

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 5011/2009

Ramon Distilleries Limited,
a Company incorporated under the Companies
Act, 1956, having its Registered Office at 13,
Wanjara Layout, Kamptee Road, Nagpur 440 026,
through its Director Jasbirsingh Anand.

PETITIONER

.....VERSUS.....

1. The State of Maharashtra,
through Department of Home (Excise), Mantralaya,
Madam Cama Road Mumbai – 400 032.
2. Commissioner of State Excise,
Maharashtra State, Mumbai.

RESPONDENTS

Shri A.S. Manohar, Counsel for the petitioner.
Mrs. K.R. Deshpande, Assistant Government Pleader for the respondents.

CORAM : A. S. CHANDURKAR AND URMILA JOSHI-PHALKE, JJ.

DATE : 16TH JUNE, 2022.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

The challenge raised in this writ petition filed under Article 226 of the Constitution of India is to Condition No.5 in the order dated 31.08.2009 issued by the Desk Officer, Home Department, Maharashtra State thereby requiring the petitioner to pay privilege fees on account of a tie-up agreement for manufacture of Indian Made Foreign Liquor.

2. The facts giving rise to the present proceedings are that the petitioner is a company registered under the Companies Act, 1956 which

engages in the activity of manufacturing Indian Made Foreign Liquor. The petitioner entered into a tie-up agreement with M/s United Spirits Limited (for short, 'USL') a company also incorporated under the Companies Act, 1956. USL was engaged in the manufacture, marketing and sale of Indian Made Foreign Liquor under exclusive brands. As per the tie-up agreement dated 10.09.2008 it was agreed that Indian Made Foreign Liquor would be manufactured by the petitioner while its marketing and sale would be undertaken by USL. The monthly/quarterly production schedule was to be given by USL while the petitioner was to have full control of its factory where Indian Made Foreign Liquor was manufactured. USL had the right of quality control as well as rejection of any batch or product. At the same time the petitioner was free to engage itself in selling or providing similar goods to another party. Technical support was to be provided by USL. The petitioner was to receive sale proceeds for the Indian Made Foreign Liquor invoiced by it. It was clarified that nothing in the agreement would mean that either party was the agent or the representative of the other or that either party would have any right, title or interest in the trade-marks. Either party was entitled to terminate the agreement by giving three months notice in writing.

3. After such agreement was entered into, the petitioner forwarded the copy of the tie-up agreement to the Commissioner, State

Excise. On 06.02.2009, the Commissioner enquired whether the petitioner was willing to pay the requisite fees and privilege fees for the activities. On 24.02.2009 the petitioner clarified that there was no restriction under the Maharashtra Distillation of Spirits and Manufacture of Potable Liquor Rules, 1966 to enter into such agreement. The same also did not amount to any transfer or subletting of the license. The approval was thus sought in the matter. On 31.08.2009 the State Government approved the tie-up agreement between the parties on certain terms and conditions. As per Condition No.5, the petitioner as a license holder was called upon to pay privilege fees equivalent to one time license fees. This communication was addressed to the Commissioner State Excise. The petitioner on 03.09.2009 paid an amount of Rs.22,14,300/- towards one time license fees under protest. Being aggrieved by the Condition No.5 as contained in the order dated 31.08.2009 the petitioner has challenged the same herein.

4. Shri A.S. Manohar, learned counsel for the petitioner submitted that Condition No.5 in the order dated 31.08.2009 requiring the petitioner to pay privilege fees equivalent to one time license fees was without any authority of law and thus illegal. The Bombay Prohibition (Privileges Fees) Rules, 1954 (for short, 'the Rules of 1954') did not empower the respondents to demand privilege fees to the extent of one

time license fees for permitting the activities under the tie-up agreement. Inviting attention to the Rules of 1954 as they stood on 31.08.2009 when the impugned order was passed, it was submitted that under Rule 5 of the Rules of 1954 fees were payable for transfer of a licence from one name to another. In the present case, the license continued in the name of the petitioner and there was no such transfer of license as contemplated by Rule 5. He submitted that Rule 3 related to fees for issuing a Nokarnama while Rule 4 related to fees for transfer of license from one site to another. Rules 3 and 4 were not at all attracted. Similarly in absence of any transfer of license by the petitioner in favour of USL the provisions of Rule 5 of the Rules of 1954 were not attracted. He then submitted that by issuing notification on 16.11.2011, Rule 5-A came to be inserted in the Rules of 1954. As per that Rule, fees were payable by any licensee for privilege of having the lease or sub-lease of his license under any agreement or arrangement to any person with the previous written permission of the Government or the Commissioner. Even if it was assumed that the tie-up agreement resulted in entering into a lease or sub-lease of a license, Rule 5-A could not be relied upon for the reason that the tie-up agreement was dated 10.09.2008 while the impugned order was dated 31.08.2009 and Rule 5-A was inserted for the first time on 16.11.2011. Inviting attention to the affidavit-in-reply filed by the respondents, it was urged that a stand not in consonance with the

impugned order could not be taken while supporting the impugned order. In that regard, he referred to the decision in *Mohinder Singh Gill & Another Versus The chief Election Commissioner, New Delhi & Others* [AIR 1978 SC 851] and submitted that the validity of the impugned order was liable to be adjudicated on the basis of reasons mentioned in the impugned order and not in the subsequent affidavits. He also referred to the decision in *Tata Iron and Steel Company Limited & Another Versus State of Bihar & Others* [(2018) 12 SCC 107] to urge that even for collection of any 'fee', authority of law was mandatorily required under Article 265 of the Constitution of India. It was thus submitted that the demand of privilege fees for having entered into the tie-up agreement was without any force of law and thus Condition No.5 in the order dated 31.08.2009 was liable to be set aside.

It was then submitted that since privilege fees had been paid under protest, the petitioner would be entitled to refund of the same if its challenge were to succeed. Privilege fees paid under protest therefore were liable to be refunded with interest at the rate of 18% per annum. It was thus submitted that the petitioner was entitled to the reliefs as prayed in the writ petition.

5. Mrs. K.R. Deshpande, learned Assistant Government Pleader for the respondents supported the impugned order. She referred to the

affidavit-in-reply filed on behalf of the respondents and submitted that under Rule 5 of the Rules of 1954 if there was a transfer of business by the party in whose name the license was granted to another party, the fees as chargeable for the grant or renewal or continuance of license was chargeable. In view of provisions of Section 49 of the Maharashtra Prohibition Act, 1949 (for short, 'the Act of 1949') and Rule 5 of the Rules of 1954, the demand for privilege fees as made was clearly sustainable. It was also submitted that the tie-up agreement was nothing but a 'concealed transfer' and hence there was no reason to interfere with the impugned demand. It was submitted that the writ petition was liable to be dismissed.

6. We have heard the learned counsel for the parties at length and with their assistance, we have perused the documentary material placed on record. The license for manufacturing Indian Made Foreign Liquor has been granted to the petitioner. As per the tie-up agreement dated 10.09.2008 the petitioner was to manufacture Indian Made Foreign Liquor as directed by USL having full control on its factory where such manufacturing activity was to take place. USL was to market and sell the Indian Made Foreign Liquor subject to applying quality control at its absolute discretion. At the same time, the petitioner was free to engage itself in the sale of Indian Made Foreign Liquor or providing similar goods

to another party. Insofar as the personnel deputed by USL were concerned, it was to bear the expenses of their salaries. The tie-up agreement could be terminated by either party giving three months notice.

Perusal of the tie-up agreement indicates that the license standing in the name of the petitioner has not been transferred to USL and the petitioner continues with its manufacturing activities, besides supplying Indian Made Foreign Liquor over and above what was supplied to USL. In other words, it was open for the petitioner to engage into similar activities and also continue manufacture of Indian Made Foreign Liquor notwithstanding the tie-up agreement dated 10.09.2008.

7. Rule 5 of the Rules of 1954 prescribe the fees payable by any licensee for privilege of having the transfer of its license from one name to another. On a plain reading of the entire tie-up agreement, it is not seen that the petitioner has sought to transfer the license standing in its name in favour of USL. On the contrary, besides supplying Indian Made Foreign Liquor to USL after its manufacture, the petitioner was free to supply and sell Indian Made Foreign Liquor to other parties even during the currency of the tie-up agreement with USL. Undoubtedly, Section 49 of the Act of 1949 empowers the State Government to have the exclusive right or privilege of manufacturing, bottling and selling amongst other

activities any intoxicant, hemp or toddy and thus demand such fees for conferring the right or privilege to undertake such activities on behalf of the State Government. The Rules of 1954 as they stood on 10.09.2008 when the tie-up agreement was signed or on 31.08.2009 when the impugned order of demand was passed do not permit charging of any fees for entering into such tie-up agreement. It is well settled and reiterated in *Tata Iron and Steel Company Limited & Another* (supra) that even for collection of any fee, there ought to be an authority of law to charge the same in view of Article 265 of the Constitution of India. In other words, the Rules of 1954 as they then stood ought to have permitted charging of fees for operating such tie-up agreement. Rules 3 to 5 of the Rules of 1954 do not prescribe the same.

8. The aforesaid conclusion can also be supported by the fact that Rule 5-A was inserted in the Rules of 1954 vide notification dated 16.11.2011. By that Rule, fee was chargeable for lease or sub-lease of a license. It to be kept in mind that the tie-up agreement dated 10.09.2008 was for a period of three years and the said tie-up agreement ceases to operate on 10.09.2011 when the period of three years came to an end. Rule 5-A of the Rules of 1954 was inserted much later on 16.11.2011. Since Rule 5-A of the Rules of 1954 was not included in the Rules of 1954 when the tie-up agreement was signed or the impugned order was

passed, we do not find it necessary to go into the question whether the tie-up agreement could be termed to be a lease or sub-lease of license since such discussion would be rendered academic when it is clear that the State Government could not have charged such fees for lease or sub-lease of license as Rule 5-A was inserted much later. Since it is found that the Rules of 1954 as they stood when the tie-up agreement was signed and the impugned order was passed did not contain any provision for demanding privilege fees for such tie-up agreement, Condition No.5 in the impugned order dated 31.08.2009 demanding the same is liable to be set aside. It is accordingly held that the State Government was not justified in demanding privilege fees equivalent to one time license fees while approving the tie-up agreement between the petitioner and USL dated 10.09.2008.

9. Having found that the demand of privilege fees pursuant to the impugned order dated 31.08.2009 is without any statutory support and thus falls foul of Article 265 of the Constitution of India, the petitioner would be entitled to refund of privilege fees paid by it under protest. The communication dated 03.09.2009 indicates that pursuant to the impugned order dated 31.08.2009 the petitioner had paid an amount of Rs.22,14,300/- on 02.09.2009 under protest. Keeping in view the fact that privilege fees were paid to the State Government under protest, we

are inclined to direct the refund of the said amount alongwith interest at the rate of 4% per annum. This is in view the fact that it is the State Government that would be required to refund the said amount.

10. Hence, in the light of what has been held hereinabove, the following order is passed:-

- (I) Condition No.5 in the order dated 31.08.2009 demanding privilege fees for granting approval to the tie-up agreement between the petitioner and USL is set aside as being without any force of law.
- (II) As a consequence the respondents shall refund the amount of Rs.22,14,300/- to the petitioner alongwith interest at the rate of 4% per annum. The interest would be payable from 02.09.2009 till realization.

11. Rule is made absolute in aforesaid terms with no order as to costs.

(URMILA JOSHI-PHALKE, J.)

(A.S. CHANDURKAR, J.)

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