(1996) 08 AHC CK 0002

In the Allahabad High Court

Case No : C.M.W.P. No. 294 of 1985 and 7 other Writ Petitions

Mohan Meakin Ltd. APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 27-08-1996

Acts Referred:

Uttar Pradesh Issue of Spirit from Distillery (Amendment) Rules, 1978 — Rule 5

Citation : (1996) 08 AHC CK 0002

Hon'ble Judges : Om Prakash, J;J.S. Sidhu, J

Bench : Division Bench

Advocate : S.C. Budhwar and Arun Tandon, for the Appellant;

Final Decision : Dismissed

Judgement

Om Prakash, J.—The short question for consideration in this bunch of as many as eight writ petitions filed by one and the same Petitioner is whether wastage of country spirit in transit in excess of 0.5% is exigible.

2. All these writ petitions involving a common question for decision, are being disposed of by a common judgment.

3. Facts being common in all the writ petitions, the facts relating to Writ Petition No. 294 of 1985 M/s. Mohan Meakin Ltd., (Lucknow Distillery) Lucknow v. State of U.P. and Ors. are stated.

4. The Petitioner a limited company having its registered office at Solan Brewery in Himachal Pradesh, was granted a licence in Form P. D. 2 to run a distillery situate at Daliganj, Lucknow. Under the said licence the Petitioner is permitted to manufacture the spirit and transport the same from the distillery to the bonded warehouses, wherefrom it is actually issued for sale in bottles to the licensed vendors. The Petitioner carries on this business subject to the provisions of the U.P. Excise Act and the rules framed thereunder.

5. The Petitioner executed a general bond in Form P. D. 15 for transporting the

spirit to the bonded warehouse which is transported in drums or bottles or in both from the distillery to the bonded warehouse.

6. In this bunch of writ petitions, the spirit was transported both ways, i.e., in drums as well as in bottles. Whereas in Writ Petition Nos. 704/80, 137/81 and 909/83 consignment was sent in drums, in the remaining writ petitions, the spirit was transported in bottles from the distillery to the bonded warehouses.

7. Admittedly, the consignment of spirit sent in drums, was subjected to bottling process in the bonded warehouses and from there, the spirit was issued for sale only in bottles. The excise duty is levied when the spirit is issued in bottles for sale. The contention of the Petitioner is that duty is leviable at the time of issue and not prior to that and, therefore, excess wastage resulting during transit from distillery to the bonded warehouses, cannot be subjected to excise duty. Rule 814 of the Rules under the U.P. Excise Act, as published in the new U.P. Excise Manual, Vol. I as substituted by a Notification dated February 8, 1978. provides that an allowance upto 0.5% will be made for the actual loss in transit by leakage, evaporation or other unavoidable cause of spirit transported or exported under bond in wooden casks or metal vessels. The case of the Petitioner Is that the amended Rule 814 of the Excise Manual, Vol. I is arbitrary inasmuch as allowable wastage was limited upto 0.5% without any study or experiment. It is contended that the consignment dispatched from the distillery is duly checked up and sealed by the excise authorities and that the consignment is accepted at the bonded warehouse only when the seal is found intact. If seal remains intact upto the bonded warehouse, the Petitioner contends that the wastage, if any, arising during transit could not be attributed to the negligence of the Petitioner and that would be on account of evaporation, leakage etc.

8. It is averred in Paragraph 25 of the writ petition that a committee was set up to find out wastage in transit and that carried on experiment on a consignment sent from M/s. Mohan Meakin Breweries Ltd., Mohan Nagar to the Agra bonded warehouse and then transit wastage of 0.73% was found and in an other consignment sent from the Pilkhani Distillery to the bonded warehouse at Bareilly, the wastage came to 1.04%. The contention of the Petitioner is that actual wastage being much more than the allowable wastage as prescribed under Rule 814 of the Excise Manual, reduction in allowable wastage under Rule 814 is arbitrary.

9. It is contended that wastage during transit being prior to the point of excisable event, that is, issue of excisable articles for sale from the bonded warehouse in these cases, is not exigible.

10. The Petitioner seeks quashing of the Notification dated February 8, 1978, Annexure 8 to the writ petition which introduces the rules, called as the Uttar Pradesh Issue of Spirit from Distillery (Amendment) Rules, 1973, (hereinafter referred to as the amending Rules). By these amending Rules, Rule 5 was so amended as to allow loss in transit by leakage, evaporation or other unavoidable

cause of spirit only upto 0.5%. Since the allowable wastage is limited to 0.5% by the amending Rules, the Petitioner seeks quashing of these amending Rules as well.

11. In the counter-affidavit filed on behalf of the State, the contentions of the Petitioner are said to be unsustainable.

12. The question whether excess wastage arising during transit is exigible came up for consideration before this Court in several cases, and, therefore, this question is no more res Integra in so far as this Court is concerned. In Writ Petition No. 252 of 1990 M/s. Pilkhani Distillery, and Chemical Works Ltd., Pilkhani, district Saharanpur v. State of U.P. and Ors. the Petitioner had a licence for the manufacture of spirit including country spirit and the Petitioner was permitted to transport country spirit from the distillery to the bonded warehouses. The Petitioner transported country spirit under a pass in Form P. D. 25 issued by the Excise Inspector of the Distillery as provided in Paragraph 793 of the Excise Manual, Vol. I. Wastage during transit in excess of 0.5% was claimed. A Division Bench of this Court then dismissed the petition filed by M/s. Pilkhani Distillery and Chemical Works Ltd. observing as follows:

In our opinion, in view of the Rule 5 of Uttar Pradesh Issue of Spirit from Distillery (Amendment) Rules, 1978 and the conditions laid down in general or special bond in Form P. D. 15 and P. D. 16 also the provisions of Para 814 of the U.P. Excise Manual, Volume I, leave no room for doubt that the Petitioner is liable to pay the Excise duty on wastage that had occurred in transporation from distillery premises to the Government bonded warehouse.

13. In General Distillery and Breweries Ltd. v. State of U.P. and Ors. 1991 (18)ALR 52, a Division Bench following the decision in the case of M/s. Pilkhani Distillery and Chemical Works Ltd. (supra) rejected similar contention of the Petitioner. In this case, the Petitioner company was granted licence in Form P.D. 2 to operate a distillery situate at Cantonment, Meerut. The Petitioner supplied Spirit in poly packs or pouches to the bonded warehouse after execution of a Bond in Form P. D 15. Wastage during transit in excess of 0.5% was claimed asserting that no duty could be levied on spirit which was never issued from the distillery or the warehouse of the Petitioner, as the same was wasted during transit. The State of U.P. in its counter-affidavit relying on Rule 814 of the Excise Manual, Vol. 1. contended that wastage was allowed only upto 0.5% in respect of transport of spirit in wooden casks or metal vessels and that no wastage was allowed under that rule in respect of the spirit transported in bottles, poly packs or pouches. The Division Bench accepting the contention of the State rejected the contention of the Petitioner holding in Paras 10 12 and 13 as follows:

1O. The legal position is now well-settled that no one has any inherent or absolute right to carry on business of manufacture and sale of intoxicants. The State can control and regulate it completely, it may undertake to carry on activities of manufacture, export, import, transport, or sell directly. It may in its discretion permit the carrying on or any such activity to the extent and subject to such conditions on such forms as it may consider appropriate. It is for the State Government to decide as to whether any wastage allowance in transit may be allowed in case of spirit packed in bottles or poly packs as has been allowed in the case of transit of the same in wooden casks and metal vessels.

12. In view of this condition of the bond executed by the Petitioner, the Petitioner was also liable to pay duty to the State Government in respect of any shortage or wastage during the transit. Of course he could claim necessary wastage allowances under Rule 814, if it was admissible to him.

13. However, until the same relief is provided in respect of the spirit transported in poly packs or bottles also by framing appropriate rules or by amending the existing rules, the Petitioner cannot assert that wastage allowance should be allowed to him in the case where the spirit is transported in poly packs also.

14. From the foregoing decisions, it is manifest that Division Benches of this Court relying on Rule 814 of the Excise Manual, Vol. I and the conditions as contained in the general bond executed by the Petitioner in Form P. D. 15 held that the Petitioner was not entitled to any wastage allowance in respect of transport of spirit in poly packs, pouches or bottles as no provision was made for that in Rule 814 and as the Petitioner undertook liability under the general bond executed in Form P. D. 15 to indemnify the Governor for any loss of duty, which the Governor may suffer by reason of non-delivery of the entire quantity despatched from the distillery at the destination.

15. Therefore, the controversy arising in the instant bunch of writ petitions was fully decided by the two Division Benches of this Court in the aforementioned cases in which it was clearly held that transit wastage would not be allowed if excisable articles are transported in poly packs, pouches or bottles and that transit wastage upto the limit of 0.5% would be allowable only if the spirit was transported in wooden casks or metal vessels. Following these decisions, the contention of the Petitioner that wastage in transit is not exigible has to be rejected.

16. However, we proceed to discuss the contentions raised by the Petitioner before us. The first contention of the Petitioner is that a consignment in drums is bottled before the spirit is actually issued for sale from the bonded warehouse and that no sale is made for human consumption in drums. It is contended that until a consignment in drums is bottled, the manufacturing process continues and that comes to an end only when the spirit sent in drums is filled in bottles. In short, it is canvassed before us that until bottling process is over, the manufacturing process continues and so long as the manufacturing process continues, the spirit cannot be said to be exigible. We find no force in this submission. Then a finished product is transported in drums to a bonded warehouse where bottling process starts, it is clear that manufacturing process comes to an end the moment the product becomes fit for consumption. Spirit in

drums may not be issued for sale, but it cannot be said that the same is not fit for human consumption. Spirit is transported in drums only when the manufacturing process comes to an end. Bottling process starts at the bottling plant owned by the Petitioner itself. In some of the writ petitions, loss in transit in regard to bottles has been claimed and that implies that bottling was done in the bottling plant of the Petitioner, situate in the premises of distillery itself. Finished product can be transported in drums as well as in bottles, as per the rules the finished product cannot be issued for sale in drums and, therefore, the finished product transported in drums to the bonded warehouse is bottled there before issue for sale. Admittedly, when spirit is filled in bottles, manufacturing process is over. It is preposterous to say that the manufacturing process continues when the finished product is transported to the bonded warehouse in drums. Once finished product comes into being, it is immaterial whether that is transported in bottles or in drums. Nature of container is not determinative of the finished product. Indubitably, the manufacturing process comes to an end when finished product comes into being and finished product continues to be the finished product irrespective of the nature of container. Therefore, the Petitioner cannot successfully contend that manufacturing process continues till the finished product transported in drums, is bottled at the bonded warehouse. What is transported to the bonded warehouse is the finished product, which implies that the manufacturing process ended before transportation to the bonded warehouse started. We, therefore, hold that the manufacturing process comes to an end the moment the spirit is transported from the distillery to the bonded warehouse in bottles or drums.

17. The second contention is that the 1973 amending rules provide that when the wastage exceeds the allowable limit, the Officer Incharge of the distillery shall obtain the explanation of the distillery from the person executing the bond and forward the same together with a full report of the circumstances to the Assistant Excise Commissioner or the Deputy Excise Commissioner and the Assistant Excise Commissioner or the Deputy Excise Commissioner, as the case may be, shall charge duty on excess wastage. It is contended that explanation was called for by the excise authorities from the Petitioner and the same was submitted, but the impugned order dated 10.4.1985 Annexure-5 to the writ petition was passed by the Deputy Excise Commissioner without considering the Petitioner''s explanation. The explanation of the Petitioner is dated 11.11.1983, Annexure-2 to the writ petition, which states that despite taking necessary precautions for making each bottle of spirit pilfer proof, some breakage did occur on account of severe jerks and jells en route caused by a bad condition of roads. In the explanation, it is also stated that the loss of spirit transported to the bonded warehouses in drums unavoidably occurs due to evaporation taking place at the time of bottling of the spirit in the bonded warehouse where bottling process starts under the supervision of the excise authorities. From this explanation, it is abundantly clear that no extraordinay circumstance was pointed out by the Petitioner for excess wastage. For the wastage arising from the

circumstances as stated in the explanation, allowable limit upto 0.5% has already been prescribed under Rule 814 of the Excise Manual, Vo. I. If the Petitioner brings to the notice of the excise authorities any extraordinary circumstance, then the same will be considered by them for allowing excess wastage. Since no such circumstance was set out by the Petitioner in its explanation, the excise authorities cannot be blamed for not having considered the explanation. The explanation being usual and stereotype, normal wastage upto 0.5% was rightly allowed. There being no extraordinary circumstance in the explanation, there was nothing for the excise authorities to consider in the explanation of the Petitioner.

18. Then it is contended that the excisable event is the issue of spirit in bottles for sale and not the manufacture or production. In A.B. Abdulkadir and Others Vs. The State of Kerala and Another, , the court held that an excise duty imposed on the manufacture and production of excisable goods does not cease to be so merely because the duty is levied at a stage subsequent to manufacture or production. This was a case on Central Excise. The question is whether the principle laid down in the matter of Central Excise can hold good for the U.P. Excise Act. In State of U.P. and Ors. v. M/s. Delhi Cloth Mills and Ors. AIR 1991 SC 735, the court after about 29 years alluding to the case of A. B. Abdulkadir (supra) reiterated that the principle laid down in A. B. Abdulkadir (supra) is equally applicable to the U.P. Excise Act. In Delhi Cloth Mills (supra), the court referring to the case of A B. Abdulkadir (supra) held with perspective:

That was a case on Central Excise, but the principle is equally applicable here. It does not cease to be excise duty because it is collected at the stage of issue of the liquor out of the distillery or at the subsequent stage of declaration of excess wastage.

19. In State of Mysore and Others Vs. D. Cawasji and Company and Others, , which was on Mysore Excise Act, the court held that the excise duty must be closely related to the production or manufacture of excisable goods and it did not matter if the levy was made not at the moment of production or manufacture but at a later stage and even if it was collected from retailer.

From this authority, it is patent that the excisable event is the manufacture/ production and not the issue of liquor in bottles for sale. The excisable event remains the manufacture or production, but its determination and collection is deferred to the stage of issue of liquor in bottles for sale from the bonded warehouse. Therefore, the contention of the Petitioner that before issue of liquor in bottles for sale, no excise duty can be levied and, therefore, excess wastage cannot be said to be exigible, has to be rejected.

20. In Delhi Cloth Mills (supra), the State of U.P. challenged the judgment of the High Court of Allahabad dated 26.10.1979 holding that the State of U.P. and the excise authorities were not entitled to levy excise duty on the wastage of liquor in transit. The Respondents in that case also used to manufacture military rum

under the licence and supply the same to the defence personnel inside and outside the State of U.P. The excise duty on military rum for export was Rs. 7 per L. P. litre while the rate for consumption within the State was Rs. 21 per L. P. Litre. If the exported military rum was under bond thereupon duty was realised by the importing State from the importer thereof. The Respondents bottled the rum according to rules and supplied the same to the consignees at the distillery premises and the consignments were taken by the consignees under the seal of the railway authorities to their respective destinations. Countervailing duty is paid by the importer on the quantity actually received in the importing State. If there is excess wastage on transit, the result is that the quantity actually received by the destination State is less than the quantity on which the State of U.P. charged the lower rate and, therefore, on the quantity shown as wastage the State of U.P. required the exporter to pay differential duty, i.e., difference of Rs. 21 and Rs. 7.

The question arose whether the differential duty is leviable under the U.P. Excise Act and the rules framed thereunder. The court adverting to the relevant provisions of the Act and the rules, particularly Rule 814 of the Excise Manual, Vol. I and the decisions held:

(Para 17 page 742)

17. ...If out of the quantity of military rum in a consignment, a part or portion is claimed to have been wastage in transit and to that extent did not result in export, the State would, in the absence of reasonable explanation, have reason to presume that the same have been disposed of otherwise than by export and impose on it the differential excise duty.

The court rejected the submission of the Respondents that they paid duty on the entire quantity of rum to be exported under excise passes issued to the importer and that after payment of the export duty the rum bottled under the conditions enumerated in the Rules was supplied to the consignee at the distillery premises and the consignments were taken by the consignees under their seals and under the seal of the Railway authorities and the consignment reached their destination with seals intact and that the State Government was not competent to levy any duty on the excess wastage that is shown to have occurred during transit, in as much as only a concessional rate of duty was levied on the liquor which was supposed to be exported outside the State of U.P., saying that if the entire quantity on which such concessional duty was paid did not reach its destination and the shortage is shown as wastage in transit, it surely meant that the short delivery was not exported. The reason of the wastage would not be material so far as this conclusion is concerned. Had this quantity been not exported but consumed locality, the State would have derived higher duty of which it has been deprived. In Paragraph 21 at page 743, the Court held:

...The fact that the exported rum was on payment of export duty or on bond would not again be material inasmuch as when the rum meant for export failed to be exported, there may be a presumption, may be rebuttable one, that what is shown as the excess has merged in mass of rum consumed within the State and was not separated from such a mass. The imposition of differential duty was only deferred to this moment and it still continued to be a duty on production or manufacture of rum. It would not be regarded as a duty not connected with the taxable event of manufacture or production.

The rule laid down in Delhi Cloth Mills (supra) by the Supreme Court fully supports the contention of the Respondents herein. When differential duty on the alleged extra export wastage is payable by the manufacturer, we fail to understand why the duty on excess wastage during transit claimed by the Petitioners herein cannot be levied.

21. The Petitioner contended that the committee set up to find out the transit wastage made some study and experiment in the case of M/s. Mohan Meakin Ltd. and Pilkhani Distillery, but no report as such of the committee has been filed. The Petitioners, therefore, failed to establish that limit of allowable wastage fixed at 0.5% in the Notification dated February 8, 1978, Annexure 8 to the writ petition is arbitrary. This being so, the said Notification will continue to remain in force and that cannot be quashed.

22. Since the Petitioner is not entitled to claim wastage in the case of transport of spirit by bottles at all and it is entitled to claim wastage only upto 0.5% in the case of spirit transported in drums, the recovery sought to be made from the Petitioner by the Respondents is not illegal.

23. In the result, all the petitions fail and are dismissed.