(1985) 02 PAT CK 0011

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4975 of 1978

S.K.G. Sugar Ltd. APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 19-02-1985

Acts Referred:
Bihar and Orissa Excise Act, 1915 — Section 27, 28, 90

Citation : (1985) PLJR 454

Hon'ble Judges : P.B. Pd., J;N.P. Singh, J

Bench : Division Bench

Advocate : A.K. Sen, Balbhadra Prasad Singh, A.B.S. Sinha, Ganga Prasad Bimal and Amrendra Sharan, for the Appellant; R.B. Mahto, (Addl. A.G.) and S.K.P. Sinha, (J.C. to Addl. A.C.), for the Respondent

Judgement

N.P. Singh, J.—The petitioner has questioned the validity of rule 106-A, which was framed by the Board of Revenue in exercise of the powers conferred on it by section 90 of the Bihar and Orissa Excise Act, 1915 (hereinafter to be referred to as ''the Act''). The petitioner holds licence for manufacture and sale of India made foreign liquor. In view of the rule under challenge the India made foreign liquor can be exported to a place outside Bihar only on payment of export pass fee at the rate of 60 paise per litre. Rule 106-A is as follows:--

106-A. India made foreign liquor may be exported to any place outside Bihar, provided that an export pass fee at the rate of sixty paise per London Proof Litre has been levied and realised in the State of Bihar.

2. The validity of Rule 106-A aforesaid has been challenged on the ground that while purporting to impose a fee, in fact, duty or a tax has been imposed by the Board of Revenue which is beyond the purview of section 90 of the Act. According to the petitioner, the export pass fee in substance being a duty or tax it should have been imposed by the State Government in exercise of the powers under sections 27 and 28 of the Act. Alternatively, it was submitted that if it is held to be a ''fee'' then the amount realised as export pass fee must be

correlated to the expenses incurred by the Government in rendering services to the petitioners.

3. Section 2(6) defines "excisable article" to mean (a) any alcoholic liquor for human consumption, or (b) any intoxicating drug. Section 12 provides that no intoxicant exceeding such quantity as the State Government may prescribe by notification shall be imported, exported or transported, except under a pass. Chapter IV of the Act contains provisions which require licence for manufacture, possession and sale of intoxicant. Section 22, which is in the same Chapter, prescribes that the State Government may grant to any person on such condition and for such period as it may think fit, the exclusive privilege of manufacturing or supplying wholesale or selling any country liquor or intoxicating drug within any specified fatal area. Chapter V of the Act deals with the duty. The relevant part of section 27 is as follows:--

An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed either generally or for any specified local area on--

xxx xxx xxx

(b) any excisable article exported.

Section 28 gives out the procedure of levying duty imposed by the State Government under Motion 27. Section 29 is as follows:

Instead of, or in addition to any duty leviable under this Act, the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege u/s 22.

Chapter VI deals with licences, permits and passes. Section 38, which is an important section to be considered in the present case, reads as follows:

38. Fees for terms, conditions, and form of, and duration of, licenses, permits and passes.

(i) Every license, permit or pass granted under, this Act--

(a) shall be granted--

(i) on payment of such fees (if any) and

(ii) subject to such restrictions and on such conditions, and

(b) shall be in such form and contain such particulars, as the Board may direct.

(2) Every license, permit or pass under this Act shall be granted for such period (if any) as may be prescribed by rule made by the State Government u/s 89, clause (e).

4. If the imposition of sixty paise per litre on the export of India made foreign liquor under rule 106-A is held to be tax or duty, as contended on behalf of the

petitioner, there is no escape from the conclusion that the Board had no authority to impose the same. It could have been imposed only by the State Government in exercise of the powers u/s 27 of the Act. Learned Additional Advocate General appearing for the State took the stand that the validity of the rule aforesaid has to be examined treating the imposition as fee under the Act, and it has to be upheld or struck down as a provision for realisation of the fee.

5. In view of the stand taken on behalf of the State Government, learned counsel for the petitioner urged that once the imposition is held to be a fee, it is absolutely necessary that the levy of fee be correlated to the expenses incurred by the Government in rendering services to the petitioner failing which it has to be struck down. In this connection reference was made to well known case of The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., where it was observed:--

A fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the legislative provision, be correlated to the expenses incurred by Government in rendering the services.

The aforesaid view has been reiterated in several judgment of the Supreme Court and it has been consistently pointed out that in fees there is always an element of quid pro quo. Strong reliance was placed on behalf of the petitioner on the judgment of the Supreme Court in the case of the Indian Mica Micanite Industries Vs. The State of Bihar and Others, The appellant before the Supreme Court was a consumer of a denatured spirit. It used to purchase the denatured spirit from wholesalers or manufacturers for the purpose of manufacturing micanite. In view of the provisions of the Act, license fee had to be paid for license to possess denatured spirit, The demand for license fee was challenged as illegal in absence of quid pro que. The Supreme Court, after pointing out the distinction between the tax and fee observed:--

From the above discussion it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable co-relationship 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.

The Supreme Court remanded the cases to the High Court to enable the State to show that the services rendered by the State had reasonable co-relationship with the fee charged. Reference was also made to the case of M/s S.K.G. Sugar Limited Vs. The State of Bihar and Others, where this Court had to consider the validity of a demand purported to have been made by way of levy of licence fee. Rule 106 prescribed a licence fee of Rs. 36/- per annum payable in advance, which was later raised to Rs. 200/- per annum. The validity of the demand was questioned on the ground that the aforesaid licence fee had no co-relationship with any service rendered by the State. This Court having found that there was no correlation between the service, if any, rendered by the State to the licensee and the fee sought to be charged from it, quashed the notice making demand for the licence fee.

6. Now it is a settled position that if fee charged under any particular Act is a fee as it is generally understood, it can be upheld only on satisfying the court that it has a correlation with the services rendered by the State to the persons who are enjoined to pay such fees. However, in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, the Supreme Court examined as to whether the expression "licence fees" used in the Excise Acts are really fees in its technical sense so as to require the State charging such licence fees to provide corresponding services to the different licensees. In this connection it was pointed out that rights in regard to intoxicants belong to the State, and, as such, it is open to the State Government to part with those rights for a consideration and on conditions. It was also observed that there was no inherent right in a citizen to sell liquor "and that the control and restriction over consumption of intoxicating liquors was necessary for the preservation of the public health and morals and to raise revenue". It was further pointed out that any such restriction or control in respect of the trade or liquor shall not attract even Article 19(1)(g) of the Constitution so that the court of law may test whether the restrictions imposed are reasonable within the meaning of that Article. About the nature of, the fee charged for grant of licence to deal in liquor it was observed:--

A fee is a charge for special services rendered to individual by some governmental agency and such a charge has an element in it of a quid pro quo. Commr., The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., . The amounts charged to the licensees in the instant case are evidently, neither in the nature of a tax nor of excise duty. But then, the ''licence fee'' which the State Government charged to the licensees through the medium of auctions of the ''Fixed fee'' which it charged to the vendors of foreign liquor holding licences in Forms L-3, L-4, and L-5 need bear no quid pro quo to the services rendered to the licensees. The word ''fee'' is not used in the Act or the Rules in the technical sense of the expression. By ''licence fee'' or ''fixed fee'' is meant the price or consideration which the Government charges to the licensees for parting with its privileges and granting them to the licensees. As the State can carry on a trade or business, such a charge is the normal incident of a trading or business transaction.

On behalf of the State it was urged that in view of the judgment of the Supreme Court aforesaid any fee paid for grant of a licence to deal in intoxicants has to be held to be a consideration for parting with the privilege and granting of the licence, and, as such, it is nor a fee in the technical sense of the expression to which principle of quid pro quo is applicable.

7. Faced with the judgment in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, learned counsel for the petitioner urged that in the said judgment the Supreme Court has held that any fee realised for grant of licence can be held to be a consideration for parting with its privileges,

but the Supreme Court never purported to lay down that even any fee charged for grant of pass or permit shall also be consideration. According to the petitioner, while realising fees for issuing passes or, permits, for export of liquor outside the State, the State shall not be absolved of the responsibility to satisfy the existence of quid pro quo. It was urged that in respect of export pass fee the principle laid down by the Supreme Court in the case of the Indian Mica Micanite Industries Vs. The State of Bihar and Others, referred to above, is applicable. In my opinion, it is not possible to accept this contention. In the case of she Indian Mica and Micanite Industries Ltd. (supra) both parties proceeded under the assumption that the licence fee so charged was a fee in the technical sense of the expression. On behalf of the State no such stand was taken that the expression ''fee'' used in the Act has not been used in the technical sense of the expression as was contended later in the case of Har Shankar and others (supra). The Supreme Court had no occasion to examine in the earlier case arising under the same Act as to whether expression ''fee'' used in the Act has to be interpreted in its technical sense or in the sense of consideration which the Government charges from the licensees for parting with its privileges and for granting the licences. In the case of Har Shankar and others (supra) this question was raised and has been decided that the expression ''fee'' used under the Act has not been used in the technical sense of the expression ''fee'' Apart from that the dispute which had been raised in the case of India Mica and Micanite Industries Ltd. (supra) related to charging of fee for the grant of licence to possess denatured spirit which is not an intoxicant. The view expressed in the case of Har Shankar and others (supra) is in respect of the fee, which is charged for grant of licence in respect of intoxicant. That is why, it was pointed out that no; citizen has fundamental right to trade in intoxicant and such restrictions cannot be decide in the background of Article 19(1)(g) of the Constitution. Section 38 says in clear and unambiguous words that "every licence permit or pass granted under the Act," shall be granted "on payment of such fees (if any) and subject to such restrictions and on such conditions as the Board may direct". Section 38 Vests power in the Board to levy fees for grant of not only licence, but also for grant of permit or pass in respect of intoxicants. In view of section 38, the Board of Revenue may direct that a licence, permit or pass shall be granted on payment of particular amount of fee. If the amount realised as a price which Government charges for parting with its privilege, then as a necessary corollary any fee charged for granting pass or permit has also to be held as consideration for granting permission to the licensees concerned to export liquor/intoxicants outside the State of Bihar. If the expression ''fee'' has been held to have been used not in the technical sense in section 38 of the Act in context of a licence then it cannot be held to have been used in the technical sense in respect of grant of permit or pass so as to saddle the responsibility on the State to establish quid pro quo. In my view, the principle enunciated in the case of Har Shankar and others (supra) by the Supreme Court in connection with the grant of licence is equally applicable in respect of grant of passes. In such a situation the State cannot be directed to correlate the fee realised with the services rendered td person from whom the export pass fee has been realised.

8. It was then submitted that the impugned levy of fee on export is violative of Articles 301 and 304(b) of the Constitution as it restricts the movement and export of goods. It was urged that any such restriction on export in view of Article 304(b) of the Constitution should be reasonable and must be imposed by the'' State Legislature after the Bill has obtained previous sanction of the President. In this connection reliance was placed on the well known cases of Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, and State of Mysore Vs. H. Sanjeeviah, . If the export of intoxicants to other State is held to be a trade in its true sense, then only the question will have to be considered, whether the restrictions are reasonable. But, dealing in intoxicants is not trade or business within the meaning of Article 19(1)(g) of the Constitution. It was pointed out by the Supreme Court in the case of P.N. Kaushal and Others Vs. Union of India (UOI) and Others,

Trade in liquor has historically stood on a different footing, from other trades. Restrictions which are not permissible with other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, viz. manufacture, collection, sale and consumption.

Again, in the case of Sat Pal and Co. and Others Vs. Lt. Governor of Delhi and Others, it was observed as follows:--

If there is no fundamental right to carry on trade and business in liquor, there is no question of its abridgement by any restriction which can be styled as unreasonable. In fact as stated in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, (sic) under its regulatory power has a right to control or even to prohibit absolutely every form of activity in relation to intoxicants apart from anything else, its import too. This power of control is question of society''s right to self-protection and it rests upon the right of the State to act for the health, moral and welfare of the people.

In my view, now it is too late to urge that any restriction or control in respect of grant of licence, permit or pass in connection, with intoxicants should conform to the requirement of Article 301 or Article 304(b) of the Constitution.

9. On behalf of the petitioner it was pointed out that earlier a notification dated 30.7.1973 had been issued by which duty at the rate of sixty paise per L.F. litre had been imposed on export of India made foreign liquor. That was challenged in the case of M/s S.K.G. Sugar Limited Vs. The State of Bihar and Others, before this Court This Court held that the State Government cannot impose as extra excise duty on export of foreign liquor which is subject to excise duty payable at the rate inscribed by the State in which it is exported On behalf of the petitioner

it was urged that the same attempt, has been made by labelling it as an export pass fee. In my opinion, the aforesaid judgment has no bearing on the facts and circumstances of the present case. In that case it was pointed out that in view of rule 11-A, which contained a provision in respect of "pre-payment of duty at the fate in force in the State to which it is desired to be exported", a second duty cannot be imposed at the time of export. So far as the present impugned rule is concerned, it makes a provision for imposition of export pass fee to which rule 11-A is not applicable. Apart from that (sic) the aforesaid judgment this Court had no objection to consider the nature of right, granted by the State to the licensees under the provisions of the Act and to what extent it is under the control of the State Government. These questions have later been examined by the Supreme Court in the cases of Har Shankar and others (supra), P.N. Kaushal (supra) and M/s. Sat Pal and Co. (supra). In my view, it is difficult to hold that the rule under challenge is ultra vires, and, as such, liable to be struck down. In the result, this writ application fails and it is dismissed, but, in the circumstances of the case, there will be no order as to costs.