

(2005) 02 JH CK 0014

Jharkhand High Court

Case No: Writ Petition (C) No"s. 4521, 4558, 4645, 4717 and 4858 of 2004

Ram Kumar Singh
Choudhary and
Others

APPELLANT

Vs

State of Jharkhand
and Others

RESPONDENT

Date of Decision: Feb. 2, 2005

Acts Referred:

- Bihar and Orissa Excise Act, 1915 - Section 38, 91, 98
- Constitution of India, 1950 - Article 226
- Jharkhand Excise Rules - Rule 107

Citation: (2005) 2 BLJR 1054 : (2005) 2 JCR 105

Hon'ble Judges: S.J. Mukhopadhaya, Acting C.J.; Narendra Nath Tiwari, J

Bench: Division Bench

Advocate: Dilip Jerath, R.K. Singh, Rajesh Kumar and M.B. Lal, in W.P.C No. 4521/ 2004, M.B. Lal and Manoj Kumar, in W.P.C No. 4717/2004, Sujit Narayan Prasad, Manoj Tandon, M.B. Lal, S.S. Kumar and Rajesh Kumar, in W.P.C No. 4558/2004, Mahesh Tiwari, Rashmi Pradhan and Sujata Bhattacharjee, in W.P.C No. 4858/ 2004 and M.B. Lal and Manoj Kumar, in W.P.C No. 4645/2004, for the Appellant; R.A. Gupta, Spl. GP, for the Respondent

Judgement

Narendra Nath Tiwari, J.

In all these writ applications a common prayer has been made for quashing the Notification bearing No. 1142 (B) dated 31.7.2004 issued by the Member, Board of Revenue (respondent No. 2) whereby the annual license fee for bars and restaurants to different categories and locations within the State has been enhanced and on that basis additional subsequent demands have been made from the petitioners, who hold license(s) for the financial year 2004-05, for their respective bar(s), restaurant(s), shop(s) and have already deposited their prescribed annual license fee in advance in one lump sum on 31.3.2004. In W.P. (C) No. 4521/2004 the license fee

of the petitioners has been enhanced from Rs. 60,000/- to Rs. 4,00,000/- and they have been asked to deposit the balance enhanced amount at one go in advance within one week by the Assistant Commissioner, Excise, Dhanbad. In W.P.(C) No. 4717/2004 the petitioner's license fee has been enhanced from Rs. 60,000/- to Rs. 2,00,000/- and the petitioner has been asked to deposit the entire amount in advance within two weeks as per the order of the respondent No. 5, Assistant Commissioner, Excise, Pakur. The annual license fee of the petitioners of W.P.(C) No. 4558/2004 has been enhanced from Rs. 2,00,000/- to Rs. 5,00,000/- and the petitioners have been asked to deposit the entire amount in advance within one week as per the order of the Assistant Commissioner, Excise, Dhanbad. The annual license fee of the petitioner of W.P. (C) No. 4858/2004 has been enhanced from Rs. 60,000/- to Rs. 4,00,000/- and the petitioner has been asked to deposit the entire amount in advance within one week as per the order of the Assistant Commissioner, Dhanbad. The annual licence fee of the petitioner of W.P.(C) No. 4645/2004 has been enhanced from Rs. 1,00,000/- to Rs. 3,00,000/- and the petitioner has been asked to deposit the entire amount in advance within two weeks by the order of the Assistant Commissioner, Excise, Pakur.

2. The grievances of the petitioners and points of law and factual basis being common, all the above writ petitions are being disposed of by this order.

3. The petitioners carry on the trade of bar and restaurant/liquor shop for years and their licence(s) are renewed every year. For the financial year 2004-05; notices were sent to the petitioners asking them to deposit the annual license fee in advance within the specified period for renewal of their licence(s). Pursuant to the notices the petitioners deposited the annual licence fee for the financial year 2004-05 in one lump sum. On payment of the license fee, their licences were renewed for the financial year 2004-05 which is valid up to 31.3.2005. The petitioners have annexed their licences and receipts of deposits of annual license fees with the respective writ petitions. According to the petitioners, as a condition precedent for renewal of their licenses the respondents realized the annual license fee in one lump sum in advance. The petitioners contended that there is no clause in the license, containing any condition for enhancement of the license fee during the license period. According to the petitioners, this time, a short hand-written note appeared in their licenses without any signature and identity of the authority mentioning that for the financial year 2004-05 the department has decided to change the condition which would be binding on the licensees. According to them even such unauthorized endorsement is read as one of the terms of the license, the same can not be stretched to read and mean any power to enhance the already paid/accepted annual license fee for the current financial year with retrospective effect. The petitioners emphatically challenged the power of the authority to issue the said Notification No. 1142(B) dated 31.7.2004. According to the petitioners, the said sudden unconscionably exorbitant enhancement of annual license fee is arbitrary and unjust and the same would create a situation compelling the petitioners to close

their business which has already become dull due to poor sale and inability to compete with the rampant sale of cheaper illicit liquor in open market in connivance with the interested officers of the excise department. According to the petitioners, the excise department is not providing any additional facility to the petitioners in lieu of the said enhancement in the license fee and the same is not in conformity with the requirement of the doctrine of "quid pro quo". The respondents in that form thus intend to collect taxes from the petitioners which is not permissible in law. Previously the petitioners were informed and taken into confidence as and when enhancement in the amount of the license fee or its renewal were intended. The petitioners contended that the unreasonable enhancement is unjust enrichment and the same is not permissible in law. The Member, Board of Revenue, has no legal sanction to enhance the licence fee by more than double and that too in the midst of the licensing year. The petitioners concluded that the impugned notification is, thus, wholly arbitrary and illegal and the same is liable to be quashed by this Court.

4. The respondents appeared and filed their counter affidavit stating, inter alia, that the State has got legislative power on the subject of intoxicating liquor which comes within the Entry 8, List II of the 7th Schedule of the Constitution of India. The Jharkhand Excise Act, 1915 (hereinafter referred to as the said "Act") governs the trade of this field in the State of Jharkhand and the provisions of the State Act regulates the trade and provides for imposition and collection of duties on intoxicants and for levying fees for granting the privilege or right to sale or vend the liquor. The control and restriction is meant for preservation of public health moral and to raise the revenue which is the purpose of the Act. No person has any absolute right to sell the intoxicant liquor. Section 20 of the Act prescribes prohibition of sale of any intoxicant without any licence. Section 38 of the said Act lays down the provision for realization of fee and terms and conditions subject to which a license, permit or pass can be granted under this Act. Section 90 of the Act empowers the Board of Revenue to make rules for prescribing the scale of fee or manner of fixing fee payable in respect of any exclusive privilege granted u/s 22 or any license, permit or pass granted under this Act and for other terms and conditions which include regulating the time, place and manner of payment of fee. Section 91 of the Act provides that the Board of Revenue may exercise power conferred by the Act from time to time. Rule 107 made by the Board of Revenue under the provision of Section 98 of the Act prescribes fee for the sale of foreign liquor in hotel, restaurant, bar, club and canteen. These rules also prescribe the manner of payment of such fee. The rule was published by Notification No. 23-137-2 dated 29.4.1919 and the same has been amended from time to time. It has been further contended that the right to carry trade of liquor is not absolute but is subject to the provisions of the said Act, Rules and Notifications. Dealing in intoxicants is not trade or business within the meaning of Article 19(1)(g) of the Constitution of India. The restrictions, which are not permissible in other trades, are lawful and

reasonable so far as the trade in liquor is concerned. The State possesses the right of complete control over the trade of intoxicants. The State has power to grant license for a sum which is the consideration for parting with the right and privilege of the State. The said consideration is neither a tax nor a fee in that sense. In excise law, "License Fee" or "Fixed Fee" is actually the price or consideration which the Government charges to the licensees for parting with its privilege and granting them to the licensees and as such the principle of "Quid Pro Quo" is not applicable. It has been further stated that the Government had appointed a Committee to study the excise system in some of the major revenue earning states. The committee suggested some rational, effective and profitable changes in the prevailing system for the purpose of maximum possible revenue to the State and for effective control on the trade of liquor. The said committee made a number of recommendations including the changes in the prevailing excise system and structure of excise duties and fees levied on different kinds of licenses including hotel, restaurant and bar licences. Final decision for adopting the said new policy could not be taken by the State by the financial year 2003.04 and thus the retailers were granted provisional licences. Similarly it was necessary to renew the licenses which were granted earlier. In that view, the Excise Commissioner vide his letter No. 565 dated 24.3.2004 directed all the Excise Superintendents and Deputy Commissioners of Excise that while granting/renewing such licenses, it should be mentioned that in case of any change in the conditions of the licences during 2004-05, the same shall be binding on the licensees. Accordingly such endorsement was made on the licences under the direction of the Excise Commissioner and the licences were renewed for 2004-05 subject to any change in the condition. In view of the said endorsement, no notice was required to be issued to the licensees prior to enhancing the scale of the licence fees. Under the new excise policy, license fees for retail "off vend of foreign liquor and "off vend of India made foreign liquor have been enhanced in the locality in which the petitioners restaurants are situated. In view of the said policy of manifold increase in the license fee for the retail licences for "off vend of foreign liquor, the retail license fee of the petitioners has been enhanced which is neither excessive nor unreasonable. Rule 107 speaks of the fixed fees imposed on hotel, restaurant, bar, club and canteen licences for a year or a part thereof. The higher license fee was also intended to regulate and keep within the reasonable limit the number of those who may engage in this trade. The State Government has done the same in order to get maximum price for parting with its valuable right in favour of the licence holders which is also in the public interest and the enhancement in license fee of the petitioners is neither arbitrary nor violative of Article 14 of the Constitution of India.

5. We have heard the learned counsel for the parties who supported and reiterated their respective stands taken in the affidavits. After hearing them and perusing the records, we find that for the financial year 2004-05, the petitioners were given notice for payment of annual renewal fee for renewal of their respective licences which are made annexures to their respective writ applications. From perusal of the same, it is

evident that in each of the notice amount of annual the renewal fee of the licence was specifically mentioned. It is also evident that the respective annual fee(s) quoted in the said notice(s) were paid by the petitioners in one lump sum. Receipts thereof are also annexed with the respective writ applications. From perusal of the licences of the petitioners brought on record, it is evident that there is no clause providing condition for enhancing license fee in the midst of the licence period. No such provision of law or rule framed under the said Act has been brought to our notice which provides for enhancement of licence fee with retrospective effect during the license period after the realization of annual license fee in one lump sum. Mr. R.A. Gupta, learned counsel appearing on behalf of the respondents, in order to justify the said enhancement of licence fee for the licence period 2004-05 for which the annual licence fee has already been realized in one lump sum, brought to our notice one letter issued by the Excise Department, Government of Jharkhand, issued under the signature of Excise Commissioner vide memo No. 565 dated 24.3.2004, particularly paragraph 2 of the same, which reads thus :--

"Vitiya Varsh 2004-05 Ke Dauran Vibhag Dwara Purwa Men Nirdharit Mapdandon men yadi pariwartan hota hai to anugyadhari nirdharit mapdandon ko manne ke liye vadhay honge."

According to the learned counsel, on the basis thereof, an endorsement was also made on the licence of the petitioners at the time of renewal mentioning the said condition. Learned counsel urged that the power for issuing the same flows from the provisions of Section 38 of the said Act and Rule 107. Section 38 of the Bihar Excise Act, now after adoption, the Jharkhand Excise Act, 1915, reads thus :--

"38. Fees for terms conditions, and form of, and duration of, licences, permits and passes.--(1) Every licence, permit or pass granted under this Act

(a) shall be granted--

(i) on payment of such fees (if any), and

(ii) subject to such restrictions and on such conditions, and

(b) shall be in such form and contain such particulars, as the Board may direct.

(2) Every license, permit or pass under this Act shall be granted for such period (if any) as may be prescribed by rule made by the State Government under Sections 89, Clause (e)."

Under the said Act Rule 107 has been framed to prescribe fee for all sales of Indian made foreign liquor under hotel, restaurant, bar, club and canteen licences payable in lump sum in advance according to the scale of fee fixed therein. From perusal of Section 38, it is evident that this Section provides for granting of licence (i) on payment of fee and (ii) subject to such restrictions or such conditions as the Board may direct. It also provides that every license, permit or pass under this Act shall be

granted for such period as may be prescribed by Rule made by the State Government. Thus there is nothing in this Section providing any power for enhancing license fee of the licences which have already been renewed for the following financial year on realizing the annual licence fee in lump sum at one go, Similarly, we do not find any such provision under Rule 107. The respondents thus failed to justify their power for enhancing the licence fee with retrospective effect and to realize the enhanced price of consideration for parting with the right and privilege at an earlier date of granting/renewing the licence.

6. The letter dated 24.3.2004 issued by the Excise Department speaks about the change in the norms and standard "MAPDAND" of licences and not about the enhancement of licence fee which is disjunctive and separate from the other norms and condition of the licence. The said letter provides for any change in the conditions of the licence which was granted for consideration of payment of licence fee subject to change in any norm or condition, as had been informed by making an endorsement on the licences. In our considered view, no power flows from the above referred provisions of Act. Rule or Notification entitling the respondents to realize the difference of the enhanced annual licence fee or any amount over and above annual license fee already realized from the petitioners as the condition precedent for renewal of their licences for the financial year 2004-05.

7. So far as the validity and propriety of the Notification No. 1142(B) dated 31.7.2004 issued by the Member, Board of Revenue is concerned, the same has been challenged mainly on the basis that the enhancement in annual license fee for bars and restaurants is arbitrary, exorbitant and the same amounts unjust enrichment and that the same does not conform with the requirement of the doctrine of "Quid Pro Quo." We are not impressed by such arguments due to the following reasons :--(i) The Supreme Court in [Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others](#), has held long back that the amount charged from a licensee is neither in the nature of tax nor excise duty but the same constitutes price or consideration which the Government charges for parting with its privilege and nobody has fundamental right to trade in intoxicants and raise objection regarding fixation of price or terms of settlement. We, thus, see nothing wrong if the State chooses to enhance the consideration or price for parting with its privilege in granting licence to the others. Nobody can object to such enhancement of price or consideration as he has got no fundamental right to carry on trade or business of intoxicant liquor. (ii) The license fee in case of intoxicant is not based on "Quid Pro Quo" principle and in that sense it is not technically a fee nor indeed a tax rather it is in the nature of price of a privilege which a purchaser has to pay in lieu of giving that privilege to him; (iii) u/s 38(1)(a), the State has authority to charge fee and to incorporate any term and condition for granting such licence; (iv) If the Government is the exclusive holder of that right and privilege and it has control over the said trade and business, the rights guaranteed under Article 19(1)(g) or Article 14 of the Constitution can not be read in this case in the sense which is generally meant,

barring the element providing limited protection against any arbitrariness. The said view is supported by the decision of the Apex Court in the case of *The State of Orissa v. Harinarayan Jaiswal*, reported in AIR 1978 SC 1186. In earlier decision rendered in [Nashirwar and Others Vs. State of Madhya Pradesh and Others](#), the Apex Court held that the State has to enforce morality and to prohibit trade of dangerous goods to enforce an absolute prohibition for manufacture and sale of intoxicants, and in view of history of excise law the State has exclusive right or privilege of manufacture or sale of intoxicants.

8. In the light of the said discussion of provisions of law and the settled legal principles, it can not be held that the notification bearing No. 1142(B) dated 31.7.2004 issued by the Member, Board of Revenue, is arbitrary, illegal or without jurisdiction, so far its applicability for fresh settlement or renewal of the licence of liquor shops is concerned. The same will also be equally applicable for fresh settlement/ renewal of the licenses in favour of the petitioners with prospective effect.

9. For the reasons aforesaid, the prayer of the petitioners for quashing the Notification No. 1142(B) dated 31.7.2004 can not be allowed. But we hold that the enhancement of the licence fee, as sought by the said notification, will not be applicable in the cases of the petitioners licenses for which renewal fee for the financial year 2004-05 has already been realized in advance in one lump sum prior to the issuance of the said notification and the same can not be enforced with retrospective effect and will be applicable only on the fresh settlement or renewal of the licences, with prospective effect.

10. All the writ applications are, thus, disposed of with the aforesaid observations and directions. There shall be no order as to costs.

S.J. Mukhopadhyaya, A.C.J.

11. I agree.