
(2010) 06 PAT CK 0036

In the Patna High Court

Case No : Civil Writ Jurisdiction Case Nos. 5000 and 3638 of 2000

Riga Sugar Company Limited (Distillery Division) APPELLANT

Vs

The State of Bihar
 Sci India Limited and Rajendra RESPONDENT
Mahto Vs The State of Bihar and Others

Date of Decision : 23-06-2010

Acts Referred:

Citation : (2010) 06 PAT CK 0036

Final Decision : Allowed

Judgement

Shiva Kirti Singh, J.—These seven writ petitions have been treated as analogous matters and heard together because they raise common issues by challenging the vires of Bihar Molasses (Control) (Amendment and Validation) Act, 1999 (Hereinafter referred to as the Validating Act) published in the official gazette on 10.01.2000. Petitioners have also sought for quashing of various demand notices issued pursuant to the aforesaid Validating Act by which they have been directed to pay administrative charges for the molasses consumed by them in their captive distilleries (in case of those petitioners who have sugar mills along with captive distilleries) or for the molasses lifted by them from various sugar mills during the period 1995-2000. In some of the writ petitions interlocutory applications have been filed for refund of administrative charges already paid pursuant to the Validating Act.

2. The issues falling for determination in these cases are mainly issues of law. The relevant facts lie within a narrow compass and are not in dispute. For the sake of convenience the facts and documents shall be referred from the records of CWJC No. 3829 of 2000. Only in case of necessity facts from other records may be referred to with due reference to the specific case. In general, it is evident that petitioners are distilleries holding relevant licenses under Bihar Excise Act and are engaged in the manufacture of spirit and Indian Made Foreign Liquor from molasses and other bases. Some of the petitioners also have their own sugar mills wherein they produce molasses which they consume in their

captive distilleries. The dispute relates to levy of administrative charges under the provisions of Bihar Molasses Control Act, 1947 (hereinafter referred to as the "Act").

3. The object of the aforesaid Act is to provide for control of distribution, supply, storage and price of molasses produced in the State of Bihar. The occupiers of the factory and the stockists engaged in production and storage respectively of molasses are required to submit returns as per provisions of Section 3 of the Act. Section 4 of the Act requires permission of the controller for moving molasses produced in a sugar factory. Section 5 also imposes restraint on the supply of molasses in absence of permission of the controller. Section 8 contains power for price fixation of molasses to be sold by the factory or stockist. Section 8A of the Act empowers the State Government to levy administrative charge at rates notified by the State Govt. This charge is to meet the cost of establishment for supervision and control over release of molasses and is to be recovered from the purchaser.

4. At this stage, it would be useful to keep the historical perspective of the Act in mind. In exercise of rule making power u/s 13(1) of the Act, the State of Bihar made certain rules in 1965 making provision for imposition of charges and fees through Rules 4-A, 9-A and 11-A. These Rules and the levy of administrative charges imposed under them were successfully challenged by the affected parties as is evident from judgment of this Court in the case of Bhola Nath Gupta and Ors. v. State of Bihar 1975 BBCJ 397. The Rules and the levy were struck down because there was no legal sanction for such levy in the Act as it stood at that time. By Bihar Molasses (Control) (Amendment) Act, 1977 Sub-section (f) in Section-2 and Section 8-A were inserted in the Act empowering the State Government to impose administrative charges on molasses. In terms of Section 8-A notifications were issued laying down the rates for levy of administrative charges. Such charges till issuance of a notification dated 20th December, 1995, were payable on the released molasses intended for supply to the distilleries of outside the State. When by an amendment notification dated December, 20th 1995 administrative charge was sought to be imposed on the released molasses intended for supply to the distilleries within the State, this notification and subsequent notification enhancing the rate of administrative charges were again successfully challenged by the distilleries and sugar mills in State of Bihar. Some of the petitioners in that case such as M/S Riga Sugar Company Ltd are again petitioners before us. By judgment of this Court in the Case of S.K.G. Consolidated Limited and Anr. v. The State of Bihar reported in 1997 BBCJ 387, this Court held the imposition of administrative charges illegal in view of the nature of power provided u/s 8-A and definition of released molasses u/s 2(f) of the Act.

5. At the relevant time and before the Amendment Act Section-2(f) and Section 8-A read thus:

Section-2 In this Act, unless there is anything repugnant in the subject:

(f) "released molasses" means such molasses which is either considered surplus to the requirements of the distilleries of the State of Bihar or which is unfit for the use of such distilleries.

Section 8-A: Imposition of administrative charges on molasses- notwithstanding anything to the contrary contained in Section-8, the State Government may in such manner and at such rates as may from time to time prescribe, impose on any sale of released molasses charges for meeting the cost of establishment for supervision and control over such releases and such charges shall be recoverable from the purchaser thereof.

Provided that the State Government may exempt or reduce the rate of charges in respect of sale of released molasses to distilleries outside the State of Bihar.

6. Noticing the aforesaid provisions, in the case of M/S S.K.G Consolidated Limited (supra) this Court held that for the imposition of any administrative charges two conditions were required to be satisfied, (i) there must be an incident of sale and (ii) the article forming the subject of sale must be "released molasses". It was also held that molasses sold to distilleries within the State of Bihar had to be excluded from the definition of "released molasses". It was also held that in case of captive consumption of molasses, there would hardly be any question of sale. The Court further held that the petitioners of that case will be entitled to refund of the amount/adjustment because the State could not be permitted to appropriate the administrative charges realized without any legislative sanction when the petitioners could not have passed on to the consumer such administrative charges.

7. It was in order to meet the situation arising out of the aforesaid judgment that the impugned Amending and Validating Act was enacted after more than 3 years of the judgment. A copy of the Validating Act as published in the Bihar Gazette has been annexed as Annexure-7. The Preamble of the Act makes a reference to the Notification dated 22nd December, 1995 which prescribed rates of administrative charge on supply of "released molasses" to the distilleries within the State of Bihar and also to the judgment of this Court in the case of M/S S.K.G Consolidated Ltd (supra). It further states that it has become necessary to impose and validate administrative charges on sale or supply of molasses to the distilleries within the State of Bihar in accordance with policy approved by the Cabinet. By Section-2 of the Amending Act Clause (f) of Section-2 of the Act has been substituted so as to read thus:

"released molasses" means such molasses which is allotted to any distillery of the State of Bihar or to the distilleries outside the State of Bihar or to any person.

8. By Section-3 of the Amending Act, Section-8A of the Act was substituted with the following Section:" 8A. Imposition of administrative charges on molasses.- Notwithstanding anything contrary contained in Section 8, the State Government may, in such manner and at such rates as from time to time may be prescribed, impose on any sale or supply of released molasses, charge for meeting the cost

of establishment or supervision and control over such releases and such charge shall be recoverable from the person to whom such sale or supply is made:

Provided that the State Government may exempt or reduce charges in respect of released molasses to the distilleries outside the State of Bihar.

9. Section-4 of the Validating Act has been enacted explicitly for validation of collection of administrative charges. It provides as follows:

4. Validation of Collection of administrative charges.-Notwithstanding any judgment, decree or order of any Court to the contrary, every notification issued or purported to have been issued under Rule 4A of the Bihar Molasses (Control) Rules, 1955, before the commencement of this Act shall be deemed to have been issued u/s 8A read with the provisions of Clause (f) of Section 2 as amended by this Act and shall be so interpreted and be deemed to be always to have been valid as if the provisions of Section 2 and 3 of this Act, were in force at all material time and accordingly anything done or any action taken (including any order made, proceeding taken, jurisdiction exercised, assessment made, or administrative charges levied, collected or paid or purported to have been done or taken in pursuance of any such notification shall be deemed to be, and always to have been validly and lawfully done or taken.

10. The effect of Section-4 of the Validating Act is to validate the notification issued under Rule 4A of the Bihar Molasses (Control) Rules, 1955 (hereinafter referred to as the "Rules") and also to validate the administrative charges levied, collected or paid in pursuance of the said Notification dated 22nd December, 1995 which has been validated retrospectively from the date of its issuance.

11. Leading the arguments on behalf of the petitioners in CWJC Nos. 3829/2000, 3638/2000, 3588/2003, 1048/2003, Mr. Yaduvansh Giri, Senior Advocate advanced submissions to the following effect:

(i) The Validating Act transgresses the limits laid down for a Validating Act as laid down in various judgments of the Supreme Court and this Court.

(ii) If the levy of administrative charge is justified as a fee, it deserves to be invalidated for want of quid pro quo.

(iii) If the levy of administrative charge is accepted to be a tax, then, whether the State Legislature has the legislative competence to impose such a tax in respect of captive consumption of molasses which transaction lacks the ingredients of sale.

(iv) Even if legislative competence is found to exist, the impugned provisions authorizing State Government to impose administrative charges at rates to be specified by it deserves to be struck down because of vice of excessive and unguided delegation. On this ground it has been submitted that the provision cannot be upheld even in relation to such manufacturers of alcohol who purchase molasses and are not captive consumers. The petitioners are entitled to refund of

administrative charges realized from them under the provisions of the Act or the Validating Act.

(v) Lastly, it has been submitted in alternative that even if vires of Validating Acts is upheld it should be held that it empowers the authorities only to retain the collected administrative charges but not to demand and collect what may be calculated to be dues of earlier period.

12. Learned Counsels appearing in other two CWJC Nos. 588/2003 and 5000/2000, Mr. Ram Balak Mahto, Senior Advocate and Mr. Satyabir Bharti, Advocate adopted and reiterated the aforesaid submissions. They underlined the submissions that in the light of recent judgments of the Supreme Court in the case of Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd., in the context of provisions in the corresponding Act of Uttar Pradesh similar to those u/s 8A of the Act, the Apex Court has found and held similar administrative charge to be tax and not a fee. It has further been submitted that tax cannot be imposed under a general entry. Power to tax must be derived from a specific entry in any of the three lists in Schedule-VII to the Constitution of India providing for power to levy tax. According to the petitioners there is no specific entry providing for tax in the nature of administrative charges as mentioned in the Act and hence such tax is without legislative competence.

13. On the other hand, learned Advocate General appearing for the State in these writ petitions has made no attempt to defend the administrative charges as a fee and has accepted that in view of Supreme Court judgment in respect of similar provisions in Uttar Pradesh, the administrative charges may now be treated to be a tax. However, he submitted that unlike the provisions in the U.P. Act, Section 8 A of the Act contains sufficient guidelines for the State Government to prescribe rates of administrative charge and therefore there is no substance in the submission that the provisions suffer from excessive and unguided delegation. He further took a stand that entry-33 in list-III of VIIth Schedule contains source of power and hence the levy of tax is not without legislative competence. Lastly, it has been submitted that demand notices have been issued in accordance with provisions of the Act as amended by the Amendment and Validation Act of 1999 and hence there is no question of refund of administrative charges realized from the petitioners. According to learned Advocate General, in view of the Validating Act, the Notification of 22nd December, 1995 has become valid from the date of its issuance and hence notices have rightly been issued for collecting administrative charges under the aforesaid Notification which has remained uncollected so far.

14. The submissions advanced by the parties as noticed above have been elaborated and supported by several judgments which require consideration. Hence, the aforesaid submissions may now be considered in some details. So far as the submissions advanced by Mr. Giri are concerned, instead of discussing hypothetical issues of law unnecessarily, it is deemed proper to first consider the issue as to whether levy of administrative charge under the Act as it stands after

the Validating Act is in the nature of a fee or a tax. On this issue, learned Counsel has placed reliance upon the following judgments:

1. Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd.,
2. Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others,
3. Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others,

15. In view of the stand of the learned Advocate General noted earlier that levy of administrative charges may be treated to be a tax, the aforesaid issue does not require detailed consideration. But a brief review of the aforesaid judgments appears to be necessary for coming to a definite conclusion. In the case of Commissioner of Central Excise, Lucknow (Supra) the respondent-company was a manufacturer of molasses and had collected administrative charges u/s 8(5) of the relevant U.P. Act on behalf of the State Government from the buyers/allotees, on sale of molasses. The question falling for determination was whether the said administrative charges were in the nature of a tax and therefore to be excluded from the value of molasses in terms of provisions under the Central Excise Act, 1944 or were in the nature of a fee and therefore includible. After examining various relevant aspects, the Supreme Court held in clear terms that the administrative charges imposed on production of molasses for sale and passed on to the buyer distillery is a tax and not a fee.

16. In the case of T.N. Kalyana Mandapam Assn. v. Union of India and Ors. (supra) the main issue was whether the Parliament had the legislative competence to impose service tax on services provided by Mandap-Keepers. While deciding in favour of validity of the tax it was held that service tax did not amount to a tax on land or a tax on sale and purchase of goods. Clearly, the issue was different.

17. In the case of Southern Petrochemical Industries Co. Ltd (supra), one of the issues was whether electricity being "Goods" under Sales Tax Laws and other tax laws, power to fix tariff on electricity will include a power to impose tax. In that context, in paragraph-150, the Court observed that supply does not mean sale. A fortiori, it does not also mean consumption. The Court held that Tamil Nadu State Legislature was competent to enact and act providing for tax on consumption or sale of electricity.

18. On a comparison of Section-8 of the U.P. Act which has been extracted in paragraph-7 of the Supreme Court judgment in the case of Commissioner of Central Excise, Lucknow with the provision in Section-8A of the Bihar Act, it is noticed that while in the U.P. Act the purpose of levying administrative charges is not made explicit as in the Bihar Act. The levy of administrative charges is at the first stage, like in the Bihar Act, imposed upon producer of molasses, described as the occupier of the sugar factory and the rate may be fixed by the State

Government not exceeding Rs. 5/- per quintal. The occupier is entitled to recover the administrative charges from the purchaser/allottee of molasses, in addition to the price of molasses. In the Bihar Act also, the provisions are in substance to the same effect and the price of molasses is determined u/s 8 of the Act whereas in U.P. Act it is determined under Section-10. The nature of the administrative charges for the purpose of deciding the issue whether it is a fee or tax remains the same both in the U.P. Act and in Bihar Act. Hence, the principle laid down by the Apex Court in the case of Commissioner Central Excise, Lucknow is found applicable to the provisions in the Bihar Act also and accordingly it is held that the administrative charges levied under the Act is in the nature of a tax and not a fee.

19. The next issue requiring attention and determination is whether the State legislature has the legislative competence to impose such a tax in respect of such captive consumers of molasses who do not buy the molasses because they own the sugar mill producing the molasses as well as distilleries which consume the same for manufacturing alcohol. As noticed earlier the stand of the State, as per submissions of the learned Advocate General is that the legislative competence is available through Entry-33 in List-III, i.e., concurrent list of the VIIth Schedule to the Constitution. The said Entry No. 33 covers subject- Trade and Commerce in, and the production, supply and distribution of-

- (a) the products of any industry whether 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) the food stuffs, including edible oil seeds and oils;
- (c) capital fodder, including oil cakes and other concentrates;
- (d) raw cotton whether ginned or unginned, cotton seed;
- (e) raw jute.

20. On the other hand, the stand of the petitioners is that tax cannot be imposed under a general entry. Power to tax must be found in some specific entry providing for tax such as Entry-54 in List-II (State list) which provides for tax on the sale and purchase of goods other than newspapers, subject to the provisions of Entry-92A of List-I. In support of this proposition reliance has been on behalf of the petitioners upon a constitution bench judgment of the Supreme Court in the case of Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, In paragraph 71 of the judgment reference was made to several earlier judgments of the Supreme Court for holding that "Legislative power normally includes all incidental and subsidiary powers, but the power to tax is neither incidental nor subsidiary to the power to legislate on a matter or topic". It was further held that Entries in Lists I and II, dealing with certain specific topics do not grant power to levy tax on transactions relating to those topics. Power to tax must be derived from a specific taxing entry". In that case it was further held

that no tax or levy can be justified on the theory of police power alone or on the doctrine of privilege as these doctrines are not parts of Constitution of India. Reliance has also been placed upon another constitution bench judgment of the Supreme Court in the case of Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others, to support the aforesaid view by referring to observations in paragraphs-45 and 46 of that judgment. Those paragraphs emphasize that the Indian Constitution has made the taxing power of the Union and of the States mutually exclusive and there is no over-lapping anywhere in the taxing power. It has also been held that taxing entries must be construed with precision and clarity so as to avoid any construction of a taxing entry which may lead to over-lapping.

21. There is no difficulty in accepting the submissions advanced on behalf of the petitioners that in the light of aforesaid constitution bench judgments of the Supreme Court, legislative competence for imposing of a tax must be shown by the State of Bihar not under a general entry such as Entry-33 in List-III but in a specific entry providing for tax. The State has failed to show any specific entry providing for tax by way of administrative charges over sale or supply of molasses.

22. Although the explanation to Section-8A noticed by the Amending Act creates a deeming fiction that transfer of released molasses from a sugar factory to its own distillery for captive consumption shall be deemed to be supply and this will also attract administrative charges, this alone cannot and does not change the nature of the administrative charges as imposed by Section-8A. Explicitly such administrative charges on molasses are not imposed as sales tax as understood in the context of Entry No. 54 in the State List i.e., List-II. Under the Act administrative charges are conceived as a mechanism to realize from buyer or consumer of molasses, only the cost of establishment or supervision and control over release of molasses. But in order to be accepted as a fee, the Act had to ensure that the charges are realized from the person to whom services by way of quid pro quo is being rendered by the State. Thus, it is found that the Act contemplates and imposes administrative charges only as a fee for which there is legislative competence under Entry-33 of List-III but in view of the Supreme Court judgment in the case of Commissioner Central Excise, Lucknow (supra), now the State of Bihar is being forced to look for another source of legislative power to justify administrative charges as a tax. As discussed earlier no specific entry could be shown to vest legislative competence in the State of Bihar to impose administrative charges by way of an indirect tax levied upon the manufacturer of molasses who in turn are to realize the same from the purchaser or the consumer.

23. The aforesaid vexed issue of law requires going to the basic issue as to what is the definition of taxation and tax under Article-366(28) of the Constitution. The said entry defines taxation in an illustrative manner so as to include the imposition of any tax or impost, whether general or local or special and tax has

to be construed accordingly. For easy reference Article-366(28) is extracted herein below:

Taxation includes the imposition of any tax or impost, whether general or local or special and "tax" shall be construed accordingly.

24. A division bench of this Court in the case of Bholanath Gupta v. State of Bihar (supra) considered this aspect and noted that "impost" is a word of wide import which includes fee as well and therefore the word "tax" will also include fee as well. The word "tax" will include all varieties of fee but if there is legislative competence for imposing a fee, only because it partakes nature of a tax, can it be said that its imposition will go beyond legislative competence of the legislature which has competence to impose such impost as a fee. The answer is not very simple but if the competent legislature declares a particular impost to be a fee and if in fact it can qualify the well understood concept of fee then there should not be any warrant to declare such a fee to be ultra vires on the ground that it also qualifies as a tax. In this regard, the constitution bench judgment in the case of Synthetics and Chemicals Ltd. is relevant. In paragraphs-109 and 110 of the judgment it has been accepted that a regulatory fee in matters relating to commodity which could be easily converted into alcoholic liquors may be justified but it should not be imposed to earn substantial revenue, rather the purpose must be of regulation so as to prevent the illegal conversion of concerned commodity into alcoholic liquor. Such justification of a similar regulatory fee was accepted after holding in earlier part of judgment that State of U.P. had failed to show any entry in the State List which vested it with legislative competence to impose such levies as a tax. In the present case the said principle is clearly attracted because the administrative charges have been provided by the legislature for the purpose of effective regulation so as to prevent misuse of molasses which can be easily converted into alcohol.

25. The regulating fees must be only to meet the cost of regulation and not with a view to create substantial earnings for the State because as per the aforesaid constitution bench judgment if the revenue earning is substantial it may not be justifiable as a fee.

26. We have no hesitation in following the aforesaid view of the Supreme Court in the case of Synthetics and Chemicals Ltd and to hold that although the administrative charges are in the nature of a tax because presently this burden is being passed on to the buyer or the consumer but that alone will not affect the legislative competence of the State legislature to impose a regulatory fee. Hence the issue of legislative competence is decided in favour of the State.

27. In spite of direct challenge by the petitioners that the imposition of administrative charges cannot be justified without reference to the actual cost of supervision and establishment for the control and supervision in respect of released molasses, the State has not been able to justify the rate of fees imposed by it. It has suppressed all facts and figures in this regard. Hence, the

imposition of substantial fee in the garb of administrative charges cannot be justified only by holding the fee in question to be regulatory and within the legislative competence of the State. On this ground the challenge to the levy and realization of administrative charges from the petitioners requires to be struck down. The Validating Act cannot protect the imposition of substantial impost in the garb of regulating fees. The Validating Act by its nature can only validate a transaction for which the legislature has the competence. As held earlier, in the present case the legislature has legislative competence not to levy substantial amount of revenue by way of tax in respect of transaction in question but only to impose reasonable fee to meet the cost of regulation. Hence, by a Validating Act the State of Bihar cannot confer upon itself a power to impose unlimited revenue in the garb of fee when there is no specific entry providing for levy of such tax by the State legislature. Hence, regardless of the Validating Act, the levy and realization of the administrative charges are struck down as illegal. But this shall be only prospective inasmuch as the administrative charges realized already as per the Validating Act shall not be refundable and since the Notification dated 22nd December, 1995 has been made valid from the date of its issuance, the administrative charges leviable and realizable under that Notification till the date of this judgment can only be realized by the State of Bihar but for the period after the date of this judgment the State of Bihar cannot levy the administrative charges under the impugned provisions of the Act till a Notification is issued afresh giving estimate of expenses likely to be incurred over regulation mechanism which alone can be realized as administrative charges even on approximate estimates. The rates for the administrative charges must be notified afresh in the light of such reasonable estimate. Once such fresh notification is issued by the State of Bihar, administrative charges may be realized in accordance with law from the date of such fresh notification.

28. The writ petitions are allowed to the aforesaid extent only.

29. In the facts of the case there shall be no order as to costs.