(2011) 08 KL CK 0005

In the High Court Of Kerala

Case No : Writ Petition (C) No. 1734 of 2005

Elite Distilleries and Beverages Co. APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 01-08-2011

Acts Referred:

Kerala Abkari Act, 1077 — Section 12, 14, 17, 6
Kerala Distillery and Warehouse Rules, 1968 — Rule 34, 55
Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975 — Rule 7
Rectified Spirit Rules — Rule 8

Citation : (2011) 3 ILR (Ker) 788

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : P.R. Venkatesh, for the Appellant; Antony Mukkath, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Siri Jagan

1. The petitioner in this writ petition is a company engaged in the manufacture of Indian made foreign liquor. It has licences for compounding, blending and bottling spirits. They obtained permit for importing 20000 bulk litres of Extra Neutral Alcohol (ENA) from a manufacturer in Maharashtra. While the same was being transported to their distillery in Kerala, the tanker in which, the ENA was being transported, met with an accident, as a consequence of which, 11965 bulk litres of ENA was lost. Only 8035 bulk litres could be salvaged from the accident, which reached the distillery of the petitioner. The respondents demanded excise duty on the 11965 bulk litres of ENA on the ground that the quantity of wastage is more than the permitted exemption and, therefore, the petitioner is liable to pay excise duty on the same. That is under challenge in this writ petition. According to the petitioner, excise duty is payable only on import of the ENA into Kerala. It has not been imported into Kerala State insofar as, on the way, in the accident, the ENA was lost. According to them, insofar as admittedly it was lost

and the petitioner never used the alcohol clandestinely or otherwise for manufacture of liquor, no excise duty is payable on the same. The petitioner, therefore, seeks the following reliefs:

(a) declare that Exhibit P-10 notification in so far as it provides for levy of duty of excise on rectified spirit or Extra Neutral Alcohol is ultravires the provisions of the Abkari Act, unconstitutional and therefore unenforceable;

(b) issue a writ of certiorari or any other appropriate writ, order or direction quashing Exhibit P-9;

(c) declare that Rule 8 of Rectified Spirit Rules framed under the Abkari Act is also untravirs provisions of the Abkari Act and unconstitutional in so far as it provides for a levy of duty of excise on rectified spirit or Extra Neutral Alcohol as the case may be.

2. A counter-affidavit has been filed by the respondents supporting the impugned demand for excise duty on the alcohol which was lost in the accident. According to the respondents, normally, u/s 6 of the Abkari Act, no liquor can be imported to Kerala unless taxes and levies on the same are paid in advance. u/s 17 of-the Abkari Act, excise duty is leviable on liquor or intoxicating drugs permitted to be imported u/s 6. Under Rule 7 of the Kerala Foreign Liquors (Compounding, Blending and Bottling) Rules, 1975, a licensee can, under a bond, without prior payment of duty, import spirit. But under Rule 7(3), the imported spirit has to be duly accounted for and duty can be collected on the excess wastage and the licensee who has been permitted to import spirit without prior payment of duty, is liable to remit the duty on all spirits short accounted during the import. Therefore, according to the respondents, since the petitioner has short accounted 11965 bulk litres of ENA, they are bound to pay excise duty on the same.

3. I have considered the rival contentions in detail.

4. Section 6 of the Abkari Act reads thus;

6. Import of liquor or intoxicating drug.--(1) No liquor or intoxicating drug shall be imported unless the permission of the Government or any officer authorised by the Government in this behalf is obtained for the importation of such liquor or intoxicating drug and unless the duties, taxes, fees and such other sums as are due to the Government under this Act, in respect of such liquor or intoxicating drug, have been paid or a bond for such payment on its importation has been executed.

(2) A permission granted by the Government or such officer under sub-section (1) shall be subject to such conditions and restrictions as may be specified by the Government by notification in the Gazette.

Section 17 of the Abkari Act prescribes that a duty of excise or countervailing duty and/or luxury tax shall be levied, in such manner as may be prescribed, on liquors or intoxicating drugs permitted to be imported u/s 6. Section 17 reads thus:

17. Duty on liquor or intoxicating drugs.--A duty of excise or countervailing duty and/or luxury tax shall be levied, in such manner as may be prescribed, on liquors or intoxicating drugs,

(a) permitted to be imported u/s 6, or

(b) manufactured under any licence granted u/s 12, or

(c) manufactured at any distillery, brewery, winery or other manufactury establishment u/s 14.

Provided that no duty or gallonage fee or vend fee or other taxes shall be levied under this Act on rectified spirit including absolute alcohol, which is not intended to be used for the manufacture of potable liquor meant for human consumption.

(underlining supplied)

Rule 7 of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975, provides thus;

7. Import.--(1) A licensee may, under bond, in Form 11, without prior payment of duty,

(i) import spirit; or

(ii) obtain spirit from distillers in the State.

(2) Rectified spirit which does not conform to the following specifications shall not be imported:

(a) aldehyde contend must not exceed 6 parts per 1,00,000 reckoned as acetaldehyde;

(b) the acid content must not exceed 6 parts per 1,00,000 reckoned as acetic acid.

(c) must satisfy the permanganate test as given in the United States pharmacopoeia;

(d) must be mixable with water in all proportions without percipitate or opaleocerce;

(e) must have the characteristic spirit Colour; and

(f) must be free solid matter in suspension or solution and when 10 ml. are evaporated should leave only an unweighable stain.

(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 verificaion report sent to the officer-in-charge of the distillery and the Assistant Excise

Commissioner in order that duty may be collected on the excess wastage, if any. The drums showing excess wastage, if they are found to have been tampered with or if the wastage exceeds twice the wastage ordinarily allowed as transit wastage must be retained at the licensed premises for the inspection of the Assistant Excise Commissioner or other officer deputed by the Commissioner in this behalf. The spirits should be vatted immediately after or within one day of the verification, if one or two drums be held over owing to want of storage capacity in the vat, the verification should be completed and the unvatted spirits kept in drum.

(4) The actual stock found on verification shall be entered in the storage register of spirits in Form 3.

(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 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.

(underlining supplied)

Clause 2 of Form No. 11 prescribed under Rule 7 reads thus:

(2) that the bounden/boundens shall within the time mentioned in the permit issued by the officer authorised in this behalf reach all the spirits mentioned therein to the licensed premises and the fact should be reported before the officer-in-charge of the distillery and he/they shall remit the duty on all spirits short accounted during the import.

Rule 55 of the Kerala Distillery & 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 imported or transported under bond in wooden casks or receptacles shall be at the rate of 1 % for a journey every of 400 k.m. or part there of subject to a maximum of 4% for the whole journey.

(2) If the spirits are imported or transported in metalic 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 k.m. or part there of 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 despatched 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 greater 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 so 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 prevented by the exercise of proper care and precaution, and that the spirits could not have passed into consumption, the duty levied on such deficiency shall be refunded. The Commissioner''s decision shall be final.

(underlining supplied)

Rule 34 of the Kerala Distillery & Warehouse Rules, 1968, provides thus;

34. Distillers and warehouse keepers to account for deficiency in stocks.--An account shall be taken of the distiller''s and warehouse keeper''s stocks at such intervals, not exceeding three months, and in such manner as the commissioner may direct; and the distillers and Warehouse keepers shall pay to the Government, duly at the rate prescribed for rectified spirit on all spirits which are not forthcoming and which could not be accounted for, to the satisfaction of the commissioner, in excess of an allowance of one per cent which shall be made for wastage. Wastage for the purpose of collection of duty on the excess as aforesaid shall be calculated at the end of every quarter ending the last day of June, September, December and March of every year. If the licence is to expire earlier than the last day of the quarter the wastage shall be calculated at the end of such period:

Provided that if it is proved to the satisfaction of the Commissioner or of such officer as he may appoint that any deficiency in excess of one per cent could not have been prevented by the exercise of proper care and precaution, the payment of duty at the above rate on such deficiency shall not be required.

(underlining supplied)

5. A reading of the above said provisions would unmistakably indicate that excise duty is payable on spirit imported into Kerala and used in the manufacture of potable liquor. The rules do contain provision for allowance of wastage. That does not mean that duty has to be paid on the balance spirit, whether the same has been used for manufacture of potable liquor or not or whether the spirit has been actually imported into the State or not. The purpose behind this is to ensure that the spirit imported by a licensee is properly accounted for. But the licensee is free to prove to the satisfaction of the Commissioner that shortage could not have been prevented by exercise of proper care and precaution, and the spirit could not have been passed into consumption, in which case, the duty they paid in

advance is liable to be refunded. That essentially shows that if the licensee is successful in proving that he could not prevent wastage in spite of proper care and caution and the wastage has not gone into consumption, no duty is payable on the wastage. It is all the more so since under the proviso to Section 17, no duty is leviable on rectified spirit, unless it is intended to be used for the manufacture of potable liquor meant for human consumption.

6. Here, in the counter-affidavit filed by the respondents they admit that 11745 bulk liters of ENA was lost in accident in the course of import, at Karnataka. Apart from the fact that the petitioner has produced documents to prove the same, the respondents also frankly admit that the said liquor was lost due to the accident. Therefore, the petitioner has proved to the satisfaction of the respondents that the wastage could not have been prevented by exercise of proper care and precaution and that the spirits could not have passed into consumption because the respondents themselves admit the accident and loss of the ENA in that accident. Of course, in the counter-affidavit it is stated that as per the FIR, loss of spirit occurred due to negligence and over speed in driving and the licensee has not produced any documents to prove that he had taken necessary steps to avoid loss during import. I am of opinion that proper care and precaution mentioned in the rules are not in relation to the driving of the vehicle carrying the spirit, but in the matter of licensee taking proper precaution that the spirit imported reaches destination without the same having not misused otherwise. The emphasis should be on the misuse of the spirit and not on the loss or the negligent driving of the tanker carrying the ENA as such. When the respondents themselves frankly admit that the spirit in question was lost in the accident, there is no question of that spirit being misused and passing into consumption otherwise elsewhere. Therefore, I am of opinion that the petitioner has proved to the satisfaction of the respondents that the spirit in question was lost in the accident and it could not have passed into consumption. Therefore, the petitioner is not liable to pay excise duty in respect of the spirit, which was lost in the accident in the course of transit from Maharashtra to Kerala. Therefore, Ext.P-9 notice demanding duty on the spirit, which was completely lost in the accident, is clearly unsustainable. Accordingly, the same is quashed.

The writ petition is allowed as above.

Interlocutory applications stand closed.

