(1974) 01 OHC CK 0040

In the Orissa High Court

Case No : O.J.C. No. 1036 of 1971

Ziyaul Haque APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 03-01-1974

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22, 22(1), 22(2), 29, 29(2)
Constitution of India, 1950 — Article 19(1)

Citation : (1974) 40 CLT 247

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : B.M. Patnaik, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—The Petitioner is an excise licensee under the Bihar and Orissa Excise Act (2 of 1915) (hereinafter referred to as the Act) and operates his business in country liquor within the district of Mayurbhanj. He was granted licence in form O.S. 1 by the Collector of Mayurbhanj for the year beginning with 1-4-1971 and ending on 31-3-1972. In this application the Petitioner challenges the vires of Sections 22 and 29 of the Act on the ground that those are ultra vires the Constitution. He has Claimed for a declaration that the monthly consideration money paid by him is not due to the State and, therefore, has asked for a direction for refund of the amount to him.

2. The impugned sections of the Act are as follows:

22(1). The State Government may grant to any person on such conditions and for such period as it may think fit the exclusive privilege:

(a) of manufacturing, or supplying wholesale, or

(b) of manufacturing and supplying wholesale, or,

(c) of selling, wholesale or retail, or

(d) of manufacturing or supplying wholesale and selling retail or

(e) of manufacturing and supplying wholesale and selling retail, any country liquor or intoxicating drug within any specified local area;

(1-a). The State Government may also grant to any person, on such conditions and for such period as it may think fit the exclusive privilege for retail sale of foreign liquor within any specified place.

Provided that public notice shall be given of the intention to grant and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2). No grantee of any privilege shall exercise the same unless or until he has received a licence in that behalf from the Collector or the Excise Commissioner.

29(1) Instead of or in addition to, any duty leviable under this Act the State Government may accept payment of a sum in consideration of the grant of any exclusive privilege u/s 22.

(2) The sum payable under Sub-section (1) shall be determined:

(a) by calling tenders or by auction or otherwise as the State Government may, by general or special order, direct; and

(b) by such authority and subject to such control as may be specified in such order.

(3) The sum determined under Sub-section (2) shall be final and shall be binding on the party making the offer by way of tender, bid or otherwise once such offer is accepted by the authority referred to in Clause (b) of that sub-section.

Sub-section (1-a) of Section 22 of the Act was added to the parent Act by way of amendment under Orissa Act 4 of 1971 and some minor alterations were made in the proviso as also in Sub-section (2). Similarly Section 29 of the parent Act was first amended by Orissa Act 17 of 1970 and again by Orissa Act 10 of 1971. The sections as extracted embody these amendments. The vires of Section 22 was challenged before this Court by another excise dealer and this Court by its judgment reported in Siba Prasad v. State of Orissa ILR 1971 Cutt 777, came to uphold that provision as valid by saying:

It appears to us that the primary purpose of Section 22 is to restrict the manufacture and sale of country liquor or any intoxicating drug, by restricting the number of manufacturers and sellers in an area and also by making it as costly as possible consistent with local conditions of the area. It may be that when the exclusive privilege is put to auction, there is competition amongst persons who are keen to have the exclusive privilege and thereby a large amount of auction price is realised. The same result may ensue by calling for tenders. That is obviously because alcohol despite its evil when consumed in excessive quantities has universal attraction for humanity and therefore there is keen competition amongst the traders to secure the exclusive privilege for its manufacture and sale with the attendant consequences of a fairly large income to the State. That apart, the sum of money collected u/s 29 does not at all possess the characteristics of a tax. A tax is a compulsory exaction of money by public authority for the public purposes enforceable by law and is not payment for services rendered. The essence of tax is compulsion, that is to say, it is imposed under statutory power without the tax-payer''s consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purposes without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purpose of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is no element of ''quid pro quo'' between the tax-payer and the public authority see The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., . The sum collected u/s 29 of the Act is not a compulsory levy. Traders in alcohol of their own accord come and participate in auction or submit tenders, as the case may be offering a certain amount in lieu of having the exclusive privilege to manufacture and sell liquor. There is an element of ''quid pro quo'' present in the payment, although for that reason, it cannot be considered to be a fee. Apart from the fact that the amount when collected forms part of the general revenues of the State there is no characteristic in this levy which would bring it within the category of a tax as that expression is generally understood. We are, therefore, satisfied that the provision in Section 22 of the Act for grant to any person of the exclusive privilege of manufacture and sale of country liquor for a sum, the method of determination of which is provided in Section 29, are provisions which are calculated to restrict and control trade in liquor although incidentally revenue is earned for the State thereby and that Entry 8 in List II of the Seventh Schedule confers power on the State Legislature to enact such a regulatory measure and consequently the State Legislature has legislative competence to enact Sections 22 and 29.

In paragraph 17 of the said judgment while reiterating the conclusion that Section 22 was intra vires, this Court further held:

On a consideration of these circumstances, we are satisfied that no case of excessive delegation has been made out by the Petitioner. Our conclusion, therefore, is that Section 22 and Section 29 without the expression ''or otherwise'' in Clause (a) of Sub-section (2) thereof, are valid and constitutional.

The expression "or otherwise" in Clause (a) of Sub-section (2) of Section 29 was found to be an excessive delegation of power. The sum of money realised u/s 29 was found to be neither a fee nor excise duty nor a tax, but was held to be revenue incidentally got by the State in course of exercise of its regulatory power to control the manufacture and/or sale of liquor. Some time after, in Harinarayan

Jaiswal v. State of Orissa and Ors. ILR 1971 Cutt 1186, this Court was again called upon to consider the validity of Section 29 of the Act and It came to hold.

The position, therefore, is that ''sum of money'' referred to in Section 29 of the Act has to be viewed only as revenue incidentally yielded to the State in the course of regulating the trade in liquor; and as earning of revenue cannot thus be the main purpose, non-acceptance of the highest bid merely on the ground that reserved price has not been obtained at the auction or that more money can be obtained by resorting to the system of tender would contravene Article 19(1)(g) of the Constitution and cannot, therefore, be upheld.

The State of Orissa carried an appeal to the Supreme Court against this decision and by the judgment reported in State of Orissa v. Harinarayan 1972 S.C.D. 401 the Supreme Court came to hold:

As seen earlier Section 22 of the Act confers power on the Government to grant to any person on such conditions and, for such period as it may think fit, the exclusive privilege of selling in retail any country liquor. Section 29 empowers the Government to accept payment of a sum in consideration for the grant of any exclusive privilege u/s 22 either by calling tenders or by auction or otherwise it may be general or special order direct. The powers conferred on the State Government by Section 22 and Section 29 are absolute powers.

It is true, before the Supreme Court the vires of Sections 22 and 29 was not challenged. The Court, however, came to hold:

The Government it the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the Legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. The Government''s power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue.

As we have already noticed, Section 29 was found to be intra vires except for the portion "or otherwise" occurring there. This Court had obviously struck that portion as bad because no guide line had been provided. By the next amendment of 1971 "in the interest of excise revenue" has been added to supply the vacuum which had prevailed upon this Court to hold that there was'' excessive delegation. The learned Additional Government Advocate has contended that the words brought in by amendment ("in the interest of excise revenue)" relate to the third alternative mode of settlement Indicated in Section 29(2)(a) of the Act and cannot be taken as declaratory of the legislative intention that Section 29 of the Act is essentially a revenue raising provision. There is force in such contention and particularly in view of the observations made by the Supreme Court in Jaiswal''s case 4, it cannot be said that the requisite guide-line has not now been provided. Mr. Patnaik for the Petitioner had contended that raising of excise revenue was the sole purpose of Section 29. We are of the view that the Act provides for regulation and simultaneously keeps excise revenue in view. We do not think that would be sufficient to declare Section 29 to be ultra vires the Constitution even keeping the tests in Ajodhya v. State of Orissa ILR 1971 Cutt 51 in view.

3. The petition has no merit and must therefore, be dismissed. In the circumstances, we direct parties to bear their own costs.

B.K. Ray, J.

4. I agree.

