
(2000) 06 PAT CK 0025

In the Patna High Court

Case No : C.W.J.C. No's. 10969 and 11183 of 1999

Mcdowell and C. Ltd., Etc.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 26-06-2000

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 27, 28, 38

Citation : (2000) 3 BLJR 1847 : (2000) 3 PLJR 475

Hon'ble Judges : Nagendra Rai, J;D.P.S. Choudhary, J

Bench : Division Bench

Judgement

Nagendra Rai, J.—Both the cases involve the same question of law and as such, they have been heard together and are being disposed of by this common judgment.

2. The question which involve for determination in this case is as to whether a notification issued by the Government of Bihar dated 11.6.1996, which was published in the official Gazette on the same date revising the rate of duty on Indian Made Foreign Liquor (hereinafter referred to as "IMFL") and bear, will come into force from the date of printing in the official Gazette or it will come into force from the date it was made available to the public or known to the persons having concerned with the same.

3. The petitioner in C.W.J.C. No. 10969 of 1999 filed the present writ application challenging the order dated 1.9.1997 passed by the Superintendent of Excise, Hathidah Distillery, Hathidah, respondent No. 6, by which it has been directed to deposit Rs. 11,75,525/- by way of difference between the duty prevailing between 11.6.1996 and 21.6.1996 as enhanced duty on IMFL/bear and the order dated 14.6.1999 passed by the Commissioner of Excise, Bihar dismissing the appeal against the said order and the order dated 4.10.1999 passed by the Board of Revenue dismissing the revision application against the said order. Copies of the said orders have been annexed as Annexures 3, 4 and 5 to the writ application respectively.

4. The petitioner in C.W.J.C. No. 11183 of 1999 have challenged the order dated 17.7.1996 passed by the Superintendent of Excise, M/s U.B. Distilleries Ltd., Mirganj Distillery, Mirganj, Gopalganj, respondent No. 5, by which it has been directed to deposit Rs. 42,31,541.25 paise byway of difference between the duty prevailing between 11.6.1996 and 4.7.1996 as enhanced duty on IMFL/bear and the order dated 14.6.1999 passed by the Commissioner of Excise, Bihar in appeal and order dated 4.10.1999 passed by the Member, Board of Revenue. Copies of the said orders have been annexed as Annexures 10, 11 and 12 to the writ application respectively. It is to be stated that the appellate and the revisional Court disposed of both the petitions by a common order.

5. Both the petitioners are the companies registered under the Indian Companies Act, 1956, The petitioner of C.W.J.C. No. 10969 of 1999 has its head office in Madras and its distillery is situated at Hathidah in the district of Patna and the petitioner of C.W.J.C. No. 11183 of 1999 has its head office at Calcutta and its distillery is situated at Mirganj in the District of Gopalganj, Bihar. Both the companies are engaged in manufacturing of Whisky, Brandy, Gin, Rum, Vodka, etc. Both the petitioners hold licence under the provisions of the Bihar Excise Act (hereinafter referred to as the Act) and they have been granted licence in Excise Forms No. 19, 19B, 19C, 20 and 28-A prescribed by the Board of Revenue u/s 38 of the Act. The licence in Form No. 19 is issued for compounding and blending of IMFL. The licence in Form No. 19-B is granted to deposit or keep foreign liquor without payment of duty in a Warehouse established with the approval of the Excise Commissioner and Form 19-C is the licence for distribution of IMFL/Beer to the wholesale licensees and Army and military authorities and Form No. 20 is for bottling of potable IMFL. Section 27 of the Act empowers the State Government to impose duty on import, export, transport and manufacture on excisable articles. Section 28 of the Act provides ways of levying such duty and for the purpose of the present cases, relevant provision is 28(C)(ii) which provides that the excise duty imposed u/s 27 of the Act shall be levied by payment upon issue for sale from a warehouse established, authorised or continued under this Act. The first proviso of Section 28 provides that where payment is made upon the issue of an excisable article for sale from a warehouse, it shall be at the rate of duty in force on the date of issue of such article from such warehouse. Thus, in the cases of the petitioners the rate of duty which is to be payable on the excisable article is the date of issue of such article from such warehouse. The State Government in exercise of power u/s 27 of the Act enhanced the rate of excise duty on IMFL/Beer vide Notification S.O. No. 241 dated 11.6.1996 which was published in the extra-ordinary Gazette on 11.6.1996.

6. The petitioner in C.W.J.C. No. 10969 of 1999 removed IMFL Between 11.6.1996 and 21.6.1996 at the rate prior to the enhancement of rate by notification dated 11.6.1996, whereas the petitioner in C.W.J.C. No. 11183 of 1999 also removed the IMFL between 11.6.1996 and 4.7.1996 at the pre-fixed/earlier rate.

7. It is asserted on behalf of the petitioner in C.W.J.C. No. 10969 of 1999 that the copy of the notification enhancing the rate of duty was sent to the petitioner by the Deputy Commissioner of Excise (D & W), Bihar, Patna-respondent No. 4, by letter dated 20.6.1996 and thereafter after receipt of the same, he started paying enhanced rate of excise duty and the period for which he did not pay the enhanced rate is 11.6.1996 to 20.6.1996. Though the demand notice demanding Rs. 42,31,541.25 P being the difference of excise duty from 11.6.1996 to 4.7.1996 was issued to the petitioner in C.W.J.C. No. 11183 of 1999, but it has been stated in the writ petition which has not been controverted that the controversy in the present case with regard to payment of excise duty at the enhanced rate is from 11.6.1996 to 20.6.1996.

8. According to the petitioners of both the writ petitions, the said notification was never published on 11.6.1996 as it has been shown in the Gazette. On the other hand, the same was published later on and it was circulated by the Department of Excise on 20.6.1996 among the authorities and the copies were also sent on that date to the persons concerned and as such, the said notification shall come into force on 20th June, 1996 when it was made available to the public and not from the date of publication in the official Gazette.

9. The stand of the respondent-State on the other hand is that the Government of Bihar, Department of Excise, enhanced the rate of excise duty on IMFL/beer from the date of publication of the notification in the official Gazette. The notification was published on 11.6.1996 and as such the petitioners-Companies are liable to pay enhanced rate of excise duty from 11.6.1996 to 20.6.1996 and 4.7.1996 as mentioned in the demand notice. The petitioners did not pay enhanced rate of excise duty for the aforesaid period and paid at the pre-revised rate. When the audit party raised objection whereupon demand notices were issued to the petitioners for payment of excise duty on the quantity of IMFL/beer transferred between the period as mentioned in the demand notices. According to Section 92 of the Act, the notification will come into force from the date of its publication in the official Gazette and the claim of the petitioners that mere publication of the notification in the official Gazette will not make the notification enhancing the rate of excise duty, is unjustified.

10. The only question for determination is as to when the notification dated 11.6.1996 published in the official Gazette will come into force.

11. Section 92 of the Act contains the provisions with regard to publication of rules and notifications. It provides that all rules made and notifications issued under this Act shall be published in the official Gazette and on such publication shall have effect as if enacted in this Act. Thus, according to the said provisions, once the notification is published in the official Gazette the same will come into force as if the same is a part of the Act. The controversy is what is the meaning of publication in the official Gazette, whether printing of the notification in the official Gazette itself satisfies the requirement of its being published or the publication in the official Gazette requires something more, that is, the same is

made available to the public. A Division Bench of this Court in the case of the Mahnar Notified Area Committee and Ors. v. State of Bihar 1968 PLJR 582, considered the provision contained u/s 28 of the Bihar and Orissa General Clauses Act which provides that where in any Bihar and Orissa Act, or in any rule made under any such Act, it is directed that any order, notification or other matter shall be notified or published, such notification or publication shall, unless the Act otherwise provides, be deemed to be duly made if it is published in the Gazette. This Court held that the notification in the Official Gazette cannot mean printing in the official Gazette only. It must mean its publication in the sense of notifying it to be public by sending copies of it to the various subscribers or to the persons or institutions who are entitled to get such copies or by exposing it for sale to the general public. Mere printing the notification in the official Gazette and keeping it in the almirahs of the Government Printing Press or the Secretariat cannot mean a notification in the official Gazette within the meaning of Section 4(36) of the Bihar and Orissa General Clauses Act read with Section 28 of the Act.

The apex Court has also considered this question in catena of cases and it is not necessary to overburden this judgment by citing all the decisions, suffice it to refer the recent case reported in Collector of Central Excise Vs. New Tobacco Co. Etc. Etc., . From perusal of the said section it appears that the New Tobacco Company Limited was engaged in manufacturing cigarettes. It was paying duty under the provisions of Central Excises and Salt Act, 1944 in terms of Notification dated 1.3.1979, as amended from time to time. The said notification was rescinded with effect from 30.11.1982 by the Government by notification dated 30.11.1982 which prescribed new rates of excise duty. Between 30.11.1982 and 8.12.1982, the Company cleared 79, 456 million cigarettes and paid duty thereon at the lesser rate fixed by notification dated 1.3.1979. Thereafter, a demand notice was issued calling upon the Company to pay the differential amount between the duty short-paid and the duty which had become payable in terms of the new notification dated 30.11.1982. Thereafter, the said demand was confirmed by the Assistant Collector and the same was upheld by the Collector of Central Excise (Appeals). The Tribunal, however, accepted the contention of the Company that as the notification dated 30.11.1982 was made available to the public on 8.12.1982 and as such the duty at the enhanced rate could be demanded from 8.12.1982. It held that the publication as contemplated u/s 38 of the Central Excise and Salt Act, 1944 and Rule 8 of the Central Excise Rules, cannot be equated with mere printing and it is the availability of the printed material to the general public that constitutes the required publication. The department challenged the matter before the apex Court and the apex Court held that it would be a proper publication if it is published in such manner that persons can, if they are so interested, acquaint themselves with its contents. If a publication is made through a Gazette, then mere printing of it in the Gazette would not be enough. Unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly

published. It is apt to quote paragraphs 4 and 12 of the said judgment:

Section 38 of the Act provides that all the rules made and notifications issued under the Act shall be published in the Official Gazette. So, the requirement of Section 38 is publication of the rules and the notifications in the Official Gazette. The dictionary meaning of the word "publish" as given in Webster's Comprehensive Dictionary, International Edn; is" (1) To make known or announce publicly; promulgate; proclaim, (2) To print and issue to the public (3) To communicate to a third person". According to the Legal Glossary, published by the Legislative Department, Ministry of Law, Justice and Company Affairs, Government of India in 1992, it means "to make generally accessible or available; to place before or offer to public; to bring before the public for sale or distribution". Thus, the word "publish" connotes not only an act of printing but also further action of issuing or making it available to the public. Notification, according to Webster's Third New International Dictionary, inter alia means "1. The act or an instance of notifying: Intimation, Notice; est; the act of giving official notice or information; 2. a written or printed matter that gives notice". The Legal Glossary, referred to above, defines it as "a written or printed matter that gives notice:, Even if we go by the dictionary meaning the requirement of publishing the notifications would connote that what is intended to give notice or information to the public can be treated as published only when it is made available to the public so that they can know about it. The requirement of publishing the notifications in the Official Gazette, which is an official journal or a newspaper containing public notices and other prescribed matters, also indicates that the word "publish" in Section 38 should be so interpreted.

* * * * We hold that a Central Excise notification can be said to have been published, except when it is provided otherwise, when it is so issued as to make it known to the public. It would be a proper publication if it is published in such a manner that persons can, if they are so interested, acquaint themselves with its contents. If publication is through a Gazette then mere printing of it in the Gazette would not be enough. Unless the Gazette containing the notification is made available to the public, the notification cannot be said to have been duly published.

12. The same view has been reiterated by the Supreme Court in the case of Garware Nylons Ltd. Vs. Collector of Customs and Central Excise, Pune, .

13. Thus, where the notification is required to be published in the Gazette then mere printing in the Gazette is not a publication of the notification. The notification will be treated to have been published only when it is made available to the public. However, the learned Counsel appearing for the respondents relying upon the provision of Section 92 of the Act submitted that once the notification is published in the official Gazette, it shall come into force. I am unable to agree with the aforesaid submission. The word "publish" as held by the Supreme Court means when it is made available to the public. Merely printing of the notification in the Official Gazette is not a publication in the Official Gazette.

14. At this stage, I would like to clarify that there is no requirement of law that the notification which is required to be published in the official Gazette should come into force only when it is served upon the persons affected or concerned. Once it is made available to the public in the sense that the copies are sent to the authorities who are required to implement the notification, then that will mean the publication in the official Gazette.

15. Coming to the facts of the present case, the only averment that has been made in the counter-affidavit is that the notification was published in the official Gazette on 11th June, 1996. There is nothing on record to show on behalf of the respondent-State that apart from printing of the notification in the Official Gazette, it was made available to the public on that day or any other date prior to 20th June, 1996 when the copy of the said notification was sent by the Department to all the District Magistrates, Deputy Commissioners of Excise, Assistant Commissioners of Excise and Superintendents of Excise, a copy of which has been annexed as Annexure-2 to C.W.J.C. No. 10969 of 1999. The said letter clearly mentions that the copies of the notifications are being sent for necessary action. Thus, the said notification though printed on 11.6.1996 was published on 20th June, 1996 when the copies of the notification were sent to the authorities who were required to receive the same. In other words, the same was made available to the public on 20th June, 1996. Thus, the petitioners are liable to pay enhanced rate of excise duty from 20th June, 1996 and not from 11th June, 1996 when the notification enhancing the rate of excise duty was printed in the official Gazette.

16. Accordingly, the impugned demand notices and the orders passed by the appellate and the revisional Courts are quashed so far as the demand of excise duty at the enhanced rate from 11.6.1996 to 19.6.1996 are concerned. The petitioners are liable to pay enhanced rate of excise duty from 20th June, 1996 onwards.

17. In the result, both the writ applications are allowed in part. There shall be no order as to costs.

D.P.S. Choudhary, J.

18. I agree.