

(2011) 08 BOM CK 0179

In the Bombay High Court

Case No : Writ Petition No. 3657 of 2010

Jitendra Bose

APPELLANT

Vs

The State of Maharashtra, Secretary, State Excise
Department Mantralaya and The Collector of Nagpur

RESPONDENT

Date of Decision : 11-08-2011

Acts Referred:

Bombay Prohibition Act, 1949 — Section 49
Contract Act, 1872 — Section 56, 65

Citation : (2011) 113 BOMLR 2853 : (2011) 5 MhLj 412

Hon'ble Judges : Vasanti A. Naik, J;P.D. Kode, J;B.P. Dharmadhikari, J

Bench : Full Bench

Advocate : Anand S. Jaiswal and R.A. Jaiswal, for the Appellant; Bharti H. Dangre, Additional Government Pleader, for the Respondent

Judgement

Vasanti A. Naik, J.—This reference before the Full Bench has been made on 26th of April, 2011 in view of the apparent conflict in view expressed by the Division Bench of this Court in the case of M/s Samarth Cooperative Consumers Central Stores Limited v. State of Maharashtra and the view expressed by the Division Bench of this Court in this writ petition. Earlier, the Division Bench of this Court had, in the case of M/s Samarth Cooperative Consumers Central Stores Limited v. State of Maharashtra and Ors., held that the Petitioner therein, a foreign liquor licensee, was not liable to pay the license fee for the period during which he had not carried on business. Since the FL-III license of the Petitioner therein was not renewed for the period from 01.04.1979 to 01.04.2004, the Division Bench held that the Petitioner cannot be asked to pay the license fee for that period. The Court observed that Section 49 of The Bombay Prohibition Act, 1949 did not empower the authorities to demand license fee for the period for which the Petitioner had not carried on business. The other Division Bench making the reference, however, was unable to agree with the view and the observations in the case of M/s Samarth Cooperative Consumers Central Stores Limited v. State of Maharashtra and Ors.. In view of the Division Bench, making the reference,

the licensee was not entitled for refund of privilege fees for the period during which the license was not in use. According to the Court making the reference, privilege fee is charged by the State for parting with the exclusive privilege of trading in liquor and since the Government had not withdrawn the privilege granted to the licensee at any point of time, the licensee was not entitled to refund of license fee, even if he was prevented from carrying on business due to the prohibitory order of the Court. In the circumstances, the Division Bench considered it appropriate to refer the following question for a decision by a larger Bench.

Whether the State Government is bound to refund the privilege fees, charged from a licensee, where such licensee is prevented by an order of a Court or similar reason not attributable to the Government, for the period when such business was not carried out ?

2. Few undisputed facts giving rise to the writ petition and then to the order of reference, are stated thus

A FL-III license was granted in the year 1974 in the name of one Parasram Ghatge. Since the licensee failed to carry on business, the license lapsed and in the year 2005, it was revalidated and transferred in the name of the Petitioner. The Petitioner desired that the license be transferred from Narkhed to Nagpur and, hence, applied to the Excise Commissioner in that regard. The Excise Commissioner, however, rejected the application for transfer of the license to Nagpur. A revision against that order was allowed and the shop was shifted to Bidipeth, Nagpur. Some residents of Bidipeth locality filed a writ petition challenging the order granting permission to shift the shop from Narkhed to Bidipeth, Nagpur. In Writ Petition No. 4693 of 2007, filed by the residents of Bidipeth, this Court granted stay to the effect, implementation and operation of the order of transfer on 19.10.2007. The adinterim relief was confirmed on 23.07.2008. During the pendency of the petition, the Petitioner informed the Court that he was willing to shift his shop to some other locality of Nagpur and the Court granted permission to the Petitioner to make the necessary application to the competent authority. The Superintendent of Excise, Nagpur was pleased to allow the Petitioner to shift his shop from Bidipeth, Nagpur to Radke Layout, Nagpur. Since the Petitioner was prevented by the order of the High Court from operating his license at Bidipeth, Nagpur, the Petitioner filed the writ petition seeking the refund of the license fee paid by him for the period during which his shop remained closed. The Division Bench of this Court, was of the view that in the circumstances of the case, the Petitioner was not entitled for refund of privilege fees. Since the Division Bench was unable to agree with the view expressed by the other Division Bench in the case of Samarth Cooperative Consumers Central Stores Limited v. State of Maharashtra and Ors., the question stated hereinabove was referred for a decision by a larger Bench.

3. Shri Jaiswal, the learned Counsel for the Petitioner, submitted that the business of the Petitioner was stopped without any fault on the part of the

Petitioner and, hence, the Petitioner was entitled to the refund of license fees. According to the learned Counsel for the Petitioner, the Government had transferred the privilege and the license fee is the profit, which the Government would have earned, had it done the business of vending foreign liquor. It is submitted on behalf of the Petitioner that if the privilege was not transferred to the Petitioner, the State would have done the business and due to the prohibitory order of the Court, if the State could not have carried on the business and earned the profit, it is not for the State to seek the license fees from the Petitioner, who was prevented by an order of the Court to carry on business. The learned Counsel for the Petitioner relied on the judgments reported in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , AIR 1975 SC 2008 (*Panna Lal and Ors. etc., etc. v. State of Rajasthan and Ors.*), 1994 Supp (1) SCC 8 (*State of U.P. and Ors. v. Sheopat Rai and Ors.*), *State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another*, and *State of M.P. and Others Vs. Lalit Jaggi*, to substantiate his submission that the amount charged as a license fee is not a fee or a tax but, is in the nature of price of a privilege, which the purchaser has to pay in any trading and business transaction and thus falls within the realm of a contract. The learned Counsel for the Petitioner submitted by relying on the provisions of Section 56 of the Contract Act, 1872 that the contract to deal with liquor became impossible in view of the prohibitory order of the High Court and as the Petitioner was prevented from carrying on the business in liquor, the contract for that period became void. The learned Counsel for the Petitioner also relied on the provisions of Section 65 of the Contract Act, 1872 to submit that as the contract became void, the State, having received the advantage under the void contract or agreement, was bound to restore it to the Petitioner, who did not carry on the business due to the prohibitory order of the Court.

4. Mrs. Dangre, the learned Additional Government Pleader, submitted that the State has an exclusive right or privilege of dealing in intoxicants and the State had parted with the privilege by granting a license in favour of the Petitioner. According to the learned Additional Government Pleader, the Government enters into a contract with the holder of the license for carrying out the trade or business, which exclusively vests in the State Government and while conferring the right or privilege, the amount charged is not for any services rendered. It is submitted on behalf of the State that whether the licensee carries on the business or not, he is liable to pay the license fees as long as the grant of privilege to the licensee is not cancelled or withdrawn. It is submitted that on a reading of Section 49 of the Act, it is clear that the licensee is liable to pay the license fees for the period of having the license and it is immaterial whether he has used the license for that period or not. The learned Additional Government Pleader took us through the various provisions of The Bombay Prohibition Act, 1949 and specially the provisions of Section 11, 49, 52, 53, 54, 55, 56, 58, 139 and 149 to canvas that the absolute regulatory power and control in regard to the business of intoxicants lies only with the State Government. The learned

Additional Government Pleader also referred to the various provisions of the The Bombay Foreign Liquor Rules to submit that the business in foreign liquor is controlled by the State Government in accordance with the provisions thereof. The learned Additional Government Pleader relied on the decision reported in AIR 1980 SC 2018 (State of Haryana and Ors. v. Jage Ram and Ors.) to submit that the Hon''ble Supreme Court had turned down the prayer of the licensees therein for refund of license fees for the period during which the licensees were not able to carry on the normal business and had suffered losses. As the Supreme Court had discussed about the nature of the privilege fees in the judgment reported in State of Orissa and others Vs. Narain Prasad and others, etc. etc., , the Additional Government Pleader referred to the same. It is submitted on behalf of the State that since the State has parted with its exclusive privilege of dealing with liquor in favour of the Petitioner, the Petitioner was not entitled to refund of license fees for the period for which the business was not carried on. The learned Additional Government Pleader relied on the decision reported in 2005 3 All MR 810 (Chunilal R. Gandhi v. The Collector of Mumbai and Ors.) to canvas that a licensee will have to pay the license fees for the period of having the license, whether he used the license for that period or not. It is submitted on behalf of the State that even during the pendency of Writ Petition No. 4693 of 2007, the Petitioner had kept his license alive by seeking a renewal of the same after paying the necessary fees. According to the learned Additional Government Pleader, the Petitioner was not entitled to the refund of the license fees.

5. It is now well settled that No. citizen has a fundamental right to trade or do business in intoxicants. The State under its regulatory powers has a right to prohibit every form of activity in relation to manufacture, storage, import, export, sale and possession of intoxicants. Neither can anyone claim against the State, the right to trade or do business in liquor nor can the State be compelled to part with its exclusive right or privilege. It is observed by the Hon''ble Supreme Court in case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , that since the right in regard to the intoxicants belongs to the State, it is open to the State to part with its right for a consideration and the amount charged to the licensee is not a fee properly so called nor indeed a tax but, is in the nature of the price of a privilege, which the purchaser has to pay in any trading or business transaction. The view expressed by the Hon''ble Supreme Court in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, is consistently followed by the Supreme Court in the decisions reported in AIR 1975 SC 2008 (Panna Lal and Ors. etc., etc. v. State of Rajasthan and Ors.), 1994 Supp (1) SCC 8 (State of U.P. and Ors. v. Sheopat Rai and Ors.), State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, and State of M.P. and Others Vs. Lalit Jaggi, .

6. The Government has an exclusive right or privilege of exporting, importing, manufacturing, selling, buying of intoxicants, hemp, toddy etc. and the Government can validly part with the privilege for consideration, by permitting the licensee to carry on its activities. The provisions of the The Bombay

Prohibition Act and the Rules framed thereunder regulate the trade and business in liquor and seek to achieve the objects of the Act. Chapter III of the Act of 1949 contains the entire scheme of prohibition enumerating various prohibitions imposed in respect of intoxicants. These prohibitions include the prohibition of manufacture of liquor and construction and working of the Distillery or the Brewery, prohibition of sale of liquor, prohibition of import, export, transport, sale, etc. of intoxicating drugs and sweet toddy, prohibition of possession of opium, prohibition of production of Charas, etc.

7. Section 49 of the Act, which falls under Chapter IV dealing with control, Regulation and exemption, begins with a NonObstante Clause and stipulates that the State shall have the exclusive right or privilege of importing, exporting, transporting, manufacturing, bottling, selling, buying, possessing or using any intoxicants, hemp or toddy and whenever any fees are levied or collected for any license, permit, pass or authorization given to any person for any such purpose, such fees shall be deemed to include the rent or consideration for the grant of such right or privilege to that person by or on behalf of the State Government.

Section 52 of the Act authorizes the authorized officers to grant licences, permits and passes and Section 53 stipulates that the license should be granted only if the licensee undertakes to abide by all the conditions of the license and the provisions of the Act and only if the authorized officer forms an opinion to that effect.

Section 54 speaks of the power of the authorized officer to cancel or suspend the license on the conditions mentioned therein. Section 55 provides that the holder of the license would not be entitled to either compensation or refund of license fees in case of cancellation or suspension of license u/s 54. If the authority granting the license considers that it should be cancelled for any cause other than the causes specified in Section 54, it can do so under Sub-section (1) of Section 56 and in case of cancellation of license u/s 56(1), the part of the license fee for the unexpired term of license is liable to be refunded to the license holders. The other provisions of the Act exhaustively deal with the offences and the penalties, powers and duties of the officers, appeals and revisions and the general powers of the State Government including the power to make Rules.

8. In this case, we are concerned with the The Bombay Foreign Liquor Rules, 1953 as a FL-III license was granted in favour of the Petitioner. The Rules regulate the procedure in regard to the grant, duration and renewal of licenses. The Rules exhaustively deal with the matters in regard to sale and transport of liquor. The State exercises absolute power and control over these matters. Thus, the Act and the Rules framed thereunder are a complete Code. The legislature has vested the privilege with the State and has laid down the terms and conditions to be followed when the State decides to part with it. Hence, it is not permissible to import concepts or provisions from any other law.

9. Having considered the provisions of the Act and the Rules, we are of the view

that the licensee is not entitled to refund of privilege fees, in a case where he is prevented by an order of the Court or similar reason from carrying on the business. A plain reading of Section 49 of the Act makes it clear that the State Government has an exclusive right or privilege of dealing in intoxicants. This Court has observed in the case of *The Collector of Bombay and others Vs. Meena Narayan Idnani*, , by following the judgment in the case of *State of Uttar Pradesh and Ors. v. Sheopat Rai and Ors.*, reported in 1994 Supp (1) SCC 8 that it is obvious that the Government enters into a contract with the holder of license for carrying on the trade or business, which exclusively vests with the State Government and while conferring the right or privilege, the amount charged is not for the services rendered and consequently, the concept of requirement to render services for charging fees, does not arise. This being the nature of the privilege fees, in our view, the licensee would be liable to pay the fees, which under the Act and the Rules, are in the form of one time payment and shall not be entitled to a proportionate refund only because the license was not operated for certain period. It does not matter that the license could not be operated due to the circumstances beyond the control of the licensee, which includes a prohibitory order of the Court. By issuing license, the Government parts with the privilege and the Government is entitled to the license fees irrespective of the fact that the licensee actually carries on the business or not. It would be useful to refer to the judgment rendered by the Division Bench of this Court in the case of *Chunnilal R. Gandhi v. The Collector of Mumbai and Ors.*, reported in 2005 (3) All MR 810, in this regard. This Court has observed in the aforesaid judgment that considering the provisions of Section 49 of the Act, the licensee whether has used the license for the period after its expiry or not, will have to pay the license fees for the period of having the license, if he seeks a transfer of the license. We are in respectful agreement with the view expressed by this Court in the case of *Chunilal Gandhi*.

10. On a perusal of the provisions of the Act and the Rules, we find that the legislature in its wisdom has provided for the refund of proportionate license fees only under the provisions of Section 56(2) and none other. It is only in the case of cancellation of the license u/s 56(1) that the part of the fees for the unexpired term of the license is liable to be refunded to the licensee. Hence, considering the scheme of the Act, the details of arrangements envisaged therein and the nature of the privilege fees, we are of the view that the State is liable to refund the license fees only u/s 56(2) of the Act and in No. other circumstances. In such circumstances, we find that the reliance placed on behalf of the licensee on the provisions of Section 56 and 65 of the Contract Act is not well founded. The Act and the Rules do not permit any recourse to these provisions. Since privilege fees are charged by the Government for parting with the exclusive privilege of trading in liquor, which vests with the Government, and since the fees are not charged for any service rendered by the Government, the fees are liable to be paid till the privilege is withdrawn by the Government. The submission made on behalf of the licensee, that the Government would have also been prevented

from doing the business due to the prohibitory order of the Court and, hence, it should refund the fees for the period during which the license was inoperative, is misplaced and is liable to be rejected. In the case of State of Haryana and Ors. v. Jage Ram and Ors. reported in AIR 1980 SC 2018, the Hon''ble Supreme Court had turned down the prayer of the licensees for refund of the proportionate bid amount on the ground that there was severe drought in the District of Rohtak and in the Summer months, the consumption of liquor was less than in Winter and, therefore, there was less business resulting in losses. The Hon''ble Supreme Court held that the refund was not permissible as what the Government was trying to recover from the licensees is in essence the price of the privilege which was parted in their favour and not the Excise Duty on the undrawn liquor.

11. Having observed thus, we are of the view that the judgment in the case of M/s Samarth Cooperative Consumers Central Stores Limited v. State of Maharashtra and Ors., dated 01.10.2008 in Writ Petition No. 4796 of 2003 does not lay down the correct position of law as it is observed in the said judgment that the licensee could not be asked to pay the license fees for the period for which the licensee had not carried on business.

12. With these observations, we now proceed to answer the question under reference as follows;

The State Government is not bound to refund the privilege fees, charged from a licensee, where such licensee is prevented by an order of a Court or similar reason not attributable to the Government, for the period when such business was not carried out.

Having answered the question in reference accordingly, we direct that Writ Petition No. 3657 of 2010 be placed before the Division Bench for appropriate orders.