
(2011) 10 AHC CK 0013

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 7433 of 2002

Oudh Sugar Mills Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 14-10-2011

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2011) 9 ADJ 625

Hon'ble Judges : Satish Chandra, J;Devi Prasad Singh, J

Bench : Division Bench

Advocate : R.K. Srivastava, for the Appellant;

Final Decision : Dismissed

Judgement

Devi Prasad Singh, J.—Petitioner Oudh Sugar Mills Ltd. Hargaon, District-Sitapur, U.P. is a public limited company registered under the Indian Companies Act, 1956 engaged in production, sale and business of rectified spirit/absolute alcohol in its distillery situated in Hargaon. The distillery was established in pursuance to the licence granted by the Government of India in the year 1994. It is stated that later on the company was registered under the provision contained in Industries (Development and Regulation) Act, 1951 (in short I.D.R. Act). Certificate has been filed as Annexure No. 2 to the writ petition. It is pleaded that by an order dated 31.8.1962, the name of petitioner-company was substituted in place of M/s Cotton Agents Ltd. Certificate issued by Government of India dated 31.8.1962 is Annexure No. 3, It is admitted fact that the fermentation industry of alcohol has been declared and notified as a scheduled industry at Item No. 26 of the First Schedule of the I.D.R. Act. According to Dr. R.K. Srivastava, learned counsel for the petitioner, the alcohol industry on the basis of declaration of the Parliament by law is under control of the Central Government under Item No. 52 of the List 1 (Union List) of the Seventh Schedule of the Constitution of India. Union of India has authority to impose excise duty on alcohol which is unfit for human consumption. On the other hand, under the U.P. Excise Act, 1910, the

State of U.P. exercises, its power to control the production, sale and supply of excisable goods and to impose duty on alcoholic liquor meant of human consumption. u/s 3 (22-a) of the U.P. Excise Act, 1910, the power of the State Government is limited to alcohol meant for human consumption excluding the jurisdiction conferred to Union of India under Entry 51 of the List 2 of Schedule 7 of the Constitution of India. The Excise Commissioner, U.P. Allahabad issued an export permit for supply of to M/s. Jai Chemical & Pharmaceutical works, Jaipur, Rajasthan for Rs. 10,000/- bulk litre (in short B.L.). Copy of the export licence issued to the petitioner dated 20.3.1998 is annexed as Annexure No. 4 to the writ petition. It shall be appropriate to re-produce the licence in its verbatim, which is as under:

2. A plain reading of the licence reveals that the licence was granted subject to condition that within a period of 45 days, the licensee shall submit Pass PD 25 with due endorsement, to the office of Excise Commissioner. In the event of failure on the part of licensee-petitioner to return Pass PD 25 and 26 within 45 days after getting it verified by purchaser, penalty equal to the duty would be charged from the distiller. The licence was issued subject to execution of indemnity bond. While filing counter-affidavit, the photo stat copy of the indemnity bond has been filed by the respondents as Annexure No. CA-1. The indemnity bond has been duly signed by the petitioner as well as by the Excise Officer. Clause 3 of the indemnity bond provides that in case alcohol is not delivered at the destination as agreed between the parties, the distiller shall indemnify the Governor for any loss of duty which the Governor may suffer by reason of such non-delivery or short delivery by paying to him on demand the duty at the rate in force, on any quantity of spirit not so delivered after making the allowance aforesaid. The indemnity bond signed by the parties has been filed as Annexure No. CA-1. The indemnity bond is re-produced as under:

P.D. 15 (Paras 433 and 633)

FORM OF GENERAL BOND TO BE EXECUTED FOR THE REMOVAL OF SPIRITS FROM DISTILLERIES FOR TRANSPORT/EXPORT WITHOUT PRE-PAYMENT OF DUTY

THIS INDEMNITY BOND MADE THE Twentyth day of February, 1997 Between the Oudh Sugar Millss Distilleries, Hargaon (District-Sitapur) (hereinafter called the Distiller which expression shall include their heirs, representatives, successors and assigns) of the one part AND the Governor of Uttar Pradesh (hereinafter called "the Governor" which expression shall include his successor and assigns) of the other part:

WHEREAS under the rules of the Government of Uttar Pradesh in the Excise Department the distillers are permitted from time to time to transport/export spirits from their distillery at Hargaon to all or any of the bonded warehouses mentioned in the passes covering such export without previous payment of duty on the distillers executing an indemnity bond on the terms and conditions hereinafter mentioned:

NOWTHIS BOND WITNESS and the distillers hereby covenant with the Governor as follows:

1. That the distillers shall not at any one time so transport/export any quantity of spirits the duty on which at the rate prescribed therefor at the time or the aggregate of such duty and the duty at the afore aid rate on any quantity previously transported/exported and not yet delivered at destination shall exceed the sum of Rupees 5,00,00,000/- (Rupees Five Crores Only) provided that any allowance sanctioned for dryage and wastage and quantity not delivered at destination for which duty has been paid under Clause (3) hereinafter following shall not be included in the calculation of the quantity not delivered at destination.

2. That the distillers shall within the time mentioned in their pass issued by the officer Incharge of the distillery on further time as may be granted by way of extension by the Collector of transporting/exporting district, deliver or cause to be delivered the spirits so transported/exported on that occasion into custody of the officer-in-charge of the bonded warehouse mentioned in the pass.

3. That if the whole quantity of spirits transported/exported on any occasion after deducting such allowance for dryage and wastage as may be sanctioned shall not have been delivered at the destination as here-in-before agree, the distillers shall indemnify the Governor for any loss of duty which the Governor may suffer by reason of such non-delivery or short delivery by paying to him on demand the duty at the rate when in force on any quantity of spirits not so delivered after making the allowances aforesaid.

IN WITNESS WHEREOF the distillers have hereunto set their hands hereunder on the day and the year first above written.

3. It appears that Pass PD 25/26 was not returned to the respondent by the petitioner after exporting the bulk of alcohol at Jaipur, hence by the impugned notice dated 2.12.2002, the petitioner was informed that on account of breach of terms and conditions of the licence (supra) the penalty equivalent to excise duty to the tune of Rs. 3,98,000/- has been imposed and the petitioner was directed to deposit the same in Government Treasury.

4. Feeling aggrieved, the petitioner preferred the instant writ petition precisely challenging the impugned notice on the ground that the State of U.P. lacks jurisdiction to impose excise duty as it falls within the domain of Central Government under Entry 54 List 1 of the 7 Schedule. It is further stated that under Entry 84 (A) of List 1, Schedule 7 only Union of India has got right to impose duty on alcohol unfit for human consumption. Learned counsel has relied upon the cases in Deccan Sugar & Abkari Co. Ltd. and others v. Commissioner of Excise, Andhar Pradesh, (2004) 1 SCC 243; Rampur Distillery and Chemical Co. Vs. State of U.P. and Others, ; Union of India (UOI) and Another Vs. Girja Shanker and Others, 1; Mehendra Pratap and another v. Deputy Registrar (Registration), Lucknow and others, 2010 (28) LCD 1744; Lipton India Limited

Vs. State of U.P. and Others, and Dharendra Kumar Rai v. State of U.P., 2010 (28) LCD 1248.

5. On the other hand, Shri H.P. Srivastava, learned Additional Chief Standing Counsel submits that the petitioner has voluntarily signed the indemnity bond and accepted the terms and conditions of the licence for export of alcohol to Rajasthan. Once the petitioner accepted the terms and conditions, he has got no right to go back from its own words. It is further submitted that the State of U.P. has not imposed duty but it is a penalty. He relied upon a case in Pratibha Processors and others Vs. Union of India and others, .

6. Coming to first limb of argument of Dr. R.K. Srivastava, learned counsel for the petitioner that the respondent has got no right to impose excise duty, plain reading of the impugned notice shows that the respondent-State does not intend to impose any excise duty rather it is imposing penalty equivalent to excise duty keeping in view the terms and conditions contained in the licence (supra).

7. In the case of Deccan Sugar & Abkari Co. Ltd. (supra), the dispute was with regard to rectified spirit where the Hon'ble Supreme Court held that though the rectified spirit is capable of being used for producing potable liquor but it is beyond the State's power to levy excise duty. The state can levy excise duty only on potable liquor meant for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. Hence the Hon'ble Supreme Court set aside the order passed by the Commissioner of Excise. In the case of Rampur Distillery and Chemical Co. (supra) a Division Bench of this Court held that on the rectified spirit not fit for human consumption. State cannot impose duty and further held that in terms of agreement, excise duty cannot be charged. In the case of Lipton India Ltd. (supra), while deciding the case, we have opined that the dismissal of writ petition on the ground of alternative remedy shall not be justified if the order passed by the authority is arbitrary, or is an incident of the abusing power or passed in violation of principles of natural justice and it may always be subjected to judicial review. The same principles have been reiterated in the case of Dharendra Kumar Rai (supra).

8. It has been vehemently argued by Shri H.P. Srivastava, learned Additional Chief Standing Counsel that the petitioner has alternative remedy to prefer appeal under Rule 6 of the U.P. Excise (Appeal and Revision Rules 1968) and thereafter may prefer a revision to the State Government within a period of six months from the date of order passed by the appellate authority, i.e. Collector or Excise Commissioner, as the case may be. There appears to be no dispute over the proposition of law that statutory alternative remedy is no bar in case the order passed by the excise authority is an instance of abuse of power, highly arbitrary or violative of principles of natural justice but at the same time in case controversy involved disputed question of fact and law, then in ordinarily course the Court should loath to interfere with such order and matter may be relegated to statutory appellate or revisional authority vide Union of India (UOI) Vs. Ghaus

Mohammad, , AIR 1997 993 (SC); D.L.F. Housing Construction (P) Ltd. Vs. Delhi Municipal Corpn. and Others, ; Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, ; Sohanlal Vs. The Union of India (UOI), ; Thakur Amar Singhji Vs. State of Rajasthan, ; New Satgram Engineering Works and Another Vs. Union of India (UOI) and Others, and Ranjeet Singh Vs. Ravi Prakash, and Dwarka Prasad Agarwal (D) by LR. and Another Vs. B.D. Agarwal and Others, .

9. However, so far as the present case is concerned, the indemnity bond readwith terms and conditions of the licence provides that the imposition of penalty equivalent to excise duty, the Government has power to impose excise duty on rectified spirit but in the event of breach of terms and conditions of the licence read with indemnity bond, Government has right to impose penalty.

10. It is true that even by entering into the agreement, the Government cannot acquire power to impose excise duty beyond jurisdiction conferred by Entry 51 List 2 of the 7th Schedule but possesses power to impose penalty in terms of conditions provided in the licence with regard to export. It is different thing that instead of providing the maximum limit in terms of money with regard to penalty, the condition given in the licence speaks for imposition of penalty equivalent to excise duty.

11. In the case of Pratibha Processors and Others (supra) their Lordships opined that words "tax" "interest" and "penalty" represent different concepts. For convenience Para 13 of the said case is reproduced as under:

In fiscal statutes, the import of the words - "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty which is penal in character.

12. Accordingly, on account of breach of agreement on the part of petitioner to return Pass PD 25 and 26, the Government has got power to impose penalty equivalent to excise duty in terms of licence condition. In case punitive clause is not given effect to or made redundant, then it shall make easy for the licence holder to breach the licence condition and abuse the export process for extraneous consideration. Penalty may be equivalent to excise duty which may be chargeable by the Central Government but it cannot be a substitute of excise duty. Of course, the licensee would have right to raise objection by preferring an appeal or revision before the appropriate authority to submit that the penalty

imposed is excessive or is not equivalent to excise duty or is not in conformity with the terms and conditions of the licence.

13. There is one other aspect that the petitioner has accepted the terms and conditions of the licence and exported the rectified spirit to Jaipur and also undertaken to return duly verified PD 25 and 26. Once the parties accept the terms and conditions, they have got no right to violate the same by taking different stand on finding inconvenience. The approbation or reprobation are prohibited by law of estoppel. A party receiving benefit under an order cannot claim that it was valid for one purpose and invalid for other purposes vide *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, *Rajasthan State Road Transport Corporation and Another Vs. Bhik Nath*, ; *SACI Allied Products Ltd., U.P. Vs. Commissioner of Central Excise, Meerut*, ; *Bansraj Laltraprasad Mishra Vs. Stanley Parker Jones*, ; *State of Karnataka and Another Vs. All India Manufacturers Organization and Others*, ; *Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others*, and *Mumbai International Airport Pvt. Ltd. Vs. Golden Chariot Airport and Another*, .

14. Accordingly, once the petitioner availed the benefit of licence issued on 20.3.1998 and exported the rectified spirit outside the State of U.P., then it cannot rely upon its validity to avail benefit for one reason and assail the same for other reason with regard to respondent's right to impose penalty in the event of breach of own duty to return Pass PD 25 and 26.

15. There is one other aspect of the matter that the impugned penalty has been imposed in pursuance to terms and conditions and power conferred by the licence dated 20.3.1998. While preferring the present writ petition, the petitioner has not impugned the licence or its terms and conditions. The notice dated 2.12.2002 issued by opposite party No. 4 contained in Annexure No. 1 is consequential order issued on account of breach of terms and conditions contained in the licence dated 20.3.1998. The terms and conditions contained in the licence has not been impugned in the present writ petition.

16. It is trite law that the writ petition shall not be maintainable in case basic order is not challenged vide *Government of Maharashtra and Others Vs. Deokar's Distillery*, ; *Ashok Pratap Singh Vs. State of Uttar Pradesh and Others*, ; *P. Chitharanja Menon and Others Vs. A. Balakrishnan and Others*, ; *Roshan Lal and Others Vs. International Airport Authority of India and Others*, .

17. In view of above, since the basic order, terms and conditions of the licence and indemnity bond have not been challenged, the writ petition is not maintainable. There was legal obligation on the part of the petitioner to challenge the basic order and only if the same is found to be wrong, the consequential order, i.e. the impugned order could be examined under the process of judicial review.

18. Attention has been invited by Shri H.P. Srivastava, learned Additional Chief Standing Counsel, to a recent judgment of Hon'ble Supreme Court dated

6.7.2011 passed in Civil Appeal No. 6896 of 2002 Kesar Enterprises Ltd. v. State of U.P. Their Lordships of Supreme Court upheld the order of High Court and held that under Rule 633 of the Excise Manual, Excise Commissioner has got right to impose penalty. However, it has been held that before imposing penalty, it shall be incumbent to provide opportunity of hearing. Paras 21 and 22 of the judgment are reproduced as under:

Para 21 - Having considered the issue, framed in para 12 supra, on the touchstone of the afore-noted legal principles in regard to the applicability of the principles of natural justice, we are of the opinion that keeping in view the nature, scope and consequences of direction under sub-rule (7) of Rule 633 of the Excise Manual, the principles of natural justice demand that a show-cause notice should be issued and an opportunity of hearing should be afforded to the person concerned before an order under the said Rule is made, notwithstanding the fact that the said Rule does not contain any express provision for the affected party being given an opportunity of being heard. Undoubtedly, action under the said Rule is a quasi-judicial function which involves due application of mind to the facts as well as to the requirements of law. Therefore, it is plain that before raising any demand and initiating any step to recover from the executant of the bond any amount by way of penalty, there has to be an adjudication as regards the breach of condition(s) of the bond or the failure to produce the discharge certificate within the time mentioned in the bond on the basis of the explanation as also the material which may be adduced by the person concerned denying the liability to pay such penalty. Moreover, the penalty amount has also to be quantified before proceedings for recovery of the amount so determined are taken. In our view, therefore, if the requirement of an opportunity to show-cause is not read into the said Rule, an action thereunder would be open to challenge as violative of Article 14 of the Constitution of India on the ground that the power conferred on the competent authority under the provision is arbitrary.

Para 22 - Thus tested, in the instant case, vide his letter dated 2nd October 1992, the Excise Commissioner called upon the appellant to deposit an amount of 14,20,943/- towards Excise duty and interest on account of default on their part to furnish PD-25 pass duly certified by the competent authority at Kandla Port. The letter/notice does not indicate the exact quantity of rectified spirit on which duty @ 40/- per alcoholic litre has been charged, though the total amount of duty payable is mentioned. Similarly, in the final show-cause notice dated 6th April 1994, threatening action for black listing for future exports on account of non-payment of the aforementioned amount, there is not even a whisper as to how and why rectified spirit in question was being subjected to Excise duty by the State. As stated above, this Court having categorically held in Synthetics And Chemicals (supra) and in catena of subsequent decisions that the State Legislature had no legislative competence to impose Excise duty on rectified spirit (industrial alcohol), the Commissioner of Excise could not demand Excise duty on rectified spirit contained in the tank wagon which, later on, was found to be empty, without returning a finding that the said spirit had been diverted/

converted into potable alcoholic liquor fit for human consumption, on which the State was empowered to impose duty. It bears repetition that such a finding could not be recorded by the Commissioner without affording due opportunity to the appellant to explain its stand in this regard for which, the onus lay on them as transporter and the executant of the bond. We may, however, add that in the absence of any reasonable explanation regarding disappearance of rectified spirit, the Commissioner would have reason to presume that the same has been disposed of otherwise than by way of export outside the country, for which purpose it was being transported. We are convinced that in the present case, before imposing the impugned demand of penalty and interest, there was absolutely no adjudication by any authority as regards the breach committed by the appellant, except the allegation that the appellant had failed to furnish the PD-25 pass certified by the Collector. In our opinion, therefore, the action of the respondents for the recovery of penalty and interest, being violative of principles of natural justice, is null and void.

19. Subject to finding (*supra*) the impugned order does not seem to be an instance of levy of excise duty by the State Government but it is a penalty on account of breach of terms and conditions given in the licence. In case the petitioner has any objection with regard to impugned notice or the licence dated 20.3.1998, then appropriate remedy was to raise objection before the appropriate authority immediately or challenge the same before this Court. Since condition has not been impugned before the appropriate Forum, it shall be binding on the petitioner to pay the penalty in terms of condition contained in the licence.

20. It has been submitted by the learned counsel for the petitioner that the in order to give effect the export of absolute alcohol, a sum of Rs. 20,000/- was deposited to the excise authorities by the exporter as export pass fee. Copy of the Pass PD 25 in respect of 10,000 B.L. of absolute alcohol is enclosed as Annexure No. 6 to the writ petition.

After exporting absolute alcohol, opposite party No. 7 has not returned bond, Pass PD 25 and 26. Since the petitioner has not received back the Pass PD 25 and 26, he informed opposite party No. 7 to do needful.

According to the learned counsel for the petitioner, instead of taking any action against respondent No. 7 vide dated 4.4.2000 Annexure No. 8, Excise Inspector, In-charge, Hargaon Distillery, informed the petitioner that the penalty shall be imposed in case Pass PD 25 and 26 are not returned. The arguments advanced by the learned counsel for the petitioner seems to be misconceived.

21. A plain reading of the terms and conditions contained in the licence reveal that burden was on the petitioner to return PD 25 and 26 after delivery of alcohol and in the event of default, the petitioner was liable to be punished in the form of penalty equivalent to excise duty. Burden was on the petitioner to ensure the return of PD 25 and 26 being exporter of the rectified spirit and under the terms

and conditions of the licence and indemnity bond. The petitioner has got no right to shift the burden with regard to return of Pass PD 25 and 26 on the department or fix liability on the respondent Excise Department to ensure the recovery of Pass PD 25 and 26. The business transaction was between the petitioner and respondent No. 7. It was further for the petitioner to ensure the compliance of terms and conditions of the licence and indemnity bond otherwise to face the penalty in terms thereof.

22. In view of above, the writ petition lacks merit. It is an instance of abuse of process of law, hence liable to be dismissed with exemplary cost. However, we make it open to the petitioner to approach statutory appellate/revisional Forum to ventilate its grievance against the impugned order/notice or return PD 25 and 26 within a month.

Accordingly, subject to liberty above the writ petition is dismissed with cost of Rs. 50,000/- which shall be deposited in this Court by the petitioner within two months failing which, the District Magistrate concern shall recover the same as arrears of land revenue. The cost shall be remitted to Mediation Centre, High Court, Lucknow Bench, Lucknow. Registry is directed to take follow up action.