(2004) 02 AHC CK 0030

In the Allahabad High Court

Case No : C.M.W.P. No. 640 of 1990

Bindal Agro Chemical Ltd. and Another — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 10-02-2004

Acts Referred:

Constitution of India, 1950 — Article 32
Uttar Pradesh Excise Act, 1910 — Section 40(2)
Uttar Pradesh Excise, Import, Export, Transport and Possession of Denatured spirit (14th Amendment) Rules, 1989 — Rule 10, 10(1), 2, 3

Citation : (2004) 5 AWC 4418

Hon'ble Judges : Poonam Srivastava, J;M. Katju, J

Bench : Division Bench

Advocate : Bharat Ji Agrawal and Piyush Agrawal, for the Appellant; K.D. Mishra and S.C., for the Respondent

Final Decision : Allowed

Judgement

M. Katju, J.—This petition has come on transfer to us by order of the Supreme Court dated 3.5.1990 in Writ Petition Nos. 363 and 364 of 1990 under Article 32 of the Constitution. The aforesaid order of the Supreme Court reads as follows:

A 7-Judge Bench of this Court in the Synthetic case some time back settled the legal issue involved in these two writ petitions. Therefore, the law has already been declared by this Court. The fee which is being demanded in the States of West Bengal and Uttar Pradesh is under challenge in these petitions and the validity thereof can appropriately be considered by the respective High Courts and we do not propose to entertain these petitions under Article 32 of the Constitution. For convenience, we direct Writ Petition No. 363 of 1990 to be transferred to the High Court of Allahabad and Writ Petition No. 364 of 1990 to the High Court of Calcutta where these two petitions shall be disposed of in accordance with law.

2. Heard learned Counsel for the parties.

3. The prayer in the writ petition is for a writ of certiorari to quash the notification dated 23.11.1989 (Annexure-11 to the petition) issued by the Respondent seeking to levy Export-Pass Fee on the purchase of and/or transportation and/or Export of Industrial Alcohol (denatured and special denatured spirit) by the Petitioner. The Petitioner has also prayed for an order declaring Rule 10 framed u/s 40(2)(d) of the Uttar Pradesh Excise Act, 1910 and the Uttar Pradesh Excise, Import, Export, Transport and Possession of Denatured spirit (Fourteenth Amendment) Rules, 1989 as illegal and unconstitutional.

4. The Petitioner is a company registered under the Indian Companies Act having its head office in Delhi and a factory at Rishra in District Hooghly, in the State of West Bengal where it manufactures low density polythene (hereinafter referred to as LDPE). The Petitioner is challenging the alleged illegal and unconstitutional levy of Export-Pass Fee charged by the State of U.P. from the Petitioner for purchase and transportation of denatured and special denatured spirit from the State of U.P. for consumption by the Petitioner at its unit at District Hooghly.

5. The Petitioner purchases the denatured and special denatured spirit which is required as a basic raw-material for the manufacture of LDPE in its factory at Rishra, West Bengal. It is transported by road/rail from U.P. to Rishra, where it is consumed.

6. In exercise of the powers u/s 40(2)(d) of Uttar Pradesh Excise Act, the Uttar Pradesh Excise Import, Export, Transport and Possession of Denatured Spirit (14th Amendment) Rules, 1989 were framed. Rule 10(1) provide for export pass fee of 0.50 paise per bulk litre for the quantity of denatured spirit or special denatured spirit.

7. The Petitioner has challenged the validity of the notification dated 23.11.1989 levying export pass fee as above on the transportation of the above goods. Until the export pass fee is deposited in the Government Treasury the goods are not allowed to be transported from U.P. by the Respondent.

8. In paras 37 and 45 of the counter-affidavit of Amar Ahmad it has been admitted that the Petitioner purchases specially denatured spirit.

9. In para 50 of the counter-affidavit it is stated by the Respondent that the production, distribution, export, and import of rectified spirit and specially denatured spirit are regulated by the Industries (Development and Regulation) Act, 1951 and the Rules framed thereunder.

10. Sri. Bharat Ji Agrawal, learned Counsel for the Petitioner has submitted that the impugned levy is unconstitutional in view of the decision of the 7-Judge Constitution Bench judgment of the Supreme Court in Synthetics and Chemicals Ltd. v. State of U.P. AIR 1990 SC 1927, and the very recent decision of the Supreme Court in State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others,

11. We are fully in agreement with the submission of Sri. Bharat Ji Agrawal,

learned Counsel for the Petitioner. As held in para 42 of the judgment of the Supreme Court in State of U.P. v. Vam Organic Chemicals Ltd. (supra), denatured spirit is outside the seisin of the State Legislature and only Parliament can legislate upon it.

12. It may be mentioned that while the State Legislature cannot legislate on denatured or specially denatured spirit under the Constitutional Scheme, it was held in the Ist Vam Organic Chemicals Ltd. Vs. State of U.P. and others, that regulations can be framed by the State to ensure that rectified spirit is not surreptitiously diverted for use for human consumption.

13. In the 2nd Vam Organic case State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others, the Supreme Court observed:

Considering the various authorities cited, we are of the view that the State Government is competent to levy fee for the purpose of ensuring that industrial alcohol is not surreptitiously converted into potable alcohol so that the State s deprived of revenue on the sale of such potable alcohol and the public is protected from consuming such illicit liquor. But this power stops with the denaturation of the industrial alcohol. Denatured spirit has been held in Vam Organics I, to be outside the seisin of the State Legislature. Assuming that denatured spirit may by whatever process be renatured, (a proposition which is seriously disputed by the Respondent) and then converted into potable liquor this would not give the State the power to regulate it. Even according to the demarcation of the fields of legislative competence as envisaged in Bihar Distillery, industrial alcohol for industrial purposes falls within the exclusive control of the Union and according to Bihar Distillery "denatured spirit, of course, is wholly and exclusively industrial alcohol." Besides, the fee is required to be justified with reference to the cost of such regulation. The industry is already paying a fee under Rule 2 for such regulation. Indeed the justification for levying the fee under Rule 3(a) is the identical justification given by the State for levying the fee under Rule 2. Presumably, a full complement of Excise Officers and staff are appointed by the State in the Excise Department to carry out their duties under the Act to oversee, control and keep duty on the various kinds of intoxicants under the Act. Having regard to the decision in Vam Organics I, we must also assume that apart from the normal strength, additional officers and staff were appointed to regulate the denaturation of the industrial alcohol. There is nothing to show that there has been any deployment of any additional staff to oversee the possibility of renaturation of the denatured spirit.

The question is (to borrow the language in Synthetics) whether in the garb of regulations a legislation which is in pith and substance, as we look upon the instant legislation, a fee or levy which has no connection with the cost or expenses administering the regulation, can be imposed purely as a regulatory measure. Judged by the pith and substance of the impugned legislation, we are definitely of the opinion that these levies cannot be treated as part of regulatory measures. The State has not produced any material to show that it was incurring any additional cost for any further regulation of denatured spirit. Any trace of a lingering doubt as to the propriety of the levy under Rule 3(a) must be taken to have been noted off effectively with the order passed by three Judges of this Court in the writ petition filed by Synthetics challenging the same levy as we have noted earlier. That order has resulted in granting Synthetics and Chemicals Ltd. relief from payment under Rule 3(a). The only distinction between the present Respondent'' cases and Synthetics was that the Respondent chose to challenge the levy before the High Court. That could be no rational basis for denying the Respondent who are otherwise identically situated the same relief. [See Anil Kumar Neotia v. Union of India (1998) 2 SCC 587. In the absence of any such correlation the fee under Rule 3 is not a fee at all levied for the purpose of additional regulation or for any service rendered but is really a tax in the garb of a fee.

14. It may be mentioned that when alcohol is first produced it is called ethyl alcohol or rectified spirit which contains about 95% alcohol, and hence is unfit for human consumption. However, by diluting rectified spirit with water the liquid can become fit for human consumption after a certain stage of dilution. If, however, certain chemicals called denaturants are put into the rectified spirit then even by adding water into it, it will remain a toxic substance and will not be fit for human consumption. In para 7 (ix) of the writ petition it is stated that a denaturant called Croton Aldehyde is added by the Petitioner to the rectified spirit used by it. Hence obviously the liquid becomes unfit for human consumption even after diluting it with water.

15. It is not denied by the Respondent that the denaturant ''Croton Aldehyde'' is added by the Petitioner to the rectified spirit, and this is then tested by the Alcohol Technologist, Government of U.P.

16. According to the Constitutional Scheme, the State Legislature can legislate on potable alcohol but not on alcohol which is unfit for human consumption. Rectified spirit by itself is unfit for human consumption since its alcoholic level is very high. However, by the mere process of adding water into it, it can be made fit for human consumption. Rectified spirit, being unfit for human consumption, is not within the scope of legislative powers of the State Legislature. Once, however, water is put into it in sufficient quantity to make it fit for human consumption, it comes within the legislative competence of the State Legislature. However, where denaturants are added to rectified spirit it becomes denatured or specially denatured spirit and becomes unfit for human consumption as it becomes toxic. Hence denatured and specially denatured spirit are outside the scope of legislative power of the State Legislature, as held in the 2nd Vam Organic case (supra).

17. No doubt regulations can be framed, and a regulatory fee can be charged, to ensure that rectified spirit is not surreptitiously diverted for human consumption. It is obvious that the State Government has an interest in realising the excise duty on potable liquor and hence it can frame regulations to ensure that its

revenue is not lost by surreptitious diversion of received spirit to use for human consumption, and for that purpose the State can levy and realize regulatory fees as it will have to maintain staff and incur other expenses, but even here there must be a broad co-relation between the fee realised and the regulatory expenses incurred, as held in the 2nd Vam Organic case (supra).

18. In the present case it is not the case of the Respondent that the regulatory fee is being charged for ensuring that rectified spirit is not diverted and used for human consumption. The Respondent are demanding the export pass fee merely for transportation of denatured and specially denatured spirit from U.P. to West Bengal. In our opinion this can surely not be called a regulatory fee for the purpose of ensuring that rectified spirit is not diverted for human consumption. In fact once denaturants are put into the rectified spirit then even after diluting it with water it cannot be made fit for human consumption.

19. In para 7 (ix) of the writ petition it is mentioned that to make the alcohol used by the Petitioner unfit for human consumption a chemical known as Croton Aldehyde is added to the alcohol. This is tested by the Alcohol Technologist, Government of U.P. These allegations are not denied in the counter-affidavit. What is alleged in para 21A of the supplementary counter-affidavit is that denatured spirit can be renatured. This contention has been dealt with by the Supreme Court in the 2nd Vam Organic case whose relevant observation has been quoted above.

20. In a recent short order of the Supreme Court in Civil Appeal No. 324 of 1981, Hindustan Sugar Mills Ltd. v. State of U.P., decided on 19.7.2001, the Supreme Court observed that "the levy of export pass fee on industrial alcohol was not permissible."

21. As a result this petition is allowed. The impugned notification dated 23.11.1989 imposing export pass fee on denatured and specially denatured spirit is quashed. Consequently the Respondent are restrained from realising the same. Any amount of export pass fee deposited by the Petitioner with the State Government shall be returned to it within two months along with interest at 10% per annum from the date of deposit/realisation to the date of refund.

22. We may mention that we are passing the direction for interest since interest is the normal accretion on capital.

23. Often there is misconception about interest. Interest is not a penalty or punishment at all.

24. For instance, if A had to pay a certain sum of money to B at a particular time, but he pays it after a delay of several years, the result will be that the money remained with A and he would have earned interest thereon by investing it somewhere. Had he paid that amount at the time when it was payable then B would have invested it somewhere and earned interest thereon. Hence if a person has illegally retained some amount of money then he should ordinarily be

directed to pay not only the principal amount but also the interest earned thereon.

25. In the present case the petition was filed in the year 1990 and this is the year 2004. Money, doubles every six years (because of compound interest). Rs. hundred in the year 1990 would become Rs. two hundred in the year 1996 and it will become Rs. 400 in the year 2002. Hence if A had to pay B a sum of rupees 100 in the year 1990 and he pays that amount only in the year 2002, the result will be that A has pocketed Rs. 300 with himself. This clearly cannot be justified because had he paid that amount to B in the year 1990 B would be having Rs. 400 in the year 2002 instead of having only Rs. 100. Hence, ordinarily interest should always be awarded whenever any amount is detained or realised by someone, otherwise, the person receiving the amount after considerable delay would be losing the entire interest thereon, which will be pocketed by the person who managed the delay. It is for this reason that we have ordered for payment of interest along with the amount realised as export pass fee.