

(2000) 01 MAD CK 0037

In the Madras High Court

Case No : W.A. No. 2610 of 1999 and C.M.P. No.22107 of 1999

South India Hotels and Restaurants Assn. (Regd) APPELLANT

Vs

The Secretary Prohibition and Excise Department,
Government of Tamil Nadu and another RESPONDENT

Date of Decision : 06-01-2000

Acts Referred:

Constitution of India, 1950 — Article 226, 265
Madras Prohibition Act, 1937 — Section 17C, 17D, 53, 54

Citation : (2000) 1 CTC 393 : (2001) 1 LW 655 : (2001) WritLR 157

Hon'ble Judges : K.G. Balakrishnan, C.J;K. Govindarajan, J

Bench : Division Bench

Advocate : Mr. M. Sivathanu for M/s. Surana and Surana, for the Appellant; Mr. M. Kandasamy, Special Government Pleader, for the Respondent

Judgement

1. This writ appeal is directed against the judgment of the learned single judge in W.P.No1980 of 1993. The appellant is an association representing

the hotels and restaurants. In the writ petition, the appellant challenged the notification dated 22.7.92 issued by the Government by which the

Government enhanced privilege fee in respect of FL.3 Licence granted to star hotels. The appellant has also challenged a circular issued by the

Excise Department to the Collectors whereby the Collectors were directed to take suitable action to recover the enhanced privilege fee. The

appellant contended before the learned single judge that the Government have no power or jurisdiction to enhance the privilege/licence fee for the

year 1992-93, as the licence had already been issued to the licensees on the basis of the then existing privilege fee and the enhancement of the fee

during the middle of the year amounts to breach of contract and is an attempt to collect privilege fee with retrospective effect. It is also alleged that

for augmenting the excess revenue, the State should have levied tax and the enhancement of the fee was arbitrary and illegal. The appellant had also contended that the impugned order was in the nature of levying tax and therefore it was void and unenforceable. It was contended by the appellant that income derived from the Star Hotel should not have been the basis for fixing the privilege fee. The appellant further contended that the impugned orders were not in tune with the object of the statute and the object of the statute being to regulate the consumption of liquor, the same cannot be misused by the respondents for augmenting the revenue of the state. The administrative orders passed by the respondents to increase privilege fee exorbitantly was ultra vires the Act and the Constitution.

2. The learned single judge rejected these contentions and held that the impugned order was not violative of the provisions contained in the Constitution and that the fixation of privilege fee at different rates for different types of star hotels, was not violative of the principle of equality under Article 14 of the Constitution as the basis of the classification was reasonable. Aggrieved by the same, the present writ appeal is filed.

3. The learned counsel for the appellant contended before us that the "star hotel" is defined under the Tamil Nadu Liquor (Licence and Permit) Rules, 1981, and under the definition, no classification as such, has been made and therefore, the fixation of the licence fee at different rates in respect of different types of star hotels was illegal. The counsel argued that under the definition contained in the Rules, star hotel is treated as one class and the further classification of the same into different types for the purpose of levying fee, was illegal. The contention of the appellant cannot be accepted. It is be true that in the definition, it is only stated that the star hotel includes a beach resort hotel which satisfies various criteria mentioned in the Rule and is certify by the Director of Tourism of the State Government. The definition is a general definition giving out the various criteria to be fulfilled to come under the definition of star hotel. There are various types of star hotels depending upon the amenities and facilities available in these hotels and classification of the star hotels is based on these amenities. FL.3 licence is granted to these hotels for supply of liquor to foreign tourists, foreigners resident in India holding personal permits and also citizens of India holding personal permits for consumption within

the licensed room of the hotel or for removal to their private rooms in the same hotels for consumption of liquor. The purpose of granting of such licence is to encourage tourism and the authorities relied on the gradation of hotels approved by the tourism department. The contention of the counsel for the appellant is that when there is no classification as such in the definition in the Rules, there should not have been a further classification in the impugned notification. The counsel also argued that when there is a classification it must be in consonance with the objects sought to be achieved and according to him, the object sought to be achieved under the provisions of the Tamil Nadu Prohibition Act is to regulate the consumption of liquor and this object is not achieved by the said classification. FL.3 licence is given to various hotels for the sale of liquor mainly to foreign tourists and other tourists, who come as customers in these hotels. Admittedly, there exists a different types of hotels and as regards the licence fee, only a fixed amount is collected from these various types of star hotels. The classification is made only for the purpose of privilege fee. The privilege fee does not partake the character of tax or licence fee. The fee stipulated to be paid by the appellant is the price or consideration, which the Government charges from the licensees for parting with its privileges to sell liquor. The state has exclusive right to manufacture and sell liquor and this right could be used to raise the revenue and as there are different types of star hotels, the Government is perfectly within its right to collect a privilege fee according to the types of hotels, to which this privilege is extended. The object of the impugned notification could only be viewed as to regulate the supply of liquor to tourists and to see that this privilege of the Government is not misused by the licensees. Therefore, we do not think that the classification made in the impugned notification suffers from any irregularity or irrationality.

4. The next contention urged by the learned counsel for the appellant is that the amount sought to be recovered from the appellant is a licence fee

and as it varies depending upon the financial capacity of the hotels, such enhancement is illegal and the licence fee cannot be levied simply on the ground of extent of trade or financial resources of the licensees. The counsel also contended that this privilege fee partakes the character of fee and

there is no quid pro quo in the sense that the State is not rendering any special service to the licensees.

5. Our constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists

with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of

any of the matters that is included in it. The distinction between 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 a special benefit or privilege. Fees confer a special capacity although the special advantage, as for example in the case

of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest. Sometimes, some

positive work for the benefit of persons is done by the Government and the money is taken in return for the work done or services rendered. If the

money thus paid is set apart and appropriated specifically for the purpose of such work and is not merged in the public revenue for the benefit of

the general public, it is counted a fees and not a tax.

6. In *State of U.P v. Sheopat Rai*, 1994 Supp (1) SCC 8 : AIR 1994 SC 813, the legislative competence of state legislature to provide for levy

and collection of "licence fee" in public auction or "fixed fee" as determined by Excise Commissioner by way of consideration receivable by State

Government from private parties, for parting with exclusive privilege or right of liquor vend under licence, was challenged on various grounds. It

was held as follows:

The "licence fee" or "fixed fee" cannot partake of the character of either "regulatory fee" or "compensatory fee" so as to regard it as "fee". Thus,

neither the "licence fee" nor "fixed fee" realisable from a private party for granting the privilege or right to sell or vend foreign liquor to such party

can fall within the ambit of the subject "fee" in the entry of List II of the seventh schedule to the Constitution. Then, the "licence fee" on the "fixed

fee" under consideration, cannot be regarded as "tax" since the characteristics of tax, namely, its levy being compulsive in nature, its burden being

common, it being payable according to the varying abilities of the person to be charged, are wholly absent in both of them. As "duty" or "cess"

stand on the same footing s"tax, the "licence fee" or "fixed fee" under consideration, cannot be regarded either as "duty" or "cess". Since the view

taken by the High Court that the ordinance could not be regarded as that

competently made by the State under entries 51, 62 and 65 of List 11, has not been questioned as unjustified, there is no need to examine the correctness of the said view of the High Court.

However, the Ordinance promulgated enabling the State to grant shop licences for sale of foreign liquors to private parties on "licence-fee" or

"fixed fee" can be regarded as a subject on which the State Legislature had competence to legislate under Entry 8 of List II of the Seventh

Schedule to the Constitution. Section 24-A inserted in the U.P. Excise Act by the Ordinance, which was held to be ultra vires the Constitution for

want of legislative competence by Allahabad High Court stands negated by the Supreme Court's Constitution Bench decision in *Har Shankar*

case and the seventh-judge bench decision in *Synthetics and Chemicals LTD.* Hence, the conclusion of the High Court relating to the constitutional

invalidity of the ordinance for want of legislative competence is unsustainable.

7. In the instant case, there is only enhancement of the privilege fee fixed by the Government while granting the FL3 licence. As the right to sell

liquor being the exclusive privilege of the State, the State Government have got the authority to fix the privilege fee. u/s 17-D of the Prohibition Act,

1937, the State Government can levy a sum of fee both in consideration of the grant of any exclusive or other privilege u/s 17-C and also a fee on

licences granted u/s 17-C. The provision contained in Section 17 of the Act gives power to the state Government to fix the privilege fee. We do

not think that the contention of the appellant that it partakes the character of fee and there should be fulfilment of the condition that the Government

should confer some benefit or service for the money collected, is acceptable.

8. The learned counsel for the appellant further contented that u/s 54 (3) of the Tamil Nadu Prohibition Act, whatever Rule made by the delegated

authority, should be placed before the House of the legislature and the legislature shall be given the opportunity to suggest modification, if any, and

then only the impugned notification shall have the force of law. The appellant has not specifically alleged the fact that the delegated legislation was

not placed before the legislature. It could only be assumed that the procedure contained in section 54 (3) was followed. As the appellant had not

alleged this contention in the affidavit filed in support of the writ petition, nor did they raise this objection before the learned single judge, we are not

inclined to accept the contention now raised by the appellant. Had the appellant raised this objection at the appropriate time, the respondents

would have got an opportunity to explain and clarify the position.

9. Lastly, the appellant contended that the impugned notification was passed on 22.7.92 and by the instruction issued by the Excise Department to

the Collectors on 12.1.93, the enhanced privilege fee was sought to be recovered from the members of the association with retrospective effect.

But, on going through the proceedings dated 12.1.93 it appears that the authorities sought to recover only the difference in the enhanced privilege

fee for the remaining period of the year 1992-93. Therefore, it is not correct to say that the privilege fee is enhanced with retrospective effect. The

appellant further contended that the instruction was given only on 12.1.93 and therefore, the amount cannot be recovered from 22.7.92. We do not

find any force in this contention as the members of the Association have been directed to pay only the difference in the enhanced privilege fee. The

learned single judge has rightly rejected the writ petition and we do not find any merit in the writ appeal. The writ appeal is dismissed.

Consequently, CMP No.22107 of 1999 is dismissed.