

(2000) 06 GUJ CK 0090

In the Gujarat High Court

Case No : Special Civil Application No's. 8877 of 1989 and 2916 and 6546 of 1991

Ashok Organics Industries Ltd. and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 20-06-2000

Acts Referred:

Bombay Denatured Spirit (Gujarat Amendment) Rules, 1988 — Rule 50, 52
Bombay Prohibition Act, 1949 — Section 143(2), 143(3), 58A

Citation : (2001) 1 GLR 38

Hon'ble Judges : P.B. Majmudar, J; B.C. Patel, J

Bench : Division Bench

Advocate : M.J. Thakore, B.H. Chhatrapati and D.C. Rawal, for the Appellant;
D.N. Patel, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

B. C. Patel, J.—Messrs. Gujchem Distillers India Limited, a Company incorporated under the Companies Act, 1956 is one of the petitioners in Special Civil Application Nos. 8877 of 1989 and 2916 of 1991. Messrs. Ashok Organics Industries Limited is one of the petitioners in Special Civil Application No. 6546 of 1991. In Special Civil Application No. 8877 of 1989, the relief which is claimed is as under :-

"21.

(A) to declare the impugned notification al Aimexure "A" (Bombay Denatured Spirits (Guj. Amendment) Rules, 1988) to be illegal, unconstitutional, without jurisdiction, null, void and of no effect whatsoever from 25th October, 1989.

They have also prayed for refund of vend fee collected, with interest at the rate of 18% per annum.

2. In Special Civil Application No. 2916 of 1991, the petitioners have challenged the Rules made in exercise of power conferred by clause (u) of sub-section (2) of

Section 143 of the Bombay Prohibition Act, 1949 read with the proviso to sub-section (3) of the said Section 143. The Rules are known as : "The Bombay Denatured Spirit (Gujarat Amendment) Rules, 1988".

3. The petitioners of Special Civil Application No. 6546 of 1991 have similarly challenged the Rules.

Date : 20-6-2000

4. The Division Bench at the stage of admission of Special Civil Application No. 8877 of 1989, considered the decision of the Apex Court in Writ Petition No. 182 of 1980, decided on 22-10-1989. The Constitution Bench of the Apex Court in that case has taken the view that the State Legislature has no power to impose any vend fee. Therefore, in view of the Supreme Court judgment, no defence was available to the respondent. Considering the submissions in detail, following the Apex Court judgment, interim relief was granted in terms of paragraph 22 to be operative from 15-2-1990. The Court also stayed the operation of the order for a period of four weeks to enable the respondents to file SLP against the order passed by the Court. It seems that the respondents have not challenged the order made by the Division Bench at the stage of admission. The Company is manufacturing Resins, Chemicals, Sodium, Carboxy Methyl Cellulose, Acetic Acid, Acetaldehyde etc., at its factory situated at Billimora in Valsad District and at Ankleshwar factory in Bharuch District. At the Ankleshwar factory, the petitioner manufactures Acetic Acid, for which principal raw material is industrial alcohol, i.e. Special denatured spirit, denatured with 0.5% Acetaldehyde. Even at Billimora, one of the raw materials used by the Company is industrial alcohol, i.e. Special denatured spirit, with 0.5% benzene. The Company has obtained the licence to manufacture spirit from the Director of Prohibition and Excise under the provisions contained in the Bombay Prohibition (for Manufacture of Spirit) (Gujarat) Rules, 1963. It has a bonded warehouse. It is specifically averred by the Company that the Company obtains industrial alcohol/Special Denatured Spirit for its captive consumption at its Billimora factory from its own distillery after obtaining the requisite transport pass as prescribed under Rule 50 of the Bombay Denatured Spirit Rules after paying the prescribed fees. Respondent No. 1 issued a notification, which has been published in Gujarat Government Gazette, Part IV-B of February 11, 1988, by which the Bombay Denatured Spirit (Gujarat Amendment) Rules, 1988, whereunder the said fee of "20 ps." per litre, appearing in Rule 50, has been substituted by "50 ps." per litre. The petitioners have prayed to declare this notification to be illegal, unconstitutional, without jurisdiction, null and void and has prayed for consequential reliefs.

5. The aforesaid petitioner also filed Special Civil Application No. 2916 of 1991.

6. The State Government issued the Notification, which has been published in Gujarat Government Gazette Part IV-B, on 21st December, 1990 in exercise of the powers conferred by clause (u) of sub-section (2) of Section 143 of the Bombay Prohibition Act, 1949, to amend the Bombay Denatured Spirit Rules,

1959. By this Notification, Government introduced The Bombay Denatured Spirit (Gujarat Amendment) Rules, 1988, under which the first proviso to Rule 50 of the Bombay Denatured Spirit Rules, 1959 was amended by substituting the words "fifty paise" in place of "twenty paise" thus reading administrative fee at "fifty paise" per litre. So far as Rule 52 is concerned, it was amended vide Notification dated 9-2-1988, published in Gazette Part IV-B by substituting the words "twenty paise per litre" in place of "fifty paise per litre". Thus, the fee at the rate of 50 paise was to be charged from 9-2-1988.

7. Petitioners of Special Civil Application No. 6546 of 1991 have also challenged the said Notification as being unconstitutional.

8. Our attention was drawn to the decision of the Apex Court in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, . Considering the Union List, State List and Concurrent List, the position with regard to the control of alcohol industry has been indicated by the Apex Court in paragraph 86 of the judgment :

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

(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.

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

(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.

(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. See in this connection, the observations of Indian Mica Case....."

In view of this finding, it was submitted that the State is not entitled to even charge administrative fee. In the alternative, it was submitted that as the vend fee was not leviable in view of the decision of the Apex Court, merely by substituting the words, the State cannot levy the tax which otherwise is not entitled to levy. It was submitted that the State is not rendering any services by collecting this administrative fee. Mr. Patel, learned Advocate appearing for the State, submitted that in clause (d) of paragraph 86 of the Apex Court's decision aforesaid, it has been made clear that if the State is rendering any service, as distinct from its claim of so-called grant of privilege, then it can charge fees based on quid pro quo. Mr. Patel, therefore, submitted that the State was justified in charging administrative fee. To appreciate his submissions, it will be

necessary to read the affidavit filed on behalf of the State by Mr. M. L. Soni, Deputy Director of Prohibition and Excise. In paragraph 4 of the affidavit, the deponent has relied on the decision of the Apex Court in the case of Synthetics Chemicals Ltd. (supra), by stating that :

"... Hon"ble Supreme Court had abolished the levy of vend fee, and declared such levy to be illegal and invalid on the facts of the said case. But in the said judgment it was clarified that the State Government has power to charge fee on the basis of quid pro quo, thereafter, the social welfare department of the State of Gujarat by issuing Notification dated 21-12-1990 has decided to levy the administrative fee under Rule 50 and 52 of the Bombay Denatured Spirit Rules, 1959....."

It is further contended that the administrative fee is payable by the users of industrial alcohol, who are manufacturing various chemicals, drugs, etc. It is specifically stated in the affidavit as under :-

"...The Admn. fees is no! leviable from the manufacturer of the industrial alcohol or from the distilleries. The users of industrial alcohol are not having any supervision of the department of respondent No. 2 and are not paying any supervision charges, therefore, the order annexed at Annexure-E to the petition is not relevant for the purpose of present petition...."

It is admitted that the petitioners are having distilleries as well as captive use division and that the petitioners are not paying any supervision charges, and are required to pay administrative fee. With a view to justify the claim, the deponent has further stated that the State of Maharashtra also collect administrative charges at the rate of 20 ps. per litre. The deponent further states as under :-

"... In fact, there are several departments which are required to be engaged in the activities of consumption and transport of spirit in the State, i.e. (1) Staff of Police Deptt. and Staff of Prohibition (2) P. & E. Deptt. (3) Staff of Industries Deptt. (4) Staff of F.D.C.A. Deptt....."

It is specifically averred that the respondent No. 2 has collected statistical informations regarding expenses with respect to the above referred departments in the said activities and after considering above referred information and recommendation the notification in question is issued. With a view to justify the need of the staff, it is stated in paragraph 6 as under :

"...I say that many a times non-potable alcohol is diverted and misused as a substitute for potable alcohol, and therefore, we find frequent incident, popularly known as "Latlha Kand"...."

It seems that the State wanted to collect the duty with a view to see that the liquor which is not potable, is not made potable by the users. The petitioners pointed out that the amount collected is being utilised by other Departments. Averments in paragraph 11 of the affidavit of the deponent are as under :

"...I further say that income received from levy in question goes to public local fund i.e.. called the Government Treasury, and out of that fund, expenses of various other departments" are made including departments" which have no source of income....."

Thus, the State is collecting the amount for not a specific purpose, but the amount goes to the common pool, from where it is diverted for its expenses.

9. It is required to be noted that the respondent-State ought to have considered the provisions contained in Section 58A of the Bombay Prohibition Act, which reads as under :

"...58A. 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 the person manufacturing, importing, exporting, transporting, storing, selling, purchasing, using, collecting or cultivating the intoxicant, denatured spirituous preparation, hemp, mhowra flowers or molasses :

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...."

Reading the provision, it is clear that the manufacturer, importer, exporter, transporter, warehouse keeper, seller, purchaser, user, all are covered. However, if there is any supervision to check the services rendered by the aforesaid persons, then the cost of supervision of such Prohibition and Excise or Police staff, as it may deem proper to appoint, can be recovered by the State Government. In the case of Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, , the Apex Court, in similar facts and circumstances, held that the rate of 7 paise per litre was intended to ensure that Ethyl Alcohol - rectified spirit meant for industrial use may not be misused or diverted for obtaining liquor or other forms of potable liquor for human consumption. The Apex Court further held that the State Legislature is competent to legislate in respect of intoxicating liquor or alcoholic liquor for human consumption. It has also regulatory power to prevent misuse of industrial alcohol for potable purpose and also to levy the impost. Denaturation fee is in the nature of regulatory fee for which quid pro quo is not necessary. The Apex Court held that the rate of the fee, on the facts, was reasonable. In case of Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. Vs. State of Gujarat and Another, , the validity of demand u/s 58A of the Bombay Prohibition Act for maintenance of the excise staff for supervision of the manufacture of industrial alcohol was the subject-matter. The appellant urged in that case that even if the State's power to supervise production of alcohol is conceded, the State could not be said to have the power to impose any levy to meet the cost of supervision. The Apex Court observed :

"...According to learned Counsel since the entire judgment of the High Court proceeded on privilege theory it cannot withstand the principle laid down in Synthetics and Chemicals case. Levy as a fee under Entry 8 of List II of Seventh Schedule or excise duty under Entry 51 are different than cost of supervision charged u/s 58A. The former has to stand the test of a levy being in accordance with law on power derived from one of the constitutional entries. Since Synthetics and Chemicals case finally brought down the curtain in respect of industrial alcohol by taking it out of the purview of either Entry 8 or 51 of List II of Seventh Schedule the competency of the State to frame any legislation to levy any tax or duty is excluded. But by that a provision enacted by the State for supervision which is squarely covered under Entry 33 of the Concurrent List which deals with production, supply and distribution which includes regulation cannot be assailed. The Bench in Synthetics and Chemicals case made it clear that even though the power to levy tax or duty on industrial alcohol vested in the Central Government the State was still left with power to lay down regulations to ensure that non-potable alcohol, that is, industrial alcohol, was not diverted and misused as substitute for potable alcohol. This is enough to justify a provision like Section 58A. In paragraph 88 of the decision, it was observed that in respect of industrial alcohol the States were not authorized to impose the impost as they have purposed to do in that case but that did not effect any imposition of fee where there were circumstances to establish that there was quid pro quo for the fee nor it will affect any regulatory measure. This completely demolishes the argument on behalf of the appellant....."

The Apex Court also pointed out that in case of M/s. Gujchem Distillers India Ltd. Vs. State of Gujarat and another, , on a proper appreciation of the legal situation, the fee of 7 paise per litre has to be seen as a part of the regulatory measure, namely, denaturation of spirit and supervision of the said process. Mr. Patel was not in a position to say that the Department has not collected the charges from the manufacturer, etc. It was submitted before us by the petitioners that if they are required to engage staff, then, as per the decision of the Apex Court and in consonance with the provisions of Section 58A of the Bombay Prohibition Act, 1949 the manufacturers are duty-bound to pay the amount, and in fact, they are paying that amount. If the manufacturer is manufacturing industrial alcohol in the premises and with a view to see that there is proper control, then as per the Rules, the amount can be recovered and is being recovered. If the manufacturer has sold the industrial alcohol, then if something happens to the alcohol on the way, it is not the responsibility of the manufacturer, but, may be, the duty of transporter, or may be, the duty of purchaser, or in certain cases, may be, the duty of manufacturer, depending upon the nature of the contract. But, for that also, there is a provision in the Rules, viz., Rule 50A of the Bombay Denatured Spirit Rules, 1959, and for transport, the charges can be collected under the said Rule from the person, who is liable to pay, But, for that purpose, as indicated in Section 58A, there must be staff appointed for supervision and not otherwise. Similarly, it may be the case with regard to the user. It is open for the

Department to appoint staff to supervise and to recover the expenses. In the instant case, what it appears is that vend fee was declared unconstitutional, and therefore, the same is sought to be collected in the name of "administrative fees". Reading the affidavit, which we have indicated in detail, it is very clear that, in fact, amount is not collected for the purpose indicated in Section 58A of the Bombay Prohibition Act and the respondents have produced no material on the record to show that additional services are rendered by the State. On the contrary, amount collected is utilised for the benefit of other Departments not connected with the activities required to be controlled u/s 58A of the Act (paragraph 11 of the affidavit-in-reply). In this view of the matter, we find no substance in the contention raised on behalf of the respondent-State and the petitions are required to be allowed. Rule is made absolute accordingly. The impugned notification is quashed. Under the ad interim relief, in one of the petitions, viz., Special Civil Application No. 6546 of 1990, amount of 5 paise per litre has been collected by the State and we do not pass any order for refund as no serious grievance is made by the petitioners in the said petition. So far as Special Civil Application No. 8877 of 1989 is concerned, vend fee collected from the petitioners shall be refunded within a period of three months.

10. Petition allowed.