

CASE NO.:
Appeal (civil) 7399 of 2001

PETITIONER:
Government of Maharashtra & Ors.

RESPONDENT:
M/s Deokar's Distillery

DATE OF JUDGMENT: 10/03/2003

BENCH:
S.B. Sinha

JUDGMENT:

J U D G M E N T

W I T H

CIVIL APPEAL NO.7400 OF 2001

AND

CIVIL APPEAL NO. 1302 OF 2003

[Arising out of SLP (C) No.22142 of 2001]

S.B. SINHA, J :

I regret to be unable to persuade myself to concur with the opinion of my learned Brother Hon'ble Dr. Justice AR. Lakshmanan for whom I have the highest respect.

Concededly a citizen of India in view of a catena of decisions of this Court has no fundamental right to carry on trade or business in potable liquor. The State indisputably has a right to regulate or prohibit business in potable liquor as a beverage or otherwise keeping in view the fact that the same is dangerous and injurious to health and is, therefore, an article which is res extra commercium being inherently harmful. The State is, therefore, entitled to completely prohibit a trade or business in liquor and create monopoly either in itself or in an agency created by it or take over such activities itself. For the purpose of selling the licence it can adopt any mode with a view to maximise its revenue so long as the method adopted is not discriminatory.

However, when the State permits trade or business in potable liquor, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business. [See Khoday Distilleries Ltd. vs. State of Karnataka (1995) 1 SCC 574].

Although a citizen has no fundamental right to carry on trade or business in potable liquor, but when he is permitted to carry on such business, he would be entitled to claim equal right as against other citizens. In absence of the State imposing any prohibition or monopolizing the business, the same may be carried on by the licensee without being subjected to any discrimination. Such a right although may not be elevated to the status of a fundamental right but all the same it is a right.

The Bombay Prohibition Act, 1949 regulates the rights of the distillers in carrying on business. It is beyond any cavil that a right to carry on business in liquor being not absolute, the same would be subject to such restrictions and limitations as may be imposed by law.

Section 58A of the Act mandates that the cost of the excise supervision would be borne by the licensees.

The mode and manner of realisation of such costs, however, has been laid down only in the rules and/or the conditions of the licence. Such cost of excise supervision does not constitute 'tax' or 'fee' but is a part of the price for grant of exclusive privilege to the licensee for carrying on his business. The price required to be paid is, thus, a contractual one. The charges, thus, can be levied either prior to entering into contract or during the currency thereof.

But can it be said that by reason thereof, the State is entitled to recover the difference in the salaries of the employees after the currency of the licence is over is the primal question involved in this appeal?

By reason of the Maharashtra Civil Services (Revised Pay) Rules, 1998, a retrospective effect and retrospective operation was given to the recommendations of the Fifth Pay Revision Commission with effect from 1.1.1996. A purported circular enabling the State to recover the difference in wages was issued in December 1999 and the impugned demand notices were issued in 2000. The rules, the circulars as also the demands were indisputably made/issued after the licensing period was over.

Rule 17 of Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules, 1966 inter alia that the licensee is to pay the amount as and when a demand therefor is made. Clause (12) of Rule 17 of the rules was amended on 15.8.1974 providing that the cost of excise supervision should be paid to the State Government by the licensee annually in advance. Furthermore, condition No.2 of the licence is in the following terms :

"(2) In addition to the fee mentioned above, the licensee shall pay quarterly in advance such charges as the Government of Maharashtra (hereinafter referred to as "Government") may, from time to time, fix in this behalf towards the costs on account of salary, dearness allowance, compensatory allowance and other charges, namely, contingent expenditure, if any, and the leave and pension charges of such Prohibition and Excise staff as the Commissioner of Prohibition and Excise (hereinafter referred to as "Commissioner") may think it necessary to employ for the purpose of supervising the operations of manufacture, storage and issues of spirit by the licensee."

(Emphasis supplied)

It is, therefore, clear that by reason of the provisions of the Rules or terms of conditions of licence, the demand on account of excise supervision charges was to be made in advance.

Such charges are required to be paid by the licensee quarterly in advance. The State is entitled to fix the cost of supervision charge from time to time but the same has to be done during the currency of contract and not thereafter as there does not exist any contract to the contrary.

Interpretation of a statute, it is trite, must be made on a conjoint reading of the Act, rules made thereunder as also the terms and conditions of the licence. Section 58A of the Act does not provide for the mode and manner for recovery of the cost of excise supervision. It has been provided for in the rules as also the conditions of licence. The rule when validly made forms part of a statute. Can it be said that a statutory rule can be ignored on the ground that the same was made only for administrative purposes? Can it further be said that the conditions of the licence can be interpreted in such a manner so as to impose upon the licensee a burden which was not contemplated at the time when licence had been granted and/or during the

currency thereof ? Answer to both the questions, in my opinion, should be rendered in the negative.

This Court in Government of Andhra Pradesh vs. M/s Anabeshahi Wine and Distilleries Pvt. Ltd. [(1988) 2 SCC 25] while considering the validity of Section 28(2) of the A.P. Excise Act, 1968 which is in pari materia with Section 58 of the Bombay Prohibition Act, observed :

"A predetermined amount equivalent to or even higher than the amount which is sought to be recovered by the appellant from the respondent calculated for the entire period of the licence could have been demanded in a lump sum as price for parting with the privilege and it could not have been challenged by the respondent in view of the principle enunciated by this Court in the aforesaid cases. Simply because the demand was spread over with a view to making it just and reasonable so as to represent the actual expenditure incurred by the government to maintain the requisite excise staff at the factory premises of the respondent as contemplated by the relevant provisions of the Act and the Rules, it would not become illegal and vulnerable."

(Emphasis Supplied)

This Court, therefore, held that the amount should be predetermined at the time of entering into contract. Such an amount, however, may be spread over with a view to making it just and reasonable. This Court further observed:

"5. The perusal of the aforesaid provisions of the Act and the Rules leaves no manner of doubt that it was open to the appellant to grant the exclusive privilege of manufacturing and selling wine etc. to the respondent only provided it was, apart from making any other payment, also willing to pay the salaries and allowances referred to in the aforesaid provisions which for the sake of convenience have been described as establishment charges, and which were sought to be recovered as such under the impugned notice of demand. The respondent-Company was not under any obligation to take the licence. It was open to it to have refrained from taking any licence under the Act and the Rules if it was not willing to pay the price as required by the government for the grant of privilege to manufacture and sell intoxicants."

The option of the licensee to take or not to take a licence, would, thus depend upon the price which was to be fixed. The risk involved in the matter may be reasonably certain. A licensee before entering into a contract is entitled to know what price he has to pay for the grant of exclusive privilege or what are the risks involved in it. A price, thus, must be predetermined and cannot be redetermined and/or demanded after a period of four years of the expiry of the licence.

The rights and obligations of the parties to a contract are mutual. Both the State and the Licensee are bound by it. When a contract is a statutory one, the terms and conditions of a statute, the statutory rules would

govern the contract. (See Assistant Excise Commissioner and Others Vs. Issac Peter and Others reported in (1994) 4 SCC 104) A court of law shall not for the purpose of interpretation of the terms of the contract read the provisions of statute in such a way as a result whereof additional liability may be imposed on a party to the contract.

The reason why a manufacturer must have a fair knowledge about his liability for obtaining a licence would be that he may during the currency of the licence fix the price of liquor in such a manner so that all charges are payable by him may be passed on to the consumers. It would not be correct to contend that such costs can be recovered after the demands are made long after the contract has been worked out. It will be preposterous to suggest that the liability in respect of the increased costs of excise supervision for one licensing year can be passed on to his consumers after four years or more.

It is trite that the rights and obligations of the parties will come to an end with the cessation of the contract unless there exists a contract contrary thereto. In other words, in a case where the liability of a contracting party would extend beyond the contract period, an express stipulation in that behalf must be made in the contract itself.

A party to a statutory contract is bound to discharge his obligations in terms of the provisions of the Act, Rules or conditions of licence as they stood. He is also entitled to enforce his rights. No executive order, in my opinion, can be issued after a long time to fasten a new liability upon the licensee particularly when grant of licence for each year would result in a separate contract which may not only provide for a different price but also different terms and conditions as well as the mode and manner in which the rights of the parties thereto are required to be exercised and/ or the obligations are to be discharged; more so when one contracting party has no say therein. It is well-settled that by reason of an executive act a liability cannot be created with retrospective effect. The said rule shall squarely apply also in relation to a statutory contract. Furthermore, the statutory authority has been enjoined with a duty to follow the mode as regards recovery of the costs of excise supervision. The mode and manner thereof having been fixed, the statutory authorities ordinarily must follow the procedure laid down therefor.

State in pursuance of its welfare activities may increase the pay of its employees with retrospective effect but such burden cannot be passed on to a licensee by an unilateral act on its part. For enforcing the same, there must be a contract to the contrary.

It is one thing to say that a little deviation in the procedure may not prejudice a party to the contract but it is another thing to say that a fresh/new liability is created by an executive act by giving a complete go-by to the contractual terms.

The period of licence determines the period of contract and, thus, no recovery of any demand made in respect thereof is permissible in law.

The matter may be considered from another angle. The licence of the licensee after 1996 might not have been renewed. Licence for each year is a fresh grant and, thus, the liability of a licensee in relation to the licensing year so far as the price for grant of exclusive privilege is concerned must be held to be payable only within the year during which the contract remain in force. For the purpose of entering into a contract with the State, the licensee has to pay different price for each contract. The said Act, the rules made thereunder or the conditions of licence do not postulate that a part of the price can be demanded even after the contract comes to an end.

It may be one thing to say that the liability of the licensee had been determined pursuant to or in furtherance of a decision taken by the State in terms of the provisions of a statute or otherwise within the period during

which the licence was in force but it is another thing to say that the decision had been taken after expiry of the licence as a result whereof the liability of the licensee is determined after the period of contract is over. It may be true that under the rules or conditions of licence, the licensee is bound to comply with the provisions of the Act, rules and regulations and conditions of the licence but such undertaking and/or liability comes to an end with the cessation of contract.

In Halsbury's Laws of England, 4th Edition, Volume 41, the law is stated thus:

"677. Effect of revenue duties on price. Whoever may be liable and on whatever event for the payment of customs or excise duty or value added tax, the amount of the duty is usually passed on to the buyer as part of the price. It is the responsibility of the seller to quote an inclusive price if he wishes, and if he fails to do so he cannot later recover the duty payable as an addition to the contract price. However, where a new or increased customs or excise duty or value added tax is imposed after the making of the contract, but before delivery of the goods in the case of customs or excise duty, or supply of the goods in the case of value added tax, the duty or increase of duty, if paid by the seller, may, unless otherwise agreed, be added to the price; and conversely where a duty is repealed or reduced, if the seller has had the benefit of the alteration, the duty or reduction may be deducted from the price. As regards customs or excise duty, but not value added tax, in addition to the actual amount of the duty to be added or deducted there may also be added or deducted a sum representing the expenses incurred or saved, as the case may be, as a result of the additional or repealed duty. The amount of such expenses, if not agreed upon by the parties, is settled in default of agreement by the revenue authorities."

Section 62 of the Sale of Goods Act, 1930 reads thus :

"Exclusion of implied terms and conditions.- Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract."

A change in the amount of consideration not only must be specifically provided in the contract but the same must also undergo a strict test.

In Conway Brothers and Savage vs. Mulhern and Co. (Limited) [Vol.XVII (1900-1901) The Times Law Reports 730], sub-section (1) of Section 10 the Finance Act, 1901 interpretation whereof fell for consideration was in the following terms :

"Where any new Customs import duty or Excise duty is imposed, or where any Customs import duty or Excise duty is increased, and any goods in respect of which the duty is payable are delivered after the day on which the new or increased duty takes effect in respect of a contract

made before that day, the seller of the goods may, in the absence of agreement to the contrary, recover as an addition to the contract price a sum equal to any amount paid by him in respect of the goods on account of the new duty or the increase of duty, as the case may be."

Interpreting the said provision, as regard the defendant's plea of realisation of additional tax in future deliveries, it was held that the said Act cannot be applied retrospectively so as to impose an additional liability upon the buyer, save and except when a contrary intention is clearly manifested.

In American Commerce Company (Limited) Vs. Frederick Boehm (Limited) [Vol. XXXV 1918-19 The Times Law Reports 224] interpreting the said provision, it was observed:

"His Lordship read the section and said that as it was a c.i.f. contract there would have been no obligation on the vendors to pay any duty at all in the absence of the special provision that the sale was to be duty paid. Mr. Neilson had contended that those words meant that both the old duty and the new duty should be borne by the sellers, but he could not accept that contention. The case was one, in his opinion, to which the section directly applied, and the words "duty paid" did not constitute an agreement to the contrary within the meaning of the section.

As to the further point that the time for performance was extended by agreement, there was in law a new agreement. That was made on April 2, and the date for fixing the amount of duty payable would therefore be that day. But the increased duty did not come into force until April 23, so the fact that the time had been extended would not held the defendants. The defendants should have protected themselves by expressly providing that the sellers must pay any increased duty which might be imposed, and as they had not done so the plaintiffs must have the benefit of the statute and would have judgment, with costs."

In the instant case also the State of Maharashtra did not expressly protect themselves that the respondents must pay any amount by way of increase in wages pursuant to or in furtherance of the recommendations made by the Fifth Pay Commission with retrospective effect. Having not done so, they are not entitled to claim the same from the licensees.

In Occidental Crude Sales Inc. Vs. Latsis [1976 Vol. 2 Lloyd's LR 412] despite provision in the contract that buyer has to bear all charges, fees, dues, and taxes which would not be deemed to be new charges, it was observed:

"The seller accordingly wishes to guard against a possible loss-making situation which could be extremely serious for him. That is the purpose of cl. 11.1. However, the buyer, in his turn, could not be expected to accept an open-ended commitment to bear any increase in cost which might be imposed upon the seller or the producer of the oil. He would wish to have the choice of accepting the increase and going on with the contract or of not

accepting it and terminating the contract."

These decisions are pointers to the fact that even in relation to the increase in duty, the same, subject to an express contract, shall be operative only during the currency of the contract and not beyond the same.

In Love vs. Norman Wright (Builders), Limited [Law Reports 1944 (1) K.B. 484], while answering a question as regards levy of purchase tax under Section 27 of the Finance Act, 1940, it was observed :

"The matter really becomes clear when s.28 is considered. That section has the same object as s.10 of the Finance Act, 1901, which, dealing with the imposition of new duties, whether of customs or excise, gives the seller of goods under a contract made before the new duties were imposed the right to add the amount to the contract price, or, if the duties are abolished or decreased, allows the buyer to reduce the price by the amount of the reduced duty. So, with regard to purchase tax. No doubt in the great majority of cases the seller would pass on the burden of the tax to the buyer. Consequently, this section provides, by sub-s. I, that he may do so in respect of a contract made before the tax was imposed but which would be subject to tax when the time for the performance arrived, and sub-s.2 gives a corresponding right to the buyer to make a deduction if the tax is reduced after the contract is made. In either case the right is given only in the absence of agreement to the contrary, and in the case of a buyer only "if the seller has had the benefit of the tax not becoming chargeable "or becoming chargeable at the reduced rate." Observe that sub-s. I allowed an addition to, and sub-s.2 a reduction from, the consideration, that is, the price. Similarly, s.21, sub-s. I, which provides for the ascertainment of a wholesale value of goods in respect of which tax is chargeable, says that it is to be "the price which the goods would fetch if "no tax were chargeable in respect of the sale," thus indicating an assumption that normally the tax will be added to the purchase price by the seller."

It was further observed :

"Where an article is taxed, whether by purchase tax, customs duty or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration, though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price it is not for him to consider how it is made up, or whether the seller has included tax or not."

The said decision has been followed by this Court in Black Diamond Beverages and Another vs. Commercial Tax Officer, Central Section, Assessment Wing, Calcutta and Others [(1998) 1 SCC 458].

It is well-settled that a definite price is an essential element of a binding agreement and although a definite price need not be stated but assertion thereof either by reason of express reason or implied reason is imperative.

In para 59 of Halsbury's Laws of England, Fourth Edition, Reissue, the law is stated thus :

"59. Adjustment of contracts on changes in customs or excise duties or value added tax. Whoever may be liable and on whatever event for the payment of customs or excise duty or VAT, the amount of the duty is usually passed on to the buyer as part of the price."

An act on the part of the State to increase wages of its employees is a welfare act. When such increase takes place with retrospective effect the validity thereof can be upheld only because it is for the benefit of the employees. Such a beneficial act on the part of the State, however, would not bind a third party. An increase in wages by the State with a retrospective effect was an unilateral act on the part of the State. If, it will bear repetition to state, if it was intended to be passed on by the State to the respondent the same ought to have been the subject matter of a specific contract so as to avoid the uncertainty of the terms of contract as contemplated under Section 29 of the Indian Contract Act. The rule of construction of a contract is that if the terms of the agreement are so vague and indefinite that it may not be ascertained with reasonable certainty as regard intention of the parties, the same would not be enforceable at law. Meaning of a contract must be clear on its face. In any event, in the instant case, the contract had been worked out. Once the contract had been worked out, a fresh liability cannot be thrust upon a contracting party.

It is now accepted that the decision of the Full Bench of the Bombay High Court in Mohan Meakin's case was not brought to the notice of the Bench deciding Polychem. The parties referred to two conflicting views of the High Court. This Court applied its mind and approved the judgment rendered by the Division Bench in Bilimoria's case. There is no rule of practice or precedent that where a Bench of the High Court is faced with two conflicting views; one rendered by this Court and another by a Full Bench of the same High Court; both have to be read together. In fact both can't be so read unless the decisions are such which can be explained and the ratio of one may be held to be not applicable in the fact of the matter. In the instant case, the views of the Full Bench and this Court are diametrically opposite and thus both the decisions could not have been given effect to simultaneously by reading them together or otherwise.

For the aforementioned reasons, I am of the opinion that the impugned judgment cannot be faulted. This appeal is, therefore, dismissed.