

(1989) 11 DEL CK 0008

In the Delhi High Court

Case No : Criminal Writ Appeal No. 1244 of 1987

Embassy Restaurant and Others

APPELLANT

Vs

Delhi Administration and Others

RESPONDENT

Date of Decision : 17-11-1989

Acts Referred:

Delhi Liquor Licence Rules, 1976 — Rule 18

Citation : (1990) 40 DLT 286 : (1990) 18 DRJ 51 : (1990) RLR 52

Hon'ble Judges : S.B. Wad, J

Bench : Single Bench

Advocate : D.D. Thakur, P.R. Agarwal, Rajeev Sharma, A.S. Chandhiok, D.Mishra and Shivpriya Kundra, for the Appellant;

Judgement

S.B. Wad, J.

(1) The petitioners. Embassy, Gaylord ,Quality, Standards and Volga are well known restaurants running at Connaught Place, New Delhi. They have challenged the constitutional "validity of rule 18 of the Delhi Liquor Licensing Rules, 1976 which provides that a license for liquor in form L-5 for the retail vend of foreign liquor in a Bar may only be granted to the holders of a license in form L-3 for the retail vend of foreign liquor in Hotel or Restaurant. The purport of the impugned order is that Indian made foreign liquor can be sold in Restaurants which form part of a hotel but cannot be sold in restaurants, which are running as independent restaurants, not being a pan of any hotel. The petitioners contend that rule 18 is discriminatory and violates article 14 of the Constitution of India. These petitions were heard by the bench consisting S.S. Chadha, and Y.K. Sabharwal, JJ. Justice Chadha held that rule 18 was unconstitutional being vocative of article 14 while Justice Sabharwal held that rule 18 was free from the said vice of discrimination and was valid, in view of this difference of opinion the reference is made to me as a third Judge.

(2) Both the learned Judges have elaborately traced the legislative history of the liquor regulations and history of liquor licensing in Delhi. They have also referred

to some decisions of the superior courts. Both the learned Judges, it appears, have proceeded on the assumption that granting of liquor license (including the restrictions) is amenable to writ jurisdiction under article 226 of the Constitution of India and can be subjected to rigour of article 14 of the Constitution of India. Apparently, they have relied upon the decision of the Supreme Court rendered by Bhagwati, C J. and Khalil, J. in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, . In that case the two learned Judges of the Supreme Court have held that although no citizen has fundamental right to carry on trade or business in liquor and it is an exclusive right or privilege of the State to do so the State cannot escape the rigour of article 14 of the Constitution of India once it decides to grant right or privilege to others. It cannot act arbitrarily or at its sweet will. The Supreme Court further held that it was not possible to uphold a contention that Article 14 can have no application in a case where the license to manufacture or sell is being rendered by the State Government. There is no doubt that the two learned Judges of the Supreme; Court have laid down a new approach in regard to the manufacture and sale of liquor and its licensing. The new approach is welcome for a number of reasons. But the difficulty is that the said ratio is clearly in conflict with the earlier decisions of the Supreme Court and particularly the decisions of the Constitution Bench of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . The Constitution Bench has quoted with approval the earlier decision of the Supreme Court in *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, in which it was held by the Supreme Court. "If the Government is the exclusive owner of this privilege, reliance on article 19(1)(g) or Article 14 of the Constitution of India becomes irrelevant". The question then is, is it open to the High Court to prefer a decision of a Division Bench of two Judges of the Supreme Court in preference to the decision of the Five Judge Bench of the Supreme Court, even if the bench of the High Court feels that the decision of the two Judge Bench is more wholesome ? The two learned Judges of this Court have not adverted to the decision of the Supreme Court in *Har Shankar* case. In *State of "Madhya Pradesh v. Nand Lal*, in para 32 of the judgment two learned Judges have referred to *Har Shankar*'s case. It appears that the learned Judges agreed with *Har Shankar* that dealing in liquor is the, privilege of the State and that there was no fundamental right in a citizen to carry on trade or business in liquor. But as I read the judgment of the two Judges of the Supreme Court I find that they have cut a new ground in holding "that State cannot escape the rigour of article 14": Thus there is a conflict between the two decisions of the Supreme Court, one rendered by the Constitution Bench and the other by two Judges Bench. It would be for the Supreme Court to clarify as to which of the two judgments are correct. The Supreme Court may hold that there is no conflict between the two decisions. It can approve the approach of the two Judges of the application of article 14 to the liquor trade by another Constitution Bench. So long as it is not done, the discipline of the law of the precedents would require this court should follow decisions of the Five Judge Bench in *Har Shankar* and dismiss the writ petition on a preliminary ground of maintainability.

(3) Shri D.D.Thakur appearing for the petitioners tried to persuade me that the decision of the two Judge Bench of the Supreme Court Nand Lal case was in keeping with various earlier decisions of the Supreme Court on their true analysis. The exercise made by him in analysing the various cases is quite interesting. If the question was open and was not concluded by the Five Judge Bench of the Supreme Court a different view could have been possible. The question is, whether it is permissible or not keeping in view the law of the precedents ?

(4) It is true that while dealing with the matter regarding liquor trade and its State regulations, one is required to face number of troublesome questions. In Har Shankar the Supreme Court Constitution Bench had relied upon the decision of the American Supreme Court in *Crowley v. Christensen* (1890) L E 620 and the statement of law made in "American Jurisprudence". In para 53 of the judgment the court has quoted them. It may be noted that the view of the American law quoted by the Supreme Court represents the law as it existed around the turn of this century. It is a matter of common history that the experiment in the prohibition of liquor totally failed in the United States of America and, Therefore, the State regulation was abolished in the United States of America. The Government of United States of America does not now think that the protection of health, and welfare of the people can be achieved through a policy of prohibition of liquor. While holding that there is no fundamental right in the trading activities which are noxious or hazardous to people our Supreme Court has equated gambling with trading in liquor. They are described as "extra-commercial", (*The State of Bombay Vs. R.M.D. Chamarbaugwala*,). The social reality, however, is that neither gambling nor drinking liquor is treated as obnoxious by the Society or by the State in India. As regards gambling. States permit horse racing and all States in India are running their own lotteries. The revenue on liquor trading collected by all states form an appreciable part of the revenue of all states. Indeed no state is ready to forgo that source of revenue. It cannot be denied that in higher echelons of society as well as in the lowest strata gambling and drinking enjoys much more respectability today as compared to pre-independence era. If drinking liquor is , injurious to human health and is a reason for pauperism and crime in the lower orders of the society, it is not reflected in the drinking activities of the individuals or the state action in this regard. Revenue collected by the State on the licenses for selling the country liquor is very large and is increasing every year. Thus the justification for state privilege in liquor trade, as assumed a century back, is seriously eroded today. Article 47 of the Constitution of India is also mis-interpreted many times. It was vigorously cited in support of policy of total prohibition (which was introduced in various states in India immediately after independence). But curiously, the same article is cited with equal vigour for justifying what is called liberalisation or partial prohibition. The entry in regard to prohibition in Article 47 is linked with drugs, which are injurious to human health. The object of prohibition of liquor and drugs as mentioned in Article 47 of the Constitution of India, was protection of public health. It may be noted that the moral fervour regarding prohibition of

liquor emphasised during the freedom movement is not the basis of prohibition on consumption of intoxicating drinks in Article 47 of the Constitution. But apart from these theoretical positions, the reality in regard to liquor trading is too bizarre to be ignored in any judicial pronouncement. Under the cover of the state monopoly and privilege in the trade and business in liquor, the entire business is appropriated in various states by the Ministers, politicians, their relative and friends. It has become a major source of distribution of patronage for easy and quick money. There is a chain of illicit liquor distillation and bootlegging working under the protection and encouragement of Politicians of different shade. Restrictions on the manufacture of different brands, sale of different brands in different territories and pricing are very often decided by extraneous considerations. Arbitrariness in these matters is writ large and no court can afford to ignore it. The monopoly or the privilege, which was originally intended for the health and protection of the Society is now being abused by the agents running the State, for their personal illegal gains of wealth. Reconsideration, of the earlier decisions of the Supreme Court has thus become a necessity, of time. If life of law (judge-made) is not merely to be logic but an experience and the duty of the court is not merely to cling to the out dated precedents but to actively participate in the social engineering, the call of duty cannot be ignored. For the time being, I will prefer to rest with Har Shankar and dismiss the petitions as not maintainable. I would agree with Sabbarwal, J. that the petition should be dismissed but for my own reasons stated above.