CASE NO.:
Appeal (civil) 3195 of 2002

PETITIONER:
STATE OF WEST BENGAL & ANR.

Vs.

RESPONDENT:
MADAN MOHAN GHOSH & ORS.

DATE OF JUDGMENT: 30/04/2002

BENCH:
N. Santosh Hegde & Shivaraj V. Patil

JUDGMENT:

SANTOSH HEGDE,J.

Leave granted.

The State of West Bengal has preferred this appeal against the judgment of the Division Bench of the Calcutta High Court dated 17th of August, 2001 whereby the said High Court allowed the writ petition filed by the respondents herein and set aside the judgment of the West Bengal Taxation Tribunal and directed the State Government to consider the case of the respondents for grant of foreign liquor off-shop licences at the new sites selected by the State Government along with other eligible candidates.

The respondents are holders of licence under the West Bengal Excise Act for sale of 50 U.P. Rum and Beer issued to them by the State Government with a view to rehabilitate these persons whose business in ganja, opium and bhang came to be prohibited under the Narcotic Drugs and Psychotropic Substance Act, 1985.

The State of West Bengal notified the West Bengal Excise (Selection of Persons for Grant of License at New Sites for Retail Sale of Spirit and certain other Intoxicants other than foreign liquor on categories of licences and licence for Denatured Spirit) Order, 2000 w.e.f. 4th of February, 2000. As per this order the application of an applicant for grant of excise licence was liable to be rejected, if the applicant held any other excise licence. The respondents who sought for grant of licence for the right to sell foreign liquor (Indian made foreign liquor) were told that because of their holding of another excise licence, they were not eligible to get another licence for the sale of foreign liquor. This stand of the Government came to be questioned by certain licencee similarly situated as the respondents wherein the question of validity of the Government Order of 2000, referred to herein above, was questioned in Writ Petition No.7335(W) of 2000 which challenge came to be dismissed by the High Court upholding the validity of the Government Order of 2000. It is stated at the bar that an SLP filed against this order by the aggrieved applicants also came to be dismissed.

However, the present respondents once again sought to challenge the restrictions imposed by the Order of 2000 by way of a petition before the West Bengal Taxation Tribunal which by its order dated 12.4.2001 following the earlier order of the High Court dismissed the said challenge. Against the said order of the tribunal, the respondents preferred the writ petition wherein the High Court by the impugned order held that in view of the overriding effect of Rule 17 of the West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Spirit and Certain Other Intoxicants) Rules, 1993 (the 1993 Rules), the restrictions imposed by the Government Order of 2000 of not granting more than one excise licence would not operate as a bar against the holder of an existing excise licence from seeking the grant of another licence. It is against this order of the High Court, the above civil appeal is preferred.

Shri Mukul Rohatgi, learned Addl. Solicitor General appearing for the State of West Bengal contended that it is the policy of the State Government to restrict the concentration of excise licences in the hands of the persons who already hold another excise licence. This policy of the State Government being in consonance with the public policy and there being no fundamental right on a citizen to deal in liquor, the respondents herein could not have challenged the said Order nor could the High Court have granted relief to the respondents contrary to the said policy. He contended that the view taken by the High Court that Rule 17 of the 1993 Rules had an overriding effect on all other rules and orders made by the Government under the delegated power under the Excise Act, is wholly erroneous. It is the contention on behalf of the State Government that the Order of 2000 was issued by the State Government under the exercise of its powers conferred on it by Sections 85 and 86 of the West Bengal Excise Act which was in supersession of the earlier Government Order of 25th of April, 1991. He further argued that this Government Order though called a notification, was published in the official gazette in compliance with the requirement of Section 88 of the Excise Act, consequently even though the notification is termed as an order, the same is in fact had the effect a rule made under Sections 85 and 86 of the Excise Act. Therefore, it stands on the same footing as the Rules of 1993, that being the case the Order of 2000 being a subsequent order and having specifically provided for a condition of rejection of an application which is not covered under the Rule of 1993, could not have been held to be in effective because of a non obstante clause in Rule 17 of the 1993 Rules. Learned counsel further contended that the non obstante clause in Rule 17 refers only to rules which were in existence at the time when the said rule was brought into force and the same could not be construed as having an overriding effect for all times to come. He also pointed out that under Rule 13 of the 1993 Rules, it was still open to the State Government to issue a notification to modify the conditions prescribed for grant of licence or impose restrictions as to eligibility in addition to what was specified under Rules 10 to 13 of 1993 Rules. Even otherwise, he contended that there was no conflict between the imposition of restriction under the Order of 2000 and the provision of Rules 10 to 13 of 1993 Rules.

Shri Gopal Subramanayam, learned senior counsel appearing for the respondents, in our opinion, very fairly conceded that he does not support the view of the High Court that the non obstante clause of Rule 17 could operate against all future enactments made by the State Government under the delegated power vested on it in the excise statute. He, however, very strenuously contended under Rules 10 to 13 of the 1993 Rules, the respondents had a right to obtain a licence even if they had another

excise licence under the very same Act. That right which is given to them under the Rules could not have been taken away by an executive order issued by the Government because an executive order cannot override the Rules made by the State. Therefore, he contends that imposition of a restriction which is not found in the 1993 Rules by the order of 2000 could not have been made by the State Government.

Having heard the learned counsel, we are of the opinion that we need not dilate very much on the finding arrived at by the High Court in regard to the overriding power of Rule 17 of 1993 Rules vis-a-vis the order of 2000. We agree with the learned Addl. Solicitor General that the language of Rule 17 of the 1993 Rules cannot be construed so as to mean that all future rules and notifications will be subject to such a non obstante clause.

Be that as it may, we will have to address ourselves to the argument advanced on behalf of the respondents herein, that a right conferred on them under a subordinate legislation cannot be curtailed by an executive order. This argument, in our opinion, suffers from a basic fallacy which is founded on the fact that 2000 Order indicates it to be an executive order simpliciter. In our opinion, the words used in the title of an enactment cannot be a conclusive fact to ascertain the legislative nature of such enactment. It is undisputed before us that under Sections 85 and 86 the Government had the power to make a legislation of the nature, we now see in the Order of 2000. The said order specifically derives the power of the State Government under Sections 85 and 86 of the Excise Act. It is not the case of the respondents that procedures required for the purpose of enacting this order have not been followed by the State Government. The contents of the order are within the delegated power of the Government, the order has been notified in the official gazette as required under Section 88 of the Excise Act. Therefore, the State Government has followed the necessary procedure required to make a rule or an order under the powers vested in it as a delegate and within the scope of its rule making power. Taking into consideration the object of the order, the field that it covers reflecting policy of the State Government which is in conformity with the constitutional obligation, we think that the Order of 2000 though termed as an order for all purposes has the same force as a rule which the State Government is empowered to make under Sections 85 and 86. Therefore, in our opinion, the argument of the learned counsel for the respondents that the Order of 2000 is an executive order being subordinate to a statutory rule could not have taken away the right that is available to an applicant under Rules 10 to 13 of 1993 Rules cannot be sustained. On the contrary, we are of the considered opinion by the Order of 2000, the State Government has only imposed an additional restriction to what is found in Rules 11 and 12 of 1993 Rules. As a matter of fact, if we peruse Rule 12 of 1993 Rules, the restrictions imposed therein are of a particular nature and additional restrictions now imposed under the Order of 2000 does not, in any manner, run counter to those restrictions but only supplements them and the same can very well co-exist with the object of 1993 Rules. At this stage, we must also note that the Rules 11 and 12 of 1993 Rules do not create any vested right on the respondents or other applicants, it only prescribes the eligibility for applying for the licences. Therefore, a question of taking away the vested right by a subsequent enactment in the form of the Order of 2000 does not arise at all.

Apart from the above, we are also of the view that putting a restriction on a number of licences that could be held by a person to deal in a trade involving intoxicants is in conformity with the public policy as also the constitutional objectives.

For the above reasons, we are of the opinion, that the High Court fell in error in allowing the writ petition of the respondents.

However, we must note that the respondents herein having lost their trade because of an enactment which prohibited the dealings in ganja opium etc. were considered as a class by the State Government, who ought to be granted on compassionate ground, a particular type of excise licence. These respondents are now wanting to improve their business by taking out a licence which, in their opinion, is more lucrative but the bar of holding more than one licence prevents them from acquiring this new licence. Before the final hearing, we had called upon the respondents to say before this Court whether they are willing to surrender their existing licence in preference to the licence which they are now seeking. They have stated that they are willing to surrender their existing licences for the sake of a new licence they now seek. In these circumstances and in view of the fact that these respondents have lost their earlier business, we think it appropriate that we should direct the State Government to consider the applications of these respondents for the grant of licences for the sale of foreign liquor as sought for by them, provided these respondents surrendered their existing excise licences and approach the concerned excise authorities for the grant of new licence. If this is done and if the respondents are otherwise not disqualified, we direct the State Government to consider their application on a preferential basis. If for any reason, these respondents cannot be granted the new licence sought for by them, then the appellants shall restore the surrendered licence. The above concession given to the respondents will not, in any manner, entitle them to claim any other exemption from the requirement of the Excise Act.

For the reasons stated above, the order of the High Court is set aside. This appeal is allowed with the directions made herein above.

J.
(N.Santosh Hegde)

.J.
April 30, 2002. (Shivaraj V.Patil)

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