(1976) 03 AHC CK 0035

In the Allahabad High Court

Case No : Special Appeal No. 173 of 1975 and Civil Miscellaneous Writ Petition No''s. 4075 etc. of 1975

State of Uttar Pradesh and Others — APPELLANT

Vs

K.P. Sui and Another — RESPONDENT

Date of Decision : 22-03-1976

Acts Referred:
Constitution of India, 1950 — Article 226
Uttar Pradesh Excise (Amendment) Rules, 1970 — Rule 13, 13B
Uttar Pradesh Excise Act, 1910 — Section 31, 41

Citation : AIR 1977 All 279

Hon'ble Judges : G.C. Mathur, J

Bench : Single Bench

Advocate : V.P. Mishra, for the Respondent

Final Decision : Disposed Of

Judgement

G.C. Mathur, J.—(On difference of opinion between the Judges constituting the Division Bench before the Special Appeal came for hearing):

Consequent upon a difference of opinion between the learned Judges constituting the Bench hearing the Special Appeal and the writ petitions the following three questions have been referred to me for opinion:--

1. What is the true interpretation and scope of Section 41 (e) (v) of the U. P. Excise Act?

2. Whether the Excise Commissioner can make Rule 13-B in exercise of his powers under the U. P. Excise Act?

3. Whether the closure of the licensed premises on Tuesdays as a condition in the licence of the petitioner became a binding term of the contract and the licensee could not be allowed to avoid it through a petition under Article 226 of the Constitution?

2. The U. P. Excise Act, 1910, makes provisions relating to the import, export, transport, manufacture, sale and possession of intoxicating liquors and intoxicating drugs. Section 3 of the Act defines in Sub-section (11) and (12) "liquor" and intoxicating drugs. Sub-section (13) defines "intoxicant" to mean any liquor or intoxicating drug as defined in the Act. Section 21 provides that no intoxicants shall be sold without a licence from the Collector. Section 31 deals with the form and condition of licences. Section 40 confers powers on the State Government to make rules for the purpose of carrying out the provisions of the Act or other law for the time being in force relating to excise revenue. Section 41 empowers the Excise Commissioner to make rules with the previous sanction of the State Government. The relevant part of this Section reads as follows:

"41. The Excise Commissioner, subject to the previous sanction of the State Government may make rules-

(a) Regulating the manufacture, supply, storage or sale of intoxicants including-

(e) Prescribing the restrictions under and the conditions on which any licence, permit

Or pass may be granted, including provision for the following matters:

(i) ....

(v) the fixing of the days and hours during which any licensed premises may or may not be kept open and the closure of such premises on special occasions.

(vi) ....

3. Under the Act as it stood before its amendment in 1923, the power to make rules u/s 41 was conferred on the Chief Revenue Authority. Under this power the Board of Revenue framed the U. P. Excise Rules, 1910. By a notification dated January 2, 1971, the Excise Commissioner in exercise of the power u/s 41 (e) (v) of the Act made the U. P. Excise (Amendment) Rules. 1970. These Amendment Rules introduced the following Rules 13-A and 13-B:--

"13-A. Every shop licensed for the sale of-

1. Country spirit

2. Tari.

3. Foreign liquor for consumption ''on'' and ''off'' the premises.

shall be kept closed on the day following the burning of Holi and on the principal Diwali day.

Exception-- This condition does not apply to railway refreshment rooms, dining cars and such hotels and restaurants which are licensed for the sale of foreign liquor to foreign tourists.

"13-B. All excise shops including foreign liquor, country spirit, hemp drugs, opium, tari and out still shops shall remain closed on Independence day (August 15), Mahatma Gandhi Birthday (Oct. 2) and on the day of Mahatma Gandhi''s tragic death (Jan. 30) every year and also on all Tuesdays:

Provided that the Excise Commissioner may in consultation with the Collector of the District concerned waive the condition of keeping on excise shop closed on Tuesday for such specified period as he may think fit, in the case of hotels possessing a licence in Form F. L. 6 for the sale of foreign liquor for the benefit of such foreign tourists as may hold a valid permit under the All India Liquor permit Scheme of the Government of India."

As a consequence of the making of Rule 13-B a condition was added in licences for the retail sale of liquor providing that all licensed shops shall remain closed on the following days every year:--

(i) Independence day (August 15),

(ii) Mahatma Gandhi''s birthday (October 2),

(iii) Mahatma Gandhi''s death day January 30),

(iv) On each Tuesday.

All licences hereafter for the retail sale of liquor were granted subject to this condition.

4. A large number of writ petitions were filed in this Court challenging the validity of Rule 13-B in respect of closing of the excise shops on all Tuesdays. A learned Single Judge allowed Writ Petition No. 441 of 1975 and Special Appeal No. 173 of 1975 was filed by the State Government against that judgment. This Special Appeal together with the writ petitions came up for hearing before a Division Bench. One of the learned Judges was for dismissing the Special Appeal and allowing the writ petitions, while the other was for allowing the appeal and dismissing the writ petitions. Hence this reference.

5. The first question referred relates to the true interpretation and scope of Section 41 (e) (v) of the Act. The real question is whether this provision permits the Excise Commissioner to make a rule for the closure of licensed premises on every Tuesday. Sub-clause (v) of Clause (e) of Section 41 is in two parts: The first part empowers the Excise Commissioner to make rules, fixing the days and hours during which any licensed premises may or may not be kept open. The second part empowers him to make rules for the closure of licensed premises on special occasions. It was contended by learned counsel for the licensees that the two parts provided for different contingencies and, closure being specifically provided for in the second part, no rule for closure can be made under the first part. It was urged that the words ''may not be kept open'' do not mean ''closure''. There is really no difference between closure and not keeping open. Whether the rule directs a licensed premises to be closed or whether it directs the licensed premises not to be kept open during a particular period or on a

particular day means the same thing. It is, therefore, not correct to say that, under the first part, no rule can be made for the closing of licensed shops.

6. Admittedly, every Tuesday is not a special occasion and a rule for the closure of licensed premises on every Tuesday cannot be made under the second part of Sub-clause (v). The question is whether such a rule can be made under the first part of Sub-clause (v). This part empowers the making of a rule, "fixing days and hours'''' during which a licensed premises may or may not be kept open, The normal meaning of the expression ''fixing days and hours'' is fixing days as well as hours. That is the normal result of using the word ''and'' between days and hours. Read thus, the first part empowers the making of rules fixing the days as well as the hours during which licensed premises may or may not be kept open. But it is contended for the licensees that the words fixing days and hours'' really mean ''fixing hours of the day''. There is no warrant for changing the language of the sub-clause in this manner. If the Legislature intended to empower the Excise Commissioner only to fix the hours of the day during which the licensed premises may or may not be kept open, it could have used the language suggested by the licensees. If this were the intention, the word ''days and'' in Sub-clause (v) were unnecessary and the words "fixing hours during which licensed premises may or may not be kept open'' would have been sufficient to achieve the object. The language of the first part of Sub-clause (v) is unambiguous and clearly empowers the Excise Commissioner to make rules, fixing the days as well as the hours during which the licensed premises may be kept open or kept closed.

7. Learned counsel also relied on the observations of the Supreme Court in Sambhu Nath Sarkar Vs. The State of West Bengal and Others, where it has been said that the word ''and'' in Clause 7 (a) of Article 22 of the Constitution has been used in the conjunctive sense. Clause 7 (a) provides:

"(7) Parliament may by law prescribe--(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of Sub-clause (a) of Clause (4)." The observations of the Supreme Court relied on read thus:

"In this view, the meaning of the word ''and'' in that clause must be held to have its ordinary conjunctive sense, the context in that clause also requiring not the opposite but its commonly understood sense, requiring Parliament to prescribe both the circumstances and the classes of cases in which only consideration by the Board can be dispensed with."

If these observations are applied to the interpretation of Sub-clause (v) of Clause (e), the Excise Commissioner must make rules both with respect to the days as well as the hours during which licensed premises may be kept or not kept open. The observations of the Supreme Court do not support the contention of the licensees.

8. It was next contended that the closing of the licensed premises on every Tuesday will curtail the period of the licence and the power to do so is vested in the State Government and not in the Excise Commissioner. If the closing of licensed premises on Tuesdays will curtail the period of the licence, so will the closure on special occasions do. But it is not urged that the Excise Commissioner cannot make a rule regarding closure on special occasions. The closing of licensed premises on Tuesday does not really curtail the period of the licence. The licence remains effective for the entire period for which it was granted. The closure of licensed premises on any particular day or on any particular occasion does not, in any way, shorten the period of the licence.

9. It was then urged that, if the licensed premises can be closed on any day by a rule under the first part of Sub-clause (v), the second part of this sub-clause would become redundant. The contention is that the Excise Commissioner would be enabled to make a rule for closure of licensed premises also on days on which special occasions fell. This is not quite correct. The first part talks of days, that is to say, days of the weak or the month or the year and the second part talks of special occasions, such as Holi, Diwali, Muharram, festivals, melas, elections etc. Under the second part, Rule 13-A has been made, providing for closure on the days following the burning of Holi and on the principal Diwali day. Since the special occasions do not fall on the same day in every year, a power has been conferred to make rules for the closure by reference to special occasions. The second part of Sub-clause (v) thus cannot be said to be redundant.

10. On a true interpretation of Section 41 (e) (v) of the U. P. Excise Act, I am of opinion that it empowers the Excise Commissioner to make a rule, fixing the days as well as the hours during which licensed premises may be kept open or kept closed and that Rule 13-B could validly be made under this provision.

11. The next question referred is whether the Excise Commissioner could make Rule 13-B in exercise of his powers other than those conferred by Sub-clause (v) of Clause (e) of Section 41. This question arises on the assumption that the Excise Commissioner could not make Rule 13-B under Sub-clause (v). The learned Standing Counsel urged that, in that event, Rule 13-B is justifiable under three provisions, that is to say, under the main part of Clause (e) of Section 41, under the main part of Clause (a) of Section 41 and u/s 31.

12. The main part of Clause (e) empowers the Excise Commissioner to make rules, prescribing the restrictions under and the conditions on which any licence, permit or pass may be granted. The later part of this clause provides that this power shall include the power to make provisions for the matters enumerated in Sub-clauses (i) to (viii). Prescribing the restrictions under and the conditions on which the licence may be granted clearly embraces the fixing of the days on which the premises, for which the licence is granted, may be kept open or kept closed. The argument of the licensees is that the use of the word ''including'' in clause (e) shows that the matters enumerated in Sub-clauses (i) to (viii) are outside the main provision of Clause (e). The argument is based on the following

observations of the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, :--

"The word ''includes'' is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute."

Where a definition given in a statute is an inclusive definition, it has been held that the matters included are normally not within the scope of the word defined but are added to it by the inclusion. But Clause (e) of Section 41 is not a definition clause and it is very doubtful whether this rule of interpretation can be applied to it. The argument of the licensees is self-defeating. The argument is that what is included in Sub-clauses (i) to (viii) is necessarily outside the main part of Clause (e). The licensees'' case is that the power to make rules fixing days on which the licensed premises may be closed, is not included in Sub-clause (v). It is also not included in the other Sub-clauses of Clause (e). It could be held to be excluded from the main part of Clause (e) only if it was included in Sub-clause (v) or in any of the other sub-clauses. What is not included in Sub-clauses (i) to (viii) is not excluded from the main provision of Clause (e) if otherwise, on the language, it is included therein. Since the language of the main part of Clause (e) is wide enough to include the power to make rules fixing days on which the licensed premises may he kept closed and since such a power, according to the licensees themselves, is not contained in Sub-clause (v) or in any of the other sub-clauses, it is not excluded from the main provision. The result is that if Rule 13-B cannot be justified under Sub-clause (v), it can certainly be justified under the main part of Clause (e).

13. The main part of Clause (a) of Section 41, which has been quoted above, empowers the Excise Commissioner to make rules regulating the manufacture, supply, storage or sale of any intoxicant. Clause (a) is not concerned with the conditions of licences which subject is specifically covered by Clause (2). Rule 13-B is concerned with the opening and closing of licensed premises and not with regulating sales of liquor. This subject is dealt with in Clause (e) (v). Of course, the closing and opening of licensed premises will affect sales also but the rule is not one for regulating sales but is essentially one for closure of licensed premises on certain days. This rule cannot be justified u/s 41 (a).

14. The learned Standing Counsel also sought to justify Rule 13-B u/s 31. This section reads as follows:--

"31. Form and conditions of licences, etc.--. Every licence, permit or pass granted under this Act shall be granted-

(a) on payment of such fees (if any),

(b) subject to such restrictions and on such conditions,

(c) shall be in such form and contain such particulars, as the Excise Commissioner may direct either generally or in any particular instance in this behalf, and

(d) shall be granted for such period as the State Government may, in like manner, direct."

The section is somewhat clumsily drafted. Though the words ''as the Excise Commissioner may direct either generally or in any particular instance in this behalf have been put at the end of Clause (c), they obviously govern all the three Clauses (a), (b) and (c). Clauses (a), (b) and (c) of Section 31 do not confer any power on the Excise Commissioner either to prescribe the amount of the licence fee or the terms and conditions of the licence or the form of the licence or the particulars which should be contained therein. Likewise, Clause (d) does not confer any power on the State Government to prescribe the period of the licence. Section 31 only provides that a licence shall be granted on payment of fees prescribed by the Excise Commissioner that it shall be subject to the terms and conditions prescribed by the Excise Commissioner, that it shall be in such form and contain such particulars as may be prescribed by the Excise Commissioner and that it shall be for such period as may be prescribed by the State Government. The Excise Commissioner can prescribe these things only by making rules u/s 41 and the State Government can prescribe the period of the licence only by making rules u/s 40 (2) (e). The Excise Commissioner can prescribe the licence fee by making a rule under Clause (c) of Section 41 and can prescribe the terms and conditions as well as the form of the licence by making a rule under Clause (e) of Section 41. Section 31 confers no power on the Excise Commissioner to give a direction that a licence shall be granted subject to the condition that the licensed premises shall remain closed on all Tuesdays. Until a valid rule is made to that effect u/s 40 by the State Government or u/s 41 by the Excise Commissioner, no such condition can be imposed u/s 31. Rule 13-B, therefore, cannot be justified u/s 31.

15. In my opinion, Rule 13-B can be justified under the main part of Clause (e) of Section 41 but not under Clause (a) of Section 41 or u/s 31.

16. So far as the third question is concerned, in view of my opinion on the first two questions, it does not really arise for consideration. It arises only on the assumption that Rule 13-B is ultra vires the powers of the Excise Commissioner. If the rule regarding closure on Tuesdays is invalid, its incorporation in the licence as a condition or term thereof will not make it a binding condition. Licences have been granted by the Collector who has no power to add any term or condition in the licence which is not covered by some provision of a valid rule made either by the State Government or by the Excise Commissioner. A term of the licence, which is based on an invalid rule, is itself invalid. An invalid term or condition of a licence cannot be enforced and the licensee cannot be estopped from challenging it through a writ petition under Article 226 of the Constitution. There is another aspect of this matter. Rule 349 in the U. P. Excise Manual reads thus:--

"349. (1) Every shop shall, unless exempted by the Excise Commissioner or any officer not below the rank of Excise Inspector to whom he may delegate this power, be kept open every day throughout the year and the licence holder shall maintain at his shop a minimum quantity of the intoxicant for which he holds the licence and the same shall be fixed by the Collector for each shop with due regard to the normal demand of consumers in the locality."

This rule enjoins that the licensed premises shall be kept open on every day during the year. It will operate until superseded or amended by a valid rule made either by the State Government or by the Excise Commissioner. If Rule 13-B, in so far as it requires the closing of licensed premises on Tuesdays, is invalid or void, Rule 349 will remain in operation and neither the Excise Commissioner nor the Collector can require the licensees to close their licensed premises on Tuesdays. A condition in the licence contrary to Rule 349 will be void. The licensees cannot be estopped from invoking provisions of Rule 349 merely on account of the void condition incorporated in their licences contrary to Rule 349. It is well settled that there is no estopped against statute or statutory rules.

17. My answers to the three questions referred are as follows:--

1. On a true interpretation of Section 41 (e) (v) of the U. P. Excise Act, Sub-clause (v) empowers the Excise Commissioner to make a rule fixing the days as well as the hours during which licensed premises may be kept open or kept closed. Rule 13-B could validly be made under this provision;

2. The Excise Commissioner could make Rule 13-B in exercise of his powers under the main part of Clause (e) of Section 41 also but he could not make the rule in exercise of his powers either under Clause (a) of Section 41 or u/s 31; and

3. If Rule 13-B, in so far as it relates to the closure of licensed premises on Tuesdays, is ultra vires and void, its incorporation in the contract of the licensees will not make it a binding term of contract and the licensees will be entitled to avoid it through a petition under Article 226 of the Constitution.

18. The appeal and the writ petitions may now be placed before the Bench concerned with my opinion.