
(2010) 05 OHC CK 0050
In the Orissa High Court
Case No : Writ Petition (C) No. 5627 of 2010

Smt. Sunita Senapati

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 10A, 20(A)
Constitution of India, 1950 — Article 14, 19(1)

Citation : (2010) 110 CLT 156

Hon'ble Judges : B.N. Mahapatra, J;A.S. Naidu, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J

1. This Writ Petition has been filed with a prayer for quashing the guidelines prescribed under Clause 23(B) of the Circular dated 25.02.2010 (Annexure-4) for the year 2010-11 (for short Guidelines 2010-11) pertaining to excise duty & fees structure & for a direction to the Opp. Parties not to reduce the percentage of profit as prescribed under Circular dated 19th December, 2006.

2. Bereft of unnecessary details facts & circumstances giving rise to the present Writ Petition are that the Petitioner is a licensee under O.P. No. 1 for running IMFL Off Shop at Patia & Rasulgarh No. II, Bhubaneswar. Prior to 2001, liquor business in the State of Orissa was directly handled by the manufacturers through their wholesalers & retailers. On the 1st day of January, 2001, the Orissa State Beverages Corporation Ltd. (for short "the Corporation") was established to carry on wholesale trade & distribution of foreign liquor in the State of Orissa & it became mandatory for all the IMFL Off Shopkeepers to purchase liquor from the Corporation for the purpose of sale in retail. For the first time in the year 2006, it was decided by the State government for fixation of maximum retail price of IMFL & Beer bottle. Accordingly, the Government of Orissa in Excise Department vide its letter dated 19th December, 2006 (Annexure-3) wrote to the

Managing Director of the Corporation informing that the Government had approved the recommendation of the Price Fixation Committee of the Corporation regarding the principles & formula for determination of Maximum Retail Price (for short "MRP") of IMFL & Beer bottle. In the said letter, it was further informed that the Corporation had been requested to intimate all the suppliers & manufactures to take effective steps for printing MRP inclusive of all taxes & duties on IMFL & Beer bottles. While determining the MRP, the profit margin for retailers on different products was provided varying from 41 % to 25%. However, in the guidelines issued for the year 2010-11 under Annexure-4, the Government of Orissa in Excise Department has reduced the profit margin in respect of retailers like the Petitioner on different products varying from 25% to 15%, This being the reason for which the present Writ Petition has been filed.

3. Mr. Goutam Acharya, Learned Counsel appearing on behalf of the Petitioner vehemently argued that Clause 23(B) of the Guidelines 2010-11 is arbitrary, unjustified & made without proper application of mind. No reason has been assigned by the Opp. Parties for reducing the profit margin of the retailers in respect of different types of liquor in the Guidelines for the year 2010-11 from the profit margin prescribed in Circular dated 19th December, 2006 (for short "Circular 2006"). The Corporation being a licensee under the Opp. Parties like the Petitioner should not be allowed to decide the landing cost of IMFL & Beer along with its own profit margin, when the profit margin of the retailers has been decided by the State Government. This action is clearly violative of Articles 14 & 19(1)(g) of the Constitution. The Guidelines 2010-11 is silent as to who will be benefited by such reduction of the profit margin of the retailers. The Petitioner will suffer irreparable financial loss because of such reduction of the profit margin prescribed in the Guidelines 2010-11, which is violative of Article 19(1)(g) of the Constitution. Due to such reduction of profit margin the revenue generation in the State will ultimately hamper to a lot. While the licence fee has been increasing & 10% from year to year since 2000, the reduction of profit goes to prove the high handedness of the Opp. Parties. Manufacturers as well as the Corporation, who are by & large business entities, have not been touched in the Guidelines 2010-11 so far as their profit margin is concerned, whereas the profit margin of dealers/retailers has been reduced arbitrarily. The Opp. Parties have no authority to reduce the profit margin in the Guidelines 2010-11.

4. Per contra, Mr. Mishra, Learned Addl. Government Advocate appearing on behalf of Opp. Parties argued that nobody has any vested right to deal with liquor trade. It is the privilege of a State. State parts with the privilege for the sake of revenue consideration. While parting with the privilege, the State Government is competent to prescribe the terms & conditions which cannot be termed to be violative of any principles of law. The authority after taking into consideration several factors including interest of the general consumers have come to the conclusion that percentage of profit of the retailers should be reduced for the year 2010-11. The scope of judicial review or interference is very limited. As per Annexure- 3, the retailers were getting profit margin from 12% to

41 % depending upon the category of IMFL dealt with by them. The calculation made in Annexures- 3 & 4 are presumptive in nature. In practice, the retail vendors sell the IMFL at a lesser price than the maximum retail price in the competitive market reducing their profit margin. There has been huge growth in the sale of liquor in the State since 2005-06. The Excise Commissioner in his letter No. 6517 dated 01.10.2009 suggested the Government for limiting the retailers' margin while fixing maximum retail price. After the matter was examined at length at the level of the Government in Excise Department & the Government in Finance Department, the Government has prescribed the guidelines under Clause 23(B) (Annexure-4). The matter relating to fixation of MRP has been fully decided by the Price Fixation Committee of the Corporation constituted by the State Government. In the State of Andhra Pradesh, retailers' profit margin in relation to the IMFL is " 20% & Beer at the rate of 25%. Similarly, in the State of Bihar, retailers' margin is prescribed " 15% on the MRP of the Brand. In support of his contention, Mr. Mishra, drawn the attention of this Court to the true copies of the letter No. 8550 dated 10.03.2010 of the Andhra Pradesh Beverages Corporation Ltd. & letter No. 5590 dated 09.09.2008 of the Bihar State Beverages Corporation Ltd. under Annexure-B/2 series to the counter affidavit.

5. The sole grievance of the Petitioner in the Writ Petition is that while Clause 23(B) of the Guidelines 2010-11 prescribes that the landing cost will be decided by the Price Fixation Committee & Corporation's margin will be decided by the Corporation itself, the retailers' margin will be decided in the manner prescribed in the said Guidelines. While the profit margin of the Corporation is remained intact the same has been reduced in case of the Petitioner-retailer. According to the Petitioner, it is arbitrary, unreasonable & violative of Articles 14 & 19(1)(g) of the Constitution of India. As per Clause 23(8) of Guidelines 2010-11, profit margin with regard to the IMFL up to Rs. 850 & Beer is 25%. In case of IMFL above Rs. 850, the profit margin is 20%. In case of Scotch, the profit margin is 15%. The profit margin prescribed in the Guidelines" 2010-11 is less in comparison to profit margin prescribed in 2006 Guidelines so far as Petitioner-retailer is concerned.

6. Before deciding the issue, it is necessary to keep in mind that there is no inherent right in a citizen to sell intoxicating liquors by retail; it is not the privilege of a citizen, as it is a business attended with danger to the community; it may be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner & extent of regulation rest in the discretion of the governing authority. (See Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others,).

In State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, , the Apex Court held that the right to carry on trade in liquor is a fundamental right within the meaning of Article 19(1)(g) of the Constitution & the State may, however, legislate prohibiting such trade either in whole or in part in terms of

clause 16 thereof.

In *Cooverjee B. Bharucha* (supra), the Apex Court held that in order to determine the reasonableness of the restriction regard must be had to the nature of the business & the conditions prevailing in the trade. It is obvious that these factors must differ from trade to trade & no hard & fast rules concerning all trades can be laid down. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order & morals of the community.

6. (SIC) u/s 20(A) of the Bihar & Orissa Excise Act 1951 (for short "Act 1951") the right to carry on & distribution of foreign liquor in the State is vested in the State Government or an agency of the State Government or a Corporation established & incorporated under the Companies Act, 1956 & wholly owned & controlled by the State Government for the purpose. In exercise of the powers conferred by Section 10-A of Act 1951, the Corporation has been incorporated & established under the Companies Act, 1956 on 6th November, 2000 with the corporate objectives of efficient & effective distribution, import & export of foreign liquor, Beer & C.S. with growth having social responsibility while adhering to legal & financial propriety.

The State Government vide Excise Department Notification No. 514 dated 30.01.2001 appointed the 1st day of February 2001 as the date on & from which the right to carry on import; export & the wholesale trade & distribution of foreign liquor in the State shall solely vest in the Corporation. The OP-authorities after taking into consideration several factors including the interest of the consumers have come to the conclusion that percentage of profit of retailers should be reduced for the year 2010-2011. The Excise Commissioner vide his letter dated 01.10.2009 suggested the Government for limiting the retailers' profit margin while considering the question of fixation of maximum retail price. The matter regarding fixation of MRP & profit margin of the retailers was examined & discussed, as stated in the counter affidavit, in the government level in the Excise Department & in the Finance Department. The matter was also thoroughly decided by the Price Fixation Committee of the Corporation constituted by the State Government. After obtaining due approval from the Government, Clause 23(B) prescribing the margins of profit in relation to different "products has been introduced in the Guidelines 2010-11.

Law is well settled that a policy decision taken by a State or its authority/instrumentality is beyond the purview of judicial review unless otherwise the same is found to be arbitrary & unreasonable or in contravention of the statutory provisions or the same infringes the fundamental right of an individual guaranteed under the Constitution. In *Tamil Nadu Education Department Ministerial and General Subordinate Services Association and Others Vs. State of Tamil Nadu and Others*, , the Apex Court held as under:

Once the principle is found to be rational, the fact that a few freak instances of hardship may arise on either side cannot be a ground to invalidate the order or the policy. Every cause claims a martyr & however unhappy we be to see the seniors of yesterdays becoming the juniors of today, this is an area where, absent arbitrariness & irrationality, the Court has to adopt a hands-off policy.

In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , the Supreme Court held as under:

It is not possible for Courts to question & adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale & purchase of products & with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded & at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the Courts, such decisions are up held on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of play in the joints to the executive. On the basis of those Judgments it cannot be urged that the Court has left to the option of the authorities concerned whether to invite tenders or not according to their own discretion & to award contracts ignoring the procedures which are basic in nature, taking into account factors which are not only irrelevant but detrimental to the public interest.

The Apex Court in *Ekta Shakti Foundation Vs. Govt. of NCT of Delhi*, , held that the policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental rights is not shown, the Courts will have no occasion to interfere & the Court will not & should not substitute its own Judgment for the Judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.

In *Akhil Bharat Gosewa Sangh Vs. State of A.P. and Others*, , the Apex Court held as under:

It is also well settled that policy decision of the Government cannot be interfered with or struck down merely on certain factual disputes in the matter. It is not open to the Court to strike down such decision until & unless a serious & grave error is found on the part of the Central Government or the State Government.

In view of the above legal propositions, it cannot be said that Clause 23 (B) is in any way unreasonable or arbitrary & violative of Article 19(1)(g) or the

Constitution of India.

7. The other contention of the Petitioner that Clause 23(B) authorizing the Corporation to decide its "margin of profit & Government to decide the margin of profit of the retailers is hit by Article 14 of the Constitution does not merit, consideration. Article 14 comes into operation only when there is discrimination between two similarly situated persons. The Apex Court in *Indian Hume Pipe Co. Ltd. Vs. State of Rajasthan*,), held that two persons, similarly situated, could not have been treated differently as the same may amount to discrimination. In *Krishnan Kakkanth Vs. Government of Kerala and others*, , the Apex Court observed as under:

To ascertain unreasonableness & arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial if a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise & is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary & not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality & unconstitutionality, Court should avoid embarking on uncharted ocean of public policy.

In *State of H.P. and Another Vs. Anjana Devi and Others*, , the Apex Court held that discrimination presupposes classification of similarly situated persons into different groups without any reasonable basis, for extending dissimilar benefits or treatment. Technical services & non-technical services are different categories. Persons appointed against reserved vacancies after reservation was provided, & persons appointed before introduction of reservation, belong to different classes. Persons appointed on or after 03.05.1983 & those appointed prior to 03.05.1983 are not of the same "class", hence different yardsticks could be applied to them. The Respondents could have complained of discrimination only if a benefit had been introduced retrospectively by fixing a cut-off date arbitrarily thereby dividing a single homogeneous class into two groups & subjecting them to different treatments. That is not the case here. Choice of the date 03.05.1983 for extension of benefit of option is not an arbitrary selection of a cut-off date. It is logical & rational, being the date on which reservation was made applicable to technical services.

8. In the instant case, the Corporation is a Public Sector Undertaking, an instrumentality of the Government. It has been incorporated to achieve certain objectives. It distributes IMFL, country liquor, Beer etc. on wholesale basis. The Petitioner is an individual; it carries on retail business for the sake of his own interest. There is clear distinction between the Corporation & the Petitioner. It is not the case of the Petitioner that there are different profit margins provided

among the similarly situated individual retailers. Therefore, Clause-23(B) does not create clash within class.

9. In that view of the matter, we are of the considered view that Clause 23(B) of the Guidelines dated 25.02.2010 (Annexure 4) for the year 2010-11 being not violative of Articles 14 & 19(1)(g) of the Constitution of India we are not inclined to quash Clause 23(B) of the said Guidelines.

10. The Writ Petition is dismissed accordingly.

No order as to cost.

A.S. Naidu, J.

11. I agree.