(1978) 10 AHC CK 0004

In the Allahabad High Court

Case No : Writ Petition No. 8455 of 1978

Mohan Meakin Breweries Ltd. and Others — APPELLANT

Vs

Excise Inspector-in-Charge and Others — RESPONDENT

Date of Decision : 30-10-1978

Acts Referred:

Constitution of India, 1950 — Article 265
Uttar Pradesh Excise Act, 1910 — Section 28, 29

Citation : (1979) 4 ELT 7

Hon'ble Judges : R.R. Rastogo, J;N.D. Ojha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

N.D. Ojha J.

1. Identical questions are involved in these two writ petitions and as such they are being disposed of by a common judgment. Auctions for wholesale vendor of FL 2 licenses for the area of Ghaziabad as also for Lucknow were held sometime in March, 1978. The petitioner No. 1 in writ petition No. 8450 of 1978 was the highest bidder in respect of the auction for Lucknow. Likewise petitioner No. 1 in writ petition No. 8455 of 1978 Was the highest bidder in respect of the auction for Ghaziabad. At the time when the auction was held and even during the period between 1st of April 1978, and 16th of April, 1978, the rate of excise duty was fixed at Rs. 40/- per litre of alcohol. In exercise of the powers under Sections 28 and 29 of the U.P. Excise Act, 1910, the State Government issued Notification No. 3514-E/XIII-331-78, dated April 17, 1978, whereby the rate of Excise duty was enhanced from Rs. 40/- per litre of alcohol. This notification was published in the U.P. Gazette, Extraordinary, dated 17th April, 1978. The petitioner No. 1 in each of these two writ petitions had an Advance Duty Account with the respondents. It appears that subsequently the respondents adjusted the excise duty from the Advance Duty Account of petitioner No. 1 for period between 1st of April, 1978 and 16th of April, 1978, at the rate of Rs. 55/- per litre of alcohol. It

is this act of the respondents which has been challenged in these two writ petitions. The case set up by the petitioners in these writ petitions is that the excise duty could not be recovered by the respondents from the petitioner at the rate of Rs. 55/- per litre of alcohol for the period between 1st April, 1978 and 16th April, 1978. It could be recovered only at the rate of Rs. 40/- per litre of alcohol. Since the question raised in these writ petitions was purely of law it was thought expedient that in place of admitting them the standing counsel may be given time to obtain instructions and preferably file a counter-affidavit. As such on 28th September, 1978 when the writ petitions were filed they were directed to be listed for admission on 6th October, 1978 by which date the standing counsel was required to obtain instructions and preferably to file a counter-affidavit. In view of the facts stated above we are of the opinion that these writ petitions deserve to be finally disposed of as contemplated by the second proviso to Rule 2(1) of Chapter 22 of the Values of Court. We accordingly proceeded to dispose them of finally.

2. Having heard counsel for the parties we are of the opinion that these writ petitions deserve to be allowed. The only justification which was pointed out by the standing counsel for adjusting the excise duty for the period between 1st of April, 1978 and 16th of April, 1978, from the Advance Duty Account of the petitioner as aforesaid was that in the notice which was issued on 25th February, 1978 it was stated that the excise duty payable for the year 1978-79 shall be at the rate of Rs. 55/- in our opinion the mere fact that such an intimation was given in the notice dated 25th February, 1978, did not entitle the respondents to collect duty from the petitioner at the said rate. Article 265 of the Constitution contemplates that no tax shall be levied or collected except by an authority of law. It is not disputed that excise duty is a tax within the meaning of Article 265 of the Constitution. The rate of excise duty could be fixed only by a notification by the State Government under Sections 28 and 29 of the U.P. Excise Act. The rate of excise duty as fixed earlier was at the rate of Rs. 40/- per litre of alcohol. It was raised to Rs. 55/- for the first time by a notification dated 17th April, 1978, referred to above. It is, therefore, apparent that only with effect from 17th April, 1978, the excise duty at the rate of Rs. 55/- per litre of alcohol in place of Rs. 40/- could be recoverable. For the period between 1st April 1978, and 16th April, 1978 the excise duty recoverable was only the rate of Rs. 40/- per litre of alcohol. In Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, a question arose about the recovery of compensation in pursuance of a condition incorporated in the licence of the respondents to the effect that they would lift the fixed minimum quantity of liquor and sell the same at their allotted shops and in case of their default or failure to do so, they would be liable to pay compensation equal to the amount of the excise duty leviable on the unlifted quantity. In paragraph 18 of the report it was held : -

"We have therefore, not the slightest hesitation in holding that the demand made by the appellants though disguised as compensation, is in reality a demand for excise duty on the unlifted quantity of liquor which is not authorised by the provisions of the Act.

The same principle will apply even in regard to the collection of excise duty at a rate which was increased subsequently.

3. It was also urged by the Standing Counsel that in view of the notice dated 25th February, 1978, it is possible that petitioner No. 1 may have realised excise duty from the dealers at the rate of Rs. 55/- even during the period of 1st April, 1978 to 16th April, 1978. In our opinion even if that be so it cannot validate the collection of excise duty at the rate of Rs. 55/- by the respondents from the petitioner. In R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, in paragraph 5 of the report it was held : -

"If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer."

It would be seen that the aforesaid observations were made even in respect of a law made for the purpose. In the instant case the excise duty at the rate of Rs. 55/- for the period between 1st April, 1978 and 16th April, 1978, is not sought to be recovered Jon the basis of any law but only on the basis of a notice. This apparently cannot be done in view of the decision in Abdul Quarter''s case (supra).

4. In the result each of these two writ petitions succeeds and is allowed and the respondents are directed to adjust back the excise duty at the rate of Rs. 15/- per litre of alcohol in the Advance Duty Account of petitioner No. 1 for the period between 1st April, 1978 and 16th April, 1978, and to make the entry in the said account that for this period the duty recoverable was at the rate of Rs. 40/- per litre of alcohol only. This shall be done within a month from today''s date. In the circumstances of the case there will be no order as to costs.