

(2011) 03 PAT CK 0006

In the Patna High Court

Case No : CWJC Nos. 727 of 1995 and 3676 of 1999

New Swadeshi Distillery Proprietor Oudh Sugar Mills Limited
and Shri Sushil Kumar Poddar

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Citation : (2011) 03 PAT CK 0006

Judgement

S.K. Katriar, J.—CWJC No. 727 of 1995 is directed against the following orders passed by Respondent No. 3 in purported exercise of powers conferred on him under the Bihar Molasses (Control) Act, 1947 (hereinafter referred to as "the Act"), and the Bihar Molasses (Control) Rules, 1955 (hereinafter referred to as "the Rules"), framed in exercise of the powers to frame rules u/s 13 of the Act:

(i) The order bearing memo No. 3 dated 23.1.95 (Annexure-4), for the year 1993-94, whereby penal duty of Rs. 2,64,78,069/- (Rupees two crores sixty four lakhs seventy eight thousand and eighty nine), was imposed for the alleged short-fall in distillation of spirit to the extent of 1053159.2 L.P.L.;

(ii) Order bearing memo No. 7, dated 23.1.95 (Annexure-5), for the period 1993-94, whereby penal duty of Rs. 29,47,771/- (Rupees Twenty nine lakhs forty seven thousand seven hundred and seventy one), was imposed for loss in transit of 3275.29 quintals of molasses; and

(iii) Order bearing memo No. 7, dated 23.1.95 (Annexure-7), for the year 1993-94, whereby penal duty of Rs. 1,90,800/- was imposed after rejecting the claim of the Petitioner for destruction of molasses on account of floods.

2. A brief statement of facts essential for the disposal of this writ petition may be indicated. The Petitioner is a public limited company registered under the , with its registered office at Calcutta. The company, inter alia, owns and operates two integrated plants at Narkatiaganj in the district of West Champaran, one of which manufactures sugar and the other one manufactures and distils industrial/

rectified spirit. Molasses is the raw material for production of industrial/rectified spirit. Molasses is allotted to such distillation plants under specific orders of the Molasses Controller, and it receives molasses from various sources including its own sugar plant situate in the same precincts under authorization of the Molasses Controller. Though not of much relevance in the present context, it may be stated for the sake of clarity that the Petitioner for its distillation unit is not free to draw molasses from its own sugar plant and has to be allotted by specific orders of the Molasses Controller. The dispute arising out of the three impugned orders are with respect to the same period, i.e. 1993-94.

2.1. In order to provide the requisite background for issuance of Annexure-7, it may be stated that the Petitioner had sent a communication to Respondent No. 3, seeking to inform them that flood waters had entered their premises which had got mixed up with the molasses stored there which was rendered unfit for distillation of industrial/rectified spirit. The stand taken by the Petitioner was rejected by Respondent No. 3 as false and consequently is-sued Annexure-7, whereby penal duty of Rs. 1,90,800/- was imposed and was directed to be deposited in the Government treasury.

2.2. Respondent No. 3 also issued Annexure-4, stating therein that the Petitioner had not distilled industrial/rectified spirit as per the prescribed procedure resulting in short-fall of 1059159.2 LPL Therefore, the Petitioner was directed to deposit a sum of Rs. 2,64,78,089/- by way of penal duty.

2.3. This was followed by Annexure-5, whereby the Petitioner's claim for loss of 327529 qntls. of molasses in transit was rejected by Respondent No. 3, as a result of which Rs. 29,47,771/- was imposed on the Petitioner by way of penal duty.

The three orders have been impugned in this writ petition.

3. While assailing the validity of the impugned action, Learned Counsel for the Petitioner submits that the issues are concluded by judgments of this Court and that of the Supreme Court. He submits that the Act read with the Rules do apply to the transactions of the Petitioner, but there is no provision for penal duty in the Act and/or the Rules. He relies on the following reported judgments:

(i) Judgment of a Division Bench of this Court in Industrial Corporation Pvt. Ltd. and etc. Vs. State of Bihar and Others,

(ii) The said judgment of the Division Bench of this Court was taken in appeal in the Supreme Court and has been upheld in State of Bihar and Others Vs. Industrial Corporation Pvt. Ltd. and Others,

He submits in the same vein that it is settled by authoritative pronouncements of the Supreme Court and this Court that, in the scheme of the Constitution of India, the power to legislate with respect to non-potable spirit, i.e. industrial/rectified spirit, is vested in the Parliament. Therefore, Excise Laws of the State framed before enforcement of the Constitution are wholly inconsistent with the

provisions of the Constitution, and have become archaic and has indeed been set aside as ultra vires and unconstitutional by different decisions of this Court. He relies on the following judgments:

(i) Division Bench judgment of this Court to which one of us (S.K. Katriar, J.) was a party. *Mc Dowell v. State of Bihar* 2010 (4) PLJR 994

(ii) *New Swadeshi Distillery v. State of Bihar* 2011 (1) PLJR 1039

(iii) *Industrial Corporation Pvt. Ltd. and etc. Vs. State of Bihar and Others*, (paragraphs-19, 20, and 25)

4. Learned Additional Advocate General has supported the impugned orders. He submits that the impugned actions are not under the Excise Laws of the State, but under the provisions of the Act and the Rules which deal with storage, disposal, etc. of molasses. He relies on the judgment of the Supreme Court in *The Belsund Sugar Co. Ltd. Vs. The State of Bihar and Others Etc.*,

5. We have perused the materials on record and considered the submissions of Learned Counsel for the parties. It is common case of the parties that the impugned action is not under the Excise Laws of the State of Bihar which have been declared as ultra vires the Constitution of India to the extent the same apply to the industrial/rectified spirit. In view of distribution of legislative powers spread over Lists. I, II and III under the Constitution, the power to legislate with respect to non-potable spirit is vested in the Parliament. The Excise Laws of Bihar were originally framed before promulgation of our Constitution though amended thereafter also, are inconsistent with the provisions of the Constitution, have been declared ultra vires by decisions of the Supreme Court as well as this Court, and have become archaic and inapplicable to non-potable industrial/rectified spirit being manufactured in the State of Bihar. Learned Counsel for the Petitioner has rightly relied on the Division Bench judgments of this Court in *Mc Dowell v. State of Bihar* (supra), as well as *New Swadeshi Sugar Mill (sic-- Distillery ?) v. State of Bihar* (supra), to which one of us (S.K. Katriar, J.) was a party.

6. We now pass on to the next issue canvassed at the Bar. Learned Counsel for the Petitioner has fairly conceded that the Petitioner company is indeed governed by the Act and the Rules, but there is no provision for penal duty, i.e. cash penalty, thereunder. Learned AAG submits that there are adequate provisions, particularly in the Rules, vesting the requisite power in the authorities to impose penal duty. He, inter alia, relies on Section 3(j) of the Rules which reads as follows:

3. Supply of Molasses.

(j) The ownership of all molasses allotted to a distillery or any person or organisation shall continue to vest in the owner, occupier or Manager or a sugar factory or the stockist until it is actually delivered at the distillery or at any other place where it is directed to be delivered and all losses occurring from any cause

other than wilful omission on the part of the allottees shall be borne by the sugar factory.

It is evident on a perusal of the same that it does not even remotely vest any power in the authorities to impose penal duty on the Petitioner for the alleged acts of omission and commission/The limited scope and sweep of Rule 30") is as to who will bear the losses in transit of molasses. It has either to be borne by the transferor or the transferee as per the circumstances indicated therein. We, there-fore, reject this part of the submission advanced on behalf of the Respondents.

7. We have gone through the entire scheme of the Act and the Rules, and we do not find any provision authorizing the State Government to impose penal duty, i.e. cash penalty, for any act of omission or commission committed thereunder. The same contain provisions enabling the Respondents to prosecute the Petitioner for the alleged acts of omission and commission, but cannot impose penal duty.

8. We are relieved of the duty of a detailed discussion of this issue. A heavy batch of writ petitions including the present ones raising identical issues were admit-ted for consideration and all of which were directed to be taken up for hearing and disposal together. All the cases (except the present one by inadvertence) were disposed of by a Division Bench of this Court in *Industrial Corporation Pvt. Ltd. v. State of Bihar* (supra). The Division Bench by its exhaustive judgment set aside identical orders passed with respect to those Petitioners. Indeed three writ petitions of the present Petitioner, namely, CWJC Nos. 6433 of 1988, 4696 of 1995, and 8032 of 1995, were also allowed by the same judgment. The present writ petition ought to have been taken up along-with the same batch of cases but es-caped attention inadvertently. We are of the view that the present writ petition is clearly covered by the said judgment. It has been held therein that the issues are covered by the Constitution Bench judgment of the Supreme Court in *Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others*, The Court also considered the alterations in the Licence in Form No. 28A under the Bihar Excise Act and the Rules thereunder, whereby the following clause was inserted (published in the Bihar Gazette Extraordinary No. 609, dated 17.10.1986):

The spirit manufactured under this Licence shall be subject to periodical analysis by or under the orders of the Collector or the Excise Commissioner and the Licensee shall be bound to take steps to remedy any defect in quality thereof which the Excise Com-missioner may consider material and the Licensee shall ensure a minimum recovery of 22.5 Bulk litres or 36.0 I.P. Litres of rectified spirit from one quintal of molasses. If he makes available lesser recovery than this, he shall be liable for payment of penal duty for the loss calculated on the shortage. The Licensee shall be bound to supply out of his total production of spirit such quantity or quantities to such person or, concerns as the Excise Commissioner may from time to time direct.

The Division Bench held that the afore-said insertion in the licence in Form No. 28A is wholly unconstitutional, because the parent Act and the Rules themselves are ultra vires the Constitution. We will do well to reproduce here in below paragraph-20 of the judgment:

20. We have examined the rival contentions of the parties. The Respondents have taken contradictory stand whether licence was issued in Form Nos. 27, 28 or 28A. If we refer to the decisions of the Supreme Court in Modi Distillery's and Synthetics and Chemicals Ltd.'s cases, both licences in Form Nos. 28 and 28A would appear to be ultra vires State power, to grant such licences. Otherwise also the demand of penalty, we find, is bad on many counts. As noted above, before creating such a demand of penal duty or penalty, no show cause notice was issued to the Petitioners. Merely on the basis of audit report, penalty was sought to be recovered. The matter was not examined even from the angle if proper grade of molasses was supplied and what was the reason for shortfall in production of rectified spirit. That there has been a shortfall in production of rectified spirit, which apart from the fact that the State had no jurisdiction to levy any duty, could not lead one to the conclusion that molasses had been diverted or misutilised for illicit distillation. If at all there is any contravention, it has to be under the Molasses Act or the Rules framed thereunder. That Act does not envisage levy or any penalty, Mr. Maitin, Learned Counsel for the Respondents, could not point out any provision of law either under the Excise Act or Molasses Act under which the demand of penalty could have been made. Penal duty is also a part of excise duty and when State has no jurisdiction to impose excise duty it certainly cannot levy any penal duty. In some of the cases where the licences had been granted on the basis of acceptance of tenders of the Petitioners, it was stressed that the Petitioners had agreed to payment of penalty, but such a clause without any specifications as to how and under what circumstances penalty could be levied is arbitrary. After all, power to levy penalty has to be derived from the pro-visions of the Excise Act or the Rules and exercised under those provisions. Outside the Act no authority has any power to impose any penalty and then to use the State machineries for recovery or the same. The argument, there-fore, that condition No. 8 of the tender notice provided for levy of penalty is meaningless. As noted above, the Supreme Court in Synthetics and Chemicals Ltd.'s case has laid down the parameters of powers of State to legislate in respect of alcohol. The State can pass legislation laying down Regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol. We have not been shown any provision either in Excise Act or the Molasses Act or the Rules framed thereunder under which the penalties demanded from the Petitioners have been levied. It is not the case of the Respondents that on ac-count of less production of ethyl alcohol from molasses ethyl alcohol had been diverted and misused as a substitute for potable alcohol. Their whole case is that because of less production of ethyl alcohol which ultimately would have been converted into potable alcohol on the basis of licence granted by the State, the State has suffered loss of excise duty on potable

alcohol. This argument appears to be rather far-fetched. Even the foundational facts necessary to prove diversion or mis-user of molasses are lacking.

9. The Government of Bihar challenged the same by preferring appeal in the Supreme Court which was dismissed by its decision in the State of Bihar v. Industrial Corporation Pvt. Ltd. (supra), and the Division Bench judgment of this Court was fully upheld.

10. We must deal with the judgment of the Constitution Bench of the Supreme Court in Belsund Sugar Company Ltd. (supra), relied on by the learned AAG. That was a case with respect to sale and purchase of molasses in the concerned market area within the meaning of the Bihar Agricultural Produce Markets Act, 1960. The Supreme Court observed that the Act and the Rules are intra vires, and the legislative authority for the same is traceable to Entry 33 of List-III of the Constitution, and has had the President's assent. It has also been held that the scope and the sweep of the Act and the Rules is to provide for the control, distribution, supply, storage and price of molasses produced by factories in the State of Bihar. It has been further held therein that the Market Act cannot apply to the transactions of purchase of sugarcane and sale of sugar and molasses by the sugar mills situated and functioning within the market area of the Market Committee concerned constituted under the Market Act. On a perusal of the judgment of the Supreme Court in Belsund Sugar Company Ltd. (supra), we are of the view that completely different issues had arisen for consideration in the judgment, namely, can the authorities under the Market Act impose market fee on purchase of molasses by the sugar mills, and on sale of sugar and molasses within the market area under the Bihar Agriculture Produce Markets Act. It is evident that the same is of no assistance in adjudicating the issues arising in the present proceeding.

11. In the result, CWJC No. 727 of 1995 is allowed. The impugned orders marked Annexures-4, 5 and 7, are hereby set aside. In the facts and circumstances of the case, there will be no order as to cost.

12. We now take up CWJC No. 3676 of 1999. This writ petition is directed against the following orders:

(i) The order bearing memo No. 11 dated 12.1.99 (Annexure-2), passed by Respondent No. 3, imposing penal duty on the Petitioner to the tune of Rs. 91,642.41 p.

(ii) The order bearing memo No. 79, dated 12.6.99 (Annexure-5), whereby Respondent No. 3 raised demand to the tune of Rs. 3,60,000/- by way of penal duty on the alleged loss of 400 quintals of molasses in flood water.

(iii) The order bearing memo No. 107, dated 15.7.96 (Annexure-6), whereby Respondent No. 3 renewed its demand.

(iv) The order bearing memo No. 13, dated 14.1.99 (Annexure-13), whereby Respondent No. 3 directed the Petitioner distillery to deposit a sum of Rs.

4,83,543.90p. by way of penal duty on account of loss of rectified spirit during the course of its transportation, and (v) The order bearing memo No. 86, dated 11.4.99 (Annexure-20), whereby Respondent No. 3 enumerated the dues which according to him were payable by the Petitioner company.

With minor variation of facts which do not make any difference in our conclusions, we are of the view that this writ petition is covered by the aforesaid judgment in CWJC No. 727 of 1995.

13. In the result, CWJC No. 3676 of 1999 is allowed. The impugned orders marked Annexures-2, 5, 6, 13 and 20 are hereby set aside. In the facts and circum-stances of the case, there shall be no order as to costs.