
(2009) 05 AHC CK 0252
In the Allahabad High Court

Oudh Sugar Mills Ltd.And another

APPELLANT

Vs

State of U.P.and others.

RESPONDENT

Date of Decision : 27-05-2009

Acts Referred:

Citation : (2009) 05 AHC CK 0252

Hon'ble Judges : Pradeep Kant, J and Syed Nazim Husain Zaidi, J

Final Decision : Dismissed

Judgement

S.N.H. Zaidi, J.

This is a bunch of writ petitions, in which an interim order was passed on 15.05.2009. Considering the pleas of the parties that the question raised in the petitions regarding levy of and realization of administrative charges on molasses transferred from the sugar mill to its own distillery requires determination of competence of the State to levy such charges which have been held to be "tax" by the apex court and the argument that the use of molasses by the own distillery of the sugar mill, cannot be subjected to any such imposition of tax coupled with the statement given by the learned Additional Chief Standing Counsel Sri H.P. Srivastava that no direction has been issued by the Commissioner/Controller of molasses restraining the sugar mills from transferring the molasses from sugar mill to its own distillery in absence of payment of administrative charges in terms of the amended provisions under the direction of the Commissioner, this court passed the following order:

" We under the circumstance direct that till 19.5.2009 no coercive steps shall be taken against the petitioners for non payment of administrative charge in respect of transfer of molasses of the sugar Mills to their own distillery and their functions shall not be stopped. This order was passed subject to further consideration of the matter on 19.5.2009".

We have heard Sri Bharat Ji Agarwal, Sri R.N. Trivedi learned Senior Advocates assisted by respective counsel in various writ petitions and Sri Manish Kumar, for

the petitioners and Sri J.N. Mathur, learned Additional Advocate General and Sri H.P. Srivastava, Additional Chief Standing Counsel for the respondents.

The writ petitions challenge the constitutional validity of Sheera Niyantran Adhiniyam(Amendment) Act, 2009 (hereinafter referred to as the "Amended Act") which has added a new clause (d1) in section 2 defining the "molasses for captive consumption" to mean and include only such transfer of molasses by an occupier of the sugar factory to a distillery or to industrial unit having the same ownership, provided the distillery or industrial unit is situated within the same premises or where it is in such "contiguous vicinity" of the sugar factory so that the transfer or transportation of such molasses outside the premises or the gate of the sugar factory is not required to be effected by a vehicle and also amends section 8 of the Act wherein in sub section (1) of section 8 of the Principal Act, the words "sell or supply" have been substituted by the words "transfer or sell or supply" and in sub sections (4) and (5) of the section 8 of the Principal Act, the words "sold or supplied" have been substituted by the words "transferred or sold or supplied".

The effect of these amendments is that the sugar factory will be required to pay administrative charges, even on molasses, which are transferred to its own distillery, although it does not involve any sale or commercial transaction as the molasses are required only for captive consumption.

The amending Act seeks to amend provisions of U.P. Sheera Niyantran Adhiniyam1964 which has been assented by the President of India on 17.10.1964 under the provisions of Article 254 of the Constitution of India. The amending Act has not been assented by the President of India and that the statement of objects and reasons appended to the said Act takes into account the following salient facts, which prompted the State to pass the impugned enactment:

- a. Judgment of Dhampur Sugar Mills Ltd. Vs State of U.P. and others in terms of which sugar factories having their own distilleries were absolved from the requirement of supply of molasses to other distilleries engaged in the manufacture of country liquor till such time as the molasses was required for use by itself.
- b. The other object and reason as stated is that since the Court has passed interim orders in various writ petitions as such on the basis of legal advice of counsel, the definition of "captive consumption" has been included in the impugned amendment. Significantly the matters are pending before the Hon"ble High Court and as such the action of the respondents is blatantly arbitrary, illegal and amounts to interference in the judicial process.

Lengthy arguments have been raised from both the sides but for the purpose of interim relief, it would be sufficient to summarize the issues involved and to consider as to whether the petitioners are entitled for any interim order restraining the respondents from realizing administrative charges from the sugar

mill for transfer of molasses to its own distillery i.e.

(1) Administrative charges being "tax" can not be imposed or realized by the State as it lacks competence to do so;

(2) "tax" aforesaid is referable, only to entry 54 list II of Seventh schedule, which permits the State to levy and realize tax only on sale and purchase of goods other than newspapers, and not on transfer;

(3) Section 8 is inoperative or unworkable as Rule 23 of the Rules of 1974, which prescribe a mechanism for realization of administrative charges under section 8(4), does not include "transfer"

Administrative charges have been held to be a "tax" by the apex court in the case of Commissioner of Central Excise Lucknow U.P. vs. M/s Chhata Sugar Co. Ltd., reported in (2004) 3 SCC 466; the argument is that a tax cannot be imposed by the State Government on transfer of molasses by the sugar mill to its own distillery for its own consumption as it lacks competence to impose and realize such a "tax". Nor entry 26 and 27 of list II or Entry 33 of List III of Seventh Schedule empowers the State to levy tax on stock transfer for captive consumption and that the provisions of Article 366 (29A) of the Constitution of India are not attracted. Submission is that the impugned Act in so far as it seeks to impose tax on its own or captive consumption or stock transfer of molasses is ultravires the powers of the State legislature.

Further argument is that administrative charges under section 8(4) and 8(5) which provide for levy of administrative charges read with rule 23, is a tax as held by the apex court in the case of M/s Chhata Sugar Company Ltd. (Supra) and as such, the tax is referable only to entry 54 list II of Seventh Schedule of the Constitution of India which authorises the State to levy tax on the sale or purchase of goods other than the newspapers.

Another argument has been raised that amendment in section 8 is bad in the eye of law being inoperative and unworkable as the levy of such administrative charges under section 8(4) has to be made in the manner prescribed in Rule 23 of the U.P. Sheera Niyantran Niymawali 1974 which does not include any transfer.

The counsel for the petitioners in addition to the arguments aforesaid also raised a plea that by delicensing the sugar industry, it cannot be said that such industry is under the control of the Union in terms of sub clause (a) of entry 33 and that the control which was being exercised under the provisions of Industries (Development and Regulation) Act (65 of 1951) under section 18 (g) is no more in existence.

Elaborating the aforesaid pleas it has been urged that under the Constitution of India the State legislature is only empowered to impose tax on sale or purchase of goods and not on the transfer of such goods as the same does not resemble the character of "sale" as is recognized by general law and/or Sales of Goods Act, 1930. The State legislature is empowered to impose tax only on sale and

purchase of goods other than newspapers, therefore, the impugned amendment imposing the tax (administrative charges) on such transfer of molasses is not only arbitrary and illegal but ultravires the provisions of Constitution of India and is unsustainable.

Prior to the aforesaid amendment, section 8 did not include the word "transfer" and that the administrative charges were imposed for such captive consumption also, under the word "supply" used in section 8. Of course it was not treated as sale even under the unamended provisions of the Act.

Writ petitions were filed challenging the aforesaid order of the State Government in which interim orders were passed and the respondents were restrained from realizing any administrative charges on molasses which were transferred by the sugar mill to its own distillery namely; for "captive consumption", which are still pending and the interim orders are continuing.

Sri J.N. Mathur in response submitted that the power to legislate and to incorporate the aforesaid amendment in the U.P. Sheera Niyam Adhiniyam 1964, vests with the State Government both under entry 33 of list III as well as under entry 54 of list II of Seventh Schedule. In the alternative it has also been argued that Article 366 (29A) of the Constitution of India also empowers such legislation so as to include transfer which is nothing but a notional sale of goods namely molasses from one unit namely; the sugar mill to another unit namely; the distillery who are two different entity and therefore, it cannot be said that such transfer is bereft of the ingredients of sale.

Reliance has been placed upon the case SIEL Ltd. And others Vs Union of India, AIR 1998 SC 3076 wherein challenge to the validity of U.P. Sheera Niyam Adhiniyam was made and while upholding the validity of the said act, it was held that the legislative power of State Government was referable to entry 33 of List III. Entry 33 of List III relied for the purposes reads as under:

" 33. Trade and commerce in, and the production, supply and distribution of,

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;

(b)

(c)

(d)

(e)

Submission is that the constitutional validity of the Act having been upheld reading the aforesaid entry 33 which relates to trade and commerce in, and the production supply and distribution of the products of any good, it cannot be presumed that the apex court was not conscious of the provisions of section 8

which provided for imposition and realization of administrative charges and since by the pronouncement of the apex court in the case of M/s Chatta Sugar Company Ltd. (Supra) only a declaration has been made of the provision of the existing statute it can safely be presumed that the apex court upheld the validity of this taxing provision also and therefore, it cannot be said that the State Government was not having any legislative competence to enact the impugned amendment under entry 33 of list III. Explaining the aforesaid argument it has been submitted that if the taxable event could not have been legislated upon in the Act under the aforesaid entry (section 8) the said provision (section 8) would have been declared as ultravires the Constitution but having not done so, the power to legislate or to enact a law for imposition and realization of the administrative charges under the said entry has been upheld and therefore, it is not open for the petitioners to raise the said plea.

Respondents further submitted that even under entry 54 of list II, the transfer being a sale itself, may be a notional sale, therefore, it is covered by the said provision also.

In regard to the plea that the sugar Industry is no more covered by sub clause (a) of entry 33 of list III, the learned counsel submitted that it is not the correct interpretation of the Industries (Development and Regulation) Act, (65 of 1951).

Questions raised from both the sides, including the plea of the legislative competence of the State Government to impose and realize the administrative charges on transfer of molasses from sugar mill to its own distillery requires consideration by the Court.

Entry 33 of list III speaks of trade and commerce in, and production, and supply and distribution of the products of any industry where the control of such industry by the Union is declared by the Parliament by law to be expedient in the public interest. By upholding the constitutional validity of the Act, *prima facie* it cannot be presumed that the taxing authority of the State Government under the said entry has also been upheld by the apex court. The general entry cannot be read for imposition of tax or introducing the incidence of tax and its realization. A tax can be imposed and realized only if it falls within a given entry and there is power to legislate and make any enactment for the imposition of such a tax. This distinction has been clearly considered by the apex court in the following cases, wherein it has been held that for imposing a tax, the general entry given in list III would not be sufficient to confer this power upon the State legislature.

In the case of M/s Hoechst Pharmaceuticals Ltd. Vs State of Bihar and others (1983)4 SCC 45 the apex court held as under:

"It is equally well settled that the various entries in the three Lists are not "powers" of legislation, but "fields" of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence the power to tax cannot be deduced from general legislative entry as an ancillary power. Further,

the element of tax does not directly flow from the powers to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the Centre's power of price control".

In the case of Southern Petrochemical Industries Co. Ltd. vs. Electricity Inspector and ETIO and others, AIR 2007 SC 1984, the apex court held as under:

"Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the Lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence visavis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifests the aforementioned nature of the entries of the List, and thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. We, however, do not mean to suggest that in regard to the validity of a taxation statute, the same, by itself, would be a determinative factor as in a case where the Parliament may legislate an enactment under several entries, one of them being a tax entry".

In regard to the plea that the aforesaid tax is also covered by entry 54 of list II, we may look to the entry aforesaid as under:

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I".

Sale or purchase of goods have a different connotation in law which cannot be effected unless there are two or more persons as there cannot be a sale or purchase of goods by one person. It is not disputed that it is one company which owns the sugar mill as well as distillery though they are granted separate licenses and may be different units but whether a transfer of molasses from such sugar mill to its own distillery would constitute a sale, is a matter which requires consideration.

We are prima facie satisfied that the imposition of administrative charges on transfer of molasses by the sugar mill to its own distillery cannot be protected under either entry 33 of list III nor it is governed by entry 54 of list II and is also not referable to Article 366 (29A) of Constitution which is only an enabling provision and in the absence of any valid law having been enacted in this regard, the said provision cannot in itself be applied for imposition of tax or for realization thereof.

We are also prima facie satisfied that such a transfer cannot amount to sale as it

is a company which is a person who owns both the units and that "transfer" and "sale" can not be interchanged, nor "transfer" can be read in "sale".

Learned counsel for the respondents vehemently urged that since the petitions challenge the vires of the Act, therefore, there cannot be a blanket stay order as it would mean the declaration of the Act, ultravires without adjudicating upon it and that the interest of the petitioners can be safe guarded by allowing them to deposit the administrative charges subject to undertaking given by the State that in case of their success in the writ petitions, the entire amount would be refunded with interest at the prevalent bank rate of interest at that time.

Responding to the aforesaid arguments the learned counsel for the petitioner drew the attention of this court to article 265 of the Constitution of India. Article 265 of the Constitution of India prohibits the imposition of tax and says that no tax shall be levied or collected except by authority of law.

The petitioners also give an undertaking for the deposit of tax with interest in case their petitions fail.

We being, prima facie satisfied that the tax (administrative charges) neither could have been imposed nor could be collected, provide as an interim measure that no administrative charges shall be realized from the sugar mills on transfer of their molasses, a by product of sugar mill to its own distillery for its own use and consumption, till next date of listing. The petitioners' sugar mills shall however, maintain an account of molasses transferred to their own distillery and in view of undertaking given by them that they will make payment of the entire amount due in case the petitions fail, we further direct that the amount so payable shall be paid by the petitioners' sugar mills within 30 days from the date of decision of the writ petition, alongwith interest at the then prevalent bank rate.

As legal questions are involved, we admit all the petitions and looking to the issues involved as well as urgency in the matter we direct that writ petitions be listed for hearing in the month of July 2009. In the meantime the parties may exchange their affidavits.