

(1970) 12 DEL CK 0023

In the Delhi High Court

Case No : Civil Writ Petition Appeal No. 132 of 1968

Oberoi Clarks

APPELLANT

Vs

Excise Taxation Officer

RESPONDENT

Date of Decision : 22-12-1970

Acts Referred:

Citation : (1971) 7 DLT 172

Hon'ble Judges : S.I. Rangarajan, J

Bench : Single Bench

Advocate : Sushil Malhotra and C.L. Kapila, for the Appellant;

Judgement

S. Rangarajan, J.

(1) The petitioner, Oberoi Clarks Hotel, Simla, is aggrieved by the imposition of a fee of Rs. 10,000.00 in addition to the assessed fee on the liquor licenses L. 3 L 4 and L. 5 held by them for the period 1st April, 1968 by virtue of an amendment made by the Excise and Taxation Commissioner, Himachal Pradesh exercising the powers of the Financial Commissioner u/s 9 of the Punjab Excise Act, 1914 (No. I of 1914) and in exercise of the powers conferred by section 59 of the said Act? the amendment taking retrospective effect from 1st April, 1968.

(2) The short question for consideration in this writ petition is whether the Excise and taxation Commissioner could impose the said extra levy during the currency of the financial year 1st April, 1968 to 31st March, 1969 by an amendment dated 30th October, 1968 but have retrospective effect from 1st April, 1968.

(3) It was stated by Shri C. L. Kapila, learned counsel for the respondents, that the Financial Commissioner had sent a circular letter even on 22nd March, 1968 that Rs. 10,000.00 was to be added in respect of the concerned licenses for the period 1st January, 1968 to 31st March, 1969 but this, however, can have no significance because what is contended for the petitioner is that the Excise and Taxation Commissioner, exercising the delegated powers of the Financial Commissioner, had no legal authority to make the said amendment to the Rules

with retrospective effect.

(4) Before discussing this legal position it is necessary to notice the relevant provisions of the Punjab Excise Act, 1914 and the Punjab Liquor license Rules, 1956 which alone are applicable to the present case u/s 9 of the Punjab Excise Act, which will hereafter be called "the Act", the State Government may by notification appoint an Excise Commissioner and, subject to such conditions and restrictions as it may deem fit, may invest him with all or any of the powers conferred on the Financial Commissioner by this Act. There is no dispute in this case that the Excise and Taxation Commissioner was so empowered u/s 59 of the Act, the Financial Commissioner may by notification make rules in respect of various matters, of which we are concerned with clause (d) alone. It reads as follows:-

"PRESCRIBING the scale of fees or the manner of fixing the fees payable in respect of any license, permit or pass, or in respect of the storing of any intoxicant"

(5) It is in pursuance of the said power that the Excise and Taxation-Commissioner made the impugned notification on 30th October, 1968, a copy of the notification is annexure "R-A" to the return filed by the respondents. It reads as under :-

"GOVERNMENT OF Himachal Pradesh Excise & Taxation Department Notification No. 7-7/68-EXT, dated Simla-2, the 30th October, 1968. In exercise of the powers conferred by section 59 of the Punjab Excise Act (I of 1914) as in force in the areas added to Himachal Pradesh u/s 5 of the Punjab Reorganization Act 1966 (31 of 1966) and by virtue of powers of the Financial Commissioner u/s 9 of the said Act, I K. R. Chandel, hereby direct that the following amendments shall be made in the Punjab Liquor License Rules, 1956 as in force in the said areas :- Amendments In the said Rules :- (1) In rule 5.27, after sub-rule (2), the following sub-rule shall be added, namely :- "(3) Licenses in forms L. 3, L. 4 and L. 5 for the vend of foreign liquor in botels/restaurants/dak bungalows will be granted on fixed fees in addition to the fees assessed according to the scale prescribed under rule 5.31, The following are the rates of fixed fees :- For hotels/restaurants/dak bungalows in towns. (a) With population below 15,000 Rs. 2,500.00 (b) With population below 30,000 Rs. 5,000.00 (c) With population above 30,000 Rs 10,000.00" (2) From rule 5.28, the following shall be deleted :-- "L.3 Retail vend of foreign liquor in a hotel or dak bungalow; L.4 Retail vend of foreign liquor in a restaurant ; L.5 Retail vend of foreign liquor in a bar attached to a restaurant (Supplementary to form L.4)". These amendments shall take effect from the 1st April, 1968 sd/- K. R. CHANDEL. Excise & Taxation Commissioner, Himachal Pradesh."

(6) According to the Punjab Excise Liquor Rules. Chapter V, rule I, there shall be the following classes of license. Their mode of grant and the authorities to grant and renew them shall be as noted against each, of which the following alone in

respect of foreign liquor need be noticed -

Form Nature Mode of Authority grant empowered to grant Renew 1 2 3 4 5 L.3. Retail vend of foreign Assessed fee Collector Collector liquor in a hotel or dak bungalow L. 4. Retail vend of foreign Ditto Do Do liquor in a restaurant L.5, Retail vend of foreign Ditto Do Do liquor in a bar attached to a restaurant (Supplementary to Form L. 4)

(7) Prior to the amendment, rule 5.28 provided for certain licenses including L.3, L.4 and L.5 being granted on assessed fees. The scheme of the Punjab Liquor License Rules is that fees payable in respect of licenses were, according to rule 5/24, of four kinds (a) fixed fees; (b) assessed fees; (c) auction fees and (b) tender fees. Rule 5.27 originally contained only two clauses providing for fixed and assessed fees being levied. By the said notification licenses L.3, L.4 and L.5 were specifically brought under rule 5.27 and consequently taken out of rule 5.28 which provided for license being granted on assessed fee alone. The effect of the impugned amendment is that in addition to the assessed fees a fixed fee has been levied on those licenses by bringing those licenses within the scope of rule 5.27 which provide for both fixed and assessed fees. u/s 58(3) the power of the State Government to make rules by notification for the purpose of carrying out the provisions of the Act is subject to the condition that the rules may be made after previous publication provided that any such rules may be made without previous publication if the State Government considers that they should be brought into force at once,

(8) The power to make the said amendment prospectively is not in question. The only question for decision in this case is whether such an amendment could be made retrospectively. Even though it is stated in the majority opinion of the Supreme Court in (*Indramani v. W. R. Nattu*) that it was not necessary for the purpose of that case to decide the question whether retrospective operation could be given without the enactment under which the said bye-law was framed permitting the same by express language or by necessary intendment, *Subha Rao J.* (as he then was), in his dissenting judgment, approved the view taken by the Mysore and Kerala High Courts in (*India Sugar & Refineries Ltd. v. State and C.W. Motor Service (P) Ltd v. State of Kerala*) respectively which took the view that when the executive Government exercised subordinate and delegated legislative powers, the power to act retrospectively could not be exercised unless the said power was expressly conferred by the legislature on the Government. There has been an elaborate discussion of this question in the Mysore case by *S. K. Das Gupta C, J.* It was held in that case that a legislative body unlike the executive body could always legislate retrospectively unless there was any prohibition under the Constitution which had created it. But so far as subordinate legislation, as it has been called, is concerned, it is a different question; unless the enactment authorized the making up of bye-laws with retrospective effect by using express language to that effect or the same can be inferred by necessary intendment rules cannot be made by the executive, exercising its powers of

subordinate legislation to make the rule have retrospective operation. Having regard to the fact that above question was left open by the majority opinion of the Supreme Court, I was curious to know whether there had been any appeal as against the decision by the Mysore High Court India Sugar and "Refineries Ltd, v. State, and if any appeal was filed to the Supreme Court, what the result of it was. My attention has been drawn to the fact that in the Supreme Court Encyclopedia by Shri R. Gopakrishnan. there is a summary of the decision of the Supreme Court in the State of Mysore v. India Sugar and Refineries in Civil Appeal No. 12 of 1969; the appeal was dismissed on 28th March, 1961. The decision itself being unreported, I have not been able to get a copy of the said judgment. It is, however, clear from the above that the decision of the Mysore High Court had been confirmed. There is, in addition, the opinion of Subba Rao J. on the above question approving the Mysore decision even though the majority did not want to decide this question. Subba Rao J. had also approved the view taken by Varadaraja Iyengar J. in the Kerala case holding the notification by the executive in that case giving retrospective effect thereto was bad. Subba Rao J. also "referred, with approval, to the observations of the House of Lords in *Howell v. Falmouth Boat Construction Co, Ltd*, to the following effect :-

"IT would be a dangerous power to place in the hands of Ministers and their subordinate officials to allow them, whenever they had power to license, to grant the license ex post facto ; and a statutory power to license should not be construed as a power to authorise or ratify what has been done unless the special terms of the salutatory previsions clearly warrant the construction."

(9) My attention has also been drawn to yet another case of the Kerela High Court in *I, T. Officer v. M, Ponnoose*, where a Division Bench of the said Court, following AIR 1960 Mys 326 and the opinion of Subba Rao J. in *Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others*, , applied the same principle. In that case. dealing with the relevant provisions of the Income Tax Act as amended by the Finance Act, it was held that the legislature had not conferred the said power to the executive by express language or by necessary intendment or implication.

(10) In *Guruviah v. State of Madras*", the decision was rested not only on the ground of the principle not being disputed but on the ground that it was an established principle, Bhargava J. (as he then was), speaking for the Division Bench in *Modi Food Products v. Commissioner Sales Tax* upheld the same principle.

(11) A Full Bench of the Punjab High Court invalidated the delegation of powers of State Government u/s 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act (50 of 1948) on the ground that there was no distinct provision in the Act conferring such a power on the State Government vide *Shivdev Singh v. State of Punjab*. this view was followed in *Chandi Charan v. Tax Recovery Officer*^.

(12) A similar view was also taken by the Rajasthan High Court in *K. Ganeshilal v.*

State, and by the Bombay High Court in *Boghalal v. Mohanlal*.

(13) I have examined the provisions of the Act in the present case to find out whether such power has been given to the executive to make rules with retrospective effect and I am unable to find any. On this ground alone the notification of the Excise and Taxation Commissioner giving retrospective effect to the said notification with effect from 1st April, 1968, has to be struck down. On the other hand, section 58(3), to which I have already referred, indicates that the rule making power conferred by section 58 is subject to the condition that the rules may be made after previous publication and that it is only the State Government that could dispense with the previous obligation if it considers that the same should be brought into force at once. The action of the Excise and Taxation Commissioner making the rule retrospective was clearly ultra vires of his powers and would be ultra vires even of the powers of the State Government. It was to make the rule come into force at once, without previous publication. It follows from the above-said provision itself that the executive has not been given by power by the Act to make rules with retrospective effect.

(14) My attention has also been drawn to other provisions of the Act which impose penal provisions for non-payment of the levies due in respect of licenses granted under the Act. Section 36(b) of the Act enables the license to be cancelled if any duty or fee payable by the holder thereof had not duly paid. According to section 38 of the Act, in case of cancellation of a license u/s 36(b) also, the fee payable for the balance of the period for which any license would have been current but for such cancellation or suspension, may be recovered from the excise licensee as excise revenue. These drastic consequences, therefore, could not be set in motion by the Excise and Taxation Commissioner by requiring the fixed fee of Rs. 10,000.00 in this case being made payable for the licenses in question over and above the assessed fee by giving retrospective effect to his notification dated 30th October, 1968 with effect from 1st April, 1968. It may be that in this case that since no stay was granted after the filing of the writ petition the said amount is stated to have been paid but that cannot make any difference because the said notification of the Excise and Taxation Commissioner giving retrospective effect to it from 1st April, 1968 was ultra vires.

(15) The writ petition is accordingly accepted the retrospective effect given by the impugned notification from 1st April 1968 is quashed and it is declared that the levy of Rs. 10,000.00 from the petitioner in this case under the said notification for the period 1st April, 1968 to 31st March, 1969 was invalid. The petitioner will also have his costs of this petition. Counsel fee fixed at Rs. 250.00.