
(1978) 10 AHC CK 0038

In the Allahabad High Court

Case No : Special Appeal No's. 351 to 353, 355 to 359 of 1975 and 312 of 1978

State of U.P.

APPELLANT

Vs

Agarwal Spirit Supply Co.

RESPONDENT

Date of Decision : 06-10-1978

Acts Referred:

Uttar Pradesh Excise (Amendment) (Reenactment and Validation) Act, 1976 — Section 2

Uttar Pradesh Excise Act, 1910 — Section 24B, 30(1), 40(2), 41

Uttar Pradesh Excise Rules, 1951 — Rule 680(1), 680(2)

Citation : AIR 1978 All 529

Hon'ble Judges : Satish Chandra, C.J.;Yashoda Nandan, J

Bench : Division Bench

Advocate : S.K. Suri, for the Respondent

Final Decision : Allowed

Judgement

Satish Chandra, C.J.—This group of special appeals is directed against the judgment of a learned single Judge quashing the Excise Commissioner's order dated 18th September, 1974, whereunder he had indicated that vend fee will continue to be charged from wholesale licence-holders of denatured spirit, and further directing the Excise Commissioner to refund the vend fee actually paid by the petitioner-respondents for a period of three years prior to the institution of the writ petition.

2. The petitioner-respondent holds a licence in Form FL-16 for the wholesale vend of denatured spirit. It questioned the validity of the levy of vend fee on denatured spirit. According to the petitioner-respondent, the State was rendering no service to the trade of denatured spirit. The vend fee hence could not be levied as a fee. In its true nature and character it was an excise duty or tax. The State Legislature had no competence to authorise the levy of excise duty or tax on denatured spirit, because levy of such duty or tax on denatured spirit was exclusively in the domain of Parliament.

3. The appellate State has pleaded that the levy of vend was not a tax or a duty. It was consideration for parting with the exclusive privilege of the State to trade in intoxicating liquors, including denatured spirit. In law the State had exclusive privilege to deal in such articles, and it could validly part with the privilege for consideration. The levy of licence fee and the vend fee constituted consideration for permitting the petitioner-respondent to carry on trade in the wholesale vend of denatured spirit. It was also suggested that the vend fee was a fee properly so-called.

4. In 1972 the State Legislature enacted the U. P. Excise (Amendment) Act, 30 of 1972. By this Act the State Legislature authorised the Government to sell by auction the right of retail and wholesale vend of foreign liquor (which includes Denatured Spirit).

5. The validity of the 1972 Act was challenged in *Sheo Pat Rai v. State of U. P.*, 1972 All LJ 1000. In that case this Court held that the levy of fee on retail vend of foreign liquor by auction was a levy in the nature of tax. It was not a fee. The State Legislature had no competence to impose tax on foreign liquor. It was also held that the State did not have the exclusive privilege or monopoly to trade in intoxicants. The State could only place reasonable restrictions on the inherent right of every citizen to carry on trade in intoxicants.

6. Subsequently in *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, the Supreme Court considered this aspect. It had occasion to consider the same matter again in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . In these cases the Supreme Court repelled the submission that a citizen had a fundamental right to trade in intoxicating liquors. After considering and interpreting its own earlier decisions, it ruled that the State under its regulatory powers has power to prohibit every form of activity in relation to intoxicants -- its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State. The State could auction the right to vend by retail or wholesale foreign liquor by appropriate legislation under Entry No. 8 of List II of the Seventh Schedule of the Constitution.

7. Relying on the Supreme Court decision in *Nashirwar's* case, the State Legislature repealed and re-enacted the U. P. Excise (Amendment) Act, No. 30 of 1972. By the U. P. Excise (Amendment) (Re-enactment and Validation) Act, 1976, Sections 24-A and 24-B were added to the U. P. Excise Act u/s 24-B it was provided that--

"For the removal of doubts, it is hereby declared:

(a) that the State Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor;

(b) that the amount described as licence fee in Clause (c) of Section 41 is in its essence the rental or consideration for the grant of such right or privilege by the

State Government.

8. Section 24-A provided that subject to the provisions of Section 31, the Excise Commissioner may grant to any person a licence or licences for the exclusive or other privilege of manufacturing or of supplying by wholesale and selling by retail any foreign liquor in any locality.

9. The validity of the Amendment Act of 1976 was again challenged in this Court in *V. P. Anand and Sons v. State of U. P.*, 1976 All LJ 436 . A Full Bench of this Court held that as a result of the Supreme Court decision in *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, and *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, the position was that a citizen has no fundamental right to trade in intoxicants, but that the State has the exclusive privilege to do so. It can part with that privilege by auctioning the right of wholesale or retail vend. The 1976 amendment Act was upheld as valid.

10. These decisions, therefore, settle the legal position that a citizen does not have a fundamental right of trade in intoxicants, and further that the State has the exclusive privilege or monopoly in that respect.

11. The principal point which requires consideration is whether the imposition of the vend fee is part of the consideration for the wholesale vend of denatured spirit.

12. Before we address ourselves to this aspect we must clear the table of another point.

13. For the respondent it was urged that the Validation Act of 1976 was not retrospective in operation and hence did not validate the levy of vend fee at the rate of Re 1/10 P. per bulk litre imposed with effect from 3rd November, 1972.

14. The U. P. Excise (Amendment) (Re-enactment and Validation) Act No. 5 of 1976, was stated to be an Act to re-enact and validate the U. P. Excise (Amendment) Act, 1972. By Section 2 it provided--

"2. The Uttar Pradesh Excise (Amendment) Act, 1972, is hereby, with effect from August 10, 1972, repealed and re-enacted with the following modifications:

(1) Section 1 shall be renumbered as Sub-section (1) thereof, and after Sub-section (1) as so re-numbered the following sub-section shall be inserted:

(2) It shall be deemed to have been in force ever since the commencement of the United Provinces Excise Act, 1910, and accordingly all references to the State Government in the amendments made in that Act by this Act shall, in relation to the period before January 26, 1950, be construed as references to the Provincial Government.

(ii) for Section 3, the following section shall be substituted:

(3) After Section 24 of the principal Act, the following sections shall be inserted, namely :

24-A

24-B

(iii) after Section 3, the following section shall be inserted :

3-A. For Section 30 of the principal Act. the following section shall be substituted and be deemed always to have been substituted, namely:

30

(iv) after Section 4, the following section shall be inserted :

4-A

(This provided for amendment of Section 41)

3. In Section 40 of the principal Act:

4. Notwithstanding any judgment, decree or order of any Court to the contrary, anything done or purporting to be done and any action taken or purporting to have been taken under any provision of the Uttar Pradesh Excise (Amendment) Act, 1972, before the commencement of this Act, shall be deemed to be and always to have been as valid as if the provisions of this Act were in force at all material times.

5."

15. The 1976 Act expressly repeals and re-enacts the 1972 Amendment Act, It specifically provides that the 1972 Act as repealed and re-enacted shall be deemed to have been in force ever since the commencement of the U. P. Excise Act, 1910. Thus the re-enactment of the Amendment Act of 1972 was made retrospective ever since 1"910, when the U. P. Excise Act, 1910, originally came into force. All the amendments as well as the enactments, for instance, enactment of Sections 24-A and 24-B and the amendments made in Sections 30, 40 and 41 will be deemed to have been made with effect from 1910.

16. Learned counsel for the petitioner-respondent pointedly invited our attention to the substitution of Section 30 of the principal Act by Section 2 (iii) of the Amendment Act. There it has been stated--

"(iii) after Section 3, the following section shall be inserted :

"3-A. For Section 30 of the Principal Act, the following section shall be substituted and be deemed always to have been substituted namely :"

17. The mention of the phrase "and be deemed always to have been substituted" is obviously by way of abundant caution. This cannot take away the effect of express provision in Sub-section (2) of Section 2 of the Act that the Amending Act of 1972 shall be deemed to have been in force ever since the commencement of the U. P, Excise Act, 1910.

18. There is no doubt in our minds that the provisions of the 1976 Amendment Act are retrospective in operation since 1910.

19. In this view the submission on behalf of the petitioner-respondent that the State cannot create monopoly in any trade by means of rules does not arise. By the enactment of Section 24-B the State has by Legislation, created and recognised the monopoly of the State to deal in intoxicants.

20. It was contended that the levy of vend fee was, in its true nature and character, the imposition of an excise duty or tax. The State Legislature had no competence to impose it on denatured spirit, which was intoxicating liquor unfit for human consumption.

21. There is no dispute that denatured spirit is liquor unfit for human consumption and hence, the power to levy a tax or excise duty on it vests in Parliament. The appellant State, however, urges that it has not imposed excise duty or tax. It has levied a charge as a consideration for parting with the exclusive privilege to trade in denatured spirit by way of wholesale trade. This right to sell its privilege is within the regulatory power under Entry 8 of List II of the Seventh Schedule, and the same has been recognised by the Supreme Court in the aforesaid decisions.

22. We deem it unnecessary to go into the question whether in essence or substance the levy of vend fee is an excise duty or a tax. If it is found that the vend fee is really charged as consideration for parting with the exclusive privilege vesting in the State, it will be valid on that ground.

23. It is well settled that the exercise of power would be referable to a jurisdiction which conferred validity upon it and not to a jurisdiction under which it would be nugatory, see *L. Hazari Mal Kuthiala Vs. The Income Tax Officer, Special Circle, Ambala Cantt.*, ; *Afzal Ullah Vs. The State of Uttar Pradesh*, and *N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.*, .

24. We now come to the crux of the problem whether vend fee on denatured spirit is being charged as consideration for grant to the licence-holder of the right of wholesale vend. Section 24-B States :--

"24-B. For the removal of doubts it is hereby declared :

(a) that the State Government has an exclusive right or privilege of manufacture and sale of country liquor and foreign liquor:

(b) that the amount described as licence fee in Clause (c) of Section 41" is in its essence the rental or consideration for the grant of such right or privilege by the State Government.

(c) that the Excise Commissioner as head of the Excise Department of the State shall be deemed while determining or realising such fee, to act for and on behalf of the State Government."

25. Clause (c) of Section 41 as substituted by this Act provides--

"(c) prescribing the scale of fees or manner of fixing the fees payable for any licence, permit or pass including any consideration for the grant of any exclusive or other privilege granted u/s 24 or Section 24-A or for storing of any intoxicant."

26. It is thus evident that the amount described as licence fee in Section 41 (c) is the rental or consideration for the grant of the privilege of wholesale vend by the State Government.

27. The amount described as licence fee in Clause (c) of Section 41 is the prescribed scale of fees or manner of fixing the fee payable for any licence including any consideration for the grant of any exclusive or other privilege. In order to be the rental or consideration within meaning of Clause (b) of Section 24-B, the prescribed scale of fee or the prescribed manner of fixing the fee and prescribing the consideration for the grant of the exclusive privilege all together constitute the consideration for the grant of such privilege.

28. Section 30 (1) as substituted by the Validation Act of 1976 authorises the State Government to accept payment of a sum in consideration of the grant of licence for any exclusive or other privilege u/s 24 or Section 24-A. Under this provision the State Government was entitled to issue notifications fixing a fee, either be it fixed or assessed for the grant of such a licence.

29. Rule 680 of the Rules prescribed the fees and also fixes the fee payable for a licence in form F. L. 16. It says--

"680 (1). The Collector may grant to a distiller who denatures spirit and to approved dealers of denatured spirit a licence in form F. L. 16 for the wholesale vend of denatured spirit. The licence shall also cover the right to bottle denatured spirit. The scale of fee for such licence shall be as follows:

Rs.

(a) for sales not exceeding 10,000 litres per annum 1,000 per annum

(b) For sales exceeding 10,000 litre per annum The fee shall be increased by Rupees 500 for every 5000 litres or fraction thereof.

.....

(2) In case of issues from a distillery a vend fee of rupee one and ten paise per bulk litre will be payable in advance before the spirit is issued. The fee will not be charged on denatured spirit in case of

(i) issue to hospitals, dispensaries, (etc.)

.....

(ii) issues for export out of the State

.....

30. Sub-rule (1) prescribes what is commonly called the fixed fee, while Sub-rule (2) prescribes the assessed fee. Both are charged for the grant of licence for either distilling or wholesale vend of denatured spirit. The fee mentioned in Clause (a) or Clause (b) of Sub-rule (1) is payable at the time of the issue of the licence, while the fee prescribed by Sub-rule (2) is payable at the time of the actual issue of denatured spirit. The assessed fee mentioned in sub-rule (2) is not payable in cases of issues to hospitals etc. or for export as mentioned in the sub-clauses.

31. In our view both the charges mentioned in sub-rule (1) or sub-rule (2) constitute the fee payable for the licence. Sub-rule (1) prescribes the scale of fees, while Sub-rule (2) provides another manner of fee so payable. Both kinds of fees are payable as a condition to the grant of the licence i. e. for parting with the right of wholesale vend. It is not correct to say that the scale of fee prescribed in sub-rule (1) alone constitutes the licence fee. It may be recalled that the rental or consideration spoken of in Clause (b) of Section 24-B is the amount described as licence fee u/s 41, Clause (c). It would include more than one amount if they are so prescribed. As already observed, Rule 680 prescribes the scale of fee as also prescribes the manner of fixing the fee at the time of issue. Both the charges are within the provisions of Clause (c) of Section 41 and so are covered by Clause (b) of Section 24-B. The label of vend fee attached by sub-rule (2) is neither material nor decisive to judge its true nature and character. Since the fee charged under sub-rule (2) is at the time of issue of denatured spirit from a distillery, that is to say it is payable at the time of sale by the distillery, it has been called a vend fee. It is an integral part of the scheme of the rental or consideration for the grant of the privilege. The levy of vend fee under sub-rule (2) of Rule 680 is hence within the competence of the State Government.

32. Our attention was invited to the fact that the levy of vend fee was introduced for the first time by a notification dated 18th January, 1937, and it was fixed at eight annas per bulk gallon. At that time the licence fee was one rupee only. The vend fee was increased to twelve annas per bulk gallon by a notification of 19th April, 1940. It was further increased to Rs. 2/- per bulk gallon under a notification issued on 27th Dec., 1961. Then on 1st Dec., 1962, the State Government issued another notification increasing the vend fee to sixty six naya paisa per bulk litre. Ultimately on 1st Oct., 1965, the State Government issued another notification increasing the vend fee to Re. 1/10 p. per bulk litre. Similarly, the licence fee, which was originally Re. 1/- has been, over the years, increased gradually. Now it is a minimum of Rs. 1,000/- per year.

Since the enactments made by the 1976 Validation Act are retrospective from 1910 the State Government had the power to sell its exclusive privilege to vend denatured spirit by charging consideration. It is no wonder that over the decades the consideration has increased like increase in the prices of virtually all commodities. The levy does not become invalid merely because the consideration

has been enhanced.

33. Learned counsel for the petitioner respondent further submitted that Clause (c) of Section 41 authorises the Excise Commissioner to make rules for prescribing the scale of fee or manner of fixing the fee payable for any licence. In the present case the State Government has been issuing notifications increasing the vend fee from time to time. Those notifications are hence without power and invalid.

34. It is true that Section 41 authorises the Excise Commissioner, subject to the previous sanction of the State Government to make rules prescribing the scale of fee for any licence.

35. u/s 40 the State Government has been conferred the power to make rules for the purpose of carrying out the provisions of this Act. Clause (d) of Sub-section (2) confers specific power to make rules regulating the import, export, transport or possession of any intoxicant. Under Clause (g) the State Government can make rules for the prohibition of the sale of any intoxicant to any person or class of persons.

36. In the first place, the Excise Commissioner cannot act on his own. He can frame rules u/s 41, subject to the previous sanction of the State Government. It is the State Government which, has to determine the quantum of the fee for a licence and then sanction it. The ultimate decision in this respect vests in the State Government.

37. In the next place, Clauses (d) and (g) of Section 40 (2) are according to the Supreme Court, wide enough to confer power for making rules in respect of prescribing the rental or consideration for the grant of such right or privilege by the State Government. In *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, and *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, it was held that the State could auction the right to vend by retail or wholesale foreign liquor by appropriate legislation under Entry 8 of List II. Entry 8 of List II of the Seventh Schedule of the Constitution empowers the State Government to legislate with regard to intoxicating liquor, that is to say, production, manufacture, possession etc. of intoxicating liquor. On the same reasoning the power to fix the consideration for parting with the exclusive privilege of the State will be covered by Clause (d) of Section 40 which entitles the State Government to make rules for regulating import, export, transport or possession of any intoxicant.

38. The notifications issued by the State Government are hence not liable to be quashed on any of the grounds taken by the petitioner-respondent.

39. The Excise Commissioner by his order of September, 1974, only clarified to his subordinate officials that the wholesale dealers, having a licence in F. L. 16, were liable to pay vend fee. He did not commit any illegality in issuing the circular letter. In *Sheo Pat Rai's case* 1972 All LJ 1000 this Court held that since

the State has no exclusive privilege to vend denatured spirit, the levy of vend fee was an excise duty or tax. This decision has been held by the Full Bench in V. P. Anand 1976 All LJ 436 to have been overruled by the Supreme Court in Nashirwar and Others Vs. State of Madhya Pradesh and Others, and Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . It is hence no longer an impediment before us.

40. In the result the appeal succeeds and is allowed. The judgment of the learned single Judge is set aside and the writ petition is dismissed with costs.