

(2017) 12 BOM CK 0082
In the Bombay High Court
Case No : 8548 of 2004

M/s. Arss Biofuel Pvt. Ltd.

APPELLANT

Vs

State of Maharashtra & Ors.

RESPONDENT

Date of Decision : 13-12-2017

Acts Referred:

[Bombay Prohibition Act, 1949](#), [Section 143](#) of [Section 2\(10\)](#), [Section 21 \(A\)](#) -
Maharashtra Distillation Spirit and Manufacture of Potable Liquor Rules, 1966, Rule 56, Ru

Citation : (2017) 12 BOM CK 0082

Hon'ble Judges : A.S. Oka, Riyaz I. Chagla

Bench : DIVISON BENCH

Advocate : D.B. Sawant, Vinayak R. Salokhe, Ramesh?Lad, S.S. Thakur, Veena Thadhani, ?Mahesh Gawade, A.B. Vagyani, Manish M. Pabale, ?G.R. Golatkar,R.S. Sawant

Judgement

1. The Petitioners in writ petition no. 8548 of 2004 challenge the Bombay Denatured Spirit Rules, 1959 (for short "the Rules") in so far as they regulate the possession, use, sale, import, export and transport of denatured spirit after denaturation as being ultra vires and unconstitutional. The Petition also seeks directions from this Court that the Petitioners who are manufacturers of denatured spirit do not require license under the Bombay Prohibition Act, 1949 (now Maharashtra Prohibition Act and for short "the Act") for sale, purchase, transport, possession, storage, dehydration, import, export of denatured spirit under the Act. The other Petitions have similar challenges and hence these Petitions are decided by this common judgment.

2. The Petitioners are manufacturers of denatured spirit and have obtained a license for manufacturing under the Rules. The Petitioners claim that they have also obtained the license under the Rules for the re-distillation process of denatured spirit granted by the Government of Maharashtra under the Maharashtra Distillation Spirit and Manufacture of Potable Liquor Rules, 1966.

The Petitioners are manufacturers of Ethanol by re-distillation process of denatured spirit. The Ethanol manufactured by the Petitioners is used as admixture in motor spirit. The Petitioners have described denatured spirit as a basic raw material and after extracting water, the same is converted into absolute alcohol having purity of 99.5%. The manufacturing process of the denatured spirit is done in the distillery from where the Petitioners have brought the denatured spirit under excise supervision appointed under Condition No.2 of Licence in Form "I". The Petitioners supply the absolute alcohol in form of denatured, called denatured ethanol to various petrochemical companies either in the State of Maharashtra or outside the State of Maharashtra. The Petitioners also import denatured spirit from outside the State of Maharashtra. Petitioners are also exporting absolute alcohol outside the State of Maharashtra. The Petitioners state that under the Rules they have to obtain a pass issued by Respondent No.3 under 49 and 50 of the Rules for the import and export of denatured alcohol and this is granted only after paying import / export fees mentioned in Rule 52 and 59 of the Rules. The import of denatured spirit is governed by Rules 51 to 56 and the export of denatured spirit is governed by Rules 57 to 62 of the Rules.

3. The Petitioners have referred to the Industries (Development & Regulation) Act, 1951 which was amended in the year 1956 and particularly item 26 of schedule 1 which reads thus:- "26. Fermentation Industries :- 1. Alcohol

2. Other products of fermentation industries,"

The Petitioners have therefore, submitted that by declaration of fermentation Industries in the year 1956, the Union of India has taken alcohol and other products of Fermentation Industries under its control whereby the State has lost the power to make any law in respect of industries declared by the Union under its control to be taken over in public interest. Ethanol which is manufactured by the Petitioners is covered under Item 26 of the First schedule of the Industrial (Development and Regulation) Act, 1951 and hence the State has no powers to take regulatory measures, for manufacture, sale, possession of the industrial alcohol or Fermentation Industry. The Petitioners have claimed that the State has only power to levy duty or fees on alcoholic beverages for human consumption including regulating the rectified spirit, which can be diverted for potable purpose. The power of the State to regulate and control comes to an end, the moment the rectified spirit becomes denatured.

4. The Petitioners have relied upon the definition of denatured spirit in Section 2, sub-section (10) of the Bombay Prohibition Act, which reads thus :- "denatured" means subjected to a process prescribed for the purpose of rendering unfit for human consumption."

The Petitioners have submitted that the Rule making power of the State under Section 143 of the Act does not empower the State to impose duty upon alcohol which is not for human consumption. This is further made clear by the

Constitution of India in Entry No. 51 of List II of Schedule VII, which reads thus:-

"the duties of the excise on the following goods manufactured or produce in the State and contravene duties at the same or lower rates on similar goods manufactured or perused elsewhere in India; (a) Alcohol liquors for human consumption..."; Entry 8 of List II of the VIIth Schedule reads thus:-

"intoxicating liquor, i.e. manufacture, production, transport, purchase or sell of intoxicating liquor" These entries read together enjoins the State to make law in respect of intoxicating liquor. The denatured spirit not being capable of human consumption cannot come under "intoxicating liquor". The Petitioners have accordingly challenged the Rules which empower the State to grant licenses for sale and possession of denatured spirit as not being within the legislative competence of the State and beyond the Rule making authority and ultra vires constitution.

5. Mr. Sawant, the learned counsel for the Petitioners has referred to the Industries (Development and Regulation) Amendment Act, 2016 notified in the gazette of India on 14th May 2016. The first schedule of the Act has been amended and item 26 reads thus : "Fermentation Industries (OTHER THAN POTABLE ALCOHOL) shall be substituted".

The above amendment is retrospective i.e. on and from the commencement of the pre amended Act i.e. Industries (Development and Regulation) Act, 1951. The learned counsel for the Petitioners has accordingly submitted that from the Amendment Act it is clear that denatured alcohol, not being potable alcohol, is exclusively within the perview of the Central Government and the State Government only has control over potable alcohol. He has submitted that under Section 2 Subsection (10) of the Bombay Prohibition Act (now The Maharashtra Prohibition Act) denatured spirit is unfit for human consumption.

6. He has submitted that under the Act denatured spirit has incorrectly been included in the definition of "Liquor" and classified along with spirits, wine, beer, toddy and all liquids consisting or containing alcohol. This has been defined in Section 2 subsection (24) of the Act. The word "spirit" has been defined in Section 2 Sub-section (43) as : "spirit" means any liquor containing alcohol and obtained by distillation (whether it is denatured or not)".

7. He has submitted that denatured spirit is not capable of human consumption as defined under the Act and hence cannot be regulated by the State both under List II Item 8 and as well as under List II item 51. He has contended that the State Government albeit having powers under Section 143 of the Act to frame Rules, these Rules cannot regulate possession, use, sale, import, export and transport of denatured spirit after denaturation. He has submitted that the position of law is been well settled by a seven Judge Bench of the Supreme Court in Synthetic & Chemicals Vs. State of U.P. And Ors., AIR 1990 Supreme Court p.109. as well as in the judgment of the Supreme Court in Bihar Distillery and Anr. Vs. Union of India, AIR 1997 Supreme Court p.1208 and in judgments of the

Supreme Court in VAM Organic Chemicals Ltd. Vs. State of U.P.(VAM I), (1997) 2 SCC p.715 and State of U.P. And Ors Vs. VAM Organic Chemicals Ltd. (VAM ? II), (2004) 1 SCC p.225. It has been consistently held that although the State is competent to regulate and ensure that rectified spirit / industrial alcohol is not surreptitiously converted into potable alcohol so that the State is deprived of revenue, but the power of the State to so regulate stops once there is denaturation of industrial alcohol. He has thus submitted that the State has no power to regulate denatured alcohol as denatured alcohol is incapable of human consumption. He has referred to other judgments of the Supreme Court which have relied upon the seven bench judgment in Synthetics and Chemicals (Supra) and has contended that the Rules by which the State regulate the possession, import, export and sale of denatured alcohol is clearly beyond the legislative competence of the State. He has referred to material from Wikipedia, which has described the denatured alcohol as being unpalatable and unsuitable for human consumption.

8. Mr. Vagyani, the learned Government Pleader appearing for the State has submitted that denatured spirit is capable of being renatured and hence Section 21 of the Act imposes restriction on the denaturing spirit. He has submitted that Section 21 (A) of the Act prohibits any person from altering or attempting to alter denatured spirit by dilution with water or by any method whatsoever, with the intention that such spirit may be used for human consumption as an intoxicating liquor or have in his possession any denatured spirit which he has reason to believe that such adulteration or attempt has been made to alter the denatured spirit. He has further contended that the statute imposes the strict imposition of penalty under Section 67 for contravention of the provisions of Section 21 of the Act. He has also relied upon the judgment of the Supreme Court in VAM Organic (VAM ? II) (Supra) which has recorded the submissions of the Appellants therein, in particular the possibility to renature denatured spirit. It is in this context, he has submitted that the State has a power to take steps to ensure that denatured spirit remains denatured. He has also relied upon the judgment of this Court in the case of Hanil Era Textiles Ltd. Vs. Hindustan Petroleum Corporation Ltd.⁵ wherein this Court has observed that the tender condition of obtaining an endorsement of the name and dosage of denaturants cannot be found fault with and that the quantity and quality of the denaturant should be endorsed by the State Excise Authority. This Court has relied upon the expert opinion regarding variation in the denaturants added to the spirit. This Court has observed from the expert opinion that in the process of converting SDS to Ethanol of 99.6% concentration, the desired level of denaturants may not be retained. However, the question whether the denaturation of a spirit is a permanent and irreversible process is still a question of doubt and needs consideration. He has submitted that there have been several 5 W.P. No. 6937 of 2005 along with other Petitions decided on 21st February 2006. casualties in the case of persons consuming denatured spirit as "hooch" and he has stated that since there was no control or regulation over use and sale of denatured spirit,

the State had enacted the Rules.

9. He has also relied upon the judgment of the Supreme Court in Bihar Distilleries (Supra), where the Supreme Court has observed that the State has the power to ensure that rectified spirit in the course of manufacture or after its manufacturing is not diverted or misused for potable purposes. He has also relied upon the Forensic Science Laboratories Reports and the result of analysis of the products manufactured by the Petitioners which have borne out the inclusion of Methyl alcohol and Ethanol. These products tested were seized by the police in Alibaug, Dist. Raigad. He has contended that this denatured alcohol is capable of being misused and hence it is necessary for the State to regulate its sale, possession, import or export etc. in order to prevent casualties of those consuming denatured alcohol. He has relied upon a decision of this Court in Saral Manufacturing Company Vs. State of Maharashtra dated on 19th November 1998 which has also observed that the State has the power to see that the rectified spirit is not diverted or misused for the potable purposes. He has also submitted that the judgment in Synthetics Ltd. (Supra) has been referred to a larger bench in the case of State of U.P. Vs. Lalta Prasad Vaish, (2007) 13 SCC p.463, where impact of the Industries (Development and Regulation) Act, 1951 and its impact on the power of the State to legislate and / or regulate the industrial alcohol has been referred to a larger bench. He has, therefore, submitted that this Court should await the decision of the larger bench of the Supreme Court.

10. We have carefully considered the submissions. We have perused the various provisions of the Act and the Rules, particularly in the context of the power of the State to regulate the possession, sale, import or export etc. of denatured alcohol. Section 2 Sub-section (10) of the Act has defined denatured as being subjected to a process prescribed for the purpose of rendering unfit for human consumption. The Act thus recognizes denatured spirit as being incapable of human consumption. This would be so despite denatured spirit falling within the definition of liquor in Section 2 Sub-section (24) of the Act as well as within the definition of spirit in Section 2 Sub-section (43) of the Act. The State power to regulate alcoholic liquors under the Constitution of India in List II item 51 is restricted to alcoholic liquors for human consumption and under List II Item 8 is only to regulate the production, manufacture, possession, transport, purchase and sale of "intoxicating liquors". Hence the State has no power to legislate in respect of denatured alcohol which is incapable of human consumption. Section 143 of the Act provides for the Rule making power of the State and by which the impugned Rules have been enacted. The Petitioners have no grievance insofar as the Rules pertaining to obtaining of license for manufacturing denatured alcohol and regulating industrial alcohol till its denatured as provided for under the Rules. The Petitioners have also obtained license for manufacture under the Rules. The Petitioners appear to be aggrieved by Rules 23 to 31 which cover the possession and use of Denatured Spirit and requires a permit for domestic purposes and license for medical purposes of registered medical practitioners. Also by the Rules relating to obtaining wholesale and retail licence for denatured

spirit viz. Rules 32 to 47. As well as the Transport Permit Rules viz. Rules 48 to 50 B and the Import Rules (Rules 51 to 56) and Export Rules (Rule 57 to 62) which provide for obtaining pass from the State Government by paying to them import / export fees.

11. The issue which arises in the Petitions is whether the State has power to regulate denatured alcohol viz. rectified alcohol after its denatured. It is clear from the various judgments of the Supreme Court commencing from *Synthetics and Chemicals (Supra)* that the State has the power to regulate so as to prevent the conversion of alcoholic liquors for industrial use to one for human consumption and for that purpose regulatory fees imposed by the State are justified. It is clearly held that the intoxicating liquor in Entry 8 List II does not cover denatured alcohol which is incapable of human consumption Paragraphs 80, 94 and 110 of the judgment read thus:- "80. It was submitted that the activity in potable liquor which was regarded safe and exclusive right of the State in the earlier judgments dealing with the potable liquor were sought to be justifiable under the police power of the State, that is, the power to preserve public health, morals, etc. This reasoning can never apply to industrial alcohol manufactured by industries which are to be developed in the public interest and which are being encouraged by the State. In a situation of this nature, it is essential to strike a balance and in striking the balance, it is difficult to find any justification for any theory of any exclusive right of a State to deal with industrial alcohol. Restriction valid under one circumstance may become invalid in changing circumstances. Reference may be made to the observations of Justice Brandeis in *Nashville, Chattanooga & St. Louis Railway v. Herbert S. Walters*, 79 L ed 949 : 294 US 405 (1935). See also *Nebbia V. People of the State of New York*, 78 L ed 940, 941 : 291 US 502. Similar is the effect of the approach of this Court in *Motor General Traders v. State of Andhra Pradesh*, (1984) 1 SCC 222 : (1984) 1 SCR 594 : AIR 1984 SC 121.."

"94. It is further contended that Entry 8 in List II which talks of intoxicating liquors only authorises the State legislature to enact laws to regulate but does not empower the State legislature to impose any levy and the various levies which have been imposed by the State legislature on industrial alcohol and even methylated spirit could not be brought within the ambit of regulatory duties for purposes of regulation only and therefore could not be justified under Entry 8 of List II."

"110. In our opinion, therefore so far as the present case is concerned the State in exercise of powers under Entry 8 of List II and by appropriate law regulate and that regulation could be to prevent the conversion of alcoholic liquors for industrial use to one for human consumption and for purpose of regulation, the regulatory fees only could be justified. In fact, the regulation should be the main purpose, the fee or earning out of it has to be incidental and that is why the learned counsel appearing for the State attempted to use this terminology or saying that the purpose is regulation, the earnings are incidental but frankly

conceded that in fact the earnings are substantial. In fact in some of the excise laws in the States they have even used terminology relying on the doctrine of privilege and parting with privilege but in my opinion it is not necessary for us to go into these questions in greater detail as we are not here concerned with the trade in alcoholic liquors meant for human consumption and therefore in view of clear demarcation of authority under various items in the three lists, Entry 8 List II could not be invoked to justify the levies which have been imposed by the State in respect of alcoholic liquors which are not meant for human consumption."

12. The Supreme Court in Bihar Distillery (Supra), following Synthetics and Chemicals (Supra) has in paragraph 24 (1) held thus:- "So far as industries engaged in manufacturing rectified spirit meant exclusively for supply to industries (industries other than those engaged in obtaining or manufacture of potable liquors), whether after denaturing it or without denaturing it, are concerned, they shall be under the total and exclusive control of the Union and be governed by the I.D.R. Act and the rules and regulations made thereunder. In other words, where the entire rectified spirit is supplied for such industrial purposes, or to the extent it is so supplied, as the case may be, the levy of excise duties and all other control including establishment of distillery shall be that of the Union. The power of the States in the case of such an industry is only to see and ensure that rectified spirit, whether in the course of its manufacture or after its manufacture, it is not diverted or misused for potable purpose. They can make necessary regulations requiring the industry to submit periodical statements of raw material and the finished product (rectified spirit) and are entitled to verify their correctness. For this purpose, the States will also be entitled to post their staff in the distilleries and levy reasonable regulatory fees to defray the cost of such staff, as held by this Court in Shri Bileshwar Khand Udyog Khedug Sahakari Mandali Ltd. Vs. State of Gujarat, (1992) 1 SCR 391 : (1992 AIR SCW 554 and Gujchem Distillers India Ltd V. State of Gujarat, (1992) 1 SCR 675 : (1992 AIR SCW 1206".

13. The Supreme Court has thus drawn a distinction between rectified spirit meant exclusively for supply to industries whether after denaturing it or without denaturing it and the rectified spirit in the process of manufacture or after manufacture being diverted or misused for potable purpose. The Supreme Court has held that the State Government has no power to regulate the former i.e. rectified spirit which is exclusively for supply to industries other than for potable purposes. This is further made clear by the Supreme Court in its decision in State of UP Vs. VAM Organics Chemical Ltd. (VAM ? II) (Supra), relying on its decision in VAM ? I (Supra), paragraph 43 of the judgment reads thus:- "43. Considering the various authorities cited, we are of the view that the State Government is competent to levy fee for the purpose of ensuring that industrial alcohol is not surreptitiously converted into potable alcohol so that the State is deprived of revenue on the sale of such potable alcohol and the public is protected from consuming such illicit liquor. But this power stops with the denaturation of the industrial alcohol. Denatured spirit has been held in VAM Organics ? I, to be

outside the seisin of the State Legislature. Assuming that denatured spirit may by whatever process be renatured (a proposition which is seriously disputed by the respondents) and then converted into potable liquor this would not give the State the power to regulate it. Even according to the demarcation of the fields of legislative competence as envisaged in Bihar Distillery, industrial alcohol for industrial purposes falls within the exclusive control of the Union and according to Bihar Distillery "denatured rectified spirit", of course, is wholly and exclusively industrial alcohol."

14. It is thus clear that the Supreme Court has consistently held that the industrial alcohol after denaturing falls within the exclusive control of the Union. We are of the view that although the judgment of the Supreme Court in Synthetics (Supra) has been referred to a larger bench in State of UP Vs Lalta Prasad Vaish (Supra), this does not alter the well settled position that the power of the State stops with denaturation of industrial alcohol. In fact, the issues referred to the larger bench are different viz in relation to the provision of the Industrial (Development and Regulation) Act, and whether the provisions of the Act oust the States powers to legislate under the concurrent list and whether the States powers is also ousted by the Central Government vide Entry 52 of List I and by the legislation of Central Government to regulate the use of industrial alcohol so as to prevent it from being used as an intoxicating liquor. We are accordingly of the view that the present Petitions are to be decided in the light of the law already laid down by the Supreme Court. We accordingly pass the following order: ORDER (a) The Bombay Denatured Spirit Rules, 1959 to the extent that they regulate the possession, use, sale, import, export and transport of denatured spirit viz. Rules 23 to 62 are ultra vires and unconstitutional and are struck down.

(b) There shall be no licence required under the Maharashtra Prohibition Act for sale, purchase, transport, possession, storage, dehydration, import and export of denatured spirit.

(c) We hereby clarify that the power of the State Government in the case of rectified spirit supplied for industrial purposes is only to see and ensure that rectified spirit, whether in the course of its manufacture or after its manufacture, is not diverted or misused for potable purpose. The State can make necessary regulations requiring the industry to submit periodical statements of raw material and the finished product (rectified spirits) and is entitled to verify their correctness.

(d) The Writ Petitions are made absolute on the above terms with no order as to costs