(2007) 12 J&K CK 0004

In the Jammu And Kashmir High Court

Dogra Distilleries — APPELLANT

Vs

State of Jammu & Kashmir and Others — RESPONDENT

Date of Decision : 31-12-2007

Acts Referred:

Jammu and Kashmir Excise Act, 1958 — Section 17, 25(o)

Citation : (2008) 2 JKJ 511

Hon'ble Judges : J.P. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

J.P. Singh, J.—Audit check indicating short payment of excise duty by M/s Dogra Distilleries during 1989 to 1994, resulted in issuance of a

demand for Rs. 57,33,603.05 on M/S Dogra Distilleries, the petitioner, who, after objecting it before the Excise authorities, had come to this

Court in OWP No. 893/1995 questioning the demand issued by the Excise Commissioner. This Court while disposing of the writ petition, had

directed the respondents to review their demand.

2. Acting on the instructions conveyed vide Excise Commissioner No. 68/Ex. Of 2000 dated 1.2.2000, Deputy Excise Commissioner (Distilleries)

Jammu, issued a fresh demand vide his No. DECDJ/9679-81 dated 29.3.2000 on the petitioner for payment of excise duty of Rs. 12,07,500/-

along with penal interest. The petitioner has filed this writ petition seeking quashing of Deputy Excise Commissioner (Distilleries) Jammu's demand

notice as also Rule 38 of the Jammu and Kashmir Distillery Rules on the basis whereof the demand is stated to have been raised.

3. Raising a short but interesting question of law, the petitioner says that excise

duty under the Jammu and Kashmir Excise Act, Svt.1958, can be

levied in case of spirits either on the quantity, produced in the Distillery or passed out of the Distillery or Warehouse or exported from or imported

into the State. According to it, no excise duty may be leviable under the Excise Act unless spirit is actually produced or passes out of the Distillery,

meaning thereby that Excise duty on presumptive production of spirits is not chargeable under the Excise Act. The duty sought to be recovered by

the respondents from the petitioner on the basis of the quantity of molasses received by it in its factory for the purpose of manufacture of spirits

with the aid of Rule 38 of the Jammu and Kashmir Distillery Rules is impermissible.

4. According to the official respondents, the fresh demand raised on the petitioner pursuant to the order passed by this Court in OWP No.

893/1995 was on account of short recovery of 26250.01 London Proof Litters (LPLs) from molasses during the manufacturing process and at the

end of it. They had calculated the short fall in the manufacture of alcohol on the basis of what is provided in Rule 38 of the Jammu and Kashmir

Distillery Rules, in terms whereof the calculation of the out turn had to be based on the assumption that 100 gallons of wash, whether of gur,

molasses or mahua would yield 12 proof gallons of spirit and that each continuous still will work on an average 12 hours' a day and that each pot-

still will be charged with wash one and a half times a day, and that all stills will work for an average of five days a week throughout the year.

5. Whereas the State justifies the imposition of duty with the aid of Rule 36 of the Distillery Rules, saying that the rule is intra vires the Constitution

and had been framed in exercise of powers vested in the government u/s 25 of the Act to ensure that the excise duty was not evaded by

unscrupulous manufacturers of liquor, the petitioner submits that Rule 38 of the Distillery Rules is an over broad exercise by the government of the

powers which Section 25 of the Excise Act vests in it, for it does not intend to carry out any provision of the Act or any other law for the time

being in force and relating to the excise revenue.

6. Rule 38, according to the petitioner, runs contrary to the mandate of the Excise Act in enacting an additional provision, prescribing the mode

and manner in which the Excise duty may be levied on the presumptive recovery of spirits from the raw material. This is so because the Legislature

in its wisdom had specifically prescribed as to how duty was to be imposed on spirits or beer and in view of Legislature's clear intention having

been spelt out in various clauses of Section 17, there is no room left for the government to have prescribed some other mode of imposition of

Excise duty other than and in addition to the one prescribed in Section 17 of the Act.

7. Petitioner relies on Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, , Supreme Steels and General Mills Vs. Union of

India, , and State of U.P. and Others Vs. Modi Distillery and Others, .

8. I have considered the submissions of learned Counsel for the parties. Before dealing with the issue raised in this case, reference to Chapter V of

the Excise Act and Rule 38 of the Jammu and Kashmir Distillery Rules becomes necessary. Barring Chapter V of the Excise Act, there is no other

provision in the Act dealing with the levying of duties and matters connected there with. Section 17(a) is the only section in this chapter which deals

with the mode of levying Excise duty in case of spirits, with which we are presently concerned. This section, for facility of reference, is reproduced

hereunder:

17. How duty may be imposed

Such duty may be levied in one or more of the following ways:

(a) by duty of excise to be charged, in the case of spirits or beer, either on the quantity produced in the distillery or brewery or passed out of the

distillery, brewery or warehouse or imported into or exported from the State, as the case may be;

(b) in the case of intoxicating drugs, by a duty to be rateably charged on the quantity produced or manufactured or passed out of the warehouse or

on the acreage cultivated;

(c) by payment of a sum in consideration of the grant of any exclusive or other privilege:

(1) of manufacturing or supplying by wholesale, or

(2) of selling by retail, or

(3) of manufacturing or supplying by wholesale, and selling by retail any country liquor or intoxicating drug in any local area and for any specified

period of time,

(d) by fees on licences for manufacture or sale,

(e) by transport duties assessed in such manner as the Government may direct.

(f) By duty on bottling of liquor.

9. This Section prescribes only three modes of imposing Excise Duty on Spirits or beer i.e. (1) on the quantity of spirit and beer which is produced

in the distillery or brewery or (2) which passes out of the distillery/brewery/ warehouse, or (3) which is imported into or exported from the State.

This sub-section, on its plain reading, therefore, contemplates imposition of duty on the actual production of spirits in the Distillery or Brewery or

actual storage of Spirits or beer in Warehouse or its exit from the Distillery/ Brewery or warehouse, or on the actual quantity of Spirits or beer

imported into or exported from the State. This section, therefore, does not even remotely suggest imposition of duty on presumptive production of

spirits or beer in the factory or stored in the warehouse or taken out there from. There is no provision specific or otherwise in the Excise Act which

may empower imposition of duty on presumptive quantity of spirits from molasses or any other raw material, which the licensee may get into his

factory for production of spirits or beer.

10. The duty imposed by the respondents on the petitioner, presumptive quantity of spirit cannot, therefore, be traced to, or justified, as duty,

under any provision of the Excise Act.

11. The respondents justify their demand on the petitioner on the basis of imposition of Excise duty on the presumptive quantity of Spirits, which

the petitioner should have got out of the raw material received in its factory. This, they want to do with the aid of Rule 38 of the Distillery Rules,

which have been framed by the government in exercise of powers, which Section 25 vests in it.

12. In order to examine the contention of learned Advocate general, that Rule 38 of the Distillery Rules, framed in terms of power vested in the

government u/s 25 of the Excise Act read with Section 17, authorizes the government to levy Excise duty on the presumptive quantity of liquor,

regard needs to be had to the provisions of Section 25 of the Excise Act as to whether or not this provision delegates any such authority in the government to frame rules, facilitating imposition of Excise duly in one or the other way, or more particularly in any way prescribing mode and

method in addition to one prescribed by the Legislature u/s 17 of the Act. Section 25, therefore, needs to be noticed. It reads as follows:

25. Powers to frame rules

The Government may from time to time frame rules:

(a) for determining the number of licences of each description to be granted in any district or place;

(b) by regulating he number, size and description of stills, utensils, implements and apparatus to be used in any distillery;

(c) prescribing the instruments to be used in the testing of liquor and the tables of corrections according to temperature to be used therewith;

(cc) prescribing of procedure for regulating the vending of country liquor through auction;

(d) prescribing the measures to be used for the sale of country liquor;

(dd) prescribing the type and description of bottling liquor and regulating other conditions relating thereto;

(e) fixing for any focal area the maximum or minimum price above or below which any country liquor or opium shall not be sold;

(f) for the warehousing of liquor and intoxicating drugs and for the removal of the same from any warehouse in which they are deposited for

deposit n any other warehouse or for local consumption or for export;

(g) for the inspection and supervision of stills, distilleries, private warehouses and breweries;

(h) for the management of any public distillery or public warehouse established u/s 13;

(i) for placing the growth of the poppy or hemp plant and the preparation of intoxicating drugs and the storage, import, export, possession or

transport of liquor or intoxicating drugs under such supervision and control as may be deemed necessary for the purpose of this Act;

(j) prohibiting the use of any article which the Government shall deem to be noxious or otherwise objectionable in the manufacture of liquor or any

intoxicating drugs;

(k) for the grant of batta to witnesses summoned before Magistrate or Deputy Commissioner under this Act;

(I) regulating the powers of the officers of the Excise Department to summon witnesses;

(II) prescribing and limiting the powers and duties of Excise and Taxation Officers and regulating the delegation of duties to any by such Officers;

(m) for the disposal of the articles confiscated and of the proceed thereof;

(n) for the grant of rewards to Excise and Taxation Officers and other persons who have assisted in the detection or conviction of offences against

this Act;

(o) generally to carry out the provisions of this Act or of any other law for the time being in force and relating to the Excise revenue.

13. Plain language employed in Section 25(a) to (n) does not indicate vesting of any power by the Legislature in the government to frame rules for

imposition of duty muchless the duty in the manner other than the one prescribed u/s 17 of the Act. The only other sub-section which, therefore,

remains to be considered is Sub-section 25(o) of the Act, on which reliance was placed by learned Advocate General and, according to him, any

rule framed by the government for the purpose of ensuring due payment of Excise revenue would be justified under Rule 25(o) of the Act.

14. Section 25(o) of the Excise Act is not intended to be an omnimax provision embracing all residuary powers in the government to frame rules

for any purpose whatsoever. It, on the other hand, going by its plain language, restricts government's power to frame such rules as may be

necessary to carry out the provisions of the Act or of any other law for the time being in force but relating only to the Excise revenue. This is so

because the word ""and"" employed by the Legislature in its wisdom in Section 25(o) does not admit of its being read as ""disjunctive"". Presence of

word ""and"" in Section 25(o), on the other hand, suggests Legislature's emphasis on vesting such power in the State government to frame rules,

pertaining only to the Excise revenue and to no other purpose.

15. The next question which would fall for consideration is as to whether the expression, 'Excise revenue' appearing in Section 25(o) would include

in it imposition of Excise duty as well. To find answer to this question reference needs to be made to the definition of expression ""Excise revenue

as it appears in Section 3(1) of the Act, which reads thus:

Revenue derived or derivable from any duty, fee, tax, line or confiscation imposed or ordered under the provisions of this Act or of any other law

for the time being in force relating to liquor or intoxicating drugs.

16. A plain reading of the definition of the expression ""Excise revenue' indicates about the revenue which gets generated from any duty, fee, tax,

fine or confiscation imposed or ordered under the provisions of the Excise Act or under any other law for the time being in force relating to liquor

or intoxicating drugs. In other words Excise revenue would come in existence only after any duty, fee, tax, fine or confiscation was sanctioned

under the provisions of the Excise Act or any other law for the time being in force relating to liquor or intoxicating drugs. In other words, imposition

of duty, fee, tax or fine etc. is a stage prior to the coming into being of Excise revenue.

17. Rule making power of the government in terms of Section 25(o) of the Excise Act is referable only to the method, manner and mode of

recovery etc. pertaining to Excise revenue and not to the mode and manner of imposition of any duty, fee, tax, fine or confiscation, which, as

already pointed out, is a stage prior to coming into being of the Excise revenue.

18. Section 25(o) of the Excise Act, in my opinion, therefore, does not vest any authority in the government, by way of delegated legislation, to

frame rules prescribing method and manner of levying duty on presumptive production of spirits from raw material.

19. Rule 38 of the Jammu and Kashmir Distillery Rules now needs to be examined. This rule reads thus:

38. The licensee shall, if there is a demand upon his distillery for such a quantity, produce during each calendar year at least 90 per cent, of the

outturn of plain and spiced country spirit which his stills are capable of producing according to the estimate of their charge capacity entered in his

licence. The calculation of (he outturn shall be based on the assumption that 100 gallons of wash, whether of gur, molasses or mahua will yield 12

proof gallons of spirit, that each continuous still will work on an average 12 hours a day, and that each pot-still will be charged with wash one and

a half times a day, and that all stills will work for an average of five days a week throughout the year.

20. Perusal of this Rule indicates about the formulae which may be employed to presume about the quantity which the manufacturer of spirit would

generate from the raw material it had received in its factory. In other words, it is this rule which permits presumptive determination of the quantity

of spirits out of the raw material received by a licensee in its factory. This rule had been urged to owe its existence to Section 25(o) of the Excise

Act, which, as held earlier, does not delegate any such power in the government to frame rules, prescribing mode and manner of levying duty on

presumptive production of spirits from the raw material.

21. This rule, therefore, cannot be used by the respondents to treat the presumptive quantity of spirit, determined in terms of this rule, as actual

production of spirit by a licensee for levying duty under Chapter V of the Excise Act.

22. The question as to whether Excise duty is leviable on ""presumptive quantity"" of liquor came up for consideration before Hon'ble Supreme

Court of India in case titled State of U.P. and Others Vs. Modi Distillery and Others, , where their lordships held as under:

10. What the State seeks to levy excise duty upon in the Group 'B' cases is the wastage of liquor after distillation, but before dilution and, in the

Group 'D' cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to

levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fir for

consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made

into alcoholic liquor for human consumption.

23. This view was reiterated in Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, . The view gets support from yet another

case, Supreme Steels & General Mills v. Union of India reported as 2997 (96) E.L.T. 232 (Del).

24. Action taken by the respondents in imposing and recovering duty on the presumptive quantify of spirits on the basis of audit check, with the aid

of Rule 38 of the Distillery Rules and contrary to the provisions of Section 17 of the Excise Act, cannot thus be justified. Rule 38 of the Distillery

Rules may be used by the respondents for any purpose other than the one for determining the quantity of spirits and beer for imposition of Excise

duly u/s 17 of the Excise Act. This rule, therefore, is required to be read down to the above extent.

25. Reading down Rule 38 of the Jammu and Kashmir Distillery Rules, demand notice No. DECDJ/9679-81 dated 29.3.2000 is, accordingly,

held to be in violation of Section 17 of the Excise Act.

26. This petition is allowed and demand notice No. DECDJ/9679-81 dated 29.3.2000, issued by Deputy Excise Commissioner (Distilleries)

Jammu, placing a demand of Rs. 12,07,500.00 on the petitioner, accordingly quashed.

27. No costs.

