

(2004) 10 AHC CK 0198

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1369 of 2004

Dhampur Sugar Mills Ltd.

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35L
Constitution of India, 1950 — Article 14, 19(6), 226, 47
Uttar Pradesh Sheera Niyamtran Adhiniyam, 1964 — Section 11, 12, 3, 3(1), 8
Uttar Pradesh Sheera Niyamtran Niyamawali, 1974 — Rule 14

Citation : (2005) 5 AWC 5089

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : A.K. Gupta and N.C. Gupta, for the Appellant; S.M.A. Kazmi and S.P. Kesarwani and S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.K. Agrawal, J.—By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner, M/s Dhampur Sugar Mills Ltd., through its Vice President, Sri J.S. Sharma, seeks the following reliefs:

"(a) issue a writ, order or direction in the nature of certiorari calling for the records and quashing the impugned G.Os. dated 9.6.2004 & 10.6.2004 and orders dated 15.6.2004 & 26.6.2004 passed by the Respondents No. 2 and 3 respectively i.e. (Annexure Nos. 14, 15 and 16 to this writ petition, respectively).

(b) issue a writ, order or direction in the nature of certiorari quashing the orders dated 26.7.2004, 3.8.2004, 27.8.2004, 2.9.2004 issued by the respondent No. 3 and show cause notice dated 4.9.2004 issued to the petitioner sugar mills by the Respondent No. 3 i.e. (Annexure Nos. 18, 21 and 26 to this writ petition respectively).

(c) issue a writ, order or direction in the nature of Mandamus staying the

operation of the impugned show cause notice dated 4.9.2004 and the respondents may be restrained from taking any punitive/coercive action against all factories/units of the petitioner company and the respondents may further be restrained from initiating the action u/s 11 & 12 of the U.P. Sheera Niyam, 1964.

(d) issue a writ, order or direction in the nature of Mandamus directing the State Government not to allot the Molasses from the petitioner Sugar Mills for the purpose of manufacturing the country liquor to the other factories.

(e) issue a writ, order or direction in the nature of which this Hon'ble Court may deem fit and proper in the circumstances of the case. And

(f) Award the costs to the writ petition."

2. Briefly stated, the facts giving rise to the present petition are as follows:-

The petitioner, M/s Dhampur Sugar Mills Ltd., is a public limited company incorporated under the provisions of the Companies Act, 1956 and has its registered office at Dhampur (Bijnor). It manufactures sugar by vacuum pan process in its sugar factories situate at Dhampur in the district of Bijnor, Asmouli in the district of Moradabad, Mansurpur in the district of Muzaffarnagar and Roza Gaon in the district of Barabanki. According to the petitioner, Munsurpur unit is its subsidiary. It has been granted licence to manufacture ethyl alcohol for use in chemicals by the Central Government and it is claimed by the petitioner that it has also been given the licence to manufacture and sell power alcohol. The State Government had recently in September, 2004 granted permission to the petitioner to manufacture rectified spirit. It has its own distillery at Dhampur. According to the petitioner, during the process of manufacture of sugar, molasses comes out as a bye-product. The molasses produced by it is not sufficient to meet the requirement of its distillery and, therefore, it had to import molasses from Nepal and alcohol from other countries. The capacity of its distillery is 1.4 lacs litre per day to 2 lacs litres per day. The petitioner's requirement of molasses for its distillery is about 21 lacs quintal per annum. The State Government, vide letter dated 9.6.2004, after due consideration and in public interest decided to make amendment in its molasses policy relating to year 2003-04. Clause (3) of the policy, as contained in the letter dated 29.6.2004, addressed by the State Government to the Excise Commissioner, U.P., Allahabad is relevant for the purpose of the present writ petition, which provides that from the balance stock of molasses of each sugar mills 20% shall be reserved for the distillery manufacturing country liquor. The sugar mills having their own distillery shall not be covered by this reservation to the extent that after consumption of molasses in their captive distillery 20% reservation shall be applicable on the balance stock. The aforesaid clause was amended vide letter dated 15.6.2004 and it was provided that the stock of molasses would be reckoned as on 15.4.2004. Vide order dated 26.6.2004 the Controller of Molasses had issued allotment orders for the financial year 2003-2004 upto November, 2004 for the

use in manufacture of country liquor. It provided that this allotment would be from 20% stock of molasses available with the sugar mills as on 15.4.2004.

3. In order to ensure that the allottees were getting the requisite quantity of molasses from the sugar mills, the Controller of Molasses, U.P., Allahabad issued a general direction on 26.7.2004, 3.8.2004 and 2.9.2004 for ensuring that requisite information be collected and submitted to him as to whether the sugar mills are selling their molasses to the distilleries for manufacture of country liquor as per allotment or not. The petitioner, vide letter dated 11.8.2004, requested the Deputy Excise Inspector, posted at the sugar mills, that as it has its own distillery and is facing shortage of molasses and being on the verge of closure, permission be granted to utilise the molasses available with their sugar mills. The Deputy Excise Inspector, vide letter dated 12.8.2004 asked for certain clarifications. The clarifications was given vide letter dated 6/7.9.2004 and it was stated therein that 20% reservation of available stock of molasses as on 15.4.2004 in their case is not applicable as it already has a captive distillery. The petitioner also made a representation on 7.9.2004 before the Excise Commissioner, U.P., Allahabad who is also the Controller of Molasses. In the meantime, the Additional Excise Commissioner on behalf of the Controller of Molasses, vide letter/notice dated 4.9.2004, has asked the petitioner to show cause as to why action be not taken for violation of Sections 8(1), 11 and 12 of the U.P. Sheera Niyantaran Adhiniyam, 1964 (hereinafter referred to as "the Act") as the petitioner had not sold the reserved molasses to the distilleries for manufacture of country liquor. Notices were issued to the occupier of all the sugar factories of the petitioner situated at Mansurpur, Dhampur, Roza Gaon and Asmouli. The petitioner, vide letter dated 16.9.2004, had submitted its reply and once again reiterated that molasses produced by its Sugar Mills is cent per cent control free for sale, meaning thereby that no order for supply of molasses can be issued u/s 8(1) of the Act till the policy for molasses year 2004-05 is declared. It was further submitted that as the petitioner owns a distillery, there is no question of supplying/selling molasses to other distilleries for manufacture of country liquor. A supplementary explanation was given vide letter dated 19.9.2004. The Government Orders dated 9.6.2004, 10.6.2004, 15.6.2004, 26.6.2004 as also the order dated 26.7.2004, 3.8.2004, 27.8.2004, 2.9.2004 issued by the Controller of Molasses, U.P., Allahabad and the notice dated 4.9.2004 is under challenge in the present petition.

4. We have heard Sri Arun Kumar Gupta, learned counsel, assisted by Sri N.C. Gupta, Advocate, on behalf of the petitioner, and Sri S.M.A. Kazmi, learned Chief Standing Counsel, assisted by Sri S.P. Kesarwani, learned Standing Counsel, on behalf of the respondents.

5. Since the counter affidavit and the rejoinder affidavit have been exchanged between the parties, with the consent of learned counsel for the parties, the writ petition has been heard and is being disposed of finally at the admission stage in accordance with the Rules of Court.

6. The learned counsel for the petitioner submitted that u/s 3 of the Act an Advisory Committee was to be constituted which has to advise on the matters relating to control, storage, preservation, gradation, price, supply and disposal of molasses. According to him, under Rule 14 of the Rules framed under the Act, before the Controller can make any order regarding sale or supply of molasses, the estimated availability of molasses has also to be placed before the Advisory Committee constituted u/s 3 of the Act. According to him, as the Advisory Committee has not been constituted, the Controller of Molasses could not have made any allotment whatsoever. He further submitted that there was no material before the State Government regarding production and availability of molasses so as to enable it or the Controller of Molasses to make any allotment orders.

7. He also submitted that the allotment of molasses for distillery manufacturing country liquor is against the public policy and is contrary to the Directive Principle of the State policy as provided under Article 47 of the Constitution of India which stipulates that the State shall endeavour to bring about prohibition of the consumption of intoxicating drinks which are injurious to health. In the alternative, he submitted that under the Government Order dated 9.6.2004, as amended by the Government Orders dated 15.6.2004 and 26.6.2004, if a sugar mill has its own distillery then 20% of the available stock has to be reckoned from molasses which is left over after its consumption in its distillery and, therefore, no allotment of molasses could have been made from the petitioner sugar mills as it has no extra molasses.

8. Sri S.M.A. Kazmi, the learned Chief Standing Counsel, submitted that u/s 3 of the Act the State Government has been empowered to constitute the Advisory Committee to advise on matter relating to control storage, preservation, gradation, price, supply and disposal of molasses. The word used is "may" and not "shall" and, therefore, it is only directory and not mandatory. According to him, even if the constitution of the Advisory Committee is held to be mandatory, till such time the Advisory Committee is not constituted, the Controller of Molasses has been authorised u/s 8(1) of the Act to pass orders requiring the occupier of any sugar factory to sell or supply such quantity of molasses to such person as may be specified in the order. The only requirement is that the Controller of Molasses can pass such an order only after obtaining the previous approval of the State Government. According to him, u/s 9 of the Act any person who is aggrieved from any order of allotment issued u/s 8(1) of the Act, can file an appeal to the State Government. Thus, he submitted that if the petitioner has any grievance regarding the allotment orders issued by the Controller of Molasses, it can file an appeal before the State Government u/s 9 of the Act. He further submitted that during the previous year the petitioner had excess quantity of molasses available with it, which it had sold in the open market and, therefore, the plea of shortage during this year is not correct. He further submitted that clause 3 of the Government Order dated 9.6.2004 and also subsequent Government Orders referred to reservation made in favour of distilleries manufacturing country liquor and, therefore, the phrase "sugar mills

having its own distilleries" is also referable to the distilleries manufacturing country liquor.

9. Having heard the learned counsel for the parties, we find that the validity of the Act has been upheld by the Apex Court in the case of SIEL Ltd. v. Union of India, AIR 1988 SC 3076.

10. Taking up the plea of availability of alternative remedy by way of appeal u/s 9 of the Act against the allotment orders, it may be mentioned here that the Court has entertained the writ petition as the petitioner has challenged the validity of the various Government Orders issued by the State Government providing for reservation of molasses to distillery manufacturing country liquor as being arbitrary and violative of Article 14 of the Constitution of India, which plea could not have been raised by the petitioner before the State Government in the appeal, if any, as it is well settled that an authority constituted under the Act cannot go into the validity of the provisions of statute or the Government Orders issued under the Act or the Rules framed thereunder. The Hon'ble Supreme Court in the case of K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, (1966) 17 STC 418 , has held that an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. The Hon'ble Supreme Court in the case of Alpha Chem and Another Vs. State of U.P. and Others, has held as under:--

"The High Court was not right in its contemplation that the vires of the impugned provisions could be examined in the revision proceedings. The jurisdiction of the High Court in revision is under the same limitation in so far as the contention as to constitutionality is concerned as was indicated by this Court in K.S. Venkataraman and Co. Vs. State of Madras, at 247 and 248, in the context of the reference jurisdiction of the High Court under the Income Tax Act. It was held :

"Upto this Stage all the three authorities are the creatures of the Act and they function thereunder. They cannot ignore any sources of income on the grounds that the relevant provisions offend the fundamental rights or are bad for want of legislative competence. The Act does not confer any such right on them...whether the provisions are good or bad is not their concern... Can it be said that a question whether a provision of the Act is ultra vires of the legislature arises out of the Tribunal's order? As the Tribunal is a creature of the Statute, it can only decide the dispute between the assessee and the Commission in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As no such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the ultra vires of a provision."

Even as the authorities under the Act cannot go into the vires of the very statutes under which they are constituted and draw their power and jurisdiction from, so is the High Court in the matters arising before it from proceedings under the Act and examine the constitutionality of the State and its provisions. The High Court, can, of course, deal with the question of constitutionality in juridical review of Legislation under Article 226. That is what the appellants sought to do before the Court in the writ petition. The High Court was not justified in requiring the appellants to have recourse to proceedings of revision taken under the "Act" to have the contention as to constitutionality resolved."

11. Apex Court in the case of Union of India (UOI) Vs. Ahmedabad Electricity Co. Ltd. and Others, has held that a circular issued by Central Board of Excise & Customs could not have been challenged before the departmental authorities as they would have felt bound by it. Repelling the plea of alternative remedy in such a case the Apex Court has held as follows:

"The objection is that the a High Court should not have entertained a petition under Article 226 of the Constitution of India in the facts and circumstances of the case. At the outset, we may note that we have only one civil appeal in the case of Ahmedabad Electricity Co. (CAs Nos. 2168-69 of 2001) which is arising from proceedings before the High Court under Article 226. The remaining matters in the bunch are statutory appeals u/s 35L of the Central Excise Act. Therefore, this Court has to go into the matter on merits. Moreover, in Ahmedabad Electricity Co. case challenge by way of a writ petition under Article 226 was to a circular dated 7.4.1998 issued by the Central Board of Excise and Customs and the consequential Trade Notice No. 36 of 1998 dated 22.5.1998 issued by the Office of the Commissioner of Central Excise and Customs, Ahmedabad by which it was clarified that "coal ash (cinder)" is an excisable commodity classifiable under Sub-Heading 26.21 of the Central Excise Tariff Act, 1985. In the first place no objection regarding the maintainability of the writ petition seems to have been taken before the High Court. Even if such an objection was raised, the same would have been futile attempt. In the facts of the case, the High Court would have been justified in rejecting such an objection. The impugned circular could not have been challenged before the department authorities, as they would have felt bound by it. We find no merit in the objection. The said is rejected."

12. In view of the foregoing discussions the preliminary objection regarding availability of alternative remedy raised by the learned counsel for the respondent is rejected.

13. Coming to the merits of the matter, we are of the opinion that u/s 3(1) of the Act, which reads as follows, the State Government has been empowered to constitute an Advisory Committee. The word is "may" and not "shall":--

"3. Constitution of Advisory Committee.--(1) The State Government may, be notification in the Gazette, constitute an Advisory Committee to advise on

matters relating to the control of storage, preservation, gradation, price, supply and disposal of molasses."

14. Even if it is held to be mandatory and not directory, as canvassed by the learned Standing Counsel, we are of the opinion that u/s 8(1) of the Act, the Controller of Molasses has been empowered to pass orders of allotment of molasses requiring of molasses to any person after the prior approval of the State Government. A harmonious construction has to be given to the provision of Sections 3 and 8 of the Act and, therefore, till such time an Advisory Committee has been constituted by the State Government, the Controller of Molasses has the power to make an allotment order with the previous approval of the State Government. It may be mentioned here that the Act has been enforced on 9.11.1964 and cannot be held to be inoperative merely because the Advisory Committee has not been constituted. In this view of the matter, we are not impressed with the argument of learned counsel for the petitioner that in the absence of the Advisory Committee no allotment of molasses could have been made.

15. As regards the plea of learned counsel for the petitioner that there was no material before the State Government regarding production, availability, consumption, utilisation of molasses by various sugar factories and, therefore, reservation of 20% of existing stock of molasses with the sugar mills as on 15.4.2004 in favour of the distilleries manufacturing country liquor, could not have been made is concerned, it may be mentioned here that on a query being made by us as to whether the petitioner has made any averment to this effect or not, learned counsel for the petitioner referred to paragraphs 28, 33 and 54 of the writ petition. Paragraphs 28, 33 and 54 of the writ petition are reproduced below:--

"28. That the respondent State had decontrolled the molasses with a view to ensure that the same could be readily used for production of Industrial Alcohol a raw material for Chemical Industry as also production of Power Alcohol and Rectified Spirit, bearing in mind the economic requirement of the State as also of National and also with a view to decrease in expenditure in the import of petrol after mixing power Alcohol in petrol for making more ecofriendly. Supply of power Alcohol produced and manufactured by Petitioner Company cannot be stopped due to commitment of Petitioner Company with the Central Govt. and it is also in the larger public interest.

33. That the allotment order in favour of sugar mills of the petitioner was issued without considering that there is no excess stock of molasses after the requirement of distillery of the petitioner is determined as per enclosed Licence capacity approved by the Controller of Molasses-cum-Excise Commissioner. The copy of the allotment order dated 22.6.2004 is enclosed as Annexure No. 16 to this writ petition.

54. That the police of the State Government dated 9.6.2004 is ultra vires and

against the provisions of Section & Rule 14 of the Adhiniyam as well as Niyamawali, 1974."

16. From the perusal of the aforementioned averments we do not find that any such averment has been made as this argument proceeds on a factual basis. In the absence of any such pleading, we are not in a position to go into this question.

17. The challenge to the molasses policy regarding reservation of 20% of available molasses as on 15.4.2004 with the sugar mills in favour of the distilleries manufacturing country liquor on the ground of violative of public policy and also contrary to Article 47 of the Constitution of India, is also misconceived. Apart from the fact that the Directive Principle of the State policy cannot be enforced in a Court of law, the Apex Court in the case of *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, has repelled such a submission in the following words:--

"(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injuries to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business."

18. The plea that the sugar mills having their own distilleries referred to in clause 3 of the Government Order dated 9.6.2004, as amended on 15.6.2004 and 26.6.2004, does not confine to the distilleries manufacturing country liquor, is also misconceived. Clause 3 of the Government Order dated 9.6.2004 is reproduced below:--

"PRATYEK CHINI MILL KE SHEERE KE AWASHESHA STOCK ME SE DESHI MADIRA KE LIYE 20 PRATISHAT SHEERE KE AARAKSHAN RADESH KI DESHI MADIRA UTAPAKAK AASHWANIYO KE LIYE KIYA JATA HAI. AISI CHINI MILE JINKI SWAYAM KI BHI AASHWANIYA HAI, UKTANUSAR KIYA JA RAHE SHEERE KE AARAKSHAN SE OOS SEEMA TAK BAHAR RAHEGI KI CHINI MILL SAH-AASHWANI DWARA SWAYAM KE VASTAVIK UPBHOG KE ATIRIKT JUDGMENT AND ORDER DATED SHEERA BACHATA HAI, OOS PER 20 PRATISHAT KA AARAKSHAN LAGOO HOGA."

19. From a reading of the aforesaid clause, it appears that the said clause is talking of reservation of molasses in favour of distilleries manufacturing country liquor and exception has been provided to such distilleries owned by sugar mills. Placing a harmonious construction to Clause 3, we are of the considered opinion that the benefit of exemption provided in clause 3 of the Government Order is available only to such distillery owned by sugar mills which manufactures country liquor and not to such distilleries owned by a Sugar Mill which do not manufacture country liquor.

20. In view of the foregoing discussion, we do not find any merit in this writ petition. It is dismissed. However, the parties shall bear their own costs.