(1996) 06 PAT CK 0019

In the Patna High Court

Case No : C.W.J.C. No. 1773 of 1994 and M.J.C. No. 1878 of 1992

New Swadeshi Ditillery APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 11-06-1996

Acts Referred:
Bihar and Orissa Excise Act, 1915 — Section 22, 22A, 22B

Citation : (1996) 06 PAT CK 0019

Hon'ble Judges : D.P. Wadhwa, C.J;S.J. Mukhopadhaya, J

Bench : Division Bench

Advocate : Y.V. Giri, Barmeshwar Tewary, Mahesh Narain Parbat, Jyoti Sharan and G.P. Bimal and Gita Verma, in CWJC 5828/94, for the Appellant; Rameshwar Prasad, Shashi Bhushan Kumar, in C.W.J.C. No. 1773 of 1994, S. Raza Ahmad, S. Qaisher Hasan, Veena Kumari Jaiswal, in C.W.J.C. No. 4272 of 1994, Rajan Kumar in C.W.J.C. No. 2233 of 1994, S. Raza Ahmad, Bijay Kumar Sinha, in C.W.J.C. No. 5828 of 1994, Deo Narayan Yadav in M.J.C. No. 1878 of 1992 and Bhola Lal Das in M.J.C. No. 1441 of 1993, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, J.—In all the four writ Petitioners, common Ordinance/Act is under challenge. Further-common prayer has been made for direction on the Respondents to act in accordance with the decision of this Court in the case of New Swadeshi Distillery reported in 1993 (2) P.L.J.R. 587.

On the other hand, the contempt petitions arise out of the decision of this Court in the aforesaid case, New Swadeshi Distillery (supra), as it has been alleged that the decision in the aforesaid case has not been complied by the Respondents. It is for the said reason, all the cases are being disposed of by this common judgment.

2. The brief facts of the case, which are relevant for the purpose of adjudication, are as follows:

The Petitioners are engaged in manufacture/production of commercial spirit/

rectified spirit (for short rectified spirit), at their distilleries. Admittedly, the ''rectified spirit'' produced by the Petitioners are not fit for human consumption, till the same are processed and made intoxicant like ''country liquor''.

Earlier, there was a practice, when certain quantity of ''rectified spirit'' maunfactured by the Petitioners, were used to be supplied to the Warehouses, owned or controlled by the State Government. The Petitioners used to transport the ''rectified spirit'' to such Warehouses, controlled by the Government, as a courtesy, otherwise they were not obliged to supply ''rectified spirit'' beyond their factory premises. Such practice the Petitioners used to follow in order to maintain congenial atmosphere, there being directions of the Excise authorities to supply such ''rectified spirit'' to the Warehouses.

Admittedly, the Petitioners do not own any of the Ware-houses nor they were the contractors of such Warehouses. For all purposes, the Petitioners were ''sellers'', whereas the State Government was ''buyer'' with respect to such ''rectified spirit''. After such purchase of rectified spirit'' from the Petitioners, the same used to be stored in the Warehouses to process the same and thereby to convert ''rectified spirit'' as ''country liquor''. The Warehouse people thereafter used to sell such ''country liquor'' to the different retailers of the State Government.

3. According to the Petitioners, an understanding was given by the State Government and its authorities to them that they will be paying a sum of Rs. 3.42 p. for one L.P. Ltr. of ''rectified spirit''. They were, in fact, paid such amount of Rs. 3.4.2 p. per L.P. Ltr. of ''rectified spirit''. It was only by one letter dated 19th February, 1990 (Annexure-A to C.W.J.C. 1773/94), the Petitioners were intimated that out of the amount of Rs. 3.42 p. per L.P. Ltr. of ''rectified spirit'', State Government has decided, that a sum of Rs. 0.70 p. is to be retained by the State Government, as maintenance charge of Warehouses. Breakup of such Rs. 3.42 p. was shown as follows:

(i) Cost of spirit Rs. 1.72 p.

(ii) Transportation/ Working wastage Re. 0.08 p.

(iii) Sales Tax Re. 0.27 p.

(iv) Cost of Transportation of''spirit'' Re. 0.45 p.

(v) Warehouse maintenance charge. Re. 0.70 p.

After such decision communicated vide letter dated 19th Feburary, 1990 (Annexure-A to C.W.J.C. No. 1773/94), a letter to that effect was issued to all Collectors vide common letter dated 26th July, 1990 (Annexure-2 to C.W.J.C. 1773/94), wherein all the Collectors were directed to recover such Rs. 0.70 p. per L.P. Ltr. from the cost of 1 L.P. Ltr. of ''rectified spirit'' including the cost, which had already been paid to, the Petitioners. Individual letters to such effect for recovery was also issued by the Respondents.

It was, in this background, the Petitioner, New Swadeshi Mill moved before this

Court by filing C.W.J.C. No. 6868 of 1990. The aforesaid decision relating to deduction of Re. 0.70 p. from the cost of ''rectified spirit'', was challenged.

On 24th January, 1991, an interim order was passed by a Bench of this Court in the said case. It was observed that the Respondents shall not insist refund of Re. 0.70 p. per L.P. Ltr., out of the cost which had already been paid in the past. However, with respect to the period of pendency of the writ petition, it was ordered that the Respondents will pay only a sum of Rs. 2.72 p. per L.P. Ltr., after deducting the Warehouse maintenance cost of Re. 0.70 p. per L.P. Ltr., our of Rs. 3.42 p. per L.P. Ltr. It was made clear that in case the writ petition was allowed, the Respondents will have to pay back the full amount to be calculated @ Re. 0.70 p. per L.P. Ltr. of ''country spirit'', to the Petitioner of the writ case, within a period of four months from the date of delivery of judgment. The matter relating to grant of interest, in that event, was left for the Bench which was to hear the case. Similarly, it was observed that in case the writ petition was dismissed, the Petitioner was to refund an amount @ Re. 0.70 p. per L.P. Ltr., out of Rs. 3.42 p., which had already been paid in favour of the Petitioner of the said case. The said writ petition was ultimately heard by a Division Bench of this Court and was allowed in favour of the Petitioner of the said case. The decision of the State Government to charge a sum of Re. 0.70 p., out of Rs. 3.42 p. per L.P. Ltr., as maintenance cost of Warehouse, was set aside by this Court. It was taken into note that there was no such rule laid down by the State. It was further observed that the amount of Rs. 3.42 p. per L.P. Ltr. which had already been paid to the Petitioner, the Respondents cannot recover any amount out of the same. The Respondents were directed to carry out the interim order, as was granted by the Court on 24th January, 1991 in the said case. The decision is reported in 1993 (2) P.L.J.R. 587.

4. After the aforesaid decision, when no action was taken by the Respondents to refund back the amount in favour of the Petitioner of the said case, in terms with the order of this Court passed in the said writ petition, including the interim order, the contempt petitions have been filed by the concerned parties, which are being heard together with the present writ petitions:

5. After filing of such contempt petitions, certain development took place. The Respondents came out with a Validating Ordinance, known as ''Bihar Excise (Amending & Validating) Ordinance, 1993-''(Bihar Ordinance No. 26/93)''. By the said Ordinance, two provision''s, namely, Sections 22A and Section 22B were inserted after Section 22 of the Bihar Excise Act, 1915 (Bihar Act II of 1915). According to the Respondents, by virtue of the aforesaid Validating Ordinance No. 26/93, they are not duty-bound to comply with the decision of this Court passed in the case of New Swadeshi Distillery (supra), the action earlier taken by the Respondents having been validated. It is for the said reason, the Petitioners filed the instant writ petitions, originally challenging the aforesaid Ordinance No. 26/93, with further prayer for a direction on the Respondents to act in accordance with the decision of this Court passed in the cast of New Swadeshi

Distillery (supra).

6. During the pendency of the Petitioners in hand, original Ordinance No. 26/93 was replaced by subsequent numerous ordinances, namely, Ordinance No. 1/94, published on 2nd January, 1994; Ordinance No. 9/94, published on 26th April, 1994; Ordinance of 1994, published on 15th August, 1994 and; Ordinance No. 1/95, published on 25th January, 1995. Thereafter, the Respondents promulgated one Act, known as Bihar Excise (Amending & Validating) Act, 1995 (Bihar Act 9 of 1995), para materia similar to the ordinances. There being a number of ordinances issued, one after Anr. , finally followed by an Act, the counsel for the Petitioners obtained permission for challenging the aforesaid Act 9 of 1995, which was granted.

7. The counsel for the Petitioners while assailed the provisions of Act 9/95, made the following submission:

(A) By one validating law, though it is open to a State to cure a permissive defect pointed out in a judgment, but in the garb of validating law, it is not open to the State to over-reach a judgment. In other words, by one Act/or the Ordinance, the State Government cannot over-ride nor can nullify a valid judgment, which is binding between the parties. In support he referred the decision of Supreme Court, in the case of Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, ; D. Cawasji and Co., Mysore Vs. State of Mysore and Another, . According to him, a judgment, even if wrong, is binding on parties. He referred the decision of Pandit M.S.M. Sharma Vs. Dr. Shree Krishna Sinha and Others, in this regard.

(B) The State Legislature has no competence to come out with a law determining the price of ''rectified spirit'', that too without consultation with the seller. In this regard, he referred the decision already given earlier in the case of New Swadeshi Distillery 1993 (2) P.L.J.R. 587, as well as in the case of New Swadeshi Sugar Mills Ltd. and Anr. v. The State of Bihar and Ors. 1983 P.L.J.R. 105.

(C) The Promulgation of subsequent Ordinances without placing the same before the Assembly is bad, there being lack of legislative competence. In this regard, he referred the decision of Dr D.C. Wadhwa and Others Vs. State of Bihar and Others, and decision of this Court in the case of Citizens Cause and Another Vs. State of Bihar and Others .

(D) According to the counsel for the Petitioners, the present Ordinance/Act does not cover the Petitioners. The same is applicable for ''country liquor'' and not with respect to ''rectified spirit''. So the Respondents are duty-bound to act on the basis of the decision of this Court given in the case of New Swadeshi Distillers (supra).

8. The learned Advocate General referred the case of R.K. Garg v. Union of India and Ors. AIR 1981 S.C. 2138, Dr D.C. Wadhwa and Others Vs. State of Bihar and Others, , and Vijay Mills Company Limited etc., etc. Vs. State of Gujarat and

others, , and submitted that the State has got power to come out with validating law, to rectify such defect, earlier pointed out by court of law. He defended the action on the part of the Respondents in coming out with such Ordinances/Act.

9. So far as fixation of price is concerned, according to the learned Advocate General, the price of ''rectified spirit'' was fixed @ Rs. 3.42 per L.P. Ltr., on negotiation with the Petitioners, and it was on that basis, the letter dated 19th Feburary, 1990 (Annexure-A) was issued. As in the earlier case of New Swadeshi Distillery 1993 (2) P.L.J.R. 587, this Court observed that the Respondent has not framed any rule or law, fixing the price and the said letter dated 19th Feburary, 1990 (Annexure-A) was issued by the Excise Commissioner, who had no jurisdiction to issue such letter, it is for. the said reason, now the validating Ordinance/Act has been promulgated by the State, validating the said provisions as laid down under letter dated 19th Feburary, 1990 (Annexure-A).

10. So far as promulgation of one after Anr. ordinances is concerned, according to the learned Advocate General, ultimately the Respondent-State having come out with Act No. 9/95, this question has become redundant and thereby requested the Court not to decide the issue.

11. So far as the fourth issue is concerned, according to me, this is the most important issue. Counsel for the Petitioners submitted that the Act, in question, is not applicable to the Petitioners, as the same covers supply of ''country liquor'' and not the supply of ''rectified spirit''. When the query was made by Bench to the learned Advocate General as to the Act No. 9/95 is applicable in the case of rectified spirit or not, he did not choose to give any straight-way reply to the same. According to the learned Advocate General, the issue is as to whether the State Government can charge Re. 0.70 per L.P. Ltr. for the purpose of maintenance of Warehouses or not, and to that effect a validating law can be issued or not. He made his submission on that aspect, without replying the issue in question. However, the learned Advocate General accepted that the language used in the Ordinance/Act, particulary, in Hindi version (which is original), relates to ''country liquor''.

For proper appreciation of the case, the relevant extract of the impugned Act 9/95 is given hereunder:

2. Insertion of new sections after Section 22 of Bihar Act II, 1915.--In the Bihar Excise Act, 1915 (Bihar Act II, 1915) (hereinafter referred to as the said Act) after Section 22, the following new sections shall be inserted, namely--

22-A. The Fixation of cost price of country liquor, by the State Government.--(1) The State Government, while granting exclusive privilege of manufacturing, supplying wholesale or of selling wholesale or retail of country liquor may fix the cost price which includes the price of the spirit, the transportation charges, warehouse maintenance charges, taxes, if any, and other charges, such as bottling, packing etc. and dividend.

(2) Any person to whom the State Government has granted exclusive privilege of manufacturing, supplying wholesale or selling wholesale or retail country liquor during the year 1990 wherein the cost price of the country liquor was fixed by the State Government taking different components into account including warehouse maintenance charges at the rate of 70 paise per L.P. Liter shall be deemed to have been fixed under this section.

22-B. Validating of cost price of country liquor and realisation of werehouse maintenance charges.--(1) Notwithstanding any judgment, decree or order of any court, Tribunal or Authority the price of country spirit, including the warehouse maintenance charges at the rate of 70 paise per L.P. Litre fixed during the year 1990 shall be deemed to have been fixed under this Act and any amount collected from the retailer as a cost price of country liquour per L.P. litre shall be paid to or payable to the Contractor (Distiller)/supplier after deducting at the rate of 70 paise per L.P. Litre as the maintenance charges of the warehouses and the said amount shall not be payable to the Contractor (Distilled/Supplier.

(2) The amount so collected shall be deemed to have been collected under the provision of this Act and the said amount of warehouse maintenance charges shall not be refundable and no Court, Tribunal or Authority shall order for refund of such amount:

Provided that where the amount collected from the retailer hgs been paid to the Contractor (Distiller)/Supplier the State Government shall realise such amount from the Contractor (Distiller)/Supplier and the Contractor shall be required to refund the said amount to the State Government:

Provided further, that the State Government may adjust, the said amount from any amount due or payable to the Contractor by the Government:

Provided also that the said amount shall be spent by orders of the Excise Commissioner under administrative instructions issued for the maintenance of warehouses:

Provided further also, that the amount realised on account of warehouse maintenance charges but refunded to the supplier, under the order of any Court, Tribunal or Authority shall be refunded by the Supplier and the State Government shall recover the same from the Contractor (Distiller)/Supplier as arrears of revenue.

22-C. Overriding effect of the Act.--Notwithstanding anything to the contrary contained in any judgment, decree or order passed by any Court and in any other law for the time being, in force, the provisions of this Act shall have the effect.

12. It will be evident from Section 22-A aforesaid that the same relates to manufacture/sell of ''country liquor''. So far as Section 22-B is concerned, therein the words ''country liquor'' have not been mentioned, nor the words ''rectified spirit''/''Commercial spirit'' has been mentioned therein. When query was made

from the learned Advocate General, as to what is ''country spirit'', learned Advocate General submitted that the said is, in fact, ''country liquor'' and not ''rectified spirit'' from which the ''country liquor'' is prepared. It was accepted at the Bar by the learned Advocate General that the Hindi version of the Act 9/95 is the original one, wherein the words ''DESHI SARAB'' has been mentioned, which means ''country liquor'' and not the ''rectified spirit''.

13. From the aforesaid plain reading of the provisions of Act 9/95, particularly, the Hindi version, it will be mainfest and clear that the Act in question has been promulgated with respect to the manufacturers/dealers of ''country liquor''. No provisions has been laid down therein with respect to manufacturers of ''rectified spirit''/''commercial spirit'', which is the original raw material manufactured by the Petitioners and supplied to the Respondents. No rate has been fixed by the State Government with respect to such ''rectified spirit'' by the impugned Act 9/95 and/or earlier ordinances. Thereby, I hold that the impugned Act 9/95 is not applicable to the Petitioners, who supplied ''rectified spirit'' to the State in their Warehouses.

It is for the said reason, the question of declaring the impugned Act as ultra vires does not arise, in the present case, and for similar reason, there is no necessity of giving any specific finding with respect to the first three issues raised by the counsel for the Petitioners.

Apart from the same I find that the Respondents have not given any reason as to why they have fixed an amount of Re. 0.70 p. per L.P. Ltr. as the cost of maintenance of Warehouses. The learned Advocate General has failed to show any nexus with such cost of maintenance, as fixed by the Respondents. It has been accepted at the Bar that out of one L.P. Litre of ''rectified spirit'', a number of L.P. Litres of ''country liquors'' are being prepared. While, according to the Petitioners, out of one L.P. Litre of ''rectified spirit'', four L.P. Litres of ''country liquor'' are prepated, according to the learned Advocate General, out of one L.P. Litre of ''rectified spirit''--2 1/2

L.P. Litres of ''country liquor'' are prepared. Even if the statement of learned Advocate General is accepted, it will be evident that the State Government is realising Re. 0.70 p. per L.P. Litre of ''country liquor''--that means Rs. 1.75 p. as charge for maintenance of Warehouse, on sale of 2 1/2 L.P. Liters of ''country liquor'' i.e. one L.P. Litre of ''rectified spirit''. Such being the position, it has not been made clear as to how they will charge further 70 paise for such one L.P. Litre of ''rectified spirit'' from the Petitioners, as against maintenance of Warehouses, which is completely arbitrary.

Apart from the same, in the present case, the Petitioners are sellers, whereas the Respondents-State is the buyer. No power has been vested with the Respondents-State to fix price of ''rectified spirit'' under any provision of law. Such being the position, it is not open to the Respondents to fix price of ''rectified spirit'' ex-parte, without any negotiation with the sellers i.e. the Petitioners.

Further, it has come to my notice that the Respondents again resorted the mode of issuance of one after Anr. ordinances, in the present case, inspite of deprecation made by the apex court in the case of Dr. D.C. Wadhwa and Ors. v. State of Bihar and Ors. AIR 1987 SC 529, and by this Court in the case of Citizens Cause and Another Vs. State of Bihar and Others . I caution the, Respondents not to act in such arbitrary fashion in future and/or in appropriate case/cases, suitable action may be taken against the concerned authority/ authorities.

14. For the reasons stated above, the second relief sought for by the Petitioners is allowed. The Respondents are directed to act in terms with the order and direction of this Court, as given in the case of New Swadeshi Distillery 1993 (2) P.L.J.R. 587 and refund the admitted amount in favour of the Petitioners, which they deducted @ Re. 0.70 p. per L.P. Litre for the period the same was in effect (from 1990 to September, 1992) and must release amount within a period of four months from the date of receipt/production of copy of this judgment.

15. The writ petitions are allowed to the extent indicated above.

16. So far the contempt petitions are there, it will be evident from the discussion made in the preceding paragraph that the Respondents have not complied with the decision of this Court given in the earlier case. But it cannot be said that such action was a deliberate disobedience of this Court''s order and direction. There was reasonable mis-understanding on the part of the Respondents because of the promulgation of one or other Ordinances, followed by one Act. It is for the said reason, no action is being ordered for the present in the contempt petitions, which are being dropped. Respondents are directed to comply with the aforesaid decision within four months.

17. Accordingly, the writ petitions are allowed and the contempt petitions are disposed of with the observations and directions, made above. No cost.

D.P. Wadhwa, C.J.

I agree.