

(1978) 10 KL CK 0024

In the High Court Of Kerala

Case No : W.A. No's. 32, 33 and 209 of 1976 and O.P. No's. 1866 and 1908 of 1975

State of Kerala and Others

APPELLANT

Vs

V.M. Koya

RESPONDENT

Date of Decision : 27-10-1978

Acts Referred:

Constitution of India, 1950 — Article 226
Foreign Liquor Rules — Rule 13, 13(3), 14, 18, 35
Kerala Abkari Act, 1077 — Section 15, 17, 18(1), 18(3), 18A

Citation : (1978) 10 KL CK 0024

Hon'ble Judges : Gopalan Nambiyar, C.J; Balagangadharan Nair, J

Bench : Division Bench

Advocate : Government Pleader, for the Appellant; K.V. Kuriakose, for the Respondent

Judgement

1. These appeals and the two writ petitions have been heard together. Two of the appeals - W.A. Nos. 32 and 33 of 1976 - arise out of the common judgment in O.P. Nos. 1676 and 1782 of 1975 and the third - W.A. No. 209 of 1976 - out of a judgment which followed the common judgment. The two writ petitions raise the same question as the appeals. In the three Writ Appeals, the State, the Assistant Commissioner of Excise and the Excise Inspector are the Appellants. We shall refer to the facts in W.A. No. 32 of 1976 with respect to which the arguments were advanced. Sri K.V. Kuriakose, learned Counsel for the Respondent in W.A. No. 33 of 1976 replied on behalf of the Respondents, and the other counsel only associated themselves with the said arguments, and added little to what was stated by Sri Kuriakose. No independent arguments were advanced in the writ petitions, their fate being left to depend on the result of the writ appeals.

2. The question raised in W.A. No. 32 of 1976 is regarding the quantum of licence fee payable for the year 1975-76 (that is, for the period from 1st April 1975 to 31st March 1976) in respect of foreign liquor 3 licence which was applied for by the writ Petitioner for that year. The application was made on 27th March 1975.

At that time the licence fee which was current and in force was Rs. 4,000. By Ext. P-1 letter dated 2nd April 1975 sent by the Excise Inspector, the writ Petitioner was informed, enclosing a copy of the Board of Revenue's order (Ext. P-1), that the differential rental (licence fee) had to be remitted within 24 hours. The enclosed order of the Board of Revenue stated that the rental in respect of foreign liquor 3 licence had been enhanced to Rs. 12,000 per year. The writ Petitioner claims that he was issued permit for the transport of the liquor to his place of business. The relevant Government notification enhancing the licence fee was issued only on 10th April 1975 (Ext. P-2). It was the Petitioner's case that as the application for the licence had been made on 27th March 1975, before the issuance of the notification enhancing the licence fee, he was entitled to the grant of licence at the rate in force on the date of the application, and not at the enhanced rate. He accordingly prayed to declare Section 24 of the Kerala Abkari Act, 1077 M.E. unconstitutional, and to quash Exts. P-1 and P-2. The learned Judge quashed Exts. P-1 and P-2 and directed a renewal of the Petitioner's foreign liquor 3 licence with effect from 1st April 1975. It was ordered that the Government was entitled to get the annual fee as per Ext. R-2 notification dated 10th April 1975 only on and from that date; and that in regard to the renewal of the licence asked for before 1st April 1975 the Government was bound to renew the licence in accordance with the law then existing. The Fixed Deposit handed over to the authorities by the writ Petitioner as per the direction of this Court was directed to be handed back to him.

3. We shall turn to the provisions of the Abkari Act 1 of 1077. Section 15 of the Act enacts that no liquor or intoxicating drug shall be sold without a licence from the Commissioner. Section 17(g) enacts:

17. Duty on liquor or intoxicating drugs. -- A duty of excise or luxury tax or both shall, if the Government so direct, be levied on all liquor and intoxicating drugs

* * *

(g) Sold in any part of the State. (proviso omitted)

Section 18(1) and (3) in so far as they are material are as follows:

18. How duty may be imposed. -- (1) Such duty of excise may be levied.

* * *

(e) in the case of toddy, or spirits manufactured from toddy, in the form of a tax on each tree from which toddy is drawn, to be paid in such instalments and for such period as the Government may direct; or

(f) By import, export or transport duties assessed in such manner as the Government may direct;

(2) * * *

(3) The duty of excise under Sub-section (1) and the luxury tax under Sub-

section (2) shall be levied at such rates as may be fixed by the Government, from time to time, by notification in the Gazette not exceeding the rates specified below:

* * *

Section 24 enacts:

Forms and conditions of licences, etc. -- Every licence or permit granted under this Act shall be granted:

- (a) on payment of such fees, if any;
- (b) for such period;
- (c) subject to such restrictions and on such conditions; and
- (d) shall be in such form and contain such particulars, as the Government may direct either generally, or in any particular instance in this behalf.

And Section 69 provides:

Publication of rules and notifications. -- All rules made and notifications issued under this Act shall be made and issued by publication in the Gazette. All such Rules and notifications shall thereupon have the force of law and read as part of this Act and may in like manner be varied, suspended or annulled.

The Form for foreign liquor 3 licence is fairly detailed and elaborate. Among the Foreign Liquor Rules, reference may be made to Rule 13(3) which provided that the licence in the requisite form may be issued on payment of the annual rental. Rules 14 and 18 provide:

14. If any of the licenses referred to in Rule 13 is granted in the course of a financial year, the full annual fee shall be paid and the licence shall expire at the end of the financial year.

18. Before the issue of each licence detailed above, the fee fixed thereof shall, except in the case of retail (tavern) licences that are sold in auction be paid in full to a Government Treasury and the chalan submitted to the Excise Commissioner along with the application for licence.

From the provisions of the Act and the rules, the following seems to emerge; that the impost is styled by the statute itself as a duty of excise or luxury tax; that it is levied at rates fixed by the Government from time to time by notification in the Gazette; that no liquor is to be sold without a licence; that the rules themselves contemplate the grant of a licence in the course of the financial year (vide Rule 14), in which case, the full licence fee shall be paid and the licence is to expire at the end of the financial year; and that before the issue of the licence, the full licence fee is to be paid (vide Rule 18). From these provisions, we are unable to see any right on the part of the Petitioner to have the licence fee levied and collected only at the rate prevailing on the date of the

application or on the commencement of the financial year for which the application was made. Indeed, the provisions of Rules 14 and 18, which we have extracted seem to militate against any such construction. And neither the provisions of the statute and the rules, nor the nature of the right to obtain a licence justify our applying in this region, the principle applicable elsewhere, that an application made before an amendment of the substantive law is to be dealt with according to the law in force on the date of the application, unless express or implied provision is found to the contrary. The decisions of this Court which have sustained the provisions of the Abkari Act and the validity of the impost levied thereby, have explained the nature of the licence fee levied and collected by the Act. [See *Madhavan v. Assistant Excise Commissioner, Palghat* ILR 1969 Ker. 71 confirmed on appeal in *Damodaran v. State of Kerala* ILR 1969 Ker. 95 . See also *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, where the first noted decision was referred to with approval.] In the light of these decisions, we are unable to sustain the direction given by the learned Judge that the Petitioner is entitled to renewal of the Foreign Liquor 3 Licence for 1975-76 at the rate prevailing on the date of the application, and that the enhanced licence fee will have application only from 10th April 1975. The licence applied for by the writ Petitioner had not been granted. Before that, he had approached this Court with the writ petition. In the circumstances, he was not entitled to the relief granted by the learned Judge.

4. Our attention was called to a number of decisions which have dealt with and explained mostly, the legal nature of the "rental" or fee realised by auction of the liquor shops. We have already referred to the decisions of this Court in regard to the nature of the impost. In *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, a three Judge Bench of the Supreme Court, had occasion to examine the provisions of Section 18-A of the Kerala Abkari Act dealing with the collection of "rental" for auction of liquor shops. The Court there observed:

35. Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible in 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. The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. That is the view of this Court in *Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others*, and *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, . The nature of the trade is such that the State confers the right to vend liquor by farming out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.

In *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, a Five Judge Bench of the Court again considered the question whether there was any fundamental right to do trade or business in intoxicants and also the nature of the fee demanded from vendors of foreign liquor holding licences in L-3, L-4 and L-5 forms under the Punjab Excise Act. The learned Judges upheld the preliminary objection that the matter related purely to the enforcement of contractual rights and obligations for which Article 226 was not the appropriate remedy; but in view of the importance of the issues raised, dealt with the matter on the merits. Paragraph 25 of the judgment notices the argument that there is no quid pro quo for the levy of the licence fee, and that the fees are in the nature of a tax. Dealing with these contentions, the Supreme Court noticed the statutory provisions of the Act. Section 27 empowered the Government to "lease" on such terms and conditions and for such period as it may deem fit, the right of manufacturing, supplying or selling country liquor or intoxicating drug. The licence is to follow such lease. u/s 59, rules have to prescribe the scale of case payable in respect of any licence. Rule 36 prescribed the procedure for the grant of licence by auction. There seems to have been no provision like Section 17(g) or 18(3) of our Act. After analysing the various decisions, it was observed by the Supreme Court:

63. As the amount payable by the licensees on the basis of the bids offered by them in auctions and on the basis of "Fixed and Assessed Fees" is neither a fee in the technical sense nor a tax but is in the nature of the price of a privilege, there is no question of the Financial Commissioner lacking power to organize auctions so as to authorize the recovery of any amount which is not a fee properly so-called. The Financial Commissioner, u/s 34 of the Act read with Rule (sic) (Section) 59(d), has the power to direct that licences may be granted on payment of such fees, that is, such consideration as he may by rules prescribe. It is open to him to frame a rule, as he has in fact framed Rule 35, directing that any class of licences may be granted on payment of fees fixed by auction. Once it is appreciated that auctions are only a mode or medium for ascertaining the best price obtainable for the grant of privilege to sell liquor, there would be no "contradiction in terms" in directing, as Rule 35 does, that a class of "licences may be granted on the fee fixed by auction".

The decision was concerned with the "rental" realised by auction of the liquor shop and not with the nature and quality of the levy of licence fee. Nor was there any statutory provision like Sections 17(g) or 18(3) of the Kerala Act.

5. In *Panna Lal v. State of Rajasthan* AIR 1975 S.C. 2008 a three Judge Bench of the Supreme Court again considered the position with respect to the provisions of the Rajasthan Excise Act. Section 28 of that Act provides that an excise duty or a countervailing duty may be levied at such rates as the State Government may direct on any excisable article imported, exported, transported, etc. u/s 29 the duty may be levied in one or more of such ways as the State Government may by notification direct. In paragraph 22, the Supreme Court approved the

decision of this Court in *Madhavan v. Assistant Excise Commissioner, Palghat* ILR 1969 Ker 71 where it was stated that the rental charged by the State for the licences is the consideration for the privilege of vending liquor. In paragraphs 26 and 27 the Supreme Court observed:

26. The decisions of this Court establish that the lump sum amount voluntarily agreed to by the Appellants to pay to the State are not levies of excise duty but are in the nature of lease money or rental or lump sum amount for the exclusive privilege of retail sales granted by the States to the Appellants.

27. There is no levy of excise duty in enforcing the payment of the guaranteed sum or the stipulated lump sum mentioned in the licences, for these reasons. First, the licences were granted to the Appellants after offer and acceptance or by accepting their tenders or auction bid. The Appellants stipulated to pay lump sum amounts as the price for the exclusive privilege of vending country liquor. The Appellants agreed to pay what they considered to be equivalent to the value of the right. Second, the stipulated payment has no relation to the production or manufacture of country liquor except that it enables the licensee to sell it. The country liquor is produced by the distilleries. u/s 28 of the Act and under the relevant duty notifications the excise levy is on the manufacture and not on the sale or retail of liquor. Under the duty notifications no excise duty is levied or collected from the liquor contractors who are liable only to pay the price of liquor. The taxable event is not the sale of liquor to the contractors but the manufacture of liquor. What the liquor contractors pay in consideration of the licence is a payment for the exclusive privilege for selling country liquor. The liability for excise is on the distillery and the liquor contractors are not concerned with it. Before 1965 there was no excise duty. The Appellants were required to pay the guaranteed amount. After the imposition of excise duty the position is not altered because the privilege of selling is granted by auction or by offer and acceptance before the goods came into existence. Excise contracts are settled in the preceding year. Third, the stipulated amounts payable by the Appellants have relation only to what the Appellants foresaw they could recoup by the sale of country liquor from the liquor shops licensed to them. There are several varieties of country liquor and rates of excise levy on these varieties are different. The Appellants are not bound to take any particular quantity or any particular quality of any variety. Without reference to any quantity or quality, it is impossible to predicate the alleged levy of excise duty.

6. If the duty is to be viewed as a statutory impost as a luxury tax, u/s 17(g) read with Section 18(3) of the Act, we are of the opinion, that it is payable on the issue of the licence. The historical background supports this conclusion. The rules themselves envisage that the licence can be granted in the course of the financial year, in which event the entire licence fee is payable by the licensee, although the licence will ensure only from the date of the grant to the expiry of the financial year. In these circumstances, we are unable to accept the view of the learned Judge that the enhancement of the rate of licence fee on 10th April

1975 cannot take effect on the pending application for the licence for the same year, made by the writ Petitioner in this case.

7. Even viewed, as explained by the decisions of the Supreme Court, (in regard particularly to "rental" in respect of auction or lease of the right to trade in liquor, or to carry on liquor shops), as neither a tax nor a fee, but merely as consideration for the grant of the privilege of vending liquor, we think that the matter would be purely contractual, for which, as pointed out in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, the remedy under Article 226 is hardly appropriate. Even if it were to be deemed appropriate, on the facts and circumstances, as the licences have not so far been issued to the writ Petitioner, we are unable to agree that the enhanced rate of licence fee which came into force on 10th April 1975 cannot take effect for the financial year 1975-76 for which the application for the licence was made on 27th March 1975. Either way, we are of the opinion, that the judgment of the learned Judge must be set aside and this appeal allowed. We do so, and direct that O.P. No. 1676 of 1975 will stand dismissed. There will be no order as to costs.

W.A. No. 33 of 1976

Following our judgment in W.A. No. 32 of 1976, we allow this appeal and set aside the judgment of the learned Judge and direct that O.P. No. 1782 of 1975 will stand dismissed with no order as to costs.

W.A. No. 209 of 1976

In view of our judgment in W.A. No. 32 of 1976, this appeal is allowed and the judgment of the learned Judge, set aside; and O.P. No. 1918 of 1975 will stand dismissed with no order as to costs.

O.P. Nos. 1866 and 1908 of 1975

Following our judgment in W.A. No. 32 of 1976, these Original Petitions are dismissed with no order as to costs.