

CIVIL MISCELLANEOUS

Before A. N. Grover and H. R. Khanna, JJ.

JAGATJIT DISTILLING AND ALLIED INDUSTRIES,
LTD.,—Petitioner

versus

STATE OF PUNJAB AND ANOTHER,—Respondents.

Civil Writ No. 2121 of 1963.

Punjab Excise Act (I of 1914)—S. 80(2)—Whether unconstitutional—S. 59—Punjab Distillery Rules (1932) framed under—Rule 9.36—Whether ultra vires in so far as it empowers Financial Commissioner to levy penalty—Ss. 36 and 80(2)—Whether an order imposing penalty can be passed without first passing an order cancelling or suspending the licence and giving the option to the licensee.

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September, 11th.

Held, that section 80(2) of the Punjab Excise Act, 1914, is valid. It cannot be held to be invalid on either of the following two grounds:—

- (i) That it is left to the discretion of the excise authorities either to take the case to Criminal Courts where there would be a regular trial in accordance with the procedure prescribed or to levy a penalty of which no limit is indicated which the Distillery must pay if it has to save the cancellation or suspension of its licence without which all its working and business must be stopped. Under section 80(2) it is the Financial Commissioner alone who has the authority to cancel or suspend the licence of a distillery and who can take action.
- (ii) That the maximum amount of penalty which can be imposed under section 80(2) has not been indicated by the Legislature as is to be found in almost all other Acts where authorities are empowered to impose penalties in certain events, namely, the Income-Tax Act, the Sales-Tax Act, the Sea Customs Act, etc. It is the Financial Commissioner who is the highest authority in the Department who can fix such penalty and this is sufficient safeguard against the abuse or misuse of discretion.

Held, that the later part of Rule 9.36 of the Punjab Distillery Rules, 1932, in so far as it empowers the Financial Commissioner to impose penalty is not *ultra vires*. This Rule should be regarded as subordinate to section 80(2) of the Act. The general power conferred by section 21(d) (1) and (11) of the Act on the Financial Commissioner to make rules with regard to matters connected with the working of distilleries and granting of licences empowers the rule-making authority to impose some sanction for violation of those rules. The impugned portion of rule 9.36 does not confer any independent power on the Financial Commissioner to levy penalty for breach of the conditions contained in that rule but it only lays down certain conditions in which penalty would be levied when the matter comes up for exercise of discretion under section 80(2).

Held, that an order imposing penalty under section 80(2) of the Act cannot be passed without first passing an order under section 36(c) of the Act and affording an option to the distillery to have its licence cancelled or suspended.

Petition under Article 226 of the Constitution of India praying that a writ in the nature of Certiorari, Mandamus or any other appropriate writ, order or direction be issued quashing the order dated the 9th August, 1963, passed by respondent No. 2 and directing the res-

pondents to refund the amount of Rs 25,000 illegally recovered by them from the petitioner-Company.

B. R. TULI AND SUDERSHAN TULI, ADVOCATES for the Petitioner.

S. K. KAPUR, ADVOCATE-GENERAL AND N. N. GOSWAMY, ADVOCATES, for the Respondents.

ORDER

GROVER, J.—This is a petition under Article 226 of the Constitution filed by the Jagatjit Distilling and Allied Industries Limited (hereinafter called the Distillery) challenging the imposition of a penalty amounting to Rs. 25,000 by the Excise and Taxation Commissioner with powers of Financial Commissioner, Punjab, for violation of rule 9.36 and other rules of the Punjab Distillery Rules, 1932 (to be referred to as the Rules).

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The Excise and Taxation Commissioner sent a memorandum, dated 1st August, 1963, to the Distillery stating that it had been reported as follows:—

- “(1) That the stock of empty bottles with the distillery on the 1st July, 1963, and since then has been below the requirements of rule 9.37-A of the Punjab Distillery Rules;
- (2) That the stock of plain and spiced bottled country liquor with the distillery on the 1st July, 1963, and since then has been much below the requirement of Rule 9.36 of the Punjab Distillery Rules.
- (3) Owing to shortage of empty bottles, bottled country spirit and pilfer proof seals with the Distillery it could not supply country liquor to the licensees according to their requirements, which amounted to refusal of supplies. This is in violation of rule 9.110 of the Punjab Distillery Rules.
- (4) You have not complied with the direction issued in this office memorandum No. 2161-X. S. II, dated the 19th July, 1963, to convert all spirit with you excepting denatured spirit into country spirit.”

After affording an opportunity to the Distillery to present its case, Shri Daljit Singh, who was exercising the powers

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of Financial Commissioner, recorded a lengthy order on 9th August, 1963, imposing the aforesaid penalty. By a memorandum, dated 13th August, 1963, the Distillery was informed that,—vide order dated 9th August, 1963, under rule 9.36 of the Punjab Excise Manual, Volume II, and under section 80 read with section 36 of the Punjab Excise Act, 1914 (to be called the Act) a penalty of Rs. 25,000 had been imposed for the irregularities committed by the Distillery and it was required to deposit the aforesaid amount into the Government Treasury immediately. This was followed by another memorandum, dated 14th August, 1963, saying that since the Distillery had failed to make the payment of Rs. 25,000, movable properties mentioned in the memorandum were being attached. The Distillery addressed a letter dated 31st August, 1963, praying that the case may be reopened and the previous order reviewed and the penalty waived and in the meantime the attachment might be lifted. Ultimately, however, by a letter dated 13th November, 1963, the amount of Rs. 25,000 was paid by the Distillery by means of a cheque without prejudice to its rights to have the demand set aside. The present petition was filed on 16th November, 1963, in which apart from the prayer for quashing of the order dated 9th August, 1963, a direction was sought for refunding of the amount of Rs. 25,000 which had been paid by the Distillery.

Mr. Bal Raj Tuli, who appears for the Distillery, has challenged the validity of the last portion of Rule 9.36, which empowers the Financial Commissioner to impose a penalty as determined by him in case of serious or continued failure to comply with the conditions mentioned in that rule. The rule is in the following terms:—

“Subject to the provisions of the preceding rules, the licensee shall maintain a stock of plain and spiced country spirit, in bottled form, so that such stock shall, at the beginning of each month after allowing for compliance with all orders in hand at the time, be equal to one-half of the average issues during that month in the three preceding years. If, on account of an emergent and unexpected demand during the last days of the preceding month, the stock on the first day of any month is below the quantity required by

this rule, the licensee shall, in the beginning of the month, make it good with the least possible delay. In case of serious or continued failure to comply with this condition, the licensee may be required to pay a penalty determined by the Financial Commissioner and persistent failure to comply with this condition will entail the cancellation of the licensee's licence."

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The power to make rules is conferred on the Financial Commissioner, subject to such restrictions or conditions as the State Government may impose, by section 21 of the Act. It is common ground that sub-clauses (1) and (11) of clause (d) of section 21 are relevant for the purpose of seeing whether the Financial Commissioner could frame rule 9.36. These provisions are—

“(1) the granting of licences for distilleries, stills or breweries;

(11) any other matters connected with the working of distilleries or breweries.”

Section 59 of the Act also empowers the Financial Commissioner to make rules, but the learned Advocate-General has not relied on its provisions for supporting the validity of rule 9.36, in so far as it relates to the imposition of penalty. According to Mr. Tuli, the power to make rules regarding the granting of licences for distilleries and any other matters connected with their working cannot either expressly or by necessary implication include the authority to make a rule for imposition of penalty for the breach of any rule made under those provisions. It has also been argued that the entire scheme of the Act is such that contravention of any of the provisions of the Act or the rules renders the Distillery liable to the various penalties provided in Chapter IX. Section 65 says, *inter alia*, that whoever, being the holder of a licence wilfully does or omits to do anything in breach of any of the conditions of the licence not otherwise provided for in the Act, shall be punishable with fine which may extend to five hundred rupees. Similarly, section 68 provides that whoever may be guilty of any act or intentional omission in contravention of any of the provisions of the Act or of any rule, notification, etc., and not otherwise provided for in the Act

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shall be punishable for every such act or omission with a fine which may extend to two hundred rupees. Section 71 lays down that if on an investigation by an excise officer it appears that there is sufficient evidence to justify the prosecution of the accused, the investigating officer, unless he submits the case for the orders of the Collector under section 80, shall submit a report to a Magistrate having jurisdiction to enquire into or try the case. The intention of the Legislature, therefore, was to make breach of the conditions of the licence or violation of the provisions of the rules a penal offence for which punishment is provided as also the procedure. Section 80, however, empowers the Collector to accept from any person, who is reasonably suspected of having committed an offence punishable under section 62, section 65 or section 68 a sum of money by way of composition for such offence and on payment of such sum the accused person shall be discharged. Sub-section (2) of section 80 provides that the cancellation or suspension of any licence under section 36(a), (b) or (c) may be foregone or revoked by and at the sole discretion of the authority having power to cancel or suspend it on payment by the holder of such licence as such authority may fix. Section 36 empowers the authority granting any licence to cancel or suspend it if there is any breach of any of the terms of conditions of such licence. It is common ground that in all licences a condition is inserted that all the rules shall be observed and such a condition exists in the licence of the Distillery (Annexure "A"). Thus, the scheme of the Act appears to be that if there is breach of a rule, the licence can be cancelled or suspended under section 36(c) but the cancellation or suspension can be foregone or revoked at the sole discretion of the authority having power to cancel or suspend the licence on payment of such penalty as that authority may fix. Unless the case is submitted for orders of the Collector under section 80 by the excise officer under section 71, he can start a criminal prosecution as provided by that section in which case punishment can be awarded under section 65 or section 68, as the case may be, for breach of the conditions of the licence or of the rule.

Mr. Tuli's contention that no independent provision for imposition of penalty could be made under rule 9.36 by the Financial Commissioner, appears to require a careful

examination as *ex facie* section 21(d)(1) and (11) does not confer such a power. The position taken up in the return filed by the respondents was not quite clear. The learned Advocate-General has submitted that the offending portion of rule 9.36 should be read in the context of section 80(2) as it is intended to supply a guiding principle for the exercise of discretion while fixing the penalty under that provision. According to him, the conditions laid down with regard to maintenance of stock of plain and spiced country spirit, in bottled form, etc., as provided for in rule 9.36 are regarded as vital and, therefore, if a licensee commits a breach of that rule, his licence could be cancelled or suspended under section 36(c). On payment of penalty as fixed under section 80(2), the cancellation could be foregone. The last portion of rule 9.36 deals with a situation where there is serious or continued failure to comply with the conditions laid down in that rule. It says that the Financial Commissioner shall require the licensee to pay a penalty in that event but if the failure becomes persistent, then the licence will be cancelled. The argument, therefore, is that the part relating to imposition of penalty of rule 9.36 should be read as if it were regulatory of the exercise of discretion under section 80(2). In *Messrs Sainik Motors v. State of Rajasthan* (1), the Rajasthan Passengers and Goods Taxation Act, 1959, allowed an option to pay a lump sum in lieu of the tax but rules 8 and 8-A of the Rules framed thereunder made the payment of the lump sum compulsory and the question was whether the Rules were invalid. Their Lordships were of the view that the statutory provisions gave a right of election to the taxpayer to pay a lump sum or to pay the tax chargeable in accordance with the provisions contained therein. The lump sum payment was a convenient mode of payment. It was observed at page 1485—

“Now, Rules 8 and 8-A and the notification only lay down what lump sum payment has to be in each case, if a lump sum is being paid. The mandatory language is used to fix ~~pre-emptorily~~ ^{per} the amount of the lump sum. Rules 8 and 8-A and the notification cannot be said to overreach the

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section to which they are subordinate and from which they must take their colour and meaning. If the Act creates an option, it cannot be negatived by the Rules. The Act and the Rules must be read harmoniously, and reading them so, it is plain that the apparent mandatory language of the Rules and the notification still retains the permissive character of the section, but only lays down what the amount of the lump sum must be, if lump sum payment is made in lieu of payment of the tax calculated on actual fares and freights."

The rules and the notification were held not to be void and contradictory of the Act. The Advocate-General has relied on the above statement for saying that the offending portion of rule 9.36 should be regarded as subordinate to section 80(2). He has sought to sustain the validity of the rule by relying on the general power conferred by section 21(d)(1) and (11) and has submitted that if rules can be made with regard to matters connected with the working of distilleries and granting of licences, then the rule-making authority would have the power to impose some sanction for violation of those rules. He agrees that the impugned portion of rule 9.36 does not confer any independent power on the Financial Commissioner to levy penalty for breach of the conditions contained in that rule but it only lays down certain conditions in which penalty would be levied when the matter comes up for exercise of discretion under section 80(2). There is a good deal of substance in the submissions of the learned Advocate-General. Once it is held that the offending portion of rule 9.36 does not confer any independent power on the Financial Commissioner, apart from the provisions contained in section 80(2), to fix a penalty in the event of foregoing or revoking the cancellation or suspension of a licence, the cloud which has been sought to be created with regard to its validity is dispelled.

Mr. Tuli has also assailed the validity of section 80(2) and has preferred a two-pronged attack. He says firstly that when criminal prosecution can be ordered according to the procedure prescribed by section 71 in which case penalty in the nature of a fine to a limited extent can alone be imposed, no arbitrary and unfettered power by

levying any amount of penalty can be sustained by virtue of the provisions of Article 14 of the Constitution. The submission, in other words, is that it is left to the discretion of the excise authorities either to take the case to Criminal Courts where there would be a regular trial in accordance with the procedure prescribed or to levy a penalty of which no limit is indicated which the Distillery must pay if it has to save the cancellation or suspension of its licence without which all its working and business would be stopped. The other objection of Mr. Tuli is that the maximum amount of penalty which can be imposed under section 80(2) has not been indicated by the Legislature as is to be found in almost all other Acts where authorities are empowered to impose penalties in certain events, namely, the Income Tax Act, the Sales Tax Act, the Sea Customs Act, etc. The learned Advocate-General has relied on *Shanti Prasad Jain v. The Director of Enforcement* (2) for meeting the challenge on the first part of the argument and as regards the second part, he submits that it is implicit in section 80(2) that the licensee, who has rendered himself liable to cancellation of his licence, can be allowed to keep it alive only by paying such price as the Financial Commissioner may determine. In that case the validity of section 23(d) was impugned which empowers the Director of Enforcement to hold an enquiry and impose such penalty as he may think fit for contravention of certain provisions of the Foreign Exchange Regulations Act, 1947. The Director, however, has the power of making a complaint in writing to the Court if he considers that the penalty which he is empowered to impose, would not be adequate. It has been held that Foreign Exchange has features and problems peculiarly its own, and that it forms a class in itself. Therefore, a law which prescribes a special procedure for investigation of breaches of foreign exchange regulations will not be hit by Article 14 as it is based on a classification which has a just and reasonable relation to the object of the legislation. The case of *State of West Bengal v. Anwar Ali* (3), on which Mr. Tuli has also relied, was distinguished by saying that there an absolute discretion had been conferred on an officer to send a case for trial either to a Court or to a Magistrate empowered to try cases under a special procedure, but under section 23(d) of the aforesaid

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(2) A.I.R. 1962 S.C. 1764.

(3) 1952 S.C.R. 284.

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Act the case was to be sent for trial to a Court only when it was considered that a more severe punishment should be awarded. It is not possible to see how Article 14 can be invoked in the present case where the provisions of either the Act or the rules have no analogy whatsoever with the law which was impugned in *Anwar Ali's case*. As has been already noticed, section 71 empowers an excise officer to put the case into Court unless he submits the same for orders of the Collector under section 80 and that has reference to sub-section (1) and not sub-section (2) of section 80. Under sub-section (2) it is the Financial Commissioner alone who has the authority to cancel or suspend the licence of a distillery and who can take action.

As regards the submission of Mr. Tuli, that no limit has been prescribed in the matter of imposition of penalty under section 80(2), that *per se* is not a vice which will render the provision invalid. As stated in *Corpus Juris Secundum*, Volume 70, at page 391, the amount of penalty to be inflicted rests in the sound discretion of the Legislature. Statutes imposing penalties usually either fix the amount thereof definitely or prescribe certain maximum and minimum limits within which the Court may fix any amount they may see fit as punishment in the individual case. Failure of the Legislature to prescribe the maximum penalty, the minimum only being fixed, does not invalidate the statute. Moreover, taking into consideration the object and purpose of section 80(2), the authority is not expected to impose penalty arbitrarily without reference to the violations of breaches for which the cancellation or suspension of the licence may be ordered. It is not disputed that it is the Financial Commissioner, who is the highest authority in the Department, who can fix such penalty and this is a safeguard against the abuse or misuse of discretion. The contentions advanced by Mr. Tuli with regard to the vires of the last part of rule 9.36 as also section 80(2) must, therefore, be repelled.

Mr. Tuli, has finally urged that it was not open to the Financial Commissioner while acting under section 80(2) to impose a penalty and proceed to realise it without conforming to the procedure that is contemplated by the aforesaid provision. It is said that the Financial Commissioner should have, in the first instance, issued a proper

notice indicative of the proposed action of cancellation or suspension of the licence of the Distillery under section 36(c) for breach of the rules and conditions of licence in question. After it was determined that the licence was liable to cancellation or suspension, then the question of fixing the penalty would arise and after such penalty had been fixed, the Distillery could be called upon to deposit the penalty within reasonable time, failing which the cancellation or suspension of the licence would stand. Mr. Tuli also says that at no previous stage the excise authorities thought of following the procedure which ought to be followed when dealing with a case under section 80(2) and the Financial Commissioner proceeded to impose the penalty under rule 9.36 as if it conferred independent power on him to do so, apart from section 80(2). The learned Advocate-General has, on the other hand, contended that a clear notice was given to the Distillery about the violations and breaches of the rules and conditions of the licence and after a full hearing had been afforded, the penalty of Rs. 25,000 was fixed and since this could only be done under section 80(2) the Distillery had the option either to pay it or to have its licence cancelled or suspended. It is perfectly clear that although the Distillery has had full opportunity to answer the charge with regard to the violation and breaches of the rules and conditions of the licence as also with regard to the determination of penalty, it could not be made to pay the same without having been given an option of having its licence cancelled or suspended. In another petition (*The Karnal Distillery Co. Ltd v. The State of Punjab*, Civil Writ No. 315 of 1964), which was disposed of by us on 20th August, 1964, the Excise and Taxation Commissioner, exercising the powers of the Financial Commissioner, had made an order while acting under section 80(2) in the following manner:—

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“The management of the Distillery have thus rendered their licence in Form D-2 granted in favour of the Karnal Distillery Company Limited, Karnal, liable to cancellation or suspension under section 36(c) of the Punjab Excise Act (1 of 1914). However, instead of cancelling the licence, I, in exercise of powers under section 80(2) of the Act *ibid*, hereby impose a penalty of Rs. 500 (Rupees five hundred) only on the

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management of the said Distillery. The amount of penalty should be deposited by the management in the Government Treasury, Karnal, within a fortnight of the receipt of this order failing which action for cancellation of the Distillery licence will be taken under section 36(c) *ibid.*"

That appears to be the correct form of the order which should have been made in the present case also after determining the penalty. It may be mentioned that Mr. Tuli took us through the entire order for the purpose of showing that the amount of the penalty imposed was wholly unjustified but that is not a matter which can be gone into in these proceedings.

In view of what has been stated above, the petition is allowed to the extent that the order made by respondent No. 2. dated 9th August, 1963, as also the demand contained in the memorandum, dated 13th August, 1963, (copy Annexure "D") are hereby quashed in so far as they direct immediate payment by the Distillery of the amount of the penalty into the Government Treasury. It will be open to the aforesaid authority to make a proper order in accordance with our decision. The Distillery would also be entitled to the refund of the amount of Rs. 25,000 which has already been realised pursuant to the aforesaid orders. It is unnecessary to make any directions in that behalf because it will be for the Distillery to make up its mind after fresh orders, if any, are made either to allow that amount to remain with the Government in payment of the penalty or to face proceedings for cancellation or suspension of its licence. It is needless to say that the amount of penalty which has already been realised shall have to be refunded if the Distillery chooses the latter course, namely, of having its licence cancelled or suspended in accordance with the orders to be made by the respondents. In the circumstances the parties are left to bear their own costs.

It may be added that during the course of arguments the Bench expressed the opinion that the penalty of Rs. 25,000 appeared to be on the higher side. The learned Advocate-General has stated at the time of announcement

of judgment that in view of our observations, the Government has agreed to reduce the amount of penalty to Rs. 10,000. Jagatjit Distilling and Allied Industries Ltd.

H. R. KHANNA, J.—I agree.

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