

STATE OF MAHARASHTRA AND ORS.
v
NAGPUR DISTILLERS, NAGPUR AND ANR.

MAY 1, 2006

[S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

Constitution of India; Article 47—Bombay Rectified Spirit (Transport in Bond) Rules, 1951—Rule 5(2)—Levy of fees by State for transport of rectified spirit purchased from other distilleries to manufacturer's premises for manufacture of Indian made foreign liquor—Writ Petition challenging levy of fees under the Rules—High court granted interim order of stay of demand upon an undertaking by the manufacturer till the disposal of the Writ Petition—Correctness of—Held, State cannot run the Government on undertakings—High Court was not justified in passing an unconditional interim order of stay—Hence, balancing the interests of the State and the manufacturer, the manufacturer is directed to pay 50 per cent of license fee payable to the State and give an undertaking to pay the balance if the Writ Petition is dismissed—Bombay Prohibition Act, 1949—Bombay Rectified Spirit Rules, 1951—Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules, 1966.

Respondent no. 1, which is engaged in the business of manufacture and sale of Indian made foreign liquor (IMFL), purchases rectified spirit and extra neutral alcohol from other distilleries for manufacture of IMFL. The respondent is a licensee for possession of the rectified spirit and extra neutral alcohol under the Bombay Rectified Spirit Rules, 1951. Appellant State issued demand notice for payment of fee under Rule 5(2) of the Bombay Rectified Spirit (Transport in Bond) Rules, 1951.

Respondents filed a Writ Petition before High Court challenging the demand of fee made under Rule 5 of the Bombay Rectified Spirit (Transport in Bond) Rules, 1951. The respondents sought interim order of stay of the demand pending disposal of the Writ Petition on the ground that the High Court has granted stay of similar demand in earlier years; that the High Court quashed similar demand in a Writ Petition filed by another company *Vam Organic Chemicals Ltd.* and that the Supreme Court, in the appeal filed by

A the State has granted interim stay on an undertaking given by the company. The State contended before the High Court that the case of the respondents are different from the case of the *Vam Organic Chemicals Ltd.*; that the accumulated liability to pay the fee would be huge and that the interests of the State would remain unprotected if unconditional interim order of stay is granted. The High Court rejected the contention of the State and granted an interim order staying the recovery of fee on an undertaking by the respondents.

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D In appeal to this Court, the appellant contended that the in *Vam Organic Chemicals Ltd.* case, the company was a manufacturer of rectified spirit and it was used by the manufacturer himself; that respondent no. 1 is not a licensee to manufacture rectified spirit and hence the respondent is bound to pay the fees under the Bombay Rectified Spirit (Transport in Bond) Rules, 1951 of transport of rectified spirit purchased from other distilleries to its own premises; that the right to trade in IMFL is a mere privilege granted to the licensee by the State; that the respondents have not made out any *prima facie* case for the grant of an unconditional order of stay of recovery of fees by the State; that the State cannot run on securities and undertakings and hence it was not proper for the High Court to grant the impugned interim order.

E The respondents contended that its case is squarely covered by the decision in *Vam Organic Chemicals Ltd.*; that there is no justification in interfering with the interim order of the High Court as it had given an undertaking which was adequate to protect the interests of the State; that the State has no competence to impose such a levy; and that there is no justification in filing an appeal against the interim order of the High Court since similar orders were passed in various Writ Petitions which are pending.

F Allowing the appeal, the Court

G HELD: 1.1. The decision in *Vam Organic Chemicals Limited.* case is distinguishable from cases where the licensee himself does not manufacture the rectified spirit. The rectified spirit is not manufactured by the first respondent and such spirit is not being used captively in its own premises form manufacture of IMFL. Respondent No.1 is purchasing rectified spirit or extra neutral alcohol from other manufactures and getting it transported to its own premises for manufacturing and bottling IMFL. This factual distinction apart the right to trade in liquor is only a privilege farmed out by the State. [609-F, G]

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1.2. Any amount paid to the State, could be adjusted either towards future liability or directed to be refunded by the State in case the challenge of the licensee succeeds in the Writ Petition when it is finally heard and decided. The only purpose for which the State undertakes liquor trade, notwithstanding the mandate of Article 47 of the Constitution of India, is the revenue that it generates. This aspect also cannot be lost sight of while considering the balance of convenience in cases where a liquor licensee seeks an interim order stating the fulfilment of his obligation to pay all the fees or other charges demanded from him as such a licensee. In view of the long years it takes for a Writ Petition to be decided finally, the licensee himself would find it an onerous burden to pay the fees for years together in case his challenge to the levy is ultimately rejected. The High Court was not justified in passing in practical terms, an unconditional interim order of stay as sought for by the respondents. The High Court should have paid a little more attention to the interests of the State and the consequence arising out of its order staying the payment of the fee merely on an undertaking by the licensee to pay it in case at a future point of time he is found liable to pay the same. It is trite that Government cannot run on undertakings. It has, therefore, become necessary to interfere with the order of the High Court, though normally, this Court would be reluctant, in exercise of its jurisdiction under Article 136 of the Constitution of India, to interfere with interim orders made in pending writ petitions. [610-E-H; 611-A]

1.3. The interests of both would be protected if it is ordered that the licensee is to pay 50 per cent of the license fee payable and that it should give an undertaking to pay the balance 50 per cent in case ultimately the Writ Petition is decided against it, within the time fixed by the High Court. This would balance the equities and afford protection to the interests of the State and the interests of the licensee. It would save the licensee from meeting the entire liability here and now pending disposal of his challenge to the levy and at the same time would not make his obligation too onerous, in case ultimately, he is found not entitled to succeed in his challenge in the Writ Petition. This would also enable the Government to realize a part of the revenue which alone appears to be the motive in permitting the trade in liquor notwithstanding the mandate of Article 47 of the Constitution of India. Thus, on a balancing of the interests of both parties in the background of the nature of the trade and the directive principle of State Policy in that behalf, the order of the High Court calls for interference. [611-B-D]

A From the Judgment/Order dated 20th July, 2004 of the High Court of Judicature at Bombay, Bench at Nagpur in W.P. No. 2417 of 2004.

Soli J. Sorabjee and Ravinder Keshavrao Adsure for the Appellants.

B Uday U. Lalit, Prasenjit Keswani, Nitin Sagar, Amol Chitale and V.D. Khanna for the Respondents.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. 1. Leave granted.

C 2. This appeal by the State of Maharashtra and the Officers of the State Excise Department challenges an interim order passed by the Division Bench of the High Court of Bombay, Nagpur Bench, in a Writ Petition filed by the respondents herein. Respondent No.1 is a partnership firm and respondent No.2 is a partner thereof. Respondent No.1 is engaged in the business of manufacture and sale of Indian made foreign liquor (hereinafter described as **D** “IMFL”) and holder of a wholesale licence under the State Government in Form PLL as per the Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules, 1966. The said Rules are made under the Bombay Prohibition Act, 1949. Respondent No.1 did not own a distillery and was not manufacturing rectified spirit and extra neutral alcohol which it required for manufacture of IMFL. Respondent No. 1 had to purchase rectified spirit and extra neutral alcohol from distilleries owned by others. For possession and use of rectified spirit including the extra neutral alcohol, license was required in Form R.S.II prescribed under the Bombay Rectified Spirit Rules, 1951. The manufacture and sale of IMFL is supposed to take place under the supervision of the staff of the State Excise Department as provided in Rule 12(2) of the Bombay Rectified Spirit Rules, 1951. As per Rule 17 (12) of the Maharashtra Distillation of Spirit and Manufacture of Potable Liquor Rules, 1966 and as per condition No. 1 of the PLL license obtained thereunder, Respondent No.1 as licensee, had to pay the cost of the supervisory staff to the State in terms of Section 58A of the Bombay Prohibition Act.

G 3. As it is elsewhere, in the State of Maharashtra also, under Section 12 of the Bombay Prohibition Act, manufacture of liquor, construction or working of a distillery or brewery, import, export, transport, possession, sale or purchase of liquor are banned. Though, under Section 13 of the Act, the bottling of liquor for sale, consumption or use of liquor is prohibited; under **H** Section 11, the State has taken upon itself the right to permit any of the

aforesaid activities in the manner and to the extent provided for, by the provisions of the Act or any Rules, Regulations or Orders made in that behalf. Under Section 49 of the Act, the State has the exclusive privilege of importing, exporting, transporting, manufacturing, bottling, selling, buying, possessing or using any intoxicant. For consideration, the State farms out the right to the concerned licensee. The State has made rules in terms of Section 143 of the Act prescribing fees including rent or consideration payable in respect of any privilege, license, permit, pass or authorization granted or issued under the Act.

4. In view of the relevant provisions in the Bombay Rectified Spirit Rules, 1951, the Bombay Rectified Spirit (Transport in Bond) Rules 1951 are made applicable for rectified spirit. The issue of a transport pass is contemplated for the transport of rectified spirit from the distillery to the factory of the user subject to payment of the fee prescribed under Rule 5(2) of the Bombay Rectified Spirit (Transport in Bond) Rules 1951. According to the State, the first respondent was to pay the fee at the rate of Rs.2 per litre for rectified spirit and Rs.3 per litre for extra neutral alcohol obtained by it for manufacture of IMFL. The respondents filed Writ Petition No. 2417 of 2004 in the High Court challenging the notification dated 12.7.1999, impugning rule 5 of the Bombay Rectified Spirit (Transport in Bond) Rules 1951 and the fee prescribed imposed on them under the Bombay Rectified Spirit (Transport in Bond) Rules 1951. The challenge was mainly based on a decision of the Bombay High Court in *Vam Organic Chemicals Limited v. State of Maharashtra*, Writ Petition No. 2275 of 2000. It was their plea that the decision in *Vam Organic Chemicals Limited* covered the position regarding the fee sought to be collected from the Respondent No.1 and the demand was liable to be quashed for the reasons stated in *Vam Organic Chemicals Limited*. The respondents also sought an interim order of stay of the demand pending disposal of the Writ Petition. They pointed out that in a number of other cases including a case of their own relating to a previous demand, interim orders of stay had been granted and that even in the petition for special leave to appeal against the decision in *Vam Organic Chemicals Ltd.* (supra) being SLP (C) No. 12180 of 2001, filed in the Supreme Court, the Supreme Court has ordered *Vam Organic Chemicals Limited*, a licensee similarly situated, only to file an undertaking that in case the appeal is allowed by the Supreme Court, *Vam Organic Chemicals Limited* would satisfy the liability as per law and as determined by the Supreme Court within the time fixed by the Supreme Court. The prayer was opposed by the State. The High Court granted an interim order staying the recovery of the fee on the strength of the decision in *Vam*

A *Organic Chemicals Limited* and the interim order granted by this Court in the appeal from that decision.

B 5. In its counter affidavit, the State had indicated that the position of the first respondent who does not manufacture rectified spirit for its own consumption was different from the case of *Vam Organic Chemicals Limited* and that the decision therein or the interim order made in appeal therefrom, does not enable the respondents herein to contend that an interim order as sought for by them should be granted by the Court. It was also submitted by the State that there was a stay as regards earlier years and if during the pendency of the Writ Petition the liability to pay the fee now challenged is kept stayed or suspended, in case the Writ Petition were to be dismissed, the accumulated liability of respondent No.1 would be huge and the interests of the State would remain unprotected and in such a situation, the balance of convenience was not in favour of the grant of an interim order of stay, that too unconditional, as has been done by that Court in some cases. The High Court declined to accept the distinction sought to be made by the State between the present case and the case of *Vam Organic Chemicals Limited* and granted a stay of recovery, merely on an undertaking by the respondents. The appellants have challenged that order of the Division Bench of the High Court dated 20.7.2004 in this appeal.

E 6. Learned Senior Counsel appearing for the appellants submitted that the case of *Vam Organic Chemicals Limited* was one where the licensee was a manufacturer of rectified spirit and such manufactured rectified spirit was being used by the manufacturer himself. Learned counsel submitted that the view taken by the High Court in that decision was not correct and that there was every chance of this Court allowing the appeal. But learned counsel submitted that even assuming that the decision in *Vam Organic Chemicals Limited* case was correct, the same would not cover the case of the respondents since the first respondent did not have a license to manufacture rectified spirit and respondent No.1 was not a licensee which manufactured rectified spirit and consumed it for its own purpose of manufacturing IMFL. Learned counsel submitted that the fact that the first respondent purchased rectified spirit or extra neutral alcohol from others and transported it to its premises for the purpose of manufacturing IMFL was a clear distinguishing feature and the first respondent had necessarily to pay the fee under the Bombay Rectified Spirit (Transport in Bond) Rules 1951. The State had the power to make the relevant Rules and to impose the impugned fee. There was no *prima facie* case made out by the respondents for the grant of an unconditional order of

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stay in respect of the fee to be paid by the first respondent. Learned counsel reminded the Court of the observations of this Court that a Government cannot run on securities and that in cases involving revenue, interim orders should be passed with care and caution and only on appropriate conditions. Learned counsel submitted that the right to trade in IMFL was a mere privilege granted to the licensee by the State.

7. Learned counsel for respondents, on the other hand, submitted that the case put forward by the respondents was squarely covered by the decision in *Vam Organic Chemicals Limited* and there was no justification in interfering with the interim order passed by the High Court especially in the context of the order passed by this Court in the appeal from the decision in *Vam Organic Chemicals Limited*. Learned counsel submitted that the undertaking to be given by the respondents was adequate to protect the interests of the State. It is submitted that the fee impugned was not an impost on potable alcohol, but on rectified spirit and the State has no competence to impose such a levy. Learned counsel submitted that various Writ Petitions were pending in the High Court and their final disposal was being delayed only because of the attempt of the State to stall their hearing. There was no justification in filing an appeal only against the interim order in their case when similar orders have been passed in various other writ petitions filed in the High Court.

8. In reply, learned counsel for the State submitted that substantial amounts are outstanding from such licensees and it would be appropriate if this Court passes an order that protects the interests of both sides. The State can then move the High Court for vacation of the orders in similar cases that are distinguishable from the case of *Vam Organic Chemicals Limited*.

9. *Prima facie*, we find some merit in the argument that the decision in *Vam Organic Chemicals Limited* may be distinguishable from cases where the licensee himself does not manufacture the rectified spirit. Here, rectified spirit is not manufactured by the first respondent and such spirit is not being used captively in its own premises for manufacture of IMFL. Respondent No.1 is purchasing rectified spirit or extra neutral alcohol from other manufactures and getting it transported to its own premises for manufacturing and bottling IMFL. This factual distinction apart, we have to keep in mind that the right to trade in liquor is only a privilege farmed out by the State. Article 47 of the Constitution of India clearly casts a duty on the State at least to reduce the consumption of liquor in the State gradually leading to prohibition itself. It appears to be right to point out that the time has come for the States

A and the Union Government to seriously think of taking steps to achieve the goal set by Article 47 of the Constitution of India. It is a notorious fact, of which we can take judicial notice, that more and more of the younger generation in this country is getting addicted to liquor. It has not only become a fashion to consume it but it has also become an obsession with very many. Surely, we do not need an indolent nation. Why the State in the face of Article 47 of the Constitution of India should encourage, that too practically unrestrictedly, the trade in liquor is something that it is difficult to appreciate. The only excuse for the State for not following the mandate of Article 47 of the Constitution is that huge revenue is generated by this trade and such revenue is being used for meeting the financial needs of the State. What is more relevant here is to notice that the monopoly in the trade is with the State and it is only a privilege that a licensee has in the matter of manufacturing and vending liquor.

10. It is pointed out by learned counsel for the appellants that even in the conditions attached to the license, there is an undertaking by the licensee to pay the fees as demanded. It is his submission that there was no reason to water down that obligation by way of an interim order when an attempt is made to challenge the very imposition of the fee which a licensee had agreed to pay in the first instance. We see some force in the submission, but have to balance it with the plea that the State has no power to impose such a levy. We have also to take note of the fact that after all, any amount paid to the State, could be adjusted either towards future liability or directed to be refunded by the State in case the challenge of the licensee succeeds in the Writ Petition when it is finally heard and decided. The only purpose for which the State undertakes liquor trade, notwithstanding the mandate of Article 47 of the Constitution of India, is the revenue that it generates. This aspect also cannot be lost sight of while considering the balance of convenience in cases where a liquor licensee seeks an interim order staying the fulfillment of his obligation to pay all the fees or other charges demanded from him as such a licensee. There is also merit in the submission that in view of the long years it takes for a Writ Petition to be decided finally, the licensee himself would find it an onerous burden to pay the fees for years together in case his challenge to the levy is ultimately rejected. We are therefore satisfied that the High Court was not justified in passing in practical terms, an unconditional interim order of stay as sought for by the respondents. The High Court should have paid a little more attention to the interests of the State and the consequences arising out of its order staying the payment of the fee merely on an undertaking by the licensee to pay it in case at a future

point of time he is found liable to pay the same. It is trite that Government cannot run on undertakings. It has, therefore, become necessary to interfere with the order of the High Court, though normally, this Court would be reluctant, in exercise of its jurisdiction under Article 136 of the Constitution of India, to interfere with interim orders made in pending writ petitions. A

11. Then the question is what can be an appropriate order in the case on hand. We feel that the interests of both would be protected if we were to order that the licensee is to pay 50 per cent of the license fee payable and that it should give an undertaking to pay the balance 50 per cent in case ultimately the Writ Petition is decided against it, within the time fixed by the High court. This, as we see it, would balance the equities and afford protection to the interests of the State and the interests of the licensee. It would save the licensee from meeting the entire liability here and now pending disposal of his challenge to the levy and at the same time would not make his obligation too onerous, in case ultimately, he is found not entitled to succeed in his challenge in the Writ Petition. This would also enable the Government to realize a part of the revenue which alone appears to be the motive in permitting the trade in liquor notwithstanding the mandate of Article 47 of the Constitution of India. Thus, on a balancing of the interests of both parties in the background of the nature of the trade and the directive principle of State Policy in that behalf, we are satisfied that the order of the High Court calls for interference. B
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12. We therefore allow this appeal and setting aside the order of the High Court order that if the respondents pay one-half of the license fee payable by the respondents and as demanded of them and give an undertaking that they will pay the balance 50% of the levy within the time fixed by the High Court, if the writ petition were to be dismissed, the recovery of the licence fee payable as per the impugned notification will be kept in abeyance until the disposal of the writ petition by the High Court. The respondents are given three months time from today to file a modified undertaking and to deposit 50 per cent of the license fee payable for the Excise Year 2005-2006. The respondents would be liable to pay 50 per cent of the license fee for the subsequent years on or before the thirty-first of December of that year and to file undertakings in the subsequent years until the Writ Petition is heard and finally decided by the High Court. If the respondents fail to make the deposit and to file the undertaking as indicated above, the appellants will be free to take all steps that are permissible under law for recovery of the entire fee due from the respondents as may be demanded from them in accordance F
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A with the relevant rules. In case the respondents succeed in their challenge in the writ petition, the State will be liable to refund the amount paid with interest thereon at the rate of 9% per annum from the date of payment till the date of refund. The amount will be refunded within two months of the allowing of the writ petition unless otherwise agreed to by the parties, regarding the adjustment of that sum.

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Appeal allowed.