

GUJCHEM DISTILLERS INDIA LTD.

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v.

STATE OF GUJARAT AND ANR.

FEBRUARY 17, 1992

[P.B. SAWANT AND S. MOHAN, JJ.]

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Bombay Prohibition Act, 1949—Section 58(A)—Constitutional validity of—Supervision under—Legality of.

Constitution of India, 1950—Article 136—Appeal—Matter not contended before High Court whether permitted to contend in appeal.

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The appellant, a company registered under the Indian Companies Act, 1956, was using industrial alcohol as one of the raw materials for manufacturing resins, chemicals, sodium carboxy methyl, cellulose and certain other chemicals. In May, 1970, the company installed its own distillery for the purpose of manufacturing industrial alcohol from molasses.

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The respondent No. 2 on 3.7.1969 issued a licence to the company for manufacturing spirit. In accordance with the conditions No. 2 and No. 3, the respondent No. 2 appointed a 9 member supervisory staff consisting of one Inspector, one Sub-Inspector, one Nayak, one Jamadar and five constables, to supervise the manufacture of the spirit in the company's distillery plant. The appellant-company was required to provide residential accommodation to the supervisory staff within its factory premises and to deposit supervisory charges from time to time. The company complied the requirements.

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In 1973 the appellant-company filed a Civil Application in the High Court challenging the constitutional validity of the Section 58(A) of the Bombay Prohibition Act, 1949.

The High Court dismissed the petition, hence this appeal by certificate granted by the High Court under Articles 132(1) and 133(1)(a) of the Constitution.

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The appellant-company contended that this Court in *Synthetics and Chemicals Ltd. case*, [1989] Supp.1 SCR 623 held that in respect of

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A industrial alcohol, the States had no power to impose the impost; that in view of the judgment of this Court, the theory of privilege as adumbrated by the High Court could not be sustained, and that there was no *quid pro quo*.

B The respondent-State submitted that the *Synthetics and Chemicals Ltd.* case dealt merely with the vend fees, and not about supervisory charges.

Dismissing the appeal, this Court,

C HELD: 1.01. The States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol. This is an added reasoning to uphold the validity of Section 58(A).

[684D, F-G]

D *Synthetics & Chemicals Ltd. v. State of U.P. and Ors.* [1989] Supp.1 SCR 623-Followed.

E 1.02. Section 58(A) of the Bombay Prohibition Act creates a statutory duty of supervision and incidentally provides for recovering from a manufacturer or a businessman having been permitted under a licence to carry on lawfully a business or industrial activity which would otherwise have been unlawful. [684G-685A]

F 1.03. The maintenance of the staff contemplated under Section 58(A) of the Act is primarily for the purpose of ensuring that while dealing with industrial alcohol, no attempt shall be made to divert non-potable alcohol. Therefore, by regulatory measures, the State sees to it that industrial alcohol is not diverted for the use as potable alcohol. Such a regulatory measure is perfectly valid. However, such a power was sustained though not on police power but as a regulatory measure. [679C-D]

G *Southern Pharmaceuticals & Chemicals v. State of Kerala*, AIR 1981 S.C. 1863; *Sh. Bileshwar.Khand Udyog Khedut Sahakari Mandali Ltd. v. The State of Gujarat & Anr.*, C.A. No. 503 of 1974-Followed.

H 2. The appellants are precluded from contending that the services did not make the impost, since the High Court has noted that it was not contended before it that there was not sufficient *quid pro quo* between the

quantum of impost and the services rendered to the manufacturer or businessman. [679E-F] A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 350 of 1974.

Appeal by Certificate from the Judgment and Order dated 29/30-8-1973 of the Gujarat High Court in Special Civil Application No. 163 of 1973. B

M.H. Baig, Rajiv Shakhdar, R. Sasi Prabhu (for M/s S.A. Shroff & Co.) for the Appellants. C

P.S. Poti, Bimal Roy Jad. Anip Sachthey and Ms. Rashmi Dhariwal for the Respondents.

The Judgment of the Court was delivered by

MOHAN, J. This is an appeal by certificate granted by the High Court of Gujarat at Ahmedabad under Articles 132(1) and 133(1)(a) of the Constitution of India. It is directed against the judgment dated 29/30th August, 1973 in Special Civil Application No. 163 of 1973. D

The facts leading to this appeal are briefly as under :- E

The Appellant is a company registered under Indian Companies Act. It is engaged in the business of manufacturing resins, chemicals, sodium carboxy methyl, cellulose and certain other chemicals. Industrial alcohol is one of the raw materials used by the appellant company.

Though, till the year 1969, the appellant was purchasing industrial alcohol from the market, it installed its own distillery from May 1970 at Bilimora, within the State of Gujarat. This was for the purpose of manufacturing industrial alcohol from molasses. F

On July 3rd, 1969 the second respondent, the Director of Prohibition and Excise, Gujarat State, Ahmedabad issued a licence to the appellant for manufacturing spirit. In accordance with the conditions No. 2 and 3 of the licence, the 2nd respondent appointed a staff of 9 persons. The said staff consisted of one Inspector, one Sub-Inspector, one Nayak, one Jamadar and five constables to supervise the manufacture of spirit in the G H

A appellant's distillery plant. The appellant was also required to provide residential accommodation to the supervisory staff within the factory premises. On July 3rd, 1969 the 2nd respondent asked the appellant to deposit the supervisory charges. From time to time, these supervisory charges were also deposited in accordance with the directions of 2nd respondent.

B It requires to be stated at this stage that the levy of supervisory charges, is traceable to Section 58(A) of Bombay Prohibition Act of 1949. The Section says :

C "Sec. 58(A) : The State Government may by general or special order direct that the manufacture, import, export, transport, storage, sale, purchase, use, collection or cultivation of any intoxicant, denatured spirituous preparation, hemp, mhowra flowers, or molasses shall be under the supervision of such Prohibition and Excise or Police Staff as it may deem proper to appoint, and that the cost of such staff shall be paid to the State Government by person manufacturing, importing, exporting, transporting, storing, selling, purchasing, using, collecting or cultivating the intoxicant, denatured spirituous preparation, hemp, mhowra flowers or molasses:

E Provided that the State Government may exempt any class of persons or institutions from paying the whole or any part of the cost of such staff."

F Section 143 of the said Act confers power for making rules. Rules have been framed called Bombay Prohibition (Manufacture of Spirit) (Gujarat) Rules, 1963. These rules *inter alia* regulate the working of distilleries, manufacturing spirit. Rule 2 provides for the licence. Condition Nos. 2 and 3 of the licence require payment of the supervisory staff and for provision of quarters for the residential accommodation of the staff respectively.

G The appellant filled Civil Application No. 163 of 1973 in the High Court of Gujarat challenging the constitutional validity of Section 58(A) of the Act. By the impugned judgment, the said petition was dismissed.

H Hence, the present civil appeal.

The arguments of the appellant briefly stated will boil down to this. It has been categorically laid down in *Synthetics & Chemicals Ltd. v. State of U.P. & Ors.*, [1989] Supp. 1 SCR 623 that in respect of industrial alcohol, the States have no power to impose the impost as is sought to be done in the instant case. The theory of privilege as adumbrated by the High Court can no longer be sustained in view of the judgement.

Even otherwise, there is no *quid pro quo*.

In countering the submissions, it is argued on behalf of the State that *Synthetics and Chemicals Ltd. etc.* (supra) dealt merely with the vend fees. That is not the case here. The maintenance of the staff contemplated under Section 58(A) of the Act is primarily for the purpose of ensuring that while dealing with industrial alcohol, no attempt shall be made to divert non-potable alcohol. Therefore, by regulatory measures, the State sees to it that industrial alcohol is not diverted for the use as potable alcohol. Such a regulatory measure is perfectly valid as seen from *Southern Pharmaceuticals & Chemicals v. State of Kerala*, AIR 1981 SC 1863. This decision was noted with approval in *Synthetics & Chemicals Ltd. Etc. (Supra)*. However, such a power was sustained though not on police power but as a regulatory measure.

As regards the services rendered, the appellants are precluded from contending that the services did not make the impost, since the High Court has noted that it was not contended before it that there was not sufficient *quid pro quo* between the quantum of impost and the services rendered to the manufacturer or businessman.

We are relieved of the necessity of deciding the correctness of these submissions by a detailed judgment, since indential points were raised in Civil Appeal No. 503 of 1974 (*Sh. Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. v. The State of Gujarat & Anr.*) to which one of us (Mohan, J.) was a party. The said Civil Appeal has been dismissed considering these aspects and upholding the validity of Section 58(A). The said judgement will squarely cover this case as well. We fully concur with the reasons contained therein. In *Synthetics & Chemicals Ltd. etc.* (supra) concerning the power to make regulations in order that non-potable alcohol may not be diverted for use as potable alcohol, the following observations are found at page 681:

A "The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol :

B (a) it may pass any legislation in the nature of prohibition of potable liquor referable to entry 6 of list II and regulating powers.

C (b) it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

D (c) the State may charge excise duty on potable alcohol and sales tax under entry 52 of list II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.

E (d) however, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on *quid pro quo*."

In this connection, we may also usefully refer to *Southern Pharmaceuticals & Chemicals (supra)*. This case related to the constitutional validity of Sections 12-A, 12-B, 14(e) & (f), 68-A of Kerala Abkari Act (1 of 1977) and Rules 13 and 16 of the Kerala Rectified Spirit Rules, 1972.

F One of the contentions raised was that the provision contained under Section 14 (e) of the Act for the collection of supervisory charges was clearly invalid inasmuch as :

G (a) They are in conflict of Rule 45 of Central Excise Rules and,

(b) They could not be sustained as fee as there was no *quid pro quo*.

In the said judgment at page 1875, para-27 *Southern Pharmaceuticals & Chemicals (supra)* reads as under :

H "A fee may be charged for the privilege or benefit conferred,

or service rendered, or to meet the expenses connected therewith. A fee may be levied to meet the cost of supervision and may be, something more. It is in consideration for the privilege, licence or service".

Again in para 29, it was stated thus:

"There is a broad co-relationship between the fee collected and the cost of the establishment under Section 14(e) of the Act it is provided that the Commissioner, with the previous approval of the Government may prescribe the size and nature of the establishment necessary for supervision of a manufactory and the cost of the establishment and other incidental charges in connection with such supervision be realised from the licensee. There can be no doubt that the supervisory staff is deployed in a bonded manufactory by the Government for its own protection to prevent the leakage of revenue, but there is no denying the fact that a licensee undoubtedly receives a service in return. The cost of the establishment levied under Section 14(e) of the Act is to be collected from the licensee in the manner provided by Rule 16(4) of the Kerala Rectified Spirit Rules, 1972, relevant part of which reads :

"(4) All the transactions in the spirit store shall be conducted only in the presence of an Excise Officer not below the rank of an Excise Inspector. Such officer shall be assisted by at least two Excise Guards. The cost of establishment of such officer and the guards shall be payable by the licensee in advance in the first week of every month as per counter-signed challan to be obtained from such officer. The rate at which the cost of establishment is to be paid by the licensee shall be fixed by the Commissioner from time to time and intimated to the licensee in writing....."

There is admittedly no provision made in the Central Rules for the recovery of supervisory charges, perhaps because as the Court observed in the *Hyderabad Chemicals and Pharmaceutical's* case (AIR 1964 SC 1870) (supra) it was felt that the duty on medicinal and toilet preparations containing alcohol

A would be sufficient to defray the cost of such supervision. But
the absence of such a provision in the Central Rules, as we
have already indicated, does not deprive the State from making
a provision in that behalf. It is true that the supervisory charges
are in the nature of a compulsory exaction from a licensee and
B the collections are not credited to a separate fund, but are taken
to the consolidated fund of the State and are not separately
appropriated towards the expenditure incurred in rendering
the service. However, as observed in *Government of Madras v.*
Zenith Lamp & Electricals Ltd., [1973] 2 SCR 973; (AIR 1973
C SC 724) followed in *State of Rajasthan v. Sajjanlal Panjawat*,
[1974] 2 SCR 741; (AIR 1975 SC 706) that by itself is not
decisive, by reason of Art. 266 of the Constitution. It is equally
true that normally a fee is uniform and no account is taken of
the paying capacity of the recipient of the service, but absence
of uniformity will not make it a tax if co-relationship is estab-
D lished [see *Commissioner H.R.E., Madras v. Lakshmindra Thir-*
tha Swamiar of Shirur Mutt and *Government of Madras v. Zenith*
Lamp and Electricals Ltd., AIR 1954 SC 282 and AIR 1973 SC
724 (supra)]. The cost of supervision would necessarily vary
with the nature and extent of the business carried on by a
E licensee. Therefore, the supervisory charges can be sustained
even if they are regarded as a fee for services rendered by the
State or its instrumentalities.”

In dealing with *Synthetics Chemical* case (supra) the following obser-
F vations were made :

“Learned Advocates-General for the States of Gujarat and
Kerala have also made their submissions, and referred to
several decisions and the concept of police power, and con-
tended that imposition of a fee would be the most effective
G method of regulating intoxicating liquor other than alcohol.
According to the Advocate-General of Kerala, that would be
justified as the reasonable measure in regard to intoxicating
liquor. According to him, it has been accepted by courts all
along that the ‘police power’ of the State enables regulations
H to be made regarding manufacture, transport, possession and

sale of intoxicating liquor. Such police power could be exercised as to impose reasonable restrictions as to effectuate the power. He referred to the observations of this Court in *Cooverjee B. Bharucha v. The Excise Commissioner and the Chief Commissioner, Ajmer & Ors.*, [1954] SCR 873 which quoted the passage from *Crowley v. Christensen*, (1890) 24 Lawyers' Edn. 620. Reference was also made to *Hari Shanker's* case (supra). Where this Court quoted Vol. 38 of the American Jurisprudence where it was stated that the higher the fee is imposed for a licence, better is the regulation. Reliance was also placed on *P.N. Kaushal's* case (supra). It was contended that it has been accepted by this Court that the police power is exercisable for regulation of an activity of a legislature within the permissible field or impost as regulatory measure. It may be valid though it may neither be fee nor a tax in the limited sense of the term. See the observations of this Court in *Southern Pharmaceuticals & Chemicals. Trichur & Ors., etc. v. State of Kerala & Ors. etc.*, [1982] 1 SCR 519 at 537. Regarding regulatory measures in connection with medicinal preparations containing alcohol it was observed by this Court that the impugned provisions had to be enacted to ensure that the Rectified Spirit is not misused under the pretext of being used for toilet and medicinal preparations containing alcohol. Such a regulation is a necessary concomitant of the police power of the State to regulate such trade or business which is inherently dangerous to public health. The American doctrine of police power is not perhaps applicable as such in India, but powers of the sovereignty to regulate as part of the power of the competent legislature to effectuate its aim are there.

It is true that that in the *State of West Bengal v. Subodh Gopal Bose & Ors.*, [1954] V SCR 587 at 601-604 and *Kameshwar Prasad & Ors. v. The State of Bihar & Anr.*, [1962] 3 Suppl. SCR 369 the concept of police power was accepted as such, but this doctrine was not accepted in India as an independent power but was recognised as part of the power of the State to legislate with respect to the matters enumerated in the State and Concurrent Lists, subject to constitutional limitations. It was stated

A that the American jurisprudence of police power as distinguished from specific legislative power is not recognised in our Constitution and is, therefore, contrary to the scheme of the Constitution. In interpreting the provisions of our Constitution, we should go by the plain words used by the Constitution-makers and the importing of expression like 'police power', which is a term of variable and indefinite connotation can only make the task of interpretation more difficult. It was contended that in enacting a law with respect to intoxicating liquor as part of the legislative power measures of social control and regulation of private rights are permissible and as such may even amount to prohibition.

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D We are of the opinion that we need not detain ourselves on the question whether the States have police power or not. We must accept the position that the States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol being used as intoxicating or drinkable alcohol. The question is whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, fee or levy which has no connection with the cost or expenses administering the regulation, can be imposed purely as regulatory measure. Judges by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures. In this view of the matter we do not detain ourselves with examining the numerous American decisions to which our attention was drawn by learned counsel very elaborately and thoroughly."

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This is an added reasoning to uphold the validity of Section 58(A).

G Turning to the second argument about the absence of *quid pro quo*, we need only extract the following from the judgment of the High Court:

H "Section 58(A) of the Bombay Prohibition Act creates a statutory duty of supervision and incidentally provides for recovering from a manufacturer or a businessman the cost of supervision which is primarily necessitated by the manufacturer

or businessman having been permitted under a licence to carry on lawfully a business or industrial activity which would otherwise have been unlawful. We need not go into the details of this aspect because it has not been contended before us that if the levy under Section 58A is held to be a fee, there is no sufficient *quid pro quo* between the quantum of the impost and the services rendered to the manufacturer or businessman." A B

In the result, the appeal fails and is dismissed with costs.

V.P.R.

Appeal dismissed.