(1995) 06 KAR CK 0047

In the Karnataka High Court

Case No : Writ Petition No. 2472 of 1995 connected with Writ Petition No''s. 21618 to 21621 of 1995

Bhanu Liquor Shop APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 20-06-1995

Acts Referred:
Karnataka Excise Act, 1965 — Section 23 (c), 71

Citation : (2000) 5 KarLJ 512

Hon'ble Judges : R.V. Raveendran, J

Bench : Single Bench

Advocate : Sri A. Jagannatha Shetty and Sri S.V. Subramanyam, for the Appellant; Sri H. Rangavithalachar, A.G.A., for the Respondent

Judgement

1. Petitioners in these petitions are licensees holding CL. 2 and CL. 9 licences issued under the Karnataka Excise (Sale of Indian and Foreign Liquor) Rules, 1968 (hereinafter referred to as ''the rules''). The licences are granted for the duration of the excise year, that is from the 1st July of a year to the 30th June of the following year. Every licensee is required to make a fresh application for licence every year. Rule 4 provides how an application for licence should be made. Sub-rule (1) requires the applicant to make an application to the Deputy Commissioner of the District if the sale is within a District or to the Excise Commissioner, if the sale is more than one District in that behalf. Sub-rule (2) gives the particulars to be contained in an application for licence. Sub-rule (3) of Rule 4 which has been introduced with effect from 1-7-1992 provides: "The application shall be accompanied by up-to-date Sale Tax Clearance Certificate issued by the Department of Commercial Taxes" (''said sub-rule'' for short).

2. Rule 4-A provides that the Excise Commissioner or Deputy Commissioner shall register every application in the prescribed register; and if the application does not contain the prescribed particulars or otherwise not in order, such applications shall be returned to the applicant for resubmission under a written endorsement;

and if the applicant fails to resubmit such application within fifteen days from the date of receipt, such application shall be deemed to have been rejected. Hence if the application for grant of licence is not accompanied by a Sales Tax Clear- ance Certificate issued by the Department of Commercial Taxes, it will be considered as an application which is not in order and unless the certificate is obtained and produced, it is liable to be rejected, even though the application is otherwise in order. Petitioners have therefore filed these petitions for quashing sub-rule (3) of Rule 4 and seeking a declaration that the provisions of the Excise Act do not warrant requirement of production of Sales Tax Clearance Certificate and a direction to the respondents not to insist on production of Sales Tax Clearance Certificate with their applications.

3. The said rules were made by the State Government in exercise of its powers u/ s 71 of the Excise Act, 1965 (''Act'' for short). Sub-section (1) of Section 71 provides that the State Government may, by notification and after previous publication, make rules to carry out the purposes of the said Act. Sub-section (2) enumerates the matters relating to which State Government may make rules without prejudice to the generality of sub-section (1). Item (0 of sub-section (2) enables the State Government to prescribe the procedure to be followed and the matters to be ascertained before any licence for wholesale or retail sale of intoxicants, is granted for any locality. The petitioners contend that the making of the said sub-rule by the State Government is beyond its rule making power and therefore the said sub-rule is ultra vires the provisions of the Karnataka Excise Act, 1965 as there is no nexus between the requirement introduced by the said sub-rule and object and purpose of the Excise Act. The responsibility of collecting sales tax is that of the authorities under the Karnataka Sales Tax Act and the machinery under the Karnataka Excise Act cannot be used indirectly to collect sales tax in the absence of an enabling provision in the Karnataka Sales Tax Act and a corresponding provision in the Karnataka Excise Act. It is next contended that the term ''Sales Tax Clearance Certificate'' has not been defined either in the Karnataka Sales Tax Act or in the Karnataka Excise Act or under any rules framed under the said statutes. There is no provisions in the Karnataka Sales Tax Act for grant of such certificate nor any indication as to, who should grant the certificate and in what manner and in what circumstances such a certificate should be granted. Hence requirement to produce such a certificate, in requiring performance of something not contemplated in law.

4. Learned Counsel appearing for the petitioners submitted that the matter is covered by two decisions of this Court, that is, the Division Bench decision in Srinivasa Prasanna Chitra Mandira v State of Karnataka, and the decision of a learned Single Judge of this Court in N. Ramesh v District Magistrate, Bangalore District (Urban). The said two decisions considered the validity of Rule 85(iii) of the Karnataka Cinema (Regulation) Rules, 1971, a provision similar to Rule 4(3) with which we are concerned in these cases. A detailed reference to the said decisions is necessary. The Karnataka Cinemas (Regulation) Act, 1964 is an Act to provide for regulating exhibition by means of cinematographs and the

licensing of places in which cinematograph films are exhibited. Section 19 of the said Act relates to powers to make rules. Sub-section (1) provides the State Government may by notification, after previous publication, make rules to carry out the purpose of that Act. Sub-section (2) enumerates the matters relating to which the State Government may make rules without prejudice to the generality of the power under subsection. The matters enumerated include the particulars to be given in an application for licence and the terms, conditions and restrictions subject to which a licence may be granted under the Act. The Karnataka Cinemas (Regulation) Rules, 1971 were framed in exercise of the powers u/s 19 of the said Cinemas (Regulation) Act. Rule 85 of the said rules provided that every application for the regrant of a licence shall be made to the licensing authority one month before the expiry of the licence and shall be accompanied by several certificates referred to therein. By an amendment which came into force on 28-8-1985, sub-clause (iii) was added to Rule 85(1). In view of the said amendment, it became necessary for the applicant to produce with the application, in addition to the Certificates already specified, "an Entertainment Tax Clearance Certificate issued by the Competent Authority". The validity of said clause (iii) of Rule 85(1) was challenged in Srinivasa Prasanna Chitra Mandira''s case, supra. A Division Bench of this Court after considering the said clause held that the purpose of Cinemas (Regulation) Act was to see that proper place was chosen for exhibition which should be licensed and proper provisions are made to safeguard the interest of the persons who visit the theatre and to ensure that their safety is not jeopardised by improper construction and to provide facilities to the public who use the theatres. But the Act nowhere provided for levy and collection of entertainment tax or tax on exhibition of cinematograph film. Therefore, levy and collection of entertainment tax was not one of the purpose of the Act. And the Act also did not contemplate that a licence holder should not be a tax defaulter for grant or regrant of licence. The Court then found that levy and collection of entertainment tax was under the provisions of Karnataka Entertainment Tax Act, 1958 and the said Act did not provide that a licensee under the Cinemas (Regulation) Act should not be a defaulter before seeking a regrant of licence under the Cinemas (Regulation) Act. This Court ultimately held that if levy and collection of entertainment tax was not one of the purposes sought to be achieved under the Cinemas (Regulation) Act, then certainly the State Government could not make rules governing that aspect of the matter u/s 19 of the Cinemas (Regulation) Act. In that view of the matter, clause (iii) of Rule 85(1) was held to be beyond the scope of the Cinemas (Regulation) Act and was declared illegal, unenforceable and was struck down. This was followed by a learned Single Judge in Ramesh''s case, supra, holding that in view of the decision in Srinivasa Prasanna Chitra Mandira''s case, supra, holding that Rule 85(1)(iii) had been made without authority and beyond the rule making power of the State Government, an applicant could not in law, be required to produce an Entertainment Tax Clearance Certificate as a condition for submitting or considering an application for grant or regrant of licence.

5. The case on hand is similar. The provisions of Section 19 of the Cinemas (Regulation) Act are similar to the provisions of Section 71 of the Karnataka Excise Act. Requirement that was introduced under Rule 85(1)(iii) of cinemas (Regulation) Rules is also similar to the requirement that is introduced by Rule 4(3) of the rules with which we are concerned. While under Cinemas (Regulation) Rules, what was required was an Entertainment Tax Clearance Certificate for regrant of a Cinema licence, what is required under Rule 4(3) is a Sales Tax Clearance Certificate, for grant of a excise licence. The principles and tests that were applied in Srinivasa Prasanna Chitra Mandira''s case, supra, apply equally in this case also. Firstly, levy and collection of sales tax is not one of the purposes sought to be achieved under the Excise Act. Secondly, the Karnataka Sales Tax Act does not provide that a licence holder under the Excise Act should not be a defaulter of sales tax for the purpose of grant of licence under the Excise Act. Thirdly, neither the Sales Tax Act nor the Excise Act define what is a Sales Tax Clearance Certificate. Hence, if the principles laid down in Srinivasa Prasanna Chitra Mandira''s case, supra, are applied, there can be no doubt that Rule 4(3) is beyond the rule making power of the State Government and consequently Rule 4(3) will have to be struck down.

6. But Sri Rangavithalachar, the learned Additional Government Advocate submitted that the decision in Srinivasa Prasanna Chitra Mandira''s case, supra, cannot be applied to test the validity of Rule 4(3). He contended that Rule 85(1)(iii) of Cinema (Regulation) Rules considered in the said decision, was made under the Cinemas (Regulation) Act, which was only a regulatory legislation; whereas Rule 4(3) has been made under the Excise Act, which is not only a regulatory legislation, but is also a fiscal legislation. He contended that while the objects of Cinemas (Regulation) Act did not contemplate collection and levy of entertainment tax as one of its purposes, levy and collection of excise revenue (of which sales tax on sale of liquor/intoxicants was a part) was one of the purposes of the Excise Act. Hence, collection of sales tax was one of the objects of the Excise Act; and consequently in exercise of its powers under the Excise Act, the State Government could make a rule providing for production of a Sales Tax Clearance Certificate.

7. The learned Additional Government Advocate first invited my attention to the preamble to the Excise Act which reads as follows:

"Whereas it is expedient to provide for a uniform law relating to the production, manufacture, possession, import, export, transport, purchase and sale of liquor and intoxicating drugs and the levy of duties of excise thereon, in the State of Karnataka, and for certain other matters hereinafter appearing".

He next referred to Section 63 of the Excise Act which provides for recovery of Government dues, including excise revenue or amounts due to Government on account of any contract relating to excise revenue, as if they were arrears of land revenue. ''Excise revenue'' is defined u/s 2(11) as "revenue derived or derivable from any duty, fee, tax, rent, fine or confiscation imposed or ordered under the provisions of this Act or any other law for the time being in force, relating to liquor or intoxicating drugs. "Relying on the preamble and Section 63, he contended that recovery and collection of excise revenue is one of the objects and purposes of the Act and having regard to the definition of excise revenue even sales tax would be excise revenue. It is contended that as ''excise revenue'' includes all revenue derivable from any duty, fee, tax, rent, fine or confiscation imposed under the provisions of the Excise Act or any other law for the time being in force, sales tax was a excise revenue, as it was a revenue derivable by tax on sale of liquor. He relied on the following passage from the decision of this Court in the case of Prakash T. v State of Karnataka and Others:

"Amount payable as duty levied at the time of manufacture or production, tax on sale of liquor, fee or rental collected for parting with the monopoly of the State -- are all considered as excise revenue, non-payment of which is called as Excise due. ''Due'' as defined in Black''s Law Dictionary, Fifth Edition "always imports a fixed and settled obligation" or ''liability'', ''debt enforceable''. ''Excise revenue'' as defined includes rental, ''excise due'' is a compendious term including ''excise duty'', ''excise revenue'' and any liability pertaining to excise. Therefore, the shop rental due cannot be anything de hors ''excise duty''".

He submitted that the intention of Rule 4(3) was not to recover sales tax, but to ensure that an applicant for excise licence was not a defaulter in paying sales tax which was part of excise revenue, recovery of which was one of the objects of the Excise Act. If so, the power to make such a rule was available u/s 71(1) of the Excise Act and therefore Rule 4(3) was valid.

8. Therefore the question for examination would be whether the term ''excise revenue'' takes into its fold, sales tax on sale of liquor. If the answer is in the negative, argument of respondents will have to be rejected and the applicability of the decision in Srinivasa Prasanna Chitra Mandira''s case, supra, will not be open to question. On the other hand, if the answer is in the positive, then the decision in Srinivasa Prasanna Chitra Mandira''s case, supra, may not apply. While learned Additional Government Advocate, as already noted, argued that it includes sales tax on sale of liquor, learned Counsel for the petitioners contend that ''excise revenue'' does not include sales tax on liquor, levied under the Sales Tax Act.

9. Except in Section 63 which provides for recovery of excise revenue, as land revenue, the Excise Act does not refer to the term ''excise revenue'' anywhere else. It is admitted that ''sales tax'' and ''excise duty'' are different. A careful reading of Section 2(11) shows that if sales tax should be included in excise revenue, then it should be a tax that is imposed (a) under the provisions of Excise Act; or (b) any other law relating to liquor or intoxicating drugs. A ''tax'' can thus become excise revenue only if it is a tax that is imposed under Excise Act or any other enactment relating to liquor or intoxicating drugs. That important requirement is absent in the case of sales tax. For example, a ''tax'' which can be referred to as part of excise revenue is the tax that can be levied

on each tree from which toddy is drawn, u/s 23(c) of the Excise Act. Sales tax is not a tax that is imposed under the Excise Act. Sales tax is imposed under the Karnataka Sales Tax Act, which is certainly not a law relating to liquor or intoxicating drugs. Thus, sales tax cannot be considered as excise revenue.

10. Distinction between revenue from excise and revenue from sales tax has always been well-recognised. In re Sea Customs Act (1878), Section 20(2), Special Reference No. 1 of 1962, the Supreme Court held that while the taxable event in the case of excise duty is the manufacture of goods, the taxable event in the case of goods sold, is the act of sale; and thus even though both excise duty and sales tax are levied with reference to goods, the two are very different imposts, as one being the imposition on the act of manufacture or production, the other being imposition on the act of sale; and while excise duty partakes the nature of an indirect tax, sales tax is a direct tax. This was reiterated in Shinde Brothers v Deputy Commissioner, Raichur. Thus the contention of the respondent that sales tax leviable under the Sales Tax Act on sale of liquor, has to be considered as excise revenue, is rejected. It is not excise revenue. Consequently, neither recovery of sales tax nor ensuring that an applicant is a defaulter in sales tax is an object or purpose sought to be achieved by the Excise Act. It follows therefore, that Rule 4(3) is beyond the rule making authority of the State Government.

11. The decision of this Couri, in Prakash''s case, supra, is of no assistance to the respondents. The passage relied on, was with reference to the definition of the term ''excise revenue'' u/s 2(11) and the words ''tax on sale of liquor'' used in the decision, which is extracted in para 7 above merely refers to any tax leviable under the Excise Act or any other law relating to liquor and intoxicating drugs, and not to sales tax under the Karnataka Sales Tax Act. It should further be noticed that the question whether ''sales tax'' was part of ''excise revenue'' did not arise for consideration in that decision. This Court was considering the term ''excise dues'' with reference to Rule 7(iii) of Karnataka Excise (Lease of the Right of Retail Vend of Liquor) Rules, 1969 which disqualified a person from submitting a tender, if he had not paid the arrears of excise dues or sales tax in respect of liquor sold by him. In fact, the said Rule 7(iii) was also not under challenge in that case. The Court was examining a contention that the said rule was not mandatory but directory. The Court found ''excise revenue'' when remained unpaid becomes ''excise dues''. If the said decision is interpreted as laying down that sales tax under the Sales Tax Act is part of ''excise revenue'', which it does not, the said decision will be contrary to the decisions of the Supreme Court in Sea Customs case, supra, Shinde''s case, supra, and the subsequent decision of the Supreme Court in the case of State of Mysore and Others v D. Cawasji and Company and Others .

It is of some relevance to note that in Rule 7(iii) the State has used sales tax as different from excise dues, making it clear that even the State all along considered sales tax revenue as different from excise revenue.

12. The learned Additional Government Advocate next contended that having regard to Section 71(1)(f), the State Government could make rules prescribing the procedure to be followed and the matters to be ascertained, before any licence for sale is granted for any locality; and Rule 4(3) was a matter relating to procedure to be followed and a matter to be ascertained before a licence could be granted. While the power and authority of the State Government to prescribe the procedure to be followed for granting a licence is not in dispute, the question is whether requirement regarding production of Sales Tax Clearance Certificate can be said to be reasonable and relevant. This question is covered by the decision in Srinivasa Prasanna Chitra Mandira''s case, supra, where also the State Government had the power to prescribe the particulars to be given in an application for licence and the terms, conditions and restrictions subject to which a licence may be granted.

13. For the reasons stated above, these petitions are allowed and it is declared that Rule 4(3) of the Rules is beyond the rule making power of the State Government and it is unenforceable. Rule 4(3) of the said rules is hereby struck down. Consequently, the authorities enforcing excise laws will not be entitled to insist on production of Sales Tax Clearance Certificate as a condition for accepting an application or for granting licence under the Karnataka Excise (Sale of Indian and Foreign Liquor) Rules, 1968.