IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5815 OF 2009

ASSISTANT EXCISE COMMISSIONER, KOTTAYAM & ORS. **...APPELLANT(S)**

VERSUS

ESTHAPPAN CHERIAN & ANR. **...RESPONDENT(S)**

J U D G M E N T

S. RAVINDRA BHAT, J.

1. The State of Kerala, is aggrieved by the judgement of the Kerala High Court, which allowed the respondent's -(hereafter called "the licensee") writ petition -whereby he claimed for an order quashing a demand in respect of a certain amount towards the balance sought to be recovered after a country liquor license was cancelled.

2. The licensee was the successful bidder for *arrack* shops in the state of Kerala for the year 1993-94; the bid amount it offered

was ₹60 lakhs. A permit for import of 13,00,920 litres of rectified spirit was awarded. The excise duty payable for the designated quantity, monthly was ₹ 3,58,162/-. The licensee entered into an agreement with the State on 01-04-1993. Alleging that the licensee committed default in the payment of the bid amount, in not replenishing the security in a timely manner, the state issued a show cause notice on 23-07-1993 eliciting a response as to why action should not be taken. Later, alleging that the licensee failed to replenish the security amount, the license was cancelled by an order dated 19-08-1993, of the state. The licensed shops were put up for re-auction on seven different dates. However, the re-auction was unsuccessful as there were no bidders. As a consequence, the shops were managed by the Department of Excise in terms of the Abkari Shops Departmental Management Rules, 1972 (hereafter "the Management Rules"). A sum of ₹ 14,94,570 was collected as departmental management fee and ₹ 16,50,971/- was collected as duty on rectified spirit for the period 13-09-1993 to 31-03-1994. The state argued that had the licensee continued operating the shop, it would have gained revenues to the tune of ₹ 1,09,87,989/-. It accordingly demanded dues, from the licensee.

3. The licensee preferred a writ petition for a declaration that the cancellation of the licensee for sale of country liquor for the period 01-04-1993 to 31-03-1994 was illegal and void and that its liability with respect to Group-II arrack shops for the year 1993–94 ended upon the cancellation taking place. It sought to limit its liability for the period April 1993 to 19th August 1994. The petition was dismissed by the single judge. Aggrieved with this, the licensee preferred an appeal to the Division Bench. The Division Bench by a short order-impugned in the present appeal-followed its previous decision and held that since the contracts were entered into before the amendment of Rule 13, the licensee was liable to pay only the actual loss suffered by the government, in realisation of rentals and excise duty. The court directed the government to issue fresh demands in accordance with the rules and agreements executed with the licensee covering only the actual loss.

4. It is argued on behalf of the state that there was no challenge to Rule 13 of the Management Rules, and as a result, the impugned order was not justified in holding that the licensee was liable only for a limited period. Pointing to the language of Rule 13, it is submitted that with effect from 23-12-1993 an

amendment was made in terms of which the question of adjustment of any liability did not arise. Learned counsel contrasted this with the pre-existing or old Rule 13, which permitted credit of departmental management fee and other amounts realised during the currency of the term of management by the state, as against the overall liability of the previous licensee.

5. It was submitted by the state that the Division Bench fell into error in relying upon its previous judgement which had declared that licenses entered into prior to 23-12-1993 were not covered by the amendment. Urging that the decision of the state was based upon its policy not to give credit, learned counsel highlighted that this was premised on its understanding of the statute. Learned counsel also submitted that it is only where resale licensees had entered the picture that the department management fee collected from the date of confirmation of the resale (of the vend or particular shop) could be given credit to reduce from re-sale purchases if the latter completed the security. However, the departmental management fee that could be given credit to the original contractor would be forfeited if he had not completed the security. Relying upon this condition in

the old Rule, learned counsel sought to argue that in the present case, the licensee had in fact not replenished the security; the security that he originally deposited was adjusted towards the amounts due for the three months payable after the auction. Thus, in August, the security had not been replenished and in these circumstances, having regard to the express terminology of the old rule, there was no question of giving any credit to the licensee. It was argued that rather the entire liability sought to be recovered, was justifiably so. In the case of the licensee it worked out to over ₹ 77,65,189/- with interest @ 18 per cent per annum.

6. Mr Roy Abraham, learned counsel appearing for the licensee urged this court not to interfere with the findings and order of the High Court. He relied upon the circumstance that the contract in the present case was entered into on 01-04-1993. It was submitted that, therefore, the question of the new rule (which came into force on 23-12-1993) applying to deny the adjustment of the amounts which were directly recovered by the Department as management fees from the overall liability, did not arise. It was emphasised that importantly, the rules were brought into force after the termination of the license, which occurred on 19-08-1993. However, the rules were amended on 23-12-1993.

Therefore, the amendments were inapplicable to a past event, i.e. the respondent, whose license had been terminated earlier. It was argued that even otherwise, the licensee cannot be made liable for non-payment of dues for the entire period, since the department itself ran the outlets and recovered departmental management fee as well as excise duties.

7. It was also argued that the Division Bench correctly relied on its previous ruling in *Lucka v State of Kerala & Ors*[1] where the amended Rule 13 was held inapplicable to contracts awarded or entered into previously. It was also urged that the state had issued amnesty policies in 2008 and later in 2011. Despite the judgment of the High Court, the respondent's application for relief under the amnesty scheme of 2008 was rejected without rhyme or reason. It was also pointed out that this court permitted the respondent to deposit 50% of the admitted amount, under interim orders, in terms of the 2011 scheme. Learned counsel stated that such amounts were deposited but by then the state apparently had used its powers and taken over immovable property belonging to the respondent, which was put to auction to realize the arrears in terms of the demands, which had been

[1] Dated 11-08-2000 in OP 8271/1994

quashed. The state itself bid ₹ 1 and sought to appropriate the property. However, when the respondent applied for interim relief, this court directed the state to maintain *status quo.*

Analysis and Conclusions

8. The facts stated shows that the licensee was a successful bidder in an auction held by the State of Kerala and had deposited a security amount, to ensure the timely payment of the amounts (*kist*) due in terms of the contract entered into. Alleging that the licensee did not remit the *kist* due to the State in a timely manner, a show-cause notice was issued and eventually the license was cancelled. Indisputably the license entered into was effective for the period, commencing from 01-04-1993. The cancellation of license occurred by an order dated 19-08-1993. The State repeatedly put up the shops in question for auction- seven times, but was unsuccessful in securing the proper bids. Therefore, it had to manage the shops- which it did. The shops appear to have been re-auctioned subsequently and given out in the next financial year. For the period 13-09-1993 (when the State took over the possession) to 31-03-1994 the state collected ₹ 14,94,570/- as Departmental Management Fee and ₹ 16,59,771/- as Excise Duty on rectified spirit. The state

contended, that had the licensee continued, it would have obtained ₹ 1,09,87,989/-

9. The state's case is that the licensee had deposited ₹18,00,000/- as security and ₹ 7,16,324/- by way of Excise Duty and ₹ 6,39,800/- as *kist* dues for April (total amount of ₹ 31,56,124/-). The relevant rule before its amendment, is extracted below:

> *"13.* ***Departmental Management fee to be given credit of*** *- The amount collected as Departmental Management fee may be given credit towards the dues from the original contractor provided he had completed the security and such credit shall be given only upto the date of confirmation of the resale, if any. In the case of resale purchasers, the Departmental Management fee collected from the date of confirmation of the resale may be given credit towards the dues from the resale purchaser, if he completes the security. The departmental management fee that may be given credit to the Original, contractor shall be forfeited if he had not completed the security. Similarly, the departmental management fee that may be given credit to the resale purchaser shall be forfeited if he fails to complete the security."*

10. The rule was amended with effect from 23-12-1993. The amended Rule 13 is as under:

> *"13. Departmental Management fee to be given credit of - The Departmental Management fee collected from a shop while it was under Departmental Management due to default of payment of security, kist, excise duty etc., shall be liable to forfeiture:*
>
> *Provided that where the licensee dies during the currency of a licence, the amount collected as departmental management fee may be credited towards his kist amount."*

11. The petitioner deposited ₹ 31,81,800/- being 30% of the bid amount as security deposit in terms of Rule 10 of Chapter IV of Abkari (Disposal in Auction) Rules. This constituted the cash security for due performance of the conditions of the licence. The amount was to be credited towards *kist* dues for *"the last two or more instalments as the case may be of the contract unless previously appropriated under the rules as per Rule 5(19) of the Abkari Shops (Disposal in Auction) Rules"*. There are 10 instalments of *kist*. Each *kist* fell due on the 10th day of each and every subsequent month. A period of 15 days is allowed, from 10th onwards as the grace period to remit the *kist* instalment under Rule 6 (28) of the Abkari Disposal in Auction Rules. The petitioner was to pay seven instalments of *kist* up to 10-10-1992, leaving three instalments to be adjusted from security deposit, provided he had fulfilled all the conditions of the license.

12. This court notices that the impugned judgment relied on a previous Division Bench ruling of the High Court, which dealt with the applicability of the amended Rule 13 to pre-existing contracts, and held that the condition of non-adjustability was inapplicable for contracts entered into, and vends auctioned, before it came into force. In that judgment, *Lucka v State of*

Kerala & Ors[2] the High Court had to deal with a similar situation, i.e. the rules applicable in the event of cancellation of an excise liquor vend. The court held that:

> *"On combined reading of the provisions of the act and rules, especially section 8 of the Act Rules 5, 10, 15 and 16 of the Abkari Shops Disposal Rule and Rule 13 of the Abkari Shops Departmental Management Rules, shows that due to the cancellation of the contract of the licensees any losses suffered by the revenue loss has to be reimbursed by the licensees. While calculating the loss amount obtained by the departmental management also should be taken into account and given credit as to that amount was received by the government and only after deducting the same actual loss can be found out. The words "at the risk" shows that only the actual loss suffered can be recovered from the licensees. This is apart from imposing any damages by the Government, according to law or passing a discretionary or order by the excess commissioner regarding the future of departmental fee for valid reasons after issuing show cause notice at the time when licences cancelled."*

The Division Bench also held that:

> *"With regard to Abkari contracts entered in 1992-93, there is not a question for dispute at all, as the contract period was over on 31. 3. 1993, before the amendment of rules and admittedly amended rules are not applicable and if no damages by way of kist ordered at the time of cancellation on the basis of amended Rule 13, no recovery steps can be issued with legal contracts and licensees for the Abkari year 1992-93. Other contracts and license under question in these original petitions were also entered before the amendment of the rules with effect from 1.4.1993. The amendment of Rules 13 was made on in December 1993. Therefore, contracts, executed after the amendment of rules may be bound by it if the rules are valid. But contracts covered in these years were executed prior to the amendment of the above rule."*

[2] Dated 11-08-2000 in OP 8271/1994

13. In this case, it is evident that when the state initiated recovery proceedings it did not give credit of the amounts collected under the head of department management fee -as was required under pre-existing Rule 13. Its main contention before this court is that amounts collected as departmental management fee were not adjustable. In view of the decision in *Lucka*[3], there cannot be any dispute that contracts entered into before amendment of Rule 13-as in this case-were not to be treated as those transactions for which amounts were non-adjustable. There is no indication that Rule 13 applied retrospectively.

14. There is profusion of judicial authority on the proposition that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary. In *Commissioner of Income Tax* v *Vatika Township*[4] this court, speaking through a Constitution Bench, observed as follows:

> *"31. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not*

[3] f.no. 1

[4] (2015) 1 SCC 1

tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as lex prospicit non respicit : law looks forward not backward. As was observed in Phillips vs. Eyre[3], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

32. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision reported in L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co.Ltd[4]. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later."

15. Another equally important principle applies: in the absence of express statutory authorization, delegated legislation in the form of rules or regulations, cannot operate retrospectively. In *Union of India v M.C. Ponnose*[5] this rule was spelt out in the following terms:

"The courts will not, therefore, ascribe retrospectivity to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature. The Parliament can delegate its legislative power within the

[5] 1970 SCR (1) 678

> *recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."*

16. The principle has been affirmed in many decisions such as *Hukum Chand v Union of India*[6], *Regional Transport Officer v Associated Transport Madras*[7]*; Federation of Indian Mineral Industries v Union of India*[8] and recently, in *Union of India v G.S. Chatha Rice Mills*[9].

17. The decision in *Lucka*[10], therefore, correctly stated the law. In these circumstances, the amounts calculated by the state as departmental management fees for the period September 1993 to March 1994, when it actually was in charge of the vend, and carried out transactions, had to be adjusted. In other words, the amounts collected could not be again recovered as department

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[6] (1973) 1 SCR 896;

[7] (1980) 4 SCC 597

[8] (2017) 16 SCC 186

[9] 2021 (2) SCC 209

[10] f.no.1

management fees. Likewise, it is not in dispute that during the same period, the state was able to collect revenue i.e. excise duty, as well of ₹ 16 lakhs.

18. It appears that an amnesty scheme was introduced by the State[11], in 2008. The respondent sought to deposit amounts in terms of the said scheme. However, the state rejected this request by its letter dated 25-08-2008, contending that the department management fee could not be adjusted against arrears. This court permitted the respondent to deposit 50% of the amount it claimed as payable to the government, in terms of a subsequent amnesty scheme, framed in 2011. By the order dated 08-12-2008 this court clarified the previous order dated 29-03-2011, regarding deposit of amounts under the amnesty scheme:

> *"we accordingly direct in the light of the fact that amnesty scheme has been extended up to 31 March 2011, that the petitioner may deposit 50% of the amount due within one week from today, and the balance into monthly instalments in court."*

19. According to the respondent, the reduced arrears are ₹ 40,51,288 in terms of amnesty scheme issued on 26-05-2008. The licensee respondent had applied under the scheme; however, the appellant state refused to process it on the ground that since

[11] By an order, dated 26.5.2008

the license was cancelled due to non-replenishment of security, the departmental management fee collected could not be adjusted.

20. This court had noticed that the Division Bench in *Lucka*[12], correctly reasoned that the amended Rule 13 was inapplicable to contracts previously awarded or entered into. The sequitur is that departmental management fee collected by the state, for the period the vend (or outlet) was in its direct management, could not be recovered again, and had to be adjusted. Apparently, the state had preferred appeals, by special leave from the common judgment in *Lucka*[13]. Those appeals were ultimately dismissed on 19.2.2008.[14] In these circumstances, and having regard to the principle that retrospectivity cannot be presumed, unless there is clear intention in the new rule or amendment, it is held that there is no infirmity with the judgment of the High Court.

21. The findings and conclusions previously recorded would have been dispositive of the issues arising in this appeal. However, this court is mindful of the fact that the respondent had succeeded before the High Court and was thus entitled to claim

[12] f.no.1

[13] f.no.1

adjustment of the departmental management fees, for the period after its contract was terminated. The respondent was also entitled to claim relief under the Amnesty Scheme, which was denied to it despite having succeeded before the High Court. Eventually, when the Scheme was announced afresh in 2011, this Court permitted the respondent to deposit 50% of the admitted amount[15]. Having regard to the overall circumstances, it would be in the fitness of things if the respondent is permitted to deposit the balance – for which it is hereby granted two months to do so. This shall be considered as closure and discharge of this liability so far as payment of amounts under the contract cancelled on 13-09-1993, are concerned. Since the respondent had approached this Court complaining that the State had sought to auction his properties, a *status quo* order was made, binding the parties not to take fresh steps. In view of the findings recorded, the State has to ensure that the property of the respondent is released from attachment and due possession is handed back to the latter within the same period of two months.

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[14] In Civil Appeal Nos. 4976-4987/2002 and connected cases as well as a special leave petition (SLP (C) 19586/2007).

[15] The admitted amount being ₹ 40,51,288/-

22. In the light of the above discussion, following directions are hereby given:

(a) Upon payment of 50% of the amount, i.e. 50% of ₹40,51,288/- within two months from today, the respondent's liabilities towards the arrears of dues for the liquor vend in issue which was cancelled by the appellant State's order dated 30-09-1993 shall stand discharged;

(b) The state is hereby directed to release the respondent's property attached and sought to be sold, towards satisfaction of the above liability, upon receiving the said balance 50% of the amount within two months or latest within four weeks of receipt of the amount;

(c) The respondent shall not be liable to pay any interest for the upheld payment or for any other reason whatsoever, on the principal amount, i.e. ₹ 40,51,288/-. The State shall refrain from initiating any proceedings for its recovery towards arrears for the said period the contract was to be in operation, i.e. 1993-94.

23. The impugned judgment is accordingly upheld. The appeal is dismissed but in terms of the directions contained in the preceding paragraph. The parties are left to bear their own costs.

.....J.
[L. NAGESWARA RAO]

.....J.
[S. RAVINDRA BHAT]

NEW DELHI;
SEPTEMBER 06, 2021