
(1996) 07 P&H CK 0055

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 18750 of 1995

Haryana Breweries Ltd.

APPELLANT

Vs

Government of Haryana and Another

RESPONDENT

Date of Decision : 22-07-1996

Acts Referred:

Punjab Brewery Rules, 1956 — Rule 35
Punjab Excise Act, 1914 — Section 31

Citation : (1996) 114 PLR 450 : (1996) 3 RCR(Civil) 540

Hon'ble Judges : S.S. Sudhalkar, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : A.M. Singhvi and Arun Monga, for the Appellant; R.N. Raina, Dy. A.G., for the Respondent

Final Decision : Allowed

Judgement

G.S. Singhvi, J.—This is a petition to quash the orders Annexure P-1, P-2 and P-7 passed respectively by the Excise and Taxation Commissioner, Haryana and the Financial Commissioner-cum-Secretary to the Government, Haryana, Excise and Taxation Department requiring the petitioner to deposit the amount specified in these orders.

2. In order to examine the legality of the impugned orders, it is necessary to take into account some facts which are borne out from the record of the case. Petitioner-Haryana Breweries Limited is carrying on the business of manufacturing/brewing of Beer in its Brewery at Murthal (Sonapat) since 1971. Till 1994, it was a public sector undertaking owned by the Government of Haryana. In the year 1994 the Government of Haryana sold 51 percent of the total share holdings to M/s Shaw Wallace and Company and retained only 21 per cent of the shares. Petitioner is licensed u/s 21 of the Punjab Excise Act, 1914 (hereafter referred to as "the Act"). It is said that between the year 1974 and 1988 the Government of Haryana earned excise revenue amounting to Rs. 5.8 Crores (approximately) on the manufacture of Beer by the petitioner. In the year

1978 three notices, one dated 1.11.1978 and two dated 1.12.1978 were issued to the petitioner under Rule 35(1) of the Punjab Brewery Rules, 1956 (for short "1956 Rules") as they are applicable to Haryana read with clause 5 of the Punjab Excise Fiscal Orders, 1932 (for short the "Fiscal Orders") calling upon the petitioner to show cause why excise duty be not levied on the alleged excess wastage during the brewing of Beer in the years 1974-75 to 1976-77. Vide order dated 26.3.1984 the Excise and Taxation Commissioner confirmed the demand raised through three show cause notices. Notices were again issued for the years 1977 to 1980-81 and by order dated 24.5.1984 the Excise and Taxation Commissioner confirmed the demands. Similar notices were issued to the petitioner on 23.12.1987 and 2.8.1988 directing the petitioner to pay Rs. 27.93 lacs and 20.54 Lacs respectively for the years 1986-87 and 1987-88. For the year 1988-89 notice dated 31.7.1989 was issued and the demand was confirmed vide order dated 10.1.1990. Petitioner filed separate appeals against orders dated 26.3.1984, 21.5.1984 and 23.12.1987 all of which were disposed of by a common order dated 22.8.1990. The Appellate Authority remanded all the three cases back to the Excise and Taxation Commissioner for re-calculation of the excise duty and for passing fresh orders. Therefore, respondent No.2 issued ten notices dated 26.11.1990 to the petitioner in respect of years 1974-75 to 1985-86. Later on the Excise and Taxation Commissioner passed order dated 19.5.1991 confirming demand for excise duty in respect of alleged excise wastage of Beer. The petitioner filed three appeals against the orders passed by the Excise and Taxation Commissioner. All these appeals have been dismissed by the Financial Commissioner by one order and the petitioner has been directed to pay excise duty on the wastage of Beer in excess of the permissible limits.

3. The petitioner has challenged the levy of excise duty in pursuance of the provisions of the "Act of 1914" and the "Rules of 1956". Case of the petitioner is that respondents are entitled to levy excise on manufacture of liquor and not on wastages. According to the petitioner excise duty cannot be levied before the process of manufacturing of Beer is complete and, therefore, levy of excise on the alleged excess wastages is impermissible.. Amendment of the Fiscal Order No. 5 whereby allowance for wastage has been reduced from 10 percent to 7 percent has been challenged on the ground of arbitrariness. Respondents have defended the impugned orders by placing reliance on Rule 35 of "1956 Rules" and para 5 of the "Fiscal Orders". Respondents have asserted that Rule 35 of "1956 Rules", which prescribes the wastage allowance, was amended vide notification dated 22.8.1986 and order 5 of the Punjab Excise Fiscal Orders, 1932 was amended vide notification dated 6th March, 1986 whereby the total wastage allowance has been reduced from 10% to 7% and the petitioner can make no grievance against the charging of duty on the entire quantity of liquor after giving the benefit of wastage allowance. According to the respondents the actual quantity brewed by the petitioner is liable to be taken into consideration for the purpose of levy of excise and it is immaterial as to what process is adopted by the petitioner for the manufacture Beer.

4. Before dealing with the arguments of the learned counsel for the parties, we deem it proper to refer to the constitutional as well as statutory provisions which have bearing on the issue raised in this petition. Article 245 and 246(3) read with Entry 51 of List II-State List empowers the State Legislature to enact laws for imposition of duties of excise on alcoholic liquor for human consumption, opium, Indian hemp, other narcotic drugs and narcotics. Though the Punjab Excise, 1914 was enacted before the commencement of the Constitution, the provisions of that Act will be deemed to have continued in force by virtue of Article 372 of the Constitution of India. Section 3 of the "1914 Act" defines various terms and expressions including "Beer", "excisable articles", "excise duty", "liquor", "manufacture". Section 31 empowers the State to impose excise duty or countervailing duty on any excisable article. Section 32 confers powers on the Financial Commissioner to prescribe the manner of levy of duty. The "Rules of 1956" have been framed by the State Government in exercise of its power u/s 58 of "1914 Act". Rule 2 of these Rules contains definition of "Beer", "brewery", "fermenting vessel", "hopback", "mashtun", "worts", Rule 35 lays down the manner of levy of duty on Beer. The Fiscal Orders contain provision for allowance of wastage.

5. Entry 51 of List II-State List 7th Schedule, Sections 3(1), (6), (6-b), (14), (16) Section 31 and 32 of "1914 Act" are reproduced below for the purpose of ready reference. Also reproduced are the provisions of Para 5 of the "Fiscal Orders", as it stands amended in the year 1986 and the definitions of Beer, brewery, fermenting vessel, hopback, mashtun, worts contain in Rule 2 of "1956 Rules" as well as Rule 35 of those rules:-

"Entry 51 of List-II-State List of 7th Schedule:

Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:-

- (a) alcoholic liquor for human consumption;
- (b) opium, Indian Hemp and other narcotic drugs and narcotics; but
- (c) not including medicinal and toilet preparation containing alcohol or any substance included in sub paragraph (b) of this Entry."

"The Punjab Excise Act, 1914:

Section 3:

(1) Beer - "Beer" includes ale, porter, stout, and all other fermented liquors made from malt.

(6) Exciseable article - "Exciseable article" means:-

- (a) any alcoholic liquor for human consumption; or
- (b) any intoxicating drug.

(6-b) "excise duty" and countervailing duty" means any such excise duty or countervailing duty as the case may be as is mentioned in entry 51 of List II in the Seventh Schedule to the Constitution.

(14) Liquor- "Liquor" means intoxicating liquor and includes (Lahan and) all liquid consisting of or containing alcohol; also any substances which the (State) Government may be notification declare to be liquor for the purposes of this Act,

(16) Manufacture-"manufacture" includes every process, whether natural or artificial by which any (intoxicant) is produced or prepared and also redistillation, and every process for the rectification reduction flavouring, blending or colouring of liquor."

31. Duty on excisable articles:- An excise duty or a countervailing duty as the case may be at such rate or rates as the (State) Government shall direct, may be imposed : either generally or for any specified local area, on any excisable article.

(a) imported, exported or transported in accordance with the provisions of Section 16; or

(b) manufactured or cultivated under any licence granted u/s 20; or

(c) manufactured in any distillery established or any distillery or brewery licensed u/s 21;

Provided as follows-

(i) duty shall not be so imposed or any article which has been imported into **
(-) India and was liable on importation to duty under the // Indian Tariff Act, 1894, or the // Sea Customs Act, 1878;

(ii) Explanation :- Duty may be imposed under this section at different rates according to the places to which any exciseable article is to be removed for consumption, or according to the varying strength and quality of such article.

32. Manner in which duty may be levied- Subject to such rules regulating the time place and manner as the Financial Commissioner may prescribe, such duty shall be levied rateably, on the quantity of exciseable article imported, exported, transported, from, a distillery brewery or warehouse:-

Provided that duty may be levied:-

(a) on intoxicating drug, by an average rate levied on the cultivation of the hemp
* (-) plant or by a rate charged on the quantity collected.

(b) on spirit or beer manufactured in any distillery established or any distillery or brewery licensed, under this Act in accordance with such scale or equivalents calculated on the quantity of materials used, or by the degree of attenuation of the wash or wort, as the case may be, as the /(State)/Government may prescribe;

(c) on tari, by a tax on each tree from which the tari is drawn:

Provided further that where payment is made upon issue of an exciseable article for sale from a ware house established or licensed u/s 22(a) it shall be made-

(a) if the /(State)/ Government by notification so directs, at the rate of duty which was in force at the date of import of that article, or

(b) in the absence of such direction by the /(State)/ Government, at the rate of duty which is in force on that article on the date it is issued from the warehouse."

"The Punjab Excise Fiscal Order, 1932:

Para 5. The rate of duty on beer with alcoholic strength exceeding 3.25 per cent, but not exceeding 8.25 per cent, manufactured in any brewery licensed in Punjab or Indian Made beer when imported into Punjab shall be two rupees per bottle of 650 ml.

Provided that duty on beer manufactured in Punjab shall be calculated on the quantity manufactured, less an allowance of ten percent for wastage. While assessing duty on beer manufactured in any quarter in accordance with the provisions of the Punjab Brewery Rules, 1956, beer issued in band during the quarter shall be deducted from the total quantity brewed and the seven per cent wastage allowance shall be calculated on the balance thus arrived at."

"The Punjab Brewery Rules, 1956:

2. "Beer" means any liquor prepared from malt or grain, with or without the addition of sugar and hops and includes ale, porter and stout.

"Brewery" means a building where beer is manufactured, and includes every place therein where beer is stored or whence it is issued.

"Fermenting vessel" means any vessel in which worts are fermented by the action of yeast.

"Hepback" means any vessel into which worts are run after boiling in order to remove the spent hops.

"Mashtun" means any vessel in which malt or grain is exhausted in the course of brewing.

"Worts" means the liquor obtained by the exhaustion of malt or grain or by the solution of saccharine matter in the process of brewin "

"35. (1) The duty on beer, at the prescribed rate, shall be charged on the total quantity actually brewed as entered in the brewing book by the licensee or as ascertained by the Inspector and entered in his survey book form B.6, whichever is higher, less an allowance of seven per cent for wastage.

(2) The duty on beer shall become due immediately the account of brewing has been taken by the Inspector. An account of duty to be realised on collection of

daily brews shall be maintained by the Inspector in the register inform B. 5-A.

(3) The Excise Commissioner, may, however, cause the charge to be made up at the close of each quarter in respect of all the brewings within that quarter and may, if the licensee executes a bond in form B.16 for its payment, defer the payment to a date not later than the fifteenth day of the month succeeding the quarter in respect of which the duty was charged. The Inspector shall at the end of each quarter prepare Beer Duty Voucher in form B.7 and shall cause a notice in form B.8 to be served upon the licensee for the payment of the amount.

(4) At the end of each quarter the Inspector shall prepare an abstract of brewing operations in form B. 11 and a statement showing the quantity of beer issued to troops in Punjab and other states in form B.14 during the quarter. The abstract and the statement shall be submitted to the Collector concerned who after check will forward them to be excise commissioner.

(5) The Inspector shall also maintain a register in form B.15 showing issue of beer made to either State."

6. We shall now examine the issue whether levy of excise on the wastage in excess of 10% or 7% and the impugned orders are legally sustainable. Shri Singhvi argued that the impugned levy is on the alleged excess wastage calculated on the basis of entries made by the Inspector in his survey book - Form B.6 and as no excise can be levied under "1914 Act" on the quantity of wastage, the impugned orders are without jurisdiction. He argued that the material taken out of wart tank/ brew kettle is not beer within the meaning of Section 3(1) of the Act and, therefore, the Government is not entitled to impose excise on the quantity of wastage. By placing reliance on the decision of the apex Court in *State of U.P. and Others Vs. Modi Distillery and Others*, learned counsel argued that unless the goods manufactured by the petitioner can be treated as excisable articles within the meaning of Section 3(6), the Government has no power to charge excise. He further argued that Rule 35 gives benefit of wastage to the extent of 10% or 7%, as the case may be, when levy is sought to be made on excisable articles and not on the raw-material used for manufacture of the excisable articles. Learned counsel argued that if Rule 35 is read as authorising the levy of excise on the quantity of wastage beyond the limit of 10%/7% then the rule is liable to be struck down being ultra vires to the power of the State Government. Elaborating this fact of his submission, Shri Singhvi argued that Section 31 of "1914 Act" empowers the Government to levy excise duty or countervailing duty on any excisable article and the rule making power of the Government cannot be used to provide for levy of excise duty on non-excisable articles and, therefore, if rule 35 is considered as authorising levy of excise duty on the wastage, the same is liable to be struck down. On the other hand Shri R.N. Raina, learned Deputy Advocate General argued that the purpose of Rule 35 is to prevent a manufacturer from avoiding payment of excise duty and in order to achieve this purpose the entries made in the survey book are made basis for levy of excise duty and, therefore, the rule must be treated as a

rule framed in furtherance of the object of the Act rather than being inconsistent with the parent statute. Shri Raina argued that there are several stages of manufacture of beer and it is not only the final product which is to be treated as excisable but all goods which are capable of being converted into excisable article should be held as covered by the charging section.

7. Correctness of the argument advanced by the rival counsel deserves to be tested in the light of the various provisions reproduced hereinabove. Power of the State Legislature to levy duty on excisable article is traceable in Entry 51 of List II of Seventh Schedule and, therefore, construction of the various provisions of "1914 Act" will have to be made keeping in view the scope of Entry 51 of List II which empowers the State Legislature to enact laws for levy of duties of excise on alcoholic liquor for human consumption; opium; Indian hemp and other narcotic drugs and narcotics. Therefore, before the liquor can be made subject to excise duty it must be an alcoholic liquor and such alcoholic liquor must be for human consumption. As a logical, corollary it must be said that liquor which is not fit for human consumption can be subjected to levy of excise duty under a law enacted by the State Legislature. We shall, therefore, read and interpret the provision of "1914 Act" and the rules framed there under in a manner which does not render them inconsistent with Entry 51 of List II. Section 31 of the Act empowers the State Government to levy excise duty or a countervailing duty on any excisable article, an expression which has been defined in Section 3(6) to any alcoholic liquor for human consumption or any intoxicating drug. The term "liquor" has been defined in Section 3(14) and it means intoxicating liquor and includes Lahan and all liquids consisting of or containing alcohol. While Section 32 generally provides for the manner in which excise duty shall be levied on the quantity of excisable articles, Rule 35 of "1956 Rules" exclusively deals with the manner of levy of excise duty on Beer. This rule merely deals with the method which is to be adopted by the Government for calculating the amount of excise duty leviable on beer brewed at a brewery. It speaks of the total quantity of beer actually brewed which is to be reflected in the brewing book maintained by the licensee or which is ascertained by the Inspector and entered in the survey book. Out of this quantity an allowance of 10 percent/ 7 percent wastage is given to licensee. This rule nowhere speaks of imposition of duty on raw-material used for manufacture of beer or imposition of duty on a liquid which does not come within the definition of beer or other excisable articles. Therefore, we do not find any substance in the plea raised on behalf of the State that Rule 35 empowers it to levy excise on the basis of the entries made in the survey book of the Inspector at any stage of the manufacture of beer. In our opinion, on a plain interpretation of Rule 35 it is not possible to hold that excise duty is leviable on the entire quantity of liquor formed out of the raw-material irrespective of the fact that such liquor is not covered by Section 31 of the Act read with Section 3(6) thereof. Rather Rule 35 envisages calculation of total quantity of beer actually brewed. The term "wastage" used in Rule 35 of the "Rules of 1956" and para 5 of the Punjab Excise Fiscal Order, 1932 is referable to the wastage which

takes place after the goods acquire the character of exciseable articles and not the wastage which occur during the process of manufacture. We are, therefore, of the opinion that Rule 35 of "1956 Rules" and Para 5 of "1932 Order" does not empower the Government to impose excise on wastage. Any other interpretation of these provisions will render them ultra vires to the provisions of the "Act of 1914" as well as Entry 51 of List II. In taking this view, we are conscious of a well settled rule of interpretation that if a statutory provision is capable of two interpretations one of which makes it ultra vires to the provisions of the Constitution or law enacted by the State Legislature and the other does not render it unconstitutional or ultra vires to the law enacted by the State Legislature then the Court should adopt the later interpretation.

8. In this case excise duty has been imposed not on the beer manufactured by the petitioner on the liquid which comes out of wort kettle which is a stage much before the liquid extracted out of malt acquire the character of alcoholic liquor fit for human consumption. It is well known that till yeast is added to the liquor and the process of fermentation takes place, the liquid derived out of malt cannot be treated as alcohol what to say of alcoholic liquor fit for human consumption. Therefore, the action taken by the respondents to impose excise duty on the quantity of liquor taken out of wort bottle is clearly illegal.

9. Perusal of Annexure P.7 alongwith Annexures P.1, P.2 and P.6 shows that the respondents have not at all examined the issue with reference to the provisions to Section 31 read with Section 3(6) and 3(14) of the Act. They have proceeded on assumption that on the entire quantity of liquor which is taken out of wort bottle and which is entered in the survey book maintained by the Inspector the manufacturer is liable to pay excise duty over and above the rebate allowed by the rules on the quantity of wastage. This, in our opinion, is a wholly erroneous approach adopted by the respondents and, therefore, impugned orders are liable to be set aside.

10. In *State of U.P. v. Modi Distillery (supra)*, their Lordships examined the legality of the imposition of excise duty on the wastage of Indian made foreign liquor exported outside the State and also on the wastage during transportation in containers from distillery to warehouse; on an obscuration and pipeline wastage. Their Lordships of the Supreme Court took notice of the various provisions contained in the U.P. Excise Act, 1910 and held that the State is not empowered to levy excise duty on raw-material or input still in process of being made into alcoholic liquor. Their Lordships also held that obscuration is not alcoholic liquor for human consumption and it cannot be made subject to excise duty. The following observations made by the apex Court are quite appropriate and, therefore the same are quoted below:-

"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 fit for consumption of 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. That the measure of excise duty upon alcoholic liquor for human consumption-is the alcoholic strength thereof does not make any difference in this behalf. It is only the alcoholic strength of the final product which is relevant.

Mr. Sehgal drew our attention to Rule 775 aforementioned and various other rules in the U.P. Excise Rules, 1910, which indicate the mode of levy of excise duty upon alcohol other than alcoholic liquor for human consumption. It will be remembered that the U.P. Excise Act, 1910, was amended in 1950 to include Section 3(22-a) whereby the power of the State to levy excise "duty was limited to that conferred upon it by Entry 51 of the List II. The Rules however, do not appear to have been similarly amended. However wide the Rules may be they cannot extend the power of the State to levy excise duty which is limited by the Constitution and the statute. It is, therefore, not necessary to refer to the Rules in any detail" (Underlining of ours)

11. The ration of the above referred decision is clearly attracted in this case and it fortifies our conclusion that the impugned levy is without jurisdiction.

12. For the aforesaid reasons, we allow the writ petition and quash the orders Annexure-P.I, P.2, P.6 and P.7 and declare that the State has no right to impose excise duty on the quantity of liquor taken out of wort bottle and that the "Act of 1914" and Rules framed there under authorises the State to impose excise duty only on the Beer finally manufactured by the petitioner. We also direct that the amount which has been deposited by the petitioner during the pendency of this writ petition shall be refunded to it within a period of three months failing which the State shall pay interest at the rate of 18 per cent from the date of amount was deposited by the petitioner.