
(1996) 01 PAT CK 0022
In the Patna High Court
Case No : C.W.J.C. No. 3951 of 1993 (R)

Jogindar Singh and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 30-01-1996

Acts Referred:

Citation : (1996) 01 PAT CK 0022

Judgement

D.P. Wadhwa, C.J.—These two writ applications [C.W.J.C. No. 3733 of 1993 (R) and C.W.J.C. No., 3951 of 1993(R)] are being disposed of by this judgment.

2. The first writ application has been filed by Johal Tractors, a partnership firm and two of its partners, Surjit Singh and Devinder Singh seeking writ, order or direction for quashing the order dated 5.7.1991 of the second respondent, the Member Board of Revenue, Bihar and also for cancelling the order seizing the properties of the petitioners and for their return. The Member, Board of Revenue by his order had dismissed the appeal filed by Johal and Company, who is the petitioner in the second writ application, confirming the order of the authorities below holding Johal and Company liable for shortage of foreign liquor in its warehouse and demanding duty of excise amounting to Rs. 28,11,997.08 paise. It would appear, in terms of this order the authorities seized certain properties which Johal Tractors claim to be their's towards the demand of Excise duty.

3. We find that when the first writ application was filed, there were three petitioners but subsequently after seeking amendment Johal and Company was also added as fourth petitioner. There are five respondents, namely, (1) State of Bihar through Secretary, Department of Excise, (2) The Member, Board of Revenue, (3) Assistant Commissioner of Excise, Dhanbad, (4) Sub-Inspector of Excise, Sadar Circle, Dhanbad and (5) Maruti Udyog Ltd. It would appear that Maruti Udyog was added as a respondent as the petitioners have stated that the cars seized from them by respondent Nos. 3 and 4, in fact were owned by Maruti Udyog Ltd. and the first petitioner was merely a dealer. Subsequently the petitioners have also challenged the order of the lower authorities levying duty of

Excise which we would discuss a little later.

4. In the second writ application, there are three petitioners, all partners of Johal and Company and respondents are again five in number. Four respondents are common as in the first writ application and now instead of Maruti Udyog Ltd. the fifth respondent is the Certificate Officer, Dhanbad Sub-Division. In this writ application, the petitioners have prayed for a writ order or direction quashing certain notice issued u/s 7 of the Bihar Public Demands Recovery Act, 1914 requiring the petitioners to deposit Rs. 28,11,997.08 paise towards excise duty.

5. We may note at the outset that Johal and Company is a partnership firm of three partners, who are petitioners in the second writ application and they are (1) Joginder Singh, (2) Surjit Singh and (3) Devinder Singh. In the Johal Tractors there are four partners of which three are the same as of Johal and Company and the fourth is Miss Surinder Singh Johal, who is daughter of one of the partners.

6. Again at this stage we may note that Mr. Anil Kumar Sinha, learned Counsel appearing for the petitioners said that what we decide in the first writ application shall be applicable in the second one as well.

7. We can now have the sequence of events which led to filing of these writ applications.

Johal and Company was granted excise licence in Form No. 1A in the year 1972 under the provision of Bihar Excise Act (in short "the Act") for keeping Indian Made foreign liquor (I.M.F.L.) under bond in a warehouse established with the approval of the Excise Commissioner. This licence was renewed from time to time. It is stated that Johal and Company would import foreign liquor under this bond and was authorised to deposit and keep the same without payment of duty in the warehouse which, as noted above, had to be established with the approval of the Excise Commissioner for storage of such liquor. There are various conditions imposed in Form No. 1A. The liquor obtained by Johal and Company was to be stored in a warehouse in presence of an Excise Officer. Johal and Company was to pay excise duty at the rate imposed by a Government Notification in force at the relevant time upon liquor issued from the warehouse, otherwise than under bond, before issue and also (a) upon wastage over one per cent of it kept in a cask and (b) over 0.5 per cent of it kept in metal drums. Clause 15 of Form No. 1A provides as under:

That the Government of Bihar shall not be responsible for the destruction, loss or damage by fire, theft or any other cause whatsoever to spirit stored in the warehouse. In case of fire or other accident the officer in charge of a warehouse shall immediately attend to open it at any hour of the day or night.

8. By a Notification issued on 23.3.1979, the State Government introduced total prohibition with effect from 1.4.1979. Stock in the warehouse was duly verified as per rules and warehouse was sealed with double lock, key of the one lock

remaining with Johal and Company and other with the Excise Department. The prohibition was lifted as from 1.9.1980. Locks of the warehouse were opened and the stock verified. It is stated that some bottles and cartons were found damaged and the Johal and Company, the licensee was asked to deposit Rs. 38,000/- as damages on that account which amount it paid. The system of the bonded warehouse was abolished with effect from 1.4.1984. Consequently licence in Form No. 1A was not renewed. Stock was again verified, It was a licence in Form No. 1B, which was now introduced for the purpose of disposing of the stock of foreign liquor stored in the warehouse for delivery either to distillery or to wholesalers. Johal and Company was granted licence in Form No. 1B from time to time for the purpose. It is stated that some of the stocks of foreign liquor lying in the warehouse of the petitioners was destroyed sometime in the year 1986-87 as having become unfit for human consumption. This was done without notice to Johal and Company, the licensee. It is stated that Mr. Chakradhari Prasad Singh, who was the officer in charge of the warehouse, had done so and on 21.1.1987 he submitted report of shortage of foreign liquor of the quantity 91,534.294 L.P. liters. The petitioners say that this report was never supplied to them. Basing on this report, the Assistant Commissioner, Excise, on 2.3.1987 issued a show cause notice to Johal and Company to show cause as to why the amount of Rs. 41,19,043.23 be not recovered from it by way of penal duty on account of shortage of foreign liquor found in the warehouse. Answer to the show cause notice was filed by Johal and Company on 22.5.1987 denying and liability for the shortage or payment of any penal duty. The Assistant Commissioner, Excise, by his order dated 19.2.1988, however, fixed liability on the license for payment of Rs. 32,61,722.08. Johal and Company prayed before the Deputy Commissioner, Excise, for verification of stock which was allowed and the A.D.M. (Supply) was ordered to take fresh account of stock. The stock was verified on 15.3.1988. It is stated that the A.D.M, (Supply) gave his report on 9.9.1988 that the question of licensee alone removing the stock did not arise as warehouse was under the custody of the Excise Department as well on account of double lock and, as such, both were responsible and the report of Mr. Chakradhari Prasad Singh was mere a paper work without reference to the actual position. By order dated 12.12.1988 the Deputy Commissioner, Excise, rejected the application of Johal and Company dated 26.7.1988 and held it liable for payment of penal duty. By order dated 9.9.1988, the Commissioner Excise, rejected the appeal filed by Johal and Company. Finally on 5.7.1991 the Board of Revenue dismissed the revision application of the petitioners.

9. It is stated that on 16.11.1993 in pursuance of the demand certain . properties of Johal Tractors were seized. These consisted of goods of Johal " Tractors, car, scooter, etc. Since Johal Tractors was said to be a separate partnership firm, C.W.J.C, No. 3733 of 1993(R) was filed by Johal Tractors facts of which we have mentioned above,

10. During course of hearing, it was also pointed out that against the action of the authorities Johal Tractors, who are based in Dhanbad in the State of Bihar,

went to Calcutta and filed a writ application in the Calcutta High Court. That was, however, dismissed as withdrawn for filing the same in the appropriate forum as Calcutta High Court did not have jurisdiction and that is how the writ application by Johal Tractors came to be filed.

11. Before noting the rival contentions, we may refer to the licence in Form No. 1B which is a licence for disposal of foreign liquor kept under bond in a warehouse established with the approval of the Excise Commissioner (under a licence which was valid up to 31st March, 1984). This Form No. 1B was introduced in the Rules by Notification dated 24.4.1984. In the recital in this form it is mentioned that the Collector has authorised the licensee for disposal of the stock of I.M.F.L. kept in the bonded warehouse under bond from period up to three months from the date of issue of the licence or till the stocks last whichever is earlier. We have noted above the licence in Form No. 1B which was granted to Johal and Company was extended from time to time. Then this Form mentions that since the holders are themselves responsible for their stock, the Government will not incur or inherit any liability for the stock not disposed within the time of the licence. The Form imposes various conditions and condition No. 13. which is relevant for our purpose, is as under:

13. That the Government of Bihar shall not be responsible for the destruction loss or damage by fire, theft or any other cause whatsoever to I.M.F.L. stored in the warehouse. In case of fire or other accident the Officer-in-charge of the warehouse shall immediately attend and open it at any hour of the day or night.

Condition No. 13 is thus peremptory and admits of no excuse if there is loss of I.M.F.L. stored in the warehouse whatever be the cause. It is submitted by the petitioners that they could not be held responsible for the penal duty inasmuch as staff of the Excise Department was also responsible for the loss as per the report of the Additional District Magistrate (Supply) dated September 1, 1988 and also as per the impugned orders. It is, no doubt, true that the staff of the Excise Department have also been lambasted for the shortage found in the warehouse of Johal and Company. They have been equally held guilty along with the licensee as one key of the warehouse was in their custody. The Excise Commissioner in his order dated November 9, 1990 in the appeal filed by Johal and Company against the demand raised by the Deputy Commissioner, Dhanbad, observed that it could not be denied that the local excise staff posted in the warehouse have acted negligently and should be proceeded against departmentally, Even the Board of Revenue in their order dated July 5, 1991 in the revision filed by Johal and Company after noting the arguments of both the parties have referred to Condition No. 13 of Form No. 1B which we have quoted above and then went on to observe as under:

7. It is true that it was not possible for the petitioner to remove the stock from his bonded warehouse without the active connivance of the excise officials posted there but at the same time the excise staff could not have also done so without the active participation of the petitioner. Since no case has been put forward

regarding any theft or tempering into the stock of the bonded warehouse, it is clear that the shortage of stock occurred on account of illicit removal of the stock with the knowledge and consent of the petitioner. The petitioner is clearly liable to pay the amount for the shortage of stock detected in his bonded warehouse.

8. Regarding destruction of stock of foreign liquor for human consumption by the officials of the Excise Department it is clear that such stocks were destroyed in the presence of the representatives of the petitioner. There is, therefore, no ground for the petitioner to say that the stock of foreign liquor was destroyed behind his back and that the quantum of foreign liquor destroyed was much more than what was accounted for by the excise authorities of the district.

The revision was accordingly dismissed.

12. We find no error in the reasonings given by the authorities holding the Johal and Company liable for payment of duty of excise for the shortage found in the warehouse.

13. It was then contended that the Act did not provide for levying of penal duty. We think the word "penal" is misnomer as used in the present proceeding. In support of his submission Mr. Sinha referred to a Bench decision of this Court in Bihar Motor Transport Corporation and Ors. v. The State of Bihar and Ors. 1994 (1) BLJR 343 where the Court observed that penalty was additional tax and it was a tax for the purpose of Article 265 and could not be levied except by the authority of law made either by the legislature or under its authority and no tax could be levied under executive fiat. In that case the validity of the Rule 3B of the Bihar Motor Vehicles Taxation Rules, 1930 was challenged which provided for imposition of penalty to the extent of 50 per cent. of the tax not paid or deposited within the prescribed period due to any reason subject to maximum of Rs. 200/-. We do not find this case to be of any relevance to the present case. Mr. Eqbal learned Counsel for the State stated that the demand is, in fact, duty in terms of the Act and the Rules and on that basis it had been raised. The petitioners were unable to tell us if this description of duty as penal was in fact in any way more than normal duty leviable on I.M.F.L.

14. Lastly it was submitted that the excise duty was not a land revenue and the provisions of the Public Demands Recovery Act could not be resorted to and as such any seizure of the article belonging to Johal and Company or Johal Tractors could not be legal. This argument, to our mind, is devoid of any force in view of a Bench decision of this Court in S. Bhattacharya and Co. and Others Vs. Superintendent of Excise and Others, . In that case a writ application was filed against the action of the S.D.O. for realisation of certain amount of penal duty said to be payable by the petitioner in respect of the mortgage during transit of rectified spirit sent from the distillery in Saran, to the petitioner's factory in Serampore in West Bengal. The factory had applied and obtained permission from the Commissioner of Excise, Bihar and one of the conditions of the bond was that the petitioner undertook to pay the amount of duty payable on the

excisable article as may be prescribed for the same u/s 27 of the Bihar and Orissa Excise Act and any other law for the time being in force. It was found by the Excise authorities that during the transit there was shortage, far in excess of the permissible limit allowed by Rule 33 of the Rules made by the Board of Revenue under the provisions of Section 90 of the Act. Sub-rule (2) of Rule 33 empowers the appropriate authority to charge duty at the highest rate for the time being in force on so much of the deficiency as was in excess of the permissible allowance. The petitioner was, therefore, called upon to pay the penal duty and since it defaulted certificate was issued against the petitioner by the Certificate Officer. Saran for realization of penal duty. The Court noted the provision of Item No. 3 of Schedule I in the Public Demands Recovery Act which said that any money which was declared by any law for the time being in force to be recoverable or realisable as an arrear of land revenue was a public demand. The Act is undoubtedly a law for the time being in force and Section 93 of the Act in Clause (c) of Sub-section (1) it is clearly stated that all amount due to the State by any person on account of any contract relating to the excise revenue shall be recoverable as if it was an arrear of revenue, that is, as a public demand. The Court, therefore, held that on the admitted fact that the penal duty levied on the petitioner was recoverable as an arrear of revenue and was, therefore, a public demand recoverable under the provision of the Public Demands Recovery Act.

15. Mr. Eqbal also referred to another Bench decision of this Court in *Shakti Distributors and Others Vs. State of Bihar and Others*, . In this case also the Court held with reference to the execution of bond in Form No. 158 under the Rules that by executing the bond an unconditional and unequivocal undertaking is given to pay the duty over spirit which is not delivered at the warehouse and the circumstances in which the shortage took place was irrelevant with the only exception that it was an Act of God. In that case duty of excise was demanded on foreign liquor lost in transit due to breakage of glass bottles. In absence of any exemption granted to the petitioners, they were not absolved from the payment of duty.

16. Mr. Sinha in support of his yet another contention submitted that there was no evidence that the liquor had been transported from the warehouses and, therefore, the respondents had no power to impose duty on the liquor found short in the warehouse. In this connection he referred to Section 27 of the Act which empowers the State to impose excise duty on import, export, transport and manufacture of liquor. In this Section the excise duty may be imposed either generally or for any specified local area on:

- (a) any excisable article imported, or
- (b) any excisable article exported, or
- (c) any excisable article transported, or
- (d)...etc.

Then the State Government subject to any rule made u/s 90, Clause (12) of the Act can direct that the duty may be levied as provided in Section 28 of the Act. As regards importation, exportation and transportation of excisable articles liable to imposition of excise duty u/s 27 of the Act, the duty could be levied in any of the following ways as per Section 28:

(a) on an excisable article imported-

(i) by payment (upon or before importation) in the State or in the State or territory from which the article is brought, or

(ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act,

(b) on an excisable article exported -

by payment in the State or in the State or territory to which the article is sent;

(c) on an excisable article transported-

(i) by payment in the district from which the article is sent, or

(ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act.

(ii)...etc.

17. Mr.Sinha said that since there is no evidence that the liquor had been transported from the warehouse, the authorities were wrong in imposing duty on the liquor found short in the warehouse. In support of his submission, he referred to the decision of the Supreme Court in Mohan Meakin Breweries Ltd. Vs. The Commissioner of Excise, Bihar and Others, . In that case, the petitioner had imported Indian made foreign liquor from its distilleries outside the State of Bihar for sale at its depots at Patna and Ranchi. The importation was done before October 13, 1967 on payment of duty at the then current rate of Rs. 14.40 L.P. liters. By Notification dated October 13, 1967, the duty was enhanced from Rs. 14.40 to Rs. 26.20 per L.P. litre with effect from November 1, 1967. The Superintendent of Excise, Patna by his order dated January 3, 1968 directed the petitioner to pay the difference in duty on the opening balance of the liquor in its stock on November 1, 1967. This order was challenged. The Supreme Court quashed the order dated January 3, 1968 after considering the provisions of Section 27 and Section 28 of the Act and Rule 147 of the Rules framed by the Board of Revenue under Clause (12) of Section 90 of the Act. We fail to see how the decision of the Supreme Court is applicable in the present case. When the liquor is found short in the warehouse, it has to be presumed that it has been transported and consequences for payment of duty will follow we reject the contention of the petitioners that the excise duty could not have been imposed in the circumstances of the case.

18. We do not find any merit in the writ applications. The petitioners are liable

for payment of excise duty even under the bond in Form No. 1B relevant clause of which we have already reproduced above. The petitioners cannot go back from the undertaking given in terms of bond in the Form No. 1B.

19. These two writ applications C.W.J.C. No. 3951 of 1993(R) and CW.J.C. No. 3733 of 1993(R), therefore, fail and are dismissed with costs. Counsel fee Rs. 2000/- one set. Rule is discharged.

S.K. Chattopadhyaya, J.

20. I agree.