(2000) 04 AHC CK 0091

In the Allahabad High Court

Case No : C.M.W.P. No. 296 of 2000

India Glycols Limited APPELLANT

Vs

State of U.P. and others RESPONDENT

Date of Decision : 03-04-2000

Acts Referred:

Evidence Act, 1872 — Section 106
Uttar Pradesh Excise Act, 1910 — Section 41
Uttar Pradesh Excise Rules — Rule 3

Citation : (2000) 2 AWC 1635

Hon'ble Judges : M. Katju, J;D.R. Chaudhary, J

Bench : Division Bench

Advocate : Piyush Agrawal, Milan Banerjee and Bharat Ji Agarwal, for the Appellant; C.S. Singh and C.S., for the Respondent

Final Decision : Allowed

Judgement

M. Katju and D. R. Chaudhary, JJ.—Heard Shri Milan Banerjee, Senior Advocate. Shri Bharat Ji Agarwal and Shri Piyush Agrawal for the petitioner, and the learned Chief Standing Counsel and Shri C. S. Singh for the respondents.

2. This writ petition has been filed praying for a writ of mandamus directing the respondents not to realise licence fee for the Excise Year-2000-2001 and subsequent financial year for all the products manufactured by the petitioners in its factory. The petitioner also prayed for quashing Rule 3 (a) of U. P. Licence for Possession of Denatured Spirit and Specially Denatured Spirit Rules. 1976.

3. The petitioner is a private limited company incorporated under the Indian Companies Act, 1956. It manufactures chemicals and for that purpose requires molasses/Industrial Alcohol as the main raw material for the manufacture of the aforesaid chemicals. The petitioner obtained licence in Form PD 2 from the Excise Commissioner. Allahabad, U. P, for establishing a distillery within the same premises in which the petitioner''s main chemical factory is located. The petitioner then proceeded to establish a captive distillery for the manufacture of

industrial alcohol (Ethyl Alcohol by 95% v/v/). As per letter issued by the Ministry of Industry, the petitioner did not have to obtain a separate Industrial licence for the manufacture of industrial alcohol as the petitioner established a captive distillery for 100% utilisation of Industrial Alcohol captive for manufacture of chemicals, Copy of the letter of the department of Industrial Development, Ministry of Industry dated 3.5.1985 is Annexure-1 to the petition. As alleged in paragraph No. 3 of the writ petition, from the distillery Alcohol is carried through closed and sealed pipes directly to the main chemical plant for manufacture of chemicals. The production of the chemicals commenced in April, 1989. The petitioner does not buy or obtain specially denatured spirit from any other distillery unit in the State. As one of the conditions of granting of FL/39 licence for transfer of Industrial alcohol in the captive distillery of the petitioners, the petitioners are prohibited from selling Industrial Alcohol so produced to outside parties and are required to consume the entire Industrial alcohol produced within the factory for the manufacture of finished chemicals. A copy of FL 39 Form issued by the Excise Department to the petitioner clearly showing that the petitioner shall captively consume the entire quantity of Industrial Alcohol manufactured in its captive distillery and shall not purchase/sell the Industrial Alcohol so produced is Annexure-2 to the writ petition.

4. In paragraph No. 4 it is alleged that the petitioner''s factory had started production of Industrial Alcohol from December. 1998 and used it for production of chemicals. The petitioner is challenging the competence of the State of U. P. Government to impose or authorise imposition of licence fee for possession and storage of specially denatured spirit which is used as raw material for the manufacture of the said chemicals.

5. In May, 1979, by notification No. 951/licence 3 dated May 31, 1979. the Commissioner of Excise, U. P. purporting to act u/s 41 of U. P. Excise Act, 1910 and with the previous sanction of the State Government, substituted a new Rule for Rule 3 (a) of the said U. P. Licence for possession of Denatured Spirit and specially Denatured Spirit Rules, 1976, by which it was provided for the first time that a fee for licence in Form FL 39 shall be at the rate of 10 paise per litre payable on the quantity of specially denatured spirit obtained from any distillery in U. P. The amended Rule further provides that the fee shall be realised by the Excise Inspector Incharge of the Distillery from the licensee before making issues of the specially denatured spirit from the distillery and shall be deposited in the treasury. Copy of the amended rule issued by notification dated 31.5.1979 is Annexure-3 to the writ petition.

6. In paragraph No. 8 of the writ petition the original rule has been quoted as under:

"3 (a) The fee for a licence in Form FL 39 shall be at the rate prescribed for industry to industry by the Excise Commissioner per litre payable on the quantity of specially denatured spirit obtained from any distillery in Uttar Pradesh. The fee shall be realised by the Excise Inspector Incharge of distillery from the licence before making issues of the specially Denatured Spirit from the distillery and shall be deposited in the treasury under the Head "X-State Excise Miscellaneous Confiscation and Miscellaneous (a) Contribution ; towards Establishment."

7. The amended Rule 3 (a) is quoted herein below :

"3 (a) The fee for a licence in Form FL 39 shall be at the rate prescribed for industry to industry by the Excise Commissioner per litre payable on the quantity of specially Denatured Spirit obtained from any distillery in Uttar Pradesh. The fee shall be realised by the Excise Inspector Incharge of Distillery from the licensee before making issues of the specially Denatured Spirit from the distillery and shall be deposited in the Treasury under the Head "X State Excise Miscellaneous Confiscation and Miscellaneous (a) Contribution towards Establishment."

8. The Excise Commissioner, Allahabad, U. P., increased the licence fee from 10 paise per litre to 15 paise per litre vide notification dated 13.1.1990, Annexure-4 to the writ petition.

9. Before dealing with the submissions of the learned counsel for the parties, we may briefly indicate the law on this point. Entry No. 52 of list 1 of Schedule Seven to the Constitution refers to Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest. Entry No. 8 of List 1 contemplates duty of Excise on tobacco and other goods manufactured or produced except alcoholic liquors for human consumption. Thus, Parliament has power to legislate in respect of alcohol which is unfit for human consumption and can impose tax on the same. Entry 8 of list II refers to intoxicating liquors, that is to say. the production, manufacture. possession, transport, purchase or sale of intoxicating liquors. Thus, the constitutional scheme is very clear, namely, that Parliament can legislate in respect of liquor which is unfit for human consumption as held by the Supreme Court in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, . and the State Legislature or State Government has no Jurisdiction regarding the same. However, it is also equally well-settled that the State Government can charge regulatory fees for the purpose of payment of salary for the staff to see that no non-potable alcohol is converted into potable alcohol. However, the said regulatory fee must not be excessive and must have a broad co-relation with the aforesaid expenses as held by a Division Bench of this Court in Ram Surat Tiwari v. State of U. P. and others. 1991 ALJ 644 and Rajendra Prakash Sharma v. State of U. P. and others, decided on 31.3.1999. As such the regulatory fee must have broad co-relation with the cost of administering the regulation and must not be a garb for imposing excise duty for raising revenue by the State, as the State cannot impose duty on non-potable alcohol.

10. No doubt in Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, , it was held by the Supreme Court that for regulatory fee like the licence fees, existence of quid pro quo is not necessary (although the fee imposed must

not be in the circumstances of the case excessive). In our opinion. this only means that the fee charged need not be exactly the same as expenses incurred for maintenance of the staff. For example, if the expenses on salaries of staff, etc. for seeing to it that non-potable alcohol is not converted into potable alcohol is Rs. 10 lacs, a fee of Rs. 11 or 12 lacs will not be declared illegal, but if the fee charged is, say, rupees one crore. it will be certainly illegal as there will be no broad co-retation between the fee charged and the administrative expenses. In fact, the extra 90 lacs is really being imposed as a tax in the garb of administrative expenses. In our opinion, the burden of showing that there is a broad co-relation between the fee charged and administrative expenses for imposing regulatory fee is on the Government in view of Section 106 of the Evidence Act which says that the burden of proving any fact which is especially within the knowledge of any person is on him, Moreover, as held by this Court in Ram Surat Tewari''s case (supra), it is not the entire expenses on salaries of the staff of the excise department which is to be considered but only that portion of the expenses which can broadly be attributable to the expenses for checking that non-potable alcohol is not converted into potable alcohol. The excise department officials discharge several functions, e.g., checking the quantity and quality of the goods produced, and hence the entire salary of the staff posted in the premises is not to be considered, but only such portion of it which can be roughly estimated to be for the work of ensuring that non-potable alcohol is not made potable.

11. It may be mentioned that rectified spirit is non potable because it has 95% alcohol content in it. By diluting it with water however, it can be converted into potable alcohol. However, when certain chemicals known as denaturants are added to rectified spirit, it becomes unfit for human consumption even if thereafter water is added to ft.

12. The petitioner pays the fee for denaturation of spirit at the rate of 10 paise per litre, but the department is demanding an additional fee of 15 paise per litre for possession and storage of denatured spirit which is transferred by the petitioner through closed pipe lines after denaturation. In our opinion, this is illegal, as it is really a tax in the garb of regulatory fee. It may be mentioned that a regulatory fee does not really have any element of quid pro-quo, as no service is rendered. It is imposed to ensure that non-potable alcohol is not converted into potable alcohol, for in that cases the State would be a loser as it will lose excise duty on potable alcohol which is being surreptitiously sold. Hence regulatory fee can only be charged for maintaining a staff to check this. In the present case, however, the facts reveal that the licence fee of 15 paise per litre is really a tax and not a regulatory fee.

13. The learned Chief Standing Counsel has submitted that denatured spirit can be re-natured and can be used for potable purpose. However, this is a very involved process and it is extremely difficult. Moreover, it is not averred in the counter-affidavit that any additional staff has been employed for seeing that

denatured spirit is not renatured. At any event, no co-relation at all (what to say of broad co-relation) has been shown between the charge of 15 paise per litre and any additional expenses incurred by the department.

14. In para 54 of the writ petition, it has been alleged that over and above the licence fee for denaturation at the rate of 10 paise per litre which the petitioner is paying, the respondents are seeking to recover an additional licence fee at the rate of 15 paise per litre which is under challenge in this writ petition. It is alleged that the staff employed is the same and there is no additional staff for charging an additional fee of 15 paise per litre. This averment is not specifically denied in the counter- affidavit. Since no additional staff is employed for the purpose of checking that denatured spirit is not converted into renatured spirit, in our opinion, no extra expenses are being incurred by the department, hence in our opinion the demand of 15 paise per litre in addition to the 10 paise is wholly illegal as it really amounts to imposition of a tax by the State Government. As already observed, above excise duty cannot be charged on non-potable (denatured spirit) by the State Government under our constitutional scheme.

15. We are not going into the question as to whether the licence fee at the rate of 10 paise per litre for denatured spirit is constitutional or not as that is not under challenge in this petition, but we are certainly of the opinion that charging of the additional licence fee at the rate of 15 paise per litre is wholly illegal as in fact no extra administrative expense is incurred for the purpose.

16. In para 9 of the counter-affidavit it has been admitted that this licence fee is also for increasing the general fund of the State. This, in our opinion, is wholly unconstitutional and can only be done by Parliament.

17. It has also been alleged in para 54 of the writ petition that once the rectified spirit is denatured, it cannot be diverted for potable purposes. This has also been mentioned in paras 18 and 25 of the rejoinder-affidavit. No doubt in paras 17 and 20 of the counter-affidavit, it is mentioned that the denatured spirit can be renaturated, but the truth is that this is very difficult and can only be done by a very involved process. Moreover there is no allegation or whisper in the counter-affidavit that any denatured spirit was ever renatured by the petitioner. In fact such renaturing would be impossible in a captive distillery where the entire denatured and specially denatured spirit is automatically destroyed in the process itself after it is denatured when it is transferred through the closed and sealed pipelines to the chemical plant.

18. In para 54 of the writ petition, it is stated that there is no allegation against the petitioner that it has ever renaturated the denatured spirit for potable purposes, and in fact the petitioner has never done so. This allegation in para 54 of the writ petition has not been specifically denied in para 74 of the counter-affidavit (which is the reply to para 54 of the writ petition) and hence it must be treated as correct. Hence the argument that the petitioner renaturates or is likely to renaturate the spirit and additional staff has to be posted to check this, in our

opinion is far-fetched and. not tenable.

19. In para 54 of the petition, it is also stated that the entire cost of maintaining the staff of the excise department is met by the petitioner from the 10 paise per litre which it pays as licence fee. and hence the additional charge of 15 paise per litre 13 illegal. We are in agreement with this submission, for the reasons already given above.

20. For the reasons given above, this writ petition is allowed. The imposition of licence fee of 15 paise per litre for the Excise year 2000-2001 and subsequent years is quashed and mandamus is issued directing the respondents and their employees and agents not to recover the aforesaid fee from the petitioner.