**(2008) 09 MP CK 0060**

**In the Madhya Pradesh High Court**

Sivanand Damahe APPELLANT

Vs

State of M.P. and Others RESPONDENT

**Date of Decision :** 15-09-2008

**Acts Referred:**
Constitution of India, 1950 — Article 226, 227

**Citation :** (2009) ILR (MP) 653 : (2009) 1 MPHT 288 : (2009) 1 MPJR 202 : (2009) 1 MPLJ 258

**Hon'ble Judges :** Sanjay Yadav, J

**Bench :** Single Bench

**Final Decision :** Dismissed

# Judgement

Sanjay Yadav, J.

The petitioner by way of present writ petition filed under Article 226/227 of the Constitution of India, besides calling in question the legal validity of the orders dated 8-1-2007 (Annexure R-4-4) and the consequential orders passed thereof and as contained in Annexures R-4-5, R-4-6, R-4-7, R-4-8 and R-4-11 is seeking a mandamus that a liquor licence granted in favour of respondent No. 5 be cancelled and may not be extended for the years 2008 and 2009 for the Partala Block of District Chhindwara. Further direction is also sought to the effect that the respondents be directed to allow the petitioner to take possession of the shops and commence the sale of liquor as per the contract.

The facts briefly noted are that with the advent of new excise policy in the year 2005-06 small contractors got the opportunity to take part in the contract of country liquor and foreign liquor. The petitioner, in response to his participation in the bidding of liquor license was allotted the Partala Country Liquor, Partala Foreign Liquor and Indian Liquor Shops in Chhindwara District for the excise year 2005-06. The said contract was renewed by depositing 20% extra over the previous years sale for the excise year 2006-07 and this was in accordance with the Clause 16 of the Liquor Policy 2005-06. Clause 20 of the Excise Policy 2006-07 provides for that during the subsistence of the license, the licensee with prior permission can transfer his right under the license and on transfer such transferee shall be bound by all the conditions of the license. Invoking Clause 20, the petitioner on 16-12-2006 moved an application to respondent No. 3-Collector stating his desire to transfer the running of the shops to respondent No. 4 for the remaining period of contract 2006-07. The contract of retail sale was accordingly transferred in favour of the respondent No. 4. It is a matter of record that for subsequent year, i.e., excise year 2007-08, respondent No. 4 was granted renewal by invocation of renewal clause and during the subsistence of license for the year 2007-08, respondent No. 4 transferred the same in favour of respondent No. 5 which was effected vide order dated 27-12-2007 and while so operating, the respondent No. 5 got the license renewed for the excise year 2008-09 by invoking renewal clause and presently it is the respondent No. 5 who has in his favour the license to sell country/foreign liquor in Partala Block.

It is in the backdrop of the aforesaid fact the learned Senior Counsel for the petitioner states that the licensee for trade in liquor being a personal privilege, the transfer effected by the petitioner in favour of respondent No. 4 was a transfer of personal privilege and not the license and the endorsement of transfer in his favour thereof on the license of the petitioner did not clothe the respondent No. 4 as a licensee but only had the privilege to operate the retail sale of country and foreign liquors. It is accordingly urged that on the expiry of term of license the option of the renewal clause was available to the petitioner and not to respondent No. 4, a transferee of privilege. Thus, the action of the respondents in creating a privilege in favour of respondent No. 4 by allowing him to opt for the renewal of license in his favour was perse illegal and the renewal if any ought to have been in favour of the petitioner. The learned Senior Court, therefore, states that the subsequent transfer in favour of respondent No. 5 and a license in his favour for the excise year 2008-09 is non est in the eyes of law. Substantiating his arguments the learned Senior Counsel relied upon Clauses I, VI and XI of General License Conditions (referred to as ''GLC'') framed by the State Government in exercise of its powers u/s 62(2), (g), (h) and (j). It is contended, inter alia, under Clause I, every license is granted personally by name and is thus a personal privilege and this aspect, as submitted, is evident from Sub-clause (2) of Clause I of GLC, which stipulates that if any license holder dies before or during the currency of license such license would cease to be in force. Further more, while placing reliance on Clause VI, learned Senior Counsel submits that a proper construction of the clause reveals that the only right which transferee enjoys is to enter into a partnership and that too with a prior written permission of a Collector. In the alternate it is urged that the Collector at the time of drawing a lot in favour of more selectee after selecting a license in accordance with Clause 7-5 of the liquor policy and in case the option is not exercised by the original licensee the right devolves upon such selectee but not in favour of the transferee of privilege. It is accordingly contended that the action of respondent in renewing the license in favour of the respondent No. 4 and thereafter granting the same in favour of respondent No. 5 is per se illegal and deserves to be quashed and the license be reverted back in favour of the petitioner.

Countering the submissions put-forth by the petitioner, the learned Govt. Advocate appearing for the State of Madhya Pradesh and its functionaries has supported the action, contending inter alia, that the petitioner having relinquished his right to trade in liquor, loses the principles which accrues out of license which gets devolved in favour of the transferee, it is urged, having transferred his right, cannot claim the privilege of exercising the option of renewal after the expiry of the term of license. It is accordingly urged that the claim put forth by the petitioner being misconceived is liable to be negatived.

Learned Counsel appearing for the respondent No. 5 while adopting the arguments put forth by respondent-State further states that the petitioner having transferred his right in favour of respondent No. 4 with a declaration on affidavit that he will not claim any benefit whatsoever which inures from the license cannot be allowed to turn around and retract his undertaking. It is argued that there being waiver of right to trade in liquor no right whatsoever survives in favour of the petitioner for grant of renewal. The learned Counsel relies upon the judgment rendered by the Apex Court in the case reported in 2006 STPL 37405 SC AIR 2004 SC 4202 Dental Council of India v. Harpreet Kaur Bal . The learned Counsel for the State urges that the petition is also hit by delay and laches and for that reliance is placed on Chairman, U.P. Jal Nigam and Another Vs. Jaswant Singh and Another, . Having thus submitted the respondents seek dismissal of the petition.

Heard the learned Counsel for respective parties at length and perused the pleadings.

The issue which crops up for consideration is whether the petitioner has any executable right in existence in his favour after divesting his privilege to trade in liquor, and whether he can claim any lien over such privilege.

However, before dwelling upon the issue as crops up for consideration worth it would be noted certain provisions of the M.P. Excise Act, 1915 and the General Conditions of License as framed thereunder to ascertain whether the nature of right granted by the State Govt. by issuing license to trade in liquor.

There is no fundamental right to trade in liquor is a principle of law which has come to be settled. In the case of State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, , Their Lordships of the Supreme Court were of the opinion that:

103. It is well settled by a catena of decisions that trade in liquor is not a fundamental right. It is a privilege of the State. The State parts with this privilege for revenue consideration....

(Emphasis supplied)

 

Thereafter in Paragraph 113 an opinion was expressed in the following term:

In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, and Panna Lal v. State of Rajasthan : [1976]1SCR219 . As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301-304 will be rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in The State of Bombay Vs. R.M.D. Chamarbaugwala, , Har Shankar (supra), Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others, and Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, .

In the case of Chaitanya Kumar and Others Vs. State of Karnataka and Others, , Their Lordships of the Supreme Court were pleased to opine in Paragraph 2 that:

2. By general concurrence of opinion since days of yore, manufacture and sale of intoxicating liquor has always been considered to be a dangerous and obnoxious trade requiring the strictest vigilance and supervision and even prohibition. It is now firmly established that the Government is the exclusive owner of the privilege of manufacturing and selling intoxicating liquor and that the Government may farm out these privileges for the purpose of raising revenue.

(Emphasis supplied)

M.P. Excise Act, 1915 provides for regulation of manufacture, possession and sale of liquor. In the case at hand since it is the sale of liquor which is the issue, we confine to the provisions which regulate the sale of liquor.

Section 17 makes a provision regarding license required for sale of intoxicant. It stipulates:

17. License required for sale of intoxicant. - (1) No intoxicant shall be sold except under the authority and subject to the terms and conditions of licence granted in that behalf:

Provided that

(a) a person having the right to the tari drawn from any tree may sell such tari without a licence to a person licensed to manufacture or sell tari under this Act;

(b) a person u/s 13 to cultivate the hemp plant may sell without a licence those portions of the plant from which the intoxicating drug is manufactured or produced to any person licensed under this Act to deal in the same, or to any officer whom the Excise Commissioner may prescribe; and

(c) nothing in this section shall apply to the sale of any foreign liquor lawfully procured by any person for his private use and sold by him or on his behalf or on behalf of his representatives interest upon his quitting a station or after his decease.

(2) On such conditions as the Excise Commissioner may determine, a license for sale under the Excise Law for the time being in force in other States or Union Territories may be deemed to be licence granted in that behalf under this Act.

Section 28 provides that every permit or pass granted under the Act shall be granted on payment of such fees, if any, for such period and subject to such restrictions and on such conditions and shall be in such form and contain such particulars as the State Govt. may direct either generally by rules made u/s 62. Section 62 empowers the State Govt. to make rules for the purpose of carrying out the provisions of the Act. Section 62 (2) (g), (h) and (j) of the Act and relevant for the present empowers the State Govt.:

62. Power to make rules. - (1)*** *** ***

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

(g) regulating the amount, time, place and manner of payment of any duty or fee or tax or penalty;

(h) prescribing the authority by, the form in which, and terms and conditions of and subject to which any licence, permit or pass shall be granted, any by such rules, among other matters:

(i) fix the period for which any licence, permit or pass shall continue in force,

(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such licence, permit or pass,

(iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass for the performance of the conditions of the same,

(iv) prescribe the accounts to be maintained and the returns to be submitted by licence-holders, and

(v) prohibit or regulate the partnership in, or the transfer of, licenses,

(j) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use.

In exercise of powers u/s 62 (2) (g), (h) and (j), the State Government has framed General Licence Conditions. Clause I of the GLC provides that every licence granted shall be deemed to have been granted personally to the licensee named therein. It stipulates:

I. The personal character of privilege. - (1) Every licence granted shall be deemed to have been granted personally to the licensee named therein and shall on the expiry thereof, be surrendered to the Collector.

(2) If any licence-holder dies before or during the period of the currency of his licence, such licence shall forthwith cease to be in force:

Provided that the Collector may, at his discretion continue any such licence in favour of any heir or of the surety the first working licence-holder.

Clause VI however, carves out an exception to Clause I by permitting transfer of privilege by prior written permission; it stipulates:

VI. Transfer or sub-lease of Licence.- No privilege of supply or sale shall be sold transferred or sub-leased, nor shall a holder of any such privilege enter into a partnership for the working of such privilege in any way or manner without the written permission of the Collector, which shall be endorsed on the licence. A partner, sub-lessee, or transferee shall be bound by all the conditions of the licence, but the original licensee shall also continue to be responsible to the State Government for the due payment of the licence fee and proper working of the shop.

Thus, a close view of various provisions coupled with the principle of law laid down that no citizen has a fundamental right to trade in liquor, the nature of right which is transferred in favour of a person to deal in the trade of liquor is only a privilege.

"Privilege" as laid in ''The Law Lexicon'' by P. Ramanathan Aiyar: 1997 Edn.:

Privilege: As used in its broad and commonly accepted sense is a peculiar advantage; a personal benefit or favour; a private or personal favour enjoyed. It means also, in connection with the context, a particular and peculiar benefit or advantage, enjoyed by a person, company, or class, beyond the common advantage of other citizens; some peculiar right or favour granted by law contrary to the general rule; the enjoyment of some desirable right; special enjoyment of a good; an exemption from some general burden, obligation.

In Isha Valimohamed and Another Vs. Haji Gulam Mohamad and Haji Dada Trust, , Their Lordships were pleased to observe:

A privilegium, in short, is a special act affecting special persons with an anomalous advantage, or with an anomalous burthen. It is derived from privatum, which, as opposed to publicum, signified anything which regards persons considered individually; publicum being anything which regards persons considered collectively, and as forming a society.

[See Austin''s Jurisprudence, Vol. II, 5th Ed. (1911) P. 519]

The meaning of that word in jurisprudence has undergone considerable change after Austin wrote. According to Hohfeld:

.... a privilege is the opposite of a duty, and the correlative of a ''no right''. For instance, where "X has a right or claim that Y.... should stay off the land (of X), he himself has the ''privilege'' of entering on the land or in equivalent words, X does not have a duty to stay off.

[See Fundamental Legal Conceptions, (1923) pp. 38-39] Arthur L. Corbin writes:

We say that B had a right that A should not intrude and that A had a duty to stay out. But if B had invited A to enter, we know that those results would not occur. In such case we may say that B had no right that A should stay out and that A had the privilege of entering.

(See "Legal Analysis and Terminology", 29 Yale Law Journal 163) According to Kocourek:

Privilege and inability are correlatives. Where there is a privilege there must be inability. The terms are correlatives. The dominus of a privilege may prevent the servus of the inability from exacting an act from the dominus.

(See "Jural Relations", 2nd Edn. p. 24)

Paton says:

The Restatement of the Law of Property defines a privilege as a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a certain act.

[See Jurisprudence, 3rd Edn. (1964), p. 256].

Thus, ''privilege'' is an exemption from some duty or burden. Immunity from civil action is a privilege.

Thus, in a considered opinion of this Court, a lesser degree of right is enjoyed when a person has a privilege to deal in a trade which is rex extra commercium.

In other words, the trade in liquor being not a fundamental right and the same being the monopoly of the State, a person gets a privilege to deal into the same when such permission is accorded, which, in the present case is being nomenclature as a licence. The petitioner, therefore, is only a privilegee and no more and no less, and this aspect is affirmed by Clause I of GLC, read with Clause VI and once this right is relinquished the petitioner cannot say that he still holds back the right to trade in such privilege. Furthermore, the petitioner having transferred the privilege to trade in liquor in favour of respondent No. 4, further declaring thereby his intention of relinquishing all his privilege cannot now be allowed to turn around and reclaim the privilege which already stand endorsed in favour of the respondent No. 4 and the said respondent having acquired a privilege to trade in liquor is well within his right to invoke a renewal clause and exercise his right of transfer under the GLC.

Having thus considered, no relief can be granted to the petitioner, who has no executable right. In the result petition fails and is hereby dismissed. However, no costs.

 