

C. Vadiappan and ors. Vs. the State of Tamil Nadu, Represented by Its Commissioner and Secretary, Prohibition and Excise Department and ors.

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Court : Chennai

Decided On : Sep-02-1983

Reported in : (1984)1MLJ96

Appellant : C. Vadiappan and ors.

Respondent : The State of Tamil Nadu, Represented by Its Commissioner and Secretary, Prohibition and Excise Depar

Advocate for Pet/Ap. : Mr. G. Ramaswami

Judgement :

Ramanujam, J.

1. In all these writ petitions, the petitioners have challenged the constitutional validity of the Tamil Nadu Ordinance IV of 1983 which seeks to amend the Tamil Nadu Prohibition Act, 3937 in certain respects.

2. All the petitioners herein are persons who had been granted the privilege of supplying by wholesale arrack or liquor under Section 17-C of the Prohibition Act read with Rule 6 of the Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 from 16th July, 1981 till 31st March, 1983. They had applied for renewal of their licences in time. Since no orders had been passed on their applications for

renewal, the period of their licences should be deemed to have been extended for a period of two months from the date of expiry, i. e., till 31st May, 1983.

3. At that stage, the Tamil Nadu Ordinance IV of 1983 was promulgated by the Governor on 27th May, 1983 amending Section 17-C by inserting a Sub-section (1-A) and also inserting a new section, namely, Section 22-B in the Prohibition Act. Section 17-C as it stood before the amendment, enabled the State Government to grant to any person or persons on such conditions and for such period as may be prescribed the exclusive or other privilege of manufacturing or supplying by wholesale any arrack or liquor other than foreign liquor within any local area. This section has been amended under Section 2 of the Ordinance deleting the expression 'or supplying by wholesale' both in Clauses (a) and (c) of Section 17-C. The Ordinance also introduced a Sub-section (1-A) to Section 17-C and that sub-section granted the exclusive privilege of supplying by wholesale arrack and Indian-made foreign spirits for the whole of the State of Tamil Nadu to the Tamil Nadu State Marketing Corporation Limited, which is a Corporation wholly owned and controlled by the State Government and no other person shall be entitled to any privilege of supplying by wholesale arrack or Indian-made foreign spirits for the whole or any part of the State. Thus, while Section 17-C before its amendment enabled the State Government to grant privilege of supplying by wholesale arrack or Indian-made foreign spirits, to any person, after the amendment, that privilege cannot be given to any private individual and the said privilege exclusively vested with the Tamil Nadu State Marketing Corporation Limited. The Ordinance also introduced a new Section 22-B in the Prohibition Act and that section provided that all licences granted in respect of any privilege of supplying by wholesale arrack or Indian-made foreign liquor shall cease to be valid on the expiry of 31st May, 1983 notwithstanding any judgment, decree or order of any Court. The Ordinance has also repealed the Tamil Nadu Indian-made Foreign Spirits (Supply by Wholesale) Rules, 1981 and the Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 with effect from the 1st day of June, 1983. Clause (d) of Section 22-B enabled the State Government to take over the entire stock of arrack of Indian-made foreign spirits as on the 1st day of June, 1983 in the possession of any holder of a licence which has ceased to be valid after 1st June, 1983, on payment of price. Clause (e) of Section 22-B enabled the State Government as an interim measure, till the

Tamil Nadu State Marketing Corporation Limited commences the supply by wholesale arrack or Indian-made foreign liquor to retail dealers, to supply to the retail dealers directly through the officers of the State Government. The effect of the Ordinance was that the Licences held by the petitioners which expired on 31st May, 1983 could not be renewed as the privilege of wholesale supply of arrack and Indian-made foreign spirits has been conferred exclusively on the Tamil Nadu State Marketing Corporation.

4. The petitioners have challenged the validity of the provisions of the said Ordinance on the following grounds : (1) that the provisions of the Ordinance are arbitrary as well as discriminatory offending Article 14 of the Constitution; (2) that the issuance of an Ordinance is a mala fide act on the part of the Government; (3) that the Government are barred by the principle of promissory estoppel not to interfere with the petitioners* right to get a renewal of their licences ; and (4) that the Ordinance offends Article 300-A of the Constitution,

5. The complaint of violation of Article 14 of the Constitution is based on a two-fold submission. One is that Section 17-C dealt with the grant of privilege to manufacture as well as wholesale suppliers of arrack and Indian-made foreign spirits, that the same licence fee is charged for the grant of both the privileges, that by the impugned Ordinance, the Government has picked out for abolition the privileges granted only in relation to the wholesale supply without affecting the privileges of manufacturers who are similarly situated and therefore, the picking out of one of the two similar categories of manufacturers as well as wholesalers for a hostile treatment is illegal, is and is violative of Article 14 of the Constitution. Secondly, the provisions of the Ordinance are claimed to violate Article 14 of the Constitution, in that, the right of renewal of the privilege or the licence which is more or less automatic on the wholesalers paying the requisite licence fee and who could not be denied the renewal except on the ground of violation of the provisions of the Act or the conditions of the licence as contemplated by Rule 10 (c) of the Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 is arbitrary as no opportunity has been given to the petitioners who are the existing licence-holders, to put forward their case. It is not possible to accept the petitioners' contention that the provisions of the Act are violative of Article 14 either on the ground of

arbitrariness or on the ground of hostile discrimination. As already stated, the main contention is that as between two similar categories of licences, namely, manufactures and wholesalers who are similarly situated, the manufacturers have been left out and only the wholesalers have been discriminated against. However, a perusal of the preamble to the Ordinance shows that the Government originally considered the question of taking over from private sector to public sector both the wholesale and manufacture of arrack and Indian-made foreign spirits, and that suggestion had also been made both in the Legislature and in the Press that the manufacture and wholesale supply of arrack and of Indian-made foreign spirits should be taken over by the Government. But the Commissioner of Prohibition and Excise had suggested that the Government may consider the question of taking over, from the private sector to the public sector, only the business of supplying, by wholesale, arrack and Indian made foreign spirits with a view to augment the revenue of the Government leaving out the business of manufacture for the present and the Government accepting the said suggestion had taken a policy decision that in public interest, the exclusive privilege of supplying, by wholesale, arrack and Indian-made foreign spirits for the whole of the State of Tamil Nadu shall be granted only to a Corporation wholly owned and controlled by the State Government, and that all the licences granted in respect of the said privilege to private individuals shall expire on the 31st May, 1983. From this, it is clear that the Government originally contemplated the taken over from the private sector to the public sector both the manufacture and the wholesale supply of arrack and Indian-made foreign spirits, but, after due consideration, it has taken over from the private sector to the public sector only the wholesale supply of arrack and Indian-made foreign liquor for the present leaving the question of taking over of the manufacture of arrack and Indian-made foreign spirits to be considered later. As a matter of fact, the Report-of the Commissioner, Prohibition and Excise which has been referred to in the preamble which is found at page 11 of the file relating to G.O. No. 637, Ms. (Prohibition and Excise), dated 22nd July, 1983, shows that he suggested that the taking over of the manufacture of arrack and Indian-made foreign spirits cannot be done immediately without building up the necessary infrastructure and technical knowhow, and that therefore, the manufacture by private agencies may continue for the present. The reasons given by him are

contained in paragraph 3 of his letter which is as follows:

Manufacture of IMFS and arrack call for substantial investment by way of capital, plant and machinery and buildings and considerable amount of technical know-how. Three manufacturers were recently given privilege of manufacture of IMFS and two of them have been given licences. No arrack blending units were licenced in 1981. The existing licensees of arrack blending units have also made substantial investments. If the Government were to take over the blending unit business themselves, or through any agency in the co-operative or the public sector, time will be needed for the Government or such agency to build up the necessary infrastructure and technical know-how. It cannot be done immediately without causing dislocation in the supply of arrack to the retail points and loss of excise and sales tax revenue. This may also give room for illicit arrack to flourish. On an overall view of this situation, I consider that the present system of licensing arrack blending units and IMFS manufacture may continue in the private sector for the present.

It is this suggestion that the Government had considered and accepted while taking a decision on the question of taking over the supply by wholesale of arrack and Indian-made foreign spirits. Therefore, it cannot be said that the Government has arbitrarily excluded the manufacturing concerns and merely picked out the wholesalers for a discriminatory action. It appears that though originally the Government contemplated the taking over both the manufacture as well as the supply by wholesale, considering certain relative factors, they postponed the taking over of the manufacture for the present and concentrated their attention only to the supply by wholesale. It is also seen that the taking over of the manufacturing activity involves considerable finance and also the availability of technical know-how and other infrastructural facilities. The Government had therefore felt that having regard to the financial and other facilities available with them at present, they cannot take over the manufacture of arrack from the private sector to the public sector immediately. It cannot, therefore, be said that the exclusion of the manufacturers from the operation of the Ordinance is discriminatory. As a matter of fact, the above extract from the letter, dated 6th May, 1983 of the Commissioner for Prohibition and Excise will clearly indicate that

the activity of manufacture and the activity of wholesale supply stand on a different footing and that they cannot be equated. We are not inclined to agree with Mr. G. Ramaswami, learned Counsel for the petitioners that unless the Government also takes over the manufacture of arrack and Indian-made foreign liquor, they cannot take over the wholesale supply of the same as both of them stand on the same footing. It cannot be said that the Government can take over both manufacture and wholesale supply or none at all. Having regard to the limited resources available with the Government, the Government may choose to take over the one leaving out the other long as there are germane reasons for not taking over the manufacture the petitioners cannot be taken to have been discriminated.

6. There is no substance in the allegation made by the petitioner that the taking away of the right of renewal which was available to them under Rule 10 of the Tamil Nadu Arrack (Supply by Wholesale) Rules without giving them opportunity, is arbitrary. It is no doubt true that Rule 10 of the said Rules contemplated the renewal of the licence granted to the petitioner except on the ground of violation of the provision of the Act or the conditions of the licence, and that any refusal to renew the licence should be preceded by an opportunity of hearing being given to the licensee and the reasons for refusal being assigned. Such a right of renewal can be claimed by the petitioners only so long as Rule 10 rules the field. But the Ordinance has repealed the Tamil Nadu Arrack (Supply by Wholesale) Rules 1981 and it cannot be said that the legislative power does not extend to the repealing of the said Rules. We are entirely in agreement with the contention advanced by the learned Advocate-General that the manufactures and wholesale suppliers are two separate categories with different attributes and different incidents, that they are governed by two different sets of Rules, one Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 and the other, Tamil Nadu Arrack Manufacture) Rules, 1981, and that they cannot claim to belong to the same category so that any classification between them can be attacked as being discriminatory or arbitrary. In *Air India v. Nergesh Meerza and Ors.* : (1981)1ILLJ314SC , (well known as the Air Hostess case) the Supreme Court had held that having regard to the mode of recruitment, the classification, promotion avenues and other matters Air Hostesses form an absolutely separate category from the Assistant Flight Pursers having different grades, promotional avenues and different service conditions, and

therefore, no hostile discrimination is involved in making a separate rule of retirement for Air Hostesses. Here, the manufacturers and suppliers in wholesale are governed by two sets of Rules and have different incidents and attributes; Therefore, they should be treated as two Separate categories. The Ordinance cannot, therefore, be attacked either on the ground of discrimination or on the ground of arbitrariness.

7. As regards the second contention that the issuance of the Ordinance is a mala fide act on the part of the Government; the learned Counsel for the petitioners refers to certain legal proceedings taken against the Government by one of the petitioners as constituting the basis for the allegation of mala fides. We do not see how the initiation of certain legal proceedings against the Government will form the basis for a complaint of mala fide against the Government when the Ordinance is not directed against any particular licensee or person, but uniformly against all licensees supplying arrack in wholesale. According to the learned Counsel for the petitioners, though the attack based on mala fides may not be available as against legislative enactments, it is available as against an Ordinance which has been promulgated by the Governor on the advice of the Council of Ministers. In support of the said submission, the learned Counsel refers to the decision of the Supreme Court in *Rustom Cavasjee Cooper v. Union of India* : [1970]3SCR530 . In that case, the Supreme Court observed that both the power and mechanics behind the issue of an ordinance by the Governor come from the executive, and therefore, the ordinance is subject to judicial review. However, it is well-established that the Governor's power, under Article 213 of the Constitution, of legislation by ordinance is as wide as the power of the Legislature. Since Article 213 imposes certain conditions for promulgation of ordinance, the conditions contemplated therein should be satisfied before the promulgation, and the conditions relating to the satisfaction of the Governor as to the existence of certain facts and the urgency are justiciable. But once the Governor, who is the sole Judge of determining the necessity of legislating the Ordinance, finds that promulgating an Ordinance in the circumstances is warranted his decision cannot be questioned on the ground of error of judgment or otherwise. In this case, the two conditions set out in Article 213, are satisfied namely, (1) that the Houses of the State Legislature were not in session when the Ordinance was issued, and (2) the Governor was satisfied as to

the existence of the circumstances which rendered it necessary for him to take immediate action, as has been set out in the preamble to the Ordinance Therefore, once the conditions set out in Article 213 for exercising the power of the Governor to promulgate an ordinance are satisfied, then the ordinance cannot be challenged on the ground that there was no urgency or that there was no satisfaction by the Governor as to the circumstances which warranted him to take immediate action.

8. We are also of the view, that it is not open to the petitioners to challenge the Ordinance on the ground of mala fides or on the ground of promissory estoppel Apart from the fact that such a challenge is not open to the petitioners against the impugned Ordinance, we are of the view that there is no factual basis made out by the petitioners with reference to the said attack. As already stated, there are no materials at all to indicate that the Governor was motivated or acted with mala fides while promulgating the impugned Ordinance. It is no doubt true, the petitioners were granted the privilege of supplying by wholesale arrack and Indian-made foreign spirits under the Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 and the Tamil Nadu I.M F.S. (Supply by Wholesale) Rules, 1981, and that Rule 10 of the Tamil Nadu Arrack (Supply by Wholesale) Rules, 1981 enabled them to get renewal except when the petitioners contravened the provisions or conditions of the licence. It is also true that the petitioners, relying on the licences granted to them, expended moneys and acquired large stocks after arranging for the necessary storage space etc. But the repeal of the Rules by the Ordinance which the Governor is entitled to promulgate cannot be questioned on the ground of promissory estoppel. Apart from making the Rules, which have since been repealed, even according to the petitioners, there was no separate representation either by the Government or the officers that the petitioners' right of renewal will not be interfered with or the Rules regarding renewal will not be repealed. If the Government can frame Rules conferring certain rights on the petitioner, it can also repeal these Rules which will have the effect of withdrawing the benefits conferred on them. The conferment of certain benefits under the Rules repealed cannot form the basis for the petitioners' contention that the Government which framed the Rules cannot repeal the Rules, It is also well established that the plea of promissory estoppel is not available to a party against a Legislative or Sovereign function. The decision in *State of Kerala and another v. The Gwalior Rayon Silk* . :

[1974]1SCR671 , Excise Commissioner, Uttar Pradesh v. Ram Kumar : AIR 1976 SC2237 and Ms. Jit Ram Shiv Kumar v State of Haryana : AIR 1976 SC2237 , clearly establish the above legal position. In A. K. Roy v. Union of India : 1982 CriLJ340 , the Supreme Court has already laid down that the power to issue Ordinance is legislative and not executive in character, and that an Ordinance issued by the President or Governor is as much law as an Act passed by the Parliament and subject to the same inhibitions. Therefore, a mala fide motive cannot be alleged against the Governor or against the Legislature. Similarly, we hold that the impugned Ordinance cannot be challenged on the ground that the Government is barred by the principle or promissory estoppel to issue the said Ordinance and that in any event, the factual basis for sustaining the attack based on equitable estoppel have been made out by the petitioners in this case.

9. Coming to the fourth contention that the Ordinance offends Article 300-A of the Constitution, we do not see how the petitioners could invoke the aid of the said Article. Here, the petitioners have no property right in the privilege granted to them to supply by wholesale arrack or Indian-made foreign spirits. There is no question of the Ordinance taking away any such property right. The petitioners were granted only a privilege to supply by wholesale arrack or Indian-made foreign spirits by the State under the provisions of the Act and the Rules referred to above and after the period for which such privilege had been granted has expired by efflux of time it has chosen not to grant such privilege to any one except a State-owned undertaking. We do not see how this will amount to violation of Article 300-A. As has been held in Har Shankar v. The Deputy Excise and Taxation Commissioner : [1975]3SCR254 , there is no fundamental right to do trade or business in intoxicants and the State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession, and that in all their manifestations, these rights are vested in the State. The relevant observations of the Supreme Court in that case. are extracted below : -

In our opinion, the true position governing dealing in intoxicants is as stated and reflected in the Constitution Bench decisions of this Court in Sahara's case 1951 S.C.J. 478 : (1951) 2 M.L.J. 141 : 1951 S.C.R. 683 : A.I.R. 1951 S.C. 318

Cooverjee's case : [1954]1SCR873 , Kidwai's case : [1957]1SCR295 , Nagendra Nath's case : [1958]1SCR1240 , Amar Chakraborty's case : [1973]1SCR533 , and the R.M.D.C. case : [1957]1SCR874 , as interpreted in Harinarayan Jaiswal case : [1972]3SCR784 and Nashirwar's case : [1975]2SCR861 . There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants, its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.

It is seen that a Bench of this Court has upheld the validity of Section 23-A of the Prohibition Act in Mohan Bros. (P) Ltd, Madras-6 v. State of Tamil Nadu by Secretary, Prohibition and Excise Department, Madras-9 and Anr. W.P. No. 4095 of 1981, dated 29th October 1981 which directed that all licences for possession and sale or issue of bottle liquor under the Madras Liquor (Licence and Permit) Rules, 1960, will cease to be valid after 30th September, 1981 That was a case where even during the currency of the licences issued to the various dealers, the licences were made inoperative, in exercise of the Governor's power of regulation of trade in intoxicants. That was upheld by the Court on the ground that the Government has got the power to regulate the trade in intoxicants and that power includes the power to put an end to the licences already granted, in the interest of the public. That is an a fortiori case where the Government exercised the power of regulation by invalidating the licences already granted. Here, the period of the licences granted to the petitioners had expired by efflux of time and the Government had decided not to grant any fresh licence to private trade and grant the exclusive privilege to a State-owned undertaking. The principle of the said decision applies to this case on all fours. Thus, none of the contentions urged by the petitioners is found to be tenable,

10. Hence, the writ petitions are dismissed. There will be no order as to costs.