra v. The State of M.P. (2), Constitution Bench of the Hon''ble Supreme Court carved out another exception that where the alternative remedy provided under the statute is very onerous and burdensome in character, the principle of not issuing a prerogative writ may be ignored.

8. In U.O.I. v. State of Haryana (3), Bench of Hon''ble Three Judges of the Supreme Court indicated that where a question of fundamental character was raised in the writ petition, it should not have been dismissed by the High Court in suggesting an alternative remedy. In para 3 of the judgment their Lordships observed as under -

"Having heard learned counsel for the parties at length, we are of the view that these are the matters which should not have been dismissed by the respective High Courts in suggesting an alternative remedy. The question raised was pristinely legal which required determination as to which provision of telephone connections and instruments amounted to sale and even so why was the Union of India not exempt from payment of Sales Tax under the respective statutes. The respondents counter such stance. We think the question raised was fundamental in character and need not have been put through the mill of statutory appeals in the hierarchy. For the reason alone, we set aside the respective impugned orders of the High Courts and remit the writ petitions back to them for decision in accordance with law. The recovery of tax would stand

stayed till the disposal of the writ petitions.

9. Having carefully scanned the material placed before us we find that following questions of fundamental character have been raised by the petitioner-

(i) Whether the trade marks user agreement dated April 12, 1997 can be termed as a franchise agreement and as to whether the petitioner company is manufacturing brands of another company under any franchise agreement.

(ii) What are the constituents of a franchise agreement and what criteria is involved and required to make an agreement as a franchise agreement and whether the agreement in question fulfills the said criteria and requirements.

(iii) Whether the petitioner is manufacturing under the branch of an independent company located in U.K., unit and the said transaction is being done under a franchise agreement and thus the said operations would fall under Rule 68(14) and Rule 69(2)(b) of 1956 Rules so as to attract the levy of additional fee for license and bottling fee at different rates.

10. These questions can be properly gone into by the Division Bench of the Board of Revenue under Sub-section (4) of Section 9-A of 1950 Act which empowers the Division Bench to revise any order passed on appeal by the Excise Commissioner.

11. Adjudication of these questions by the Board of Revenue is also justified in view of the allegations levelled by the petitioner company in the instant writ petitions that the impugned levy has been levied in consultation with the Excise Commissioner and District Excise Officer as such an appeal from the order of the Assistant Excise Officer will amount to an appeal from CAESURAE to CAESURAE and the authority can not be a judge in its own cause. Thus in the peculiar circumstances of this case we are not inclined to put these questions of fundamental character through the mill of statutory appeals.

12. For the reasons aforementioned we dispose of the writ petition in the following terms-

(i) The Division Bench of the Board of Revenue is directed to adjudicate upon the three questions referred to in para 9 of this judgment in exercise of its jurisdiction under Sub-section (4) of Section 9-A of 1950 Act, after providing opportunity of hearing to the parties concerned.

(ii) The parties shall appear before the Division Bench on May 15, 2002 for seeking further instructions and they shall be at liberty to file necessary pleadings and documents.

(iii) The recovery of levy of additional fee for licence and bottling fee under Rules 68(14) and 69(2)(b) of 1956 Rules including the impugned demand notices would stand stayed till the final disposal of the matter by the Board of Revenue.

(iv) The Board of Revenue is expected to decide the matter as expeditiously as

possible.

(v) The amount if any deposited by the petitioner company pursuant to the interim directions of this court, could only be withdrawn after the matter is finally adjudicated upon by the Board of Revenue.

(vi) Three copies of this order be transmitted to the learned Chairman Board of Revenue for necessary compliance.

(vii) The parties shall bear their own costs.

13. The writ petitions stand disposed of as indicated hereinabove.