(1998) 02 AHC CK 0077

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 43744 of 1997, alongwith C.M.W.P. No. 1989 of 1998

Kurali Khandsari Udyog,Kurali Dist.Meerut APPELLANT

Vs

Excise Commissioner and Controller of Molasses,State of U.P.,Allahabad and Others RESPONDENT

Date of Decision : 18-02-1998

Acts Referred:
Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 — Section 2(d)

Citation : (1998) 02 AHC CK 0077

Hon'ble Judges : Palok Basu, J and D.K.Seth, J

Judgement

1. The order dated 11121997 (Annexure1) passed by the Excise Commissioner and Controller of Molasses, is under challenge in the present writ petition. The said order was also under challenge in Writ Petition No. 1989 (24) of 1998, Sushant Elhence v. The State of U.P. and others, a more comprehensive writ petition involving the same subject. This writ petition is decided alongwith the said Writ Petition No. 1989 (24) of 1998, the decision whereof shall govern this writ petition. In the light of the decision in Writ Petition No. 1989 (24) of 1998, this writ petition stands dismissed.

O.K. Seth, J.

The order dated 10121997 (Annexure1 to the Supplementary affidavit), order dated 11121997 (Annexure5) and the order dated 19121997 (Annexure8) issued by the State Government and the Excise Commissioner and Controller of Molasses, as the case may be, have been impugned in the present writ petition. The said orders have been challenged on the ground that the same imposes unreasonable restriction on the petitioner''s right to carry on trade guaranteed under Article 19(l)(g) of the Constitution, prohibiting transport of Khandsari Molasses outside the State of Uttar Pradesh without permission of the Controller.

2. By the aforesaid order it has been provided that in case Khandsari Molasses is sought to the transported outside the State of Uttar Pradesh, permission of the

Controller would be necessary. This has been challenged by Sri VB. Upadhyaya, learned Senior Counsel appearing on behalf of the petitioner, on various grounds, which will be referring to at appropriate stages. He was opposed by Sri Yatindra: Singh, learned Additional Advocate General, UP., Sri S.C. Budhwar, learned Senior Counsel, assisted by Sri Arun Tandon, learned Counsel appearing on behalf of added parties, representing the Distilleries and Sri Bharatji Agarwal, learned Senior Counsel, appearing for the added respondents (representing Chemical Industries) supporting the said clause. We shall refer to the respective contention as are necessary at appropriate stages.

3. We have heard learned Counsels for the parties at length. The arguments advanced are nonetheless erudite. The more erudite is the argument of the Counsel, the more is the confusion. Therefore, we propose to attend only to those points which are necessary for deciding the present case.

4. In the present case, two questions emerge for our consideration. First whether Khandsari molasses can be included within the definition of molasses given in Section 2(d) of U.P. Sheera Niyanatran Adhiniyam, 1964 (hereinafter referred to as the Act), with reference to Rule 24 of the U.P. Sheera Niyantran Niyamavali, 1974 (hereinafter referred to as the Rules). The second is whether the restriction imposed in the impugned order affects the rights of the petitioner to carry on trade or business in molasses as guaranteed in Article 19(l)(g). In order to decide the second question it is to be examined as to whether the restriction imposed is prohibitory or regulatory or in other words whether the restriction is reasonable so as not to offend Article 19(l)(g). If it is found that it is regulatory and restriction is reasonable then it cannot be said that it offends fundamental rights guaranteed under Article 19(l)(g). The second question will arise only if it is found that Khandsari molasses could also be brought within the purview of imposition of restriction by the Controller who is empowered under the Act and the Rules to deal with the molasses defined in Section 2(d) of the Act.

5. The first question combines several other points, which includes the question as to whether it is competent for the executive to legislate which has been sought to be legislated through the impugned clauses 7,8 and (6) of the respective orders in aid of Article 162 of the Constitution. This point we shall examine after examining the contention as to whether Khandsari molasses can be brought within the definition of molasses as defined in Section 2(d) of the Act.

6. In the Act, molasses has been defined in Section 2(d) to mean "heavy, dark coloured viscous liquid produced in the final stage of manufacture of sugar by vacuum pan from sugarcane or gur, when the liquid as such or in any form or admisture contains sugar". We have been from clause 2(f) of the U.P. Khandsari Sugar Manufacturers Licensing Order, 1967 (hereinafter referred to as 1967 Order) that Khandsari sugar has been defined to mean sugar containing more than 90 percent sucrose and manufactured by open pan process including bels." The said order Act itself suggests that any expression defined in that section should be given the meaning assigned to it there in unless the context otherwise

requires."

13. Thus we, see that the said judgment does not hint at suggestion of ignoring the definition altogether and to include something which is wholly outside the scope of the definition. The expression used in the definition is to be given meaning assigned to it unless context otherwise requires. Whether in the present case, the context otherwise so requires to give the definition a meaning other than what has been defined, is a matter to be examined, which we proposed to do at a later stage.

14. One of the point urged by Mr. Agarwal was that the subject matter falls within Entry8, ListII of Seventh Schedule viz. excise and as such it was competent for the State Government to legislate under Article 162. According to him, molasses being the raw material for alcohol it can be regulated by the Excise Controller and there cannot be any fundamental right under Article 19(l)(g) to carry on trade in respect of a commodity subject to prohibition. The argument does not appeal to us for the simple reason that the aid of Article 162 was alleged to have been sought to be availed of by the respondent (State authority) under Entry33 of ListIll of ScheduledVH. It has never been claimed by the respondent that it had proposed to obtain the aid of Entry8,; ListII of VII Schedule. The respondent represented by Mr. Agrawal being private individuals though might be interested in the matter, cannot be said to be in a position to supplement or supplant the stand of the State. It is not open to the added respondentchemical industries, to plead for the State upon a fact which had never been relied upon or thought of by the State itself.

15. Mr. S.C. Budhwar, appearing on behalf of the added respondents distilleries sought to support the order on the ground that a field which may covered by an enactment, if remains uncovered, can be treated upon through executive exercise under Article 162. According to him, manufacturing the khandsari sugar is controlled through 1967 Order, covers the field of manufacture of Khandsari sugar and "khandsarimolasses" being a product thereof, is a field, in respect whereof legislation is in existence, with the aid whereof any uncovered field under the said order, could be covered through executive legislation with the aid of Article 162 particularly when the molasses is admittedly the principal raw material for operating distilleries subject to control and regulation.

16. Now we propose to examine as to whether the filed is covered for executive legislation through Article 162. In order to decide the issue, it is necessary to find out if "khandsarimolasses" is included in any industry the control whereof is declared by law by the parliament to be expedient in the public interest.

17. Control of sugar industry has been declared to be expedient in the public interest by the parliament through inclusion in the First Schedule of Industries Development and Regulation, Act, 1951. Molasses being a product in the sugar industry admittedly comes within the purview of clause (a) of Entry33 of List III of the VII Schedule which includes "products of any industry where the control of

such industry by the Union is declared by Parliament by law to be expedient in the public interest. "Trade and commerce in.........the products" of such industry is a field which has been referred to in Entry 33. If it can be said that "molasses" comes within the purview of clause (a) of Entry 33 aforesaid, then it is open for the State Government through executive exercise to legislate with the aid of Article 162.

18. The expression ''products'' use in entry 33, clause (a) includes all kinds of products of the industry. Admittedly molasses is a product of the sugar industry. Thus, sugar industry having been declared to be an industry expedient in the public interest for being controlled, the biproducts as well as the products of sugar industry very well come within the ambit of entry 33, clause (a).

19. Admittedly, the 1967 order has been promulgated pursuant to delegation of power by the Central Government. The State Government has also enacted law in respect of molasses. It has also enacted the U.P. Khandsari Sugar Manufacturers'' Licensing Order 1967 to regulate manufacture of Khandsari Sugar, a power exerciseable by the Central Government under Clauses 7,8 and 9 of the Sugarcane (Control) Order 1966, since been delegated to the State Government by the Government of India, through an order dated 16th July, 1966.

20. Thus, we see that the field of sugar industry having been covered within entry 33, clause (a), it is the field in respect whereof the State legislature is empowered to make law. Article 162 empowers the State to legislate through executive exercise in respect of which the State legislature is empowered to make; law. Therefore, the State legislature is competent to legislate law in respect of "molasses", a product of the sugar industry.

21. Now let us examine whether Khandsari molasses can be brought within the purview of Rule 24 of the rules or in other words the expression "unless there is anything repugnant in the subject or context" used in Section 2 of the Act, permits interpretation of "any molasses" used in Rule 24 to include "khandsarimolasses."

22. Rule 24 of the Rules requires permission for transporting molasses outside Uttar Pradesh Rule 24 provides that "no person shall transport or cause to be transported outside Uttar Pradesh any molasses unless permission in writing is obtained from the Controller".

23. It has been vehemently argued by Mr. Upadhyaya that molasses expressed in: Rule 24 refers to molasses defined in Section 2(d). On the other hand Mr. Yatindra Singh, Mr. Agarwal and Mr. Budhwar sought to contend that expression ''molasses'' used in Rule 24 though is to be understood as molasses defined in Section 2(d) but the same being qualified by the word ''any'' it would bring out molasses referred to in Rule 24 of the restrictive definition of molasses in Section 2(d). From the scheme of the Act as has been examined by us the expression ''any molasses, molasses'' has been used in Section 6(1) and (2) respectively. Section 6 deals with adulterated molasses, Section 7 also used expression ''any

adulterated molasses''. Thus we see that context of the Act pre supposes of molasses other than that defined in Section 2(d). It may be noted that molasses has been qualified with the word ''any'' only when it had been intended to mean molasses other than that defined in Section 2(d). Inasmuch as adulterated molasses is not molasses as defined in the Act. Similarly in the scheme even when molasses has been used either as "no molasses," "all molasses," the molasses", as the case may be yet in Rule 24 molasses has been qualified by the expression ''any''. Selective use of the word ''any'' only in Rule 24 presupposes a different context.

24. In the counteraffidavit in paragraphs 3(C), (H) and (I), the reasons for imposing the regulatory method has been enunciated in the following manner:

"3C. That in State of Uttar Pradesh, Mill Molasses as well as Khandasari Mollasses is produced. The quantity of Mill Molasses is much njore than the Khandasari molasses. In the year 199596 about 272 lakhs quintal of Mill Molasses was produced. Last year i.e. 199697 about 224 lakhs quintal of mill molasses was produced. This year the mill molasses is estimated to go down 180 lakhs quintal. The exact figure for Khandsari is not available, but this is to the tune of about 1015 lakhs quintal. This year it is also expected to go down.

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3H. That it may be pointed out that during the last few years during verification at number of times the officers and the staff of the department has checked, detained and found that the persons transporting the molasses after declaring them as Khandsari molasses but when the sample were taken and it was tested in the Government Laboratory then the result shown that in some cases the molasses in question were produced by various sugar factory and it is being smuggled without the authority of law. Brief description of few cases of the misuse of the molasses is Annexure herewith as Annexure C.A. 4. Similarly in the previous financial year 199697 as well as 199596 also the cases of illegal transport of molasses has been noticed.

31. That it may again be emphasised that in earlier years there was no ban on export of molasses from State of U.P. Even in that year attempt has been made to illegally transport mill molasses for other purposes for which the allotment is not practically possible. It is also relevant to point out that on 1891997 the officers of the department received some information about illegal transport of the mill molasses in the garb of Khandsari molasses and after receiving the said information the team of the department rushed up and checked the consignment which was being carried out in 3 tankers near Phaphamau Bridge, Allahabad. On verification of the vehicle and goods it has been found that these tankers were carrying on molasses which has been declared as Khandsari molasses and the samples were taken from the consignment and it was sent to the laboratory for testing. Subsequently it has been confirmed that the said molasses are basically mill molasses and not Khandsari molasses but it was being transported illegally

on forged paper declaring them as Khandsari Molasses. The owner of truck ultimately confessed his guilt in the Court of C.J.M. Allahabad and has deposited penalty imposed by the Court. A correct copy of the relevant document pertinent to said case is attached herewith and marked as AnnexureC.A. 5."

25. It is admitted that under Rule 24 molasses, as defined in Section 2(d), can be subjected to permission if it is transported out side the State of U.P. If taking advantage of the situation that Rule 24 would not be applicable in respect of Khandsari molasses unscrupulous traders bypass the provision of the said Act and Rules describing molasses as Khandsari molasses while transporting outside the State of U.P., the purpose and object of the Act and the rules would surely be frustrated. In order to prevent such a situation, it is open to the administration if it thinks proper, to regulate the transport of Khandsari molasses outside the State of Uttar Pradesh in furtherance of the object and purpose of the Act and the Rules. But when permission for transporting Khandsari molasses outside the State of Uttar Pradesh is sought, there could not be any scope for restricting the transport under the provisions of the Act and the Rules. In as much as no order under Section 8(1) of the Act can be issued in respect of Khandsari molasses which does not come within the purview of the Act and Rules. In the alternative if it is said that permission for transporting the Khandsari molasses outside the State is also necessary in view of the expression molasses used in Rule 24 has been qualified by the word ''any'' then also it is only for the purpose of Rule 24 alone, it can be subjected to such permission.

26. In order to further the object and purpose of the Act and the Rules, it may be necessary that "molasses" is not shifted in the garb of "khandsari molasses" and thereby frustrate the purpose and object of the Act and Rules. It is in this context that the expression "any molasses" as occurring in Rule 24 has to be interpreted. Let it be repeated that it is only for ascertaining whether "molasses" is being transported in the garb of "Khandsari molasses" that the written permission from the Controller may be insisted as provided under Rule 24 and for no other purpose. This interpretation fully reconciles the provisions of the Act and the Rules and thus the contingencies narrated in paragraph3 (H) and (I) of the counteraffidavit appear to the justified.

27. Reliance may be placed in the case of K. Bala Krishna Rao (supra) to support such an interpretation. Such step is permissible by reason of the decision in the case of T.V Balakrishnan v. State of Tamil Nadu, 1955 (Supplement) Vol. 4 SCC page 236, wherein it has been observed that:

"When the rules as framed are intended to subserve the aims of the Act, which was meant to consolidate the law relating to the forest produce, the transit thereof and the duty leviable thereon; and hence those rules were meant to effectuate same or all these objects. Having noticed the uphill task faced by the Government in preventing illicit felling1 of trees over large extents with limited man power, and checking at checkposts at forest, frontiers having been found to be insufficient, in effective and being no match to the swift manner in which they are carried away by lorries......the impugned rules which insist on a FormII pass to accompany during every movement of timer and hammer mark being affixed on the transported timber, are absolutely necessary for the protection and management of forest wealth in the State of Tamil Nadu. Hence the impugned rules are not violative of Article 19(l)(g)."

28. The said view is also supported by the observation made in the case of Bishambhar Dayal Chandra Mohan v. State of U.P, AIR 1982 (SC) 33, wherein it has been observed that:

"Even assuming that the impugned teleprinter message is not relatable to the two Control Orders, the State Government undoubtedly could, in exercise of the executive power of the State, introduce a system of verification on movement of wheat from the State of Uttar Pradesh to various other States at the checkposts on the border and the place restrictions on interdistrict movement of wheat by traders on private account within the State. The executive power of a modern State is not capable of any precise definition........"Ordinarily the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions nor possible to give an exhaustive enumeration of the kinds and categories of executive functions of the policy as well as its execution. In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power can'' not be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf."

29. Then again by the said paragraph in the impugned order it has been specified that permission would also be necessary while transporting khandsari molasses outside the State of U.P. having regard to the observation made above namely that even while granting permission under Rule 24 in respect of khandsari molasses the Controller is not empowered to pass any order under the said Act and Rules in respect of Khandsari molasses. It does not come within purview of the said Act and the permission is confined only with regard to Rule 24 alone and not for any other purpose. The same can never be: considered to be a restriction on the right to carry on trade by the petitioner. It has not restricted the movement of Khandsari molasses outside the State of Uttar Pradesh. It only seeks to regulate the movement that too of molasses after ensuring that the molasses sought to be transported in the name of Khandsari molasses is in reality a Khandsari molasses and not molasses subject to the Act and Rules. Thus the same is only regulatory and not restrictive. The manufacture of Khandsari molasses is also governed under certain regulations provided under the licensing order. It is already subject matter of regulation. Therefore, the kind of regulatory measure sought to be imposed is nothing new in the field. Seeking of permission does not take away the right to transport outside the State of U.P.

It is open to the petitioner to sell or transport Khandsari molasses within the State of Uttar Pradesh and the same has not been restricted at all. Whereas only in case it is sought to be transported outside the State permission is being needed that too for the purpose as enunciated in paragraph 3(H) and (I) of the counteraffidavit. Such regulatory measure in no way affect the right to carry on trade or business. Thus the impugned clause does neither offend Article 19(l)(g) nor 301 nor 304B of the Constitution.

30. In the case of Armachine and Lakri Vikreta Sangh Nagpur v. State of Rajasthan, AIR 1992 (Rajasthan) 7, with which we are in agreement, it has been held that:

"So long, a rule or regulation is regulatory, it will not offend against the freedom guaranteed by Article 301. The same tests which are applicable to determine reasonableness under Art. 19(6) are also applicable to determine reasonableness under Art. 304 (b). An imposition of restriction requiring a person to obtain a permission from the proper authority for cutting trees cannot be held to be reasonable. Consequently, it cannot be held that the Rules framed by the State Government in exercise of power conferred by Sections 41 and 42 of the Act are incompetent."

31. Though it has been argued by Mr. Yatindra Singh and Mr. Bharatji Agarwal to include Khandsari molasses within the definition of 2(d) of the Act but yet as we have found the said definition cannot be stretched to the extent to which the learned Counsels had sought to, we have not been able to agree with their proposition that the definition under Section 2(d) includes Khandsari molasses as we have already observed hereinabove. On the other hand, the expression ''any molasses'' used in Rule 24 having regard to the context and object of the Act and in furtherance thereof include all kinds of molasses for the purpose of Rule 24 alone so as to ensure furtherance of the object and purpose of the Act and Rules.

32. We have already seen that the control of sugar industry having been declared necessary and expedient in the