

(2007) 01 KAR CK 0041
In the Karnataka High Court
Case No : Writ Petition No. 24918 of 2001

Khoday India Limited

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision : 29-01-2007

Acts Referred:

Karnataka Excise (Distillery and Warehouse) Rules, 1967 — Rule 3, 4, 7, 8

Citation : (2007) 3 KarLJ 162 : (2007) 4 KCCR 2215

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : R. Nagendra Naidu and N.N. Raj Urs, for the Appellant; N. Keshava Reddy, AGA, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—Writ petitioner, a limited company, is a holder of licence to run, establish and function a distillery in terms of the Rule 3 of the Karnataka Excise (Distillery and Warehouse) Rules, 1967. Under the licence, the petitioner is permitted to manufacture potable alcohol using rectified spirit or alcohol. Petitioner pays duty on the alcohol beverages that the petitioner manufactures from out of the rectified spirit that is used for such purpose. The duty is levied and paid in terms of the provisions of the Karnataka Excise Act, 1965 [for short, the Act] read with the Karnataka Excise (Excise Duties and Fees) Rules, 1968.

2. For the purpose of producing the potable liquor which the petitioner manufactures under different brand names and which is produced directly from the rectified spirit by such spirit is fed into wooden casks for maturation, thereafter by giving such treatment as individual manufacturers have developed and depending upon the nature of such treatment, liquor is assigned different names like whisky, brandy, gin etc. The process of maturing in the wooden cask is over a period of time and as it is normally the claim of such manufacturers that some part of the rectified spirit that is filled into the wooden casks is

wasted, in the sense it may evaporate during the period of storage and the entire quantity of rectified spirit fed into such wooden casks may not be available for producing the end product, it is accepted as normal process of maturing.

3. This phenomena of wastage of some rectified sprite in the process of storing it for maturity, is regulated by another rule known as the Karnataka Excise (Regulation of Yield, Production and Wastage of Spirit, Beer, Wine or Liquor) Rules, 1998 [for short, the Wastage Rules]. Rules 4 and 6 provide for the percentage of wastage that is allowed in respect of different processes of loss attributable during the maturation, which is provided for in table-3 of Schedule-B to these Rules in terms of Rule 4 of the Rules. The percentage of loss of wastage increases with the duration, starting with 3% loss allowed for six months, 6% for 12 months, 12% for 18 months, 15% for 24 months and a maximum of 22% for 36 months and above in respect of the spirit used for manufacture of Indian made liquor.

4. Rule 8 of the Wastage Rules provides for levy of penalty in respect of excess wastage which the manufacturers claim to have incurred over and above the percentage of wastage permitted in terms of the schedule.

5. Likewise, there is penalty levied under Rule 7 for failure to produce the minimum quantity of the end product, which in turn is linked to Rule 3, prescribing the minimum production of spirit, beer or wine or liquor, as indicated in the schedule-A to the Wastage Rules.

6. In respect of persons i.e. a licensee who either fails to maintain the minimum quantity of yield or production of spirit, beer, wine or liquor, as specified in Schedule-A or who exceeds the maximum quantity of wastage during the production or process of spirit, beer, wine or liquor, as specified in Schedule-B, the licencing authority, with the prior approval of the government, can suspend or cancel the licence given to the distillery and may also forfeit the security deposit if any. Provisions of Rules 3, 4, 5, 6, 7 and 8 read as under:

3. Minimum Production of Spirit, Beer, Wine or liquor: The production or yield of spirit, beer, wine or liquor as the case may be, from the raw-material used in a distillery/winery or manufactory licenced under the Act or the Rules made thereunder, shall be less than the quantity specified in Schedule-A.

4 Minimum Wastage of Spirit, Beer. Wine or liquor: The maximum wastage during the production or processing of spirit, beer, wine or liquor as the case may be, from the raw material used in an distillery/brewery/ winery or manufactory licenced under the Act, the Rules framed thereunder, shall not exceed the quantity specified in Schedule-B.

5. Drawal of Molasses samples:- (1) The distillery officer shall draw three samples of molasses at the time of preparation of wash from molasses and all such samples shall be sealed by him one sample shall be sent to the government chemical laboratory, the second one shall be handed over to the distillery for

analysis in the laboratory of the distillery and the third one shall be kept with the Distillery Officer.

(2) On receipt of report from the government chemical laboratory, distillery officer shall calculate the minimum quantity of rectified spirit that could be produced by the distillery on the basis of the minimum quantity specified in Schedule-A. If the yield or production of such rectified spirit is below the minimum specified in Schedule-A, the distillery officer shall, after obtaining the explanation of the distillery, if any, send a report to the Excise Commissioner along with his comments on the explanation offered by the distiller.

6. Suspension or cancellation of licences: Where a licensee falls to maintain the minimum quantity of yield or production of spirit, beer, wine or liquor specified in schedule-A or the maximum quantity of wastage during the production or processing of spirit, beer, wine or liquor as specified in schedule-B, the licencing authority may, with prior approval of the government, suspend or cancel the licence given to the distillery, brewery, winery or the manufactory and may also forfeit the security deposit, if any.

7. Penalty for failure to produce the minimum quantity: Where the Excise Commissioner, on examination of the report of the Distillery Officer, if any and after holding such an enquiry as he deems fit, is of the opinion that there is no justifiable reason for the licensee to show such short production, notwithstanding anything contrary contained in any other rules, he may in lieu of, cancellation or suspension of licence or forfeiture of security deposit, -

(i) in the case of spirit produced out of molasses, impose a fine equivalent to the rate of excise duty levied on brandy or whiskey under the Karnataka Excise (Excise Duties and Fees) Rules, 1968 on such quantity of short production of spirit.

(ii) In the case of beer, wine or other liquor, impose a fine equivalent to the fee or excise duty leviable under the Karnataka Excise (Excise Duties and Fees) Rules, 1968 on such quantity of short production of beer, wine or other liquors.

Provided that no such fine shall be imposed unless an opportunity of being heard is given to the aggrieved licensee.

Provided further that no such fine shall be imposed if a licensee proves to the satisfaction of the Excise Commissioner that such short production is for reasons beyond the control of the licensee.

8. Penalty for excess wastage or loss: Where the Excise Commissioner, on examination of the report of the distillery officer and after holding such an enquiry, he deems fit is of the opinion that there is no justified reason for the licensee to exceed the maximum limit of wastage in the process or production of spirit as specified in Schedule-A, notwithstanding anything contrary contained in any other rules, may in lieu of cancellation or suspension of licence or forfeiture of security deposit, if any, impose the penalty at the rate of equivalent to the rate

of excise duty leviable on beer, wine or other liquors under the Karnataka Excise (Excise Duties and Fees) Rules, 1968 on such reported excess wastages:

Provided that no such fine shall be imposed unless an opportunity of being heard is given to the aggrieved licensee.

Provided further that no such fine shall be imposed if it is proved to the satisfaction of the Excise Commissioner that such excess wastage are for reasons beyond the control of the licensee.

7. The present writ petition is in the context of levy of one such penalty under Rule 8 on the premise that the petitioner had exceeded the claim for wastage beyond the permitted limit as stipulated in table 3 of Schedule-B to the Wastage Rules. The amount of penalty levied in terms of the order purporting to be passed under Rule 8 dated 11-4-2001 [Annexure-B] is at a sum of Rs 24,50,428/- for the years 1998-99 and 1999-2000 i.e. upto 30-6-2000. The year-wise split up of penalty levied and the actual duty paid is as under:

Year

Total wastage in excess of limits

Expected qty of IML on excess wastage

Loss of excise duty

1998-99

21,282 12,646

26,956 16017-33

16,17,360 7,20,780

1999-2000 (upto 30-6-00)

770 1,868

975 2365-33

5,845 1,06,440

Total

24,50,428

8. The penalty obviously is levied for the reason that the losses claimed by the petitioner for the two years in question exceeded the maximum permitted loss of 22% and as and when such losses which had been claimed over and above 22% was noticed, the penalty for such excess wastage is levied.

9. It is questioning the validity of this order and the validity of the levy and for the same purpose, the very validity of the Rule 8 of the Wastage Rules, which is questioned in this writ petition by the petitioner.

10. For the purpose of the order at Annexure-B, in the name of the Commissioner, it appears, a show cause notice had been issued earlier on 3-8-2000 [Annexure-C] by the Superintendent of Excise and in terms of a show cause notice, the petitioner had been called upon to show cause within fifteen days. The petitioner in fact had responded and had contended that the levy is not one that is permitted to the State as it amounts to a levy of duty on rectified spirit and this is beyond the legislative competence of the State; that the Rule in fact is either ultra vires the Act or if held to be within the premises of the charging Section, it is unconstitutional. In the alternative, it was contended before the Commissioner that there was no justification for the levy of penalty as wastage that is spent was one which had already occurred and one which is beyond the control of the petitioner and attributable to a natural process and the petitioner should not have been mulcted with any penalty.

11. In terms of the order at Annexure-B, the Commissioner rejected both the contentions and has confirmed the proposition notice issued by the Superintendent of Excise in terms of Annexure-C. It is in such circumstance the present writ petition, questioning the order and the validity of the Wastage Rules.

12. It is urged in support of the writ petition that the levy of penalty virtually amounts to levy of duty on rectified spirit which is on weighty authorities beyond the legislative competence of the State legislature; that the Rule like the Wastage Rules, particularly Rule 8, levying penalty is therefore unconstitutional and liable to be struck down, being in the teeth of several judgments of the Supreme Court rendered while considering the validity of similar Rules framed by other States. It is also urged that there is no justification for levying penalty on wastage which had occurred and was beyond the control of the petitioner and this aspect of the matter has not been taken into consideration and therefore the order dated 24-6-2002 is not sustainable.

13. Writ petition was admitted and the respondents were put on notice and have entered appearance through learned Government Advocate and also filed statement of objections.

14. The order and the Rules enabling passing of such order are both sought to be defended. It is urged that the provisions of Rule 8 is in the nature of a regulatory provision and for the purpose of ensuring the avoidance of loss of revenue i.e. to prevent evasion of payment of excise duty by the manufacturers of potable liquor and therefore is not only well within the competence of the state legislature, but is also justified as the penalty is a reasonable penalty, levied under the circumstances and in situations where the manufacturers like the petitioner are unable to explain satisfactorily the wastage beyond the permitted limits. It is also urged that if the wastage is due to improper or inefficient handling by the petitioner, the mere fact that there is a distillery officer appointed at the manufacturing place of the petitioner, is no excuse, as it is not the function the distillery officer to supervise the manner in which the petitioner carries on its business; that inefficient handling of the rectified spirit capable of producing

potable liquor having resulted in loss of revenue to the State, the petitioner is running the risk of losing the licence by cancellation of the same, and the levy of penalty being in this context of such a power of cancellation and as an alternative, is a valid penalty and is therefore justified in such circumstances. It is urged that the levy of penalty is also justified on the ground that unless there is a deterrent provision on a manufacturer no one will take care to reduce the loss of wastage, in which event the loss of revenue from levy of excise duty cannot be checked. On such premise, the writ petition is sought to be dismissed.

15. I have heard Sri R. Nagendra Naidu, learned Counsel for the petitioner and Sri N. Keshava Reddy, learned Additional Government Advocate, appearing for the respondent

16. Submission of the learned Counsel for the petitioner is that the levy of penalty under Rule 8 of the Rules is virtually a levy of duty on rectified spirit fed into wooden casks for the purpose of maturation of the spirit; that though it is termed as a penalty in terms of the language of Rule 8, it is virtually in the nature of a duty, as the penalty is quantified in terms of the quantify of rectified spirit that is disallowed as wastage in the process of maturation; that the State Legislature has no competence to levy duty on rectified spirit and therefore the impugned demand in terms of the order at Annexure-"B" is invalid and that the very Rule 8 which provides for levy of such duty in the guise of penalty is illegal, unconstitutional and cannot be enforced and as the demand is sought to be justified under Rule 8, Rule 8 has to be declared as void, illegal and unconstitutional and has to be quashed for want of legislative competence and the writ petition allowed. It is also submitted that the quantification of penalty being linked to the leviable on potable alcohol capable of production from out of the rectified spirit determined as excess wastage allowed as wastage over and above the statutory provision, the levy being directly on rectified spirit is bad, whether it is termed as penalty or duty as it is one which has given effect to levy of duty on rectified spirit. In this regard, the learned Counsel would submit, though the levy of penalty is sought to be justified as one equivalent to duty that would have been realized by the State on the commensurate quantity of potable liquor which could have been reduced if the excess wastage had not been allowed, is again being in the nature of duty on potable liquor not produced or not brought into existence, the very levy of penalty is also bad in law.

17. The learned Counsel would in this regard places reliance on the decisions of the Supreme Court in the case of (1) State of U.P. and Ors. v. Mode Distillery and Ors. (1995) 5 SCC 783, (2) Decca Sugars & Abkari Co., Ltd. (2004) 1 SCC 243, (3) State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others, and (4) State of Bihar v. New Eastern Agency (2003) 11 SCC 478. Placing reliance on the decision of the Supreme Court, it is also submitted by Mr. Naidu that the State Government has no legislative competence to levy any duty on rectified spirit at what ever stage and whatever may be its ultimate use. Submission is that even though rectified spirit is one that could be ultimately used for producing potable

liquor and nothing else, then also it is not open to the State to levy any duty and such rectified spirit/industrial alcohol on the premise that it could be used to produce potable liquor which has been wasted or spoiled, on the premise that the claim towards wastage is unreasonably high etc. What is emphatically urged is that there cannot be any levy with reference to any quantity of rectified spirit under any legislation made by the State Legislature.

18. To point out the fallacy and indefensible nature of the counter filed on behalf of the State Government, learned Counsel for the petitioner would draw attention to the decision of the Supreme Court in the case of Bihar Distillery and Another Vs. Union of India (UOI) and Others, wherein the Bench comprising of two learned judges of the Supreme Court had opined that it is open to the State Legislature to regulate the industry engaged in the manufacture of potable liquor being the exclusive province of the State Legislature which also include the power to prohibit/manufacture of potable liquors including India Made Foreign Liquor, Beer, Country Liquor and other intoxicating liquor, also within the competence of the State Legislature and it was also observed the line of demarcation was removal/clearance is for industrial purpose other than industries engaged in obtaining or manufacturing potable liquors and such power shall be exercised by the Union; but where removal/clearance for the purpose of obtaining or manufacturing potable liquors the exercise of the power shall be that of the State etc., and this observation which had been relied strongly in the counter is one which is no more good law in the light of the decision rendered by the Supreme Court in Deccan Sugars v. Commissioner of Excise; that it has been very emphatically laid down in Deccan Sugar's case that the law laid down in Modi Distillery's case by the Supreme Court, being one by the Bench comprising of 3 learned judges and they in turn having followed the earlier decision of the Constitutional Bench in the case of Synthetics and Chemicals v. State of U.P., it cannot be doubted any more. It is submitted that the State Government cannot even regulate any industry involved in the production of industrial alcohol and rectified spirit even though some part of such rectified spirit is earmarked for production of potable liquor etc. In this regard, learned Counsel for the petitioner would draw further support from the decision of the Supreme Court in State of U.P v. Vam Organic Chemicals Ltd. particularly the observation contained in paragraphs 23, 24, 25 and 26 which read as under:

23. The Principle was succinctly reiterated in State of U.P. v. Modi Distillery where it was said that the State's power to levy excise duty was limited to alcoholic liquor for human consumption and

that the framers of the Constitution, when they used the expression "alcohol liquors for human consumption", meant, and the expression still means, that liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as a beverage or drink.... Dictionaries and technical books showed that rectified spirit (95 per cent) was an industrial alcohol and not potable as such.... Therefore even if ethyl alcohol (95 per cent) could be used as

a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor etc. nevertheless, it was not "intoxicating liquor" which expression meant only that liquor which was consumable by human being as it was.

(emphasis supplied)

Thus the State cannot legislate on industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor.

24. A somewhat contrary view was taken by a Bench of two Judges of this Court in Bihar Distillery v. Union of India. It was held that the decision in synthetics did not deal with rectified spirit which could be converted into potable alcohol and was merely concerned with industrial alcohol which could not be so converted i.e., denatured rectified spirit. A distinction was drawn between industries engaged in manufacturing rectified spirit meant exclusively for supply to industries (industries other than those engaged in obtaining or manufacturing of potable liquor), whether after denaturing it or without denaturing it and industries engaged in manufacturing rectified spirit exclusively for the purpose of obtaining or manufacturing potable liquor. In the first case, the industry was to be under the total and exclusive control of the Union and be governed by the IDR Act and the rules and regulations made thereunder" (SCC p. 743, paragraph 23). As far as the second case is concerned "they shall be under the total and exclusive control of the States in all respects and at all stages including the establishment of the distillery" (SCC p. 744. paragraph 23).

25. The decision in Bihar Distillery was doubted in Deccan Sugur and Abkari Co., Ltd. v. Commissioner of Excise, A.P. It was said that the decision in Bihar Distillery ran counter to the scheme of legislative competence as examined by the Constitution Bench of this Court as well as in the three Judge Bench decision of this Court in Modi Distillery. The appeals were accordingly referred to a larger Bench for reconsideration of the judgment in Bihar Distillery Case.

26. The larger Bench followed Synthetics and Modi Distillery without expressly overruling the decision in Bihar Distillery. We, therefore, proceed on the basis that the decision in Synthetics continues to exclude the State from levying tax on industrial alcohol whether or not it has the potential to be used as alcoholic liquor.

It is, therefore, submitted that reliance placed on the decision of the Supreme Court in the case of Bihar Distillery and Synthetics & Chemicals Ltd. is misplaced and the validity of Rule 8 cannot be defended in view of the observation made by the Supreme Court in Bihar Distillery's case. It is, therefore, urged that Rule 8 of the Rules should be declared as unconstitutional and consequently the demand also quashed.

19. Countering such submission Sri. Keshava Reddy, learned Government Advocate appearing for respondent would urge that Rule 8 is a provision which levies a penalty in the context of a dereliction or neglect on the part of the

person like the petitioner who is issued with a license to process spirit, that it is the duty of a licensee in whose favour the license is issued to take necessary precaution. It is submitted that when the State parts with its privilege to deal with alcoholic drinks in favour of a licensee, it is open to the state to impose conditions on a licensee for the optimum of spirit and ensure avoidance of unnecessary wastage of spirit which otherwise could have gone into production of potable liquor capable of yielding commensurate revenue to the State, such excess wastage results in is a direct loss attributable to such conduct of the licensee and therefore, if a recalcitrant licensee is sought to be mulcted with penalty under Rule 8 to ensure that he does not indulge in activities which could virtually amount to misuse and abuse for which purpose the license could have been cancelled and in lieu a penalty as per Rule 8 is levied. It is submitted that it is not duty on any rectified spirit but is only as an alternative provided for under the Rule for cancellation of the license which is a privilege parted in favour of the petitioner. The learned Government Advocate would also submit that the decisions relied upon by the learned Counsel for the petitioner were of cases where a duty is sought to be levied directly on rectified spirit, whereas in the present case under Rule 8 no duty is levied on rectified spirit but a penalty in place of cancellation of the license and for the purposes of quantification of the penalty and the duty leviable on the quantity of potable liquor that could have been produced by using the excess wastage of spirit is taken as the measure for the levy of penalty and if so it can never be characterised as a levy of duty on rectified spirit and the decision relied upon cannot further the case of the petitioner in the present situation.

20. Learned Government advocate would also point out that even in terms of the decision of the Supreme Court in the case of Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, , it has been emphatically ruled that the State Legislature has legislative power to legislate in respect of alcohol to the extent it is in the nature of regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol and the provisions of Rule 8 read with Rule 4 of the Rules is being regulatory in nature to ensure that there is no misuse of rectified spirit used as base for production of potable alcohol, the provision is well within the legislative competence being in the nature of a regulatory measure to ensure that the rectified spirit is not otherwise diverted for production of potable alcohol accounted for by the petitioner nor a licensee on the pretext of excess wastage causes loss to the state exchequer. The learned Government Advocate would in this regard draw my attention to the provisions of Rule 3 prescribing the minimum production of spirit/wine or liquor on the raw material used in the distillery in terms of the quantity specified in Schedule "A" and the penalty for not achieving this minimum production as provided under Rule 7 of the Rules. Learned Government Advocate would also submit that the license which is in the nature of privilege of the State parted in favour of a person like the petitioner can be suspended or cancelled in a situation where the licensee fails to maintain minimum production or indulges or allows

wastage above the maximum quantity permissible for levy of penalty in terms of Rule 6 of the Rules. Learned Government Advocate would submit levy of penalty under Rule 7 or Rule 8 is in lieu of such cancellation of license and is therefore only linked to the parting of the privilege of the State to deal with potable liquor and a penalty for violation of the license condition. It is, therefore, urged that the penalty can never be characterised as levy of duty on rectified spirit though for the purposes of quantification of the penalty in the case of excess wastage, the measure may be with reference to the quantity of rectified spirit fed into wooden casks and what remains after the process of maturation.

21. While for the proposition that the State Government has no legislative competence to levy any duty on alcohol which is not potable, a reference to Entry 5(a) in list II of schedule VII to the Constitution of India and the levy of duties of alcoholic liquor for human consumption having been excluded from the purview of the Parliament in terms of Entry 84(a) in List I of Schedule VII in itself is sufficient and no other authority may be necessary, nevertheless interpreting the scope of such Entry the Supreme Court having rendered a series of decisions, it is on such decisions, the learned Counsel for the petitioner in terms of the judgments rendered in *Modi Distillery, Deccan Sugar and Abkari Co., Ltd.* and *Vam Organic and Chemicals Ltd.* places reliance to contend that the State Government does not have any legislative competence to levy duty on non-potable alcohol. But, levy of under Rule 8 of the Rules is not such a thing. The authorities relied on by the learned Counsel for the petitioner would undoubtedly apply if in reality what is done or achieved under Rule 8 is a levy of duty on rectified spirit or levy of duty on rectified spirit or industrial alcohol and therefore the answer to the question depends on whether the levy of penalty is in the nature of levy of duty on industrial alcohol. A perusal of the provisions of the Karnataka Excise (Regulation of Yield, Production and Wastage of Spirit, Beer, Wine or Liquor) Rules, 1998, would indicate that the Rules are in the context of regulating the production of potable liquor by a licensee. A perusal of the definition of Rules 3, 4, 5, 6, 7 and 8 would indicate that there are certain obligations imposed on the licensee in the matter of production of potable alcohol although the raw material used may be rectified spirit as in the case of the petitioner. While Rule 3 obliges, the licensee to maintain the minimum production of potable liquor based on the quantity of the raw material used in distillery, Rule 4 like wise permits wastage of the raw-material within the stipulated limit The contravention or violation of Rule 3 or Rule 4 could result mainly in cancellation of the license under Rule 6 which may be a consequence common either violation in terms of Rule 3 or Rule 4. While cancellation of licence is provided in Rule 6, Rule 7 provides for penalty linked to the violation of Rule-3. Rule 8 links in terms of Rule 4 of the Rules. It is significant to notice that the penalty while in lieu of the cancellation of the license which would compel the licensee to close down his industry itself on the other hand would enable the licensee to carry on his activity by paying the penalty, is again a levy which is not automatic or levied like a duty on potable liquor. In the case of levy of duty, the duty is levied under

the statutory provision and not under the discretion of the authorities under the provision in the case of penalty, penalty is levied for specific violation of a particular condition and on being satisfied, that there is such violation. If one looks at the provisions of Rule 7 and 8, the levy of penalty is only after providing an opportunity to the person on whom the penalty is levied and the penalty shall not be levied if the person is able to prove to the satisfaction of the Excise Commissioner that either short production or excess wastage, were for reasons beyond the control of the licensee. This means that the levy of penalty is not automatic and in a given situation the licensee to whom the opportunity is given is able to satisfy the Commissioner that the under production or excess wastage was one which was beyond his control, then the Commissioner shall not levy any penalty in terms of the Rule. A situation like this cannot be compared with a situation where a duty is levied commensurate to the quantity of any commodity. It may be true that for the measure of penalty it is linked to the quantity of rectified spirit claimed as wastage over and above the permitted limit in terms of Rule 8 read with Rule 4. It does not necessarily mean because of this linkage, it partakes the character of levy of duty on rectified spirit. If such is the nature of levy of penalty, it is not possible to accept the contention of the learned Counsel for the petitioner that levy of penalty in terms of Rule 8 is in the nature of levy of duty on rectified spirit in fact. I am of the view that the yield Rules, particularly Rule 8 validity of which Rule is questioned in this writ petition, is one which comes well within the scope of the power of the State Legislature in terms of the judgment of the Supreme Court in Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, particularly as it contained in paragraph 85(b) which reads as under:

85. The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

- a) ...
- b) it may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol
- c)...
- d)...

22. It may be of significance to notice here while the judgment of the Supreme Court in Synthetics and Chemicals Ltd. v. State of U.P., is one rendered by a Bench comprising of 7 learned Judges of the Supreme Court and is followed in all the subsequent cases including the case of State of U.P v. Vam Organic Chemicals Ltd. it is the ruling in Sythetics and Chemicals Ltd. v. State of U.P. as indicated in paragraph 86, which is specifically referred to in paragraph 27 in the case of State of U.P. v. Vam Organic Chemicals Ltd. on which reliance is placed by the Government Advocate and attention of the Court is drawn to this

observation.

23. I am of the view that on the basis of the law declared by the Supreme Court in the case referred to above while it is very clear that the regulatory provision by the State Government if it is per se one in respect of potable alcohol and for achieving this object the provision like the Yield Rules are made, it is well within the competence of the State Legislature and therefore cannot be struck down for want of legislative competence. The provision of Rule 8 is a provision which levies penalty only in the context of a regulatory provision, particularly for regulating the conduct of a licensee in whose favour the State has parted its exclusive privilege of dealing with alcoholic drinks and by imposing on a licensee several conditions as found in Rule 3 and Rule 4. If the penalty is attributable to the violation of such license condition and in lieu of the cancellation of the license, the penalty is levied as per Rule 7 or 8, it is for regulating excess quantity of wastage in terms of Rule 4 and therefore it cannot be accepted that it partakes the character of a levy of duty on rectified spirit for the purpose of holding that levy of duty is beyond the legislative competence of the State. It is for this reason, I reject the submission made on behalf of the petitioner.

24. It still leaves me with the question of validity of the order passed by the Commissioner in terms of the order at Annexure-"B". A perusal of the scheme of the Rules indicates that while penalty is levied for violation, the penalty can be levied only after giving an opportunity which in fact is provided in Rule 8 and after a positive recording of the infraction by the authorities justifying the levy of penalty. The order of levy of penalty is to be made by the authority who has been conferred with the power and has to be by the very authority.

25. It is noticed that in the present case while the show-cause notice is issued by the Superintendent of Excise proposing levy of penalty and the petitioner had been called upon to offer his explanation and no doubt the Excise Commissioner has heard the representative of the petitioner and has passed the order at Annexure-"B", unfortunately, the order recites that the notice issued by the Superintendent of Excise is in order and therefore the Commissioner does not find any reason to interfere with the order of the Superintendent of Excise as though the order is passed by the Superintendent of Excise himself.

26. Though Sri Keshava Reddy, the learned Government Advocate submits that there are enabling provisions under the Act for delegating the power of the Commissioner in terms of Section 7, in favour of other Officers, while no such order delegating the power placed before Court, even otherwise, I am of the view that the very nature of Rule-8 which is in the nature of a quasi-judicial adjudication should be exercised by the very authority itself and not to be delegated on any other authority. Conferment of such power on a high functionary is for the reason that the consequences are grave in nature on the violator and therefore merits consideration at a higher level. In matters of such nature where the levy of penalty is huge and it is the penalty and not a levy of duty, and the legislature advisedly conferred the power on the higher authority in

the concerned department namely, the Excise Commissioner, it is the duty of this authority to pass an order and not to delegate it to any other authority. As the very language of the order at Annexure-"B" indicates that it is one not interfering with the order of the Superintendent of Excise, the order is clearly not sustainable, as the commissioner has failed to pass an order under Rule 8 in terms of this very Rule.

27. This apart what is of a greater lacunae in the order is that the Commissioner proceeds on the premise that he has no choice but to proceed to affirm penalty. The Rule does not so provide for in the sense that it is not open to the Commissioner to vary the penalty under Rule 8 of Schedule -"B" to the Rules.

28. This is clearly a misreading and misunderstanding on the part of the Commissioner as Rule 8 expressly provides that in a situation where the licensee is able to satisfy the Commissioner that the wastage was beyond his control and in spite of his efforts, then no penalty shall be levied. If so, it was for the Commissioner to have considered whether wastage was one beyond the control of the licensee and only on recording a finding on this aspect of the matter, the levy of penalty or otherwise can be determined. In the absence of a finding on this aspect of the matter, particularly in the light of the claim of the petitioner that the excess wastage was one in the normal and natural course and not attributable to the petitioner for want of commensurate effort on the part of the petitioner, it was incumbent on the Commissioner to record a finding and proceed to pass order for levy of penalty or otherwise depending on the finding to be recorded on such a claim. As the order is hopelessly lacking in all these aspects the order is not sustainable in law. Though validity of Rule-8 is upheld, the order is not sustainable and it is accordingly quashed by issue of a writ of certiorari.

29. However, it is open to the Commissioner to pass orders afresh after considering the representation if any providing an opportunity of hearing and thereafter pass orders in accordance with the statutory provisions. The penalty if any paid already shall be subject to the order to be passed by the Commissioner and such order shall be passed by the Commissioner within a period of three months from today. The petitioner or his representative shall appear before the Commissioner on 12-2-2007 and take further instructions from the Commissioner. Petition allowed. In the circumstances, no order as to costs. Rule made absolute.