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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELATE JURISDICTION
WRIT PETITION NO.172 OF 2008

Hindustan Distilleries ...Petitioner
vs.
State of Maharashtra and Anr. ...Respondents

Mr.V.M.Thorat, for the Petitioner
Mr.V.S.Gokhale, AGP for the respondent Nos.1 and 2.

CORAM : A.S.OKA, AND V.L.ACHLIYA, JJ.
DATE ON WHICH SUBMISSIONS ARE HEARD:OCTOBER 27, 2015
DATE ON WHICH JUDGMENT IS PRONOUNCED:DECEMBER 22, 2015

JUDGMENT : (PER A.S.OKA,J.)

1 The challenge in this petition under Article 226 of the Constitution of India is to the notification dated 14th August 2006 by which the Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules,1966 (for short `the said Rules') were amended. The title of the Rules published under the notification dated 14th August 2006 is the Maharashtra Distillation of Spirit and Manufacture of Potable Liquor (Amendment) Rules, 2006 (for short `the Amendment Rules'). By virtue of the Amendment Rules, after sub Rule 2 of Rule 15, Sub-Rule 2a has been added. After Rule 17, after sub Rule 27, sub Rule 27a has been added. The added sub Rules read thus:

> “(2a) No P.L.L. Licensee shall be allowed to manufacture Rum of 50 UP Strength.”

"(27a) The strength of the rum manufactured by the Licensee shall be 25 UP strength"

2 The said Rules have been framed in exercise of the Rule making power under the Bombay Prohibition Act,1949 (for short `the said Act'). The Petitioner is relying upon the provisions of the Foreign Liquor Rules,1953 (for short `the said Rules of 1953'). The Petitioner has referred to the Mahahrashtra Country Liquor Rules, 1973 (for short"the said Rules of 1973). It is pointed out in the petition that on 21st May 1990, the State Government issued a notification by which the said Rules of 1953 were amended providing for sale and manufacture of 50 UP Rum which is much milder than 25 UP Rum. It is the case of the Petitioner that after incurring huge capital expenditure it started manufacture of 50 UP strength Rum. It is stated that due to its popularity, the sales of other manufacturers were considerably reduced. It is contended that due to pressure exerted by those who were manufacturing 25 UP strength Rum, the State Government issued a circular dated 5th August 2003 completely prohibiting the manufacture of 50 UP strength Rum within the State of Maharashtra. It is pointed out that the said Circular was withdrawn on 7th November 2003. It is pointed out that on 14th August 2006, by the impugned notification, the Amendment Rules were published. On the same day, by another notification, the said Rules of 1953 were modified. The Amendment Rules as narrated earlier, impose a ban on grant of a licence to manufacture of 50 UP strength Rum and it provides

that the strength of Rum manufactured by the licensees shall be 25 UP strength.

3 The challenge is to the ban imposed on manufacture of 50 UP strength Rum. The prayer is made for issuing a writ of mandamus directing the respondents to allow the Petitioner to manufacture and sell 50 UP strength Rum.

4 The first contention raised by the learned counsel for the Petitioner is based on Article 47 of the Constitution of India which is a part of the directive principles of the State Policy. The learned counsel pointed out that Article 47 provides that the State shall endeavor to bring about total prohibition on the consumption of liquor. He pointed out that the directive principles of the State Policy are fundamental when it comes to the governance. He submitted that by virtue of the Amendment Rules, the State Government has prohibited the manufacture of 50 UP strength Rum which is much milder than 25 UP strength Rum, in view of it is lower alcohol contents. He urged that by the impugned Amendment Rules, on the one hand the State Government wants to prohibit the production of a milder version of Rum and on the other hand, the State Government wants to encourage the production of 25 UP strength Rum which is a stronger version. He invited our attention to the fact that in the year 1990, the State Government decided to permit manufacture of 50 UP strength Rum with a view to meet larger social objectives and with a view to

keep the consumers away from the stronger liquor. He urged that by the impugned Amendment Rules, by imposing a ban on the manufacture of 50 UP strength Rum, the State Government has not only violated its own policy but has also acted contrary to the mandate of Article 47 of the State Government.

5 The second ground on which the learned counsel assailed the validity and legality of the Amendment Rules is based on sub-Section 3 of Section 143 of the said Act. He submitted that the Rule making power was subject to the condition of the previous publication. He urged that in the present case, the Amendment Rules have been brought into force on 15th September 2006 and therefore, the Rules were not brought into force at once. He submitted that the Amendment Rules are illegal on account of the failure of the Government to make its prior publication.

6 Thirdly, he urged that as required by sub-Section 1 of Section 143, the Amendment Rules ought to have been laid for not less than 30 days before each House of Legislature as soon as they were made. He submitted that the said Rules were subject to modification which may be made by the State Legislature and therefore, on account of the failure to place the said Rules before the Houses of Legislature, the same are rendered illegal.

7 The learned AGP pointed out that on 14th August 2006, by separate notifications, the Amendment Rules

as well as the Maharashtra Country Liquor (5th Amendment) Rules 2006 were made. Both the Rules were made with effect from 15th September 2006. He pointed out that the provisions of Maharashtra Country Liquor (5th Amendment) Rules,2006 were challenged in the Writ Petition No.6377 of 2006 (Sunnygold Wineries Private Limited Vs. State of Maharashtra and another). By the Judgment and Order dated 12th January 2007, the said Writ Petition was dismissed by the Division Bench of this Court. He pointed out that the only challenge to the said Rules was based on the provisions of sub-Section 3 of Section 143. He pointed out the Amendment Rules state that the same are made with effect from 15th September 2006. Thus, the State Government intended to brought the said Rules into force with effect from the date on which the same were made. He urged that there is no substance in the second contention. As regards the first contention, he invited our attention to the affidavit of Shri Surchand Ramchandra Kudale, the Joint Commissioner of State Excise of the State Government and in particular paragraphs 11 and 12 thereof. He pointed out that the State government has given reasons in the said paragraph. He submitted that to avoid misuse as set out in the affidavit, that the Amendment Rules were made and hence, it cannot said that the Amendment Rules are in breach of Article 47 of the Constitution of India. As regards the laying of the Amendment Rules before both the Houses is concerned, the learned AGP submitted that the said contention is not raised specifically. However, he sought time to take instructions on this aspect. We must note here that till the date of the pronouncement of the Judgment, the State Government has not come forward to make a statement on this aspect.

8 We have given careful consideration to the submissions. The prayers made in this petition read thus:

> (a) call for the relevant records and proceeding from the office of the Respondent authorities and after going into the legality of the same allow the Petitioner to manufacture and sale 50 UP Low strength Rum in the State of Maharashtra and for that purpose issue appropriate writ and/or order;
>
> (b) quash and set aside the Notifications dated 14.8.2006 by which Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules 1966 came to be amended."

9 In the affidavit filed by the State Government of Shri Kudle, in paragraph 12, he has stated thus:

> "12 The Respondent No.1 accepted the proposal of Respondent No.2 and issued notification dated 14.8.2006 and wherein provision is made that no PLL licensee shall be allowed to manufacture Rum of 50 UP strength which is being strictly followed and

implemented through out the State by all licenses. Similar provision also been made under Maharashtra Country Liquor Rule 1973 and Bombay Foreign Liquor Rule 1953 wherein provision of allowing the sale of 50^0 UP Rum is deleted from the said rules."

10 As pointed out earlier, the Maharashtra Country Liquor (5th Amendment) Rules 2006 were notified by another notification dated 14th August 2006. By the said Rules of 2006, the said Rules of 1973 were amended. The notification contains following recitals:

"Now, therefore in exercise of the powers conferred by clause (b), (f), (g) & (u) of sub-Section (2) of Section 143 of the said Act and of all other powers enabling it in that behalf, the Government of Maharashtra hereby makes the following rules with effect from 15th September 2006, further to amend the Maharashtra Country Liquor Rules, 1973..."

11 In the impugned notification dated 14th August 2006 by which the impugned Rules were issued, there is a similar recital:

"Now, therefore in exercise of the powers conferred by clause (b) and (f) of sub-Section (2) of Section 143 of the said Act and of all other powers enabling it in that behalf, the Government of Maharashtra hereby makes the following rules with effect from 15th September 2006, further to amend the Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules,1966, namely...”

12 The third notification was issued on 14th August 2006 by which the said Rules of 1953 were amended. The said notification contains identical recital. Thus, the impugned notification provides that the Amendment Rules notified thereunder have been made with effect from 15th September 2006. Thus, the date of making the Rules is 15th September 2006. The Maharashtra Country Liquor (5th Amendment) Rules 2006 were challenged before this Court by filing the aforesaid Writ Petition No.6377 of 2006. The challenge was on the ground of the failure to make prior publication under sub-Section 3 of Section 143. The order passed on 12th January 2007 by which the said Writ Petition was dismissed reads thus:

“1 The main contention as urged on behalf of the Petitioner is that Exhibit-F to the petition which is a Notification dated 14th August 2006 by which Rules were made known as Maharashtra Country Liquor Rules, 1973 (5th Amendment Rules), 2006) had not been previously published, before they have come into force. Our attention is invited to Section 143 of the Bombay Prohibition Act,1949. Sub-Section (3) of Section 143 reads as under:

143(3) The power to make rules under this Section shall be subject to the condition of previous publication:

Provided that any such rules may be made without previous publication, if the [State] Government considers that they should be brought into force at once.

It is, therefore, clear that considering the provision, if the rules are to be brought into force at once, then necessity of previous publication is dispensed with. The notification of 14th August 2006 would show that the rules are brought in to force at once. The preamble to the rules also sets out that the delegate has resorted to the proviso to sub-Section (3) of Section 143. Considering that, in our opinion, there is no merit in the contentions.

2 The learned counsel then contends that the rules have not been tabled on the floor of the House, as contemplated by sub-Section (4) of Section 143. This point is not raised in the petition. Considering that, the above petition is disposed off."

13 The argument based on sub Section 3 of Section 143 was specifically rejected by the Division Bench by recording reasons which are quoted above. The

rejection was in an identical case. Therefore, the challenge based on non compliance with the sub-Section 3 of Section of 143 cannot be upheld.

14 As regards the first contention, it will be necessary to make a reference to the affidavit of Shri Kudle. It is admitted that in the year 1990, manufacturing of 50 UP strength Rum was permitted with a view to meet a social objective. The reasons for change have been set out in paragraph 9 which reads thus:

> "9 I say that Think Tank Meeting held on 2.8.2003, it was decided to have foreign liquor of Uniform strength of 25 UP and the Liquor of other strength should be regulated so as not to cause, confusion to the consuming public. As it has also come to the notice that 50 UP Rum were largely identified as 25 UP Rum on account of lack of knowledge of the public due to technicalities involved in the nomenclature, manufacture, packing and distribution. I further say that the revenue generated from 50 UP Rum was very meager as compared to revenue generated from 25 UP IMFL. Thus, manufacture of 50 UP Rum was discontinued vide circular dated 5.8.2003. The copy of the said circular is as annexed as Exhibit-2."

The State Government has given reasons which are germane and relevant.

15 As stated earlier, not only the said Rules, but the said Rules of 1953 and the said Rules of 1973 were amended. By amending the said Rules of 1953 and 1973, the provisions made for the sale of 50 UP strength Rum have been deleted. We have already quoted the prayers made in the petition. There is no specific challenge to the amendments made to the said Rules of 1973 and 1953 by the notifications dated 14th August 2006. Thus, the Petitioner has challenged only the amendments made to the said Rules which prohibit the manufacture of Rum of 50 UP strength. By amending the other two sets of Rules, the enabling provisions were deleted. Moreover the challenge is based on the violation of the Directive Principles of the State Policy. The said Rules are in the nature of a sub-ordinate legislation. The question is whether the Amendment Rules are constitutionally valid. The tests to be applied are laid down by the Apex Court in the case of *Public Services Tribunal Bar Assn. v. State of UP* which read thus :

> **"26. The constitutional validity of an Act can be challenged only on two grounds viz. (*i*) lack of legislative competence; and (*ii*) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provisions. In *State of A.P.* v. *McDowell & Co.* [(1996) 3 SCC 709] this Court has opined that except the above two grounds there is no third ground on the basis of which the law made by the competent Legislature can be invalidated** and that the ground of invalidation must necessarily fall within the four corners of the aforementioned two grounds."

(emphasis added)

Moreover, the petitioner who is a manufacturer of liquor has no fundamental right to manufacture or sell liquor. In the case of *State of M.P. v. Nandlal Jaiswal,*[2] the Apex Court held thus:

> **33.** But, before we do so, we may at this stage conveniently refer to a contention of a preliminary nature advanced on behalf of the State Government and Respondents 5 to 11 against the applicability of Article 14 in a case dealing with the grant of liquor licences. The contention was that trade or business in liquor is so inherently pernicious that no one can claim any fundamental right in respect of it and Article 14 cannot therefore be invoked by the petitioners. **Now, it is true, and it is well settled by several decisions of this Court including the decision in *Har Shanker* v. *Deputy Excise & Taxation Commissioner* [(1975) 1 SCC 737 : AIR 1975 SC 1121 : (1975) 3 SCR 254] that there is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants — its manufacture, storage, export, import, sale and possession. No one can claim as against the State the right to carry on trade or business in liquor**

2 (1986) 4 SCC 566

> and the State cannot be compelled to part with its exclusive right or privilege of manufacturing and selling liquor. But when the State decides to grant such right or privilege to others the State cannot escape the rigour of Article 14. It cannot act arbitrarily or at its sweet will. It must comply with the equality clause while granting the exclusive right or privilege of manufacturing or selling liquor. It is, therefore, not possible to uphold the contention of the State Government and Respondents 5 to 11 that Article 14 can have no application in a case where the licence to manufacture or sell liquor is being granted by the State Government. The State cannot ride roughshod over the requirement of that article.
>
> (emphasis added)

16 Hence, the petitioner cannot allege breach of any fundamental rights. There is no challenge on the ground of lack of legislative competence. Therefore, the Amendment Rules cannot be struck down only on the ground of violation of the Directive Principles of the State Policy.

17 Now we turn to the challenge based on non compliance with sub-Section 4 of Section 143 of the said Act. Sub-Section 4 of Section 143 reads thus:

> "[(4) All rules made under this Act shall be

> laid for not less than thirty days before each House of the State Legislature as soon as may be after they are made, and shall be subject to such modifications as the State Legislature may make during the session in which they are so laid or the session immediately following.]"

18 Even after granting time, the State Government could not place on record any material to show that Amendment Rules were placed before the houses of Legislature. The question is what is the effect of non placement. Whether non placement will vitiate the Amendment Rules.

19 This issue has been considered by the Apex Court in the case of M/s.Atlas Cycle Industries Ltd. and others vs. The State of Haryana[3]. The Apex Court was dealing with the issue of breach of sub-Section 6 of Section 3 of the Essential Commodities Act,1955. It provides that every order made under Section 3 by the Central Government or by any Officer or authority of the Central Government shall be laid before both the Houses of Legislature as soon as may be after it is made. The question before the Apex Court was whether the use of the word `shall' in sub-section 6 of section 3 is conclusive. In paragraph 20, the Apex Court laid down as to what should be the consideration for treating a provision as directory. Paragraph 20 reads thus:

3 (1979) 2 SCC 196

"**20.** Thus two considerations for regarding a provision as directory are: (*1*) absence of any provision for the contingency of a particular provision not being complied with or followed, and (*2*) serious general inconvenience and prejudice that would result to the general public if the act of the Government or an instrumentality is declared invalid for non-compliance with the particular provision."

In paragraph 21, the Apex Court observed thus:

"21 Now, the policy and object underlying the provisions relating to laying the delegated legislation made by the subordinate law making authorities or orders passed by subordinate executive instrumentalities before both Houses of Parliament being to keep supervision and control over the aforesaid authorities and instrumentalities, the "laying clauses" assume different forms depending on the degree of control which the Legislature may like to exercise. As evident from the observations made at pp. 305 to 307 of the 7th Edn. of *Craies on Statute Law* and noticed with approval in *Hukam Chand* v. *Union of India* [(1972) 2 SCC 601 : AIR 1972 SC 2427 : (1973) 1 SCR 896] there are three kinds of laying which are generally used by the Legislature. These three kinds of laying are described and dealt with in Craies on Statute Law as under:

"(*i*) Laying without further procedure,
(*ii*) Laying subject to negative resolution,
(*iii*) Laying subject to affirmative resolution.
(*i*) *Simple laying*.—The most obvious example is in Section 10(2) of the 1946 Act. In earlier days, before the idea of laying in draft had been introduced, there was a provision for laying rules etc. for a period during which time they were not in operation and could be thrown out without ever having come into operation (compare Merchant Shipping Act, 1894, Section 417; Inebriates Act, 1898, Section 21) but this is not used now.
(*ii*) *Negative resolution*.—Instruments so laid have immediate operative effect but are subject to annulment within forty days without prejudice to a new instrument being made. The phraseology generally used is "subject to annulment in pursuance of a resolution of either House of Parliament". This is by far the commonest form of laying. It acts mostly as a deterrent and sometimes forces a Minister (in Sir Cecil Carr's phrase) to "buy off opposition" by promising some modification.
(*iii*) *Affirmative resolution*.—The phraseology here is normally no order shall be made unless a draft has been laid before Parliament and has been approved by a resolution of each House of Parliament. Normally, no time limit is fixed for obtaining approval — none is necessary because the Government will naturally take the earliest opportunity of bringing it up for approval — but Section 16(3) of the Housing (Financial and Miscellaneous Provisions) Act, 1946 did impose a limit of forty days. An old form (not much used nowadays) provided for an order to be made but not to become operative until a

resolution of both Houses of Parliament had been obtained. This form was used in Section 10(4) of the Road Traffic Act, 1930 [cf. Road Traffic Act, 1960, Section 19(3)] .... The affirmative resolution procedure necessitates a debate in every case. This means that one object of delegation of legislation (viz. saving the time of Parliament) is to some extent defeated. The procedure therefore is sparingly used and is more or less reserved to cases where the order almost amounts to an Act, by effecting changes which approximate to true legislation (e.g. where the order is the meat of the matter, the enabling Act merely outlining the general purpose) or where the order replaces local Acts or provisional orders and, most important of all, where the spending, etc. of public money is affected.

Sometimes where speedy or secret action is required (e.g. the imposition of import duties), the order is laid with immediate operation but has to be confirmed within a certain period [cf. Import Duties Act, 1958, Section 13(4)]. This process of acting first and getting approval after has also been adopted in the Emergency Powers Act, 1920 under which a state of emergency can be proclaimed and regulations made. The proclamation must be immediately communicated to Parliament and does not have effect for longer than a month; but it can be replaced by another proclamation. Any regulations made under the proclamation are to be laid before Parliament immediately and do not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for their continuance."

21 Now coming back to the facts of the case, the Amendment Rules provide that the Government has made Rules with effect from 15th September 2006. Thus, the Amendment Rules were brought into force from the date on which they were made. Sub-Section 4 of

Section 143 does not provide that the Rules framed in exercise of the power under Section 143 of the said Act will not come into force unless the same are laid before the Houses of the Legislature. The Rules can come into operation even before the same are laid before the State Legislature. As per sub Section 4 of Section 143, the Legislature can approve or disapprove the Rules made under Section 143. Therefore, the failure to lay such Rules does not affect the enforceability and the validity of the Rules made under Section 143. Neither Section 143 nor any other provision of the said Act provide for the consequences of the failure to comply with sub-Section 4 of Section 143. There is no indication in the statute that the failure to lay the Rules before the Houses will invalidate the Rules. Therefore, in our view, the use of the word "shall" in sub-Section 4 does not make the requirement under sub-Section 4 a mandatory requirement. In any event, non compliance with the requirement of sub-Section 4 of Section 143 will not render the Rule making exercise illegal or void.

22 Lastly, we must note here that it is well settled that no person has a fundamental right to trade in liquor.

23 Hence, we find that there is no merit in the petition and the same is rejected. Rule is discharged.

(V.L.ACHLIYA,J.) (A.S.OKA,J.)