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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 26.03.2009
Pronounced on: 20.04.2009

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WP(C) No.7439/2009

Hundred Dollar Dept. Stores & Ors. Petitioner

Through : Mr. Neeraj Kishan Kaul, Sr. Advocate with
Mr. J.P. Sengh, Sr. Advocate and Mr. Jayant K Mehta
and Mr. Ajay Kumar, Advocates

Versus

Govt. of NCT of Delhi Respondent

Through : Ms. Jyoti Singh along with Mr. Ankur Chibber,
Advocates

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

S.RAVINDRA BHAT, J.

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1. The writ petitioners, in these proceedings under Article 226 of the Constitution of India, question the notification dated 27-2-2009 issued by the respondent, Excise Department of the Govt. of NCT (hereafter NCT) changing the existing terms of license for and renewal of L-53 licenses; such licenses permit vending of beer in departmental stores.

2. The liquor trade in Delhi is regulated by provisions of the Punjab Excise Act, 1914 (hereafter “the Act”) and Rules framed under that Act (i.e. the Delhi Liquor License Rules, 1976). Till 2001-2002, retail trade in Indian Made Foreign Liquor (IMFL) and country liquor was conducted by three Government owned corporations. IMFL licenses were issued to the corporations; they were in form L-2; similarly for sale of country liquor, L-10 licenses were issued. There was a change in policy for issuance of these liquor licenses, in 2002. L-53 licenses were a *species* of licenses that could be issued to “*retail vend of beer/mixed alcoholic beverages in departmental stores*”.

3. The petitioners contend to applying and being issued with L-53 licenses to vend the class of alcoholic beverages, permitted under its terms. This was in terms of a policy notice, issued by the NCT, on 4-9-2004. That notification (hereafter called “the 2004 notification”) envisioned, *inter alia*, that companies, partnerships, registered societies, and individuals, on sole proprietorship basis, could apply and hold such licenses. Clause 2.2 mandated that the applicant had to be in actual physical possession of a Departmental store, having carpet area of more than 500 square feet (excluding office space), in a commercial complex or area recognized as such by the local bodies including DDA, MCD, NDMC. Sale Hours could be 9 hours, between 10:00 AM to 10:00 PM (Clause 3); there were eleven other conditions, mandated by the 2004 notification, as essential, and governing the terms of the license. It is also an undisputed fact, that in terms of Rule 15 of the Liquor License Rules, L-53 and a few other categories of licenses, could not be held by the same person, individual or body, holding another type of license(s). L-53 as well as L-52 licenses are conditioned on the fact that vending of liquor would be for consumption “off” the premises.

4. The petitioner is aggrieved by the issuance of an “Addendum” (hereafter “the impugned addendum”) on 27-2-2009, whereby some of the terms of the 2004 notification were altered.

These are:

- i) Amendment to Para 2.5, restricting the issuance of L-53 to one license, to one departmental store/ applicant (“a chain of departmental stores will be treated as one”);
- ii) The store had to be an existing departmental store;
- iii) The license could not use more than 10% floor area for display of sale and beer; the chilling or freezer facility of only up to 200 litres capacity was to be permitted, to *“prevent the tendency of onsite consumption”*

5. The petitioners argue, in their pleadings, and through their Senior counsel, Shri Neeraj Kishan Kaul, that the impugned addendum is without authority of law. It is urged that the Addendum was issued by an authority not competent to do so, since the Act does not authorize delegation of powers, in regard to issues which are covered by the Rules. In this regard, it is emphasized that the statute provides one mode of exercise of power to regulate terms of issuance of licenses, i.e. through rules, which can, and have been framed by the Lt. Governor, under Section 58. The power under Section 58 (2) is exhaustive, and comprehends all manner of regulatory concerns, including the periods of sale, localities, import, export, procedure to be followed and the conditions to be imposed for grant of licenses and sale of liquor, etc. Such being the case, restricting eligibility conditions through an Addendum is illegal; it cannot curtail the petitioners’ right to more than one license, merely because it is a company owning a chain of departmental stores. It is further contended that in any event, the DEO is no authority to amend the terms and conditions for issuance of L-53 licenses.

6. It is next argued that when a state agency chooses to regulate a commercial activity, like liquor sale, it should conform to the mandate of the equality clause, under Article 14 of the Constitution of India. Thus, all those vending liquor, in terms of the Rules and notifications should be subjected to the same policies, norms and restrictions. Any other construction would be destructive of the principle of equality, guaranteed under Article 14 of the Constitution of India. It is submitted here that permitting L-4 (restaurant applicants seeking liquor license) more than one license, in respect of a chain of restaurant, on the one hand, and denying it to departmental stores, such as L-53 licensees, is rank discrimination, and therefore arbitrary. It is also urged that L-53 licenses are only a variant of L-52 and L-2 licenses, which are only allowed greater vending rights, in terms of brands and classes of liquor. In the entire city of Delhi, only 31 licenses have been issued to L-53 applicants, whereas for L-52, applicants, who sell hard liquor, 92 licenses have been issued, and for L-2 licenses, as many as 323 licenses have been issued. These show that facially, no public interest or purpose is sought to be achieved by imposing the restrictive conditions spelt out in the Addendum, which are utterly arbitrary and unreasonable. It is argued that the petitioners' legitimate expectation has been defeated by imposition of the impugned conditions through the Addendum.

7. The Respondent contends that the decision to impose the impugned the conditions, was taken at the highest levels by the competent authority in terms of provisions of the Act and Rules. It contends that the proposal to introduce additional conditions and restrict the grant of licences for a chain of departmental stores to only one license which was notified in the impugned addendum, was taken consciously and after due deliberation. They rely upon the official file, which was produced before the court in substantiation of their arguments of this

purpose. It is said that the proposal to amend the conditions and notify them through an addendum was mooted after due consultation, by the Principal Finance Secretary of NCT on 23 January 2009; the proposal was accepted by the Commissioner of Excise and that the competent authority entitled to decide the issue finally, i.e. the Minister of Finance and Urban Development, NCT of Delhi approved it on 23-02-2009. Learned counsel for the NCT relied upon the relevant official file notings; she also pointed to the approval and direction by the Commissioner of Excise, NCT on 25-02-2009, which culminated in the issuance of the impugned Addendum.

8. It is argued that while there can be no denial that the regulation or rule-making power under the Act is with the Lieutenant Governor of Delhi, in terms of section 58 of the Act, other authorities of the NCT are not deprived of general regulatory powers. The NCT relies upon Section 34 of the Act to say that conditions of licence can be prescribed by the Excise Commissioner and that such being the case, the impugned Addendum merely amended the conditions which had been notified by non-statutory notice or notification in September 2004.

9. On the question of discrimination, the NCT argues that there is no violation of the principle of equality. L-53 and L-4 licenses are dissimilar by their very nature. In this respect, learned counsel for the NCT submits that the first category of licence permits vending of extremely limited types of liquor for 'off premises' consumption after purchase by the customer whereas the latter category allows consumption by the customer in the premises. This classification is supported by Rule 15, which clearly mandates that L-53 licenses cannot be issued to those enjoying L-4 licenses. Counsel contended that the conditions prescribed for

different classes of licenses cannot be the same and that the petitioners' claim for parity is misplaced.

10. The respondent further contends that conditions of eligibility, including restriction placed on the number of licenses issued to a departmental store chain, are framed having regard to public interest considerations. In this context, the NCT submits that the existing system of issuing as many licenses as they were departmental stores, to applicants, owning a chain of stores, led to monopolies. Similarly the restriction on floor space and freezer area, was necessitated because existing L-53 licensed premises had been reduced to beer stores, where only few items other than liquor were sold, as a formality. It is also contended that the departmental stores were often used for consumption of beer and other beverages sold there.

11. The controversy which the court is called upon to decide in this case is two fold. One, whether the impugned Addendum is without authority of law, as being issued contrary to existing Rules and two, whether the conditions in the said Addendum are unreasonable or arbitrary.

12. Section 58 of the Act empowers the Lt. Governor of Delhi to frame rules for carrying out various purposes of the Act. Some of these purposes are spelt out in Section 58(2); they include various aspects, such as regulation of import and export transport, possession of intoxicants (clause (d)); regulating the periods and localities for which and the persons or classes of persons to whom licenses and permits for the vend by whole sale or retail may be granted and regulating the number of such licenses which may be granted in any local area, etc. In exercise of these powers, the Lt. Governor framed the 1976 Rules. The legal *regime* underwent a radical change, in 2002, when entirely new classes of licenses were introduced for the first time. L-53,

was one such class, it finds mention in Rule 1 (1). Conditions for grant are outlined in several rules; Rule 15 prescribes that categories of licenses mentioned in column 1 cannot be held by persons holding or any way connected in interest with persons holding any of the licenses shown in Column 2. Thus, licenses in form L-1, L-1F, L-2, L-2A, L-52, L-53 and L-54 for the sale of foreign liquor cannot be held by a person holding or any way connected in interest with persons holding any of the licenses L-3, L-4 (which are for service of IMFL and beer in an independent restaurant) and L-5, except with the special sanction of the Lt. Governor of Delhi. This is further reinforced by Rule 18, which says that L-4 licenses can be issued only to an independent restaurant, approved by the department of Tourism of the Central Government or the one fulfilling prescribed conditions. The same rule says that L-53 licenses can be issued to departmental stores; as to what are “departmental stores” is nowhere defined under the Act or rules. Rule 23 lists out the license fees that are to be recovered for various categories of licenses; Rule 33 prescribes the General conditions applying to all licenses. It reads as follows:

“ Every license under these Rules shall be granted subject to the conditions set forth in this rule.

(1) General: the licensee shall comply with the provisions of the Punjab Excise Act 1914 as in force in the Union Territory of Delhi and observe all rules made thereunder and the terms and conditions of his licence, and orders issued to him by the Excise officers from time to time: and shall furnish such observance give security in such amount as may be specified by the authority granting the licence in any of the forms describe below or partly in one and partly in another; and in addition shall, if the authority granting the licence so requires, given a personal security bond with or without surety in such amount as may be required to the satisfaction of such authority...”

The same rule goes on to list or detail the conditions applicable to every license, as well as the exceptions carved out, in a fairly exhaustive manner.

13. Section 34 of the Act reads as follows:

“34. (1) Every license, permit pass granted under this Act shall be granted-

(a) on payment of such fee if any,

(b) subject to the restrictions and on such conditions,

(c) in such form and containing such particulars,

(d) such period,

as the Excise Commissioner may direct.

(2) Any Authority granting a licence under this Act may require the licensee to give such security for the observance of the terms of his licence, or to make such deposit in lieu of security as such authority may think fit.”

14. Now there can be no cavail to the argument that when the statute empowers one authority to do something, exclusively, such power cannot be usurped by another. Such a proposition is obvious and uncontestable. The question, however, is whether it applies at all in these proceedings. The discussion in the preceding paragraphs of this judgment would show that the rules were amended to enable issuance of L-53 licenses to departmental stores. Unlike in the case of other categories of licenses, neither the rules nor the general terms and conditions contained in Rule 33 spell out precisely what are “departmental stores”; equally what considerations are applicable making one store or the other eligible to apply are not specified. The petitioners were unable to show that the Rules also spelt out any conditions applicable to L-53 licenses. These crucial gaps in the Rules obviously had to be addressed through circulars, notices or executive instructions. The power to issue such executive instructions or notifications, can be sourced broadly to Section 34 of the Act. As a matter of detail, it was not disputed that L-53 licenses were issued only after the 2004 notification. That notification, in turn prescribes the eligibility conditions, which the applicants are to fulfill to be entitled for issuing L-53 licenses. Concededly, the 2004 notification is not statutory. No doubt it was issued under the authority of the Excise Commissioner. Yet its character and content is that of executive instructions issued under general powers conferred by Section 34 of the Act. Such

being the case, the petitioners can hardly contend that amendment of such non-statutory notification, in exercise of valid statutory power, is unauthorized. It is well known that guidelines and administrative instructions can supplement gaps in enactments and rules framed under it though not supplant their content. (Ref. *State of U.P. v. Daulat Ram* 2002 (4) SCC 98; *Dr S. K. Kakkar v. All India Institute of Medical Sciences* 1996 (10) SCC 74). Thus, where there are no statutory rules or regulations, or, on aspects where statutory rules or regulations, or provisions of the principal Act are silent, the authorities conferred with power can frame valid notifications or administrative instructions which would govern the field.

15. Here, in this case, the powers conferred upon the Excise Commissioner are wide and comprehensive; they include prescription of fees; providing for restrictions and conditions and the period for each class or category of licence. It will not arise that the impugned Addendum conflicted with any Rule, Regulation or Provision of the Act. The conclusion therefore has to be that the said impugned Addendum is not contrary to the Act. As far as the objection that the impugned Addendum was not issued by the competent authorities concerned, the NCT has, in the opinion of the court, satisfactorily explained the factual aspects. The proposal which originated from the Principal Finance Secretary of NCT on 23rd January 2009, went to the Commissioner of Excise, was approved by the Minister in the Government of NCT; the Excise Commissioner issued instructions to notify the impugned Addendum, on 25 February 2009. It was issued on 27th February 2009. Therefore the argument that it was issued unilaterally by an incompetent authority or someone lacking statutory power, is merit less and therefore rejected.

16. Now on the question of discrimination, and arbitrariness, urged by the petitioners. It cannot be gainsaid that every aspect of state functioning, including in the contractual sphere, by itself, or through its myriad agencies and devices, should be answerable to the principle of equality, and should be non-arbitrary. Equally, it is settled law that no one has a fundamental right to trade or carry on business in liquor; it is deemed as falling outside the bounds of the right to freedom of trade, and commerce (the Supreme Court has called the activity as *res extra commerciam* "a thing outside commerce" and therefore, insusceptible to being traded- see *R.M.D. Chamarbaugwalla v. Union of India* AIR 1957 SC 628; *Sat Pal & Co. v. Lt. Governor & Ors.*, 1979(4) SCC 232; *State of Punjab and another v. Devans Modern Breweries Ltd.& Anr* 2004(11) SCC 26).

17. In *State of M.P. v. Nandalal Jaiswal* 1986 (4) SCC 566, the Supreme Court held that even though the equality clause in Article 14 would apply to the State while deciding upon its policies, for awarding liquor licenses, the standards applicable for judicial scrutiny are necessarily different from other classes of trade or professions. The Supreme Court held, in this context that:

"But, while considering the applicability of Article 14 in such a case, we must bear in mind that, having regard to the nature of the trade or business, the Court would be slow to interfere with the policy laid down by the State Government for grant of licences for manufacture and sale of liquor. The Court would, in view of the inherently pernicious nature of the commodity allow a large measure of latitude to the State Government in determining its policy of regulating, manufacture and trade in liquor. Moreover, the grant of licences for manufacture and sale of liquor would essentially be a matter of economic policy where the court would hesitate to intervene and strike down what the State Government had done, unless it appears to be plainly arbitrary, irrational or mala fide."

The Court also referred to its previous decision in *R. K. Garg's case*, AIR 1981 SC 2138, and held that:

"What we said in that case in regard to legislation relating to economic matters must apply equally in regard to executive action in the field of economic activities, though the executive decision may not be placed on as high a pedestal as legislative judgment in so far as judicial deference is concerned. We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method' and, therefore, its validity cannot be tested on any rigid 'a priori' considerations or on the application of any strait-jacket formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or 'play' in the 'joints' to the executive. 'The problems of Government' as pointed out by the Supreme Court of the United States in Metropolis Theatre Company v.State of Chicago (1912) 57 Law ed. 730 'are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercise which can be declared void'. The Government, as was said in Permian Basin Area Rate cases (1968) 20 Law ed 2d 312, is entitled to make pragmatic adjustments which may be called for by particular circumstances. The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide..."

18. The standard of judging whether a policy is arbitrary, in relation to trade or business or commerce, necessarily differs having regard to the nature of activity; it is case specific. The greater harm perceived by the commercial activity, the intensity of scrutiny is correspondingly lower. Here, concededly the individuals or concerns who are issued liquor licenses are complaining that the licenses issued to others agencies do not contain restrictions which are in place, in their licences. The state answers that these two categories of licenses – restaurant applicants in the case of L-4 licenses and departmental stores (L-53) licenses are based on intelligible differentia, having regard to the varying objectives which each license holder has, while applying, and securing them. *Nandlal (supra)* – which has been affirmed and applied in successive judgments- establishes that the State has considerable “free play the joints” while

constructing its liquor license policies, and framing restrictions. The question is whether they include the right to treat the restaurants and departmental stores differently.

19. The respondents, in these cases, have spelt out clearly the objectives for not factoring in restrictions in similar terms, to those contained in L-53 licenses, in L-4 licenses. They advert to the essential difference between the two categories; one is given to “independent restaurants” (L-4) where on site consumption of the classes of alcohol the licensee is entitled to vend is permitted; L-53 licenses, on the other hand, belong to the class of license where consumption on site, or in the premises are not permitted. Besides, the Rules, (by Rule 15) itself creates a classification. The two categories are facially dissimilar, and L-53 licenses cannot claim parity with L-4 licenses.

20. The issue also has to been seen from another perspective. The NCT relies on an inspection report which lists out the particulars of every L-53 licensee, such as its name, the premises for which licenses were issued, the area of the premises, area earmarked for storing beer and permitted alcoholic beverage, the area used for other stock, etc. That inspection record has been produced in court. The note, leading to the impugned Addendum, *inter alia* records that the minimum area for grant of L-53 license in departmental stores which earlier was 1000 square feet was reduced to 500 ft., in 2004-05 and that in most of the stores, only minimum groceries or consumer items were sold while using a larger portion of area for sale of beer and alcoholic beverages. The note also stated that this defeated the purpose of granting license to departmental stores as the idea was for one stop shop for all the consumer and food items etc. at one place. In these circumstances the note suggested that the licensees ought not to use more than one third of the area for stocking beer and other mild alcoholic beverages and

keep consumer goods in the rest of the place. The note also crucially stated that during the financial year 2004-05, it was decided that more than one L-52 licensee could not be granted to one individual/applicant. Such a restriction however could not be placed on L-53 licenses. The note therefore recommended such restriction.

21. As far as the complaint of the petitioners regarding unfairness and denial of their legitimate expectation is concerned, while the court's jurisdiction to reach out and cure any illegality, in judicial review is wide, its exercise is necessarily contextual to the facts and the rights asserted and found to be violated. As observed earlier, there is no fundamental right to carry on trade or commerce in liquor or liquor products. The state is granted, in its legitimate executive sphere, "free play in the joints" to design and fashion policies, which best sub-serve larger public good, having regard to the nature of the activity in liquor vending. While judicial review concerns itself with fairness of procedure in decision-making, legality regularity of proceedings, legitimately also enabling the courts to enquire whether the decision or decision-making was taken or arrived at in *bona fide* exercise of powers, it does not extend to arriving at value-judgments on the imprudence or unwisdom of the executive measure complained of. If courts start examining state agencies' decisions from such standpoint, they would don the mantle of government agencies without the assistance of that input which is vital for arriving at executive decisions.

22. "Legitimate expectation", an argument put forward by the petitioners to challenge the impugned addendum, is concededly a dimension of fairness, which has to be considered by the decision maker. It is not *"the key which unlocks the treasury of natural justice and it ought not to unlock the gate that shuts the court out of review on the merits"* (Ref. *Union of India v.*

Hindustan Development Corporation 1993 (3) SCC 499). It cannot inhibit the exercise of lawful executive power to change policies, in public interest; courts' interference in such instances, was described by Brennan, J (of the High Court of Australia, in *Attorney General for New South Wales v. Quin* 1990 [64] Aust LJ 327) as too nebulous to form a basis for invalidating the exercise of state power, setting "the courts adrift on a featureless sea of pragmatism" (quoted in *Chanchal Goyal v. State of Assam* 2003 (3) SCC 485). The petitioners cannot therefore, fall back on the principle of legitimate expectation as the sole basis for invalidation of the impugned Addendum, which was framed in a *bona fide* manner, for valid and relevant considerations.

23. The writ petition cannot succeed, for the above reasons. It is therefore dismissed, without any order as to costs.

CM No.3397 & 3581/2009

No further orders are required to be passed in these applications in view of the dismissal of the writ petition. The applications are dismissed.

April 20, 2009

(S.RAVINDRA BHAT)
JUDGE