

PETITIONER:
LILASONS BREWERIES (PVT.) LTD.

Vs.

RESPONDENT:
STATE OF MADHYA PRADESH AND ORS.

DATE OF JUDGMENT 21/04/1992

BENCH:
PUNCHHI, M.M.
BENCH:
PUNCHHI, M.M.
RAY, G.N. (J)

CITATION:
1992 AIR 1393 1992 SCR (2) 595
1992 SCC (3) 293 JT 1992 (3) 236
1992 SCALE (1) 834

ACT:

Madhya Pradesh Excise Act, 1915: Sections 13, 18, 25, 27, 28 and 62(2)(h).

Madhya Pradesh Brewery Rules, 1970: Rule 22- Nature of levy under and validity of -Breweries-Appointment of Excise Officers as Incharge of breweries- Provision for pay of such Officers- Rule providing that their pay should be met by State but when the charges exceed five per cent of the duty leviable the excess shall be realised from the brewer-Rule 22 held ultra vires and beyond the Rule making power of state-Levy under Rule 22 held as additional excise duty not actually due and not authorised by section 25.

HEADNOTE:

Rule 22 of the Madhya Pradesh Brewery Rules, 1970 empowers the Excise Commissioner to appoint an officer-in-charge of the brewery and to appoint such other officers of the excise department as he may deem fit to be incharge of the brewery with the object of exercising a control over the breweries. It further provides that the pay of all such officers shall be met by the Government but in case the annual charges and pay of such officers exceed 5% of the duty leviable on the issue made from the brewery to the districts within the State then the excess shall be realised from the brewer.

Demands raised under the said Rule on the appellant-brewery were challenged by it and a Division Bench of the Madhya Pradesh High court upheld the same holding that (i) the demand under Rule 22 was in the nature of a condition of licence for brewery: and (ii) Section 62 (2)(h) read with Section 28 of the Madhya Pradesh Excise Act, 1915 was wide enough to enable the State Government to make the impugned rule as a condition of the licence.

In appeal to this Court, it was contended on behalf of the appellant-brewery that the excise duty leviable under the Act was a tax imposed by the State Legislature in exercise of its plenary powers and there cannot be

596

a further demand, which is in the nature of an additional duty, by means of a rule.

On behalf of the State it was contended that the demand

under Rule 22 was nothing but a further fee or additional consideration, apart from Licence fee, which was neither a further duty nor a further tax and the demand was referable to sections 27 and 28 of the Excise Act.

Allowing the appeal and setting aside the judgment of the High Court, this Court,

HELD: 1. Rule 22 of the Madhya Pradesh Brewery Rules, 1970 to the extent it permits raising a demand, which in sum and substance is additional excise duty, without its being actually due is ultra vires the act and beyond the rule making power of the State. [604 E]

2. The excise duty collected goes to the coffers of the State. The pay of officers have to come out from coffers of the State. Under Rule 22 five per cent of the duty leviable is assessed to meet the pay of such officers, which the Government, but for the Rule, is otherwise supposed to meet. This part of the rule is purely internal between the Government and its officers. The licensee is least concerned as to how the excise duty leviable would be appropriated. It is only in the case of a shortfall when the excess is sought to be realised from the brewer that he gets affected. The excess is obviously the sum which falls short of the duty leviable. It cannot for a moment be suggested that when there is a shortfall, the demand is as if of an "additional fee or consideration" and not additional excise duty. It is obvious from the language of Rule 22 that in the event of the excise duty leviable falling short of the expected five per cent to meet the pays of the officers cannot be met therefrom, the state has all the same to pay. The measure under Rule 22 goes to recoup the state of the charges by demanding a sum equal to the duty leviable to that extent without lifting excisable articles. On this understanding arrived at the demand cannot be sustained and is quashed. [603 C-H; 604 E]

3. Though under Section 28 of the Excise Act licences are issued on the prescribed forms and on payment of such fee as prescribed and licences containing such particulars as the State Government may direct etc. this power even though wide is yet confined within its frame and can in no event assume the power to impose or levy a tax or excise duty by

597

means of a rule without the sanction of the Act. The payment asked, on the contingency of events, cannot partake the character of a fee so as to come within the purview of Section 28. And if it does not the support of Section 62(2)(h) is sterile. Seeking help from Section 27 would also be of no avail because the additional payment conceived of therein is also a payment over and above the duty leviable and as a part consideration towards the grant of any lease under section 18. The additional consideration conceived of in Section 27 is a consideration over and above the excise duty. The terms of Section 27 do not go to retrieve the situation [604 A-D]

Bimal Chandra Banerjee v. State of Madhya Pradesh, [1971] ISCR 844; State of M.P. V. Firm Gappulal etc; [1976] 2SCR 1041; Excise Commissioner, U.P. etc. etc. v. Ram Kumar etc. etc; [1976] Supp. 532, relied on.

Panna Lal & Ors. etc. etc. v. State of Rajasthan and Ors; [1976] 1 SCR 219 distinguished.

Nashirwar v. State of M.P. {1975} 2 SCR 861, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1265 of 1981

From the judgment and Order dated 4.9.80 of the Madhya Pradesh High Court in Misc. Petition No.48 of 1978.

S.K. Mehta, Dhruv Mehta, Aman Vachher and Arvind Verma for the Appellants.

B.Y. Kulkarani and S.K. Agnihotri for the Respondents.

The judgment of the Court was delivered by

PUNCHHI, J. This appeal is directed against the judgment and order dated September 4, 1980 of a Division bench of the High Court of Madhya Pradesh at Jabalpur in Miscellaneous Petition No.48 of 1978.

Vires of rule 22 of the Madhya Pradesh Brewery Rules, 1970 framed under Section 62 of the Madhya Pradesh Excise Act, 1915 stands questioned. That Rule says:

"22. EXCISE COMMISSIONER TO APPOINT OFFICER

IN-CHARGE OF BREWERY: Every brewery shall be placed

598

by the Excise Commissioner under the charge of an Excise Inspector to be designated as officer-in-charge of the brewery. The Excise Commissioner will further appoint such other officer of the Excise Department as he may deem fit to the charge of breweries. The pay of all such officers shall be met by the Government; provided that when the annual charges exceed five per cent of the duty leviable on the issue made from the brewery to districts within the State excess shall be realised from the brewer".

The roots of the Rule, through the provisions of the Madhya Pradesh Excise Act, require to be traced, as well as the nature of the exaction provided in it. A broad framework of the working of the Act would thus be necessary.

The State has the exclusive right or privilege of manufacture or sale of liquor. There is no fundamental right of any citizen to carry on trade and business of liquor. This is the Settled position of law. See in this connection *Nashirwar v. State of M.P.* [1975] 2 SCR 861, a case under the Madhya Pradesh Excise Act and other cases of the same strand. It is open to the State through its Government to part with those rights in regard to liquor and intoxicants for a consideration. Any citizen wanting to do the business in liquor or intoxicants in the State of Madhya Pradesh has to seek permission under the Madhya Pradesh Excise Act, 1915. Section 13 of the Act provides inter alia that no intoxicant shall be manufactured or collected no liquor shall be bottled for sale, no distillery or brewery shall be constructed or worked and no person shall use or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than tari, except under the authority and subject to the terms and conditions of a licence granted in that behalf. Section 18 empowers the State Government to lease to any person on such conditions and for such period as it may think fit, the right of manufacturing, supplying or selling of any liquor or intoxicating drug within any specified area. For the purpose there is a duty leviable and other fees collectable. Chapter V of the Act is earmarked for the purpose. Therein Section 25 provides that Excise Duty is payable on all excisable articles imported, exported, transported, manufactured, cultivated or collected under any licence or manufactured in any distillery established, or any distillery or brewery licensed under the Act. In the same Chapter is Section 27 which enables the government to get payment for grant of

leases. It says:

"27. PAYMENT FOR GRANT OF LEASE Instead of or in addition to any duty leviable under this Chapter, the state Government may accept payment of a sum in consideration of the grant of any lease under section 18".

It is evident from a bare reading of the aforesaid provision that two situations are envisaged. The first situation is when duty is leviable under Chapter V, the Government may accept instead a sum in substitution of the duty, in consideration of the grant of a lease under Section 18. The second situation is that the government may accept payment of an additional sum over and above the duty leviable under chapter V, in consideration of the grant of a lease under section 18. Section 28 in the following Chapter then provides for the forms and conditions of licences and fees charged thereon. It provides that every licence, permit or pass granted under the Act shall be granted on payment of such fees, if any, for such period, subject to such restrictions, and on such conditions, and shall be in such form and contain such particulars as the State Government may direct either generally by Rules made under Section 62 or in any particular instance. Section 62 Contains the Rule making power of the Government on the usual pattern. Sub-section(i) of section 62 vests the power for the purpose in the State Government, and sub-section (2) enumerates specific subjects, in particular and without prejudice to the generality otherwise of the rule making power. In particular Clause (h) of sub-section(2) of section 62 permits the State Government to prescribe the authority by, the form in which, and terms and conditions subject to which any licence, permit or pass shall be granted. It is in its rule making power, that the State Government framed the Madhya Pradesh Brewery Rules, 1970, from amongst which Rule 22 stands above-quoted, vires of which was challenged before the High Court, though unsuccessfully, for which purpose effort stands renewed.

The appellant is a company carrying on business in the manufacture and sale of beer. For the purpose it has established a brewery in the industrial area at Bhopal. It has obtained three licences in the requisite forms for manufacturing, bottling and sale of beer. It is aggrieved against the recovery of annual charges relating to the pay of the officer-in-charge etc. of the brewery from the brewer to the extent such charges exceed 5

600
per cent of the duty leviable on the issue made from the brewery to the districts within the state. The appellant claims relief of quashing of the demand notice in respect of those charges. The High Court negatived the plea of the appellant taking the view that the licences in Form B-1-A, which is a licence to work a brewery in private premises, issued to the appellant is specifically in terms subject to the Madhya Pradesh Brewery Rules. And since there was an obligation laid on the brewer under Rules 22, that if annual pay of the officers-in-charge etc. of the brewery exceeded 5 percent of the duty leviable, the excess had to be realised from the brewer. It was viewed as a condition of licence for working the brewery and well within the rule making power conferred under Section 62(2)(h read with Section 28 of the Act, whereunder the State Government could lay down terms and conditions subject to which licence could be granted. Support for the view was taken by the High court from the first part of Rule 22 empowering the Excise Commissioner to appoint an officer-in-charge of the brewery and to appoint such other officers of the excise department as he may deem fit to be incharge of the brewery with the object of exer-

cising a control over the breweries, as also perform duties assigned to these officers under Rules 23 to 26 which by themselves were reasonable. And since those were reasonable, the provision made in the latter part of Rule 22 that in case the annual charges and pay of such officers exceeded 5 per cent of the duty leviable on the issue made from the brewery to districts within the state, the excess to be realised from the brewer was also reasonable. The High court in conclusion expressed itself as follows:

"It is true that the Act provides for payment of excise duty as consideration for grant of licence and does not specifically provide for realisation of charges in respect of pay of officers posted for control of breweries. But in our view Section 62 (2)(h) read with section 28 is wide enough to enable the state Government to make the impugned rule as a condition of the licence".

The appellant maintains that though the excise duty leviable under the Act is a tax imposed by the State Legislature in exercise of its plenary power there cannot be a further demand, which is the nature of an additional duty, by means of a rule. On the basis of Section 18 it is contended that a lease is granted subject to payment of duty leviable only under Chapter V and not otherwise. The State Government under Section

601

27, may forego the excise duty and accept payment of a sum in consideration of the grant of any lease under Section 18 in its stead. The State Government while keeping the duty leviable under Chapter V intact may accept an additional payment of a sum in consideration of the grant of a lease under Section 18. The appellant maintains that the instant demand raised is not referable at all to Sections 27 and 18. The stand of the State is based on the literal reading of Rule 22. The State terms the additional payment as "a further fee apart from licence fee on the brewer in case the charges of supervision exceed 5 per cent of the duty leviable on the issue made from the brewery to various districts in the State." It has also been maintained that the charge created under Rule 22 is nothing but a further fee or additional consideration, which is neither a further duty nor a further tax. The exaction is suggestive of roots in Sections 27 and 28.

Now is the demand a further duty and hence a further tax or is it a further fee or consideration for transferring the right is the pointed question. In *Bimal Chandra Banerjee v. State of Madhya Pradesh*, [1971] 1 SCR 844 this Court had the occasion to examine some of the provisions of the Act inclusive of Sections 27 and 62 (2) (h). Under the conditions of licence of the then appellants they were required to make compulsory payment of excise duty on the quantity of liquor which they failed to take delivery of, since those conditions prescribed the minimum quantity of liquor which they had to purchase from the Government. Releasing them from such obligation, this Court ruled as follows:

"Neither s. 25 s. or 26 s. 27 or s. 62 (1) or cls. (d) and (h) of s. 62 (2) empower the rule making authority viz the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under s. 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. The legislature has levied excise duty only on those articles which come within the scope of s. 25. The rule making authori-

ty has not been conferred with any power to levy duty on any articles which do not fall within the scope of s. 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was

602

attempting to exercise a power which it did not possess.

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it."

The ratio in Banerjee's case (supra) was followed in State of M. P. v. Firm Gappulal etc., [1976] 2 SCR 1041 and then again in a case from Uttar Pradesh in Excise Commissioner, U. P. etc. etc. v. Ram Kumar etc. etc., [1976] (Supp.) 532. Now if the exaction under Rule 22 of the Brewery Rules is an exaction not authorised under Section 25 and is being made as if additional excise duty, the three cases afore-quoted would nip the demand outright. But if it is an additional payment under Section 27 as consideration for the grant of licence, or a further fee or condition of licence, as contended by the respondent-State then it may have to be sustained. It would be relevant to take note of another decision of this Court in Panna Lal & Ors. etc. etc. v. State of Rajasthan and Ors., [1976] 1 SCR 219 at this stage in which the contractual obligation of the licensee to pay the guaranteed or stipulated sum mentioned in the licence was held not to be dependent on the quantum of liquor held by him and no excise duty was held charged or chargeable on undrawn liquor under the licence. The aforesaid case cannot advance the defence of the State for there is no lumpsum payment stipulated as such in the instant licence. The licence only mentions that the licensee would be bound by the Brewery Rules. The High Court in that situation went on to lean on Sections 62 (2) (h) and 28 when discovering there was no express provision in the Act for realisation of charges in respect of pay of officers posted for control of breweries. But when we analyse the latter part of Rule 22, the following position emerges:-

- (i) the pay of all such officers shall be met by the Government; [the government owns the responsibility]
- (ii) if the annual charges do not exceed 5 per cent of the duty leviable on the issue made from the brewery to districts

603

within the State, nothing is realisable from the brewer;

- (iii) 5 per cent of the duty has been considered enough from which to reimburse the Government of the pay of such officers; and

(iv) in case the annual charges exceed 5 per cent of the duty leviable then the excess shall be realised from the brewer, i. e., to reimburse the Government for the pay of all such officers.

The excise duty collected goes to the coffers of the State. The pay of officers have to come out from coffers of the State. Five per cent of the duty leviable is assessed to meet the pay of such officers, which the Government, but for the Rule, is otherwise supposed to meet. This part of the rule is purely internal between the Government and its officers. The licensee is least concerned as to how the excise duty leviable would be appropriated. It is only in the case of a shortfall when the excess is sought to be realised from the brewer that he gets affected. Now what is this excess? It is obviously the sum which falls short of the duty leviable. In other words it is this for the brewer: "You have not lifted enough quantities of beer and sent them to distincts within the State. Thus the State has not earned enough excise duty resulting in a short fall in its 5%. That does not go to meet the annual expenses of the officers. Therefore you meet the shortfall, without lifting the goods." Therefore the shortfall partakes the same colour and content. It cannot for a moment be suggested that when there is a shortfall, the demand is as if of an "additional fee or consideration" and not additional excise duty. It is obvious from the language of the Rule that in the event of the excise duty leviable falling short of the expected five per cent to meet the pays of the officers cannot be met therefrom, the State has all the same to pay. The measure goes to recoup the State of the charges by demanding a sum equal to the duty leviable to that extent without lifting excisable articles. On this understanding arrived at the demand is hit in our view, by the ratio of Bannerjee's case, firm Gappulal's case and Ram Kumar's case (supra), and cannot be sustained. Rule 22 to that extent is ultra vires the Act and beyond the rule making power of the state.

Now with regard to the suggested wide amplitude Section 62 (2) (h)

604
and Section 28 and condition of licence, all we need to say is that though under Section 28 licences are issued on the prescribed forms and on payment of such fee as prescribed and licences containing such particulars as the State Government may direct etc. this power even though wide is yet confined within its frame and can in no event assume the power to impose or levy a tax or excise duty by means of a rule without the sanction of the Act. As we have analysed earlier, the payment asked on the contingency of events, cannot partake the character of a fee so as to come within the purview of Section 28. And if it does not the support of Section 62 (2) (h) is sterile. Seeking help from Section 27 would also be of no avail because the additional payment conceived of therein is also a payment over and above the duty leviable and as a part consideration towards the grant of any lease under Section 18. The additional consideration conceived of in Section 27 is a consideration over and above the excise duty. The way we have analysed Rule 22, the terms of Section 27 do not go to retrieve the situation.

For the aforesaid reasons, this appeal is allowed, the judgment and order of the High court of Madhya Pradesh is set aside, declaring Rule 22 to the extent it permits raising a demand, which in sum and substance is additional excise duty, without its being actually due; as ultra vires the Act and beyond the rule making power of the State. The demand raised against the appellant is therefore quashed. The appellant shall have his costs.

T.N.A.

Appeal allowed.

605

JUDIS