SUPREME COURT OF INDIA

Messrs Gupta Modern Breweries

Vs

State of Jammu and Kashmir and Others

(H. K. Sema and V.S. Sirpurkar, JJ)

JUDGMENT

H. K. SEMA, J.

These appeals have a chequered history. We shall, however, notice few facts leading to the filing of the present appeals, strictly for the purpose of disposal of these appeals.

The Jammu and Kashmir Excise Act, 1901 (hereinafter the Act) was passed on 4.12.1901.

The Jammu and Kashmir Distillery Rules 1946 (hereinafter the Rules) were framed on 29.6.1946.

On 5.9.1973, an order was passed by the Excise Commissioner under Rule 17 of the Rules that charges on account of salary of Excise Department staff were to be recovered from management at 50% of total expenses. This order was, however, withdrawn on 1.4.1974. On 13.8.1981, the Excise Commissioner, withdrew the exemption granted by an order dated 5-9-1973. By an order dated 10.9.1981, the Excise Commissioner made a demand for payment of salaries of Excise personnel posted at appellant's distillery. Notice of demand was issued on 6.10.1988. On 28.9.1981, the appellant filed first OWP No. 549 of 1981 challenging Rule 17 as being ultra vires the Act. The High Court stayed the recovery proceedings. The appellant has also filed Writ Petition No. 1208 of 1989 challenging the demand made on October 6, 1989 on account of staff charges, which was dismissed by the learned Single Judge by its order dated 27th September, 1990. Aggrieved thereby, the appellant preferred LPA (W) No.159 of 1990, which was dismissed by the Division Bench by the impugned order. Hence the present appeals.

Section 25 of the Act empowers the Government to frame rules. The relevant portion for the present purpose reads:-

"25. The Government may from time to time frame rules-

(g) For the inspection and supervision of stills, distilleries, private warehouses and breweries;

(o) Generally to carry out the provisions of this Act or of any other law for the time being in force and relating to the Excise revenue."

Rule 17 of the Rules is claimed to stream from Section 25, which has been assailed as ultra vires the Act reads:-

"The licensee shall, if required by the Excise and Taxation Commissioner, make into the Government treasury such payment as may be demanded on account of the salaries of the Government excise establishment posted to the distillery, but he shall not make any direct payment to any member of such establishment."

The validity of the Rules has been challenged before the learned Single Judge, before the LPA Bench and before this Court on the grounds that (a) Rule does not have the statutory backing; (b) Rule is in excess of the rule making power in Section 25 of the Act and suffers from excessive delegation; (c) Rule seeks to get breweries to pay for the salaries and costs of the government officials involved in revenue collection and it is manifestly unjust and arbitrary; (d) Rule imposes a tax not a fee without the authority of law and, therefore, contrary to Article 265 of the Constitution Of India, 1950; and lastly (e) The Rule is unreasonable and arbitrary and hence contrary to Article 14 of the Constitution Of India, 1950.

Before we proceed further to answer the aforesaid questions, we may at this stage, point out that this Court held that a trade in liquor is res extra commercium and, therefore, not entitled to the protection of Article 19(1)(g), but any licensing, regulation or imposition in respect of the liquor trade cannot be arbitrary and discriminatory.

In Khoday Distilleries Ltd. vs. State of Karnataka, Â 3, it is said that the State can adopt any mode of selling the licenses for trade or business with a view to maximize its revenue so long as the method adopted is not discriminatory."

In Khoday Distilleries Ltd. vs. State of Karnataka, Â , it is said in paragraph 13:

".Although the protection of Article 19(1)(g) may not be available to the appellants, the rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to

emanate from an authority delegated with the lawmaking power"(Emphasis supplied)

It is, therefore, clear that even in dealing with the liquor trade, the government cannot be manifestly unjust or arbitrary.

Dr. Rajeev Dhawan, learned senior counsel, appearing for the appellants, contended that the concept of reasonableness applicable to delegated legislation and more generally to actions under Articles 14 and 21 is that the action should not be manifestly unjust and arbitrary. According to him, Rule 17 suffers from excessive delegation and is manifestly unjust and arbitrary.

Per contra Mr.S.R. Singh, learned senior counsel, appearing for the respondents, contended that such payment postulated under Rule 17 is neither fee nor tax but such payment is being demanded in lieu of for parting with the exclusive right and privileges granted to the appellant for the services rendered to the appellant.

We may at this stage notice that both the learned Single Judge and the Division Bench erroneously relied on the decision rendered by this Court in Government of Andhra Pradesh vs. M/s Anabeshahi Wine and Distilleries Pvt. Ltd., Â . In Anabeshahi's case (supra) the fee was imposed by Section 28(2) of the A.P. Excise Act, 1968 itself. Section 28 reads as under:-

28. Form and conditions of licence etc.: (1) Every permit issued or licence granted under this Act shall be issued or granted on payment of such fees, for such period, subject to such restrictions and conditions, and shall be in such form and shall contain such particulars, as may be prescribed.

(2) The conditions prescribed under Sub-section (1) may include provisions of accommodation by the licensee to excise officers at the licenced premises on the payment of rent or other charges for such accommodation at or near the licensed premises and the payment of the costs, charges and expenses (including the salaries and allowances of the excise officers) which the Government may incur in connection with the supervision to ensure compliance with the provisions of this Act, the rules made thereunder and the licence.

Similarly, Rule 15 was framed consistent with Section 28 of the Act. Rule 15 reads:

15. (a) The licensee shall, if required by the Commissioner provide within the premises of the distillery or at such site as may be approved by the Commissioner buildings for the office and residence of the staff posted under Rule 14.

(b) The licensee shall, if required by the Commissioner, deposit into the Government Treasury such amount as may be demanded towards the salaries and allowances of the Government establishment posted at the distillery, but he shall not make any direct payment to any member of such

establishment.

A perusal of the aforesaid provisions, it clearly appears that Sections and Rules provides that the salary and allowances described as establishment charges which were sought to be recovered as such under the impugned notice of demand.

Admittedly, in the present case there is no such provision in the Act or Rules. Therefore, the decision in Anabeshahi's case (supra) is not applicable in the facts of the case at hand.

In the case of M/s Gujchem Distillers India Ltd. Vs. State of Gujarat, Â , the levy of supervisory charges is traceable to Section 58-A of the Bombay Prohibition Act of 1949. There is no such provision in the J & K Excise Act.

Dr. Dhawan referring to Rule 17 contended that it suffers from excessive delegation, as it is manifestly unjust and arbitrary. In this connection he contended that Section 25(o) required that the rules should seek to carry out the provisions of the Act or of any other law relating to the excise revenue. It is his say, that a disjunctive reading would be violative of both the grammar and the intent if the word 'generally' is given too wide an interpretation and the word 'and' is read as 'or'. Section 25(o) would become wholly and completely unguided and applicable to just about anything. The restraining element in Section 25(o) is the fact that it must relate to "excise revenue".19.04.2007(Excise Revenue Is Defined In Section 3 Of the Act. It Reads: JJ)

"'Excise revenue' means revenue derived or derivable from any duty, fee, tax, fine or confiscation imposed or ordered under the provisions of this Act"

According to Dr. Dhawan, the term fee as defined in Section 3 is not the kind of fee that falls under Rule 17 and therefore, the fee for the purpose of Rule 17 is not authorized by the Act. He also referred to various sections under the Act where the terms duty and fee are mentioned and their collection is specifically authorised:

Section 5(a) Payment of duty for import

Section 6 Payment of fee or duty for export

Sections 8-10 Permits for transport

Sections 11-A -12-A Licenses for possession

Section 16 Imposition of duty

Section 17(d) Imposition of duty by fees for manufacture

Section 18. Framing of duties

Section 22(a) Fee or duty for licenses

Section 24. Recovery of duties

Section 24-B. Refund of duty, tax or fee

He, therefore, contended that when the legislation intended the Act itself indicates where a fee or duty or tax may be charged. He, therefore, argued that to include in Section 25(o) the power to impose any independent fee not authorised by statute, makes Section 25(o) overbroad and without any guidelines whatsoever. He further contended that Rule 17 is also traceable to Section 25(g), which deals with inspection and supervision of distilleries, private warehouses and breweries and does not contain any provision for the imposition of a duty, tax or fee.

It is now well settled principle of law that the regulatory powers are generally to be widely construed. However, empowering the State Government to impose taxes, fees or duties and such demands must be authorised by the Statute and must contain sufficient guidelines.

In the case of A.N. Parasuraman vs. State of Tamil Nadu, Â, this Court pointed out as under:- *"The point dealing with legislative delegation has been considered in numerous cases of this Court, and it is not necessary to discuss this aspect at length. It is well established that determination of legislative policy and formulation of rule of conduct are essential legislative functions which cannot be delegated. What is permissible is to leave to the delegated authority the task of implementing the object of the Act after the legislature lays down adequate guidelines for the exercise of power."*

(Emphasis supplied)

In the case of Kunj Behari Lal Butail vs. State of H.P., Â , it was pointed out in Paragraph 14 as under:

"14. We are also of the opinion that a delegated power to legislate by making rules for carrying out the purposes of the Act" is a general delegation without, laying down any guidelines; it cannot be so

exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself".

In the case of Devi Das Gopal Krishnan vs. State of Punjab, Â it was pointed out at 565-566 as under:

"Under that section the Legislature practically effaced itself in the matter of fixation of rates and it did not give any guidance either under that section or under any other provisions of the Act-no other provision was brought to our notice. The argument of the learned counsel; that such a policy could be gathered from the constitutional provisions cannot be accepted, for, if accepted, it would destroy the doctrine of excessive delegation. It would also sanction conferment of power by Legislature on the executive Government without laying down any guide-lines in the Act. The minimum we expect of the Legislature is to lay down in the Act conferring such a power of fixation of rates clear legislative policy or guide-lines in that regard. As the Act did not prescribe any such policy, it must be held that section 5 of the said Act, as it stood before the amendment, was void."

In the cases aforesaid where fees akin to Rule 17 were imposed were cases where the imposition was specifically imposed by the statute. It is, therefore, clear that Rule 17 has no statutory backing.

The case of the respondents is that Rule 17 intended that in lieu of parting with exclusive right and privileges granted to the appellant and for the services rendered and therefore it is neither fee nor tax. It is contended that the Government was rendering service to the appellant by deputing excise staff not only for the purpose of ensuring that the denaturing of spirit is done properly by the manufacturer but also for the purpose of specifically seeing that the de- natured spirit does not go out of the hands, either of the distillery owner or a retail seller or any licensee or per holder contrary to law. It is further argued that there was co- relationship between the services rendered and the fee levied was essential.

The question as to whether the tax payers or license holders would have to pay for the official staff of the State for supervising collection of the revenue, has been set at rest by the Constitution Bench of this Court in the case of Indian Mica Micanite Industries vs. The State of Bihar, Â . It is held in paragraph 17 as under:

"..the only services rendered by the Government to the appellant and to other similar licensees is that the Excise Department have to maintain an elaborate staff not only for the purposes of ensuring that denaturing is done properly by the manufacturer but also for the purpose of seeing that the subsequent possession of denatured spirit in the hands either of a wholesale dealer or retail seller or any other licensee or permit-holder is not misused by converting the denatured spirit into alcohol fit for human consumption and thereby evade payment of heavy duty. So far as the manufacturing process is concerned, the appellant or other similar licensees have nothing to do with it. They are only the purchasers of manufactured denatured spirit. Hence the cost of supervising the

manufacturing process or any assistance rendered to the manufacturers cannot be recovered from the consumers like the appellant. Further under Rule 9 of the Board's rules, the actual cost of supervision of the manufacturing process by the Excise Department is required to be borne by the manufacturer. There cannot be a double levy in that regard. In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various persons such as whole-sale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into palatable liquor and thus evading heavy duty. Assuming this conclusion to be correct, by doing so, the State is rendering no service to the consumer. It is merely protecting its own rights. Further in this case, the State which was in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licensees, the costs or at any rate the probable costs that can be said to have been incurred for rendering those services and the amount realised as fees has failed to do so. On the side of the appellant, it is alleged that the State is collecting huge amount as fees and that it is rendering little or no service in return. The co-relationship between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the co-relationship between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore the levy under the impugned Rule cannot be justified."

(Emphasis supplied)

In the case of Commissioner of Central Excise vs. Chhata Sugar Co. Ltd., Â , one of the issues was whether the state government's administrative charges to collect a levy could be passed on to the person from whom the tax, fee or levy was collected. This Court categorically held that such an imposition would be a tax and not a fee and must be duly authorized since it is a tax (at para 14), it is held:-

"Hence, administrative charge under the U.P. Act is a tax and not a fee."

It is, thus, clear from the aforesaid decisions that imposition of administrative services is a tax and not a fee. Such imposition without backing of statutes is unreasonable and unfair.

In the case of Corporation of Calcutta vs. Liberty Cinema, Â , it was made clear that the nomenclature is not important. In that case, the majority judgment took the view that although the imposition under the Calcutta Municipality Act, 1951 was described as a fee, it was nevertheless a tax by stating (at pp. SCR 483, 484 & 490): *" Now, on the first question, that is, whether the levy is in return for services, it is said that it is so because section 548 uses the word "fee". But, surely, nothing turns on words used. The word "fee" cannot be said to have acquired a rigid technical meaning in the English language indicating only a levy in return for services. No authority for such a meaning of the word was cited. .. The Act, therefore, did not intend to use the word fee as referring only to a levy in return for services .. Section 548 does not use the word "fee"; it uses the words "licence fee" and those words do not necessarily mean a fee in return for services. In fact in our*

Constitution fee for licence and fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a consideration of Art. 110(2) and Art. 199(2) where both the expressions are used indicating thereby that they are not the same. The conclusion to which we then arrive is that the levy under section 548 is not a fee as the Act does not provide for any services of special kind being rendered resulting in benefits to the person on whom it is imposed. The work of inspection done by the Corporation which is only to see that the terms of the licence are observed by the licensee is not a service to him. No question here arises of correlating the amount of the levy to the costs of any service. The levy is a tax. It is not disputed, it may be stated, that if the levy is not a fee, it must be a tax."

(Emphasis supplied)

In the case of M/s Lilasons Breweries (Pvt.) Ltd. vs. State of Madhya Pradesh, Â , Rule 22 of the M.P. Breweries Rules 1970 to meet the annual expenses of the officers was struck down as ultra vires the Act and beyond the rule making power of the State.

WHY IT IS TAX AND NOT FEE

Under the Constitutional scheme, taxes are distinct from fees. Excise is a form of tax. It is self-evident from various constitutional provisions:

(i) The concept of a Money Bill in Articles 110(2) and 199(2) clearly postulate that taxes should be voted on by Parliament See Corporation of Calcutta, Â at 483

(ii) The taxes and excise in the Union List are to be found in List I, Entries 82-92B; and

(iii) The taxes in the State List are to be found in List II, Entries 42-63

(iv) Excise is specifically dealt with in List I, Entry 84 and List II, Entry 51

(v) List II, Entry 51 specifically deals with excise on alcohol

(vi) Fees are specifically dealt with in both these lists (List I, Entry 96 and List II, Entry 66) and are a distinct concept that has to be voted by Parliament

Thus, taxes, excise and fees must be voted by Parliament.

In the cases of State of Punjab vs. Devans Modern Breweries Ltd., Â 2004 (11) SCC 26 at para 25,

K.T. Moopil Nair vs. State of Kerala, Â at paras 89 & 91, Ahmedabad Urban Development Authority vs. Sharadkumar Jayantikumar Pasawalla, Â at paras 6-7, Hindustan Times vs State of U.P., Â 3 at para 30 and Bimal Chandra Banerjee vs. State of M.P., Â at para 14, it has been held that a tax under Article 265 can only be imposed by way of legislation and it is impermissible to be imposed by way of bye- laws or rules.

WHETHER THERE IS A QUID PRO QUO BETWEEN THE FEE CHARGED AND THE SERVICE RENDERED.

We have already noted that the plea of the respondents is that it was rendering service by deputing excise staff not only for the purpose of ensuring that the denaturing of spirit is done properly by the manufacturer but also for the purpose of specifically seeing that the de-natured spirit does not go out of the hands, either of the distillery owner or a retail seller or any licensee or permit holder contrary to law. It is, therefore, clear that there was no co-relationship between the expenses incurred by the Government and the fee sought to be raised under Rule 17. In other words, there is no quid pro quo between the fee charged and the services rendered. A Constitution Bench of this Court in the case of The Commissioner, Hindu Religious Endowments, Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, Â 1954 SCR 1005 (at 1040, 1041 & 1044) held that a fee must be for a quid pro quo :-

"..As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority. Another feature of the taxation is that as it is a part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay. Coming now to fees, a "fee" is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed but in this case there is total absence of any co- relation between the expenses incurred by the Government and the amount raised by contribution under the provision of section 76 and in these circumstances the theory of a return or counter-payment or quid pro quo cannot have any possible application to this case. In our opinion, therefore, the High Court was right in holding that the contribution levied under section 76 is a tax and not a fee and consequently it was beyond the power of the State Legislature to enact this provision."

(Emphasis supplied)

For the reasons foretasted we hold that:

(a) Rule 17 has no statutory backing and it is in excess of the Act.

(b) It is manifestly unjust and arbitrary.

(c) Provision of Rule 17 is clearly a tax and not a fee.

(d) Imposition of tax or fee on the citizens for the services that the State renders to itself and not the tax payers is clearly impermissible, arbitrary and unjustifiable.

This takes us to the last leg of submission of the counsel for the respondents. It is strenuously urged by the counsel for the respondents that in the event this Court struck down Rule 17 being ultra virus the Act, such decision must be prospective and the State should inter alia be permitted to retain the fees paid by the appellant in the interregnum.

In support of his contention, counsel for the respondents, relied on the judgment of this Court rendered in Federation of Mining Associations of Rajasthan vs. State of Rajasthan, Â , where this Court held that the declaration of the act unconstitutional will take effect only from the date of judgment. The ruling cited above is not applicable in the facts of this case for the following reasons:

Firstly, the interim order dated 11.9.2000 passed by this Court clearly provided for refund in the following terms:-

"No stay. In case the appeals are ultimately allowed, the respondents shall pay, on the refund ordered, interest at the statutory rate".

Secondly, Section 24-B of the Act itself provides as under:

"Any amount of duty, tax, fine or fee paid by any person which was not payable under this Act shall be refunded to such person along with interest for the period of default at the rate of 2% per month."

We, accordingly, direct the respondents to refund the payment so made in the interregnum with interest calculated at the statutory rate.

In the result, the order of the learned Single Judge and the Division Bench passed in LPA No.159 of 1990 are set aside. Appeals are allowed. In the facts and circumstances of the case, parties are asked to bear their own costs.