

(2007) 07 CAL CK 0002
In the Calcutta High Court
Case No : F.M.A. No. 1385 of 1989

M/s. Shaw Brothers (Wine) Ltd.

APPELLANT

Vs

State Of West Bengal and Others

RESPONDENT

Date of Decision : 03-07-2007

Acts Referred:

Bengal Excise Act, 1909 — Section 22, 27, 86, 86(7)
Constitution of India, 1950 — Article 266

Citation : 111 CWN 783

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : P.K. Mullick, Keya Bhattacharya, K. Sarkar and Ashok Kumar Pandey, for the Appellant; Prasenjit Basu and Supriya Roy Chowdhury, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Under the Bengal Excise Act, 1909 (hereinafter referred to as the "said Act of 1909") the State is empowered, inter alia, to regulate manufacture and sale of liquor. u/s 27 of the said Act of 1909 excise duty can be imposed on any excisable article under the Act as and when the same is manufactured and taken out from the manufacturer's factory for sale and/or consumption. u/s 22 State Government is entitled to grant any person exclusive privilege for manufacture and sale of liquor on the terms, and conditions mentioned in the license. Appellant before us, a private warehouse was issued a license in Form 28A. Under the conditions of licence the appellant was given a special privilege to store foreign liquor in the said warehouse with the pre-condition that excise duty leviable on the said liquor might be paid at the time of sale of the liquor. By virtue of such privilege the appellant need not have to pay the excise duty and/or countervailing duty at the time of bottling and/or import and they were allowed to store foreign liquor without payment of duty under the said Act which was to be paid at the time of actual sale from the warehouse. For the purpose of regulating such collection of duty at the selling point the State was to maintain infrastructure at the warehouse itself by engaging supervisory staff. For that purpose State was entitled to impose fee in

addition to the duty by way of reimbursement of the infrastructural costs. Such imposition of fee is permitted u/s 86 of the said Act and the rules made thereunder. Section 86(7) provides as follows:

"S.86. Further power of State Government to make rules.- The State Government may make rules-

.....

(7) for prescribing the scale of fees or the manner of fixing the fees payable in respect of any exclusive privilege granted u/s 22 or any license, permit or pass granted under this Act, or in respect of the storing of any intoxicant:""

State by virtue of the power derived from Section 86 framed Rule in 1915 being the Bengal Excise Rules u/s 86. Rules 21 and 22 being relevant herein are quoted below:

"21. Private warehouses.-Persons desirous of obtaining licenses to establish private warehouses, for the deposit and storage of spirit other than country spirit without payment of duty or fee shall apply to the Collector concerned, who shall not grant the license without the previous order of the Commissioner.

Rules 2 to 4 shall apply mutatis mutandis to such applications, except that the amount of the security shall be Rs. 250.

22. Establishment for supervision of private warehouses.-The Collector shall employ such officers and establishment as the Commissioner may direct to the charge of a private warehouse. The licensee of the warehouse shall pay to Government-

(a) in advance a Jee in cash equivalent to the estimated cost of such officers and establishment for three months as the Commissioner may fix, and

(b) monthhy a fee in cash equivalent to the monthly cost, which the Commissioner may fix, within seven days after the expiry of the month to which the fee relates.

In computing the cost of officers and establishment, the average of the pay (including special pay, if any) of officers and establishment, the contribution towards leave salary and pension and the compensatory allowance shall be included."

2. The appellant was given appropriate permission under Rule 21 to establish warehouse for the purpose of storage of liquor without payment on duty on the condition that such duty may be paid at the selling point.

3. Rule 22 empowers the Collector to employ officers and/or staff to supervise collection of duty at the selling point. Under sub-rule (a) the warehouse owner is to pay the estimated cost of such expenditure for three months in advance as a fee. Under sub-rule (b) the warehouse would have to also pay a monthly fee equivalent to monthly cost within 7 days after the expiry of the month to which

such fee relates. In computing the cost the average pay, special pay, salary, pension, compensatory allowance were to be included.

4. The license was given to the appellant in 1969. They were paying appropriate fees levied from time to time upon them under Rule 22. In the year 1983 an arrear bill was raised by the excise establishment amounting to Rs. 16,558.39 chargeable for the month of April, 1981 to January, 1983. The appellant raised objection. The amount was reduced to Rs. 10,285.71. The appellant again raised objection which was not replied to for sometime. Ultimately, in 1986 the demand was raised through the memo/order dated March 17, 1986 with a threat that in failure of deposit of the said sum functioning under the bond license would remain suspended. At that stage the appellant moved this court by filing the above writ petition. The disputed sum was deposited in court.

5. The writ petition was finally heard by the learned Single Judge and the learned Single Judge by judgment and order dated April 20, 1989 appearing at pages, 132 to 142 of the Paper Book dismissed the writ petition.

6. Before the learned Single Judge it was contended on behalf of the appellant that Rule 22 under which the amount was demanded was ultra vires the Act of 1909. Moreover, the said rule did not empower the Excise Authority to raise any arrear demand and the impugned demand was therefore liable to be quashed and/or set aside.

7. The learned Single Judge considered both the points and held that Rule 22 was not ultra vires the Act or the Constitution and the Authority was within their power to recover any outstanding by way of arrear or otherwise.

8. Being aggrieved by and dissatisfied with the Judgment and order of His Lordship the, appellant preferred the instant appeal which was heard by us on the abovementioned dates.

9. Mr. P. K. Mullick, learned senior Counsel appearing for the appellant contended as follows :

(i) The said Act of 1909 empowered the Government to collect excise duty and fee but not the establishment cost and as such Rule 22 being contrary to the object of Section 86 was liable to be struck down.

(ii) Assuming the authority was entitled to have reimbursement of the cost as a fee such fee must co-relate to the service rendered by the authority. The authority tried to collect fee as and by way of reimbursement of the remuneration paid to their employees whose services were utilized by the authority for collection of duty. Such service could not be said to be any service rendered to the licensee for which such fee could be prescribed and collected.

(iii) The alleged service sought to be rendered to the licensee and the fee sought to be collected had no nexus with the provisions of the said Act of 1909 and as such was bad in law and liable to be struck down.

(iv) The impugned rule did not have any support from the provisions of the Act of 1909 and as such was liable to be struck down being repugnant to the object of the provisions of the said Act of 1909.

(v) Assuming Rule 22 was valid and binding it did not empower the State to collect any arrear demand.

10. Mr. Prasenjit Bose, learned Counsel appearing for the State as well as for the learned Advocate General contended as follows:

(i) By virtue of Section 22 State granted special privilege to the appellant to store liquor without payment of duty on the undertaking to pay the same at the selling point. Since such privilege was being enjoyed by the appellant they must discharge their duty to pay fees to the State imposed on them under Rule 22 as a reciprocal obligation.

(ii) Even if assuming rule 22 did not have any nexus with Section 86 the appellant being a licensee was obliged to discharge all their obligations under the license. One of the conditions imposed in the license was to discharge their liability to pay fees as and when imposed upon them under Rule 22. Hence, the appellant was not entitled to question imposition of fee under Rule 22.

(iii) The appellant was granted license in 1969. They continued to discharge their responsibility and obligation under the license including payment of fees leviable upon them under Rule 22 so long. Their belated challenge to the such imposition, that too without challenging the conditions of license, was not maintainable.

11. In Support of the contentions the parties cited the following decisions :

(i) 1971, Volume II, Supreme Court Cases, Page 236 (The Indian Mica and Micanite Industries Ltd. vs. The State of Bihar & Ors.)

(ii) 1973, Volume I, Supreme Court Cases, Page 162 (The Secretary, Government of Madras, Home Department & Anr. vs. Zenith Lamp & Electrical Ltd.)

(iii) All India Reporter, 1981, Supreme Court, Page 1863 (Southern Pharmaceuticals & Chemicals, Trichur & Ors. vs. State of Kerala & Ors.)

(iv) All India Reporter, 1984, Supreme Court, Page 121 (Motor General Traders & Anr. vs. State of Andhra Pradesh & Ors.)

(v) 1996, Volume - X, Supreme Court Cases, Page 304 (Khoday Distilleries Ltd. & Ors. vs. State of Karnataka & Ors.)

(vi) All India Reporter, 2005, Supreme Court, Page 1879 (Calcutta Municipal Corporation & Ors. vs. M/s Shrey Mercantile Pvt. Ltd. & Ors.)

(vii) 2007, All India Reporter Supreme Court Weekly, Page 2764 (M/s. Gupta Modern Breweries vs. State of Jammu and Kashmir & Ors.)

12. To decide the controversy let us first deal with the cases cited by the parties. Much thrust was given by Mr. Mullick on the decision of the Apex Court in the case of *Indian Mica (Supra)*. In the said case identical provision in Bihar and Orissa Excise Rules was called in question. In the said case the State was imposing fee on denatured spirit which was not fit for human consumption. The appellant in the said case was a consumer of denatured spirit. It was purchasing denatured Spirit from whole seller for the purpose of manufacturing of micanite. The Apex Court observed that the State was entitled to levy fee provided it rendered service to the licensee as a *quid proquo*. From the pleadings it transpired before the Apex Court that State was imposing fee as and by way of reimbursement of charges for maintenance of the infrastructure to supervise use of denatured spirit as there was every risk that any person might attempt to render denatured spirit fit for human consumption which was punishable under the Excise Act. Considering that aspect the Apex Court was of the view that such vigil was the duty of the State and could not be termed as any service rendered to the licensee. In the light of such facts Their Lordships held that such imposition was bad in law. This decision was considered by the Apex Court in a subsequent decision in the case of *Secretary, Government of Madras, Home Department (Supra)*, Paragraph 33 being relevant herein is quoted below :

"33. It was urged that various Articles in the Constitution show that fees taken in Courts are taxes. For instance, by virtue of Article 266 all fees, being revenues of the State, will have to be credited to the Consolidated Fund. But this Court has held that the fact that one item of revenue is credited to the Consolidated Fund is not conclusive to show that the item is a tax. In *The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, it was held :

"A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.

It is not possible to formulate a definition of fees that can apply to all cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service rendered to individuals by some Governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases such expenses are arbitrarily assessed.

The distinction between a tax and fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for special benefit or privilege."

13. This was also considered by the Apex Court in a later decision in the case of *Southern Pharmaceuticals (supra)* where use of denatured spirit in medicinal and toilet preparation was considered by the Apex Court. The Apex Court observed that such reimbursement by way of imposition of fee was valid. Their Lordships observed that the cost of establishment and other incidental charges in

connection with such supervision was to be realised from the licensee.

14. In the case of Gupta Modern Breweries (Supra) in paragraph 22 it was recorded that Government contended that such imposition was not only for the purpose of ensuring that denaturing of spirit was done properly by the manufacturer but also for the purpose of specifically seeing that the denatured spirit did not go out of the hands, either of the distillery owner or a retail seller of any licensee or permit holder contrary to law. Hence, there was co-relationship between the services rendered and the fee levied. Such submission was negated by the Apex Court relying on the Indian Mica (supra).

15. On a combined reading of the cases cited before us and discussed above we would find that imposition of fee for reimbursement of the proportionate expenses for maintaining infrastructure at the warehouse would be permissible only when there would be quid proquo. In case it is proved that such fee has a co-relation and nexus with the services rendered such imposition is lawful and cannot be said to be ultra vires the Act of 1909 or the Constitution.

16. In the case before us the warehouse owner was granted special privilege to store foreign liquor without payment of duty so that he could pay the duty at the time of actual sale and thereby not taking the burden of paying the duty out of their own resources. For such special privilege the State would have to maintain an additional establishment to supervise collection of fee at such belated stage. Hence, co-relation is well established and imposition of such fee cannot be said to be de hors the object of the Act. In this regard we may refer to the observation of the Apex Court in the case of Secretary, Government of Madras (Supra) where the Apex Court observed, the distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for special benefit or privilege.

17. We therefore hold that the first contention of Mr. Mullick to the extent that the Rule 22 ultra vires the Act of 1909 is not tenable and as such is rejected.

18. Let us now come to the aspect of arrear claim. On a plain reading of Rule 22 it appears that the State is entitled to impose three months cost as a fee in advance and thereafter collect monthly fee payable within 7 days on the expiry of the month to which it relates. There is no provision for collection of any arrear payment.

19. It was sought to be contended by the State that such arrear demand was raised due to subsequent payment made to the employees which became payable in view of introduction of ROPA 1981.

20. We fully appreciate that since State was maintaining those employees to supervise functioning of the concerned warehouse and they were entitled to recover such cost, this additional burden should also be paid by the appellant. We, however, feel that apart from the legal infirmity as discussed above there is practical difficulty which cannot be brushed aside.

21. Special, privilege is being enjoyed by the warehouse so that they call collect the fee from the buyer and pay it to the Excise at the time of sale. Similarly, they can also realize the proportionate charges imposed upon them as fee from the buyer. If such claim is made at a belated stage it would be impossible for the warehouse owner to recover the same from various buyers for the sales which stood concluded long before. It would be unfair and unjust to impose such arrear demand on the warehouse owner. In any event, the same is not permissible on a plain reading of the rule.

22. We are, therefore, of the view that such demand impugned in the writ petition was without any authority in law and as such is quashed and set aside.

23. The amount covered under the impugned arrear demand being Rs. 10,285.71 so deposited by the appellant in terms of the order of the court along with interest accrued, if any, be refunded to them by the Registry.

24. Appeal is disposed of accordingly.

25. There would be no order as to costs.

26. There would be stay of operation of this judgment and order for four weeks from date. Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

I agree.