(2004) 04 KL CK 0032

In the High Court Of Kerala

Case No : W.A. No''s. 1736, 1750 etc. of 2003

Circle Inspector of Excise — APPELLANT

Vs

Super Star Distilleries — RESPONDENT

Date of Decision : 19-04-2004

Acts Referred:

Kerala Distillery and Warehouse Rules, 1968 — Rule 55
Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975 — Rule 7(5)

Citation : (2004) 2 KLT 962

Hon'ble Judges : Cyriac Joseph, J;A. Lekshmikutty, J

Bench : Division Bench

Advocate : V.K. Beeran, A.A.G, for the Appellant; A.P. Chandrasekharan, Prabha P. Menon, M. Krishnakumar, V. Giri, L. Rajesh Narayan, P. Santhalingam, A.D. Shajan and K.P. Dandapani, for the Respondent

Final Decision : Dismissed

Judgement

Cyriac Joseph, J.—Since these Writ Appeals are filed against the common judgment in O.P Nos. 9666 of 2003, 9996 of 2003, 10118 of 2003,10119 of 2003 and 10345 of 2003 and since a common question arises in these Writ Appeals, they were heard together and are being disposed of through this common judgment.

2. The question raised in the Writ Petitions is whether there is any provision in the Abkari Act or the Rules thereunder to enable the Distillery Units/Blending units to avail themselves of the wastage for spirit/liquor imported and whether duty could be levied for the entire stock which is not accounted for while spirit/ liquor imported by these units. In the impugned judgment, the learned Single Judge held in favour of the petitioners and found that in view of the provisions contained in Rule 7(5) of the Kerala Foreign Liquor. (Compounding, Blending and Bottling) Rules 1975 and Rule 55 of the Kerala Distillery and Warehouse Rules, 1968, the Distillery units/Blending units are entitled to claim allowance for wastage for spirit/liquor imported and that duty cannot be levied in respect of

prescribed quantity of spirit/liquor lost in transit. Aggrieved by the judgment of the learned Single Judge, the respondents in the Writ petitions have filed these appeals. The petitioners in Writ Petitions are the respondents in these appeals.

3. The petitioners are licensees under the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules 1975 (hereinafter referred to as "the Rules"), As licensees under the Rules, the petitioners are entitled to purchase spirit either from within the State of Kerala or to import it from other States for the purpose of compounding, blending and bottling of foreign liquor. According to Rule 7(1) of the Rules, a licensee may, under bond, without prior payment of duty, (i) import spirit, or (ii) obtain spirit from distilleries in the State. According to Rule 7(3), all consignments of spirits obtained by a licensee shall be verified by volume and strength jointly by the officer-in-charge and the licensee or his authorised agent. The net quantity received will be taken into account and verification report sent to the officer-in-charge of the distillery and the Assistance Excise Commissioner in order that duty may be collected on the excess wastage, if any. According to Rule 7(5), wastage allowance in the case of spirits allowed to be imported and in the case of spirits obtained from distilleries in the State shall be regulated by the provisions of the Kerala Distillery and Warehouse Rules, 1968 and the licensees shall pay duty at the tariff rate for excess wastage where such losses could not be accounted for to the satisfaction of the Assistant Excise Commissioner.

According to Rule 55(l) of the Kerala Distillery and Warehouse Rules, 1968, (hereinafter referred to as "the Distillery and Warehouse Rules") an allowance made for the loss in transit by leakage or evaporation or other unavoidable causes of spirits transported or exported under bond in wooden casks or receptacles shall be at the rate of 1% for a journey of every 400 Kms. or part thereof subject to a maximum of 4% for the whole journey. According to Rule 55(2) of the said Rules, if the spirits are transported or exported in metallic receptacles, tanker lorries or plastic/polythene containers, the allowance made for loss in transit by leakage or evaporation or other unavoidable causes shall be at the rate of 0.1% for a journey of every 400 Kms. or part thereof subject to a maximum of 0.5% for the whole journey. But if the actual loss is less than the loss as computed under sub-rule (1) or (2), allowance shall be made only for the actual loss. In the light of Rule 7(5) of the Rules and Rule 55 of the Distillery and Warehouse Rules, the Excise authorities used to give wastage allowances to the petitioners, whether the spirit was imported or purchased from within the State. However, on 31-1-2003 the Excise Commissioner issued a circular No. XC1-2683/03 containing certain additional instructions to prevent the loss of revenue due to Government. In the said Circular, the Excise Commissioner has stated that there is no provision to enable the Distillery units/Blending units to avail themselves of the wastage for spirit/liquor imported and hence duty should be levied for the entire stock which is not accounted for while spirit/liquor imported by these units.

Based on the said Circular of the Excise Commissioner, the Excise authorities issued notices to the petitioners demanding duty on the quantity of spirit which had already been claimed and allowed as wastage allowance. Thereupon the petitioners filed the Writ Petitions challenging the said demand of excise duty on transit wastage and also questioning the stand of the Excise Commissioner that there is no provision to enable the distillery units/blending units to avail themselves of the wastage for spirit/liquor imported. The learned Single Judge accepted the contention of the petitioners that in view of Rule 7(5) of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules and Rule 55 of the Kerala Distillery and Warehouse Rules, 1968, allowances for wastage shall be given in respect of importance spirit/liquor.

4. It will be useful to refer to some of the relevant statutory provision. According to Section 6 of the Abkari Act (Act 1 of 1077) no liquor shall be imported unless the permission of the Government or any officer authorized by the Government in this behalf is obtained for importation of such liquor and unless the duties, taxes, fees and such other sums as are due to the Government under the Act in respect of such liquor have been paid or a bond for such payment on its importation has been executed. According to Section 17 of the said Act, a duty of excise shall be levied in such manner as may be prescribed on liquors permitted to be imported u/s 6. According to Section 18(l)(f) of the said Act, such duty of excise may be levied and collected in the case of import of spirits in such manner as may be prescribed. According to Section 18(2) of the Act, the duty of excise under Sub-section (1) shall be levied and collected at such rates as may be fixed by the Government, from time to time, by notification in the Gazette not exceeding the rates specified thereunder. In exercise of the powers conferred by Section 29 of the Abkari Act, the Government of Kerala issued the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975. According to Rule 3 of the said Rules, any person who desires to carry on operations of compounding blending and bottling of foreign liquor shall apply in writing to the Commissioner of Excise, Kerala. According to Rule 4 of the said Rules, the Commissioner may, if he is satisfied, after making such enquiries as he may consider necessary, that the applicant is a person to whom licence may be issued, grant to the applicant a compounding and blending licence in Form 1 and a bottling licence in Form 2 on payment of the prescribed fees. According to Rule 7(1) of the said Rules, a licensee may, under bond, without prior payment of duty, import spirit or obtain spirit from distilleries in the State. According to Rule 7(2), rectified spirit which does not conform to the specifications mentioned thereunder shall not be imported. According to Rule 7(3), all consignments of spirits obtained by a licensee shall be verified by volume and strength jointly by the officer-in-charge and the licensee or his authorised agent and the net quantity will be taken into account and verification report sent to the officer-in-charge of the distillery and the Assistance Excise Commissioner in order that duty may be collected on the excess wastage. According to Rule 7(4), the actual stock found on verification shall be entered in the storage register of spirits in Form 3. Rule 7(5) as it stood prior to 27-9-1984 read as follows:

"(5). An allowance of not more than 1% will be made for wastage in transit in the case of spirits allowed to he imported. Wastage allowance in the case of spirits obtained from distilleries in the State shall be regulated by the provisions of the Kerala Distillery and Warehouse Rules, 1968. The licensee shall pay duty at the tariff rate for excess wastage where such losses could not be accounted for the satisfaction of the Assistant Excise Commissioner".

Sub-rule (5) of Rule 7 of the Rules was amended by the Kerala Foreign Liquor (Compounding, Blending and Bottling) Amendment Rules, 1984 issued as S.R.O. No. 1324/84 (GOMS. No. 159/84/TD dated 27-9-1984). The amended Sub-rule (5) of Rule 7 of the Rules reads as follows:

"(5). Wastage allowance in the case of spirits allowed to be imported and in the case of spirits obtained form distilleries in the State, shall be regulated by the provisions of Kerala Distillery and Warehouse Rules, 1968. The licensee shall pay duty at the tariff rate for excess wastage where such losses could not be accounted for the satisfaction of the Assistant Excise Commissioner".

In the Explanatory Note under the Kerala Foreign Liquor (Compounding, Blending and Bottling) Amendment Rules, 1984, it was stated as follows:

"Government have decided to prescribe uniform rate of transit wastage under the Kerala Distillery and Warehouse Rules and the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules for the spirit imported and that transported within the State. This amendment is intended to serve this object".

Thus, both before and after the amendment, Rule 7(5) of the Rules envisaged the grant of wastage allowance in the case of imported spirit and in the case of spirit obtained from distilleries in the State. But before the amendment, rate of wastage allowance in the case of imported spirit was prescribed in Rule 7(5) itself and the rate of wastage allowance in the case of spirit obtained from distilleries in the State was regulated by the provisions of the Distilleries and Warehouse Rules. However, after the amendment, the rate of wastage allowance both in the case of imported spirit and in the case of spirit obtained from distilleries in the State, shall be as fixed by the Distilleries and Warehouse Rules.

5. Rule 55 in Part 1 of the Kerala Distillery and Warehouse Rules, 1968 reads thus:

"55. Allowances for wastage:-

(1) An allowance made for the loss in transit by leakage or evaporation or other unavoidable causes of spirits transported or exported under bond in wooden casks or receptacles shall be at the rate of 1% for a journey of every 400 Kms. or part thereof subject to maximum of 4% the whole journey.

(2) If the spirits are transported or exported in metallic receptacles, tanker lorries or plastic/ polythene containers, the allowance made for loss in transit by leakage and evaporation or other unavoidable causes shall be at the rate of 0.1%

for a journey of every 400 kms. or part thereof subject to a maximum of 0.5% for the whole journey:

Provided that if the actual loss is less than the loss as computed under Sub-rule (1) or (2) allowance shall be made only for the actual loss.

(3) The allowance to be made under this Rule shall be determined by deduction from the quantity of spirit dispatched from the distillery or warehouse, the quantity received at the place of destination, both quantities being stated in terms of London Proof Litres and shall be calculated on the quantity contained in each consignment.

(4) If the report of the officer by whom a consignment of spirit transported or exported has been gauged and proved on arrival at its destination shows that loss has occurred in transit to a great extent than that prescribed by Sub-rules (1) to (3) the distiller or warehouse-keeper shall pay duty at the tariff rate, for the time being in force, on such much of the deficiency as is excess of the allowance so prescribed:

Provided that if proved to the satisfaction of the Commissioner that such deficiency could not have been prevented by the exercise of proper care and precaution, and that the spirits could not have been passed into consumption, the duty levied, on such deficiency shall be refunded. The Commissioner''s decision shall be final".

6. As rightly pointed out by the learned Single Judge, even prior to the amendment of Rule 7(5) by the Kerala Foreign Liquor (Compounding, Blending and Bottling) Amendment Rules, 1984, an allowance of not more than 1% was made for wastage in transit in the case of spirits allowed to be imported and the object of the amendment was to prescribe uniform rate of transit wastage under the Kerala Distillery and Warehouse Rules and the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules for the spirit imported and the spirit obtained from distilleries in the State. In other words, the object of the amendment was to prescribe uniform rate of wastage allowance in the case of spirits allowed to be imported and in the case of spirit obtained from distilleries in the State. Therefore, the Excise Commissioner was not right in taking the stand that there is no provision to enable the distillery units/blending units to avail themselves of for the wastage of spirit/liquor imported and that duty shall be levied for the entire stock which is not accounted for while spirit/liquor imported by these units. In our view, Rule 7(5) of the Rules enable the distillery units and blending units like the petitioners to claim wastage allowance for spirit/liquor allowed to be imported. For the purpose of determining the rate of such wastage allowance, the provisions of the Distillery and Warehouse Rules, have to be applied. The rate of wastage allowance in the case of spirit/liquor allowed to be imported is as prescribed in Rule 55 of the Distillery and Warehouse Rules. Hence, the petitioners are entitled to claim wastage allowance in respect of spirit/liquor allowed to be imported at the rate prescribed in Rule 55 of the Distillery

and Warehouse Rules. Therefore, the learned Single Judge was right in vacating the orders demanding excise duty on wastage claimed by the petitioners based on the actual loss certified by the departmental officers and in directing that the interpretation contained in the last paragraph of the Excise Commissioner''s Circular dated 30-1-2003 will not survive.

7. Though the learned Additional Advocate General contended that the provisions contained in Rule 55 of the Distillery and Warehouse Rules would not apply to spirits imported, we do not find any merit in the said contention. According to the learned Additional Advocate General, Rule 55 applies only to the loss in transit of spirits transported or exported and not to the loss in transit of spirits imported. The learned Additional Advocate General pointed out that while the words "transported" and "exported" are specifically mentioned in Rule 55, the word "imported" is not mentioned in the said Rule. It was contended that the said omission of the word "imported" was conscious and significant and, therefore, Rule 55 did not apply to the loss in transit of spirits imported. We do not agree within this contention. The first and the most relevant question is whether there is any statutory provision envisaging wastage allowance in the case of spirits imported. The definite answer to the said question is that Rule 7(5) of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules clearly envisages wastage allowances in the case of spirits allowed to be imported. The next question is regarding the rate of such wastage allowance in the case of spirits allowed to be imported. Prior to the amendment of 1984, Rule 7(5) itself contained the rate of wastage allowance in the case of spirits allowed to be imported. But after the amendment of 1984, Rules 7(5) states that the rate shall be regulated by the provisions of the Kerala Distillery and Warehouse Rules, 1968, Therefore, the right to claim wastage allowance in the case of spirits allowed to be imported is conferred by Rule 7(5) of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules. Only for the rate of such wastage allowance, Rule 55 of the Kerala Distillery and Warehouse Rules need be applied. Thus, the rate of wastage allowance in the case of spirits allowed to be imported shall be the . rate of allowance made for loss in transit of spirits prescribed in Rule 55 of the Kerala Distillery and Warehouse Rules. The absence of the word "imported" in Rule 55 cannot have the effect of denying the right conferred by Rule 7(5) of the Rules to claim wastage allowance in the case of spirits allowed to be imported. The second sentence in Rule 7(5) is very significant. It reads thus:

"The licensee shall pay duty at the tariff rate for excess wastage where such losses could not be accounted for to the satisfaction of the Assistant Excise Commissioner".

It cannot be disputed that the said sentence applies to cases of spirits allowed to be imported also. Then, if the licensee shall pay duty at the tariff rate for excess wastage it necessarily implies that he need not pay duty for a certain amount of wastage. The said certain amount of wastage is specified in Rule 55 of the Distillery and Warehouse Rules and nowhere else. Hence, notwithstanding the absence of the word "imported" in Rule 55 of the Distillery and Warehouse Rules, in view of Rule 7(5) of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, whatever rate of wastage allowance mentioned in Rule 55 shall apply to imported spirit also. This is the only reasonable interpretation that can be given to the above mentioned rules. The impugned stand of the Excise Commissioner is incorrect, unreasonable and unjust.

8. For the reasons stated above, we hold that there is no merit in these Writ Appeals. Hence the Writ Appeals are dismissed. No costs.

