

(1992) 03 AP CK 0051

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3613 of 1990 and Batch

Kapitan Distilleries and Others

APPELLANT

Vs

The State of A.P. and Others

RESPONDENT

Date of Decision : 06-03-1992

Acts Referred:

Andhra Pradesh Brewery Rules, 1970 — Rule 6
Andhra Pradesh Distillery Rules, 1970 — Rule 5(1)
Constitution of India, 1950 — Article 14, 19(1), 226

Citation : (1992) 2 ALT 336 : (1992) 2 APLJ 1

Hon'ble Judges : P. Venkatarama Reddi, J;M.N. Rao, J

Bench : Division Bench

Advocate : P. Seetharama Raju, P. Satyanarayana Raju, T. Raghunath Reddy, Koka Raghava Rao, S. Krishna Murthy, M.R.K. Choudary, Vedula Venkataramana and S.L. Lakshma Reddy, for the Appellant; Government Pleader for Excise, for the Respondent

Final Decision : Dismissed

Judgement

P. Venkatarama Reddi, J.—The amendment made to Sub-rule (1) of Rule 5 of the Andhra Pradesh Distillery Rules, 1970 and Rule 6 of the Andhra Pradesh Brewery Rules, 1970 enhancing the licence fee for obtaining distillery and brewery licence as the case may be, by G.O.Ms.No. 74 Revenue (Ex.III) Department dt.1-2-1990 are being challenged in this batch of writ petitions.

2. The petitioners in this batch of writ petitions are either the owners of distilleries or breweries. "Distillery" means the manufactory where wines or Indian liquors other than arrack, beer or toddy are produced. (Vide Rule 2(c) of the A.P. Distillery Rules). "Brewery" is the place where beer is manufactured, stored, or issued (Vide Rule 2(b) of the A.P. Brewery Rules). Rule 5(1) of the A.P. Distillery Rules provides for grant of distillery licence by the Excise Commissioner on the fulfilment of the conditions prescribed in Rule 4 and on payment of prescribed licence fee. In the year 1970, when the rules were first framed, licence-fee per annum was only Rs. 3,000/-. In the year 1985, it was enhanced

to Rs. 5,000/-. In the year 1987, with effect from 9-11-87, there was a steep hike in the licence fee and the system of graded licence fee linked up with the licensed production capacity was introduced. The annual licence fee for distillery licence (D.2 licence) varied between Rs. one lakh and Rs. 3 lakhs. By virtue of the amendment brought about by the impugned G.O. with retrospective effect from 1-10-1989, there was further increase in the licence fee for D.2 licence, the minimum fee being Rs. 2 lakhs and the maximum being Rs. 10 lakhs. Clause (b) of Rule 5(1) as amended is as follows:-

(B) The annual licence fee for D.2 licence for manufacture of Indian made Liquor shall be paid as prescribed hereunder:

Licensed capacity of production per annum	In proof litres	Annual licence fee
-----	-----	(1) (2)
-----	-----	-----

Below one lakh. Rupees	two lakhs.	Form One lakh to 5 lakhs. Rupees	three lakhs.
Above 5 lakhs upto twenty lakhs. Rupees	five lakhs.	Above twenty	lakhs. Rupees
		ten	lakhs.
-----	-----	-----	-----

3. Initially, the licence fee prescribed for obtaining a brewery licence (Form B.2) was only Rs. 3,000/- per year. It recorded a steep increase in the year 1987 when the licence fee had gone upto Rs. 8 lakhs per annum. The licence fee for brewery was further increased to Rs. 8 lakhs per annum by the impugned G.O. dt.1-2-1990 with retrospective effect from 1-10-1989. Rule 6 of the Andhra Pradesh Brewery Rules as amended reads as follows:-

"6. Every licence shall be in Form B.2 and shall be issued in the name of the licence and shall not be transferable. The licensee shall pay a licence fee of Rupees eight lakhs per annum. Every licence shall ordinarily be for a period of one year and may be renewable at the end of each year on the application made one month in advance."

Both licences, namely, distillery licence as well as brewery licence are for a period of one year and renewable thereafter.

4. After the amendment to the Rules was introduced the Excise authorities called upon the petitioners to pay the difference between the licence fee already paid for the year 1989-90 and the licence fee as enhanced by the impugned G.O. Hence, the present writ petitions.

5. These writ petitions were heard by us along with a batch of writ petitions questioning the enhanced licence fee in respect of various licences issued under the A.P. Foreign Liquor and Indian Liquor Rules. To some extent the contentions overlap but as they are not exactly similar, we thought it fit to dispose of these writ petitions by a separate judgment. We are, however, relieved of the need to enter into an elaborate discussions of the legal position and propositions which may be equally relevant in the context of the present batch of cases.

6. Learned counsel for the petitioners, Mr. Sitarama Raju contends that the licence fee prescribed under the impugned G.O. amending Rule 5(1) of the A.P. Distillery Rules and Rule 6 of the A.P. Brewery Rules is irrational, unreasonable and unconscionable. It is said that no other State is having such high scale of fee and the phenomenal increase has a crippling effect on the petitioner's business. The learned counsel submits that apart from the unreasonably high scale of licence fee, the retrospective effect given to the amended rule aggravates the arbitrary nature of the levy and makes it highly unreasonable. According to the learned counsel, the retrospectivity disables the petitioners from recouping the increased cost attributable to enhanced licence fee from the buyers. The learned counsel then attacks the basis of the fixation of licence fee, vis-a-vis the distillery licences. According to the learned counsel, the licence fee based upon notional production capacity and unrelated to actual production is irrational and suffers from the vice of unreasonableness. The learned Counsel submits that in view of the inability of the State to supply the rectified spirit which is the main -raw material in required quantities, the licensed capacity is seldom reached. It is also submitted that there is an inherent vice in the present system of graded licence fee. The distilleries with larger capacity would stand to benefit when compared to smaller distilleries as the latter bear a heavier dose of licence fee. In paragraph 6 of the affidavit filed in W.P.No. 3827/90, it is stated that in the case of distillery having a production capacity of one lakh proof litres, the licence fee works out on the average to Rs. 2/- per proof litre. It works out at 0-60 paise per proof litre in case the production capacity of a unit is five lakh proof litres. If the production capacity is above 20 lakhs, the average licence-fee per proof litre would come to only 0-20 paise per proof litre. It is, therefore, said that the levy is discriminatory apart from being unreasonable. The learned counsel relied upon the decisions of the Division Bench of this Court in W.P.No. 16972/88 dt.20-11-89 in support of his contention that the fundamental right guaranteed by Article 19(1)(g) of the Constitution could be invoked by the petitioners. The learned Advocate General appearing for respondents submits that when once Article 19(1)(g) is eschewed from consideration, Article 14 could only be brought in from a thin end of the edge. The learned Advocate General then submits that the State while granting the privilege exclusively vested in it, can legitimately expect to get as much revenue as possible. It is submitted that the increase is not such as to shock the judicial conscience even assuming that the quantum of increase is a justiciable issue. He further submits that the production capacity is a very rational and tangible factor and can form a proper basis for fixation of fee. The learned Advocate General further argued that the retrospectivity given for a limited period is not open to any objection and the petitioners are bound to pay the differential fee for the year 1989-90 as a result of such enhancement.

7. The attack of the learned counsel on the impugned G.O. is three-fold: (i) high rate of fee; (ii) retrospective operation of the amended rule making it difficult to realise the differential fee from the buyers and (iii) application of wrong criteria for the fixation of graded licence fee. It is for these reasons the learned counsel

says that the amended rules are violative of Article 19(1)(g) and Article 14 of the Constitution.

8. We see no force in the contentions raised on behalf of the petitioners. At the outset, we would like to reiterate what has been said in the judgment delivered by us in W.P.No. 3818/90 etc. batch with regard to application of Article 19(1)(g) of the Constitution. After referring to the constitution Bench Judgment of the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, and the decision in *Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others*, we observed as under:

"Thus, notwithstanding what has been said in *Krishnakumar Naruk*'s case, it can be taken as settled law that a citizen has no fundamental right to carry on the business or trade in intoxicants. The reason is that the State has the exclusive right or privilege of manufacture and sale of liquor and that the State is endowed with the police power to prohibit and regulate trades in noxious or dangerous goods."

After referring to the Division Bench Judgment of this Court in W.P.No. 16972/ 88 & batch, we said:

"The Division Bench held that the retrospective effect given to the amended Rule taking away the benefit of proportionate remission in issue price and privilege fee in regard to short-supplied quantity of arrack was violative of Article 19(1)(g). With great respect, we must say that the learned Judges did not notice the authoritative pronouncements of the Supreme Court, especially *Har Shankar*'s case which categorically rules out the applicability of Article 19(1)(g) in matters relating to the business in intoxicants. With great respect to the learned Judges, we must observe that the decision was per incuriam."

Turning our attention next to Article 14, we observed:

"Unreasonableness or non-arbitrariness as a facet of equality clause enshrined in Article 14 is an innovation of later origin. This principle found its echo first in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and reaffirmed in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, Whether the validity of a law regulating the trade and dealings in liquor could be decided on the touch-stone of reasonableness is not free from doubt. If a person has no fundamental right to carry on business in intoxicants and cannot complain of his business being unreasonably effected by operation of such law for the purpose of Article 19(1) (g), can he still complain that the law being so unreasonable as to make serious inroads into his business, violates the equality clause? It is highly doubtful whether a citizen who cannot claim the fundamental right to carry on trade in liquor and who cannot complain of unreasonable restrictions on his business, can still attack a law which accords similar and uniform treatment to all the traders of the same class by drawing out the yard-stick of reasonableness from Article 14. However, for the purpose of this case, we need not express our final opinion on this larger question because we are not convinced that there is no element of

unreasonableness or arbitrariness in the impugned law."

9. We, therefore, approach the problem on hand in this batch of cases from the same angle. In considering the question whether the Excise Law substantially increasing the licence fee for the manufacture and distribution of liquors is unreasonable or discriminatory we have to recapitulate certain well settled principles. First of all, it must be noted that the State is parting with its exclusive right and privilege of producing and dealing in liquor in favour of private licensees and in doing so, the State can legitimately expect to realise the best possible price or consideration - vide *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, . Secondly, while considering the applicability of Article 14, the court should allow a large measure of latitude to the State Government in determining its policy of regulating manufacture and trade in liquor-vide *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, . As a corollary thereto, it must be said that where there is more than one method of assessing tax or fee, the legislature or the rule-making authority can select one of them and if that method is not irrelevant or irrational, it is not for the court to say that the tax or fee could have been levied in a different way or in a manner that the court thinks more just and equitable. In other words, the Court does not normally concern itself with the policy underlying a fiscal statute - vide *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, and *Khandige Shambhat v. Agrl. I.T. Officer AIR 1963 SC 591*. Thirdly, as observed by Mathew, J., speaking for the constitution Bench in *S. Kodar Vs. State of Kerala*, - "Generally speaking, the amount or rate of a tax is a matter exclusively within the legislative judgment and as long as a tax retains its avowed character and does not confiscate the property to the State under the guise of a tax its reasonableness is outside the judicial ken. It is not necessary that the dealer should be enabled to pass on the incidence of the tax on sale to the purchaser in order that it might be a tax on sale of goods." It cannot therefore be said that because the dealer is disabled from passing on the incidence of tax to the purchaser, the provisions of the Act imposes an unreasonable restriction upon the fundamental rights of the dealer under Article 19". What is said about a tax applies with greater force to the disposal of the exclusive right of the State to produce the deal in liquors. The next point that is to be noticed is that even if a levy has the effect of diminishing or even greatly reducing the profits that does not amount to an unreasonable interference with the petitioners business - vide *Nazeria Motor Service etc. Vs. State of Andhra Pradesh and Another*, Lastly, we should bear in mind that the burden of establishing that the law is unreasonable or the classification is arbitrary is on the petitioners.

10. Viewing from the prospective of aforementioned principles, we are unable to say that the constitutional guarantee under Article 14 is in any way violated by the impugned amendments resulting in retrospective enhancement of licence fee. It is true that the increase in the scale of licence fee is quite high and very substantial. In the counter affidavit filed by the Assistant Secretary to Government, except claiming an absolute and unfettered right to enhance the

licence fee, no specific reasons have been given for this steep enhancement. However, in the statement laid before the State legislature, two - fold reasons are mentioned as a justification for the increase in the licence fee. The need to recoup the cost of supervisory expenses and the need to mobilise additional resources are the two reasons. Though the quantum of increase of the cost of supervision between the year 1985 and 1990 may or may not justify such heavy increase, the second reason given cannot be said to be an irrelevant factor. The State is entitled to stipulate its own terms for conferring on others the privilege to deal in liquors which is otherwise vested in it and in doing so, if the State does not discriminate between the similarly situated persons but acts in furtherance of its prime objective to realise more and more revenue from an important source available to it, the State action is not vulnerable to attack from the standpoint of Article 14. Even if the scale of licence fee is such as to discourage the persons from setting up distilleries and breweries for the purpose of manufacture of liquor, it is still not hit by any constitutional provisions. On the other hand, it would effectuate the objective enshrined in Article 47 of the Constitution. Apart from this somewhat theoretical approach to the problem, even if we examine from the angle whether the increase in licence fee operates harshly and oppressively against the petitioners we find, no basis in the complaint of the petitioners. Except making general allegations, the petitioners have not attempted to demonstrate with facts and figures as to how the impugned enhancement causes irreparable loss or damage having a crippling effect on their business. We have reason to think that in ultimate analysis, the burden does not fall so much on the petitioners as on the consumers. It is common knowledge and in fact it is stated by the petitioners themselves that the element of licence fee would be reflected in the price structure of liquors they manufacture. Even if they are not in a position to pass on the entire amount, it might only result in erosion of their profits - which can hardly be a ground to strike down the law as unreasonable. The difficulty in passing on the differential licence fee might arise only for the period covered by retrospective operation of the amended rule. But it is to be noted that the retrospectivity does not spread over a long period. The retrospective effect given to the relevant rules by the impugned G.O. is only for a period of four months i.e., from 1-10-1989 to 31-1-1990. Even here, there is no knowing that the petitioners would have desisted from passing on the liability arising from increased licence fee while effecting sales during the year. As far as breweries are concerned, a special reason has been given in the counter. In justification of the enhanced licence fee, it is stated that the demand for beer in the state is very high and huge quantity of beer is being imported by the licensees every year. It is also stated that the excise duty on beer is quite low, viz., Rs. 30/- per bulk litre. These are again relevant considerations which prompted the Government to increase the licence fee on breweries. Thus, on a conspectus of all these factors, we see no justification in challenging the impugned amendment as unreasonable or unconscionable, thereby violating Article 14 of the Constitution.

11. Let us now consider the argument that irrational classification has been adopted in Rule 5(1)(b) of the A.P. Distillery Rules by applying the criteria of licensed capacity of the distillery. We cannot say that the licence fee levied on a graded scale depending upon the licensed capacity of the distillery gives rise to an irrational classification or a classification based on irrelevant criteria. There may be other methods of classification open to the rule-making authority but so long as the particular method chosen is not inherently irrational or arbitrary the question of violation of Article 14 does not arise. The actual production capacity as suggested by the learned counsel may provide a more scientific method; but at the same time it shall not be forgotten that such a method of assessment is fraught with other practical difficulties such as the complex enquiries involved in determining the actual production capacity and the possible disputes in this regard. The mere fact that the distilleries may not be able to reach the capacity on account of non-availability of raw material or otherwise is no ground to strike down the methodology adopted by the rule-making authority as unconstitutional. If the problem is with the allocation of rectified spirit by the Excise Department, the handicap will be faced by all the four categories of distillery licensees and it is not peculiar to any particular licensee. The contention of the petitioners that the rates of licence fee now prescribed will result in an advantage to distilleries with larger capacity and a disadvantage for distilleries with lesser capacity, does not also merit any acceptance. Any graded system of taxation or levy of fee cannot be gauged by arithmetical equations. Some anomalies are bound to occur. The advantages which may be gained in one sense by the larger distilleries may be offset by the disadvantages which they may have to face in other respects. These diverse factors and situations are fit to be taken note of by the Rule-making authority, but it is not for this court to meticulously scrutinize the impact of a law of this nature. In the Judgment just delivered in W.P.Nos. 3818/90 etc., we have observed:

"It is not for this court to test the justification for increase on a priori notions or by drawing logical parallels. The quantum of fee to be charged from a licensee in consideration of parting with the exclusive privilege of the State is essentially within the discretion of the State and so long as such discretion is exercised in furtherance of public interest and the State does not make an irrational classification or hostile discrimination, there is hardly any scope for invalidating the same."

Viewed from any angle, we are not persuaded to accept the contention of the petitioners.

12. The second and alternative contention advanced by the learned counsel for the petitioners Mr. Sitarama Raju is that para (2) of the first notification issued in G.O.Ms.No. 74, dt.1-2-1990 which says that Clause (b) of Sub-rule (1) of Rule 5 (of the A.P. Distillery Rules) shall be deemed to have come into force from 1st October, 1989" and para 2 of the second notification which says that "the amendment to Rule 6 (of A.P. Brewery Rules) shall be deemed to have come into

force with effect from 1st October, 1989" are bad in law and these deeming provisions do not have the effect of creating a new liability which was not there at the time of granting the licence. According to the learned counsel, the petitioner paid the prescribed annual licence fee and obtained the licence in accordance with Rule 5 of the A.P. Distillery Rules and Rules 5 and 6 of the A.P. Brewery Rules and the licences so granted shall be in force for a period of one year according to the conditions of the licence. The licence issued specifically states that on payment of annual fee as specified in the licence, the petitioners were authorised to manufacture liquor or beer as the case may be. The retrospectivity given by the impugned G.O. is contrary to the conditions of the licence. So long as the conditions of licence remained unaltered, the question of paying the differential licence fee during the middle of the year does not arise. These contentions are countered by the learned Advocate General by pointing out that the rule-making authority is empowered to make or amend the rules retrospectively and that the specification of a particular figure of licence fee in the Form of licence does not preclude the operation of retrospective provisions enhancing the licence fee.

13. We find no substance in the above contention of the learned counsel, though plausible it is. It is true that in the normal course, the annual licence fee once paid at the rate in force at the time of obtaining the licence is unaffected by any change in the rate during the year. But the position is different where an express retrospective effect is given to the relevant rule by introducing a deeming provision that the amendment shall be deemed to have come into force on 1st October, 1989. The effect of such deeming provisions is that on 1st October, 1989, the enhanced figure of licence fee must be deemed to have been incorporated into the rule. The substituted figure is to be read into the impugned rule for all purposes and intents on and from 1st October, 1989. The amendment dates back to 1-10-1989 and as a logical corollary to this fiction created by the deeming provision, the enhanced rate is to be treated as the only effective rate that was in force on the date of commencement of the Excise year 1989-90 i.e., 1-10-1989. The legal position as to the effect of retrospective provision of law has been succinctly stated by the Supreme Court in *West Ramnad Electric Distribution Co. Ltd. Vs. State of Madras*, :

"Mr. Nambiar then contends that the impugned notification is invalid and inoperative because it contravenes Article 31(1) of the Constitution. Article 31(1) provides that no person shall be deprived of his property save by authority of law. It is urged that this provision postulates the existence of an antecedent law before a citizen is deprived of his property. The notification was issued on the assumption that there was an antecedent law, viz., the earlier Act of 1949; but since the said Act was non est, the notification is not supported by the authority of any preexisting law and so, it must be held to be invalid and ineffective. In our opinion, this argument is not well founded. If the Act is retrospective in operation and Section 24 has been enacted for the purpose of retrospectively validating actions taken under the provisions of the Act, it must follow y the very

retrospective operation of the relevant provisions that at the time when the impugned notification was issued, these provisions were in existence. That is the plain and obvious effect of the retrospective operation of the statute. Therefore, in considering whether Article 31(1) has been complied with or not, we must assume that before the notification was issued, the relevant provisions of the Act were in existence and so, Article 31(1) must be held to have been complied with in that sense."

The Supreme Court expressed the view that the position is different in so far as Article 20(1) of the Constitution is concerned. Applying the same principle, we must assume that on 1-10-1989, the enhanced licence fee was very much on the statute book. It is true that in the Form of licence, the pre enhanced rate is mentioned and the Form of licence says that on payment of annual fee at such and such a rate, the licence is issued. But when once the said rate is changed with retrospective effect and the licensee pays the differential fee as a sequel to the retrospective amendment, the recitals in the proforma of the licence get modified *protanto* so as to fall in line with the amended rule. The formal amendment to the licence may have to be carried out but the power to demand the enhanced licence fee does not depend on that, but is traced to the amended rule. Section 72(3) of the A.P. Excise Act expressly provides for a retrospective effect being given to a rule subject to the qualifications that the reasons for making the rule shall be specified in a statement to be laid before the State Legislature. This requirement has been satisfied in the instant case as is evident from the letter dt.21 -6-90 addressed by the Secretary to Legislature Department to the Revenue Department. In view of this provisions, the rule-making authority has undoubted power to make a rule with retrospective effect. Such retrospective effect can even extend to prescription or enhancement of licence fee. It is also relevant to refer to condition No. 1 of Form D.2 licence, according to which, "the terms and conditions of this licence may be modified or added at any time during the currency of this licence". This is another pointer to the conclusion that the licence fee once fixed is not beyond the scope of amendment before the expiry of the period of licence. We, therefore, find no substance in the second contention of the learned Counsel.

14. In view of the foregoing discussion, we find no merits in the writ petitions. They are accordingly dismissed without costs. Advocates fee Rs. 250/- in each.