

Trade Links Limited, New Delhi and Others

Vs

State of Uttar Pradesh and Others

Writ Petitions Nos. 528-529, 1645, etc. of 1979; 341-43, 344, etc. of 1980; 4824, 4825, etc. of 1981 and 311 of 1982

(CJI Y. V. Chandrachud, O. Chinnappa Reddy, D. A. Desai, V. D. Tulzapurkar, Islam JJ)

07.05.1982

JUDGMENT

TULZAPURKAR, J. -

1. There is no substance in this group of writ petitions filed under Article 32 of the Constitution whereby the petitioners, who carry on business, inter alia, of the wholesale vend of beer and Indian made foreign liquor at various places in the State of U.P. on the strength of licences granted to them in Form F.L. 2 under the U.P. Excise Act, 1910, have challenged the constitutional validity of Sections 1(2), 3 and 5 of U.P. Excise (Amendment) Ordinance 4 of 1979 as also the constitutional validity of Sections 1(2), 3 and 5 of U.P. Excise (Amendment) Act 13 of 1979 (which replaced the said Ordinance 4 of 1979) as being violative of their fundamental rights under Articles 14, 19 and 31 of the Constitution; the petitioners have also sought a declaration that Section 30(2), proviso to clause (c) of Section 41 and Explanations I and II to clause (c) of Section 41 of the U.P. Excise Act, 1910 as amended by Sections 3 and 5 of the said Ordinance 4 of 1979 as well as by Sections 3 and 5 of the said Act 13 of 1979 and the provisions of sub-section (2) of Section 1 of the said Ordinance (4 of 1979) as well as of the said Act (13 of 1979) are ultra vires the Constitution and have prayed for the issuance of an appropriate writ, order or direction restraining the respondents (the State of U.P. the Excise Commissioner and other Officers) either directly or through their agents, servants or otherwise from giving effect to the amended provision.

2. It may be stated that the aforesaid challenge to the U.P. Ordinance 4 of 1979, the U.P. Act 13 of 1979 and the concerned amended provisions of the U.P. Excise Act, 1910 has been made solely with a view to avoid the payment of the 'assessed fee' which the respondents are seeking to recover from the petitioners in addition to the 'fixed fee' (auction money) as and by way of consideration for the grant of licences in Form F.L. 2 for the wholesale vend of beer and Indian made foreign liquor. However, as it became clear during the hearing that even without the amendments effected in the U.P. Excise Act, 1910 (being the principal Act) by the said Ordinance 4 of 1979 and by the said Act 13 of 1979 the 'assessed fee' in addition to the 'fixed fee' (auction money) could be and was being recovered under the principal Act of 1910 as amended by the U.P. Excise (Amendment) (Reenactment and Validation) Act 5 of 1976 and the Rules framed thereunder, the aforesaid challenge was given up and no arguments in support thereof were at all advanced by any of the counsel for the petitioners and the contentions centered round the question whether such 'assessed fee' in addition to the 'fixed fee' (auction money) could be levied and recovered under the principal Act of 1910 as amended by Act 5 of 1976.

3. It was not disputed before us that the grant of exclusive privilege of manufacture, supply or sale

by wholesale or by retail of liquor was always governed by the provisions of the principal Act of 1910 and the Rules framed thereunder and that licences for wholesale vend of beer and Indian made foreign liquor were granted in Form F.L. 2 which contained the terms and conditions on which sales by wholesale of the said commodities could be effected by the grantees thereof. It appears that prior to April 1976 these F.L. 2 licences were not settled under any auction system but were renewable from year to year and the licence fee was based on the quantity of beer and Indian made foreign liquor actually sold from the concerned shop and was assessed and charged at the rate of Rs 5 per quart bottle on spirits and 60 paise per quart bottle on beers. But from April 1976 auction system was introduced whereunder F.L. 2 licences were auctioned under the provisions of paragraph 373 of the U.P. Excise Manual, Volume I and 'fixed fee' being the highest bid (auction money) accepted at such auction came to be charged for the grant of F.L. 2 licences and this system was introduced on the strength of the amendments that were made in the principle Act of 1910 by the Amending (Reenactment and Validation) Act 5 of 1976. Three or four amendments made by Act 5 of 1976 are material and we shall refer to these presently :

4. A new Section 24-A dealing with the grant of exclusive or other privilege in respect of foreign liquor was introduced in the principal Act, which reads as under :

24-A. Grant of exclusive or other privilege in respect of foreign liquor. - (1) 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, -

(a) of manufacturing or of supply by wholesale, or of both; or

(b) of manufacturing or of supplying by wholesale, or of both and selling by retail; or

(c) of selling by wholesale (to wholesale or retail vendors); or

(d) of selling by retail at shops (for consumption 'off' the premises); any foreign liquor in any locality.

(2) The grant of licence on licences under clause (d) of sub-section (1) in relation to any locality shall be without prejudice to the grant of licences for the retail sale of foreign liquor in the same locality in hotels and restaurants for consumption in their premises.

(3) Where more licences than one are proposed to be granted under clause (d) of sub-section (1) in relation to any locality for the same period, advance intimation of the proposal shall be given to the prospective applicants for every such licence.

(4) The provisions of Section 25, and proviso to Section 39 shall apply in relation to grant of a licence for an exclusive or other privilege under this section as they apply in respect of the grant of a licence for an exclusive privilege under Section 24.

Section 24-B which was also introduced by Act 5 of the 1976 in the principal Act reads thus :

24-B. Removal of doubts. - 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 the 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.

5. By the same Act Section 30 of the principal Act was amended and the amended Section 30 read thus :

30. (1) Instead of or in addition to any duty leviable under the Chapter, the State Government or on its behalf the Excise Commissioner may accept payment of a sum in consideration of the grant of licence for any exclusive or other privilege under Section 24 or Section 24-A.

(2) The sum payable under sub-section (1) may be determined either by auction or by calling tenders or otherwise.

6. Section 41 of the principal Act which confers power on the Excise Commissioner to make Rules subject to the previous sanction of the State Government touching the matters or topics specified therein was amended by Act 5 of 1976 by substituting clause (c) thereby conferring power on the Excise Commissioner to frame Rules on the substituted matter or topic and the amended clause (c) runs thus :

(c) prescribing the scale of fees or manner of fixing the fees payable for any licence, permits or pass including any consideration for the grant of any exclusive or other privilege granted under Section 24 or Section 24-A or for storing of any intoxicant :

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7. In exercise of the power so conferred upon him under the amended clause (c) of Section 41, the Excise Commissioner with the previous sanction of the State Government framed Rules called the U.P. Excise (Wholesale and Retail Vend of Foreign Liquor) (2nd Amendment) Rules, 1976 by issuing the Notification No. 27/Licence-3 dated April 14, 1976, which were brought into force with effect from the date of publication in the Gazette, namely, April 14, 1976; by this Notification the existing Rules 639, 641 and 642 as appearing in Excise Manual, Volume I (1962 Edn.) were amended; Rule 639(2) as amended provides that "licences in Form F.L. 2 shall be settle by public auction" while Rule 641 as amended provides that "the fee for a licence in Form F.L. 2 shall be the amount of money accepted at the auction of the licence as 'fixed fee' together with an 'assessed fee' charged on the basis of the scales of surcharge fee prescribed in the next paragraph following" and Rule 642 as amended runs thus :

642. The scales of licence fee applicable to wholesale licence for the vend of foreign liquor shall be as follows :

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(ii) For a licence in Form F.L. 2. - The fixed fee obtained for the licence at the auction in addition to the assessed fees according to the following scales :

#(a) Spirits, wines, liquor, cordials, Rs 5 per reputed quart etc. of all kinds bottle on sale to licensed vendors(b) Beer, stout and other Re 0.60 per reputed fermented liquors quart bottle on sale to licensed vendors * * *##

Notes. - (i) The fixed fee... in respect of licence F.L. 2 one forth of the licence fee as obtained in the auction shall be payable in advance immediately on the acceptance of the bid and the balance by such instalments as may be specified in the licence to be granted.

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8. By the very Notification dated April 14, 1976 the Excise Commissioner added one more condition in the form of a proviso to the terms and conditions of F.L. 2 licence and the said addition made after condition No. 1(c), runs thus :

Provided that the assessment fee on the sales made on the licence in the prescribed manner at such scales of surcharge fee as may be prescribed by Government and announced at the time of the auction, shall also be payable by the licensee.

9. Obviously relying upon the aforesaid amendments made in the principal Act of 1910 by Act 5 of 1976 (some of which were given retrospective effect from the date of the commencement of the principal Act and others from August 16, 1972) and the said amended Rules 639, 641 and 642 and the insertion of the new condition in the F.L. 2 licence (all of which come into force from April 14, 1976), the respondents introduced the auction system for the grant of licences in Form F.L. 2 for wholesale vend of beer and Indian made foreign liquor and started levying and recovering the 'assessed fee' in addition to the 'fixed fee' (auction money) from the grantees of the licences. Question raised is whether such levy and recovery are legal and valid ?

10. Before we deal with the question it will be desirable to set out the facts giving rise to it that lie in a narrow compass and it will suffice if the facts obtaining in Writ Petition No. 528 of 1979, being typically representative of the group, are stated. The petitioners in that petition are liquor dealers and carry on business inter alia of wholesale vend of beer and Indian made foreign liquor and for the purpose have wholesale depots in various districts in the State of U.P. For the financial years 1976-77 and 1977-78 they acquired by auction bids wholesale vending rights in respect of Indian made foreign liquor at Agra, Meerut, Varanasi, Kanpur, Bareilly and Dehra Dun; for the financial year 1978-79 they similarly acquired wholesale vending rights in Indian made foreign liquor at Agra, Meerut and Varanasi and for the financial year 1979-80 they acquired by auction similar rights at Agra, Meerut, Ghaziabad and Pilibhit. In other words being the highest bidder at these places for these years licences for the wholesale vend of Indian made foreign liquor in Form F.L. 2 were granted to them. At the time of acceptance of their bids at these auctions the petitioners deposited the entire auction money called the 'fixed fee' in respect of each of the said years with the respondents. The petitioners' case is that thereafter the respondents are seeking to levy and recover from them the 'assessed fee' at the rate of Rs 5 per quart bottle on spirits and 60 paise per quart bottle on beers actually sold during each of the financial years by their concerned shops or depots in addition to the 'fixed fee'. Such levy and recovery of the 'assessed fee' by the respondents is challenged on two or three grounds indicated hereunder.

11. In the first place counsel for the petitioners have contended that under Section 30(2) of the principal Act of 1910 prior to its amendment by U.P. Ordinance 4 of 1979 and U.P. Act 13 of 1979 it was open to the respondents to adopt either one or the other method of granting F.L. 2 licences and determine the licence fee payable by the grantee accordingly, that is to say the respondents could grant the licence "either by auction or by calling tenders" and once a particular mode was adopted it was incumbent upon them to apply the same for the purpose of determining the sum payable by the grantee; in other words the contention has been that it was not open to them to adopt a combination of two or more methods and claim 'assessed fee' in addition to 'fixed fee' and therefore the instant attempt on the part of the respondents to levy and recover the 'assessed fee' in addition to 'fixed fee' would be illegal and without authority of law. According to the petitioners a combination of two or more methods became available to the respondents only under Section 30(2) as amended by U.P. Ordinance 4 of 1979 and by U.P. Act 13 of 1979. Secondly, the petitioners have averred that at the time of the said auctions held for each of the said financial years the bidders were not informed that any 'assessed fee' had been fixed by the State Government which would be payable by the successful bidder and therefore the persons who gave their bids including the petitioners whose highest bids were accepted were led to believe that no fee over and above the auction money would be charged and that the successful bidder would be granted F.L. 2 licence merely on payment of the auction money. Counsel for the petitioners have therefore contended that the respondents' attempt to levy and recover the 'assessed fee' over and above the 'fixed fee' (auction money) is unwarranted and illegal inasmuch as the respondents cannot enhance the petitioners' contractual liability which was limited to the payment of the auction money. Yet another contention raised by counsel for the petitioners has been that as per the newly inserted condition in F.L. 2 licence the 'assessed fee' was required to be "prescribed by Government and announced at the time of auction" but in the instant case such 'assessed fee' has been prescribed by the Excise Commissioner and not by the State Government and was not announced at the time of the auction and for this reason also the same would not be recoverable. As will be shown presently none of these conditions has any merit and each one is liable to be rejected.

12. As regards the first contention a plain reading of Section 30(2) prior to its amendment by U.P. Ordinance 4 of 1979 and by U.P. Act 13 of 1979 will show that there is no substance in it. The said provision ran thus :

2. The sum payable under sub-section (1) may be determined either by auction or by calling tenders or otherwise.

In other words, the consideration for the grant of F.L. 2 licence could be determined either by auction or by calling tenders or otherwise. The phrase 'or otherwise' was sufficiently wide and conferred on its plain grammatical construction power on the State Government or the Excise Commissioner to grant the licence either by auction or by tenders or partly by auction and partly by tenders or even by adopting yet other methods than by auction or by inviting tenders. In other words, the phrase 'or otherwise' enabled the State Government or the Excise Commissioner to adopt a combination of one or more methods for granting the F.L. 2 licence and determine the licence fee accordingly. Having regard to the phrase 'or otherwise' occurring in the provision it is impossible to accept the contention that only one method to the exclusion of the others could be adopted by the respondents for granting the licence or that one type of fee appropriate to that method could alone be charged. It is true that sub-section (2) of Section 30 as amended by U.P. Ordinance 4 of 1979 or by U.P. Act 13 of 1979 runs thus :

2. The sum payable under sub-section (1) may either be fixed by auction or inviting tenders or otherwise or be assessed on the basis of the sales made or quota lifted under the licence or partly fixed and partly assessed in the aforesaid manner.

But in our view it is manifestly clear that the aforesaid amended provision in clarificatory of the legal position which obtained under Section 30(2) that was operative prior to the said amendment. In this view of the matter the first contention has to be rejected.

13. The second contention has been that since at the time of holding the concerned auctions the bidders were not informed that any 'assessed fee' had been prescribed by the State Government which would be payable by the successful bidder and since bids were offered on the representation that these successful bidder would be granted F.L. 2 licence merely on payment of the 'fixed fee' (auction money) the respondents' attempt to levy and recover the 'assessed fee' over and above the 'fixed fee' would be unwarranted and illegal because the respondents cannot enhance the contractual liability of the successful bidder which was limited to payment of the auction money. There are two answers to this contention. In the first place it was not disputed before us that to the knowledge of all the bidders these auctions for the grant of F.L. 2 licences were held under the provisions of the principal Act of 1910 as amended by Act 5 of 1976 and the Rules framed thereunder which were then in force. We have already referred to the provisions of the amended Rules 639(2), 641 and 642 which were published in the Gazette and brought into force with effect from April 14, 1976 and admittedly all auctions for the financial year 1976-77 were held subsequent to that date. Under the amended Rule 641 it was clearly provided that the fee for the F.L. 2 licence shall be the amount of money accepted at the auction of the licence as 'fixed fee' together with the 'assessed fee' charged on the basis of the scales of surcharge fee prescribed in the next following Rule and the amended Rule 642 prescribed the scales at which the 'assessed fee' would be so charged. In other words, the bidders who gave their bids must be deemed to have knowledge of the provisions of the aforesaid Rules subject to which the auctions were held and therefore it is difficult to accept the contention that the bidders including the successful bidder whose highest bid was accepted offered their bids believing that only 'fixed fee' would be charged. Secondly, the averment of the petitioners that at the time of these auctions the bidders were not informed that any 'assessed fee' had been fixed or prescribed which would be payable by the successful bidder is not quite correct. It has been admitted by the petitioners that at the time of these auctions the new condition that was inserted by the Excise Commissioner in the F.L. 2 licence by his Notification dated April 14, 1976 was read out and this newly inserted condition runs thus :

Provided that the assessment fee on the sales made on the licence in the prescribed manner at such scales of surcharge fee as may be prescribed by the Government and announced at the time of the auction, shall also be payable by the licensee.

If admittedly the aforesaid condition inserted in F.L. 2 licence was read out at the time of the auction then it is clear that the fact that 'assessed fee' on the sales made on the licence was also payable by the licensee was announced at the time of the auction. The only grievance made by the petitioners has been that the prescribed scales of surcharge fee (under Rule 642) were not announced but that is neither here nor there, for, if once it was announced at the time of the auction that 'assessed fee' on sales effected on the licence at the prescribed scales shall also be payable by the licensee then obviously the bidders were put on enquiry to find out what scales of surcharge fee had been prescribed under the relevant Rule. In other words the bidders present at these auctions had full knowledge that 'assessed fee' at prescribed rates will also be charged and it was with full knowledge

of this position that they gave their bids. If that be so, there is no question of the respondents' attempting to enhance the contractual liability of the successful bidder. It will be interesting to mention in this context that the respondents have stated in their counter-affidavit that not only did the bidders know that 'assessed fee' would be charged over and above the 'fixed fee' (auction money) but many of the successful bidders to whom F.L. 2 licences were granted have actually passed on the 'assessed fee' at the prescribed rates to and recovered the same from the retailers to whom they have effected sales of beer and Indian made foreign liquor. At least in the case of those petitioners before us who have done so the aforesaid plea put forward on their behalf cannot be regarded as honest. The second contention therefore fails and is rejected.

14. The last contention is merely required to be stated to be rejected. In support of that contention reliance was placed on the newly inserted condition in F.L. 2 licence which states that the assessed fee "at such scales of surcharge fee as may be prescribed by the Government" shall also be payable by the licensee while actually the scales of surcharge fee have been prescribed by the Excise Commissioner by framing the amended Rule 642 in exercise of the powers conferred upon him by clause (c) of Section 41 of the principal Act. Counsel urged that scales of surcharge fee ought to have been prescribed by the Government. In this connection we might refer to Section 24-B(c) which expressly declares that "the Excise Commissioner as the head of the Excise Department of the State shall be denied, while determining or realising such fee, to act for and on behalf of the State Government". It is thus clear that the Excise Commissioner has been statutorily declared to be the agent of the State Government and "while determining such fee" by framing the amended Rule 642 he acted for and on behalf of the State Government. In other words, scales of 'assessed fee' under Rule 642 must be deemed to have been prescribed by the State Government.

15. As regards the alleged non-announcement at the time of the auctions we have already dealt with that aspect of the matter while dealing with and disposing of the second contention.

16. No other point was raised. It is therefore clear that the levy and recovery of the 'assessed fee' over and above the 'fixed fee' by the respondents for granting F.L. 2 licences to all the petitioners would be legal and valid under the principal Act of 1910 as amended by Act 5 of 1976 and the amended Rules framed thereunder and all the petitions are liable to be dismissed. We accordingly dismiss all the writ petitions with costs and quantify the costs payable by each of the petitioners separately at Rs 5000.

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