

(1988) 08 OHC CK 0004
In the Orissa High Court
Case No : O.J.C. No. 1619 of 1981

Niranjan Sen

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-08-1988

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 17, 2(12), 2(6), 27, 28

Citation : (1988) 66 CLT 763

Hon'ble Judges : K.P. Mohapatra, J; D.P. Mohapatra, J

Bench : Division Bench

Advocate : R. Mohanty, for the Appellant; R.K. Patra, Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—These seven writ applications raise common questions of facts and law. By consent of the learned Counsel appearing for the parties, the cases were heard together. They are being disposed of by this judgment.

2. The Petitioners were importers and wholesalers of Indian made foreign liquors (for brevity referred to as 'IMFL') in different districts in the State. They were issued licences in Form No. F. L. I. for sale to retailers and licences in Form No. FL. 16 authorising them to import foreign liquor. The retailers also held licences for retail vend of the liquor. Such sale is commonly referred to as 'sale to trade'. The Petitioners were required to deposit a lump sum amount with the State Govt. for payment of excise duty. According to the prevailing practice the Petitioners used to import the foreign liquor from other States and the duty payable by them was being adjusted from the lump sum deposit made with the State Government and further sums were being deposited by the Petitioners as and when required by the authorities. The IMFL was stored in bonded warehouses under the control of the Petitioners. When a retailer wanted to purchase any stock from a wholesaler, he used to pay the duty in advance in the manner prescribed under the Rules and on producing evidence of such payment the stock was released

from the bonded warehouse in his favour. It is the case of the Petitioners that though this practice was prevailing since long it was discontinued in 1981 and the authorities started adjusting the duty payable by the retailers from the lump sum amount deposited by the Petitioners. The Petitioners were instructed to collect the duty from the retailers at the time of releasing the stock to them. The Petitioners challenge this practice mainly on the grounds that it is not supported by any provision in the Bihar and Orissa Excise Act, 1915 or Orissa Excise Rules, 1965 or the Board's Excise Rules, 1965. It is the further contention of the Petitioners that since the duty is payable by the retailers to the State Government the Acts and Rules cast no liability for its payment on the Petitioners and they are unnecessarily being compelled to discharge the onerous duty. On these averments the Petitioners have prayed for issue of writ of mandamus to the opposite parties directing them to issue permits to the retailers for purchase of IMFL./bear after collecting of excise duty payable therefor. The State Government represented by the Secretary to Government. Revenue and Excise Department, the Commissioner of Excise and Collector and the District Magistrates of the concerned districts have been impleaded as opposite parties in each of the writ applications.

3. The stand taken by the opposite parties in the return filed to the writ applications in essence is that, though the duty is payable by retailers to the State Government, the rules provided for several alternative -methods for realisation of the amount, one such being through the agency of the wholesaler. The State has the option of choosing the manner of collection of duty from the retailers and in exercise of that option the duty payable by the retailers is being collected from the wholesaler by deducting it from the lump sum deposits made by them with the department and the wholesaler in turn is authorised to collect the duty from the retailer at the time of releasing the stock.

4. On the case of the parties discussed above, the question that arises for decision is whether the Acts and the Rules vest any power with the opposite parties to collect excise duty payable by the retailers to the State from the wholesalers. If the answer to the question is in the negative then the Petitioners are entitled to succeed in the writ applications, notwithstanding the fact that the present procedure has proved to be a convenient method of collection of duty for the opposite parties.

5. The learned Counsel for the parties have referred to various provisions in the Act and in the Rules to substantiate their respective contentions.

I shall presently refer to and discuss the relevant provisions. At the outset, I may observe that there is no express provision specifically empowering the authorities to make the collection in this manner.

Section 2 (6) of the Bihar and Orissa Excise Act (for short the 'Act') defines 'excisable', article to mean any alcoholic liquor for human consumption or any intoxicating drug.

Under Section 2 (12-a) 'intoxicant' is defined to mean any liquor or intoxicating drug and includes mohua flower. Sub-section (21) of the said Section provides that 'transport' means to remove from one place to another within the province of Bihar and Orissa.

Section 17 of the Act provides that no intoxicant shall be removed from any distillery, brewery, warehouse or other place of storage licensed, established, authorized- or continued under this Act, unless the duty (if any) payable under Chapter V. has been paid or a bond has been executed for the payment thereof.

Section 27 of the Act, which comes under Chapter v. of the Act makes provision regarding power to impose duty on import, export, transport and manufacture, Under Sub-section (1) (c) of the said Section it is laid down that an excise duty or countervailing duty, as the case may be at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local areas on any excisable article transported.

Section 28 of the Act, a provision in the same Chapter lays down the ways of levying such duty. It provides that subject to any rules made u/s 90, Clause (12), any duty imposed u/s 27 may be levied in any of the ways enumerated in the Section. In Clause (c) of the said Section the duty on an excisable article transported may be levied: (i) by payment in the district from which the article is sent, or, (ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act.

Section 90 is the provision regarding power of the Board to make rules. Under Clause (12) of the said Section the Board is empowered to make rules for prescribing the time, place and manner of levying duty on intoxicants.

6. Coming to the provisions of the Orissa Excise Rules. 1965 (for short 'the Excise Rules') reference was made to Rules 5, 6, 15 and 16, Rule 5 makes provision regarding import of IMFL by clubs and by licensees for sale subject to certain conditions. The conditions laid down in the said Rule require, inter alia, the importer to obtain passes from the Collector of the importing district on pre-payment of the duty or on bond for payment to the Collector of duty imposed u/s 27 within a week after receipt of consignment in certain States mentioned in the Rule.

Under Rule 6 (1) passes for the import under bond of foreign liquor other than denatured spirit or rectified spirit shall be issued, only to clubs, persons authorised to cater for troops, persons holding licences, for the sale of foreign liquor and persons holding licences to denatured spirit. .

Rule 15 provides that foreign liquor (excluding denatured spirit) on which full duty has been paid u/s 27 of the Act may be transported from the premises of the holders of 'sale to trade' licences to the premises of other licensed dealers, only under a pass.

Rule 16 makes provision regarding transport of IMFL on which full amount of

duty has not been paid. The stock may be issued from distillery or a bonded warehouse to a person holding a licence for sale of foreign liquor on prepayment of duty in the district to which the liquor is intended to be transported and on the production of a pass granted by the Collector of that district.

7. Reference was made to some provisions in the Board's Excise Rules, 1965 (in short 'Board's Rules') framed u/s 90 of the Act.

It is provided under Rule 41 that Rules 6 to 10, 16 to 19, 21 to 25, 27 to 29 and Rule 32 in Chapter II relating to working in distilleries and warehouse within or attached to the distilleries and the rules in Chapter VI relating to warehouses for country spirit outside distilleries shall apply to the work and functions relating to receipt, storing compounding and blending, reducing, bottling, issue or sale of foreign liquor in or from a warehouse or a store room in bond so far as the said rules may be relevant and not inconsistent with the rules in this Chapter.

The other provisions of this Rule to which reference was made are Rules 75 (2), 76, 77 (1), 78 (1), 83 (2), 131 (1), 132 and 133.

Rule 75 lays down the procedure for issue of spirit to the retail vendors. Sub-rule (2) of Rule 75, provides that a retailer desiring to obtain a supply of spirit from a warehouse shall pay the duty leviable on the spirit, and cost price when it is to be paid to Government, into the treasury or Sub-treasury of the place where such warehouse is situated, and in the case of outlying warehouse, the vendors may, if convenient to them, send the amount by money order to the Superintendent.

Rule 76 contains the provisions regarding the manner of payment of duty, etc. and issue of pass. The duty is to be paid by the vendor by filing challan in the Treasury.

Under Rule 77 (1) the Collector is empowered to pass order permitting a licensee holding a licence for any duty paid depot of country spirit in his area of contract to credit into the treasury or Sub-treasury money in lump sum amounts from time to time on account of duty on spirit to be issued from the warehouse and a ledger account shall then be kept by the Collector and by the Officer-in-charge of the warehouse from which liquor is issued to the depot.

Rule 78 (1) casts responsibility on the Officer-in-charge of the warehouse to ensure that no spirit is issued to any vendor in excess of the quantity for which duty, and cost price when it is payable to Government, has been credited or remitted by such vendor.

Sub-rule (1) of Rule 83 provides prescribed strength shall be issued to the country spirit of wholesale depots from the warehouse in the area mentioned in Sub-rule (1) of Rule 82 and owned by the licensee for such area on payment of duty u/s 27 of the Act by such licensee who shall maintain a personal ledger account towards payment of duty in the manner specified at Rule 77.

Under Sub-rule (2) of Rule 83, it is provided that the licenses having a personal ledger account under Sub-rule (1) shall, on each occasion, himself or through his authorised agent submit an application to the Officer in charge of the warehouse for issue of a pass on the quantity of country spirit to be issued on such application by such Officer in charge and the application shall correctly indicate the balance amount remaining in the said personal ledger account which should be adequate for adjustment towards duty payable on the quantity of country spirit to be issued.

Rules 131, 132 and 133 come under Part V. of Chapter IX of the Board's Rules which deals with regulation of working of licensed premises. .

Rule 131 deals with time for payment of duty. Sub-rule (1) of Rule 131 provides that the duty payable on foreign liquor or country spirit whether imported under bond, or manufactured in distillery and stored in a distillery or excise warehouses shall be paid before removal of the foreign liquor, from the distillery or excise warehouse, as the case may be, unless a bond has been executed for such payment:.

Rule 132 specifies the place of payment of duty. It provides that when the duty on an intoxicant is to be paid before removal from a distillery or excise warehouse, the payment shall be made, subject to any special provision in these rules, into the local treasury either by direct payment or by money order and advance deposit on account of such duty may also be made with permission of the Collector.

Rule 133 which deals with allowance for loss or deficiency of Ganja and Bhang in transit under bond due to dryage etc. is not material for the purpose of the present case. Our attention was not drawn to any other provision in the Act or the Rules.

8. From the provisions discussed in the foregoing paragraphs, it appears that under the scheme of the Act and Rules the duty payable by the retailer to the State is to be paid either in advance before removal of the stocks from the warehouse or under a bond. The manner of payment is either by filing challan in the Treasury or Sub-Treasury for the requisite amounts or by sending it by money order. In certain circumstances payment may also be made by bond under order of the Collector of the district. On careful perusal of the provisions discussed above. I find no support for the contention raised on behalf of the opposite parties that the liability for the duty payable by the retailer to the State Government is also on the wholesaler who holds a warehouse licence. The duty payable by the wholesaler as admitted by the counsel for both the parties is distinct and separate from that payable by the retailer to the State. Regarding liability of payment of the former there is no dispute that the Petitioners are liable to pay it and they have been paying the same in the manner prescribed under the Act and Rules. The dispute is regarding the payment of the latter duty. The question then arises for what purpose did the Petitioners deposit the lump

sum amount with the Government. The explanation to my mind is available from Rule 83 (1) (2).

Admittedly the Petitioners have wholesale depots in addition to warehouse. They may have the necessity to remove some stock from the warehouse to the wholesale depot for sale to other retailers. In such a case, since the duty is to be paid before removal of the stock from the warehouse, adjustment from their personal ledger account is provided for under Rule 83 (2). As provided in the said Rule such adjustment only arises in the situation mentioned above, and not as a general practice for release of stock to a retailer from a warehouse. This view gains further support from the licence issued to the Petitioners for foreign liquor warehouse in or outside bond or wholesale foreign liquor shot for sale to the trade, i.e. to other licensed dealers and also the licence in Form F. I. 1. Perusal of the licence shows that the licensee is required to deposit the specified sum in the local treasury as a condition of the licence. There is no stipulation in the terms of the licence that the amount is available to be adjusted towards duty payable by a retailer to the State at the time of release of stock from the warehouse. In the absence of any express provisions in the Acts. the Rules and any stipulation in the licence empowering adjustment of deposit made by the wholesaler, in my view, it was not open to the department to make the adjustment from the deposits made by the Petitioners. As noticed earlier, the only provision for adjustment from the personal ledger account is made under Rule 83 of the Board's Rule when the wholesaler wants to remove the stock from the warehouse to his wholesale depot.

9. On the analysis in the foregoing paragraphs it is clear that the Petitioners are entitled to succeed in the writ applications. The applications are, therefore, allowed. Writ of mandamus shall be issued to the opposite parties accordingly. Parties will bear their respective costs of these proceedings.

K.P. Mohapatra, J.

10. I agree.