Nashirwar and Others

Vs

State of Madhya Pradesh and Others

Civil Appeals Nos. 1711-1721 & 1723, 1699, 1706 & 1744 of 1974, 1267 of 1970 and Writ Petitions Nos. 436 of 1971, 133 of 1972, and 26 of 1972

(CJI A. N. Ray, K. K. Mathew, N. L. Untwalia JJ)

27.11.1974

JUDGMENT

RAY, C. J. -

1. The principal question in these civil appeals and writ petitions is whether it is permissible for the State Government to auction licences for carrying on the business of selling foreign liquor which is neither manufactured nor imported by the State Government. Some of these appeals relate to State of Madhya Pradesh and others relate to State of Kerala.

2. The Madhya Pradesh appeals are governed by the Central Provinces and Berar Excise Act, 1915, which became applicable to Madhya Pradesh as the Central Provinces Excise Act, 1915. This will be referred to as the Madhya Pradesh Act.

3. The Kerala Appeals are governed by the Abkari Act (Act No. 1 of 1700). This will be referred to as the Abkari Act.

4. Prior to April 1, 1964, licences for sale of foreign liquor in Madhya Pradesh were granted by the excise authorities under the fee per bottle system. In 1964-65, the State decided that licences for foreign liquor would be disposed of by public auction to the highest bidder. The appellants then challenged in the Madhya Pradesh High Court the authority of the State Government to hold public auction for grant of licences for foreign liquor. The appellants did not succeed because the Act was amended in 1964. The result of the amendment was that whereas formerly the State Government could grant lease only in respect of country liquor, the Amending Act empowered the Government to grant lease in respect of any liquor which meant both foreign and country liquor. After the amendment, public auctions were held under Section 18 of the Madhya Pradesh Act in respect of foreign liquor as well. In 1965-66 public auctions were held in respect of foreign liquor. The leases were renewed up to 1969-70. In 1967-68 prohibition was withdrawn in certain areas of Madhya Pradesh and new foreign liquor vends were opened. These vends were disposed of by public auction. In 1968, the State Government by a notification, dated March 29, 1968, ordered that with effect from April 1, 1965 (sic 1968) foreign liquor licences shall be disposed of on payment of extra fee of Rs. 1,000 in addition to the payment of a fee per bottle at specified rates. The notification further directed that where new shops were required to be opened licences would be disposed of by public auction in addition to a fee per bottle. In 1970 there was a notification dated August 14, 1970, where the State Government would dispose of foreign liquor licences by public auction. This notification is the subject matter of the Madhya Pradesh appeals.

5. The Madhya Pradesh Act by Sections 8 and 9 confers power on the State to prohibit import, export or transport of any intoxicant. "Intoxicant" under the Act means any liquor or intoxicating drug. The State Government has power to impose restrictions on import, export or transport of intoxicant in the shape of payment of duty and compliance with other conditions. Chapter IV of the Madhya Pradesh Act consisting of Sections 13 to 24 deal with manufacture, possession and sale of intoxicants. Section 13 requires licence for manufacture, collection, possession of intoxicants and material for manufacturing intoxicants.

6. Sections 17 and 18 of the Madhya Pradesh Act are important for the purposes of these appeals. Section 17 deals with licences for sale of intoxicants. Section 18 states that the State Government may lease to any person on such conditions and for such period as it may think fit the right (a) of manufacturing or of supplying by wholesale, or of both, or (b) of selling by wholesale or by retail, or (c) of manufacturing or of supplying by wholesale, or of both, and selling by retail any liquor intoxicating drug within any specified area.

7. The Abkari Act which governs the Kerala Appeals in Sections 6 to 11 deal with import, export and transport of liquor or intoxicating drugs. Permission of the government is required for import, export of liquor. Section 9 of the Abkari Act confers power on the government to prohibit, transport of liquor from any local area to any other local area. Sections 12 to 15C of the Abkari Act deal with manufacture possession and sale of liquor or intoxicating drug. Manufacture is prohibited except under the provisions of the Act, viz., licence granted by the Commissioner. The establishment and control of distilleries, breweries, warehouse, etc. is by grant of a licence. Sections 17 to 23 of the Abkari Act deal with duties taxes and rentals. Section 17 of the Abkari Act speaks of duty on liquor or intoxicating drugs. Section 18A of the Abkari Act confers power on the Government to grant, on such conditions and for such period as the Government may deem fit the exclusive or other privilege (i) of manufacturing or supplying by wholesale; or (ii) of selling by retail; or (iii) of manufacturing or supplying by wholesale and selling by retail any liquor or intoxication drugs within any local area on his or their payment to the Government of an amount as rental in consideration of the grant of such privilege. The Act further states that the amount of rental may be settled by auction, negotiation or by any other method as may be determined by the government, from time to time, and may be collected to the exclusion of, or in addition to, the duty or tax leviable under Sections 17 and 18. No grantee of any privilege under Section 18A of the Act shall exercise the same until he has received a licence in that behalf from the Commissioner. Rule 13(i) under the Abkari Act states that the privilege under the licence will be sold in public auction subject to the conditions of the sale notification published by Government from time to time.

8. The contention on behalf of the appellants is that it is the Fundamental Right of the citizens to carry on trade in liquor. It is said that the right to trade in liquor is not declared by the Legislature to be a monopoly of the State to exclude trade in liquor from the operation of Article 19(1)(g) as Fundamental Right to trade. The appellants challenge that the State has any right or privilege in the matter of manufacture or sale of liquor which can be granted as a right or privilege to the citizens.

9. On behalf of the State it is said that the State is not claiming monopoly in foreign liquor. The State does not contend that the auction of licences is either a fee or a tax. The State contends that the highest bid represents the consideration for the lease under Section 18 of the Madhya Pradesh Act or Section 18A of the Abkari Act. It is said on behalf of the State that the State has the exclusive right or privilege to manufacture, possess and sell intoxicant liquor and these provisions in the Act confer a right or privilege on the highest bidder at the auction to vend foreign liquor in specified areas.

10. The Madhya Pradesh Act as well as the Abkari Act states that citizen cannot have the right to carry on trade in liquor except to the extent and subject to such conditions as may be imposed by the Legislature under its regulatory powers. The Acts deal with four principal forms of activities pertaining to liquor. First, the import, export and transportation of liquor is regulated by providing for passes on terms and conditions mentioned in the Act. A fee is also prescribed for such passes. Second, the manufacture of liquor is dealt with by providing for licences from the State Government and fees are prescribed for such licences. Third, the possession of liquor requires a permit from the Government and a fee therefore. Fourth, the sale of liquor is dealt with by Sections 17 and 18 of the Madhya Pradesh Act and Section 18A of the Abkari Act. The Acts speak of the grant of privilege or right to sell liquor by lease. The Government can hold a public auction to grant lease. The State Government accepts payment of a sum in consideration of the grant of any lease. The amount of bid at a public auction represents the consideration for the grant of such right or privilege.

11. The State Legislature is authorised to make a provision for public auction by reason of power contained in Entry 8 of List II of the Constitution. That Entry empowers the State Government to legislate with regard to intoxicating liquor, that is to say, production, manufacture, possession, transport, purchase and sale of intoxicating liquor.

12. Counsel on behalf of the appellants relied on the decision of this Court in Krishna Kumar Narula v. The State of Jammu & Kashmir ((1967) 3 SCR 50 : AIR 1967 SC 1368) as an authority for the proposition that a citizen has a Fundamental Right to do business to deal in liquor.

13. This Court in Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer (1954 SCR 873 : AIR 1954 SC 220) held that the grant of a lease either by public auction or for a sum is a regulation pertaining to liquor. It was contended on behalf of the citizen in Bharucha's case (supra) that every person has an inherent right to carry on trade in intoxicating liquors and that the State has no right to create a monopoly in them. In Bharucha's case the auction sale of country liquor shop under Excise Regulation 1 of 1915, was challenged on the ground that the provisions of the Excise Regulation and the auction rules were ultra vires because the same purported to grant monopoly to trade to a few persons. The Excise Regulation, 1915, in that case provided that the Chief Commissioner might lease to any person the right of manufacturing or of supplying or of selling by wholesale or retail any country liquor or intoxicating drug within any special area. This Court said that laws prohibiting trades in noxious or dangerous goods cannot be held to be illegal as enacting a prohibition and not a mere regulation.

14. In Bharucha's case (supra) this Court concurred with the observations in Crowley v. Christensen (34 L ED. 620). Those observations indicate that the sale of liquor has been at all times considered as the proper subject of legislative regulation. A licence may be exacted and restrictions may be imposed as to sale of liquor. There may be absolute prohibition of sale of liquor. At the root lies public expediency and public morality. The sanction is the police power of the State to regulate business and to mitigate evils.

15. The observations in Crowley's case (supra) which were laid down as a ruling of this Court in Bharucha's case (supra) are these :

There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said be entirely prohibited, or be permitted under such conditions as

will limit to the utmost its evil. The manner and extent of regulation rest in the discretion of the governing authority.

Bharucha's case negatived the contention of inherent right of citizens to carry on trade in intoxicating liquors.

16. Bharucha's case (supra) lays down three propositions. First, that there is no inherent right of citizens to carry on trade in intoxicating liquors. Second, the auction sale of liquor shop is a method by which carrying on particular trade in liquor is regulated and one of the purposes of regulation is to raise revenue. Third, there can be a monopoly only when a trade which could be carried on by all persons is entrusted to one or more persons to the exclusion of the general public. That is not the case with the business of liquor.

17. This Court in Narula's case (supra) referred to the decision in Bharucha's case (supra) and the concurrence of this Court in Bharucha's case with Crowley's case (supra) that there is no inherent right in a citizen to sell intoxicating liquor. In Narula's case this Court read the observations of this Court in Bharucha's case to have conceded the inherent and Fundamental Right of a citizen to carry on business in sale of intoxicating liquor. Bharucha's case in no uncertain terms repelled the citizens's contention of inherent right to sell intoxicating liquor. Bharucha's case is a Constitution Bench decision. Narula's case is also a Constitution Bench decision. Narula's case cannot be said to have overruled Bharucha's case.

18. There is an earlier decision of this Court in State of Assam v. A. N. Kidwai, Commissioner of Hills Division and Appeals. Shillong (1957 SCR 295 : AIR 1957 SC 414) where it is said that no person has any absolute right to sell liquor. In Kidwai's case this Court said that the purpose of the Act and the Rules is to control and restrict the consumption of intoxicating liquor. Such control and restriction is said by this Court to be necessary for the preservation of public health and morals and to raise revenue.

19. In Narula's case (supra) it was held that dealing in liquor is business and a citizen has a right to do business and that a State can make a law imposing restrictions on the rights in public interest. In Narula's case it was also said that unless dealing in liquor is not trade or business a citizen has a Fundamental Right to deal in that commodity. It is not correct to read the decision in Narula's case that there is a Fundamental Right to do business in liquor. The decision is that dealing in liquor is business and a citizen has a right to do business in that commodity and the State can impose reasonable restrictions on the right in public interest. If the State can prohibit business in liquor as is held in State of Bombay v. F. N. Balsara (1951 SCR 682 : Air 1951 SC 318)his this establishes that the State has exclusive right or privilege of manufacture possession, sale of intoxicating liquor and therefore the state grants such a right of privilege to persons in the shape of licence or lease.

20. The auction of the privilege of selling liquor was upheld by this Court in Guruswamy & Co. v. State of Mysore ((1967) 1 SCR 548 : AIR 1967 SC 1512). This Court said that the licensee pays for the exclusive privilege of selling toddy from certain shops. The licensee pays what he considers to be equivalent to the value of the right. It has no relation to the production or manufacture of toddy. The only relation it has to the production or manufacture of toddy, is that it enables the licensee to sell it. The privilege of selling is auctioned well before the goods come into existence. The levy is in respect of the business of carrying on the sale of toddy.

21. Narula's case (supra) was explained by this Court in a Bench decision in State of Orissa v. Hari

Narayan Jaiswal ((1972) 3 SCR 784 : (1972) 2 SCC 36) which considered whether the sale by public auction of the exclusive privilege of selling by retail country liquor in eight shops was valid. The respondent was the highest bidder there. His bid was rejected. The government was of the view that inadequate prices had been offered because of collusion between the bidders. Fresh tenders were called for. The State accepted the tender in respect of one shop and rejected the others. The remaining seven shops were sold by private negotiation for substantially higher prices. The respondent whose highest bid was rejected applied to the High Court for a direction to the Government to confirm his bid. Section 22 of the Orissa Excise Act which governed that case stated that the State government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege (e) of manufacturing and supplying wholesale and selling retail, any country liquor or intoxicating drug within any specified local area.

Section 29(2) of the Orissa Excise Act dealt with the payment for grant of exclusive privilege. Section 29(2) of the Act stated that the sum payable shall be determined by calling tenders or by auction or otherwise. In Hari Narayan's case (supra) this Court held that the right to trade in intoxicating liquor is subject to regulations and restrictions and upheld the public auction of the right or privilege of selling liquor as an attribute of collection of State revenue.

22. In the recent decision in Amar Chandra Chakraborty v. Collector of Excise, Government of Tripura under the Tripura ((1973) 1 SCR 533 : (1972) 2 SCC 544) under the Tripura Excise Rules fees for licence for the wholesale vend of country spirit were required to be fixed by tender-cum-auction. Section 22 of the Bengal Excise Act, 1909, conferred power on the Chief Commissioner to grant exclusive privilege of manufacturing and supplying country liquor. No grantee of any privilege could exercise the same without a licence. The Constitution Bench in Chakraborty's case (supra) held that trade or business in country liquor has from its inherent nature been treated by the State and the society as a special category requiring legislative control. This trade or business is treated as a class by itself and cannot be treated on the same basis as other trades while considering Article 14. A contention was raised in Chakraborty's case that the business of selling liquor is protected under article 19 as a Fundamental Right and reliance was placed on the decision in Narula's case (supra). This Court held that the State can make a law imposing reasonable restrictions in public interest on the right to deal in liquor by public auction of the right of selling liquor.

23. There are three principal reasons to hold that there is no Fundamental Right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor.

24. In Balsara's case (supra) this Court referred to Article 47 and said that the idea of prohibition was connected with public health. The challenged to a prohibition law under our Constitution was made under Articles 14 and 19 in Balsara's case. This Court held that absolute prohibition of manufacture or sale of liquor ins permissible and the only exception can be for medicinal preparations. The concept of inherent right of citizens to do business in liquor is anti-thetical to the power of the State to enforce prohibition laws in respect of liquor.

25. Das, C. J. in State of Bombay v. R. M. D. Chamarbaugwalla (1957 SCR 874 : AIR 1957 SC 699) said that gambling could not be regarded as trade or business within the meaning of Article

19(1)(f) and (g) and Article 301. Inherently vicious activities cannot be treated as entitling citizens to do business or trade in such activities. No one can deal in counterfeit coins or currency notes. Das, C.J. held that activities which are criminal, or dealing in articles or goods which are res extra commercium could not have been intended to be permitted by Article 19(1)(f) and (g) relating to Fundamental Rights to trade or business.

26. In our country the history of excise shows that the regulations issued between 1790-1800 prohibited manufacture or sale of liquors without a licence from a Collector. In 1808 a regulation was introduced in the Madras Presidency which provided that the exclusive privilege of manufacturing and selling arrack should be farmed in each district. In 1820 the law was amended to authorise the treatment of toddy and other fermented liquors in the same way as spirits by allowing Collectors to retain the manufacture and sale under direct management if deemed preferable to farming. In 1884 a Committee was appointed to investigate the excise system. The recommendations of the Committee were adopted. Under the new system the monopoly of manufacture was let separately from that of sale. The former was granted on condition of payment of a fixed duty per gallon. The right of sale was given on payment of a fee per shop or a number of shops, or on payment of a fee determined by auction. In the Bombay Presidency the monopoly of the retail sale of spirits and the right to purchase spirits was farmed. In 1857 the Government declared its future policy to be the letting by auction of each shop, with its still, separately. In 1870-71 a change was made. The rule at that time was that the Collector would fix the number and locality of the different shops and determine their letting value according to the advantages possessed by each. It was not intended that they should, as a rule, be put up to public competition; but competition might be resorted to by the Collector and taken into account in determining the sum at which each would be leased. This rule remained in force for many years. The practice of putting the shops up to auction was, thereafter followed. The history of excise administration in our country before the Independence shows that there was originally the farming system and thereafter the central distillery system for manufacture. The retail sale was by auction of the right and privilege of sale. The Government of India appointed an Excise Committee in 1905. The measures recommended by the Committee were the advances of taxation, the concentration of distillation, the extended adoption of the contract distillery system. The Committee suggested among other things the replacement of the then existing excise law by fresh legislation on the lines of the Madras Abkari Act. (See Dr. Pramatha Nath Banerjee : History of Indian Taxation, P. 470 seq.).

27. Reference may be made to the Taxation Enquiry Commissioner Report 1953-54, Vol. 3. At page 130 following there is a discussion of State excises. Among the major sources of revenue which are available to the State Government there is a duty on alcoholic liquors for human consumption. At page 132 of the Report it is stated that in addition to the excise duties, licence fees are charged for manufacture or sale of liquor or for tapping toddy trees etc. Similarly, several fees like permit fees, vend fees, out still duties are also levied. Manufacture or sale of liquor is forbidden except under licences which are generally granted by auction to the highest bidders. The manufacture of country spirit is done in Government distilleries or under the direct supervision of the excise staff. All supplies are drawn from government warehouses which ensures that the liquor is not more than of the prescribed strength. The licensed sellers have to sell the country spirit between fixed hours and at fixed selling rates. As in the case of country spirit, the right of tapping and selling toddy is also auctioned. In addition to the licence, in some States the licensee has to pay a tree tax to Government.

28. Traditionally, tobacco, opium and intoxicating liquors have been the subject matter of State monopoly. (See Section IV of the Madras Regulation XXV of 1802 relating to permanent settlement

of land revenue). Section IV states that the Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads inter alia of the abkarry, or tax on the sale of spirituous liquors and intoxicating drugs, of the excise on articles of consumption, of all taxes personal and professional, as well as those derived from markets, fairs, or bazars, of lakhiraj lands (or lands exempt from the payment of public revenue), and of all other lands paying only favourable quit rents, the permanent assessment of the land-tax shall be made exclusively of the said articles no recited.

29. This was followed by Section XXXII of Regulation II of 1803 in the Madras Presidency. That section provided that Collectors shall collect the revenue arising from sayer, spirituous liquors or from other sources, in the manner prescribed by the regulations.

30. Regulation I of 1813 in the Madras presidency provided that the licensed retail dealer shall be supplied exclusively by the Collector of Madras with the quantity of liquor which they may require, at such price as may be from time to time determined.

31. Regulation I of 1820 of the Madras Presidency inter alia provided that the Board of Revenue was authorised to empower the Collectors either to retain the exclusive privilege of manufacturing country, arrack, toddy, and other fermented liquors, as well as the retail sale of foreign or country manufactured spirits, toddy and other fermented liquors in their respective districts, under their own immediate management, on account of Government; or to rent out those privileges, jointly or separately, for such periods as may be deemed eligible.

32. The Board of Revenue as aforesaid was also authorised to alter, amend and enlarge rules for regulating the exclusive manufacture and sale of country arrack, toddy and other fermented liquors, and the exclusive sale of foreign spirits. The other provisions were that licences for renting out the exclusive privilege of manufacturing of country arrack, toddy or other fermented liquor, and of retailing spirituous liquors would be prepared by the Board of Revenue.

33. Act XXIII of 1841 of the Madras Presidency, Act XXXII of 1845 of the Madras Presidency, Sections XLIII to XLVII of Regulation VII of 1832 of the Madras Presidency all indicate that it is the right and privilege of the State Government to manufacture, sell intoxicant liquors and the State grants lease of such rights by public auction on rental in consideration of the grant of such right.

34. The excise revenue arising out of manufacture and sale of intoxicating liquors is one of the sources of the State Exchequer. One of the principal sources of State revenue is customs and excise. In England sale of intoxicating liquors although perfectly lawful at common law is subject to certain statutory restrictions. These restrictions are primarily of two kinds; those designed for the orderly conduct of the retail trade and those designed to obtain revenue from the trade whether wholesale or retail.

35. Trade in liquor has historically stood on a different footing from other trades. Restrictions which are not permissible with 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 Bharucha's

case (supra) and Jaiswal's case (supra). 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.

36. This Court in A. B. Abdulkadir v. State of Kerala ((1962) Supp 2 SCR 741 : AIR 1962 SC 922) said that in British India there used to be public auction of the right to possess and sell excisable goods like country liquor, ganja and bhang and the amount realised was excise revenue. The auction system which was in force was said by this Court in Abdulkadir's case to be only a method of realising duty from the grant of licences to those who made the highest bid at the auctions.

37. The grant of a lease either by public auction or for a sum is a regulation pertaining to liquor. One of the purposes of regulation is to raise revenue. Revenue is collected by the grant of contracts to carry on trade in liquor. These contracts are sold by auction. The grantee is given a licence on payment of auction price. [See Bharucha's case (supra).]

38. For these reasons we hold that the State has the exclusive right or privilege of manufacturing and selling liquor. The State grants such right or privilege in the shape of a licence or a lease. The State has the power to hold a public auction for grant of such right or privilege and accept payment of a sum in consideration of grant of lease.

39. The appeals and the writ petitions are, therefore, dismissed. Parties will pay and bear their own costs

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