(1994) 09 KL CK 0027

In the High Court Of Kerala

Case No : O.P. No. 11876 of 1994-L

Joney, E.M. APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 09-09-1994

Acts Referred:

Constitution of India, 1950 — Article 19, 19(1), 301, 303, 304
Kerala Abkari Act, 1077 — Section 10, 11, 12, 13, 14
Kerala Abkari Shops (Disposal in Auction) Rules, 1974 — Rule 8, 8(1)

Citation : (1994) 09 KL CK 0027

Hon'ble Judges : P.A. Mohammed, J

Bench : Single Bench

Advocate : George Poonthottam, for the Appellant; V.K. Mohammed Youseff, Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

P.A. Mohammed, J.—The Petitioner is an Abkari Contractor in respect of Group Nos. I, II and III of Kothamangalam Range for the sale of arrack during the year 1994-95. The substantial prayer in this writ petition is to declare the collection of Excise Duty at the rate of Rs. 25.73 per litre as unconstitutional. The Petitioner also challenges the validity of the Rule 8(1) of the Abkari Shops (Disposal in Auction) Rules, 1974 (hereinafter referred to as ''Rules'').

2. The validity of the Rule 8(1) of the Rule came up for consideration before the Full Bench of this Court in W.A. No. 1300/93 and connected cases. The Full Bench in Ext. P-4 common judgment observed that the rate of duty or tax leviable on a particular item is essentially a matter of expediency and policy of the Government and so long as it is not violative of any fundamental or other constitutional right, the levy at a particular rate is not open to challenge. In order to come to this conclusion the Full Bench has relied on the latest decision of the Supreme Court in Assistant Excise Commissioner and Others Vs. Issac Peter and Others, . The Supreme Court has emphatically laid down in this decision that in

case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness or reasonableness against one party to the contract namely the State, for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts and the laws relating to contracts. There is no room for invoking the doctrine of unjust enrichment in such situation as observed by the Supreme Court in the case supra.

3. T.L. Viswanatha Iyer, J. speaking for the Full Bench observed: "Distinctions between rental and excise duty, though they may exist, do not affect the position that the amount termed excise duty also forms part of the consideration for the privileges conferred on the contractors under the abkary policy of this year". What the contractors are required to pay is the consideration payable to the State for being granted the aforesaid twin privileges and not excise duty on non-imported rectified spirit. The Full Bench therefore held that the contractors are bound to pay the amount which in its measure is the excise duty payable on the designated quantum of rectified spirit under the terms of Rule 8 and as undertaken in the agreements executed by them. Therefore, it is settled that the contractors who offered their bids at the auctions with full knowledge of terms and conditions attached thereto cannot be permitted to wriggle out of the contractual obligations arising out of acceptance of their bids as observed by the Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . This being the position, the contentions urged by the Petitioner against the validity of the Rule 8(1) cannot be entertained.

4. The next argument advanced before me is that the collection of excise duty at the rate of Rs. 25.73 per litre of rectified spirit permitted to be imported by the State is violative of Article 304(a) of the Constitution of India. It is pointed out that the State is collecting only Rs. 22.13 per litre from the contractors for an equivalent quantity of rectified spirit permitted to be purchased from the distilleries in the State. In support of this contention, the learned Counsel for the Petitioner has brought to my notice the decision of the Supreme Court in Western Electronics v. State of Gujarat AIR 1988 S.C. 2038 wherein it has been held: "It is apparent that while a State Legislature may enact a law imposing a tax on goods imported from other States as is levied on similar goods manufactured in that State the imposition must not be such as to discriminate between goods so imported and goods so manufactured." Relying on this decision the counsel contended that the collection of excise duty at the rate of Rs. 25.73 per litre on rectified spirit permitted to be imported is liable to create discrimination between the goods so imported and the goods manufactured in the State. Of course, at the first blush the argument appears to be attractive but it looses its vitality when the question is examined in the background of the applicability of Article 304(a) of the Constitution in the present case.

5. It is well settled that the citizen has neither a natural nor a fundamental right

to carry on trade or business in liquor or intoxicating drugs. The unanimous decisions of five Constitution Benches of the Supreme Court uniformly emphasized after careful consideration of the problem involved that "(T)he State has the power to prohibit trades which are injurious to the health and welfare of the public, that elimination and exclusion from business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated as a class by themselves by all civilised communities." [See: (1) Logendra Nath Jha and Others Vs. Shri Polailal Biswas, (2) Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, , (3) The State of Assam Vs. A.N. Kidwai, Commissioner of Hills Division and Appeals, Shillong, , (4) Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, , (5) Amar Chandra Chakraborty Vs. The Collector of Excise, Government of Tripura and Others, . The above exposition of law, with regard to trade in liquor vis-a-vis the power of the State has again reiterated by the Constitution Bench of the Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, and in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, .

In Har Shankar''s case supra, the Supreme Court further held that the State under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession. In Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, the Supreme Court held that the State has power to regulate, though perhaps not as emanation of police power but as an expression of the sovereign power of the State.

6. The import and export of liquor or intoxicating drugs has been dealt with in Sections 6 and 7 of the Abkari Act, 1077. Under the provisions of the Abkari Act there is total prohibition of manufacture, possession and sale of liquor or intoxicating drugs by any person within the State as provided in Sections 12 to 15C. Likewise, there is a total prohibition of import, export and transport of liquor by any person within the State as contained in Sections 6 to 11. These provisions indicate that the manufacture and sale as well as the import and export are under the control and supervision of the State. u/s 18A the Government have the power to grant any person the exclusive or other privilege of manufacturing or supplying wholesale or of selling by retail any liquor or intoxicating drugs on payment of an amount as rental in consideration of grant of such privilege. That is how the trade in liquor or intoxicating drugs is carried on or regulated by the State. That being so, this is a case where Article 305 of the Constitution will apply.

7. By virtue of the provisions contained in Article 305 the provisions of any existing law shall not be affected by the operation ofthe provisions contained in Articles 301 and 303. So also, nothing contained in these Articles prevent the, Parliament or the Legislature of a State from making any law relating to any such

matter as is referred to in Sub-clause (ii) of Clause (6) of Article 19. The Petitioner cannot claim freedom of trade, commerce and intercourse guaranteed under Article 301 and challenge the provisions of the Abkari Act and Rules as violative of Article 304(a) of the Constitution. Article 304(a) dealing with restrictions ion trade, commerce and intercourse is not an independent provision. The said provision is subject to Articles 301 and 303. When Article 301 is not available then Article 304(a) cannot be invoked independently. The provisions contained in the Abkari Act and Rules are unaffected by the operation of Article 301 and 303. The contention that the State Law regarding the import and export is liable to create discrimination between the goods imported and goods manufactured or produced in the State, is therefore unavailable to the Petitioner.

8. As discussed hereinbefore this is a case where the Petitioner has no fundamental right to carry on the trade in liquor and intoxicating drugs under Article 19(1)(g) of the Constitution. When that right is not available, the Petitioner cannot challenge a law made by the State legislature relating to matters referred to in Sub-clause (ii) of Clause (6) thereof. By virtue of the said Sub-clause, the State can make a law relating to the carry on by the State, of any trade or business whether to the complete or partial exclusion of citizens. Such a law cannot be challenged by the Petitioner who has no fundamental right to trade in liquor or intoxicating drugs.

9. The Supreme Court in The State of Bombay Vs. R.M.D. Chamarbaugwala, held that the protection under Article 301 is confined to such activity as may be regarded as lawful trade activity and does not amount to an activity which is ''res extra commercium''. The concept of trade or business cannot include activities which are inherently pernicuous such as trafficking in women, gambling or training persons in goondaism. Following the above decision of the Supreme Court a Division Bench of the Karnataka High Court in M/s Jagadale and Sons v. State of Karnataka and Ors. AIR 1990 Kar. 25 held "(T)here is no fundamental right in any person to deal in liquor falling within Article 19(1)(g) of the Constitution and such a dealing is not a trade, business or commerce in the constitutional sense. Articles 301 and 304 are also not attracted to a dealing in liquor." I respectfully follow this decision for the conclusion that I have reached herein before. Therefore the contention advanced by the Petitioner on the premise of Article 304(a) of the Constitution is liable to be rejected.

In the result, the writ petition is devoid of any merit. It is accordingly dismissed. No costs.

