

(1997) 01 KAR CK 0073

In the Karnataka High Court

Case No : Writ Petition No's. 22828 to 22833, 22340, 25145, 24972, 25306, 27205, 24735, 24106, 22653, 25095, 23404, 22772, 24655, 18275, 18276, 25493, 25494 and 23244 to 23261 of 1995

M/s. J.P. Distilleries Private Limited, Bangalore and Others

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 22-01-1997

Acts Referred:

Karnataka Excise (Distillery and Warehouse) Rules, 1968 — Rule 71 (1)
Karnataka Excise Act, 1965 — Section 7 (1)

Citation : (1998) 1 KarLJ 388

Hon'ble Judges : G.C. Bharuka, J

Bench : Single Bench

Advocate : Sri M.R. Naik, Sri Gururaj, Sri G.K. Bhat, M/s. Shetty, Hegde, Sri S.V. Subramanyam, Sri I.K. Mohan Rai, M/s. Hegde Associates, Sri Javaji Srinivasalu, Sri Ravi B. Naik and Sri N. Devraj, for the Appellant; Sri S. Vijaya Shankar, Advocate-General and Sri H. Kantharaj, Additional Government Advocate, for the Respondent

Judgement

1. In this batch of writ petitions, the petitioners have challenged the validity of the Notification No. FD 10 PHS 95(II), dated 31-5-1995 (Annexure-D) issued by the State Government u/s 71(1) of the Karnataka Excise Act, 1965 (in short "the Act"), whereby by amending Rule 7 of the Karnataka Excise (Distillery and Warehouse) Rules, 1968 (in short "the Rules"), it has enhanced the licence fee and has also inserted a new Rule 7-A prescribing an additional licence fee.

2. The petitioners herein are all distillers. They have obtained licences under the provisions of the Rules. They broadly fall in the following three categories, namely.--

"(i) Distillers manufacturing both non-potable spirits, as well as, Indian liquor;

(ii) Distillers engaged in manufacturing of Indian liquor only; and

(iii) Distillers manufacturing only non-potable spirits".

3. Rule 7(1) of the Rules, before its substitution by the impugned notification dated 31-5-1995 (Annexure-D) read as under:--

"7. Licence fee.--Fee for the grant or renewal of a licence under these rules shall be.--

(i) rupees two lakhs and fifty thousand in the case of distilleries which distill spirit out of molasses;

(ii) rupees two lakhs and fifty thousand in the case of distilleries which distill spirit out of tapioca/sweet potato;

(iii) rupees seventy-five thousand in the case of distilleries which distill spirit out of toddy, cashew, pineapple and apple and use such spirit for manufacture of Indian liquor;

(iv) rupees seventy-five thousand in the case of distilleries which distill spirit out of grapes or malt and also use such spirits;

(v) rupees two lakhs and fifty thousand in the case of distilleries which use spirit distilled out of molasses, tapioca, sweet potato, grape or malt, for manufacture of Indian liquor".

4. The said rule after substitution by the impugned notification (Annexure-D), now provides thus.--

"7. Licence fee.--(1) Fee for grant or renewal of a licence under these rules shall be.--

(i) rupees five lakhs in the case of distilleries which distill spirit out of molasses;

(ii) rupees five lakhs in the case of distilleries which distill spirit out of tapioca/sweet potato;

(iii) rupees one lakh and fifty thousand in the case of distilleries which distill spirit out of toddy, cashew, pineapple and apple and use such spirit for manufacture of Indian liquor;

(iv) rupees one lakh in the case of distilleries which distill spirit out of grapes or malt and also use such spirits;

(v) rupees five lakhs in the case of distilleries which use spirit distilled out of molasses, tapioca, sweet potato, grape or malt, for manufacture of Indian liquor".

5. The newly substituted Rule 7-A, reads thus:--

"7-A. Additional licence fee.--In respect of the licences granted under these rules, within Bangalore City Planning Areas as declared u/s 4A of the Karnataka Town and Country Planning Act, 1961, an additional licence fee equivalent to fifteen per cent of the licence fee levied in respect of each kind of distillery licence under Rule 7 shall be levied towards Bangalore Mass Rapid Transit System".

6. From the above it is clear that licence fee payable by the petitioners for their activities of distillation and manufacturing have been increased by 100%, apart from making them further liable to pay additional licence fee under Rule 7-A, for the development of Bangalore Mass Rapid Transit System. The petitioners have impugned the said enhancements and the new levy on the ground of absence of quid pro quo, as also the lack of competence on the part of the State Government to do so as a Delegated Authority on the ground that such exercise is in excess of the rule making power conferred on the State Government u/s 71 of the Act.

7. I have heard the learned Counsel for the petitioners as also the learned Advocate General appearing on behalf of the State.

8. As required by me, in order to have the authoritative expert opinion regarding true import of various clauses contained in the impugned Rule 7(1) of the Rules, quoted above, the Chief Chemist and Ex Officio Assistant Chemical Examiner, Government of Karnataka, in the Department of Excise, has set out his opinion in his affidavit filed on 4-11-1996. The petitioners despite service of notice to the said affidavit have not controverted the said opinion. The opinion of the Chief Chemist as spelt out in the affidavit, is to the following effect:--

"(i) Rule 7(1)(i) and (ii) refers to primary distilleries wherein manufacturing process is upto rectified spirit/spirit of potable nature;

(ii) Rule 7(1)(iii) is concerned, composite distilleries manufacturing spirit out of raw-materials namely, toddy, cashew, pineapple and apple and the spirit manufactured out of those raw- materials is further used for manufacture of Indian made liquors in the same distilleries. Ultimately finished or end products would be IML which is potable.

(iii) Clause (iv) to sub-rule (1) of Rule 7 is concerned, the distilleries in which spirit is manufactured out of raw-materials such as grapes or malt. It is made clear that the spirit manufactured out of those raw-materials is potable one. The spirit manufactured out of grapes will be used for production of brandy to impart natural flavour of grape. The spirit manufactured out of malt will be used for production of whisky to impart natural flavour of malt. Thus the immediate product. i.e., the spirit manufactured from grapes or malt are potable. Therefore the State Government has got power to levy fee on the end products of the distilleries mentioned under both clauses (iii) and (iv) of sub-rule (1) of Rule 7 of the impugned rules also".

From the above it is clear under clauses (i) and (iii) of Rule 7(1), licence fee has been prescribed for primary distillation of rectified spirit and if a distiller intends to manufacture Indian liquor out of the rectified spirit distilled by him or acquired from any outside sources, then under clause (v) of the impugned rules, he has to pay separate licence fee for the same.

9. So far as the clause (iii) or Rule 7(1) is concerned, it provides for levy of

licence fee for the distilleries, which distill spirit out of toddy, cashew, pineapple and apple and use such spirit for manufacture of Indian liquor. Therefore, this fee is levied on the distillers, who are engaged in the manufacture of Indian liquor which is an end product for them. Therefore, the fee levied is clearly a price or consideration for parting privilege.

10. So far as clause (iv) of Rule 7(1) is concerned, now it is a matter of record that the distillers falling in this clause are engaged in the manufacture of potable spirit out of grapes and malt through their own distillation process. Therefore, for this class of distillers also the fee levied is nothing but the price or consideration for imparting privilege.

11. Coming to the clause (v) of the Rule in question, it has provided for levy of fee on distillers, who are engaged in manufacture of Indian liquor from spirit distilled out of molasses, tapioca, sweet potato, grapes or malts. From a reading of this clause, as I understand, this fee has been levied on the activity of a distiller who manufactures Indian liquor out of spirit distilled either by himself or having acquired from any outside source. Therefore, the fee contemplated under this clause also is nothing but a price or consideration for parting with the exclusive State privilege.

12. From the discussions as noticed above, under the scheme of the rules the State Government appears to have levied fee on the activities of manufacturing both the non-potable as well as potable spirits. From the copies of the licence produced placed on record, it is clearly established that several distillers who are engaged in the distillation of the spirits out of molasses, tapioca, sweet potato as also in manufacturing of Indian liquor have been charged with two sets of fee, one for their activities falling under clauses (i) and (ii) of impugned Rule 7(1) and another for their activity of manufacturing the Indian liquor falling under clause (v) of the said Rule.

13. The Supreme Court in *State of Uttar Pradesh and Others Vs. Synthetics and Chemicals Ltd. and Others*, , declared the exclusive privilege of the State to manufacture all alcohols including denatured spirit and industrial alcohol. But this judgment was overruled in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, . In paragraph 5 of the later judgment, with regard to industrial alcohol, it has been *inter alia* held that:--

"(i) the State Legislature may lay down regulations to ensure that the non-potable alcohol is not diverted and misused as a substitute for potable alcohol; and

2(ii) in case the State is rendering any service as distinct from its claim of so called grant of privilege, it may charge fee on *quid pro quo*".

14. In view of the said declaration of the Supreme Court in the *Second Synthetic's* case, *supra*, it has now to be found whether keeping in view the pleadings of the parties, materials placed on record and the judicial

pronouncements in this regard, respondents have been able to establish the requisite quid pro quo for justifying the impugned enhancement of licence fee.

15. In the case of *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, , the appellant was a consumer of denatured spirit. It used to purchase denatured spirit from wholesalers or manufacturers for the purpose of manufacturing micanite. It has challenged the licence fee levied upon it under the provisions of the Bihar and Orissa Excise Act, 1915 and the rules framed thereunder on the ground that there was no sufficient quid pro quo for the said levy. The Court after referring to leading judgments on the subject bringing out distinction between "tax" and "fee", in paragraph 11 of the judgment held that:--

"From the above discussions it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlation with the services rendered by the Government. In other words the levy must be proved to be a quid pro quo for the services rendered. But in these matters it will be impossible to have an exact correlation. The correlation expected is one of a general character and not as of arithmetical exactitude".

16. In the case of *Kewal Krishan Puri and Others Vs. State of Punjab and Another*, , it has been held by the Supreme Court that:--

"It is axiomatic that the special service rendered must be to the payer of the fee. The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, yet, by and large, or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee. It may be so intimately connected or inter-woven with the service rendered to others that it may not be possible to do a complete dichotomy and analysis as to what amount of, special service was rendered to the payer of the fee and what proportion went to others. But generally and broadly speaking it must be shown with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realised is spent for the special benefit of its payers".

17. In the case of *The Chief Commissioner, Delhi and Another Vs. The Delhi Cloth and General Mills Co. Ltd. and Others*, , the question for consideration was whether the registration fee charged on the document satisfied the two conditions of fee which were enumerated in the following language:--

(i) There must be an element of quid pro quo that is to say, the authority levying the fee must render some service for the fee levied however remote the service may be;

(ii) That the fee realised must be spent for the purpose of the imposition and should not form part of the general revenues of the State.

In this case the second condition was not found to have been fulfilled and hence impost was held to be bad. The Supreme Court in its later judgment in *Kewal*

Krishan Puri's case, supra, while considering the said two requisites for upholding the impost as fee has observed that:

"We would like to point out that the first condition is rather couched in too broad and general a language. Rendering some service, however remote the service may be, cannot strictly speaking satisfy the element of quid pro quo required to be established in cases of the impost of fee".

18. Now, so far as the distilleries whose activities are covered by clauses (i) and (ii) of Rule 7 of the Rules are concerned, licence fee is levied on them for distillation of spirits out of molasses/tapioca/sweet potato. Spirits so distilled are admittedly non-potable in nature. Then by paying further licence fee under clause (v) of the said rule, they have acquired the further right of manufacturing Indian liquor out of the non-potable spirit distilled by them. Therefore, part of the activities of such distillers can at best to be subjected to regulatory measures till the stage of manufacturing of non-potable spirit, subject to levy of fee on quid pro quo basis. The other part of the activity, being manufacturing of Indian liquor, no doubt is to be based on acquisition of privilege from the State subject to payment of price for the same, as is being done by them.

19. So far as the distillation of non-potable spirits is concerned, since the State has failed to place on record any acceptable material to show that they are rendering any service, even on any broad basis to justify the levy of licence fee to the tune of Rs. 5 lakhs, the levy cannot be held to be justified and accordingly clauses (i) and (ii) of impugned Rule 7 are declared as ultra vires and unenforceable. But so far as clauses (iii), (iv) and (v) of Rule 7(1) are concerned the licence fee levied thereunder is the price for the privilege parted by the State in favour of the distillers and the validity of quantum of such levy cannot be challenged on the ground of quid pro quo and as such the same is upheld.

20. So far as the validity of newly inserted Rule 7-A is concerned, the similar provisions inserted in Karnataka Excise (Sale of Indian and Foreign Liquor) (Amendment) Rules, 1968, was called in question before this Court in the case of Karnataka Wine Merchants Association Vs. State of Karnataka, . But this Court on examining the provisions of the Act and the purpose of the said levy upheld the validity thereof in paragraph 15 of the judgment, which reads as under:--

"I shall now take up the next contention urged on behalf of the petitioners that in levying the fee, the respondents have also levied on 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 licence granted under these rules within the Bangalore City Planning Area as declared u/s 4A of the Karnataka Town and Country Planning Act, 1961, an additional licence fee equivalent to fifteen per cent 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 purposes. 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".

21. For the said reasons the writ petitions are allowed in part, but without costs.