(1977) 01 AP CK 0010

In the Andhra Pradesh High Court

Case No : Write Petition No. 2511, 3399, 4485, 4979 and 5819 of 1974 and 3101 of 1976

Atluri Brahmanandam APPELLANT

Vs

Tahsildar Gannavaram Taluk, Krishna District and Others RESPONDENT

Date of Decision : 18-01-1977

Acts Referred:

Andhra Pradesh (Arrack, Retail Vend Special Conditions of Licences) Rules, 1969 — Rule 15
Andhra Pradesh Excise Act, 1968 — Section 21, 22, 72

Citation : AIR 1977 AP 196 : (1977) 1 APLJ 135

Hon'ble Judges : B.J. Divan, C.J;Ramachandra Rao, J;Madhava Reddy, J;Jeevan Reddy, J;Alladi Kuppuswami, J

Bench : Full Bench

Advocate : A.L. Narayana Rao, T. Dasaratharamayya, S. Parvatha Rao, M.N. Narasimha Reddy, K. Raja Reddy, T. Dhanurbhanudu and A. Narsimha Rao, for the Appellant; Advocate General and Government Pleader for Excise, for the Respondent

Judgement

Alladi Kuppuswami, J.—The Division Bench which heard these writ petitions has framed the following questions for consideration by a Full Bench :

"Whether excise duty leviable on arrack is part of the issue price which can be collected for unlifted quantity as laid down in R. 15 of the Vend Rules ? If it is so is R. 15 valid ?"

Several other contentions were raised before the learned Judges by the petitioners but they were repelled. It is therefore, stated in their order that the final result of the writ petitions in so far as the question referred to the fuller bench is concerned would depend upon the answer that would be given by the full bench and except in regard to that, the writ petitions are dismissed.

2. The petitioner in each of these cases is a successful bidder at an auction held in respect of a lease of an arrack shop. He draws arrack from the Government

Distillery from time to time paying what is known as ''issue price'' and sells arrack in pursuance of a licence granted to him. Under R. 15 of the Andhra Pradesh Excise (Arrack Retail Vend Special Conditions of Licences) Rules, 1969 (referred to in this judgment as ''Vend Rules'') which were made in exercise of the power conferred u/s 72 of the Excise Act, it is provided that no licensee shall purchase arrack less than the specified minimum guaranteed quantity in any month. If in any month, quantity less than the minimum guaranteed quantity fixed for that month is drawn, at the end of that month issue price to the extent of deficit purchase shall be deducted from the advance money paid by the licensee and the licensee shall be called upon to indemnify the amount so adjusted by the end of the succeeding month in which short drawn quantity had occurred. Though this rule provides only for adjustment at the end of each month, in the case of a purchase by the licensee of quantity less than the minimum guaranteed quantity, it was held in Verma Narasimha Rao Vs. The Superintendent of Excise, Krishna and Others, that Rule 15 fixes the liquidated damages in the case of a breach of the contract on the part of the licensee by not lifting the minimum guaranteed quantity, and this fixation is not only meant for the purpose of the remedy available under Rule 15, but is also meant for recovery of damages for the short lifted quota even after the expiry of the excise year. In each of these cases, the petitioner having failed to lift the minimum guaranteed quantity, the issue price for the unlifted quantity for the whole year was sought to be collected from him under the above rule. The issue price so demanded included not only the cost price of the arrack but also excise duty payable thereon. The petitioner resisted the demand contending that excise duty is not included in the price. It was urged that if it is included in the issue price, it would in effect amount to levy of excise duty on undrawn liquor and a rule which authorises such a levy would be ultra vires the provisions of the Act. A similar contention was raised in Verma Narasimha Rao Vs. The Superintendent of Excise, Krishna and Others, but was negatived and it was held that excise duty is a part of the issue price as mentioned in the rules and the Licensee is bound to pay it along with the cost of arrack. When these writ petitions were heard before the Division Bench it was sought to be argued that the decision of the Full Bench in V. Narasimha Rao v. Superintendent of Excise (supra) is contrary to certain decisions of the Supreme Court which will be presently referred to and has therefore to be reconsidered by a Fuller Bench. The learned Judges felt that there was an apparent contradiction in the reasoning of the Full Bench on this aspect of the matter, but sitting in a Division Bench they could not differ from the Full Bench. They therefore decided to refer this point to a Fuller Bench.

3. Section 2(10) of the Excise Act defines ''Excise Duty'' as duty of excise mentioned in Entry 51, List II of the Seventh Schedule to the Constitution. Entry 51, List II, Schedule Seven is in the following terms:

"Duties of Excise on the following goods manufactured or produced in the state ....

(a) Alcoholic Liquors for human consumption;

(b) ....
......................."

Section 21 of the Excise Act provides that the Government may by notification, levy an excise duty on any excisable Article. manufactured or produced in the State at such rate, not exceeding the rates mentioned in the schedule, as may be specified in the notification.

4. Section 22 provides that Excise Duty u/s 21 shall be levied in one or more of the following modes:

"(a) rateably, on the quantity of any excisable article produced or manufactured in or issued from a distillery, brewery or manufactory or warehouse, or imported in the State;

(b) ....
....

(c) in case of toddy.

(d) by fees on licence for the manufacture, supply or sale of any excisable article."

The schedule to the Act provides that in respect of arrack the duty is to be levied on the quantity issued from the distillery or warehouse at the maximum rate of Rs. 8/- per Litre on the strength of pure spirit. In exercise of the powers u/s 21 a notification was also issued in G. O. 1025 Rev. D/- 30-9-1968 prescribing the rate of excise duty on several articles including arrack. The first question that is referred to us is whether excise duty is part of the issue price.

5. The expression ''issue price'' is not defined in the rules, but under Rule 17 of the Vend Rules it is provided that the Licensee shall purchase arrack from the distillery and shall pay the issue price as notified by the Commissioner from time to time. The issue price as notified includes not only the cost of arrack but excise duty payable thereon. Therefore, under Rule 15 when the Licensee is to pay the issue price in respect of undrawn liquor he will have to pay not only the cost of arrack but excise duty also. It is therefore clear that the expression ''issue price'' in Rule 15 includes excise duty also and if that rule is valid the authorities are entitled to demand the excise duty in addition to the cost of arrack in respect of undrawn liquor.

6. The next contention is that if the expression ''issue price'' includes excise duty payable on undrawn liquor the rule is invalid and ultra vires the provisions of the Act.

7. It is seen from Sub-section 21, 22 and the Schedule to the Act read with the relevant notifications that excise duty is levied on the arrack issued from the distillery. It is no doubt true that excise duty is a duty on the manufacture and

production and Section 21 authorises the Government to levy excise duty on any excisable article manufactured or produced in the State. But Section 22 prescribes the mode of levying the duty and states that it shall be levied on the quantity of any excisable article produced or manufactured in or issued from a distillery. Schedule I which is referred to in Section 21(1) prescribes the maximum rate and provides that the mode of levy is on the quantity issued from the distillery. It is seen from these provisions that under the scheme of the Act the excise duty is levied on the arrack issued from the distillery. It is therefore not permissible under the provisions of the Act to levy excise duty on liquor which is not issued from the distillery or in other words not drawn by the Licensee; in V. Narasimha Rao v. Supdt. of Excise (AIR 1974 AP 15(supra)) it was observed that the expression ''Levy'' in Section 21 means imposition of duty; whereas in Section 22 it means assessment and collection of duty imposed by Section 21 and Section 22 merely states as to at what stage the duty can be assessed and collected, and does not impose any duty on the issue of liquor. The issue of liquor by itself is not subject to the imposition of duty but it only provides the stage at which duty on liquor manufactured and produced can be assessed and collected. Even assuming as observed in that case that Sub-section 21 and 22 should be construed in the manner stated above, it is clear from these two provisions read with schedule that the stage at which the excise duty can be assessed and collected is only when it is issued and the duty is dependent on the quantity issued. If there is no issue of liquor from the distillery we are unable to see how under the provisions of the Act excise duty can be assessed and collected on undrawn or unlifted liquor. On a reading of the relevant provisions of the Act and the rules we are of the view that no excise duty can be levied or even assessed and collected on undrawn liquor or liquor which is not issued from the distillery. In our view the decision in V. Narasimha Rao v. Supdt. of Excise, (supra) is not correct as far as this aspect is concerned. This view of our receives support from a number of decisions of the Supreme Court.

8. In Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., it was held that the liquor which the contractor fails to lift is not an excisable article and a notification issued under S. 62 of the Madhya Pradesh Excise Act, imposing duty on liquor which the contractor failed to lift is invalid. In that case the sale memorandum on the strength of which the auction was held said that the successful bidder will have to lift a prescribed quantity of liquor and if they fail to take delivery of the prescribed minimum quantity of liquor they will have to pay excise duty on the quantity of liquor of which they failed to take delivery. The Government in exercise of its power under S. 62 of the Madhya Pradesh Excise Act issued a notification which provided inter alia that the licensee should make good every month the deficit of monthly average of the total minimum duty on or before the 10th day of each month following the month to which the deficit duty relates. It was contended that this notification was ultra vires Sub-section. 25 and 26 of the Madhya Pradesh Act (which are in terms similar to Sub-section. 21 and 22 of the A.P. Act). The Supreme Court held that the State Government

in levying duty on the quantity which the contractor failed to lift exercised power which it did not possess and hence the impugned rule was invalid. In State of Madhya Pradesh Vs. Firm Gappulal and Others, the Supreme Court again held that the state could not levy excise duty on undrawn liquor and the condition in the licence permitting such levy and the demand notice in that connection were invalid. The Supreme Court followed their earlier decision in B.C. Banerjee v. State of Madhya Pradesh (supra) .

9. It was sought to be contended that in this case there is no levy of excise duty on undrawn liquor. Rule 15 merely provides for liquidated damages in the event of the licensee failing to lift the minimum guaranteed quantity and it says that in such a case, he has to pay the issue price for the undrawn liquor and one of the constituents of the issue price is the excise duty payable on the liquor. Thus, this is not a case where excise duty is levied on undrawn liquor and hence it was contended the decisions of the Supreme Court are not applicable to this case. Though ostensibly the rule is the case of a breach in not drawing the minimum guaranteed quantity, by directing the contractor to pay the issue price which includes excise duty, in effect the rule enables the Government to levy excise duty on undrawn liquor. By disguising the true position, the State Government cannot impose, levy, assess or collect excise duty which it cannot collect under the provisions of the Act by labelling it as compensation or damages. A similar situation arose in Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, . In that case, the condition incorporated in the Licence provided that in case of default the licensee be liable to pay compensation equal to the amount of the excise duty leviable on the unlifted quantity. It was held that the provision was not valid. It was observed that this point was no longer res integra in view of the decision in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., . It was observed that though the demand was described as compensation it was in reality a demand for excise duty on the unlifted quantity of liquor which is not authorised by the provisions of U.P. Excise Act. In view of the above decision of the Supreme Court we have no hesitation in holding that though R. 15 does not in terms provide for levy of excise duty, it is in effect a provision enabling levy, assessment and collection of excise duty on undrawn liquor and is therefore contrary to the provisions of the Act.

10. The decision in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., was cited before the Full Bench in V. Narasimha Rao v. Supdt. of Excise , (AIR was distinguished on the ground that it was a case where duty was sought to be leviedby a rule on liquor which the contractor had failed to lift and it was because of this sort of imposition of duty that it was held that the rule making authority could not have made such a rule. It was observed that under R. 15 of the Andhra Pradesh Vend Rules, no duty is imposed on the short lifted quantity. The duty is imposed on the liquor manufactured or produced and such a duty already imposed is sought to be collected at the stage of issue of the liquor from the distillery since the contract to pay issue price included excise duty so imposed on manufacture or production, it can be collected form licensee as a part of the

liquidated damages agreed to by the parties. We are unable to agree with the distinction sought to be drawn by the Full Bench between the case before them and that in B.C. Banerjee v. State of Madhya Pradesh (supra). As we have already pointed out, under Sub-section. 21 and 22 of the Act read with the Schedule the duty is levied or at any rate assessed and collected only on the arrack issued from the distillery. In so far as R. 15 enables the State Government to collect the issue price which includes excise duty from the Licensee in respect of the undrawn liquor it is in effect levying and collecting excise duty on undrawn liquor. This is not authorised by the provisions of the Act and hence R. 15 is ultra vires the Act. As pointed out by the Supreme Court in Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, the demand for excise duty cannot be justified by merely describing it as compensation or liquidated damages.

11. Considerable reliance was placed by the learned Advocate General on Panna Lal v. State of Rajasthan . In that case for certain years licenses were given under a guaranteed system. There was a total guaranteed amount. When the contractors failed to fulfil the guaranteed amount and there was short fall, demand notices were issued for the short fall. For certain other years the liquor contractors obtained licenses for sale of country liquor at a stipulated amount of licence fee under the exclusive privilege system. Where the contractors failed to pay the guaranteed amount there was a demand for the shortfall. It was contended that when the State Government wanted to enforce the guaranteed sum it amounted to recovery of excise duty as the issue price was inclusive of excise duty and therefore enforcement of the guaranteed amount meant realisation of excise duty. The Supreme Court held that the lump sum amount payable for the exclusive privilege of vending liquor is not to be confused with the issue price. The issue price is payable when the contractor takes delivery of a particular quantity of specified value of country liquor. The issue price relates only to liquor drawn by the contractor and does not pertain to undrawn liquor. The contractual obligation of the licensees to pay the stipulated amount is not dependent upon the quantum of liquor sold by them which is relevant only for the purpose of remission to be earned by them under the licence. No excise duty is charged or chargeable on undrawn liquor under the licence. To suggest that the licence obliges the contractors to pay excise duty on undrawn liquor is totally misreading the conditions of the licence. The excise duty is collected only in relation to the quantity and quality of the country liquor which is drawn. No excise duty can be predicated in respect of undrawn liqour. The decision in Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., was distinguished on the grounds that in that case the State Government was imposing excise duty on undrawn liquor whereas in the case before them the State Government was not imposing any excise duty. On the contrary the licence only takes into account the excise duty component of the issue price for the purposes of giving a concession of remission to the contractors. Far from being of any assistance to the petitioners the various observations referred to above would indicate that the

Supreme Court reiterated that excise duty cannot be imposed on undrawn liquor and approved of their earlier decision in B.C. Banerjee v. State of M.P. (AIR 1971 SC 571) (supra). In the later decisions namely, State of Madhya Pradesh Vs. Firm Gappulal and Others, ; Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, the Supreme Court distinguished the case in Pannalal v. State of Rajasthan, (supra). In state of M.P. v. Firm Cappulal (supra) they observed that the decision of the Court in Pannalal v. the State of Rajasthan (supra) , the Court found that there was no levy of excise duty in enforcing the payment of the guaranteed sum of the stipulated lump sum mentioned in the licence, that the lump sum stipulated in the agreement is not to be equated with the issue price and what was sought to be recovered from the liquor contractor in Pannalal v. State of Rajasthan (supra) was the short fall occasioned on account of the failure on the part of the liquor contractor to fulfil the terms of licence. Again in Excise Commr. U.P. v. Ram Kumar (supra) in para 17 they observed that Pannalal case was distinguishable as in that case the contractual obligation to pay the guaranteed sum or the stipulated sum mentioned in the licence was not dependent on the quantum of liquor sold by them and no excise duty was charged or chargeable on the undrawn liquor on the licence. The excise duty there was collected only in relation to the quantity and quality of the country liquor which was drawn, Pannalal v. State of Rajasthan (supra) is not of any assistance to the respondent. On the other hand B.C. Banerjee v. state of M.P. (supra), State of M.P. v. Firm Cappulal (supra) and Excise Commr. U.P. v. Ram Kumar (supra) apply to the facts of this case.

12. In the result we are of the view that R. 15 in so far as it enables the State Government to recover excise duty also as a part of the issue price in case of undrawn liquor in invalid and ultra vires the provisions of the Act.

13. It follows that the writ petitions have to be allowed in so far as the demand includes excise duty and the writ petitions are dismissed in regard to other matters. No orders as to costs. Advocate''s fee Rs. 150/- in each case.

14. Order accordingly.

