SUPREME COURT OF INDIA

State of Kerala

Vs.

P. J. Joseph

C.A.No.172 of 1954

(S. R. Das, C.J.I., T. L. Venkatarama Ayyar, S. K. Das, A. K. Sarkar and Vivian Bose, JJ.)

18.12.1957

JUDGEMENT

S. R. DAS, C. J.:

1. This appeal filed with a certificate of fitness under Art. 132 (1) of the Constitution of India is against the judgment and order pronounced on October 24, 1952, by a Division Bench of the High Court of Judicature for Travancore Cochin in writ petition No. 32 of 1952, presented on March 26, 1952, before the said High Court by the present respondent.

2. The facts are shortly as follows: Since 1945 the respondent had been a wholesale dealer in foreign liquor in Ernakulam in the erstwhile State of Cochin. In that State there was an Act called the Cochin Abkari Act (Act 1 of 1077 M. E.) For the neighbouring State of Travancore there was the Travancore Abkari Act (Act IV of 1073 M. E.). The Travancore State framed rules under its Abkari Act which were duly published in the Official Gazette under S. 65 of the Travancore Act. The Travancore practice was to fix a quota for each licensee for the sale of different varieties of foreign liquor on which no commission was charged and to charge each licensee 20 per cent. commission in respect of sales in excess of the quota. No rules had been framed by the Cochin State under its Abkari Act until 2-6-1949, when a set of rules was published in the Cochin Sarkar Gazette under S. 69 of the Cochin Act. On 1-7-1949, the two States of Travnacore and Cochin were united together and became the United State of Travancore Cochin. The respondent used to take out wholesale license under the Cochin Abkari Act 1 of 1077, M. E. At the date of the integration of the two States the respondent held a license for 1125 M. E. which covered the period between 17-8-1949 to 16-8-1950. He took out another license for the period between 17-8-1950 to 31-3-1951, and thereafter another for the period between 1-4-1951 to 31-3-1952. The licenses were wholesale licenses for the sale of foreign liquor, Indian made foreign spirits, Indian made wines and beer brewed in India, not to be consumed on the licensed premises. They were in Form No. F. L. 1 as prescribed by R. 7 of the Cochin Rules. By Cl. (1) of these licenses the privilege extended only to sales to other wholesale or retail licensees and sale to persons other than licensees was prohibited except in sealed receptacles to such extent and in such manner as might be permitted by the Commissioner. The licenses further provided that the quantity to be sold in one transaction to person other than licensees was not to be less than one pint.

3. By an order dated December 19, 1949, (Exb. B) the Board of Revenue of the United State of Travancore Cochin, one of the appellants before us, informed the respondent that his sale quota to persons other than licensees had been fixed as therein mentioned. By a memorandum (Exb. C)

issued by the Assistant Excise Commissioner on June 23, 1951, and endorsed by the Excise Inspector, Ernakulam on July 1, 1955, the respondent was informed that he must remit a commission on all sales in excess of the quota fixed for him calculated at 20% on his cost price for such excess quantity sold by him. The respondent maintained that the excise authorities had no right whatever to fix the quota or to direct that commission would be payable on sales in excess of that quota. He complained that the excise authorities had no right to fix different quotas for different licensees as had been done and thereby introduce unfair discrimination opposed to Art. 14 of the Constitution. He further contended that the aforesaid two orders amounted to an unreasonable restriction on his freedom to carry on his business and constituted an infringement of his fundamental rights under Art. 19 (1) (g) of the Constitution.

4. On the basis of the aforesaid contentions and allegations the respondent presented his writ petition before the High Court on March 26, 1952. The appellants, who were respondents in that petition, filed a counter affidavit affirmed by the Assistant Excise Commissioner, Ernakulam. They explained that the quota system had been in vogue in the Travancore area and had only been extended to the Cochin area by the Government in order to bring about a uniformity and that accordingly the Board of Revenue had fixed the sale quota of each of the foreign liquor licensees for the Cochin area including the present respondent and charged the same commission as was being charged in the Travancore area. They further pointed out that it was after the fixation of the sale quota that the present respondent took out his license for the period from August 17, 1950, to the end of March 1951, and then the last license from April 1951 to March 31, 1952, and, therefore, he could not now be heard to challenge the order fixing the quota. It was submitted that according to the Cochin Abkari Act and the rules framed thereunder the excise authorities had the right to limit retail sale by fixing the sale quota of each of the foreign liquor licensees and by levying a commission on the excess quantity sold by the licensees. The restriction thus imposed was, according to them perfectly reasonable and was made in the best interest of the general public and in furtherance of the Abkari policy of the State and there was no 'unfair discrimination made against the petitioner or unreasonable restrictions imposed on him and consequently there had been no contravention of the provisions of Art. 14 or Art. 19 (1) (g). It was maintained that the levy of 20% commission was not illegal and was not opposed to any of the provisions of the Constitution and such imposition did not really affect the petitioner who could easily pass it on to the actual consumers. It was pointed out that the Secretary. Travancore Wine Merchants Association having applied for the extension of the system of charging commission on sales of foreign liquor to Cochin area also, the Government allowed the extension as a matter of general policy. An affidavit in reply was filed by the present respondent dealing with the allegations made in the counter affidavit.

5. The matter came up before a Division Bench of the High Court of Judicature for Travancore Cochin. In the course of his final arguments the learned Government Pleader, who appeared for the excise authorities and the State who were the respondents in the writ petition, produced a document (Exb. 1) in support of his contention that there was an implied contract to pay the 20% commission. The document was a letter dated July 6, 1950, from the Secretary, Board of Revenue to the Travancore Cochin Government, Revenue Department. After referring to the request of the Secretary of the Travancore Wine Merchants Association to sanction additional quotas of foreign liquor to the wholesale licensees of the Cochin area on payment of a 20% commission on the price of the liquor sold in excess of the quota so fixed, it stated that if the Government, for the sake of uniformity, thought that excess quotas should be allowed to wholesale licensees in Cochin, the same might be allowed on payment of a commission of 20% on the price of the liquor sold in excess of the quota. The letter concluded with a request that the Board might be favoured with order of the Government in the matter at an early date. Below that there is an endorsement which reads as

follows:

"ORDER D. DIS. NO. 5208/50/RD

DATED 14-7-1950.

Sanction is accorded for extra quota of foreign liquor being allowed to wholesale licensees in Cochin on payment by them of a commission at 20% of the price of liquor. The commission so realised from the wholesale licensees in the Cochin area will be credited to Government.

By order of His Highness the

Raj Pramukh,

(Sd.) Assistant Secretary.

To

The Secretary Board of Revenue,

The Accountant General."

After hearing the parties the Division Bench, for reasons elaborately discussed in its judgment, held that the fixation of quotas for sale to non-licensees as also the impost of a commission of 20% upon sale in excess of the said quota were unauthorised and illegal, that the collection of the aforesaid commission from the petitioner (now respondent) by threat of closure of his shop after the presentation of the writ petition was also illegal. The High Court accordingly allowed the writ petition and directed the excise authorities to repay the amount collected from the petitioner (now respondent) and to desist from fixing a quota or levying the impost of any commission until a law authorising such impost or collection was made and also to pay the costs. The appellants before us, who were respondents in the writ petition, applied for and obtained a certificate of fitness for appeal to this court under Art. 132 (1) of the Constitution and have filed this appeal. After the filing of the appeal the new State of Kerala came into being on the reorganisation of the States and the new State of Kerala, in which is included the United State of Travancore Cochin, has since been substituted as one of the appellants.

6. Learned counsel appearing in support of this appeal before us contends that the order dated July 14, 1950, endorsed on the foot of Exb. (1) was a statutory order passed by the State under S. 17 of the Cochin Abkari Act 1 of 1077 M.E. That section provides, inter alia, that a duty of such amount, as the Diwan may prescribe, shall, if he so directs, be levied on all liquors and intoxicating drugs sold in any part of the Cochin State. In the counter affidavit it was contended that the Secretary, Wine Merchants Association having applied for the extension of the system of charging commission to the Cochin area, the Government allowed the extension as a matter of general policy. No reference whatever was made in the counter affidavit to what is now alleged to be a statutory order passed by the State in exercise of its powers under S. 17. It was not alleged before the High Court and has not been alleged before us that a copy of this alleged order was published in the official Gazette or was ever communicated to the present respondent. On December 19, 1949, the present respondent received only a letter (Exb. B) from the Secretary, Board of Revenue fixing his quota for sale to persons other than licensees. Again, on June 23, 1951, he received a copy of memorandum (Exb. C) from the Excise Division Office, Ernakulam to the Excise Inspectors asking the latter to

demand commission at 20% on excess sales. There was no reference in either of those two documents to any alleged order of July 14, 1950. Further the endorsement does not, in terms or in form, purport to be an order made by the State in exercise of the powers conferred on it by S. 17 of the Cochin Abkari Act. It is more in the nature of an intimation given to the Board of Revenue that the Government accorded sanction to extra quotas of foreign liquor being allowed to wholesale licensees in Cochin on payment of the Commission. The State did not make any order fixing any extra quota for any licensees or imposing a commission. It only authorised the excise authorities to allow extra quotas to wholesale licensees in Cochin on payment by them of the requisite commission and directed that the commission so realised from the wholesale licensees in the Cochin area should be credited to the Government. The document was nothing more than what in terms it purports to be, namely, a departmental instruction that the excise authorities might allow extra quotas to wholesale licensees on payment of the requisite commission. Indeed it was in pursuance of this departmental instruction that the excise authorities sent Exbs. B and C to the present respondent. In our opinion Exb. (1) cannot be regarded as a statutory order fixing any quota or imposing any commission. We are also of the opinion that the High Court should not have permitted the appellants to produce and to file Exb. (1) during final argument or use the same against the respondent.

7. Further, S. 18 of the Cochin Abkari Act, which does not appear to have been brought to the notice of the High Court, is, without the proviso which is not material, as follows:

18. "Such duty may be levied in one or more of the following ways:

(a) by duty of excise of be charged in the case of spirits or beer, either on the quantity produced in or passed out of a distillery, brewery, or warehouse licensed or established under S. 12 or S. 14 as the case may be, or in accordance with such scale of equivalents, calculated on the quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be, as the Diwan may prescribe;

(b) in the case of intoxicating drugs by a duty to be rateably charged on the quantity produced or manufactured (or issued from a warehouse licensed or established under S. 14);

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege:

1. of manufacturing or supplying by wholesale, or

2. of selling by retail, or

3. of manufacturing or supplying by wholesale and selling by retail,

any country liquor or intoxicating drug in any local area and for any specified period of time;

(d) by fees on licences for manufacture or sale;

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

(f) by (import, export or) transport duties assessed in such manner as the Diwan may direct:

Provided ...."

It will be noticed that none of the several ways referred to in the section can possibly be relied upon as authorising the imposition of any commission on the sale of foreign liquor by a wholesale licencee in excess of his quota except Cl. (d). According to that clause the duty on foreign liquor in excess of the quota can only be levied by imposing a fee on licenses for the sale of such foreign liquor. It will be recalled that all the three licenses in question were issued under Cochin Abkari Act 1 of 1077 M. E. and the Rules which had been framed thereunder on June 2, 1949, and which were in force on the dates of the issue of those licenses. Rule 7 provided that licenses for the sale, amongst others, of foreign liquor would be in the form appended thereto. Form F. L. 1 is for a wholesale license for the wholesale vend, inter alia, of foreign liquor not to be drunk on the premises and it provided that a license in that form would be issued by the Board of Revenue for an annual fee of Rs. 2,000. All the licenses issued to the respondent were in Form F. L. 1 and he paid Rs. 2,000 for each of them. The imposition of a further duty under S. 17 read with S. 18 by way of fees on licenses for sale would obviously, therefore, amount to an amendment of the provisions of R. 7 of the Cochin Abkari Rules under which the licenses had been issued. Section 69 of the Act requires that all rules made or notifications issued under this Act shall be made and issued by publication in the Cochin Sarkar Gazette. The section further provides that all such rules and notifications so published shall thereupon have the force of law and be read as part of this Act and might in like manner be varied, suspended and annulled. The rules, which included R. 7 under which the licenses in question had been issued, have been published in Cochin Sarkar Gazette and those rules have the force of law and have to be read as part of the Act and can only be varied, suspended or annulled in like manner, i.e., by a rule or notification similarly published. It is conceded that the endorsement at the foot of the Exb. (1), which is said to be a statutory order made under S. 17 and which obviously varied the provisions of R. 7 by enhancing the fee on licences by adding a 20% commission to the fee already paid was not published in the Cochin Sarkar Gazette. It follows, therefore, that even if the endorsement could be regarded as a rule or notification prescribing the levy of duty, not having been published in the manner aforesaid, the same cannot be regarded as a valid order having the force of law and, therefore, the impost cannot be said to be supported by authority of any law. Learned counsel faintly suggested that the endorsement in question was neither a rule nor a notification but was an order and was, therefore, not governed by S. 69. Section 18 being the machinery section for working out S. 17, and the alleged order not being in terms or form an imposition of a fee on license for sale, under S. 18 Cl. (d) learned counsel could not refer us to any other section in the Act under which an order of the kind appearing at the foot of Exb. (1) could be made or show us under what provision of law could such an order have legal effect without its publication in the official Gazette. Assuming the endorsement at the foot of Exb. (1) was an order, not having been published in the official Gazette, it cannot, by reason of S. 69, in any way vary R. 7 which fixes the fee on licenses in Form F. L. 1 at Rs. 2,000 per annum. The fact of the matter is that the impost was nothing but an executive order, if an order it was, which had no authority of law to support it and was, therefore, an illegal imposition. As explained by this Court in Mohammad Yasin v. Town Area committee Jalalabad 1952 SCR 572: (AIR 1952 SC 115) (A), and again in Bengal Immunity Co. Ltd. v. State of Bihar 1955-2 SCR 603 at p. 681: ((S) AIR 1955 SC 661 at p. 693) (B), an impost not authorised by law cannot possibly be regarded as a reasonable restriction and must, therefore, always infringe the right of the respondent to carry on his business which is guaranteed to him by Art. 19 (1) (g) of the Constitution. In this view of the matter it is not necessary to express any opinion on the other points dealt with in the judgment of the High Court.

8. For reasons stated above this appeal must be dismissed with costs.

Appeal dismissed.

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