(2010) 09 PAT CK 0181

In the Patna High Court

Case No : CWJC No. 12024 of 1996

New Swadeshi Distillery — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 30-09-2010

Acts Referred:
Bihar and Orissa Excise Act, 1915 — Section 2, 90
Stamp Act, 1899 — Article 15

Citation : (2011) 59 BLJR 1306 : (2013) 22 GSTR 270 : (2010) 1 PLJR 1039

Hon'ble Judges : S.K. Katriar, J;Birendra Pd. Verma, J

Bench : Division Bench

Advocate : Y.V. Giri and Vikas Ratan Bharti, for the Appellant; Ray Shivaji Nath and Satish Kumar Sinha, for the Respondent

Final Decision : Allowed

Judgement

S.K. Katriar, J.—This writ petition has been preferred with the prayer to set aside various orders of the Respondent authorities whereby the Petitioner has been called upon to purchase and furnish the requisite promissory bond of the value of Rs. 10 lacs in order to replace the earlier promissory bond of the value of Rs. 53,000/- submitted by them, in terms of various provisions of the Excise Laws of Bihar. The Respondents have placed on record their counter affidavit and have supported the impugned action.

2. A brief statement of facts essential for the disposal of this writ petition may be indicated. The Petitioner is engaged in the manufacture and sale of non-potable spirit and denatured spirit, having its manufacturing unit at Narkatiaganj, District-West Champaran. The Petitioner has taken licence to manufacture these items which are unfit for human consumption and are normally used as raw materials for manufacture of liquor, medicines, or the like which are potable and fit for human consumption. It is clearly stated in the pleadings of the Petitioner that they do not manufacture potable liquor fit for human consumption. The Petitioner had obtained licence in Form Nos. 25 and 28A under the provisions of the Bihar

Excise Act, 1915 (hereinafter referred to as ''the Act''), way back in 1962, and had furnished promissory bond of the value of Rs. 53,000/-. Respondent No. 3 issued his communication dated 13.12.82 (Annexure-7), to Respondent No. 4, that Narkatiaganj factory, i.e. the Petitioner herein, should either pledge the immovable properties of the factory premises or replace the existing promissory bond by upgrading it to the value of Rs. 10 lacs, and impugned herein. This was followed by consequential direction bearing memo No. 89, dated 17.1.83 (Annexure-8), from Respondent No. 4 to the Petitioner to furnish security bonds of the value of Rs. 10 lacs, and impugned herein. Aggrieved by the two communications, the Petitioner submitted its representation dated 15.2.83, to Respondent No. 3, that the Petitioner may not be required to purchase and furnish promissory bonds of the value of Rs. 10 lacs. The Petitioner submitted a fresh application dated 18.2.93 (Annexure-9), before Respondent No. 3, requesting for interim stay of the communications dated 13.2.82 and 17.1.83. This was followed by the communicated 15.4.94 (Annexure-10), from Respondent No. 5 to the Petitioner, enclosing thereto a copy of the audit report in justification of the impugned orders, calling upon the Petitioner to upgrade their promissory bond. The Petitioner''s representations suffered inaction. Respondent No. 3 ultimately disposed of the same by order dated 9.4.96 (Annexure-16), whereby he passed on the representations to the State Government for final orders, and impugned herein. This was followed by the communication dated 2.8.96 (Annexure-17), from Respondent No. 5 to the Petitioner, to comply with the directions of the State Government, leading to the present writ petition. By order dated 19.2.97, the present writ petition was admitted, and operation of the orders marked Annexures-7 and 17 were stayed. Further interim order was passed that the Petitioner shall not part with the possession of its property or otherwise create any charge thereon except in normal course.

3. While assailing the validity of the impugned action, learned Counsel for the Petitioner submits that, in view of the provisions of the Constitution with particular reference to the various entries in the three lists to Schedule-VII of the Constitution, the State Legislature cannot legislate with respect non-potable items, not fit for human consumption, which can be used as raw materials to produce items fit for human consumption. In view of the position that the Petitioner''s licence is to manufacture non-potable item(s), the State Government cannot pass orders controlling their industry under the Excise Laws of Bihar. It is entirely a central subject and can be governed by an Act of the Parliament. He relies on the judgment of the Supreme Court in State of Bihar v. New Swadeshi Sugar Mills Ltd. (2003) 11 SCC 478. He also relies on the judgment of a Division Bench of this Court which had the occasion to discuss the issues in the case of Shivashankar Chemical Industries (Bihar) Ltd. v. State of Bihar 2010 (3) PLJR 973. He submits that the Excise Laws have become completely out-dated, wholly inconsistent with the provisions of the Constitution and, therefore, fit to be ignored. He relies on the Division Bench judgment of this Court in Industrial Corporation Pvt. Ltd. and etc. Vs. State of Bihar and Others, , wherein, in his

submission, it has been laid down that a licence under the Excise Laws of Bihar for manufacture of non-potable items is ornamental and has no warrant in law. He next submits that Rule 14 travels beyond the power and authority conferred by Section 90 of the Act and is, therefore, ultra vires. He submits that Rule 14 applies to new distilleries and not to the existing distilleries. He further submits that Form No. 159 is under paragraphs 228 and 489. In his submission, paragraph 228 applies to a contractor, and not to manufacturer of non-potable spirit and denatured spirit. He lastly submits that the Petitioner will suffer serious prejudice, inasmuch as he is now required to spend a sum of Rs. 10 lacs to carry out the impugned directions.

4. The learned Additional Advocate General has taken us through the various provisions of the Excise Laws of Bihar and has made submissions in support of the impugned action. He also submits that, as is stated in the counter affidavit, the Petitioner is required to comply with the direction in Form No. 159 in terms of paragraph 489, and not in terms of paragraph 228 which is applicable to contractors which the Petitioner is not.

5. We have perused the materials on record and considered the submissions of the learned Counsel for the parties. We may first deal with the relevant provisions of the Act and the Rules, as well as the Executive Instructions made thereunder, as in force today. Section 2 is the definition section which, inter alia, defines denatured spirit, excisable articles, excise duty, intoxicant, liquor, spirit, etc. Section 90 of the Act confers powers on the Board of Revenue, Govt. of Bihar, to frame rules to carry out the terms and conditions of the Act. In exercise of the powers conferred by Section 90 of the Act, the Board of Revenue framed rules on 29.4.1919 (hereinafter referred to as ''the Rules''). Rule 1 provides and, inter alia, defines plain spirit, rectified spirit, etc. Rule 9 provides that the Commissioner shall appoint such officers and establishment as he thinks fit to be in the charge of a distillery, and further provides that the cost of the same including salary, post-retirement benefits, etc. of such employees of the State Government shall have to be paid by the distillery. Rule 14 reads as follows:

14. Before the licence to work the distillery is granted by the Collector, the distiller shall execute a bond in the prescribed form pledging the premises, stills, all apparatus and utensils, employed in the manufacture of spirit for the due discharge of all payments which may become due to Government. In lieu of executing such a bond, the distiller may deposit Government promissory notes of such value as the Commissioner may direct.

5.1. It appears to us that the Board of Revenue issued executive instructions supplemental to the Rules. Paragraph 1 of the same defines liquor, intoxicating drugs, and opium. Paragraph 228 reads as follows:

228. Deposit of bond. - By the terms of his license the contractor will be required to deposit a certain sum, or to execute a bond in Form 159 pledging all plant employed in manufacture of spirit in the distillery and when the distillery is a

private one belonging to him, such distillery buildings also, to such amount as shall be determined by the Board as security for the performance of his contract and the payment of all sums due to Government. Such bonds are chargeable with the stamp duty prescribed in Article 15, Schedule I of the Indian Stamp Act, 1899.

Paragraph 489 of the executive instructions reads as follows:

489. The forms to be used in inspections are given (see Vol.-II) and the forms of Bonds (see Vol.-II) the Sub-Inspectors of Excise and Salt Incharge of Circles should submit statements in forms No. 153 and 154 with their diaries for the last period of each months showing the actual figures of consumption, of country spirit and drugs respectively as ascertained from licensees'' account books.

Form No. 159, framed in terms of paragraphs 228 and 489 of the executive instructions, provides that "...the licensee shall execute a mortgage in the prescribed form of the distillery premises, stills, apparatus, plant and utensils employed in the manufacture of spirit for the total value of rupees....", or execute promissory bond of the value of Rs. 10 lacs. The impugned orders marked Annexures-7, 8, 10, 16 and 17 have been issued in exercise of powers under Rule 15 read with paragraphs 228 and 489, and Form No. 159 of the executive instructions.

6. The over-arching reality with its brooding omnipresence in the present litigation is that non-potable spirit unfit for human consumption is being governed by the laws of the State Legislature and executive instructions of the State Government which has become wholly archaic and are reminiscent of the by-gone days of imperialism. It is in gross violation of the provisions of the Constitution of India. The State Government by the existing Excise Laws in force in Bihar is controlling and regulating spirit and denatured spirit which is really non-potable, unfit for human consumption, and can be used as raw materials which may ultimately be fit for human consumption. The admitted position is that the Petitioner''s licence is only and exclusively for the manufacture of non-potable items.

7. Before we proceed further, we would like to notice the relevant entries in List-I and List-II of the 7th Schedule to the Constitution of India. Part-XI of the Constitution is headed "Relations between the Union and the States". Chapter-I of Part-XI is headed "Legislative Relations". Article 245 is headed ''"Distribution of Legislative Powers", and reads as follows:

245. Extent of laws made by Parliament and by the Legislatures of States. - (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 246 reads as follows:

246. Subject-matter of laws made by Parliament and by the Legislatures of States. - (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List-I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List-III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-I I in the Seventh Schedule (in this Constitution referred to as the ''State List'').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

The distribution of legislative powers spread over the Union List (List-I), the State List (List-II), and the Concurrent List (List-III), form the triumvirate of the Seventh Schedule of the Constitution. It is settled by the authoritative pronouncements of the Supreme Court that the Seventh Schedule to the Constitution combined together distribute the legislative powers of the Parliament and the State Legislatures. The various entries relevant in the present context have been the subject matter of a large number of authoritative pronouncements of the Supreme Court, two of which have been adverted to hereinabove. The Constitution Bench judgment in New Swadeshi Sugar Mills (supra), is the latest on these issues. Our task has been rendered easier by the judgment in Shivashankar Chemical Industries (supra), where the entire course of decisions relevant in the present context have been recapitulated and summarized. We will have the occasion to deal with the same at the appropriate place.

8. Entry 84 of the List-I (the Union List) of the Seventh Schedule are reproduced hereinbelow:

84. Duties of excise on tobacco and other goods manufactured or produced in India except:

(a) alcoholic liquors for human consumption,

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

Entries 8 and 51 of List-II (the State List), are reproduced hereinbelow:

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

9. It is evident on a plain reading of the relevant entries reproduced hereinabove, that the power to levy duties of excise on tobacco and other goods manufactured or produced in India, except alcoholic liquor for human consumption, is vested in the Parliament. Correspondingly, Entry 8 of List-II (the State List) empowers the State Legislature to legislate with respect to intoxicating liquors. The Bihar Legislature, therefore, lacks the legislative competence to frame the existing Excise Laws of Bihar, and are ultra vires and void in so far as the same seek to govern production, manufacture, and distribution of non-potable spirit. In view of the admitted position that the Petitioner''s licence is under the Excise Laws of Bihar to manufacture and produce non-potable liquor, unfit for human consumption, the Bihar Government cannot control the same in the absence of any law to do so. The existing excise laws of Bihar cannot be enforced against the Petitioner.

10. The issues in hand are entirely covered by the authoritative pronouncement of the Constitution Bench judgment of the Supreme Court in State of Bihar v. New Swadeshi Sugar Mills Ltd. (supra). Following the same, and other judgments of the Supreme Court, a Division Bench of this Court has summarized the position in Shivashankar Chemical Industries (supra), and has held to the same effect. A Division Bench of this Court in Industrial Corporation Pvt. Ltd., (supra), had the occasion to consider similar issues. This Court, inter alia, observed that a licence under the existing Excise Laws of Bihar in so far as the manufacture of non-potable spirit and denatured spirit is concerned, is ornamental. This issue also came up for the consideration of another Division Bench of this Court which held to the same effect. It is obvious that the State Government is needlessly, arbitrarily, and most illegally, forcing its inexecutable laws on the Petitioner.

11. In that view of the matter, we do not feel the necessity of examining the remaining contentions advanced by learned Counsel for the Petitioner. The State Government is hereby directed to desist from enforcing the existing Excise Laws of Bihar with respect to manufacture of non-potable spirit and denatured spirit meant for commercial purposes. The impugned orders are hereby quashed. The promissory bond executed by the Petitioner in Form No. 159, of the value of Rs.

53,000/-, is discharged. The Respondent authorities are directed to return the same absolutely unencumbered to the Petitioner forthwith. The Respondent authorities shall not realize salary, post-retirement benefits, etc. of the employees of the State Government from the Petitioner with effect from 1.10.2010.

12. The Excise Commissioner is hereby directed to take steps to frame fresh laws consistent with the provisions of the Constitution of India forthwith.

13. In the result, this writ petition is allowed. The impugned orders are hereby quashed. There shall be no order as to costs.

Birendra Prasad Verma, J.

14. I agree.