(1987) 03 OHC CK 0003

In the Orissa High Court

Case No : Original Jurisdiction Case No. 544 of 1978

Hiralal Agarwala APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 10-03-1987

Acts Referred:
Bihar and Orissa Excise Act, 1915 — Section 2, 3, 4
Constitution of India, 1950 — Article 227, 227
Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 — Rule 11, 12, 2, 9

Citation : (1987) 63 CLT 674

Hon'ble Judges : L. Rath, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : R. Mohanty and N. Patra, for the Appellant; N.C. Panigrahi, Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

L. Rath, J.—The Petitioner in this petition under Articles 226 and 227 of the Constitution of India seeks to quash the direction communicated to him in Annexure-l of the Superintendent. Excise, Sambalpur calling upon him to pay an excise duty of Rs. 1,18.526.40 being the duty payable on the medicinal preparation ?Ark podina? manufactured by him. The Petitioner as the manufacturer of ?Ark podina? has been levied with the duty under the Medicinal & Toilet Preparation (Excise Duties Act 1955 (Act 15 of 1955) hereinafter referred as the Act at the rate of Rs. 15.50 per L.C.L. and has been directed to pay the duty which has arisen after 12-8-1974.

2. Admittedly the duty desired to be collected from the Petitioner relates to the period from 2-12-1974 to 5-3-1975. A counter affidavit has been filed by opposite party to which a table has been annexed as Annexure-B showing the total amount of duty paid by the Petitioner the total amount payable on the finished goods, and the difference payable by him which amounts to the sum of Rs. l.18,526.40.

3. Mr. Mohanty the learned Counsel appearing for the Petitioner has challenged the levy solely on the ground that since the duty sought to be collected relates to the period as above and it is the case of the department that there has been a short collection of duty for which the differential amount is being claimed under Annexure-1, his case is covered under Rule 11 of the Medicinal & Toilet preparations (Excise Duties) Rules, 1956 (for short ?the Rules?) which prescribe a limitation of six months for the collection of any such duties ?short-levied? from the date on which the duty or charge as paid or adjusted in the owner?s account-current if any. It is submitted that the duty has been paid by the Petitioner on rectified spirit indented by him for manufacture of ?Ark podina? and since the duty for rectified spirit is always pre-paid, the demand raised on 16-1-1978 for payment of the balance dues is hit by Rule 11 of the Rules and is not collectible from the Petitioner. It is contended that the duty on the medicinal preparation, under the schedule to the Act, is on the basis of a rate per litre of the strength of London proof spirit and since the Petitioner has already paid the duty for the spirit, the demand raised is for the balance amount and hence being a case of short levy, is barred under Rule 11 of the Rules.

4. In the counter affidavit filed by the opposite parties it has been contended that the very same matter was before this Court earlier in O.J.C. No. 935174 in which the levy now sought to be collected and for the period prior to was under challenge. The demand in that case was for an amount of Rs. 12,31942.00 which was made on the basis of the Circular No. 2257 dated 12-8-1974 of the Excise Commissioner, Orissa, Cuttack. In the judgment dated 19-11-1976 it was held that the Circular would not have any retrospective effect but would be prospectively valid, and hence the demand of Rs. 1,18,526.40 p. has been raised after recalculation of the duty payable after 12-8-1974. It has been contended by the learned Additional Government Advocate in his submissions that Rule 11 of the Rules is not attracted to the present case since there is no question of any ?short-levy? of the duty under the Act. The Petitioner has paid duty only on rectified spirit which he indents for manufacture of ?Ark Podina? and that ?Ark. Podina, being another finished product, is liable to duty under the Act separately for which duty has not at all been collected from him. There being thus no case of any short levy, it is recoverable under Rule 12 of the Rules which is as follows:

12. Residuary powers for recovery of sums due to Government-Where these rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the collecting Government under the Act or these rules, such duty, deficiency in duty or sum shall, on written demand made by the proper officer, be paid to such person and at such time and place, as the proper officer may specify.

The Circular of 12-8-1974 on which the demand was raised in the earlier case inter alia stated as follows:

... The procedure so far adopted in this regard was that such licensees were depositing duty at the prescribed rate under Rule 49 of the M. & T.P. (E. D.) Rules, 1956; prior to issue of pass to import rectified spirit and after that no duty was collected on the finished goods prescribed under Rule 9 ibid. After careful consideration and in consultation with law Department, Government have decided that the aforesaid holders of licences should pay duty on rectified spirit under Rule 9 ibid prior to obtaining pass to import rectified spirit and also the duty on the finished goods i.e. medicinal and toilet preparations before release from the non-bonded manufactory as per the procedure laid down under Rule 9 mentioned above. The concerned licence holders can claim rebate paid under Rule 9 ibid as provided in Section 4 of the Act....

It is thus the case of the Department that no duty was ever collected on ?Ark Podina? under the Act.

5. The duty paid by the Petitioner on rectified spirit being not a duty under the Act, there is no short levy so far as the duty under the Act is concerned. Rectified spirit is dutiable under the Bihar & Orissa Excise Act 1915 (Act 11 of 1915) and is not dutiable under the Act. Section 3 of the Act is the charging section and lays down that duties of excise at the rate specified under the schedule shall be levied on all dutiable goods manufactured in India. Dutiable goods has been defined in Section 2 (c) as the medicinal and toilet preparations specified in the schedule. Items I (i) and (ii) of the schedule so far as relevant for the purpose, are as follows; Allopathic Medicinal Preparations ;

(i) Medicinal preparations containing alcohol which are not capable of being consumed as ordinary alcoholic beverages (a) Patent or proprietary medicines ... Ten percent and valore or rupee one and ten paise per litre of the strength of London Proof spirit.

whichever is higher.

(b) Others ... Rupee one and ten paise per litre of the strength of London Proof spirit.

(ii) Medicinal preparation containing alcohol which are capable of being consumed as ordinary alcoholic beverages- (a) Medicinal preparations which contain known active ingredients in therepeutic quantities... Ten per cent ad valorem or rupees three and eighty five paise per litre of the strength of London proof spirit, whichever is higher.

(b) Others ... Rupees fifteen and fifty paise per litre of the strength of London Proof spirit.

Rectified spirit is not a medicinal preparation containing alcohol since it itself is alcohol and forms an ingredient in manufacture of the medicinal preparation. It has been defined in Rule 2 (xviii) as plain undenatured alcohol of a strength not less than 50.0% over proof and includes absolute alcohol. It is thus not included in the schedule as a dutiable good. Hence rectified spirit being not dutiable under the Act, any duty paid by the Petitioner in respect of it is not accountable under the Act and as such there could not be any short-levy of duty under the Act, while levying the duty on, ?Ark Podina?. The contention raised by the Petitioner must accordingly fail. That apart such a contention is also not open for the Petitioner to raise. The demand against the Petitioner now raised was also within the ambit of the Circular dated 12-8-1974 which was the subject matter of the earlier case, O.J.C. No. 935/74. During the hearing of that case the learned Advocate General, on instructions to the Government agreed not to enforce the Circular retrospectively and the Petitioner also stated, as was recorded in the judgment, that he does not dispute the Circular in its prospective application i.e., from the date of the Circular and is prepared to abide by the arrangement contemplated in it. In that view of the matter the Petitioner cannot be permitted to raise any question regarding his liability to pay the amount which has been raised only after the decision of this Court and in compliance with it.

6. In the result, the writ application has no merit and is accordingly dismissed, but however under the circumstances, there shall be no order as to costs.

G.B. Patnaik, J.

7. I agree.

