

(1972) 07 MP CK 0011
In the Madhya Pradesh High Court
Case No : M.P. No. 466 of 1971

Gulabrai and Sons

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 19-07-1972

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 19(6), 47
Madhya Pradesh Excise Act, 1915 — Section 13, 14, 15, 16, 17, 17

Citation : (1972) JLI 868

Hon'ble Judges : Bishambhar Dayal, C.J; S.M.N. Raina, J

Bench : Division Bench

Advocate : H.C. Dhandha, V.S. Pandit, W.Y. Pande and S.S. Joshi, for the Appellant; Y.S. Dharmadhikari, Advocate General and J.P. Bajpai, D.A.G., for the Respondent

Final Decision : Dismissed

Judgement

B. Dayal, Chief Justice.

1. This order will also govern the disposal of Misc. Petition No. 467 of 1971.
2. These are two writ petitions by two hotel-keepers who had obtained a licence in Form F.L. 3 to sell foreign liquor to their customers in their hotels. According to the rules made under the M.P. Excise Act they have to pay a sum of Rs. 5,000 in a lump sum before the licence is granted and they are also required to pay some charge per bottle when they obtain the bottles from the whole-salers. Both these hotel-keepers have challenged the authority of the State Government to make the charge. The contentions of Learned Counsel appearing for these petitioners is that this charge is not a tax and it is much too high to be a fee. The State does not render any service to the petitioners and in any case the little service that it does in issuing a licence cannot support such a high charge. It is contended that the petitioners have a fundamental right of dealing in this commodity and the rules which could only be regulatory cannot be utilized for the purpose of augmenting the State revenues. The rules are also bad for excessive delegation

as the Act does not fix the limit.

3. The contention on behalf of the State is that under the provisions of the M.P. Excise Act an absolute restraint has been placed upon the exercise of the fundamental right which the petitioners may have in the manufacture and trade of alcoholic liquors and it is the State Government alone which can either produce or sell such a commodity; that when the State Government transfers this right in favour of the petitioners and permits them to sell the commodity under the terms of the licence, it can charge a price for transferring this right in their favour and that the charges which are being challenged by these writ petitions are charges, as consideration for transfer of this "right and they are neither in the nature of a tax nor of fees in the constitutional sense. Although in the return an attempt has also been made to support the charge as a tax and a fee in the constitutional sense, at the time of arguments a very faint attempt was made to support the charge on that basis.

4. We will first consider the provisions of the M.P. Excise Act to see Whether such a charge is supported on the ground of being a consideration for transferring a right by the Government in favour of the petitioners. We shall then consider the important case law which has been cited by the parties. Section 2 of the Act contains several definitions. Sub-section (6) thereof defines "excisable article"" as meaning "any alcoholic liquor for human consumption", Sub-section (8) defines "excise-revenue" as meaning "revenue derived or derivable from any duty, fee, tax, penalty, payment...under the provisions of this Act....." Since the provisions of this Act have already been considered in great details by a Division Bench of this Court in Shrimati Nanhbai Vs. The Excise Commissioner and Others, we will here notice only the relevant parts of the sections which relate to the controversy before Us. Section 17 of the Act providest

"(1) No intoxicant shall be sold except under the authority and subject to the terms and conditions of a licence" granted in that behalf:

* * * * *

Thus, under this section sale is permitted only under the authority of the Government and such sale has to be subject to the terms and conditions that may be imposed by the licence granted to the person author zed to sell. Section 18(1) then provides :--

""The State Government may lease to any person, on such conditions and for such period as it may think fit, the right --

(a) * * * *

(b) of selling by wholesale or by retail; or

(c) * * * *

any liquor or intoxicating drug within any specified area."

This sub-section, therefore, clearly envisages that the right to sell and other rights mentioned therein are the rights which belong to the Government and that the Government may lease out such rights. Much argument was advanced by Learned Counsel for the petitioners that the word "lease" can only refer to some immovable property and his contention was that this word "lease" in the sub-section refers only to the area over which a right to sell is given under licence in Form F.L. 1 and F.L. 2. We are unable to see any force in this contention. The word "lease" may not be a very happy word. But it is quite clear that what is leased out is the right to sell. No authority is given over any land or property or area. The word "lease" in this connection merely indicates that this right has not been absolutely transferred but is given for a limited period for consideration. Sub-section (2) of section 18 then states :

"The licensing authority may grant to a lessee under sub-section (1) a licence in the terms of his lease....."

This sub-section clearly envisages a lease apart from the licence. When a lease is granted to a person, that is when a person is authorized to sell liquor under certain conditions, he will be entitled to get a licence from the proper authority. It may be recalled that u/s 17 quoted above also, sale is permitted under the authority of the Government and subject to the terms and conditions of a licence, the same idea is carried in section 18, The authority to sell is called a lease while the document which contains the terms and conditions under which the power to sell is to be exercised is called a licence. Since according to sub-section (2) of section 18 the licence is to contain all the terms of the lease, this becomes a combined document, containing both the authority to sell and the terms under which sale can be made.

5. Section 25 of the Act deals with the imposition of excise duty and sub-section (3) of that section exempts imported liquor from imposition of excise duty. This exemption is obviously in terms of the constitutional provision contained in Entry No. 51 of List II in the Seventh Schedule to the Constitution. This excise duty is, therefore, recoverable only on liquor manufactured in India. Section 27 then is as follows :--

"Instead of or in addition to any duty leviable under this Chapter, the State Government may accept payment of a sum in consideration of the grant of any lease u/s 18."

Clearly, the purpose of this section is to distinguish between excise duty and the charge which the State Government can make as a consideration for granting the authority to sell. The contention of Learned Counsel for the petitioners in this connection was that the phrases "instead of" or "in addition to" indicate that even this charge can only be made in respect of those articles which are liable to pay excise duty and consequently imported liquor cannot be subject to any payment as consideration for granting a right to sell. The argument appears to be plausible and the use of the word "instead" is not very happy. But we do not

see that such can possibly be the intention of this section. The payment authorised by this section is for granting a lease u/s 18, that is, for authorizing the sale of the article. It is not contended that the sale of imported liquor is not controlled and that it can be sold even without any authority or licence from the State Government, Thus, so far as the liability to sell only after an authority from the Government is concerned, imported liquor as well as other liquors are on the same footing. The only purpose of the phrase relied upon by Learned Counsel in this connection is to make it clear that this charge of consideration for granting a lease would be irrespective of the fact whether any excise duty is charged, or not charged, upon that article. Section 27, therefore, clearly authorises the making of a charge by the Government for granting an authority to sell. Section 28 again emphasizes that a licence for sale "shall be granted on payment of such fees (if any).....as the State Government may direct either generally by rules made u/s 62 or in any particular instance." The issue of a licence, therefore, is made subject to the payment of such charges as are provided for by the Government under the rules. If the rules, therefore, provide for the charge of a sum of Rs. 5,000/- before issuing a licence to sell foreign liquor, the rules are fully within the authority of the Act. Section 62, which is the rule-making power, in the first sub-section gives a general power to the State to make rules "for the purpose of carrying out the provisions of this Act," Within this general power the State certainly has the right to impose a liability to pay consideration for the right to sell which the Government grants to the lessee u/s 18. Sub-section 2 (g) of section 62 again authorizes for the making of rules for "regulating the amount, time, place and manner of payment of any duty or fee". Obviously, the word "fee" here has not been used in the constitutional sense but has been used in the sense of a charge made on any account. Sub-clause (ii) of clause (h) of this sub-section provides again that the State Government may by such rules, among others matters -

"(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such licence, permit or pass".

Exercising powers under this section the State has from time to time framed rules and the relevant rule for grant of a licence in Form F.L, 3 is rule II (iii) of the Foreign Liquor Rules. The material part of the licence in Form F.L, 3 is as follows :--

" Form F.L. 3

Hotel Licence

Under clause (iii) of rule II of the Foreign Liquor Rules, and in consideration of the payment of a fee of Rs. 5,000... the receipt of which is hereby acknowledged/ fees payable from time to time according to the scale in the schedule below, licence is hereby granted to you.....to sell foreign liquors at your hotel situated in the town of in the district of.....during the year ending 31st March 19....., subject to the following conditions to be observed by you.,

viv:--"

* * *

6. With regard to these rules Learned Counsel for the petitioners contended that these rules have been framed, as the heading indicates, under sub-section (2) of section 62 and that they do not refer to the general power u/s 62 (1) of the Act. But this deficiency was observed by the State Government as far back as in 1964 and the M.P. Excise (Amendment and Validation) Act, 1964, was consequently passed. Section 6 of this Validation Act not only validates all the rules that had been made and were in force on that date; but it further provides:

".....the rules.....shall be and shall always be deemed to have been validly made in accordance with section 62 of the principal Act...."

It is, therefore, made clear that these rules are not only under sub-section (2) of section 62 but that they, are to be deemed to be rules made under the powers of the whole, section, so that where the rules are not squarely covered by the provisions of sub section (2) of section 62, they must be deemed to have been made under the general power.

7. We, therefore, see no force in the contention on behalf of the petitioner that the charge made from the petitioners, either in the lump sum of Rs. 5,000/- or per bottle is not authorized by the Act.

8. The next contention of Learned Counsel for the petitioners was that although previously there was a doubt whether the petitioners had a fundamental right to trade in liquor, that doubt has been resolved by their Lordships of the Supreme Court in Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, , and the contention is that all these provisions of the M.P. Excise Act and the rules can only be regulatory of that fundamental right and that since this charge is exorbitant and, in fact, prohibitive, it cannot be considered to be a reasonable restriction with in the meaning of article 19(6), of the constitution and must, therefore, be struck down on that account. We will deal will deal with the decisions of the Supreme Court presently; but before doing so we would like to refer to two Division Bench cases of this Court. which have dealt with this matter. The first case is Nanhilai v. Excise Commissioner, M.P. (supra) A Division Bench of this Court was considering the provisions of the M.P. Excise Act. The petitioner in that case had bid at an auction and her bid being the. highest was accepted by the Collector; but the acceptance of the Collector was subject to confirmation by the Excise Commissioner. The Excise Commissioner did not confirm the bid. The writ petition had been filed in this Court challenging the authority of the Excise Commissioner to deprive the petitioner of the benefit of her bid having been accepted by the Collector. The precise point there is not, therefore, relevant for the purposes of this case, But in order to decide that question the learned Judge surveyed all the provisions of the M.P. Excise Act and after a careful analysis came to the following conclusions :--

"The principle that the State Government has exclusive right of manufacturing, selling or possessing intoxicants or any country liquor intoxicating drug runs through sections 13 to 18 of the Act.

* * * *

The important condition that must be satisfied before any licence can be granted to a person for manufacture or sale of any country liquor intoxicating drug is that the person must first obtain the privilege or the right of manufacturing or selling the intoxicating drug. This is clear from section 18,.....

* * * *

In every auction sale of a liquor shop at which liquor is sold in wholesale or retail, there is a sale of the lease of the Government's right of selling country liquor intoxicating drug. On the acceptance of a bid of a person at an auction sale, a contract for the demise of the Government's interest is brought into existence and this is followed by the grant of a licence to the person whose bid has been accepted."

This case, therefore, specifically decided that under the provisions of the M.P. Excise Act the State has taken over complete control over the manufacture and sale of intoxicating liquors and that it is the State Government which transfers a part of its own right when it authorises a licensee to sell liquor. The effect of this decision, therefore, is that the original fundamental right having been completely taken over, a licensee, when he obtains the authority of the Government to sell, obtains a privilege from the Government which is not the exercise of his original fundamental right.

9. The next case which has touched on this topic and which was brought to our notice is the case of Sukhlal Sen Vs. Collector, Dist. Satna and Others, In that case a licence having been granted to the petitioner it was cancelled on some ground without giving a notice and without hearing the petitioner. He consequently filed a writ petition in this Court challenging the cancellation. This case decided that while cancelling an existing licence the authority was exercising a quasi judicial function and, therefore, it ought to have complied with the requirements of natural justice. That cot having been done, the order was quashed. While dealing with this matter it was in passing observed at page 523 of the report as follows :--

In the matter of liquor business some doubt was created by the decision in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, whether there is any fundamental right in a citizen to carry on liquor business. That doubt has now been cleared by the decision in Krishna Kumar v. J. & K, State AIR. 1967 SC 1368, where it has been held that dealing in liquor in business and a citizen has a right to do business in that commodity but the State can make a law imposing reasonable restrictions on the said right in public interests."

This case did not deal with the extent to which limits have been placed by the M.P. Excise Act on the fundamental right and the nature of the right a person exercises after he obtains a licence. The earlier Division Bench case, which we have discussed above, was not taken into consideration probably because those matters were not relevant for deciding the case. It may be noted here that Dixit C.J. was a party to both these decisions and it is difficult to assume that this decision lays down something which is contrary to the earlier decision mentioned above.

10. We now come to the pronouncements of their Lordships of the Supreme Court which have been brought to our notice and which we think throw a light on the subject, the first case which has to be noticed is the of Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, . This case arose under the Ajmer Excise Regulation. The contract for a liquor shop was auctioned. The highest bid of one Chhoga Lal was accepted. But he made certain deposits beyond time. The petitioner (here, who was also a bidder, contended that Chhoga Lal having failed to make the deposits in time, his bid must be rejected and the petitioner himself offered to take the licence at that price. This offer was not accepted by the excise officers and the money deposited by Chhoga Lal, even though a little late, was accepted. He then filed a writ petition in the Supreme Court and contended that he had a fundamental right to carry on the trade in liquor which had been infringed by the Collector condoning the late deposit by Chhoga Lal. In this connection the nature of control imposed by the Excise Regulation was considered by their Lordships of the Supreme Court. They noted with approval (at page 223 of the report) the following observations from an American case :--

"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 States. 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 "

11. Paragraph 9 of this ruling has often been quoted and was strongly relied upon by Learned Counsel for the petitioners for contending that their Lordships' observations in this paragraph mean that the fee for authorizing the sale of liquor is in the nature of a tax. We have carefully read the paragraph and we think that this was not at all what their Lordships meant. The relevant part of that paragraph is as follows : --

"The next contention that the charge of fee by public auction is excessive and is not in the nature of a fee but a tax ignores the fact that that licence fee described as a licence fee is more in the nature of a tax than a licence fee. One of the purposes of the regulation is to raise revenue. By the provisions of section 24, duties can be imposed on the manufacture, import, export and transport of liquor and other excisable articles. Revenue is also collected by the grant of

contracts to carry on trade in liquors and these contracts are sold by auction.'"

The last sentence in the quotation above is the key to the whole passage quoted above. The argument of Learned Counsel there was that the charge being made at the auction was a tax and not a fee because it was not commensurate with the expenses incurred by the Government and was, therefore, in the nature of a tax. This argument was repelled by their Lordships by saying that the fee in that sense in which it has to be commensurate with the expenses was itself in the nature of a tax. But this fee which is being charged at the auction is not that. It is a source of revenue, and it is charged by giving a contract to carry on trade. This clearly means that the State after completely controlling the manufacture and sale of intoxicating liquors may grant by contract the right to sell under conditions and as a consideration for the grant may charge money, which may loosely be called a fee. Such a charge is neither a fee nor a tax in the constitutional sense. This case, therefore, fully supports the contention on behalf of the State that this charge is neither a tax nor a fee but a consideration for granting the right to sell.

12. The next case which was mentioned in the later case of this Court Viz, Sukklal Sen v. Collector, Satna (supra) as dispelling any doubt about the existence of a fundamental right in the sale of liquor is Krishna Kumar Narula v. J. & K. State (supra). In this case Learned Counsel appearing for the State argued as follows:--

"The learned Advocate-General contended that dealing in liquor was not business or trade, as the dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals.'"

This broad argument was repelled by their Lordships by saying :--

".....the word *business" connotes some real, substantial and systematic or organised course of activity or conduct with a set purpose. Even accepting this test, if the activity of a dealer, say, in ghee is business: then how does it cease to be business if it is in liquor ?

* * * * *

If a law prohibits dealing in liquor, the dealing does not cease to be business, but the said law imposes a restriction on the said dealing.'"

Reliance having been placed on the earlier decisions of the Supreme Court, particularly Cooverjee B. Bharucha v. Excise Commissioner, Ajmer (supra), their Lordships stated that there was nothing to indicate in those cases that trade in liquor was not considered to be business; it was merely held that the regulation imposed upon the trade was reasonable. After considering those cases in detail it was observed :

"Indeed, perusal of the entire judgment shows that the Court conceded the fundamental right but held that the said regulation operated as a reasonable

restriction on the said rights.""

This case, therefore, merely lays down that trade in intoxicant liquors is also a business and a citizen has, if not restricted by any Act, a fundamental right to do that business. But it does not go to the extent of saying that the Excise Act in a particular State cannot completely take over the right to trade in this commodity; nor does it say anything as to the effect if the right is in fact taken over completely by the State and then the State grants a limited permission to carry on that trade. In this ruling also, the provisions which were said to be contravening the fundamental right of trade in liquor, were held to be reasonable in view of the special nature of trade in liquors. We, therefore, think that this ruling of the Supreme Court does not in any way affect the conclusions arrived at by the Division Bench of this Court in *Nanhial v. 1 Excise Commissioner, M.P.* (supra) or the pronouncement of their Lordships of the Supreme Court in *Cooverjee B. Bharucha v. Excise Commissioner, Ajmer* (supra) where on a consideration of the Excise Regulation it was found that the trade in liquor had been completely taken over by the State under its control and consequently when the State granted a right to sell, it can charge a price for the same.

13. This matter has later come up for consideration before their Lordships of the Supreme Court in some recent unreported decisions. One such case is *State of Orissa and others v. Harinarian Jaiswal and others Civil Appeals Nos 2024 & 2025 of 1971*, Decided on the 14th March, 1972., This was a case under the Orissa Excise Act. After analysing the whole Act their Lordships came to the same conclusion as in *Cooverjee B. Bharucha's* case (supra), and observed as follows :--

"The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Art. 19(1)(g) or Art. 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 tries to get the best available price for its valuable rights."

14. The matter again came up before the Supreme Court in *M/s Produce Exchange Corporation Ltd. V. The Commissioner of Excise, Assam & others Civil Appeal No 15 of 1972*; decided on the 17th April, 72, and at the end of the judgment their Lordships observed : -

""No-one has a fundamental right to get a Government contract."

In this case the appellant-company was challenging an order not accepting its tender and giving the contract to the fifth respondent at the very rate quoted by the appellant although the fifth respondent had given a higher rate in its tender. It may be noted that the authority to carry on the trade, which was allowed by the Government to the tenderers, was considered a right given by the Government by means of a contract.

15: The last case to which we may refer is Amar Chandra Chakraborty v. The Collector of Excise, Government of Tripura and others Civil Appeal No. 1063 of 1971; decided on the 3rd May 1972. This was again an excise case and their Lordships of the Supreme Court observed :--

""Trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category requiring legislative control which has been in force in the whole of India since several decades."

Dealing with section 22 of the Bengal Excise Act, which was extended to Tripura, it was observed :

"Section 22 contemplates the grant of exclusive privilege which amounts to a virtual monopoly for manufacturing, supplying and selling at whole sale of retail country liquor or intoxicating drugs within a specified local area."

In view of this drastic control, the provision challenged by the writ petition was considered to be within the power of the State.

16. On a perusal of all the authorities we are of opinion that wherever the question came up for discussion, apart from the restrictions placed by the Excise Acts, it was held that trade in intoxicant liquors is also a business and a citizen has a fundamental right but that that fundamental right has always been held to be completely controllable so that nobody can deal in intoxicant liquors unless the State grants him that authority. Whenever the provisions of the Excise Acts have been taken into consideration and it was found that this power to trade in intoxicant liquors has been completely taken over by the Government, it has been held that resort to the fundamental right of trade is not open. Since the Excise Act in this State has completely taken over the trade, no citizen can claim a right to trade in it unless he obtains the authority of the State and under the Act the State is entitled to charge consideration for giving this authority. We have quoted above the provisions of the M.P. Excise Act and we are of opinion that the State is within its power to make the charge which cannot be challenged on the ground of infringement of fundamental rights.

17. We may also shortly deal with two other arguments of Learned Counsel for the petitioners. He contended that the rules fixing the amount to be charged are invalid as the Legislature did not even fix the maximum amount and delegated the power entirely to the Government. He also contended that in any case the amount was excessive.

18. We think that the fixing of the amount depended on so many factors which would change from time to time that it was not possible for the Legislature to keep in touch and every time make necessary alterations. It was therefore necessary to delegate the power. It has been given to the Government itself and further delegation has been expressly prohibited. Before determining the amount to be charged the Government has to see the paying capacity of the class of persons who are expected to consume foreign liquor; the number of such persons

during the period of licence, the duty to comply with the directive principle contained in article 47 of the Constitution so that consumption may be discouraged, the need to save foreign exchange as far as practicable and to collect the largest income for the State which the trade can give consistently with the above considerations. In these circumstances limitations are inhereint, The Government cannot fix it too high, for fear of losing the trade, nor fix it too low in view of other considerations. Thus neither the delegation is excessive; nor can the charge be said to be unreasonably high. No data has been placed before us to come to that conclusion except the past rates which were very low. We do not think that, in view of the rise in the price and standards all round, the old rates alone can be a sufficient guide to come to the conclusion that the charges are unreasonably high.

19. We accordingly dismiss both these writ petitions with costs. Counsel's fee in each case is fixed at Rs. 200/- . The outstanding amount of the security deposit after deduction of costs shall be refunded to the petitioner in each of the two petitions.