

(1981) 09 KAR CK 0029

In the Karnataka High Court

Case No : Writ Petition No's. 17808 and 17809 of 1987

Ananthakrishna

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 05-09-1981

Acts Referred:

Karnataka Excise (Excise Duties) (Amendment) Rules, 1987 — Rule 2, 7, 8
Karnataka Excise Act, 1965 — Section 22, 71, 71 (1)

Citation : (1991) ILR (Kar) 3582

Hon'ble Judges : Mohan, C.J.; Hanumanthappa, J

Bench : Division Bench

Advocate : M.R. Naik, for the Appellant; P.P. Muthanna, General and B.J. Somayaji, HCGP, for the Respondent

Final Decision : Dismissed

Judgement

Mohan, C.J.—Both these Writ Petitions can be dealt with under common Judgment since identical issues are involved except that petitioners are two different persons.

2. The petitioners are Excise contractors. They took on lease the right of retail Vending of arrack in the Taluks of Maddur and Mandya of Mandya District. That was for the Excise year 1987-88. In these Writ Petitions they are seeking a direction to the respondents not to collect illegally Re. 1/- additional duty without authority of law and if any collection has been made contrary to this, they shall refund such excess collection so far as Excise year commencing from 1-7-1987.

3. The history relating to this may be briefly set out. The right to Vend arrack and intoxicant came to be regulated by the provisions of the Karnataka Excise Act, 1965 (hereinafter referred to as the Act) and various Rules made thereunder. The State Government leases out the privilege of vending liquor for valuable considerations. They are collected by way of rental or kist. After the lease is confirmed, the Contractors, like the petitioners, are governed by the Act and Rules.

4. In exercise of the powers under the Act and Rules, the respondents issued auction notifications. Inter alia, the said notifications contained a Condition No. 19 showing the place of issue of bottled arrack to Excise Contractors. It further notified that the Licencee shall pay issue price thereof at such rates as may be prescribed from time to time. It also notified the existing rate of arrack and the bottling charges of the bottles of the different capacities.

5. On July 20, 1985, draft Rules were published proposing to enhance excise duties on Arrack from Rs. 4/- per bulk litre to Rs. 6/-per bulk litre. The validity of the said proposals were challenged by various Contractors in W.P.Nos. 13061 to 13065/1985. This Court stayed the enhancement. The State Government decided to withdraw the proposed enhancement and made an announcement to that effect by publication and finally it was withdrawn with effect from 30-6-1986. Accordingly, there was a gazette publication dated 26-10-1987. The result was that the Contractors were obliged to pay only at the rate of Rs. 4/- per bulk litre.

6. On 10-11-1987, a Draft Notification bearing No. HD 10 PES 87 was issued proposing to enhance the duty payable to Rs. 5/- per bulk litre. That reads as follows:

"GOVERNMENT OF KARNATAKA

No.HD 10 OEX 87

KARNATAKA GOVERNMENT SECRETARIAT Vidhana Soudha Bangalore, 10th November 1987

NOTIFICATION

The draft of the following rules further to amend the Karnataka Excise (Excise Duties) Rules, 1968 which the Government of Karnataka proposes to make in exercise of the powers conferred by Section 22 read with Section 71 of the Karnataka Excise Act, 1965 (Karnataka Act 21 of 1966) is hereby published as required by Sub-section (1) of Section 71 of the said Act for information of persons likely to be affected thereby and notice is hereby given that the said draft will be taken into consideration on or after 25-11-1987.

Any objections or suggestions which may be received by the State Government from any person in respect of the said draft before the date specified above will be considered by the State Government. Objections or suggestions may be addressed to the Secretary to Government, Home Department, Vidhana Soudha, Bangalore-560 001.

DRAFT RULES

1. Title and commencement: (1) These Rules may be called the Karnataka Excise (Excise Duties) (Amendment) Rules, 1987.

(2) They shall be deemed to have come into force with effect from the first day of July 1987.

2. Amendment of Schedule-A: In Schedule A of the Karnataka Excise (Excise Duties) Rules, 1968 in the entries relating to serial number 1, in column 3 for the letters, figures and words "Rs. 4-00 per bulk litre", the letters, figures and words "Rs. 5-00 per bulk litre" shall be substituted."

As seen from the above, it would be clear the proposed amendments were to be given retrospective effect from 1-7-1987. At that stage, on 30-11-1987, the Writ Petitioners came to this Court contending, in main, that any proposal to increase excise duty-and a second demand for the period 1-7-1987 to 10-11-1987 at the enhanced rate of Rs. 5A per Bulk Litre would be bad in law. On 1-12-1987 this Court issued Rule Nisi and granted stay of collection at the rate above Rs. 4/-. Now the matter comes up for final disposal.

7. The argument of the learned Counsel for the petitioners is as under : No doubt, u/s 71 of the Act, there is power to frame a Rule even with retrospective effect. But, unless and until reasons are given, for such retrospective operation, the Rules cannot become Valid. Even otherwise, laying of the Rules before Legislature would be essential. Under more or less identical circumstances, this Court has taken the view in H. Dasappa and Sons Vs. State of Karnataka, that the amended Rules cannot affect the cases where the amount had been paid at the time of issue. Lastly, he submitted that on mere retrospective operation a concluded contract cannot be interfered with as laid down in Dasappa and Sons Vs. State of Karnataka,

8. We will now proceed to consider these contentions in seriatim. It is necessary on our part to refer to Section 71 of the Act, which is the rule making Section. Sub-section (1) of Section 71 says that the State Government may, by notification and after previous publication, make Rules to carry out the purposes of this Act. Thereafter, in Sub-section (2) it is stated that: "In particular and without prejudice to the generality of the foregoing provision, the State Government may make Rules -

(a) prescribing the powers and duties of Excise Officers;

(b) xxx xxx xxx

(c) prescribing the time and manner of presenting appeals and the procedure for dealing with appeals;

(d) regulating the import, export, transport, manufacture, cultivation, collection, possession, supply or storage of any intoxicant and may, by such rules, among other matters -

(i) regulate the tapping of toddy-producing trees, the drawing of toddy from such trees, the marketing of the same, and the maintenance of such marks;

(ii) declare the process by which spirit shall be de-natured and the denaturation of spirit ascertained; and

(iii) cause spirit to be denatured through the agency or under the supervision of

its own offices;

(e) regulating the periods and localities in which, and the persons or classes of persons to whom, licences for the wholesale or retail sale of any intoxicant may be granted and regulating the number of such licences which may be granted in any local area;

(f) prescribing the procedure to be followed and the matters to be ascertained before any licence for such sale is granted for any locality;

(g) regulating the time, place and manner of payment of any duty or fee and the taking of security for the due payment of any duty or fee;

(h) prescribing the authority by which, the form in which and the terms and conditions on and subject to which any licence or permit shall be granted, and may, by such rules, among other matters,-

(i) fix the period for which any licence or permit shall continue in force;

(ii) prescribe the scale of fees, or the manner of fixing the fees payable in respect of any lease, licence or permit, or the storing of any excisable article;

(iii) prescribe the amount of security to be deposited by the holders of any licence or permit for the performance of the conditions of the same;

(iv) prescribe the accounts to be maintained and the returns to be submitted by licence holders;

(v) prohibit or regulate the transfer of license, and

(vi) prescribe the ages under which it shall be unlawful to employ children and to sell or given to children excisable articles;

(i) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;

(j) regulating disposal of confiscated articles;

(k) regulating the grant of expenses to witnesses and to persons charged with offences under this Act, and subsequently released or acquitted;

(l) regulating the power of Excise Officers to summon witnesses;

(m) prescribing the rent payable to the Government in respect of toddy trees from which toddy is drawn;

(n) any other matter that may be prescribed under this Act."

What is contained in Sub-section (2) is merely illustrative and not exhaustive through the repository power contained in Sub-section (1). That need not detain is any longer. With that we go to Sub-section (3) which reads thus:

"A rule under this Act may be made with retrospective effect and when such a

rule is made the reasons for making the rule shall be specified in a statement laid before both Houses of the State Legislature. Subject to any modification made under Sub-section (4), every rule made under this Act shall have effect as if enacted in this Act."

A careful reading of this sub-section makes it clear that any rule made under this sub-section shall operate retrospectively. Normally speaking a subordinate Legislation cannot have retrospective effect because it is only the Legislature which has the plenary power which could legislate both prospectively and retrospectively having regard to the generally accepted principle of Delegates Non Potest Delegare (a delegate cannot delegate). The Government being a delegate is not enabled to frame a rule retrospectively. The solitary exception is where the Act itself authorises making of a rule retrospectively. That exactly is the position here. Therefore, one can have, no quarrel with the proposition that the rule making power under Sub-section (3) of Section 71 of the Act could be exercised so as to make a rule retrospectively. With this we pass on to the next question. This sub-section also lays down that when such a rule is made, the reasons for making the rule shall be specified in a statement laid before both Houses of the State Legislature. Therefore, here again, in order that the Legislature be made aware of the reasons which prompted the Government to make a retrospective rule, the reasons will have to be stated.

9. "Every rule made under this Act shall have effect as if enacted in this Act" occurring in Sub-section (3) of Section 71 of the Act means as though the Act itself has come to be amended to that extent. In other words, this amended rule is to form part of the Act. The question whether laying of the rules before the two Houses of Legislature is mandatory or not, is no longer open to question because of the Ruling of the Division Bench of this Court reported in State of Karnataka Vs. Anjanappa and Co., where reversing the learned Single Judge's ruling in Anjanappa and Co. Vs. State of Karnataka, it was held that the requirement relating to laying of the Rule was only directory. To the words of Division Bench:

"Further, if the Legislature had intended that the rules should not take effect till they had the sanction of the two Houses, it would have expressly said so by employing negative language. The Section does not say that the rule would not be effective till it is laid before the two Houses. What really it provides is that in the event of the two Houses modifying the rule, it is the modified rule which would be effective and in the event of the two Houses annulling the rules, the rules would be ineffective. In this view of the matter the only irresistible conclusion that can be arrived at is that it is from the date on which the Government decides to make the rules effective, they come into force and not after the expiry of 30 days after they are placed before both the Houses of the Legislature."

Now the question is when the draft Rules which we have already extracted clearly say that it shall come into force from 1-7-1981, what is the position? On

and from 1-7-1987 the rate will be Rs. 5/- per bulk litre. If this position is arrived at, we do not know how it would be open to the petitioners to contend that inasmuch as the issue price had been paid earlier, by retrospective operation of Law they would not be liable to pay the enhanced rate. In this regard we will have to make reference to Rule 2 which reads thus:

"Manner of levying Excise Duties...An Excise Duty or litre fee or both shall be levied on the excisable articles specified in Column 2 of the Schedules A and B hereto annexed at the rate specified in the corresponding entries in Column 3 thereof when such excisable articles are...

a) xxx xxx xxx b) issued from any Distillery, Warehouse or other place of storage established or licensed in the State under any of the Provisions of the Karnataka Excise Act, 1965;

Provided that no such duty shall be imposed on the excisable articles -

(i) which have been impetrated into India and liable for such import duty under the Indian Tariff Act, 1934 (Central Act 62 of 1962) or

(ii) which have been previously imported, transported or manufactured on payment of "Excise Duty or litre fee of both" at rates not less than those specified in the Schedules A and B".

10. Now, we will look at H. Dasappa and Sons Vs. State of Karnataka, In paragraph-12 what the learned Judge observes is as under:

"There is no dispute that at the time when the auction took place, the tree rent as well as the tree tax, which were required to be paid by the petitioners, were those as fixed in Rule 7 extracted earlier. Rule 8 of the Rules prescribes the time of payment of tree rent. It reads.

8. Manner of payment of Tree Rent: The tree rent shall be paid in full along with the application for grant of tapping licence.

In view of this Rule, the tree rent has to be paid in full along with the application for grant of tapping licence. When the petitioners have paid the tree rent according to the rates fixed in Rule 7 of the Rules and in terms of the contract and have taken the licence for tapping, there is no further liability on their part, as far as tree rent is concerned for that period. Hence this contention is well founded and the petitioners are entitled to the issue of a direction to the respondents not to demand the enhanced tree rent for the period commencing from 1-7-1982 till 9-11-1982."

We do not think this will have any application to the facts of these cases since the Law itself has come to be amended. That is the intent of the words:

"....shall have effect as if enacted in this Act."

If the Law is amended, the fact that at the time of clearance of dues they have paid the issue price, would not matter at all. More so, when the Writ Petitioners

agreed to pay the price as amended from time to time. In order to get over this, learned Counsel for the petitioners relied on *Dasappa and Sons Vs. State of Karnataka*, of the said Decision is as follows:

"Mr. Holla had strongly relied on the observations of the Bench in *D. Cawasji & Co.*'s case, which read as under:

"Disposal of the privilege to vend liquor is not purely a matter of contract. It is governed by the statute namely, the Mysore Excise Act. Powers and obligations of the State and rights and liabilities of the licensees, are governed by the Statute and Rules thereunder. Further, Article 265 of the Constitution declares that no tax shall be levied or collected except by authority of law. A tax cannot be levied or collected by the State under a contract. A contract to pay a tax not levied by the authority of law, is inconsistent with Article 265 of the Constitution, and is in the same position as a contract which violates the Constitutional guarantee afforded by Article 311. Hence the mere fact that before obtaining licenses to sell liquor, the petitioners had executed in favour of the State, contracts, covenanting to pay Education Cess on certain items of excise revenue, would not render levy on Education Cess valid if such levy is without the authority of law.

However, the learned Special Government Pleader argued that there was no legal impediment to the petitioners agreeing to pay to the State certain additional amounts or certain percentage over and above their respective bid amounts or amounts tendered by them to obtain the exclusive privilege of vending liquor, and that the covenant to pay Education Cess can be construed as covenant to pay certain amounts of a certain percentage over and above bid or tender amount. But what the petitioners had covenanted to pay in the contracts entered with the State, was Education Cess and not any such amounts or percentage of bid or tender amounts other than Education Cess. If what they had undertaken to pay by way of Education Cess, is found to be tax without the authority of law, such undertaking to pay a specified sum or specified percentage of bid or tender amounts."

In the same Decision reference is also made to the Judgment of this Court in *D. CAWASJI & CO. v. STATE OF MYSORE* 1969(1) Mys.L.J. 461.

Here, again, we do not think this will have any bearing on the issue because as we pointed out above, when the law is amended, the petitioners are bound by the amended law.

11. One more Decision that is cited before us is Short Notes of cases *Blue Max Enterprises v. Excise Commissioner* item No. 54, in 1982 (2) Kar.J.L 27, which reads thus:

"Karnataka Excise (Excise Duties) Amendment Rules 1981 -Effect of K.S. Puttaswamy J: As on 15-4-1981 each of the petitioners who were dealers in Indian made liquor, had with them certain unsold quantities on which the duty

that was then in force had been paid.

The Excise Duties Rules were amended and published on 15-4-1981 enhancing duty.

Held, the Rules were not given retrospective effect but had prospective effect from 15-4-1981. Hence the licensees were not liable to pay the enhanced duty. When the Rules were not given retrospective effect, it was not open to the Excise Commissioner to demand the enhanced duty on the stock on hand on 15-4-1981. Sections 16, 22 and 23 of the Act did not justify the demand for enhanced duty (1963) 2 Mys.L.J. 152 and on appeal C.A.93/65 SC and rel. on. Blue Max Enterprises v. Excise Commissioner, W.Ps.7345 etc/81, dated 31-8-1981."

It is a clear case in which Rules were given effect prospectively from 15-4-1981 as the learned Judge has noted. Therefore, that again has no application since here the Rules are retrospective in nature.

12. The following publication in the Gazette makes it clear that the contention, that there was no publication of the Draft Rules and the said Draft Rules remained in Cold-storage, is also not correct:

"HOME SECRETARIAT Notification No. HD 10 PES 87 Bangalore, dated 17th December 1987

Whereas the draft of the Karnataka Excise (Excise Duties) Amendment, Rules 1987 was published in Karnataka Gazette (Extraordinary) dated 10th November 1987 in part IV Section 2, c(i) as required by Sub-section (1) of Section 71 of the Karnataka Excise Act, 1965 (Karnataka Act 21 of 1966) inviting objections and suggestions from all persons likely to be affected thereby on or before 25th November 1987 vide Notification No. HD 10 PES 87 dated 10th November 1987;

And, whereas, the said Gazette was made available to the public on 10th November 1987;

AND, whereas, the objections and suggestions received on the said draft before the last date fixed have been considered.

Now, therefore, in exercise of powers conferred by Section 71 of Karnataka Excise Act, 1965 (Karnataka Act 21 of 1966) the Government of Karnataka hereby makes the following Rules, namely;

1. Title and commencement: (1) These Rules may be called the Karnataka Excise (Excise Duties) (Amendment) Rules 1987.

(2) They shall be deemed to have come into force with effect from the first day of July 1987.

2. Amendment of Schedule A : In Schedule A of the Karnataka Excise (Excise Duties) Rules 1968, in the entries relating to serial number 1, in column 3, for the letters, figures and words "Rs. 4-00 per bulk litre" the letters, figures and

words "Rs. 5-00 per bulk litre" shall be substituted."

Hence, we conclude that there are no merits in these Writ Petitions. Writ Petitions are accordingly dismissed. No costs.