

(1995) 07 KAR CK 0010

In the Karnataka High Court

Case No : Writ Petition No's. 20344 to 20421 and 20503 to 20517 of 1995

Karnataka Wine Merchants Association

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 27-07-1995

Acts Referred:

Constitution of India, 1950 — Article 14
Karnataka Excise (Sale of Indian and Foreign Liquor) (Amendment) Rules, 1968 —
Rule 8, 8 (1), 8A
Karnataka Excise Act, 1965 — Section 23, 24

Citation : (1995) ILR (Kar) 2599 : (1995) 4 KarLJ 214

Hon'ble Judges : Rajendra Babu, J

Bench : Single Bench

Advocate : P. Vishwanatha Shetty, Shetty and Hegde, Associates and M.R. Naik, for the Appellant; Rangavittalachar, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Rajendra Babu, J.—In these Petitions, petitioners are calling in question the Constitutional validity of Section 24 of the Karnataka Excise Act as amended by Act No. 2/1994 and the Rules framed under the Act known as the Karnataka Excise (Sale of Indian and Foreign Liquor) (Amendment) Rules, 1995 issued vide Notification No. FD 10 PES 95(i) dated 31st May, 1995 as ultra vires the Act and beyond the legislative competence of the State.

2. The petitioners are either Wine Merchants Association or the dealers in Indian and Foreign liquor. They obtained licences from the concerned authorities as provided under the relevant statute and the Rules i.e., the Karnataka Excise (Sale of Indian and Foreign Liquor) Rules, 1968 (hereinafter referred to as the "1968 Rules"). The petitioners have licences either in Form CL-1, CL-2 or CL-9 for dealing liquor in wholesale or retail - or running Refreshment Rooms or Bar & Restaurants. Petitioners contend that their trade is controlled by the provisions of the Karnataka Excise Act and the Rules framed thereunder and in particular they carry on their trade under the Karnataka Excise (Sale of Indian and Foreign

Liquor) Rules, 1968 and the Karnataka Excise licenses (General Conditions) Rules. It is submitted that though they had secured the licence for a period of one year commencing from 1st July of each year ending with the 30th June of next year, they can usually expect a renewal of their business licences and are having thus licences for the current year as well. The petitioners make necessary applications as provided under Rule 4 of the 1968 Rules for renewal of their licences. It is contended that earlier the fee payable in respect of wholesale liquor trade was Rs. 5,000/- per year in respect of one District and in respect of more than one district, an additional fee of Rs. 500/- was collected for each one of the Districts. Similarly, for retail sales of liquor, the licence fee prescribed was Rs. 10,000/- and for Refreshment Rooms, the licence was prescribed at the rate of Rs. 10,000/-. Thereafter, the said Rules came to be amended wherein the licence fee was enhanced to Rs. 50,000/- per annum in respect of wholesale dealers and an additional fee of Rs. 500/- was collected in respect of business carried by a particular licensee in more than one district. The fee payable in respect of retail licence and Refreshment Room licence also stood increased thereof.

3. It is submitted by a Notification issued on 21.2.1992 in No. FD 4 PES 91, the State Government enhanced the licence fee by increasing the rate by 100% and the wholesale licensee was thus required to pay a sum of Rs. 1,00,000/- per year. Likewise, the retail licensees were required to pay at the rate of Rs. 60,000/- per year in respect of the shops located in City Municipal Corporation areas; Rs. 55,000/- in respect of the shops located in the City Municipal Council areas; Rs. 40,000/- per year in respect of the shops located in Town Municipal Council Areas and Rs. 25,000/- in respect of the shops located in other areas. Similarly, in respect of licences arising under CL-9 were required to pay a sum of Rs. 80,000/- in respect of the City Municipal Corporation areas; Rs. 60,000/- in respect of the Municipal Corporation areas; Rs. 50,000/- in respect of the shops located in Town Municipal Areas and Rs. 40,000/- in respect of other areas.

4. It is contended that on an earlier occasion this Court examined the scope of such levy in *V.S. NARAYANASWAMY v. STATE OF KARNATAKA* 1974 (2) KARLJ 200. In the said Decision, Rule 8 was struck-down as beyond the legislative competence in so far as it related to levy of licence fee. When the matter was carried in Appeal to Supreme Court by the State in *State of Karnataka and others Vs. V.S. Narayana Swamy*, it was observed that - "... it may be possible for the legislature to make a statutory provision for a licence fee of the type contemplated under Rules, but without authority of the statute, a Rule of the type impugned should not have been made". Now, the State taking advantage of this observation, it is stated, amended the Karnataka Excise Act by Karnataka Act No. 2/1994 substituting Section 24 of the Karnataka Excise Act. The validity of the said Act is under challenge. Petitioners also challenge the amendment to Rule 8 of Karnataka Excise (Sale of Indian & Foreign Liquor) Rules, 1968. The validity of the said Rule is also challenged to which I will advert to a little later.

5. Firstly, I shall deal with the challenge to the Constitutional validity of Act 2/1994. It is submitted on behalf of the petitioners that in *State of Karnataka v. V.S. Narayanaswamy* while confirming the Judgment of this Court in *V.S. Narayanaswamy v. State of Karnataka* it was held that the provisions of Rule 8 is beyond the legislative competence in so far as it relates to levy of licence fee. It is stated in the said Decision that the licence fee sought to be levied under Rule 8(1) of the Rules cannot be regarded as Excise Duty on such liquors. The State Government has no power under the Act to make Rules providing for levy which is not in the nature of Excise Duty. Neither Section 23 nor Section 24 of the Act as it stood then, authorised the acceptance of any consideration for parting with the privilege to deal in Indian and Foreign liquor. In that case, this Court did not accept the argument of the learned Government Advocate that even if licence fee for the privilege of vending liquor, is not an Excise Duty within the meaning of Entry 51 of List II of Schedule VII to the Constitution, such licence fee comes within the ambit of Entry 8 of List II read with "intoxicating liquors" including production, manufacture, possession, transport, purchase and sale of intoxicating liquors. However, this Court pointed out that the levy of such licence fee was not authorised under the Act and therefore could not be levied. The Supreme Court noticed that the Decision of this Court was to the effect that what is authorised u/s 23(d) is imposition of a fee of licence in respect of manufacture or sale of any excisable articles and Rule 8(1) has gone beyond the enabling provision in the Section by requiring a licence fee to be paid for the premises where the licensed shop is located. Such a fee would not have the support of Section 23(d) of the Act. The learned Counsel for the petitioners contended that unless a specific provision is made in the Act providing for leasing or licensing the privilege in favour of a party to deal with Indian or Foreign liquor, mere authority to collect prescribed licence fee as contemplated u/s 24 would not be sufficient and the attempt thereof is merely to nullify the effect of Judgment but does not cure the defect thereof.

6. Supreme Court had several occasions to consider the effect of Validation Acts and stated the law as to validity thereof is to be judged on the following tests :

- (i) Whether the Legislature, enacting the Validating Act, has competence over the subject matter ;
- (ii) Whether by Validation, the Legislature has removed the defect which the Courts had found in the previous law ;
- (iii) Whether the Validating law is consistent with the provisions of Part III of the Constitution.

If these tests are satisfied, a Validating Act may be given retrospective effect like any other enactment and if it is otherwise valid, cannot be challenged on the ground that it is retrospective.

7. In *STATE OF UTTAR PRADESH AND ORS. v. SHEOPAT RAI AND ORS.* AIR 1994 SC 813, the Supreme Court had the occasion to deal with the question of grant

of periodical licence for retail vend of foreign liquor on the basis of "fixed fee" or "licence fee" and had explained therein that those fees could connote consideration received by Government for parting with its exclusive privilege to deal with intoxicating drinks and power to levy such fee was also traced to Entry 8 of List 2 of Schedule VII to the Constitution. Hence, it is no longer open to the petitioners to contend that the legislature has no competence to charge or collect licence fee for parting with the privilege to vend in Indian or Foreign liquor.

8. The next question for consideration is whether by Validation the Legislature has removed the defect which the Court had pointed out on previous occasions. It was held that Section 23 did not authorise levy of fee of the nature with which we are concerned now, it has now to be seen whether Section 24 as amended by Act 2/1995 authorises such levy. Section 24 reads as follows :

"24. Payment of fees for grant of lease :- Instead of or in addition to any excise duty or countervailing duty leviable under Sections 22 and 23, the State Government may, accept payment of a sum or levy such licence fee or privilege fee as may be prescribed, in consideration of grant of a lease or licence or both, by or under this Act".

It consists of two parts, namely, the introductory part that instead of or in addition to any excise duty or countervailing duty leviable under Sections 22 and 23, which is put in paranthesis, and the operative part that the State Government may accept payment of a such of levy such licence fee or privilege fee as may be prescribed in consideration of grant of a lease of licence or both, by or under the Act. Section 24 as amended enables not only acceptance of certain consideration in the form of fee called licence fee or privilege fee, but also for grant of licence or lease of the said privilege. If Section 24 is to be understood in that manner, it is not open to the petitioners to contend that the said provision has not cured the defect pointed out by this Court in 1974 (2) KARLJ 200. Therefore, the lacuna that was pointed out on the earlier occasion was that the State did not have the power or the authority to levy a fee or privilege fee for parting with its privilege as provided under the relevant provision stood cured.

9. Learned Counsel appearing for the petitioners contended that no specific provision has been made under the Act providing for leasing or licensing to part with the privilege as such. A perusal of the provisions of Section 17 makes it clear that the State Government may lease to any person on such conditions as it may deem fit the exclusive or other right of manufacturing or supplying by wholesale or retail any Indian liquor or intoxicating drug within a specified area. So also, Section 24 makes it clear that the State Government may accept payment of a sum or levy such licence fee or privilege fee in consideration of grant of a lease or licence or both. In order to part with a lease or licence, consideration could be collected and such consideration could be collected under this provision for the purpose of granting licence or lease. Hence, I do not think the contention advanced on behalf of the petitioners that there is no specific

provision under the Act in the matter of parting with the privilege of the State, is tenable.

10. However, Sri M.R. Naik, learned Counsel appearing for some of the petitioners, adverted to the Decision of the Supreme Court in *LAXMIKANTHA SAHU v. SUPERINTENDENT OF EXCISE, BERHAMPUR AND ORS.* 1968 SCC 14, to contend that when an identical provision as contained in Section 24 was available in the Orissa Excise Act, it was noticed that when there was no specific provision in relation to grant of lease or licence in respect of foreign liquor, the other provisions therein did not empower the Board to levy a tax in the form of a payment for the grant of a licence for the retail vend of foreign liquor or to direct that such duty should be fixed by auction. Therefore, it was held that the amended provision in so far as it directs that the fee for retail sale of foreign liquor shall be fixed by auction is beyond the rule making authority of the Board and in that case the question that fell for consideration was that validity of Rule 103 was challenged on the ground that the charge for the grant of a privilege for the retail "off" vend of foreign liquor under the system of auctioning introduced by the amended Rule 103(1) is a tax and the imposition of such a tax is not authorised by the Act. But that is not the contention advanced in the present case at all.

11. Further, the Decision in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, The Supreme Court explained the scope of the said Decision and has noticed therein that it was expressly conceded in that case on behalf of the State of Orissa that the charge for the grant of a privilege for the "off" vend of foreign liquor under the system of auctioning was a tax and not a fee and that Decision being based on a concession, does not involve determination of the point whether the levy was truly in the nature of tax. Hence that Decision can have no application to the facts of this case.

12. The next contention advanced is that due procedure in making amendment to Rule 8 is not followed. It is submitted that the draft of the said Rule was published on 15.5.1995 and the said Notification was made available to the public in the following week- Ultimately, the Rules were framed and the Notification was published on 31.5.1995 after over-ruling the objections that had been received during that time. It is contended on behalf of the petitioners that u/s 71 of the Act certain procedure is prescribed for making the Rules under the Act and previous publication of the Rules inviting objections thereto within a period to be prescribed had to be followed and having provided that u/s 71, the respondents cannot merely give lip-service to the same but in substance should comply with it and have got to consider the objections raised by the concerned persons within the time mentioned therein. It is contended that such exercise has not been done in the present case. In order to satisfy myself whether the respondents have followed this procedure or not, I called upon the learned Government Advocate to make available the necessary records. The Gazette-Extraordinary had been published dated May 15, 1995. In the Notification issued

finally approving the Rules after consideration of the objections, it is stated that the Gazette containing draft Rules was made available to public on 15th May, 1995. Considering the stakes involved in the matter and the urgency with which the State wanted to proceed, it is certainly possible for the State to make available to public the necessary Notification on that very date on which it was issued by getting it published in the Gazette and when the State itself had made it clear that it was made available to the general public on 15th May, 1995 itself, there is no reason to doubt the correctness of the same. Unless any other material had been placed before the Court to doubt that correctness, the statement made in the official records should be accepted. I do not find any such material in the present case.

13. Next it has to be seen whether the respondents have duly considered the objections. Nineteen persons had filed objections. Those objections were got processed at various levels by the Government including inviting the views of the Excise Commissioner and thereafter the matter was finalised. The objections were considered and they were classified into different categories and thus the file was prepared. Ultimately, the Joint Secretary to Government in the Department of Excise noticed that in view of the detailed remarks furnished by the Excise Commissioner, the licence fee proposed to be enhanced by the Government was justified. It was also noticed therein that in view of the recommendations made by the Excise Commissioner, objections made to the proposed enhancement could be over-ruled and final Notification should be issued accordingly. Ultimately, the concerned Minister agreed with this noting in the file. This procedure having been followed by the Government, the matter having been examined at different levels and an institutional decision taken, no exception can be taken to the nature of consideration of the matter. There had been a detailed consideration made by the Excise Commissioner of the various objections raised by different persons and the reasons as to why they are enhancing also have been set forth. In the circumstances, I do not think it could be contended that the respondents have not followed the due procedure in making the amendment to the Rules.

14. It is next contended that the levy of fee made flows from an unguided power available u/s 24 if at all, and therefore is invalid. The learned Government Advocate submitted that what is provided u/s 24 is in the nature of a consideration for contract and is not at all in the nature of any levy of fee or tax or compulsory exaction from a party, and I think there is great force in the submission made by the learned Government Advocate. When the Government proposed lease or licence on right to vend in Foreign/Indian liquor, the party concerned has a choice in the matter and there is no element of compulsion involved at all. Hence, the principles applicable to delegated legislation in respect of levy of fee or tax cannot be applied at all and therefore, the contention advanced by the petitioners is liable to be rejected.

15. I shall now take up the next contention urged on behalf of the petitioners

that in levying the fee the respondents have also levied an additional licence fee under Rule 8-A of the Rules. Rule 8-A reads as follows :

"8-A - Additional licence fee: In respect of the licences granted under these rules within the Bangalore City Planning Area as declared u/s 4-A of the Karnataka Town and Country Planning Act, 1961, an additional licence fee equivalent to fifteen percent of the licence fee levied in respect of each kind of licence under Rule 8 shall be levied towards Bangalore Mass Rapid Transit System".

It is referred to therein that an additional licence fee equivalent to 15% of the licence fee levied in respect of each kind of licence under Rule 8 shall be levied towards Bangalore Mass Rapid Transit System. Under the Act, no fee or tax could be collected in respect of any other activity. Therefore, it is submitted that it is not at all permissible for the respondents to have added the new Rule 8-A and levy an additional licence fee and the same is wholly unauthorised. In order to test the correctness of this argument we have to look at the nature of the fee contained in Rule 8-A. Rule 8-A merely enhanced the licence fee already fixed under Rule 8. That fee is sought to be raised for certain purpose. The whole object of Rule 8 and 8-A is to raise the revenue for the State. If that object is sought to be achieved by raising revenue in terms of Section 24 of the Act, which is only a consideration for granting privilege, whether it is collected in terms of Rule 8 or 8-A would not make much difference. It may be for purpose of identification of certain percentage of amount to be utilised for Bangalore Mass Rapid Transit System, such an arrangement has been made. No exception could be taken to that fixation of levy either. Hence. I do not find there is any substance in this contention.

16. The learned Counsel for the petitioners next contended that the levy is a fee and not any consideration and it has to meet with the tests laid down by the Supreme Court that it must have a broad correlation to the services rendered and the fee levied. Since I have already held that the fee collected under the relevant provisions is in the nature of consideration for parting with a privilege to vend liquor, I do not think this contention arises to be considered.

17. It is lastly contended that the Government being an authority which is invested with certain powers, has got to act reasonably and all its decisions must be informed with reasons whether it is in the nature of exercise of statutory power, executive power or contractual powers. It is contended that in fixing the fee in question, the Government has not borne in mind the economics of the matter or the market forces thereof and have arbitrarily fixed the licence fee at exorbitant rates. In this context my attention was drawn to several Decisions in State of M.P. and Others Vs. Nandlal Jaiswal and Others, and I.E. Newspapers (Bombay) Private Ltd. v. Union of India (1), (1986) 159 ITR 856 (SC) But, in my view, it is unnecessary to refer to any one of these Decisions for the petitioners have not in any of these Petitions laid a factual foundation to demonstrate the enhanced fee would result in annihilation of the petitioners business nor result in destruction of their activities. Indeed in State of M.P. and Others Vs. Nandlal

Jaiswal and Others, while dealing with the scope of interference on the ground of arbitrariness, a note of caution has been struck by the Supreme Court. The Supreme Court stated -"..in considering the applicability of Article 14, due regard should be had to the nature of trade and business and the policy of the Government in such matters should not be lightly interfered with because grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the Court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or mala fide". As stated earlier, no factual foundation has been laid in any of the Petitions to draw such an inference. Hence, I cannot accede to the contention advanced on behalf of the petitioners in this regard. In the circumstances, these Petitions are liable to be dismissed, but without any costs.

18. Considering the fact that the petitioners had to approach this Court on several occasions in this regard and obtain reliefs and in fact the State itself had to go in for amendment before making the charging of the fee by passing a Validation law, it would be appropriate to grant reasonable time to the petitioners to pay-off the amounts due and not collected pursuant to the Interim Orders granted by this Court in all such cases. If the petitioners pay-off the amounts on or before 31st December, 1995, respondents shall not take any further coercive action.

19. Subject to the above observations, these Petitions are dismissed. Rule discharged.