

(2001) 10 AP CK 0168

In the Andhra Pradesh High Court

Case No : Writ Petition No"s. 24013 of 2000 and 15152, 18512 and 19472 of 2001

Sri Narasimha Wines and Others

APPELLANT

Vs

The Proh and Excise Superintendent and Others

RESPONDENT

Date of Decision : 18-10-2001

Acts Referred:

Andhra Pradesh (Indian Liquor and Foreign Liquor) Rules, 1970 — Rule 25(9)

Citation : (2001) 6 ALT 240

Hon'ble Judges : S.B. Sinha, C.J;V.V.S. Rao, J;Bilal Nazki, J

Bench : Full Bench

Advocate : K. Manjula, for the Appellant; GP, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—Vires of sub-rule (9) of Rule 25 of the Andhra Pradesh Indian Liquor and Foreign Liquor Rules, 1970 (hereinafter referred to as "the Rules") is in question in this batch of writ petitions.

FACTS:

2. The petitioners are granted IL 24 licence for retail sale of liquor for the lease year 2000-2001. Allegedly the licence was effective from 17.5.2000 to 31.3.2001. By reason of G.O.Ms.No.190 Revenue (Ex.III) Department, dated 24.3.1998, sub-rule (9) has been inserted in Rule 25 of the Rules which is to the following effect:

The annual licence fee for the licences in Form IL 24 referred to in Rule 23 shall be amended from time to time at the rates as shown in the schedule appended to these Rules. The annual licence fee for a lease year shall be paid before the commencement of the lease year to which it relates in one lump sum or in three equal instalments or in a manner as notified from time to time. Where the licence is issued before the 31st May of the lease year, the first instalment i.e., 1/3rd of the annual licence fee shall be paid into the Government Treasury through a

SUBMISSIONS:

3. The bone of contention of the learned counsel for the petitioners is that having regard to the scope and object of the Act, as no person can carry on any business save and except in terms of licence granted under the said Act, collection of licence fee for the period during which the licence was not operative, must be held to be illegal. The learned counsel would contend that collection of such licence fee is arbitrary particularly having regard to the fact that a licence is granted for a period less than 12 months. The learned counsel would submit that having regard to the fact that persons similarly situated viz., those who had received the licence earlier would be operating their shops for the self-same period for the same amount, the impugned order must be held to be discriminatory.

4. The learned counsel would further submit that such reduction in licence fee is permissible and in support of the said contention strong reliance has been placed on Government of A.P. and others Vs. A. Sudhakar, . The learned counsel would contend that levy for the period for which no business could be transacted must be held to be ultra vires.

5. The learned Government Pleader Mr. Chandraiah, on the other hand, would submit that having regard to the scope and object of the Act, the impugned rule is intra vires.

SCHEME OF THE ACT:

6. The Andhra Pradesh Excise Act, 1968 (for short "the Act") has been enacted to consolidate and amend the law relating to the production, manufacture, possession, transport, purchase and sale of intoxicating liquor and drugs, the levy of duties of excise and countervailing, duties on alcoholic liquors for human consumption and opium, Indian hemp and other narcotic drugs and narcotics and to provide for matters connected therewith in the State of Andhra Pradesh. "Form" has been defined in Rule 2 (d) of the Rules to mean a form appended to these Rules and "lease year" has been defined in Rule 2 (ee) of the Rules to mean "a period of twelve months beginning from the first day of April of the year and ending with the 31st March of the following year. Rules 24 and 25 of the Rules read thus:

24. Period of the Licence:- Every licence other than the occasional licence in Form IL 22 or Special licence shall be valid for a lease year coming from the 1st April, ending with 31st March of the succeeding year, subject to payment of annual licence fee in one lumpsum:

Provided that the licences issued on or after the 1st April, shall be valid upto the end of 31st March of the succeeding year.

Provided further that the lease of all the licenses issues under the Andhra Pradesh Indian Liquor and Foreign Liquor Rules, 1970 and subsisting as on the 31st March, 2000 is hereby extended upto the 10th April, 2000.

25. Licence fees:- (1) The annual licence fee for each of the licences except IL 17 and IL 24 referred to in Rule 23, shall be as amended from time to time at the rates as shown in the schedule appended to these Rules. The annual licence fee for a lease year shall be paid before the commencement of the lease year to which it relates in one lump sum: ...

7. Section 15 of the Act provides that no person shall sell or buy any intoxicant except under the authority and in accordance with the terms and conditions of a licence granted in this behalf. Section 17 of the Act inter alia provides that the Government may, subject to such conditions as they may deem fit to impose, grant for a fixed period to any person at any place a lease or licence or both of exclusive privilege of selling by wholesale or by retail, any liquor or other intoxicant and the explanation thereto states that a lease shall not take effect until the Collector or any other competent officer has issued a licence under this Act.

8. The Rules have been made by virtue of the powers conferred by Section 72 read with Sections 9, 11, 12, 13, 14, 15 and 28 of the Act. Rule 31 of the Rules provides the procedure for grant of licence.

FINDINGS:

9. The petitioners are applicants for grant of new licences and they entered into a contract. They form a separate class. The dealing in Indian made foreign liquor is not a fundamental right. It is merely a privilege.

10. Rule 25 (9) of the Rules inserted by reason of amendment is done so that revenue may not suffer any loss. The provisions of the Act and the Rules made there under are complete Code in themselves.

11. The petitioners herein were aware of the conditions imposed as regards payment of annual licence fee as amended by the said G.O.Ms. No. 190, dated 24.3.1998.

12. Clause 8 of the Schedule to the Rules is attracted in the case of the petitioners. Having regard to the fact that it merely directs payment of the entire licence fee if the licence is issued before 31st May of that year cannot be said to be wholly unreasonable so as to attract the wrath of Article 14 of the Constitution.

13. The petitioners took part in the auction knowing fully well that having regard to the fact that the notification had been issued on 1.5.2000 the lease cannot be granted for a period of 12 months as a lease can be granted only within the excise year. Sub-rule (9) of Rule 25 as amended on 24.3.1998 lays down the mode and manner of grant of remission.

14. Further the question which arises for consideration is as to whether the petitioners having voluntarily offered to take part in the auction can now be permitted to turn round and contend that the said provisions cannot be implemented. The answer to the said question must be rendered in the negative.

15. The matter relating to grant of licence is a matter of contract. The petitioners, as noticed hereinbefore, without any demur whatsoever participated in the auction knowing fully well the condition as regards payment of licence fee. They did not make any protest. Those who are similarly situated might not have taken part in the auction on the plea that having regard to the phraseology used in sub-rule (9) of rule 25 of the Rules, they would not be entitled to any remission whatsoever. A person who intends to carry on business and takes part in auction, is expected to calculate the profit or loss he may incur in the venture before doing so. He would be presumed to have taken part in the auction knowing fully well that even if he were required to pay the licence fee despite the fact that he would not be able to carry out business for the whole excise year, he would earn some profit.

16. In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, it has been held:

21. ON the preliminary objection it was finally urged by the appellants that the objection was misconceived because there was, in fact, no contract between the parties and therefore they were not attempting to enforce any contractual rights or to wriggle out of contractual obligations. The short answer to this contention is that the bids given by the appellants constitute offers and upon their acceptance by the government a binding agreement came into existence between the parties. The conditions of auction become the terms of the contract and it is on those terms that licences are granted to the successful bidders in Form L. 14-A of the Rules. As stated in *Cheshire and Fifoot's "Law of Contract"* (Eighth Ed., 1972; p. 24):

17. IN order to determine whether, in any given case, it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance. In other words, the court examines all the circumstances to see if the one party may be assumed to have made a firm "offer" and if the other may likewise be taken to have "accepted" that offer. These complementary ideas present a convenient method of analysing a situation, provided that they are not applied too literally and that facts are not sacrificed to phrases.

Analysing the situation here, a concluded contract must be held to have come into existence between the parties. The appellants have displayed ingenuity in their search for invalidating circumstances but a writ petition is not an appropriate remedy for impeaching contractual obligations.

22. The writ jurisdiction of High courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred. That, however, will not estop the appellants from contending that the amended Rules are not applicable as their licences were renewed before the amendments were made.

18. Yet again in *Sham Lal and Others Vs. State of Punjab*, it has been held:

17. He does not want to abide by the terms of the contract at the same time he wants to keep the benefit he might have made by operating the vends for the whole year. ...

20. ...Having exploited the licences for the entire period without discharging the full burden of the fees payable for the same period, the appellants are seeking to avoid contractual obligations voluntarily incurred and to work the licences on terms as they find convenient.

19. In *M. SUBBA RAO v SUPERINTENDENT OF EXCISE*, 1984 (2) APLJ 203 a Division Bench of this Court considered the aforementioned aspect of the matter and held:

15. The concluded contracts for the payment of lump sum amount for parting with the privilege of vending intoxicant within the framework of the Act are binding and enforceable and the contractors cannot wriggle out of the contracts by invoking writ jurisdiction. The amount that maybe agreed to be paid pursuant to such agreements comprise the lump sum amount to cater to the diverse situations including the reimbursement for the unlifted or short drawn liquor. The amount stipulated in the agreement should not be confused with excise duty or any other obligation under the Act.

20. In *Rajaheel Wine Merchants and Others Vs. The Commissioner of Excise and Others*, it was held:

14.when the petitioners want to import liquor fro outside the State and that right has been parted with by the State Government, definitely the State is entitled to collect the fee and it cannot be said Rule 4 (2) or Rule 11 (2) of the A.P. Foreign Liquor & Indian Liquor Rules or Rule 66 (12) of the A.P. Distillery Rules is not in accordance with Section 9 (1) of the Excise Act. The legality of collection of fee as per original sub-rule (2) of Rule 4 for such approval was already admitted by the petitioners by complying with the same. Having paid the fee earlier as per original sub-rule (2) of Rule 4 and having enjoyed the privilege, it is not open to the petitioners to raise an objection with regard to the registration fee of approval of label. The Excise Act does not protect the process of approval of labels. Section 72 of the Excise Act authorises the Government to make rules for carrying out any purposes of the Act. The purpose of the Act in regulating the sale of intoxicant by importing it from a place outside the State is achieved by making the impugned rule. Previously the fee of Rs.100/- per label for the purpose of approval was payable by the applicants according to sub-rule (2) of Rule 4. The same fee is now revised and under sub-rule (2) of rule 11 of the A.P. Foreign Liquor & Indian Liquor Rules and under sub-rule (12) of Rule 66 of the A.P. Distillery Rules label fee of Rs.25,000/- is introduced, under G.O.ms.No.187 dated 18.3.1991. The Government has got the power to amend the same. The State is entitled to stipulate its own terms for conferring on others the privilege to deal in liquors which is otherwise vested in it and in doing so if the State does not discriminate between the similarly situated persons but acts

in furtherance of its prime objective to realise more and more revenue from an important source available to it, the State action is not vulnerable to attack from the stand point of Article 14.

21. In *R. GUPTA v GOVT. OF A.P.*, 1996 (2) ALD 408 the petitioner was a transport operator and he had stopped the vehicle for some period for undertaking repairs and reconstruction. However, he was called upon to pay the tax for the entire one year irrespective of the usage of the vehicle. Therein a Division Bench of this Court held:

We have already pointed out that the State which receives the composite fee (tax) will have to pass on the tax to the other States to which the authorisation extends. So the receiving State is not the real beneficiary of the composite fee (tax) but the tax is passed on to the other State. Further there are inherent difficulties in allowing refund of composite fee (tax) for the period for which the vehicle is not plied. The receiving State cannot be burdened with the liability to refund the tax and it will have to address the other States and get the refund and before that it would not be possible for the Home State to refund the tax. So having regard to these circumstances, the G.O. provides that no refund is allowed. The provision of denying the refund cannot be said to be arbitrary or illegal in view of the package of payment of a composite fee (tax) which is lesser than the tax payable in respect of each State for transportation of the vehicles covered by the authorisation in various States of the country. Further, the payment of penalty is enjoined where there is a failure to pay the tax as provided under the G.O. For this purpose, effective control will have to be exercised only by the Home State. Therefore, it may not be a tenable ground to urge that the Andhra Pradesh State should not take coercive steps to recover the composite fee (tax) merely for remitting it to the other States, as under the Scheme the responsibility is fastened on the Home State.

22. In *State of Orissa and others Vs. Narain Prasad and others, etc. etc.*, the apex court has held:

21. A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round, according to this decision, and question the validity of those obligations or the validity of the rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour.

23. Yet again in *SRI RAMA WINES v EXCISE SUPERINTENDENT, ADILABAD*, 1997 (3) APLJ 104 a Division Bench of this Court declared the law in the following terms:

The licence, though was granted under Sec.28 of the Act, is subject to certain conditions as prescribed in the Rules. It is true that conditions of licence do not contain any such liability to pay any enhanced licence fees. But the conditions do

not place any embargo on the authorities to collect the same. When such is the situation and when the authorities have been clothed with the power to require the applicant to give an undertaking for such payment, it cannot be said that the undertaking is contrary to the letter and spirit of the licence or Sec.28 of the Act. The counter-part agreement is a statutory one and an undertaking has been given as prescribed in clause (iv) of Form FL 28 under Rule 30. It is not far to seek the reason for requiring the licensee to give such an undertaking. The population of a place varies due to the lapse of time and also for the reason of merger of another area into the concerned village/town/municipality. Many other situations also can be visualised. These situations cannot be anticipated on the date of grant of licence. Since the licence fees was payable depending upon the density of the population, the Act gives the power to the authorities to require the licensee to pay the enhanced licence fee as and when levied, even during the currency of the period of licence. This power having been given by the Act itself, it cannot be said that it runs counter to the licence granted under the Act. ...

24. The apex court in PANNA LAL v STATE OF RAJASTHAN, : AIR 1975 SC 2008, categorically held:

THE licenses in the present case are contracts between the parties. The licensees voluntarily accepted the contracts. "They fully exploited 40 their advantage the contracts to the exclusion of others. Tie High court rightly said that it was not open to the appellants to resile from the contracts on the ground that the terms of payment were onerous. The reasons given by the High court were that the licensees accepted the license by excluding their competitors and it would not be open to the licensees to challenge the terms either on the ground of inconvenient consequence of terms or of harshness of terms.

25. In Assistant Excise Commissioner and Others Vs. Issac Peter and Others, it has been held:

May be these are cases where the licensees took a calculated risk. May be they were not wise in offering their bids. But in law there is no basis upon which they can be relieved of the obligations undertaken by them under the contract. It is well known that in such contracts which may be called executory contracts there is always an element of risk. Many an unexpected development may occur which may either cause se loss to the contractor or result in large profit. Take the very case of arrack contractors. In one year, there may be abundance of supplies accompanied by good crops induced by favourable weather conditions; the contractor will make substantial profits during the year. In another year, the conditions may be unfavourable and supplies scarce. He may incur loss. Such contracts do not imply a warranty or a guarantee of profit to the contractor. It is a business for him profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licensees.

....

Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so. It is one thing to say that a contract every contract must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In *Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay* it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine.

....

In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation.

26. The matter relating to remission thus having been provided for by the State in exercise of its rule making power itself, which, in our opinion, can neither be said to be unjust or arbitrary, we are of the opinion, that no writ of or in the nature of mandamus can be issued directing the respondents to grant remission

for the period during which no business was carried on. In GOVT OF A.P. v A. SUDHAKAR (supra) the period during which the licence was granted was from 18.4.1997 to 17.6.1997 for which period remission of proportionate licence fee was claimed. The said decision to which one of us (S.B.Sinha, CJ) was a party, was rendered not only without noticing the impugned rule but related to a period which was prior to coming into force of the said rules as by reason of the aforementioned amended provision the State has empowered itself to collect the annual licence fee. Even in a situation where licence had been granted after coming into effect of the excise year, the said decision cannot be said to have any application whatsoever. Further, in a matter of this nature, the Court will not enforce a contract. In State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., it has been held:

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

27. A subordinate legislation can be struck down only when the same does not conform to the statutory or constitutional requirement or is patently contrary to or inconsistent with the provisions of the Act. There is always a presumption that a subordinate legislation is valid.

28. Writ of mandamus cannot be issued directing the statutory authorities to act contrary to law. A matter governed by contract qua contract would not attract the writ jurisdiction of this Court as in such a matter public law element is not involved. The State by reason of any statutory rule or otherwise can reserve unto itself the right to revise the licence fee and/or the matters ancillary or incidental thereto. Only because some hardship is caused, the same by itself may not be a ground for declaring the same ultra vires. In Santosh Kumar Roy and others etc. Vs. State of West Bengal and others, a Division Bench of the Calcutta High Court has held that restructuring of rents for bad maintenance of flats may cause hardship to tenants and the rent when made double on ad hoc basis is not violative of the principles of natural justice. This aspect of the matter has also been considered in AIMS INDIA (P) LTD v INDIAN BANK & ORS, 1997 (2) Cal LT (HC) 179.

29. It is trite that writ of mandamus can be issued provided the writ petitioner establishes a legal right in himself and a corresponding legal duty in the respondents (see State of West Bengal and Others Vs. Bibhuti Bhusan De and Others,

30. For the aforesaid reasons there is no merit in the writ petitions which are accordingly dismissed. There shall be no order as to costs.