(2024) 04 OHC CK 0238

In the Orissa High Court

Case No : Writ Petition (C) No. 5873 Of 2024

M/s. Bacchus Bottling Pvt. Ltd., Balasore APPELLANT

Vs

State Of Odisha And Others RESPONDENT

Date of Decision : 24-04-2024

Acts Referred:

Odisha Excise Rules, 2017 — Rule 99(7)(b)
Boards of Excise Rules, 1965 — Rule 39A(7)(b)

Citation : (2024) 04 OHC CK 0238

Hon'ble Judges : Chakradhari Sharan Singh, CJ;M.S. Raman, J

Bench : Division Bench

Advocate : Arun Kumar Patra, Debakanta Mohanty

Judgement

1. This matter is taken up through Hybrid mode.

2. In the present writ petition, the petitioner has challenged an order dated 15.12.2023 passed by the Commissioner of Excise, Odisha, Cuttack (opposite party no.2), whereby he has confirmed an order dated 24.03.2023 passed by the Collector, Balasore (opposite party no.3) pursuant to a demand notice issued to opposite party no.5, i.e. Radiko Khaitan Limited to deposit excise duty amounting to Rs.35,73,544/- including 10% fine towards destruction of stocks of 1469 Cases of IMFL produced by opposite party no.5, which were declared unfit for human consumption as per the Rule 99(7)(b) of the Odisha Excise Rules, 2017 (in short 'the Rules').

3. Mr. Arun Kumar Patra, learned counsel appearing on behalf of the petitioner has argued that he is the licensee and opposite party no.5 produces IMFL of its brand under the license granted in favour of the petitioner and, accordingly, the petitioner has been asked to pay the excise duty with a fine of 10%. He has argued that the said orders have apparently been passed exercising power under Rule 99(7)(b) of the Rules. He contends that the said Rule 99(7)(b) of the Rules is ultra vires the provisions of the Odisha Excise Act, 2008 (in short 'the Act'). He further contends that Sections 90 and 94 of the Act confers power upon the

State Government to frame rules with respect to the items mentioned therein. He submits that in exercise of powers under Sections 90 and 94 of the Act, no rule could have been framed for imposition of penalty as the provisions under Sections 90 and 94 of the Act do not confer any such power on the State to frame rules in this regard.

4. Mr. Patra, learned counsel for the petitioner has also argued that similar provision was there in the nature of Rule 39-A(7)(b) of the Boards of Excise Rules, 1965 which was struck down by a division Bench of this Court in its judgment in case of Shaw Wallace & Co. Ltd. v. State of Orissa; 2019 (I) OLR-928.

5. Rule 99(7)(b) of the Odisha Excise Rules, 2017 reads as under:

"99(7)(b). If any such stock stored becomes deteriorated in quality due to leakage, sedimentation, damage to container or becomes unfit for human consumption owing to long storage or for other factors, the licensee shall be squarely responsible and shall be liable to pay fine equal to the duty payable to the State Government on the stock so spoiled along with ten percentum of excess over the amount so payable".

6. Rule 39-A(7)(b) of the Boards of Excise Rules, 1965 as it then existed, reads as under:

"39-A(7)(b). If any stock of I.M.F.L./ Beer stored under Rule 33 (c) becomes unfit for human consumption owing to long storage or for other factors the licensee shall be squarely responsible and shall be liable to pay fine equal to five times the duty payable to the Government on the stock so spoiled.

7. On comparison of the above two provisions, we prima facie find substance in the submission made by learned counsel for the petitioner that they are in pari materia. We are also prima facie satisfied with the submission advanced on behalf of the petitioner that a coordinate Bench of this Court in case of Shaw Wallace & Co. Ltd. v. State of Orissa (supra) had struck down Rule 39-A(7)(b) of the Boards of Excise Rules, 1965 on the reasoning that Section 90 of the Act did not confer such power on the Board to make rules for imposition of penalty.

8. Issue notice. Since Mr. Debakanta Mohanty, learned Additional Government Advocate (AGA) accepts notice on behalf of opposite parties no.1 to 4, let requisite number of copies of this writ petition be served upon him by learned counsel for the petitioner within three working days. Six weeks' time is allowed for the opposite parties-State to file their counter affidavit.

9. Issue notice to opposite party no.5 by Registered/Speed Post with A.D., making it returnable before the next date, requisites for which shall be filed within a week.

10. List this matter on 03.07.2024.

I.A. No.2550 of 2024

11. Considering the above facts and circumstances, we direct that in the meanwhile, the opposite parties shall not insist upon recovery of 10% of fine imposed by opposite party no.3 by the demand notice (Annexure-5).

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