(2008) 05 PAT CK 0002

In the Patna High Court

Case No : CWJC No. 4838 of 2008

Iceberg Industries Limited — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 20-05-2008

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 2, 27, 28, 90

Citation : (2009) 1 PLJR 699

Hon'ble Judges : C.M. Prasad, J;Barin Ghosh, J

Bench : Division Bench

Advocate : Satyabir Bharti, for the Appellant; P.K. Shahi, for the Respondent

Final Decision : Allowed

Judgement

1. In terms of sub-section (6) of Section 2 of Bihar Excise Act, 1915 "excisable articles" means (a) any alcoholic liquor for human consumption; or (b) any intoxicating drug. Section 27 of the Act empowers the State Government to impose excise duty or a contraveiling duty on any excisable article manufactured in any distillery or brewery licensed, established, authorized or continued under the Act. Section 28 of the Act provides the ways of levying such duties. It provides, subject to the Rules made u/s 90 clause (12) of the Act, duty imposed u/s 27 may be levied on spirit or beer manufactured in any distillery or brewery licensed, established, authorized or continued under the Act by a rate charged upon the quantity produced in or issued from the distillery or brewery, as the case may be, or issued for there from warehouse established, authorized or continued under the Act. There are, therefore, three ways of levying duty on beer manufactured in any licensed distillery or brewery. First of that is upon the quantity produced in such distillery or brewery. The second is upon the quantity issued from such distillery or brewery. The third is upon the quantity issued for sale from a warehouse established, authorized or continued under the Act. Which way or ways or mode or modes would be adopted for levying such duty had been left by the Legislature upon the Board by making the provisions contained in

Section 28 of the Act subject to any Rules made u/s 90 clause (12), which in turns authorizes the Board to make Rules for prescribing a time, place and manner of levying duty on intoxicant. In exercise of such power the Board framed Rules and in Rule 147 has provided that duty imposed on foreign liquor manufactured in a distillery, and stored in a distillery or excise warehouse shall be paid before removal from the distillery or excise warehouse unless a bond has been executed for such purpose. By making the said Rule the Board has adopted the second and third options given by the Legislature for levying duty. Petitioner is a licensed manufacturer of beer. In addition to obtaining license to manufacture beer it has obtained a license under Form No. 19B to have an excise warehouse. In terms of the provision contained in the said license petitioner is entitled to remove manufactured beer to the said warehouse without payment of duty. It is, however, in terms of the provisions contained in the said license, obliged to pay duty at the time of removal of beer from the warehouse, other than under a bond issued before. In addition to that the petitioner is also liable to pay duty upon all wastages. The moment petitioner removes any beer stored at the said warehouse for consumption within the State, it is required to pay duty on such removed beer. In the event petitioner removes any beer from the said warehouse for being sold outside the State, it would be required to give bond before hand and then it can remove such beer for the purpose of selling the same outside the State of Bihar.

2. Petitioner manufactured beer, sold a part thereof, but could not sell the remaining for various reasons, which remained in the said warehouse. Petitioner approached the Commissioner for permitting it to re-process the unsold beer which still remained in the said warehouse. Commissioner felt re-processing of beer is not viable, on the basis of opinion of the Chemist, and directed destruction of the same.

3. Rules 86 to 91 of the Rules made by the State Government in exercise of its power under the Act provides for method to be adopted in relation to spoilt beer. Rule 86 provides that a written application must be made to the Collector for allowance for spoilt beer. Rule 87 provides that there must be satisfactory evidence to enable the Collector to decide whether the beer can be identified with its proper brewing subject to Rules 88 to 91 and if he is satisfied on this point he will sanction destruction of the beer in presence of an Officer. Rule 88 provides that the brewer must sign a declaration that the boor was brewed by him and has never loft his premises and that no part of it consists of "bottoms" or "returns" from vendors or other customers. Rule 89 provides that representative samples must be taken and sent to such laboratory as the Commissioner may decide. Rule 90 provides that the Officer must state the means by which he checked the bulk quantity, and after samples have been taken as aforesaid, he must witness destruction of the beer and record a note of the fact in the brewing book. Rule 91 provides that on receipt of a satisfactory report from the laboratory, the brewer may be credited with the proper amount of duty.

4. The said Rules, therefore, makes it abundantly clear that when beer is spoilt the same should be destroyed in the manner specified and if any duty has been paid on such spoilt beer, upon destruction thereof, the brewer will be credited with the proper amount of duty so paid. This policy is based on the very definition of excisable article which means any alcoholic liquor for human consumption. Spoilt beer is not an alcoholic liquor fit for human consumption. The moment beer is spoilt it ceases to be an excisable article and, accordingly, Rules prescribe that upon its destruction, the duty paid thereon will be credited to the brewer.

5. After the Commissioner decided by taking recourse to Rules 86 to 90 of the Rules, that the beer has become spoilt and as such the same is required to be destroyed in the presence of an Officer to be nominated by him, a notice has been issued to the petitioner for payment of duty in advance upon such beer which has been proposed to be destroyed. This has resulted in filing of the present writ petition.

6. The principal contention of the State is that it was a failure on the part of the petitioner to sell beer produced by it when the same had not become spoilt and in consequence thereof the State cannot be deprived of duty leviable thereon. It was contended that the State Government cannot be made to suffer for no laches on its part, but for the inefficiency or failure on the part of the petitioner in selling manufactured beer. The learned counsel for the State also submitted that in terms of the license granted under Form 19B petitioner is also liable to pay duty upon wastage. It was contended that beer became waste in view of inability to Bell. when the same had not been spoilt.

7. The State Legislature made the Act and thereby authorized the State Government to make Rules and also authorized the Board to frame Rules. In terms thereof the method of levy of duty has been set in motion. In terms thereof duty is payable only when beer is issued for sale either from the brewery or from the warehouse. The warehouse license granted in favour of the petitioner under Form 19B also provides that if the spoilt beer is not issued from the warehouse, where the same are lying, there is no question of payment of any duty. Beer which was fit for human consumption and was stored in the warehouse, became spoilt, while it remained in the warehouse, and thus became unfit for human consumption. It lost its character of excisable article. Those are now to be destroyed and permission therefore has been given. In relation thereto, in view of non-issue of the same for sale, duty is not leviable as is the mandate of Rule 147 adopting two later options contained in Section 28 of the Act. The word "wastage" has been used in connection with the goods upon which duty is leviable. In other words, if beer packed in bottles are broken and as a result beer spills, the beer is wasted. Upon that duty is leviable, but when beer has become spoilt and, accordingly, is no longer beer, i.e. alcohol fit for human consumption, it is not a wastage. It is true that petitioner did not sell the subject beer on time, but having regard to the scheme of the Act and the conditions of

the warehouse license, petitioner did not incur any liability to pay duty thereon, since so long the same would remain in the warehouse there would be no obligation to pay duty. Petitioner would have become obliged to pay duty on removing beer from the warehouse for sale within the State. In the circumstances, the writ petition succeeds. The order dated 1st March, 2008, contained in Memo No. 627 (Annexure-9) to the writ petition, issued by the Assistant Commissioner, Excise, Patna, claiming duty on spoilt beer before its destruction, is quashed. There shall be no order as to cost.