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(1983) 12 KAR CK 0008

In the Karnataka High Court

Case No : Writ Petition No''s. 18155 of 1980 etc.

Anjanappa and Co. APPELLANT

Vs

State of Karnataka RESPONDENT

Date of Decision : 15-12-1983

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (g), 47
Karnataka Excise Act, 1965 — Section 17 (1), 21

Citation : (1985) ILR (Kar) 1772

Hon'ble Judges : Doddakale Gowda, J

Bench : Single Bench

Advocate : A. Jagannatha Shetty and Santosh Hegde, for the Appellant; M.R. Achar, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Doddakale Gowda, J.—In these batch of Writ Petitions, the petitioners who are licensees for vend of country liquor dispute their liability to pay the rental for the period during which shops were ordered to be closed pursuant to notification issued u/s 21 of the Karnataka Excise Act, 1965 (hereinafter referred to as the ''Act''). Incidentally, some of them have challenged the notification issued u/s 21 of the Act. Validity of Rule 23 of the Karnataka Excise (lease of right of retail vend of liquors) Rules, 1969 which deprives them from claiming compensation for closure or shifting is called in question; and common prayer is to forbear respondents from collecting the rentals for the disputed period/s.

2. Uncontroverted facts are that petitioners are purchasers of privilege of vend of liquor by offering highest bids, the particulars of which have been set out in the respective Petitions. During the lease period, elections to the State Legislature, bye-election, election to local authorities and Agricultural Produce Market Committees intervened and for the purpose of conduct of the election, District Magistrates of respective districts ordered closure of shops for two or three days for each election, as the case may be. Annexure-A 1 to A 12 in Writ Petitions

Nos.1630 to 1641 of 1983 are notifications issued by the District Magistrates ordering closure of liquor shops in order to preserve public peace from 5-00 a.m. on the morning of 3-1-1983 to mid-night of 5-1-1983 during general elections to the State Legislative Assembly. Notifications produced in Writ Petitions Nos. 6363 to 6367 of 1983, recite that Election Commission of India has issued direction to declare ''dry'' days in connection with the conduct of general election to State Legislative Assembly held in January 1983, consequently District Magistrates considered necessary to order closure of all shops in which any intoxicant is sold in the entire districts for the period from 0-00 hours on 3-1-1983 to 24 hours on 5-1-1983. For conduct of Bye-election to the State Legislative Assembly for Kanakapura Assembly Constituency on 15-5-1983, liquor shops of Ramanagaram, Channapatna, Bangalore South, Anekal Taluk situate within a distance of 10 KMs from the border of Kanakapura Taluk were ordered to be closed from 5 a.m. on 13-5-1983 to mid-night of 15-5-1983 by means of a notification dated 6-5-1983 by the Deputy Commissioner and District Magistrate, Bangalore, as per Annexure-A produced in Writ Petition No. 11548 of 1983.

3. On account of group clashes or communal rioting in certain areas vend of liquor was prohibited by means of a notification issued u/s 21 of the Act.

4. The District Magistrate, Mandya, ordered closure of vend of arrack and toddy in addition to closure of all bars in the entire district of Mandya with effect from 9. a.m. of 16th September 1982 for maintenance of law and order as per notification dated 16th September 1982 marked as Annexure-A in Writ Petition Nos. 38090 and 38091, 38006,37771,39129 and 42305 of 1982. The ban imposed on sale of liquor was later on confined to 12 places mentioned therein as per notification dated 27th September 1982. It was further modified by another notification dated 12th October 1982 restricting the ban only in two places viz., Malavalli Town Municipal Limits and Nagamangala Town Muncipal Limits. No material is made available to establish as to when the restriction imposed for sale of liquor at those two places was lifted.

5. The District Magistrate of Bijapur ordered closure of all liquor shops in Bijapur City from 17-2-1983 to 20-2-1983 for maintenance of law and order during communal disturbance as per notification dated 17-2-1983 marked as Annexure-C in Writ Petition No. 10835 of 1983. By notification dated 24-2-1983 (Annexure-B) it was extended till the 25th March 1983. By another notification marked as Annexure-C dated 25-3-1983, the District Magistrate of Bijapur ordered closure of all liquor shops in the city limits of Bijapur and town limits of Bagalkot from 6 a.m. of 28-3-1983 to mid-night of 29-3-1983 and again from 6 a.m. of 1-4-1983 to mid-night of 2-4-1983 for the preservation of public peace during Holi feast.

6. The District Magistrate, Bijapur, on receipt of the report from the Superintendent of Police, Bijapur, apprehending breach of peace on Ganesha Festival day ordered closure of liquor shops from 6 a.m- on 25th August 1982 to mid-night of 26th August 1982, as per Annexure-D.

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7. On the report of Superintendent of Police that anti-social elements, goondas and other miscreants are likely to take advantage of the occasion and create disturbance leading to serious breach of public peace by consuming liquor, the District Magistrate, Bijapur ordered closure of all liquor shops in Bijapur City and Bagalkot Town limits during Dasera and Moharam festivals, as per Annexure-E.

8. The District Magistrate of Mysore has ordered that all liquor shops including arrack, toddy and IML shops etc, situate within the limits of Ashokapuram. Vidyaranyapuram and Chamundipuram in the Mysore City should be closed from 0800 Hrs on 8th July 1980 to 0800 Mrs on 15th July 1980 for maintenance of public peace and tranquility in view of clashes between rival groups, as per Notification dated 8-7-1980 marked as Annexure-B in Writ Petition No. 18155 of 1980. The notification dated 15th July 1980 (Annexure C) recites that as the tension among rival group is continuing and there is likelihood of breach of peace endangering public peace and tranquility, restriction is further extended from 15th July 1980 to 22nd July 1980. For the second time, the restriction was extended from 22-7-1980 to 29-7-1980 as per Notification, Annexure-D, dated 22-7-1980.

9. In the representation made to defer the collection of rental as they had not done or carried on any business during the prohibited period, they made a specific prayer for pro rata deduction of the rental for the said periods.

10. It is averred that a months rent as well as two months rent is collected as security holding out an assurance that the petitioners would be permitted to vend toddy/arrack in the shops notified on all days of the excise year except on Gandhi Jayanthi day. Notification ordering closure are arbitrary and unreasonable. There is absolutely no material or indication for apprehension that there would have been breach of peace during the said period. As the direction for closure were uncalled for, arbitrary and illegal it is all the more just and necessary to give pro rata deduction in the rentals payable. Total sum offered can only be recovered by sale of alcoholic breweries (toddy and arrack) if prevented for no fault of their''s, pro rata deduction should be given in the rental in respect of shops which were ordered to be closed. Collection of rental for these periods is unreasonable, arbitrary and without authority of law. It is further averred that in the absence of any provision providing for recovery of rental for such period, collection is confiscatory. It is contended that apart from the liability to pay the rental for the period during which no business was held they have incurred huge loss in maintenance of their establishments. Representation made for the pro rata deduction in the rental has been turned down by the Respondent.

11. Respondents resist the relief stating - that the State has exclusive right or privilege of manufacture and sale of in toxicant liquors and parts with the privilege of vend of liquor in the shape of licence or lease by conducting auction as amongst various other modes or methods; petitioners who have voluntarily and of their free will volition offered the bids, were aware of the nature of the business that they had under-taken to do, apart from the terms and conditions

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on which it was parted; persons who have offered bids with full know-ledge of the commitments which the trade involved cannot be permitted to wriggle out of the terms of the contract disowning the contractual liability and the remedy is misconceived. In other words, dispute arising out of concluded contracts cannot be adjudicated in Writ proceedings. Those who contract with open eyes must accept the burden of the contract along with the benefits. Rental payable is lumpsum and cannot be split up into number of days or hours. Contention of the petitioners, if accepted, this Court would be re-writing a contract which is impermissible. Excise revenue raised out of manufacture and sale of intoxicating liquor being one of the source of the State exchequer no arbitrariness or confiscation is involved

12. The following questions emerge for consideration from the pleadings :

(1) Whether the notifications issued u/s 21 of the Karnataka Excise Act directing closure of shop/s during election are arbitrary and illegal ?

(2) Whether the Licensee to vend liquor is liable to pay the rental for the period during which shops were ordered to be closed, pursuant to notification issued u/s 21 of the Karnataka Excise Act, on account of unforeseen events ?

(3) Whether Rule 23 of the Karnataka Excise (Lease of the right of retail vend of liquors) Rules is ultra vires ?

13. To make the point intelligibe, it is necessary to set out the scheme providing for disposal of the privilege by the Government and the term of the contract.

14. Sub-section (1) of Section 17 of the Act provides for the State Government to lease to any person the exclusive right of manufacturing or supplying by wholesale or of both; or of selling by wholesale or by retail or of manufacturing or supplying by wholesale or of both and of selling by retail, any Indian liquor or intoxicating drug within any specific area. Sub-lease is permissible with the permission of the Government. Under sub-section (2) of Section 17 Licensing Authority may grant to a lessee a licence in terms of the lease. Sub-section (3) provides for determination of lease for the reasons mentioned therein. Sub-section (4) provides for realisation of the loss incurred by the Government on account of re-sale of the right of vend of liquor for breach committed by purchaser. Liquor and Indian liquor are defined in clauses (18) and (15) of Section 2 of the Act. ''Excise Revenue'' is defined to mean a revenue derived or derivable from any duty, fee, tax, rent, fine or confiscation imposed or ordered under the provisions of the Act or any other law for the time being in force relating to liquor or intoxicating drugs.

15. Sub section (I) of Section 21 of the Act enables the District Magistrate, by notification, to order closure of shops in which any intoxicant is sold at such time and for such period as he may think necessary for the preservation of the public peace. Sub-section (2) of Section 21 states if any not or any unlawful assembly is apprehended or occurs in the vicinity of any such shop, any Magistrate or any

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Police Officer not below the rank of a Sub-Inspector, who is present, may require such shop to be kept closed for such period as he may think necessary-provided that where a riot or unlawful assembly so occurs, the licensee shall in the absence of such Magistrate or Officer, close the shop without any order and keep it closed during the continuance of such riot or unlawful assembly.

16. Section 26 of the Act provides for the issue of a licence or permit under the Act on payment of such fees, for such period, and subject to such restrictions and on such conditions, and shall be in such form and shall contain such particulars, as may be prescribed. Section 29 of the Act authorises the Licensing Authority to cancel or suspend the licence on grounds mentioned therein. Section 30 of the Act empowers the Licensing Authority to withdraw the licence for any cause other than those specified in Section 29 on the expiration of not less than 30 days notice in writing of its intention to do so. Sub-Section (2) of Section 30 provides for refund of the deposit for the unexpired portion of the term of the licence.

17. The relevant Rules for the purpose are - (I) Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969; and (2) Karnataka Excise Licences (General Conditions) Rules, 1967 (here after referred to as the ''Rules'' and the ''General Conditions Rules'' respectively)

18. Right of retail vend of liquor may be disposed of in any one of the forms provided in Rule 3 of the Rules. Under sub-rule (2) of Rule 3 of the Rules right of retail vend of toddy disposed of under these rules shall be exclusive right except in such districts as may be specified by Government by order u/s 17. The licensee will have exclusive right of selling liquor.

19. The person whose tender, offer or bid is accepted provisionally under Rules 9, 10, 11 and 12 shall, immediately on the day such acceptance is announced, has to make a deposit of an amount which together with the earnest money deposited under sub-rule (6) of Rule 5 would be equal to one month''s rent of the shop or group of shops vide Rule 13(1). On confirmation licencee is required to execute the lease deed within fifteen days from the date of communication of such confirmation order or before the thirtieth day of June, which-ever is earlier incorporating the terms and conditions on which the right of retail vend of liquor is leased in his favorite Rule 16 of the Rules.

20. Under Rule 17 of the Rules, the Deputy Commissioner or the Excise Commissioner, as the case may be, are required to issue a licence in respect of each shop or group of shops after obtaining such security as contemplated therein. Rules 19 and 20 provide for adjustment and refund of the deposit so made. Under Rule 23, the Deputy Commissioner or the Excise Commissioner may, either on the application of the licensee or otherwise and for reasons to be recorded in writing direct the closure of shifting of a shop from one place to another and the licensee shall not be entitled to any compensation on account of such closure or shifting.

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21. Under Rule 4 of the General Conditions Rules, a licensee shall commence his business on the 1st July or such date as may be notified by the Excise Commissioner and shall keep open on every day during such hours as may be fixed by the Excise Commissioner. Shops where liquor is intended to be sold has to be approved by the Deputy Commissioner. Apart from complying with conditions or obligations imposed in the course of vend of liquor, licensee is required to pay rent in the manner provided under Rule 15. Rule 16 of the General Conditions Rules provides for suspension of licence in case the licensee makes default in payment of the rent. Under Rule 24 where a licence is cancelled during the currency of the licence, the licensee shall not be entitled to any compensation of any kind. The tenure of lease is one year but rental is payable monthly.

22. The notification issued u/s 4 of the Act which sets out the procedure for auction and condition of lease of the right of retail vend of toddy and arrack specifically states that lease shall be subject to the provisions of the Act and the Rules as amended from time to time.

23. Para 3 of the preamble of the lease deed states that in consideration of the Lessee/s paying the monthly rent of a sum of Rs............for............toddy / arrack shops/beer in beer taverns situated in the....................... Taluk/ Taluks............. District/Districts. .... the State Government hereby grants and demises unto the Lessee/s by way of Lease the right of retail vend of toddy/ arrack/wine or wine taverns in the shops or beer taverns or wine taverns specified in Schedule-I hereunder, situated in the Taluk/Taluks, District/Districts noted against them for one year commencing on the day of..........

It is hereby agreed :

"(1) This lease shall be subject to the provisions of the Karnataka Excise Act, 1965, the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969, all other Rules made under the said Act, and also in particular the terms and conditions detailed in Schedule II hereunder.

Condition (2) of Schedule II states that "Excepting on the days on which the shops are closed in accordance with Section 21 of the Karnataka Excise Act, 1965, the Lessee shall keep the shops open every day during such hours as the Excise Commissioner may fix."

Since rest of the conditions referred to therein are the same as the one prescribed either under the Act or the Rules, there is no necessity to refer them in detail.

24. Last point is taken up for consideration first as it involves no serious controversy.

Rule 23 which they have challenged reads thus :

"23. Shifting of shops : The Deputy Commissioner or the Excise Commissioner

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may, either on the application of the licensee or otherwise and for reasons to be recorded in writing direct the closure or shifting of a shop from one place to another and the licensee shall not be entitled to any compensation on account of such closure or shifting."

This Rule enables the Deputy Commissioner and the Excise Commissioner, who are Excise Officers, as defined in the Act, to direct closure of the shop/s for reasons to be recorded or to shift a shop from one place to another. In either event, the licensee is not entitled to claim compensation. It is not their case that vend of liquor was stopped or shops closed pursuant to order/s of an Excise Officer. In the absence of an order by an Excise Officer disclosing reasons for closure or shifting, petitioners cannot make a grievance regarding the validity of this rule. In this view, Learned Counsel appearing for the parties fairly conceded that there is no necessity to adjudicate the validity of this rule. Sub-mission recorded.

25. Points 1 and 2 are considered together, as they are interlinked and to avoid repeated reference to the provisions of the Act and the rules and also precedents.

26. In order to answer these intricacies, it is better to state the settled law on the incidence of this trade and rights of a citizen vis-a-vis the State. Traditionally intoxicating liquors were the subject matter of State monopoly. There is neither a fundamental nor a natural right for a citizen to do trade or business in intoxicants. By virtue of this monopoly, State has exclusive right of privilege to regulation the trade - manufacture, storage, export, import, sale and possession. In Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others, the Supreme Court has held that trade or business in country liquor as per its inherent nature has been treated by the State and the Society as a special category requiring legislative control. Its trade or business is treated as a class by itself and cannot be treated on the same basis with other trades while considering Article 14. In Cooverjee B. Bharucha v. Excise Commissioner and Chief Commissioner 1954 SC 220 the Supreme Court after tracing the history of the trade within the nation and in foreign countries accepted the principles stated by Field, J., of Supreme Court of United States in Crowly v. Christmen 34 L Ed. 620, 623 which reads thus :-

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undetermines; in his morals, which it weakens ; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him, By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of

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ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has, therefore, been, at all times, by the Courts of every State, considered as the proper subject of legislative regulation. Not only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week on which the saloons may be opened Their sale in the form may be absolutely prohibited. It is a question of public expediency and public morality, and not of a federal law. The police power of the State is fully competent to regulation the business - to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail ; it is not a privilege of a citizen of the State or of a citizen of the United Stales. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only;"

After citing this passage the Learned Chief Justice said -

"These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioners. The provisions of the Regulation purport to regulation trade in liquor in all its different spheres and are valid."

The incidence of licence is stated thus at para 115 of American Jurisprudence, II Edition, Volume 45 :-

"115. Nature of License - A license to engage in the liquor traffic is not a grant, and confers no irrevocable, vested, or proprietary rights upon the licensee which cannot be revoked or terminated by the licensing authorities. It is a mere personal and temporary permit or privilege, and not a natural right, to be enjoyed only so long as the conditions and restrictions governing its continuance are complied with, and allowing the licensee to do what could not be lawfully done without it, and it is not property in any constitutional sense. The mere fact that liquor license is transferable with the approval of the State does not alter its personal nature. Nor are vested rights created under a license by the acquisition and use of the instrumentalities necessary to the liquor business."

In State of Orissa and Others Vs. Harinarayan Jaiswal and Others, , Hegde, J., speaking for the Court held thus : -

"If the Government is the exclusive owner of those privileges, reliance on Article 19(l)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government, nor can there be any infringement of Article 14, if the Government

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tries to get the best available price for its valuable rights."

Three principal reasons to hold that there is no fundamental right of a citizen to carry on trade or to do business in liquor are :

"First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right of privilege of manufacture or sale of liquor."

The statement contained in American Jurisprudence, Vol. 30, at page 538 to the effect :

"That while engaging in liquor traffic is not inherently unlawful, nevertheless it is a privilege and not aright subject to Government control."

(Underlining is mine)

is accepted by the Supreme Court in Harshankar''s case.

In view of the principles extracted above, petitioners can neither complain infringement of Articles 14 or 19 or Article 300A of the Constitution. Nor is there any fundamental 4. State of Orissa and Others Vs. Harinarayan Jaiswal and Others, right to do anything which arises only out of grant or contract.

27. Bearing in view the declaration that there is no fundamental or natural right to carry on business inherently dangerous to the society or to carry on business at any time, at any place as they liked and the State is having monopoly right in regulating the trade, what remains for consideration is the right that flows from provisions of the Act and the terms of contract.

28. The provisions of this Act and the Rules framed there-under provide for grant of such privileges on such terms and conditions as it deems fit (i) of manufacturing or supplying by wholesale or of both; or (ii) of selling by wholesale or by retail; or (iii) of manufacturing or supplying by wholesale, or of both and of selling by retail, any Indian Liquor or intoxicating drug within any specific area. It has got power to hold public auction for grant of such privileges.

29. Since the business of selling intoxicant liquors is attended with danger to the community, it may be entirely prohibited or permitted under such conditions as will limit the utmost evil. Government while permitting trade in dangerous or noxious trades may impose such reasonable restrictions or conditions as may be deemed essential to the safety, wealth, peace, general order and morale of community.

30. The validity of the impugned notifications will have to be considered in the light of public interest involved and danger or injury which may be inherent in

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unbridled vend of liquor.

Section 21 of the Act reads thus:-

"21. Closing of shops for the preservation of public peace - (1) The District Magistrate may, by notice in writing to the licensee require that any shops in which any intoxicant is sold shall be closed at such times and for such period as he may think necessary for the preservation of the public peace.

(2) If any riot or any unlawful assembly is apprehended or occurs in the vicinity of any such shop, any Magistrate or any Police Officer not below the rank of a Sub Inspector, who is present, may require such shop to be kept closed for such period as he may think necessary :

Provided that where a riot or unlawful assembly so occurs, the licensee shall in the absence of such Magistrate or Officer, close the shop without any order and keep it closed during the continuance of such riot or unlawful assembly."

Sub-section (1) of Section 21 authorises the District Magistrate to prohibit the sale of intoxicant at such time and for such period as he may think necessary for the preservation of the public peace.

31. The Supreme Court while explaining the scope of public order found in Entry 1 of List II of VII Schedule has held that entry includes ''public safety'' in relation to the maintenance of public order and ''public order'' is synonymous with public peace, safety and tranquility. For conduct of election of State Legislative Assembly vend of liquor was stopped from 5 a.m. on the morning of 3-1-1983 to mid-night of 5-1-1983 vide Annexure-A 1 to A12 (Writ Petitions Nos. 1630 to 1641 of 1983). Certain shops of Ramanagaram, Channapatna, Bangalore South, Anekal Taluks adjoining of Kanakapura Taluk were ordered to be closed from 5 a.m. on. 13-5-1983 to mid-night of 15-5-1983 for conduct of bye-election in Kanakapura Assembly Constituency. The averment in Writ Petition is that for the conduct of election to local authorities and Agricultural Produce Market Committees vend of liquor was prohibited likewise. The plea of the petitioners is successive closure of shops for the said purpose has resulted in substantial injury and loss and are entitled to be reimbursed.

32. Prevention of vend of liquor on election day and its eve is in vogue ever since the promulgation of Representation, of People Act, 1951. Election was being conducted once in five years simultaneously both to parliament and State Legislature. Prevention of vend of liquor for two or three days once in five years that too when the highest offer was in the order of thousands only could not be made much of by the Excise Contractors. Instead, election to the Parliament and the State Legislature is conducted at different times and in between bye-elections and the election to local authorities also intervene. As a result, the closure of the shops during the period of contract (tenure) is in the order of 10 to 12 days. Closure of shops for a period of 10 to 12 days i.e., l/3rd of a month during lease period has given rise to attack the validity of these notifications. The

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averment to sustain the validity of the notification in the statement of objections filed on behalf of the State reads thus :

"The orders are all based on the information received by them and the previous experience. It was noticed that during the elections, anti-social elements will be indulging in supply of intoxicating liquors to various persons and rowdy?s and because of that, there were scuffles and serious breach of peace. Consequently, there were threats offered to voters, the candidates, the officials and the agents of the candidates and therefore, it is undesirable that any intoxicant is sold during that period. To ensure that elections are held in a calm and peaceful atmosphere, the District Magistrates have felt that the liquor shops should be ordered to be closed. This is to ensure the preservation of public peace."

These Notifications have been issued at the instance of the Election Commission to declare those days as ''dry'' days as indicated in the preamble of the Notification. The Election Commission as repository of power of superintendence can issue such directions or orders as are required for con-duct of fair election and for the purpose of safeguarding the purity of election. In order to achieve this object, the State if it had carried on the business by itself without entrusting it to contractors, like petitioners, was bound to stop vend of liquor. A purchaser of privilege of vend of liquor from State cannot claim better rights than the State itself. It is unending fact that the State is under an obligation to take all precautionary measures for proper conduct of the election. For the purpose of conduct of fair election and to maintain purity, if the District Magistrates thought fit to order closure of shops, it cannot be characterised as arbitrary or illegal. The occurrence of election to State Legislature or bye - election, if any, and to local authorities in a particular year is only a coincidence. In certain years there may be no elections at all and in certain years there may be more than one election. No one can predict the eventualities. Occurrence of more than one election during an excise year will not invalidate notification as arbitrary or capricious. The challenge to most of the notification is after the event is over. Assuming for the sake of arguments, notifications are invalid, mischief done cannot be undone. So much so, the stress is on the latter aspect claiming damages or pro rata deduction in the rental. There is no merit in the challenge made to these Notifications, hence first contention is negatived.

33. One significant factor on the second aspect is that Notifications issued ordering closure of shops for maintenance of law and order on account of communal disturbance or group clashes in areas mentioned in the notifications are neither questioned nor grounds on which they were ordered to be closed are disputed. Thus, it has become unnecessary to deal with the merit or demerit, existence or non-existence, of the ground/s on which vend of liquor was ordered to be closed for maintenance of public peace.

34. By sub-section (2) of Section 21 any Magistrate or any Police Officer not below the rank of a Sub-Inspector, present, may require a shop to be kept closed for such period if any riot or any unlawful assembly is apprehended or occurs in

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the vicinity of any shop. The proviso enables the licensee to close the shop under like situation.

35. The responsibility or the obligation of the licensee to keep the shop open as per the terms of the licence gets absolved to the extent mentioned in the proviso. A Magistrate or a Police Officer is authorised to order the closure of the shop in case of riot, unlawful assembly in the vicinity of such shop for maintenance of law and order. No one caw assert that whatever may be the situation, environment, he must be permitted to carry on the business as per the terms of the contract even at the risk of his life let alone others. Liquor laws are primarily for the benefit of community and not for the benefit of liquor dealers. The State will be well within its competence or jurisdiction to get shops closed either by an order of the Magistrate or an officer not below the rank of a Sub-Inspector for the purpose of maintaining law and order. It cannot be predicted that it has no bearing whatsoever regarding maintenance of public order. It is not possible to enumerate exhaustively the circumstances under which a Magistrate may order closure of shops for the purpose of preservation of public peace.

Notifications issued by the District Magistrates of Mandya, Bijapur and other places ordering closure of vend of liquor themselves speak of the existence of the situation. In the interest of public order, State may impose such restrictions as are permissible to prevent incitement to commit serious offences which may lead to breach of public order or commission of any offence, enraging feeling of enmity or hatred between different sections of the community. Closure of liquor shops during the period mentioned in the notifications are necessitated in the interest of general public, public order and the like.

36. The fundamental principle is that when a right is created by a statute, the exercise of that right is subject to the terms and conditions imposed by the very statute. Per-sons who have purchased privilege of vend of liquor are subjected to the terms and conditions imposed by the statute

37. Reference to a passage in ''Legal Control of Government'' by Bernard Schwartz and H.W.R. Wade, at page-115, would be of some help to decide the rights of the parties, which reads thus :

''The next step was to say that in a ''privilege'' case, the individual was entitled to only those procedures laid down in the relevant statute. When one ''takes this privilege he does so subject to the provisions of the statutes under which it is granted ; and if these statutes say or fairly imply that he is entitled to no notice or hearing before revocation, he cannot be heard to complain if he is given none.''

XX XX XX XX A welfare case expressed the idea even more bluntly: ''in accepting charity, the appellant has consented to the provisions of the law under which the charity is bestowed.''

XX XX Xx XX 38. The notification proposing disposal of the privilege states that auction is subject to restrictions imposed under the Act. The express stipulation

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in the lease deed is that the lease is subject to the provisions of the Act. Specific reference be made to condition No. 2 of the Second Schedule of the agreement which states "excepting on the days on which the shops are closed in accordance with Section 21 of the Karnataka Excise Act, 1965, the Lessee shall keep the shops open every day during such hours as the Excise Commissioner may fix."

39. Unsuccessful attempts having been made to assail the validity of the rental charged as a duty, fee or a tax, now, the relief is restricted disputing the extent of liability for the period during which they were prevented from carrying on vend of liquor, pursuant to notifications issued u/s 21. Petitioners are not disputing their liability on the ground that the contract has become frustrated, but what they contend is that on account of supervening circumstances which were not in contemplation of either parties; contract had become impossible of performance during the said period, and temporary suspension of business absolve their liability to pay the rental pro rata. Further, they contended that Government cannot get enriched by collecting the rental for this period, and such collection is opposed to all canons, equity and good conscience. It is asserted that the closure of the shop/s for unforeseen events has caused them substantial loss re- in payment of rental for the period during which no business was done, maintenance of establishment apart from loss of normal expectation of profit. The sum and substance of their contention is that curtailment of vend of liquor, whatever may be the cause, would entitle them for pro rata remission.

40. Respondents vehemently refute all these contentions. Sri M.R. Achar, Learned High Court Government Advocate, submitted that persons who have offered bids with full know-ledge of terms and conditions attached to auction cannot be permitted to wriggle out of their voluntarily incurred contractual obligation by invoking Article 226 of the Constitution of India.

41. To resolve this controversy reference to salient provisions is necessary.

Sub-Section (1) of Section 29 enumerates the grounds on which the license can be cancelled or suspended. As per sub-section (3) of Section 29 licensee will not be entitled to claim compensation for its cancellation or suspension nor refund of any fee paid or deposit made in respect thereof. Sub-section (1) of Section 30 enables an authority to withdraw a licence for cause other than those specified in Section 29 on the expiry of not less than 30 days notice in writing of its intention to do so. Sub-section (2) of Section 30 provides for refund of proportionate licence fee to the unexpired portion of the term of licence. Rule 23 states that when an Excise Officer either suo motu or on the application of a licensee directs the closure or shifting of a shop from one place to another is not entitled to any compensation on account of such closure or shifting. Rule 24 of the General Condition Rules states that the licensee is not entitled to any compensation of any kind in case license is cancelled during the currency of the licence. According to the submission of the learned Counsel for the petitioners, the State Legislature, wherever they intended denial of compensation have specifically so stated and in the absence of specific denial for the closure of the shops pursuant

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to the notification issued u/s 21 of the Act they are entitled to pro rata deduction in the monthly rentals. It is submitted that there is no stipulation in the contract for payment of the rental for the period of closure.

42. Counsel submit that as per Clause 23 of the notification governing conditions of auction except prohibiting sale of, liquor on ''Gandhi Jayanthi Day'' (2nd of October) no other condition is imposed for sale for the rest of 364 days, If for any unforeseen events shops are ordered to be closed or vend of liquor prevented during the tenure of the lease other than 2nd of October, their liability to pay rental should be reduced pro rata There is no mention regarding payment or non-payment of rental for the period during which shops are ordered to be closed pursuant to notification issued u/s 21. But purchase of privilege of vend of liquor is itself subject to closure of shops pursuant to notification issued u/s 21. Section 17 which provides for grant of privilege and subsequent provisions which impose certain obligations on lessees must be read together to determine the nature and extent of right conveyed through medium of auction. Section 17 read with Section 21 makes it manifest that the privilege purchased is subject to restriction that may be imposed for vend of liquor in pursuance of notifications under latter section. Section 21 cannot be dissociated for deciding their liabilities. Vend of liquor is permitted on all days except the days on which shops are ordered to be closed pursuant to Notification issued u/s 21 and 2nd of October.

43. Sri Jagannatha Shetty, Learned Counsel mentioned that Writ Petition filed challenging an order directing closure on ''Gandhi Jayanthi Day'' was withdrawn at the instance of the authorities. In order to obviate this difficulty a specific clause is introduced in condition governing auction expressly stipulating that vend of liquor is prohibited on the 2nd of October, but for which vend of liquor could not have been prevented by means of a notification issued u/s 21 of the Act. The insistence for closure on 2nd of October is to honour the sentiments of the ''Father of the Nation''. Condition No. 2 of Schedule II of the lease deed stipulates that vend of liquor is permissible on all days except the days on which shops are ordered to be closed by means of a notification issued u/s 21. The claim for pro ma deduction is unsustainable when they have not qualified their obligation. If the petitioners have chosen to run the risk, it is not open for them to dispute their contractual obligation. Bidders offering bid with full knowledge of terms and conditions attached to auction cannot be permitted to wriggle out of their voluntarily incurred contractual obligations. The petitioners are estopped from disputing their liability having agreed to pay lumpsum as consideration for parting with the privilege.

44. Liquor laws are meant for the protection of the community and not for the benefit of liquor dealers. "The power of control is an incident of the Society''s right to self-protection and it rests upon the right of the State to care for health, morals and welfare of the people." Regulation of sale or manufacture of liquor is left to the discretion of the authority charged with duty. Except the monthly rentals payable no separate licence fee is charged for vend of liquor in retail in

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shops specified in the area. No rate is prescribed for sale of toddy or arrack. The specific averment in the statement of objection is that some of the contractors of the previous year, of places where shops were ordered to be closed on account of unforeseen events, pursuant to a notification issued u/s 21 of the Act, have offered highest bids for succeeding years, for the same shops and that would indicate their prosperity despite restriction. Their own conduct belie the plea that they have sustained or incurred loss and Government intends to get enriched unjustly. The submission of respondents is that having regard to the facts and circumstances of the case question of recouping loss will not arise.

45. Notifications issued u/s 21 have not made the contract wholly illegal or impossible of performance. Petitioners have carried on their business as agreed except for the period interrupted. The true nature of the charge which the Government levies in such cases is that it is a price which the State charges as a consideration for parting with its privileges in favour of the licensee and the consideration agreed to be paid is not based on number of hours or the number of days or the quantity of sale effected.

46. The principles enunciated by the Supreme Court explaining its true character and the nature of the consideration in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, ; Pannalal v. State of Rajasthan "; and State of Haryana and others v. Jageram and others AIR 1980 SC 2018 set at rest the controversy.

In Har Shankar''s case the Supreme Court states thus :

"The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all 5. Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits."

In Pannalal''s case the Supreme Court has stated at para 27 thus :

"There is no levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lumpsum mentioned in the licences for these reasons. First, the licences were granted to the appellants after offer and acceptance or by accepting their tenders or auction bid. The appellants stipulated to pay lumpsum amounts as the price for the exclusive privilege of vending country liquor, The appellants agreed to pay what they considered to be equivalent to the value of the right........what the liquor contractors pay in consideration of the licence is a payment for the exclusive privilege for selling country liquor....Third, the stipulated amounts payable by the appellants have relation only to what the appellants foresaw they could recoup by the sale of country liquor from the liquor shops licensed to them."

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Last in the series is State of Haryana, where the Supreme Court has stated thus :

"It was observed in Har Shankar that the main focus of controversy on the merits of the matter related to the power of the Government to levy and realise large licence fees either through the medium of auctions or on scales fixed under the rules. After referring to the long history of liquor licensing and after considering the various provisions of Punjab Excise Act 1914 and the Rules framed thereunder, this Court held that since rights in regard to the manufacture and sale of intoxicants are vested in the State, it is open to it to part with those rights for consideration; that the amounts which are charged to the licensees who offer their bids in auction sales of , vends are neither in the nature of a tax nor in the nature of excise duty; and that the true nature of the charge which the Government levies in such cases is that it is a price which the State charges as a consideration for parting with its privileges in favour of the licensee. Such a charge is a normal incident of a trading or business transaction. What the State could itself do in the exercise of its privilege, it authorises another to do by charging a price for parting with its privilege."

Unforeseen events which prevented vend of liquor will not alter the character of price paid/agreed to be paid for purchase of privilege. The petitioners have stipulated to pay lumpsum amounts as the price for exclusive privilege for vend of liquor. The amount agreed to be paid is considered as the value of that right and will not depend upon loss or profit. Licensee can enjoy the privilege so long as the conditions and restrictions imposed are complied with.

Terms of contract indicate that they were aware of such eventualities. Persons who entered into a contract with eyes wide open must accept the burden of the contract along with its benefits. The dictum of Lord Atkinson in Matthey v. Curling 1922 (2) AC. 180 @ 234(M) which reads thus :

"A person who expressly contracts absolutely to do a thing not naturally impossible is not excused for non-performance because of being prevented by the act of God or King''s enemies.....or ''vis major'' "

has been approved by the Supreme Court in Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another,

47. Last aspect of the matter is ''implied term of the contract'' - principles on which excuse for payment of rental is sought to be sustained is that in case performance becomes impossible on account of physical causes or legal prohibition liability gets exonerated. Parties at the time of entering into contract have foreseen supervening events as probable - and have expressly provided that vend of liquor is subject to orders/direction that may be issued u/s 21 of the Act including closure by the licensee himself, under circumstances envisaged in proviso. If licensee closes the shop or stops vend of liquor under circumstances referred to in the proviso can he disown his liability for the period of closure? The express term gives no scope to contend that their liability to pay the rental ceases for the period during which vend of liquor was prevented. In this context,

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it is useful to refer to the decision of the Court of appeal in Leiston Gas Company v. Leiston-Cum-Sizewell Urban District Council 1916 (2) KB 428, in which a distinction between an event which causes temporary 8. 1922 (2) AC. 180 @ 234(M) 9 Satyabrata Ghose Vs. Mugneeram Bangur and Co. and Another, interference with the contract and an event which renders the performance of the contract impossible, is vividly explained. In the said case, plaintiffs had contracted to light their district for a period of five years and defendant had agreed to pay the fixed sum for a lamp per annum, pay-able in four equal quarterly instalments. The performance of the contract was interrupted for some time on account of an order made by the competent military authority under the Defence of the Realm Regulations, 1914. The charges claimed by the plaintiffs as stipulated were resisted by the defendants on the ground of failure of consideration.

"No doubt, the public lighting is for the time in abeyance, but this is not in my opinion enough to avoid altogether such a contract as the pre-sent with the result of relieving the defendants from making a payment a large part of which at all events must have been earned. I think the inability to enjoy all they pay for is a loss which must fall on the defendants.

xxx xxx xxx They make no express provision for any reduction from the quarterly payment in case of failure to light from the causes beyond the Gas Company''s control; nor do they say whether the Company are to suffer a reduction of payment as well as damages in the case of failure to light from causes within their control.

xxx xxx xxx There cannot be an apportionment of the quarter''s payments according to the time during which lighted gas is supplied."

The petitioners liability to pay the rental cannot be apportioned depending upon hours of sale, number of days on which liquor was permitted to be sold and/or quantity of liquor sold. Contract is indivisible and for the entire area specified. It cannot be split into area-wise/period-wise. They are not entitled to claim pro rata deduction. If accepted Court may have to embark upon to modify the term of the contract as well as provision providing for grant of privileges which is impermissible. Petitioners cannot be permitted to import into the contract a stipulation to the effect that their liability ceases if vend of liquor is prevented on account of unforeseen events. It is well settled that, where there is a positive contract to do a thing, the Contractor must perform it or pay damages, although in consequence of unforeseen events, the performance of contract has become unexpectedly burden, some or even impossible. Second contention is also devoid of merit.

48. Sri Santhosh Hegde, Learned Counsel for the petitioners, relying on the latest decisions of the Andhra Pradesh High Court in P. Manohar Lingam and others v. Superintendent of Excise, Hyderabad and another, W.P. No. 538 of 1980 DD 18-9-1980 (Andhra Pradesh) and of the Kerala High Court in Isaac Peter v.

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The Assistant Excise Commissioner, Calicut and Ors., O.P. No.2325 of 1981-I DD 14-11-1983 (Kerala) submitted that the decisions of the Supreme Court referred to above are distinguish-able on facts and are not relevant for deciding the cases on hand. The decision of the Andhra Pradesh High Court solely rests on Rule 42 of the Andhra Pradesh Excise (Arrack and Toddy Licences General Conditions) Rules, 1969 which provides for refund of proportionate licence fee and deposit, if any, without the claim for compensation. In the absence of a similar provision either in the Act or in the Rules pro-viding for refund of the amount paid towards purchase of privilege, the decision of Andhra Pradesh High Court has no relevance. In the decision of High Court of Kerala there is neither a reference to rights and liabilities of the licensee vis-a-vis the State having due regard to the nature of the trade nor the provisions of the Act and the Rules nor the terms of the contract governing conditions on which the State parted with its privilege. Principles enunciated by the Supreme Court regarding the incidence of the trade and the nature of the premium paid for parting with the privilege, extracted above, do not cease to be binding on this Court merely because facts involved in those cases are different 11. W.P. No. 538 of 1980 DD 18-9-1980 (Andhra Pradesh) 12. O.P.No.2325 of 1981-I DD 14-11-1983 (Kerala) from the facts on hand. Even otherwise, the decision turned upon sub-rule (1) of Rule 8 of Abkari Rules read with Condition No. 31 which enabled the licensee to obtain in excess of monthly quota which necessarily indicates that offer of bid had nexus with the quota undertaken to supply and for failure to supply the quota petitioners claimed remission which was granted by the High Court. Offer in the instant case is not edged with such condition. Hence, the said decision has no bearing.

49. Excise Revenue is a source for State Exchequer. The Supreme Court has stated in Har Shankar''s case thus :

"The liquor traffic is not something which is licensed for the purpose of promoting it. Indeed, licence fees may be exacted in amounts intended to discourage participation in the business. The Courts have quite gene-rally refused to hold that the licence fee imposed, merely because it is large is a tax, where the object is to control, regulation and restrict, and not to encourage the liquor traffic, the revenue being the result of the system and not the motive for its adoption .....The higher the fee imposed for a licence, it is some times said, the better regulation, as the effect of a high fee is to keep out of the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it."

Viewed in the light of the above principles, excise revenue is raised to augment the resources of the State, there is no substance in the contention that collection of rental for the said period is unjust, arbitrary and / or State intends to get itself unjustly enriched.

50. Since there is no merit in any one of the contentions urged on behalf of the petitioners, Writ Petitions are liable to be dismissed, and are accordingly dismissed. Rule discharged in all these cases.

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