(1999) 04 AHC CK 0171

In the Allahabad High Court

Case No : C.M.W.P. No. 478 of 1984

Narang Industries Ltd. APPELLANT

Vs

State of U.P. and others RESPONDENT

Date of Decision : 05-04-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Excise Manual — Rule 465, 466

Citation : (1999) 2 AWC 1692

Hon'ble Judges : R.K. Agarwal, J;M.C. Agarwal, J

Bench : Division Bench

Advocate : S.K. Suri and V.V. Sharma, for the Appellant; S.C. and B.K. Pandey, for the Respondent

Final Decision : Allowed

Judgement

M.C. Agarwal, J.—By this petition under Article 226 of the Constitution of India, the petitioner challenges an order dated 17th January, 1984, passed by the Excise Commissioner, U. P, levying a sura of Rs. 19.278 under Rule 466 of the U. P. Excise Manual.

2. The petitioner is a distiller and manufacturer of country liquor holding a licence in Form P.O. 2 and for the year 1977-78 it was granted a contract under the provisions of Rule 417 of the U. P. Excise Manual for supply of country liquor to the Government bonded warehouse at Varanasi and Gyanpur. The impugned order has been passed on the allegations that the petitioner M/s. Narang Distillery who was granted a licence in Form C.L. 1 failed to supply country liquor from 5th July. 1977 and had thus violated the conditions of the licence which required the dealer to maintain certain minimum stock and, therefore, in terms of Rule 466 of the U. P. Excise Manual it was liable to pay a penalty of Rs. 17.50 per alcohol litre (A.L.J. The petitioner''s contention is that the conditions 9 and 10 of the licence issued to it in Form C.L. 1 were as under:

"6. That condition Nos. 9 and 10 of the licence in Form C.L. 1 stand as under :

"9. Licensed vendors shall be entitled to have spirit issued to them will all reasonable expedition in such quantities subject to reasonable limit and at any of the prescribed strength, as they require on proof of payment into a Government treasury of the Excise duty at the rate from time to time prescribed and of the supply price at the rate agreed to in this contract and in the case of country spirit shops under the direct management on the production of a permit granted by the District Excise Officer or an Excise inspector authorized in this behalf."

''10. Failure to supply spirit as specified in condition No. 9, supra, within what the Collector considers a reasonable time shall entail a penalty, at the discretion of the Excise Commissioner, not exceeding Rs. 17.50 per alcohol litre spirit demanded but not supplied, in such cases the spirit may be purchased by the Collector from elsewhere at his discretion and at the risk of the contractor. The penalty, the cost of spirit purchased and any loss to Government, that may result may be deducted from the amount, if any, due to the contractor or from his deposit or from the price received under condition No. 2 above, provided that if failure to supply is proved due to (1) damage to or in the factory of the contractor from causes beyond the contractor''s control or (2) strikes, pestilence, riot, violence of the mob or other resistible force or (3) to failure on the part of railway authorities to supply sufficient wagons for transport of raw materials to and finished products from the contractors factory and if immediate notice of the said cause or occurrence has been given to the Excise Commissioner and the Collector, the penalty of Rs. 17.50 per alcohol litre of spirit in this condition will not be exacted from the contractor."

3. According to it during the period April, 1977, 12,280 bulk litres (B.L.J of plain and 7258 B.L, of spiced spirit were supplied by the petitioner to warehouse at Gyanpur as against 8240 B.L, of plain and 484 B.L. of spiced country liquor during the year, 1976-77, it has given certain other figures also to show that there was a sudden heavy demand that resulted in the shortage, it is not necessary to deal with those details, in short, its contention is that because of a sudden abnormal heavy demand in the period preceding 2nd May, 1977, there was a breakdown in the supply and the minimum prescribed stock could not be maintained. On 26th April, 1983, the Excise Commissioner issued a show cause notice to the petitioner as to why a penalty of Rs. 24.480 be not imposed, it is contended that the Government actually did not suffer any loss and that as provided in the Rule, the Collector did not requisition the supply from any other area. By the impugned order a penalty of Rs. 19.278 has been levied, it is contended that an action of the Commissioner is invalid and that the Government had no power to make any Rule of that type, it is also contended that the order does not show that the petitioner failed to "supply the country liquor within a time judged by the Collector to be reasonable nor does it show that the supply was obtained from elsewhere. Further, the Commissioner has not found that the Government actually suffered any loss.

4. In the counter-affidavit, the reliance is on Rule 466 and it is contended that

the statistical data given by the petitioner is incorrect.

5. We have heard Sri Neeraj Sharma. Advocate holding brief from Sri V. V. Sharma, learned counsel for the petitioner and Sri B. K. Pandey, learned standing counsel for the respondent.

6. As regards the validity of Rule 466, no serious argument was raised before us, in any case, the controversy about the validity or otherwise Rule 466 is of no consequence because the provisions of Rule 466 have been incorporated in the contract between the parties executed in the form of a licence in form C.L. 1 and condition No. 10 thereof as reproduced in the writ petition itself makes provision for the levy of penalty which, in our view, is nothing but damages for breach of contract. The question, however, is whether the impugned order is justified. A copy of the order is placed at pages 26 and 27 of the paper book as Annexure-3 to the writ petition and it reads as under :

"Order:

M/s. Narang Distillery Ltd., NawabganJ, Gonda, were given C.L. 1 licence by this office for wholesale supply of country liquor to the bonded warehouse situated at Varanasi district for the year 1977-78. On 5th May.'' 1977, the country liquor licensees of Gyanpur. Varanasi, district deposited a duty of Rs. 24,480 for the issue of 3060 bulk litres of spiced country liquor but the same could not be supplied to them because the C.L. 1 licenses (M/s. Narang Distillery) failed to supply this liquor to the bonded warehouse. A show cause notice was issued to the licensee on April 24. 1983, to show cause within fifteen days as to why penalty of Rs. 24,480 be not imposed on them for this failure of supplies. As no reply for the failure of supplies was given to the above show cause notice by the licensee a telegraphic reminder was issued to them on July 1. 1983. The licensee gave a written reply to the above show cause notice on 9.8.83. A further chance for personal hearing was also given to the licensee on 16.12.1983.

The arguments given on the personal hearing were based on their written reply of 9th August. 1983. The main argument was that they had to give special issues on 2.5.1977 which resulted in the shortage of stocks on 5.5.77 it was only a case of delayed supplies as the Collector did not requisition country liquor stocks from another district as is provided under Rule 466 of the Excise Manual, Vol. 1 and that subsequently it was their own supply which met this demand of 3060 litres of spiced spirit.

I find that the arguments put forward by the licensee are not tenable. Under Rule 465 of the Excise Manual, Vol. 1 C.L. I licensee has to maintain certain minimum stock on the warehouse and under Rule 466 of the Excise Manual. Vol. I the licensee is liable for penalty to the extent of Rs. 17.50 per A.L, of liquor demanded but not supplied by him. Had the licensee complied with Rule 465 of the Excise Manual, Vol. 1, this situation of not supply would not have arisen. Taking into consideration the above facts I find that M/s. Narang Distillery. Nawabganj, Gonda, the holder of C.L. I. Licence during the year 1977-78, are guilty under Rule 466 of the Excise Manual, Vol. 1 and I impose upon them a penalty of Rs. 19.278.

Sd. Rajiv Kumar Singh Excise Commissioner, U. P."

7. The condition of the agreement as contained in clause (10) shows that the penalty or damages can be imposed on a contractor when there is a failure to supply within a time considered by the Collector to be reasonable. Therefore, before action for penalty or damages can be initiated, the Collector has to record an opinion that there is unreasonable delay in making the supply to the bonded warehouse, then the penalty has to be levied at the discretion of the Excise Commissioner. This means that the discretion should be exercised by the Excise Commissioner who was holding office at the time of the breach or in proximity to the default, it is not possible that where the Collector and Excise Commissioner holding office at the time of the breach complained of did not initiate any action or did not consider the default to be worth taking any action, a successor Commissioner may after several years disturb the settled water and create an issue out of no issue, in the present case, the facts placed before us show, that the notice to show cause was issued to the petitioner after a lapse of six years when even a suit for damages had become barred by time, it is not shown that the proceedings were pending from before and were initiated promptly. Therefore, the order suffers from the vice of arbitrariness.

8. On the factual aspect of the matter also, the order does not give any details to show what was the minimum stock the dealer was required to maintain and whether the shortage or break in supply was without a reasonable cause. in its reply, the petitioner had stated that it was not informed that it had to make special issue on 2.5.1977. The facts show that on that date, there was a sudden heavy demand which the petitioner seems to have met resulting in the dwindling of its stock. Then again on 5th May. 1977, there was an unexpected demand for 3402 B.L, which was not met. The Commissioner, while levying the penalty, has not dealt with the question whether there were any circumstance which showed a neglectful default on the part of the petitioner which required the levy of damages or penalty. The inspector-in-charge of the bonded warehouse and the Collector of the district do not appear to have taken any action at all in the matter which shows that the non-supply of the liquor was not of any serious consequence. We are, therefore, of the view that the impugned order passed by the Commissioner is without jurisdiction and absolutely arbitrary.

9. Learned counsel for the respondent contended that the order of the Commissioner could be subjected to revision before the State Government, it is true that a revision to the Government was possible but that cannot take away the jurisdiction of this Court in interfering with the matter under Article 226 of the Constitution of India. This writ petition was filed in the year 1984 and has remained pending in this Court for almost 14 years and an interim order was made on 21.5.1984 staying the realisation of the aforesaid amount by furnishing the bank guarantee, it would not, therefore, be feasible to decline to entertain

this writ petition now.

10. For the above reasons, the writ petition is allowed. The impugned order dated 17th January. 1984, passed by the Excise Commissioner, U. P., is hereby quashed. The bank guarantee furnished by the petitioner in pursuance of this Court''s order dated 21.5.1984 shall stand discharged.

