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Dasappa and Sons Vs. State of Karnataka

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Court : Karnataka

Decided On : May-25-1988

Reported in : ILR1988KAR1710; 1988(1)KarLJ574

Judge : Prem Chand Jain, C.J. and Shivashankar Bhat, J.

Acts : Karnataka Excise Act, 1965 - Sections 17, 71 and 71(2); Karnataka Excise Licenses (General Conditions) Rules, 1967 - Rule 15

Appeal No. : W.A. Nos. 1708 and 1709 of 1987

Appellant : Dasappa and Sons

Respondent : State of Karnataka

Advocate for Def. : M.R. Achar, Govt. Adv.

Advocate for Pet/Ap. : B.P. Holla and ;Madhusudan R. Naik, Advs.

Disposition : Appeal dismissed

Judgement :

Prem Chand Jain, J.

1. These appeals would be disposed of by this common Judgment as the point of law urged before us in both these appeals is common.

2. The appellants are Excise Contractors. They are aggrieved by the amendment made to Rule 15 of the Karnataka Excise Licences (General Conditions) Rules, 1967, (herein after referred to as General Conditions Rules). The amendment is effected by a notification gazetted on 25-6-1983, which came into effect from 1st July 1983. Prior to the coming into force of the amendment to Rule 15, the rate of interest payable for rent not paid before the stipulated date, viz., 10th of a month, was 6 1/4%. By the amendment effected, the rate of interest has been raised to 18% per annum. The appellants have challenged the amendment by filing Writ Petitions. Their petitions came up for hearing along with the petitions of the other Excise Contractors, and all the petitions were dismissed by a learned Single Judge of this Court, vide his order dated 16th of July 1987, : ILR 1987 KAR2344 . Several appeals were filed which have already been disposed of vide our Judgment dated 1st March 1988 in Writ Appeals 1249 to 1369/87 and connected appeals, : ILR 1988 KAR1695 State of Karnataka v. Anjanappa & Co. These two appeals too are covered by that Judgment of ours. But, Mr. B.P. Holla, learned Counsel for appellants, raised two additional points, which shall be dealt with by us in these appeals.

3. Points raised by Mr. B.P. Holla -

(i) There is no competence in the State Government to levy interest because the Karnataka Excise Act, 1965 (hereinafter referred to as the Act), does not provide for the levy of interest and the relevant section under which Rules are made also does not provide for levying interest; and

(ii) Sufficient time was not given to the contractors to make their representation to the draft rules.

4. Point No. 1 :

As is evident, the main and the real focus of the controversy is the competence of the Rule making authority to levy interest. Section 71 of the Act gives powers to make Rules, and its relevant provisions read as under :-

'71. POWER TO MAKE RULES : (1) The State Government may, by notification and after previous publication, make Rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing provision, the State Government may make Rules --

xxx xxx xxxxxx xxx xxx(h) prescribing the authority by which the form in which and the terms and conditions on and subject to which any licence or permit shall be granted, and may, by such Rules, among other matters, -

(i) xxx xxx xxx(ii) prescribe the scale of fees, or the manner of fixing the fees payable in respect of any lease, licence or permit, or the storing of any excisable article.'

Section 17 of the Act to which reference was made by the learned State Counsel, in support of his contention, may also be noticed :-

'17. POWER TO GRANT LEASE OF RIGHT TO MANUFACTURE ETC :

(1) The State Government may lease to any person, on such conditions and for such period as it may think fit, the exclusive or other right -

(a) of manufacturing or supplying by wholesale or of both or

(b) of selling by wholesale or by retail, or

(c) of manufacturing or supply by wholesale, or of both and of selling by retail, any Indian liquor or intoxicating drug within any specified area.

(1A) No lease granted under Sub-section (1) shall be transferred.

Provided that the State Government may grant permission to the lessee to transfer the lease or a part thereof, in favour of any other person subject to such terms and conditions (including the transferee entering into an agreement of lease with the State Government), as may be prescribed...'

5. Before noticing the respective contentions, it is also necessary to make reference to certain Rules. The Karnataka Excise (Lease of the Right of Retail

Vend of Liquors) Rules, 1969, (herein after referred to as 'Lease Rules') have been made in exercise of the power under Section 71(1) of the Act. Rule 3 of these Rules provides that the right of retail vend of liquors may be disposed of by tender, by auction, by tender-cum-auction or in any other manner as the State Government may, by order, specify ; Rule 5 provides the manner of submission of tenders ; Rule 6 states that a tender submitted jointly by more than one person shall be rejected, unless the tender is by a firm registered under the Partnership Act : Rule 7 prescribes disqualification of persons from submitting tenders; Rule 9 makes a provision for the consideration of tenders; Rules 10 and 11 prescribe procedure for holding auction; under Rule 15 the State Government passes an order confirming the disposal of the right to retail vend of liquor; under Rule 16 the person whose tender, offer or bid is confirmed under Rule 15 is required to enter into an agreement of lease with the State Government incorporating the terms and conditions under which the right of retail vend of liquor is leased in his favour; Rule 17 requires the person in whose favour the disposal of the right of retail vend of liquor is confirmed, to make an application for a licence; Rule 18 provides penalty where a person fails to comply with Rules 16 and 17.

6. The General Conditions Rules which have also been made in exercise of the power under Section 71(1) of the Act, provide General Conditions which are required to be followed by the licensee, viz., under Rule 5 he has to get his shop approved ; under Rule 6 he is required to affix a sign board; under Rule 9 employment of women and certain others is prohibited ; under Rule 10 liquor is not to be sold to the categories of persons specified therein; under Rule 10A all shops shall remain closed on Gandhi Jayanthi Day ; under Rule 13 the customers shall not be allowed to stay at night; Rule 15 which is the subject matter of controversy provides for payment of rent etc. and reads thus :-

'15. PAYMENT OF RENT ETC. - (1) The rent payable to Government in respect of the Shop or shops shall be credited by the licensee in the Government Taluk or District Treasury wherein the shop or shops is/are situated. Every months rents shall be credited on or before the tenth of that month or the following working day, if tenth happens to be a General Holiday, without interest and on or before twenty fifth or the following working day if the twenty fifth happens to be a general holiday,

with interest at eighteen percent per annum. The interest shall be charged from the eleventh day of that month on the outstanding amount as long as it remains undischarged irrespective of the expiry of the lease period or the termination of lease. If the rent for any month is not credited together with the interest before the end of the months or before the expiry of the time granted under Sub-rule (1-A), the lease shall be determined and licences shall be cancelled and the right to vend liquor shall be disposed of afresh.

(1-A) The Deputy Commissioner may, on an application made to him in this behalf, if satisfied for reasons to be recorded in writing that the monthly rent could not be paid before the end of the month due to circumstances beyond the control of licensee, grant time upto and inclusive of the tenth day of the succeeding month. If such rent together with interest due is not paid within the time so granted, the Deputy Commissioner may. on an application made to him in this behalf and after obtaining adequate security in the form of irrevocable bank guarantee of a Scheduled Bank for an amount equal to the amount of one month's rent together with interest due for the full 'month, grant further time till the end of such succeeding month.

(1-B) The Excise Commissioner may, by order in writing, grant time fora further period not exceeding fifteen days, if, on application made to him in this behalf through the Deputy Commissioner he is satisfied that the monthly rent could not be paid for reasons beyond the control of the licensee.

(1-C) If the rent for any month is not paid on or before the date specified in Sub-rule (1) or before the expiry of the time granted under Sub-rule (1-A) or under Sub-rule (1-B), the lease shall be determined and the licence shall be cancelled and the right to vend liquor shall be disposed afresh in such manner as the State Government may direct and such disposal shall be at the risk of the defaulter who shall be liable for all losses that may be sustained by the State Government and the Deputy Commissioners may forfeit the deposits of the defaulter either in full or in part with the approval of the Excise Commissioner.

(2) The lease shall be determined and the licence cancelled in the case of tappings or the trees without payment of duty thereof on behalf of the licensee and

tree tax and tree rent is not remitted immediately, after they are booked for infraction.

(3) The Superintendent of Excise may stop the issue of the allotted liquor or trees for the realisation of rent, tree tax and tree rent.

(4) If the rent, tree tax and tree rent are not credited even in respect of any one shop of the group of shops of the licensee, the lease shall be determined and the licence cancelled and the group of shops may be put to reauction.

(5) The advance rent deposited by the licensee before the commencement of the lease shall be adjusted towards the rent of the last month of the lease period.'

An analysis of Rule 15 shows that it provides detailed procedure for making payment of rent etc., Under Sub-rule (1) rent which is payable to Government is required to be credited by the licensee before the tenth of that month or the following day if the tenth happens to be the General Holiday, without interest. In case the licensee makes a default and makes payment upto the twenty fifth day of that month or the following day if twenty fifth happens to be holiday, the licensee shall pay interest at the rate of 18 per cent per annum from the eleventh day of that month on the outstanding amount as long as it remains undischarged irrespective of the expiry of the lease period or the termination of lease. It is further provided that if the rent for any month is not credited together with interest before the end of the month or before the expiry of the time granted under Sub-rule (1-A), the lease is liable to be determined and cancelled and the authority has a right to dispose of the right to vend liquor afresh. Thus under the General Conditions Rules, the Government has imposed certain conditions on the licensees which they are required to observe.

7. It may be observed at the outset that Mr. Holla, learned Counsel, did not challenge the competence of the State to make Rules in regard to the payment of rent; rather it was conceded before the learned Single Judge that the Government has power to make Rules in that regard. The case sought to be made out before the learned Single Judge was that the rent does not include interest charged thereon. In other words, the short point urged was that the State Government had

no competency to levy interest by enacting a rule in that regard. The learned Single Judge negatived the contention by observing that liberal construction of Sub-clause (ii) of Clause (h) of Subsection (2) of Section 71 of the Act provides for the making of Rules in respect of collection of rents, fixation of fees and all ancillary powers in regard to levy and collection of fee or rent so fixed and that therefore the State Government does not lack competence to levy interest.

8. Before us, Mr. Holla contended that providing of interest in Rule 15 can be sustained only if power to do so is traced to Sub-clause (ii) of Clause (h) of Sub-section (2) of Section 71, that under that provision only the scale of fees or the manner of fixing the fees can be provided, that the concept of interest is entirely different from fees and that under that provision no Rule could be framed permitting imposition and charging of interest on the unpaid amount. On the other hand, it was submitted by Mr. Achar that Rule 15 does not draw its sustenance from Sub-clause (ii) of Clause (h), that General Conditions Rules have been framed to carry out the purposes of the Act, that the Government under Section 17 has power to lease out to any person on such conditions as it may prescribe, that the appellants have executed the lease deeds under the Lease Rules, that if they had not executed the lease deed they could not have obtained the licence and that having agreed to pay interest on the unpaid amounts, the appellants are estopped from challenging the legality and validity of the Rule.

9. We have given our thoughtful consideration to the entire matter. The Lease Rules which have been made in exercise of the power under Section 71(1), prescribe a complete procedure for the auction of the vend, the execution of the lease and the issuance of licence. The appellants have not challenged the validity of any of the Rules made under the Lease Rules. Similarly, the General Conditions Rules have been framed under the same provision. These Rules impose certain conditions which are required to be observed by the licensee. Section 17 of the Act gives power to the State Government to grant lease on such terms and conditions as it may think fit. Section 71 gives power to the State Government to make Rules to carry out the purposes of the Act. When the Act itself gives power to the State Government to impose such conditions as it may think fit, we fail to understand as to how a condition in respect of payment of interest on outstanding

amount would be invalid. It appears that the learned Counsel is building his case on the provisions of Sub-clause (ii) of Clause (h) of Sub-section (2) of Section 71. According to him, interest does not fall within the definition of 'fees'. The Rules could be made only to prescribe scale of fees or the manner of fixing the fees payable in respect of any lease, licence or permit or the storing of any excisable article. But, in our view, that Sub-clause has no applicability at all. The Government by providing payment of interest is not providing any fees nor is it imposing any levy. Rule 15 provides the procedure for the payment of rent etc., and as to what would happen in the event of default. The Rule in essence and substance is of a regulatory character meant to safeguard the interest of the revenue. The Rule by making a provision for the payment of interest on the unpaid amount only ensures payment of rent etc., within the stipulated period.

10. Further, the General Conditions Rules have been framed with a view to ensure the proper and orderly functioning of the licences. These Rules apply to all licenses issued under the Act for sale of liquors and every such licence shall be deemed to include the condition prescribed by these Rules as general conditions. Clause (h) of Sub-section (2) of Section 71 of the Act gives power to the State Government to specify the terms and conditions on and subject to which any licence or permit shall be granted. The Government in Rule 15 has prescribed a condition that on the defaulted amount of rent payable, the defaulter shall be liable to pay interest at 18 per cent. The source of power for framing the Rules is drawn from Clause (h) of Sub-section (2) and Section 71(1) of Section 71 of the Act and as earlier observed Sub-clause (ii) of Clause (h) of Sub-section (2) of Section 71 has no applicability at all nor are its provisions attracted in any manner.

11. It has been recognised for long that trade in liquor stood on a different footing from other trades and the power of the State to prohibit or regulate the trading was absolute. In this regard the Supreme Court, in NASHIRWAR etc v. STATE OF MADHYA PRADESH & OTHERS, AIR 1975 SC 36 held :-

'There are three principal reasons to hold that there is no fundamental right of citizens to carry on trade or to do business in liquor. First, there is the police power of the State to enforce public morality to prohibit trades in noxious or dangerous

goods. Second, there is power of the State to enforce an absolute prohibition of manufacture or sale of intoxicating liquor. Article 47 states that the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. Third, the history of excise law shows that the State has the exclusive right or privilege of manufacture or sale of liquor.

Trade in liquor has historically stood on a different - footing from other trades. Restrictions which are not permissible in other trades are lawful and reasonable so far as the trade in liquor is concerned. That is why even prohibition of the trade in liquor is not only permissible but is also reasonable. The reasons are public morality, public interest and harmful and dangerous character of the liquor. The State possesses the right of complete control over all aspects of intoxicants, viz., manufacture, collection, sale and consumption. The State has exclusive right to manufacture and sell liquor and to sell the said right in order to raise revenue. That is the view of this Court in Bharucha's case : [1954]1SCR873 and Jaiswal's case : [1972]3SCR784 . The nature of the trade is such that the State confers the right to vend liquor by framing out either in auction or on private treaty. Rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government.'

From the aforesaid observation it is quite clear that all kinds of right to deal in intoxicants basically belong to the State and that a licencee gets a right to deal in liquor in the manner and to the extent permitted by the licence. It is also equally clear that rental is the consideration for the privilege granted by the Government for manufacturing or vending liquor. Rental is neither a tax nor an excise duty. Rental is the consideration for the agreement for grant of privilege by the Government. The Government has granted privilege under certain conditions one of which is that the delayed payment shall be liable to 18 per cent interest. This condition has been accepted by the appellants. We fail to understand as to how the appellants can reasonably urge that the provision for charging interest in Rule 15 is ultra vires the Rule making power of the Government. As has been observed by the learned single Judge, a person has right to charge interest on his money,

the use of which he has been deprived of unlawfully. By enacting the Rule, the Government has made it clear to the licensee that if payment is not made within the specified time, he shall be liable to pay interest on the defaulted amount. In our considered view, the General Conditions Rules have been validly made in exercise of the power under Section 71(1) and (2)(h) of the Act and they are not ultra vires of Rule making power of the Government.

12. The matter can be looked at from another angle. The appellants have accepted the condition that they shall pay 18 per cent interest on the delayed payment. The licence has been granted to the appellants subject to that condition. The appellants have also executed a lease deed in which condition No. 2 of Schedule-III expressly stipulates that the appellants are liable to pay interest at 18% per annum on the belated payment. In our view, in the wake of the condition in the licence and condition No. 2 of Schedule -III of the lease deed, the appellants are estopped from challenging the validity of Rule 15 which permits charging of interest at 18%. Faced with this situation Mr. B.P. Holla, learned Counsel, sought to argue that levy of tax, if proved, is beyond the competence of the Rule making authority, and the contract entered into between the parties would not validate such a levy. The precise contention of the learned Counsel for the appellants was that if the appellants are able to prove that the levy of tax is beyond the competence of the Rule making authority, the contract entered into between the parties would not, by itself, be a ground to estop them from challenging the validity of such a levy. In support of his contention, the learned Counsel placed reliance on a Division Bench Judgment of this Court in D. CAWASJI & CO. v. STATE OF MYSORE, 1968(1) Mys. L.J. 78.

13. On giving our thoughtful consideration to the entire matter, we find no substance in the contention of the learned Counsel for the appellants especially when in the earlier part of the Judgment we have recorded a finding that provision for charging interest on the belated payment in Rule 15 is not ultra vires of Rule making power of the Government

13. Mr. Holla had strongly relied on the observations of the Bench in D. Cawasji & Co.'s case, 1968(1) Mys. L.J. 78 which read as under:

'Disposal of the privilege to vend liquor is not purely a matter of contract. It is governed by the statute namely, the Mysore Excise Act. Powers and obligations of the State and rights and liabilities of the licensees, are governed by the Statute and Rules thereunder. Further, Article 265 of the Constitution declares that no tax shall be levied or collected except by authority of law. A tax cannot be levied or collected by the State under a contract. A contract to pay a tax not levied by the authority of law, is inconsistent with Article 265 of the Constitution, and is in the same position as a contract which violates the Constitutional guarantee afforded by Article 411. Hence the mere fact that before obtaining licenses to sell liquor, the petitioners had executed in favour of the State, contracts covenanting to pay Education Cess on certain items of excise revenue, would not render levy on Education Cess valid if such levy is without the authority of law.

However, the learned Special Government Pleader argued that there was no legal impediment to the petitioners agreeing to pay to the State certain additional amounts or certain percentage over and above their respective bid amounts or amounts tendered by them to obtain the exclusive privilege of vending liquor, and that the covenant to pay Education Cess can be construed as covenant to pay certain amounts or a certain percentage over and above bid or tender amount. But what the petitioners had covenanted to pay in the contracts entered with the State, was Education Cess and not any such amounts or percentage of bid or tender amounts other than Education Cess. If what they had undertaken to pay by way of Education Cess, is found to be tax without the authority of law, such undertaking is void, and cannot be treated as an undertaking to pay a specified sum or specified per centage of bid or tender amounts.'

A little scrutiny of the facts of the aforesaid case on which reliance is placed, clearly reveals that the Judgment is not helpful to the learned Counsel for the appellants. From the aforesaid observations, it is evident that what is being held is that the tax cannot be levied or collected by the State under a contract and hence the licensees could question the levy of Education Cess or shop rent, tree tax and tree rent in spite of their having been agreed to pay Education Cess on those items. In the instant case no tax is being collected or levied under a contract. Under the lease, the appellants have covenanted to pay interest on the belated

payments. The licensees are required to make payments within a specified period. They cannot legally withhold the payment on those amounts beyond the time specified under the Rule except for some sufficient reasons. As is clear the learned Government Pleader had raised a contention in D. Cawasji & Co.,'s case, 1968(1) Mys. L.J. 78 that there was no legal impediment to the party contracting to pay to the State certain additional amounts or certain per centage over and above the respective bid amounts or amounts tendered by them to obtain the exclusive privilege of vending liquor. The learned Judges have accepted this contention of the learned Government Pleader, but did not agree that the amounts agreed to be paid were amounts as percentage of bid or tender amounts other than Education Cess. In view of this, we find that the Judgment in D. Cawasji & Co.,'s case, 1968(1) Mys. L.J. 78 is not at all helpful to the appellants. As the appellants have themselves agreed to pay interest on the amount which remained unpaid, they are bound to pay the same and are not entitled to challenge its realisation.

Moreover, the Rules were placed before the Legislature and have been approved without any modification, in other words, the seal of the Legislature which has delegated its power of making the Rules to the State Government has been put on these Rules. Further, Rule 15 has been in vogue since 1967 making a provision for charging interest on the unpaid amount. By the amendment in the year 1983, only the rate of interest has been raised. A Rule which has been in vogue unchallenged for the last 21 years and the fact that the Legislature has put its seal to the amendment are factors which deserve to be taken into consideration for upholding the validity of the Rule and in arriving at the conclusion that the State Government was competent to make such a Rule.

16. POINT NO. 2 : On this point, a half-hearted argument was raised by Mr. B.P. Holla, learned Counsel, that the Rules are invalid as sufficient time was not given to the contractors to make their representation to the draft Rules. This submission of the learned Counsel is liable to be rejected in view of the averment made by the State in para-3 of their statement of objections which reads as under :-

'3. The respondents in their notification dated 18-11-1982 published draft Rules under the Karnataka Excise Licenses (General Conditions) Amendment Rules,

1967 wherein, it is stated that the interest shall be enhanced from 6 1/4% to 18%. The respondents after receiving objections from the members of the public and after considering duly the objections, by notification dated 25-6-1983, amended the said Rule and enhanced the interest from 6 1/4% to 18% with effect from 1-7-1983. As stated herein above, sufficient time was given for the petitioners to file their objections to the draft Rules published earlier and the authorities have duly considered the objections received and have amended the Rules. As such, the petitioners cannot possibly have any grievance against the mode of amendment to Rule 15.'

No other point arises for consideration.

For the reasons recorded above, these appeals fail and are dismissed, but without any order as to costs.

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