(1975) 04 AHC CK 0056

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 441 of 1975

K.P. Sui and Another — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 08-04-1975

Acts Referred:

Uttar Pradesh Excise Act, 1910 — Section 40, 40(1), 41
Uttar Pradesh Excise Rules — Rule 13A, 13B

Citation : (1975) AWC 440

Hon'ble Judges : Hari Swarup, J

Bench : Single Bench

Advocate : V.P. Misra, for the Appellant;

Final Decision : Allowed

Judgement

Hari Swarup, J.—This petition has been filed challenging a rule framed by the Excise Commissioner in purported exercise of his power u/s 41(e)(v) of the U.P. Excise Act, 1910 (hereinafter referred to as the Act). The rule provides for the closure of the shop on every Tuesday and some other days. The petition is confined only to that part of the rule which deals with the closure of the shop on Tuesdays. The Petitioners have obtained licence for tapping and sale of Tari and contend that the rule requiring the closure of shop on Tuesday as well as attachment of the condition in respect thereof in the licence are void.

2. Learned Counsel for the Petitioner has contended that this power exercised by the Commissioner is beyond the rule-making power conferred on him by Section 41(e)(v) of the Act as Tuesday in every week cannot be regarded as a special occasion within the meaning of that Section. It is contended that if the shop remains closed on Tuesday it will not be possible for the Petitioners to sell Tari collected on Mondays before ft gets spoiled. It is also contended that if Tari is not allowed to be tapped and kept in the shop on Tuesday, the trees themselves will get dried up. According to the Petitioners they cannot keep the Tari tapped on Tuesday anywhere if the shop is to remain closed. The contention is that the rule

about closure is for these reasons an unreasonable restriction placed by the Commissioner on the Petitioners'' right to sell Tari.

3. On behalf of the Respondents the rule is said to be justifiable on the ground that it is covered by the rule-making power of the Commissioner u/s 41(e)(v) of the Act. It is also denied that either the Tari tapped on Monday becomes unfit for consumption because of being not sold on Tuesday, or that trees get dried because of non-tapping. The contention of the learned Standing Counsel is that the Tari collected on Monday can be kept preserved till Wednesday and that there is no prohibition to the tapping of Tari on Tuesday or even to the opening of the shop on Tuesday for keeping the stock which is collected on Tuesday or collected on Monday and brought on Tuesday. The Petitioner had filed a representation before the Commissioner in October 1974 but that was rejected by an order dated 12-2-1975, and the ground given for closure of shop on Tuesday was that this was done in view of the policy of prohibition. In the order it was further said that to further the policy of prohibition it was necessary that at least once in a week intoxicating liquor should not be sold. This plea again has been reiterated by the learned Counsel for the Respondents.

4. Section 40 of the Act gives power to the State Government to make rules. It runs as under:

Section 40(1) - The State Government may make rules for the purpose of carrying out the provisions of this Act or other law for the time being in force relating excise revenue.

(2) In particular and without prejudice to the generality of the foregoing provision, the State Government may make rules-

(g) for the prohibition of the sale of any intoxicant to any person or class of persons.

(1) for the prevention of drunkenness, gambling or disorderly conduct in or near any licensed premises, and the meeting or remaining of persons of bad character in such premises.

Section 41 defines the power of the Excise Commissioner to make rules. The relevant portion of Section 41 runs as under:

The Excise Commissioner, subject to the previous sanction of the State Government may make rules:

....

....

(e) prescribing the restrictions under and the conditions on which any licence, permit or pass may be granted including provision for the following matters:

(i).... (ii).... (iii).... (iv).... (v) the fixing of the days and hours during which any licensed premises may or may not be kept open, and the closure of such permises on special occasions.

It is thus clear that Section 40 confers on the State Government a general rule making power for the purpose of carrying out the provisions of the Act, and Section 41 confers only specific powers on the Excise Commissioner. The powers of the Excise Commissioner to make rules are circumscribed by the provisions of Section 41 and he can only prescribe restriction thereunder and the condition on which any licence may be granted.

5. Clause (v) deals with the general rule about fixing of days and hours during which any licensed premises may or may not be kept open. The second limb of this clause deals with the closure of such premises on special occasions. Specific rule has been framed for opening of the shop u/s 41(e)(v) of the Act. Rule 349(1) of the Excise Manual (Vol. 1) runs as under:

349(1). Every shop shall, unless exempted by the Excise Commissioner or any officer not below the rank of Excise Inspector to whom he may delegate this power be kept open every day throughout the year and the licence-holder shall maintain at his shop a minimum quantity of the intoxicant for which he holds the licence and the same shall be fixed by the Collector for each shop with due-regard to the normal demand of consumers in the locality.

According to this Rule the shop has to be kept open every day throughout the Tari season. It is admitted that the hours during which licenced premises are to remain open and closed have also been prescribed. According to the rule the shop has to remain open from 10 A.M. to 10 P.M. No rule has been shown in which a rule may have been made u/s 41(e)(v) saying that the shop will not be kept open on Tuesday except Rule 13-B which is in question. Rule 13-A provides:

Every shop licensed for the sale of:

1. Country Spirit;

2. Tari;

3. Foreign liquor for consumption ''on'' and ''off'' the premises;

4. Foreign liquor for "off" the premises;

shall be kept closed on the day following the burning of Holi and on the principal Dewali day.

Exception- This condition does not apply to railway refreshment rooms, dining cars and such hotels and restaurants which are licensed for the sale of foreign liquor to foreign tourists.

Rule 13-B- Ali excise shops (including foreign liquor, country spirit, hemp drugs, opium, tari and out-still shops shall remain closed on Independence Day (August 15), Mahatma Gandhi Birthday (October 2) and on the day of Mahatma Gandhi''s tragic death (Jan. 30) every year and also on all Tuesdays.

Provided that the Excise Commissioner, may, in consultation with the Collector of the District concerned, waive the condition of keeping an excise shop closed on Tuesday for such specified period as he may think fit, in the case of hotels possessing a licence in Form F.L. 6 for the sale of foreign tourists as may hold a valid Permit under the All India Liquor Permit Scheme of the Government of India.

From a reading of Rule 13-B, prima facie, it appears that the power has been exercised by the Commissioner envisaged in the latter part of Clause (v) which authorises the making of a rule for cloture of premises on special occasion. Tuesday appears to have been thought by the Commissioner a special occasion. There is obviously no justification for holding that Tuesday in a week is a special occasion. The power to direct closure could not, therefore be validly exercised under the second limb of Clause (v). Learned Counsel for the Respondents has further tried to contend that this power of closure has been exercised in the first limb of Clause (v) and although the word has been used as ''closed'' it should be taken to mean ''shall not be kept open.'' There is a clear distinction between the term ''not open'' and ''closure.'' Normally every word in a Statute has to be given a meaning and it is only exceptional when two words used in the same section may be given the same meaning. The words ''not open'' and ''closure'' have entirely different shades of meaning and do not ordinarily mean the same thing. A shop can be closed when it is to remain open. The first limb of Clause (v) deals with the general order about keeping the shop open or not open. It is only when the shop is authorised to be kept open on a particular day that it can be directed to be closed on a special occasion. The rule of closure cannot therefore be taken as covered by the first limb of the clause.

6. Even if the contention of the learned Standing Counsel is accepted that the word ''closure'' hat been wrongly used and it should be deemed to mean ''not open'', it will not be possible to hold the rule to be valid because u/s 41(e)(v) the Commissioner has been given the power to prescribe such restrictions and conditions which have reasonable nexus to the subject matter of the rule. If he intends to fix the days on which the shop should not remain open be has to do it by applying his mind to the special circumstances of each class of shops. The order passed by the Commissioner Himself while rejecting the representation of the Petitioners shows that he was trying to enforce some policy of prohibition which has not been shown to be laid down anywhere in the law in respect of the consumption of Tari. Tari is not similar to other types of intoxicants; it is a special variety of intoxicant made of a self-brewing liquid. Tari is included in the category of country beer. It is produced by the process of fermentation. Fermentation starts according to the ''Technical Excise Manual'' at the time when the pot still remains on the tree. In the writ petition it is stated that Tari is perishable commodity and the Tari collected on Monday, if not sold on Tuesday will perish and not remain fit for human consumption. In the counter-affidavit it is denied and asserted that the Neera collected on Monday can be preserved and if properly preserved can be sold on Wednesday. However, rules for tapping and preservation of Neera are entirely different from those meant for tapping and

sale of Tari. Rules applicable to Neera cannot be made applicable to the case of collection of Tari.

7. In the Technical Excise Manual on which reliance was placed by learned Counsel for the Petitioner and also the learned Standing Counsel, certain statistics nave been given about Tari. Speaking about the method of tapping, paragraph 259 says that a fresh slice is cut off every day and incision is thus made each day. About the alcoholic strength of different kinds of Tari, paragraph 263 says that palmyra Tari has alcoholic strength of 90.8 U.P. (5.2 per cent by volume) while date Tari has alcoholic strength of 91.4 U.P. (4.9 per cent by volume). It is also stated in that paragraph that Tari exposed for sale in Bengal in 1909 was found generally to range in alcoholic strength from about 93 to 94 degree U.P. and that when reasonably fresh it has a food value somewhat comparable with that of well made malt beer. Paragraph 264 states that due to the manner in which Tari is collected fermentation starts while the tapping goes on and what is sold as fresh Tari shows an average strength of 94 degree U.P. In paragraph 267 it is mentioned that in addition to its use as a beverage and for distillation, Tari is also used for making sugar and vinegar. Contention of the Petitioner is that with the increase of acidity-percentage the alcoholic percentage also increases and such Tari becomes non-consumable as it acquires a bitter taste. The table in paragraph 53 shows that acidity percentage in Tari goes on increasing. According to learned Counsel for the Petitioner, Tari is consumed when the acidity percentage is upto 0.5 and no more. The allegations made by the Petitioner seem to be correct, because in paragraph 19 of the counter-affidavit it has been suggested that preservative methods applicable to the tapping and preservation of Neera should be applied or other methods be adopted. The Commissioner of Excise in rejecting the representation of the Petitioner has only said that he was enforcing the rule for imposing prohibition; he has not dealt with the difficulties placed by the Petitioner before him, ''Tari'' at the moment it is collected, i.e., while it is still fresh, has food value; this food value goes on decreasing with time and its alcoholic and acidic contents go on increasing. Hence, it would have been reasonable to require that Tari be sold while it is fresh. The closure of the shop on Tuesdays will result in greater fermentation and consequent reduction of food value; and this would, instead of promoting adversely affect the policy of prohibition. It appears that when the Commissioner framed Rule 13-B u/s 41 he framed it as a general rule concerning all shops selling intoxicants without taking into consideration the special features of Tari.

8. The allegation in the counter-affidavit that the closure of the shop does not mean that collection is not permitted also shows that the rule about closure is not a practical or reasonable rule. It is an implied admission of the Petitioner''s assertion that neither tapping can be postponed nor its immediate transport to the shop. In the counter-affidavit an effort has been made to show that the word ''closed'' means ''non-conduction of business of sale''. It is not possible to give any such interpretation to the rule. It is clear that the rule requires that the

shops should remain closed on certain days including Tuesdays, Further, the law could not have intended to give the Commissioner a power to make a rule which will result in some Tari losing its food value every week by not being sold.

9. According to Section 41(e), the Commissioner has the power only to prescribe the restrictions under and conditions on which licence is to be granted. These restrictions must be reasonable restrictions. In the case of Nashirwar and Others Vs. State of Madhya Pradesh and Others, , their Lordships of the Supreme Court, interpreting Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, , held that:

The decision is that dealing in liquor is business and a citizen has a right to do business in that commodity and the State can impose reasonable restrictions on the right in public interest.

In the present case, the Respondents have failed to show that the restriction is either reasonable or in public interest. It appears that there has been no application of mind by the framer of the rule to the special circumstances in which. Tari is brewed and sold. It is also apparent that Tuesday has been clubbed up along with other ''special occasion''. The rule imposing restriction of closure cannot, therefore, be held to be validly framed u/s 41(e) of the Excise Act.

10. to the result, the petition is allowed, and the rule requiring the closure of Tari shops on every. Tuesday as also the special condition No. 3 in regard to it mentioned in the terms of the licence are quashed. In the circumstances of the case parties will bear their own costs. This order will, however, not mean that the Commissioner of Excise will not have the right to fix days and hours for sale of Tari provided he does it after applying his mind to the special circumstances in which the self-brewing Tari is collected and consumed.

