
(2013) 05 OHC CK 0018
In the Orissa High Court
Case No : Writ Petition (C) No. 3068 of 2012

Dillip Kumar Sahu

APPELLANT

Vs

State of Odisha and Others

RESPONDENT

Date of Decision : 15-05-2013

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22, 27, 28, 29, 89
Constitution of India, 1950 — Article 226

Citation : (2013) 116 CLT 307 : (2013) 2 OLR 191

Hon'ble Judges : I. Mahanty, J;B.K. Nayak, J

Bench : Division Bench

Advocate : Millan Kanungo, L. Kanungo, D. Pradhan, S.K. Mishra in W.P. C Nos. 3068, 4255 and 5111 of 2012 and Y. Mohanty and A.N. Das in W.P. C No. 3068 of 2012, S. Das in W.P. C No. 4255 of 2012 and Millan Kanungo, L. Kanungo, D. Pradhan, S.K. Mishra in W.P. C Nos. 3068, 4255 and 5111 of 2012, S.N. Das and P.S. Acharya in W.P.C No. 5111 of 2012, for the Appellant;

Judgement

B.K. Nayak, J.—These three writ applications involve common questions of facts and law for which they were heard analogously and are being disposed of by this common judgment. The petitioners in these writ applications are Excise Privilege Holders (Licensees) in respect of different retail country spirit shops for the year 2011-12 and they challenge the legality and propriety of the letter of the Excise Commissioner, Odisha (Opposite party No. 2) bearing No. 8659 dated 12.12.2011 issued to all Superintendents of Excise permitting all retail licensees of C.S. Shops for lifting their short-drawn Minimum Guaranteed Quantity (MGQ) of country, spirit not lifted till November, 2011 along with the current MGQ. Copy of such letter was forwarded to all E.P. Holders of country spirit shops. This letter has been annexed as Annexure-3 in W.P.(C) No. 4255 of 2012 and Annexure-10 in W.P.(C) No. 3068 of 2012. The petitioner in W.P.(C) No. 5111 of 2012 has challenged the order No. 1043 dated 23.12.2011 (Annexure-4) issued by the Superintendent of Excise, Puri (opposite party No. 4 therein) directing the petitioner to lift the short-drawn MGQ in pursuance of the letter dated

12.12.2011 of the Excise Commissioner, Odisha. The petitioner also challenges the letters under Annexure-7 series issued by the Inspector of Excise-in-charge, Puri Sadar demanding Excise duty against short-drawn MGQ for different shops. The petitioner in W.P.(C) No. 3068 of 2012 also challenges the letter dated 24.12.2011 issued by the Excise Deputy Commissioner (CD), Cuttack under Annexure-11 rejecting the prayer of the petitioner therein to exonerate him from lifting short-drawn MGQ of country spirit in view of the letter dated 12.12.2011 of the Excise Commissioner, Odisha as aforesaid. The further prayer of the petitioners is to exempt them from payment of excise duty against short-drawn MGQ of country spirit.

2. The facts giving rise to the finding of the writ applications, as per the averments made therein, are that by way of renewal different retail country spirit shops were settled in favour of the petitioners for the year 2011-12 with different amounts of monthly consideration money and monthly MGQ depending upon the location of such shops. As per the conditions of license, the petitioners are bound to pay the consideration money and lift the MGQ each month on pre-payment of cost price and excise duty at the Odisha State Beverages Corporation Depot (in short "the OSBC) at Khurda. In case of any default, the petitioners are liable to pay the excise duty to the extent of the short-drawn MGQ and in case of failure to pay the duty on short-drawn MGQ, the licence is liable for cancellation and re-disposal at the loss and risk of the licensee, besides his liability to pay such excise duty. The petitioners have accordingly entered into agreement with the appropriate excise authority, i.e., the Superintendent of Excise/Collector as per the provisions of the Orissa Excise Exclusive Privilege Rules, 1970.

It is stated that country spirit is manufactured by M/s. Aska Cooperative Sugar Industries Ltd. and supplied to the retail exclusive privilege Holders (licensees) through the OSBC. It is stated that due to non-availability of raw material, M/s. Aska Cooperative Sugar Industries Ltd. could not be able to manufacture and supply the required quantity of country spirit liquor during the months of April, May, June and September, 2011 to the OSBC, as a result of which the C.S. shop holders were not supplied fully the monthly MGQ for the said months. This fact is evident from the letter No. 664 dated 07.12.2011 of the Orissa State Beverages Corporation Ltd. addressed to the Superintendent of Excise, Khurda Depot (Annexure-3 in W.P.(C) No. 5111 of 2012). It is the case of the petitioners that although time and again they appeared before the OSBC to lift the MGQ, they could not be supplied with the same during the months, i.e., April, May, June and September, 2011. However, on 12.12.2011, the Excise Commissioner, Orissa issued an order/letter directing retail licensees like the petitioners to lift the short-drawn quantity of MGQ up to the end of November, 2011 by the end of February, 2012 over and above the normal MGQ for each month. It was indicated in the said letter (Annexure-3 and 10 respectively in W.P.(C) Nos. 4255 of 2012 and 3068 of 2012) that there was availability of sufficient country spirit stock in the OSBC Depots and therefore, the retail licensees should lift the short-drawn MGQ. It is stated that some of the petitioners made a representation to the Collector,

Khurda with a prayer to exempt them from lifting the short supplied MGQ at the belated stage and to waive the excise duty to the extent of such short supply, but no action was taken.

3. It is the submission of the learned counsel for the petitioners that the petitioners were not responsible for the short supply of MGQ for the month of April, May, June and September, 2011, but it is the OSBC, a Government Corporation through which supply is made, which failed to supply the MGQ because of non-availability of stock and that it was arbitrary and illegal on the part of the State, particularly the Excise Commissioner to insist by his letter dated 12.12.2011 to lift the shortfall of MGQ along with their usual monthly MGQ, as because, the petitioners would not be able to sell the shortfall MGQ of previous months with the current MGQ. They have, therefore, prayed to quash the letter dated 12.12.2011 of the Commissioner of Excise and all other consequential orders and to exempt them from payment of excise duty as against the short-supplied MGQ for the months of April, May, June and September, 2011.

4. On behalf of the Collector, Puri, Superintendent of Excise Puri, Inspector of Excise, Puri and Assistant Sub-Inspector of Excise, Pipili, opposite party Nos. 3 and 6 in W.P.(C) No. 5111 of 2012 a counter affidavit has been filed. Similarly; a counter affidavit on behalf of Collector, Khurda and Superintendent of Excise, Khurda, opposite party Nos. 3 and 4 in W.P.(C)No. 3068 of 2012, sworn by the Superintendent of Excise of Khurda has been filed. In the counter affidavits it is admitted that due to short supply of country spirit during the months of April, May, June and September, 2011 from the source of supply, i.e., M/s. Aska Cooperative Sugar Industry Ltd., the Khurda Depot of OSBC could not supply the MGQ of country spirit to the licensees attached to it. It is, however, further stated that when the supply became adequate in the subsequent period, the Excise Commissioner, Orissa in accordance with the provision of Rule 6-A(2)(ii) of the Orissa Excise Exclusive Privilege Rules, 1970 allowed the licencees to lift the short fall of MGQ. It is stated that in view of the provision of the Orissa Excise Exclusive Privilege Rules, 1970 and that the petitioners having been given opportunity and allowed to lift the short fall of the MGQ, they cannot be exempted from lifting the same and paying the excise duty in respect thereof. It is also stated in the counter affidavit filed in W.P.(C) No. 5111 of 2012 that the petitioner-licensee had executed an agreement with opposite party No. 3 undertaking therein to lift the MGQ fixed against her shop and has further undertaken to pay the duty towards the short fall MGQ. Hence, the demand by excise authorities to pay the excise duty towards short fall MGQ is in accordance with the terms of the agreement and the provisions of the Orissa Excise Exclusive Privilege Rules, 1970 and cannot be waived, particularly when the petitioner had already been allowed to lift the short fell of MGQ in the succeeding months of the Financial Year for which the licence was granted.

5. The grant of excise licence is governed by the Bihar and Orissa Excise Act,

1915 (in short "the Act") and the Rules made thereunder. Section 22 of the Act provides for grant of exclusive privilege inter alia for sale of country liquor, whether wholesale or retail. Section 27 empowers the State government to impose excise duty or countervailing duty, as the case may be, at such rate as it may direct on any of the activities specified therein. Section 28 empowers the levy of excise duty/countervailing duty in any of the several ways provided therein. Section 29 of the Act which is of utmost relevance, provides for payment of a sum in consideration of the grant of any exclusively privilege u/s 22 in addition to any duty leviable under the Act instead of or in addition thereto.

6. Section 89 of the Act empowers the State Government to make Rules to carry out the objects of the Act. Clause (i) of Sub-section (2) thereof provides for making for regulating the procedure to be followed and prescribing the matters to be ascertained before any licence for the wholesale or retail vend of any intoxication is granted for any locality.

In exercise of the power conferred by Section 89 the Government of Orissa has framed the Orissa Excise Exclusive Privilege Rules, 1970 (in short "the Rules"). Rule 6 of the Rules prescribes the manner in which the consideration determined for grant of exclusive privilege shall be paid. Rule 6-A as amended by SRO No. 215/89 provides for Minimum Guaranteed Quantity (MGQ), the obligation of the licensee to lift the same and to remit the monthly excise duty in two equal instalments every month.

Rule 6-A of the Rules is extracted below:

6-A. Minimum guaranteed quantity of country spirit--(1) MINIMUM GUARANTEED QUANTITY" means the minimum guaranteed quantity of country spirit for the year as accepted by the collector, that should be guaranteed by the successful tenderer/bidder to be lifted and transported by him from the distillery, warehouse or depot as allotted by the Department, from time to time for retail sale in the notified shop.

Every successful bidder of country spirit shop shall, before obtaining licences, guarantee the sale of the minimum guaranteed quantity of country spirit as fixed by the Collector. The bidder shall before obtaining licences submit monthly distribution statement to the concerned Collector. The licensee before the 30th June, may revise and re-submit the monthly distribution statement for the portion of the Excise Year from August to March. The Collector shall be competent to revise and approve such revised statement.

(2) The licensee shall lift the monthly minimum guaranteed quantity approved for that month before 5.00 p.m. on the last working day of that month. The right to lift the monthly minimum guaranteed quantity approved for that month and left unlifted, if any, by 5.00 p.m. on the last working day of the month shall be forfeited, unless specially permitted to be lifted in the subsequent month or months by the Collector. Provided that:--

(i) the Collector, may for any special reasons permit the licensee. to lift the short drawn minimum guaranteed quantity of the previous month in the succeeding month except for the months of February and March. The Collector shall however obtain the orders of the Commissioner of Excise in case of default and for any special reasons if the period exceeds over one month;

(ii) the Commissioner, may, wherever if he deems it necessary, permit the licensee to lift the short drawn minimum guaranteed quantity of any month other than the month of March in any, subsequent month or months;

(iii) no unlifted quantity of the country spirit shall be permitted to be lifted beyond the last day of February.

(3) Subject to provisions of Sub-rule (1) no licensee shall lift less than the specified minimum guaranteed quantity of country spirit in any month. The excise duty of country spirit for the month as approved in the distribution statement under Sub-rule (1) shall be remitted in two equal instalments by the licensee into the Government Treasury of the District in which the shop situated. The first instalment shall be remitted by fifth of the month and the second instalment by fifteenth of that month. Where due date or subsequent day happens to be a holiday, the instalment shall be remitted on the next working day. If in any month, the first or second instalment" of the excise duty of country spirit for that month is not remitted as required above, the excise duty to the extent of deficit payment without prejudice to any other mode of recovery shall be deducted first from the Bank Guarantee, if any, and the balance from the advance deposits furnished or paid under Rule 6 and the licensee shall be galled upon to indemnify the amounts so adjusted in the case of first instalment by fifteenth of that month and in the case of second instalment by twenty-fifth of that month in which deficit payment of instalments excise duty had occurred.

(4) Where a licensee fails to indemnify the advance amount adjusted under Sub-rule (3) in the case of first instalment of fifteenth of that month and in the case of second instalment by twenty-fifth of that month the licence is liable for cancellation and the right acquired by the defaulting licensee shall be liable for re-disposal subject to provisions of Sub-section (1) of Section 22 of the Act.

(5) The licensee shall, sell in retail the entire minimum guaranteed quantity of country spirit for the Excise Year before the expiry of the term of the licence. Any balance of country spirit found outstanding and unsold at the expiry of the previous years" licence shall stand forfeited to the Government. The Collector may permit the succeeding licensee to take over the forfeited quantity of country spirit after payment of the excise duty and cost therefor and adjust it against the Minimum guaranteed quantity of the country spirit guaranteed by the succeeding licensee.

(6) The licensee shall have no claim for damages or for remission of consideration money in the case of delayed supply or non-supply of country spirit in a particular month which has been subsequently drawn by the licensee in the

succeeding months.

7. In the case of State of Orissa and others Vs. Narain Prasad and others, etc. etc., where some licencees of liquor shops failed to lift the agreed MGQ for non-supply had also failed to pay the excise duty as provided by Rule 6-A and challenged notices calling upon them to remit the appropriate amount by filing writ applications, the apex Court after taking into consideration the aforesaid statutory provisions including Rule 6-A and analyzing various previous decisions of the Court and relying upon the Constitution Bench decision in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, held as under:

6. A reading of Rule 6-A makes the following matters clear the licensee shall have to undertake to lift the M.G.Q. of liquor every month. Clause (3) of the Rules, read with clauses (1) and (2) means that the obligation to lift the M.G.Q. of liquor and the obligation to remit the excise duty payable for the month are two distinct obligations. While the obligation to lift the M.G.Q. is to be discharged before the end of the month, the obligation to remit the excise duty for the month is to be discharged in two equal instalments, viz., first instalment by the fifteenth of the month. The consequences of not remitting the excise duty in the manner specified are set out in clauses (3) and (4), which make the said obligation mandatory and emphatic. The Rule also makes it clear that if in a given month, the full M.G.Q. is not lifted, the Collector can permit the deficit to be lifted in the subsequent month but this had nothing to do with the obligation to remit excise duty for the month on the dates specified. It is relevant to point out that the several consequences provided in clauses (3) and (4) follow the non-deposit of excise duty on specified dates-and not the non-lifting of M.G.Q. which is an independent obligation. It is necessary to bear this aspect in mind.

7. Every person whose bid/tender has been accepted is required to execute an agreement/contract in the prescribed form. Under this agreement, the contractor/licensee agrees to abide by the rules and conditions relating to retail vend of country spirit (liquor) as stipulated in the licence as also the general conditions of licence. The said conditions shall be treated as part of the agreement, Clause (2) obliges the contractor to draw a particular quantity of liquor every month from the specified warehouse. Under Clause (3) the contractor "undertakes to pay the duty at the prescribed rate at the Warehouse prior to lifting the stock." This condition provides that excise duty shall be remitted prior to lifting; it does not say it shall be permitted at the time of lifting. Under Clause (7), the contractor/licensee agrees to abide by all the provisions of the Act and the Rules and instructions as may be issued from time to time.

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18. A review of the decided cases of this Court on the subject indicates a clear shift in the way this matter has been looked at. Initially, the matter was looked at from the point of view of the levy of excise duty. On that basis, it was held that unless there is a sale, no duty can be collected (Bimal Chandra Banerjee,

Gappu Lal and Ram Kumar). But then a different view point emerged with the Constitution Bench decision in Har Shankar which was carried forward in Panna Lal, Jageram and Y. Prabhakara Reddy. These decisions look at the matter from the point of view of the several payments being, in truth and effect, consideration for the grant of privilege/licence. They point out that the excise duty is a duty on manufacture or production and not on sale. It was a case, they said, where the duty was being passed on to the licensee who in turn passed it on to the consumer. What all the licensee paid, they held, is nothing but consideration for the grant of licence and the mere fact that the total consideration fixed comprises several elements (including excise duty), it cannot be said that excise duty is levied upon the licensee. In our opinion, the Orissa matters fall under the ratio of Panna Lal and Y. Prabhakara Reddy and not under the ratio of Bimal Chandra- Banerjee, Gappu Lal and Ram Kumar. The amounts mentioned in Rules 6 and 6-A, as also the undertakings contained therein, together constitute the consideration for grant of privilege/licence, determined by auction, as contemplated by Section 29 of the Act. As explained hereinbefore, the obligation to remit the excise duty is independent of the sale/purchase of liquor; it is payable on or before the specified dates every month; it is an addition to the monthly instalment payable under Rule 6; its remittance is not tied up to the purchase of M.G.Q. except to the extent that the licensee has to pay the prescribed instalment of excise duty prior to the lifting of the liquor. It, therefore, cannot be said that there is any levy of excise duty upon the licensee. The concept here is altogether different. It is a case where the consideration payable by the licensee for grant of licence is made up of monthly rental plus excise duty besides the obligation to purchase the M.G.Q. The licensee pays the rental and excise duty as undertaken by him under the agreement/contract executed by him and as required by conditions of the licence under which he is doing business, i.e., as and by way of consideration. Indeed, the Rules could have provided that the entire amount provided under Rules, 6 and 6-A should be paid in advance before the issuance of licence in which event it could not have been contended that it is not in consideration of grant of licence. Merely because the Rules provide a concession and provide for collection of the said amounts in convenient instalments spread over the year, the nature and character of the payments cannot change.

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21. Lastly, we may also invoke the holding in Har Shankar and Jageram that the writ petitioners, having entered into agreements voluntarily, containing the conditions aforesaid and having done the business under the licences obtained by them, cannot be allowed to either wriggle out of the agreements nor can they be allowed to challenge the validity of the Rules which constitute the terms of the contract. The High Court should not have exercised its extra-ordinary discretionary jurisdiction under Article 226 of the Constitution in aid of such licences.

8. In the instant case through there was a short supply of MGQ for the months of April, May, June and September, 2011, subsequently by virtue of the impugned order/letter dated 12.12.2011 of the Commissioner of Excise, Orissa, the petitioners were permitted to lift the short fall of the MGQ during the succeeding months as per the proviso to sub-rule (2) of Rule 6-A. As per the conditions of licence and the formal standard agreement entered into by the petitioners with the State incorporating the statutory Rules the petitioners have undertaken to abide by the same, as has been stated in the counter affidavit filed in W.P.(C) No. 5111 of 2012. Therefore as per the principle laid down by the apex Court the petitioners are duty bound to pay the duty in terms of the conditions of the licence and the agreement and cannot be allowed to wriggle out of such agreement and avoid liability to pay. In the aforesaid analysis, we find no merit in the writ applications, which are accordingly dismissed. No costs.

I. Mahanty, J.

I agree.