(2011) 07 AHC CK 0002

In the Allahabad High Court

Case No : Writ Tax No''s. 1333, 1326, 1327, 1371 of 2007 and 317, 348, 360, 426, 456, 562, 580, 581, 656, 817 967, 968 and 1023 of 2010

Saraya Industries Ltd. APPELLANT

Vs

State of Uttar Pradesh and Others RESPONDENT

Date of Decision : 26-07-2011

Acts Referred:
Constitution of India, 1950 — Article 19

Citation : (2013) 20 GSTR 386

Hon'ble Judges : Sunil Ambwani, J;Pankaj Mithal, J

Bench : Division Bench

Advocate : Neeraj Sharma in Writ Tax Nos. 317, 360, 580, 581, 967, 968, 1023 and 817 of 2010, Vikas Budhwar, in Writ Tax Nos. 656 of 2007 and 1333, 1326, 1327, 1371 of 2010, S. C Budhwar, in Writ Tax Nos. 1333 and 1371 of 2007, Rajiv Singh in Writ Tax Nos. 348, 456, 562, 817 of 2010 and Mukesh Prasad, in Writ Tax No. 426 of 2010, for the Appellant; Jafar Naiyar assisted by S. P. Kesarwani, C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard Shri Neeraj Sharma, learned counsel for the petitioners. Shri Jafar Naiyar assisted by Shri S.P. Kesarwani appears for the respondents. By these writ petitions, the petitioners-public limited companies have challenged the notification dated March 9, 2007 by the U.P. Excise (Establishment of Distillery) (7th Amendment) Rules, 2007 by which the rates of overtime fee to be paid to the staff of Excise Department of the State of U.P. stationed at the distillery run by the company; for excise inspector at the rate of rupees four per hour; for clerks at the rate of rupee one per hour and for excise constables at 0.25 paise per hour has been increased four times, and consequently demand has been raised for payment of the overtime fees for the extra hours for which the distillery on its own request has operated.

2. The petitioners have challenged the impugned notification on the following grounds:

(i) The amendment in the rates of overtime fees in rule 19 by the impugned notification is without statutory backing.

(ii) Enhancement of overtime charge is without any basis and has no co-relation with the services rendered by the State Department of State Excise.

(iii) It is against the law laid down by the hon''ble Supreme Court in the case of Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc.,

(iv) Similar rule 17 of the J & K Distillery Rules, 1946 has been declared ultra vires to the Act by the hon''ble Supreme Court in the case of Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, (Annexure No. 8 to the writ petition).

(v) The amendment by the notification is contrary to the law laid down by the hon''ble Supreme Court in the case of Indian Mica Micanite Industries Vs. The State of Bihar and Others, (Annexure No. 9 to the writ petition).

(vi) Overtime charges under rule 12 can be levied only when the total annual establishment charges (salary and overtime charges) exceeds 10 per cent, of duty leviable on the issue made from the distilleries during the year.

3. The petitioners have relied upon the judgment of the Supreme Court in Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, in which the Supreme Court quashed the notification and directed for refund of fees for the reasons given in paragraph 34 as follows (page 700 of 8 RC):

For the reasons aforestated we hold that.--

(a) Rule 17 has no statutory backing and it is in excess of the Act.

(b) It is manifestly unjust and arbitrary.

(c) Provision of rule 17 is clearly a tax and not a fee.

(d) Imposition of tax or fee on the citizens for the services that the State renders to itself and not the taxpayers is clearly impermissible, arbitrary and unjustifiable.

4. The principle on which the supervision charges or administrative charges have been imposed are laid down in Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, following the judgment in Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, and M/s. Khoday Distilleries Ltd. etc. Vs. State of Karnataka and others,

5. In these cases, the Supreme court held that liquor trade is "res extra commercium", and therefore not entitled to protection under article 19(1)(g) of the Constitution of India. Any license, regulation for imposition in respect of liquor trade, however should not be arbitrary and discriminatory.

6. In the present case we find that unlike the case of Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, the U.P. Excise Act, 1910 gives by

section 41 powers to the Excise Commissioner of U. P. to make Rules. Sub-section (c) of section 41 as substituted by the U.P. Act No. 5 of 1976 gives the Excise Commissioner of U.P., authority prescribing the scale of fees or the manner of fixing the fees payable for any license, permit or pass including any consideration for the grant of any exclusive or other privilege granted u/s 24 or section 24A, or for storing any intoxicant.

7. Section 24 provides for grant of exclusive or other privilege to manufacturer and section 24A provides for grant of exclusive privilege in respect of foreign liquor. Rules 9 and 12 are made in exercise of powers u/s 41 of the U.P. Excise Act, 1910 quoted below:

41. Power of Excise Commissioner to make Rules.--The Excise Commissioner subject to the previous sanction of the State Government may make Rules:

(a) regulating the manufacture, supply, storage or sale of any intoxicant including--

(i) the erection, alteration, repair, inspection, supervision, management and control of any place for the manufacture, supply storage or sale of such article and the fitting, implements and fittings, implements and apparatus to be maintained therein;

(ii) the cultivation of the hemp plant (cannabis sativa);

(iii) the collection of portions of the hemp plant (cannavis sativa) from which any intoxicating drug can be manufactured and the manufacture of any intoxicating drug therefrom;

(b) regulating the deposit of any intoxicant in a warehouse and the removal of any intoxicant from any such warehouse or from any distillery (brewery or manufactory).

(c) prescribing the scale of fees or manner of fixing the fees payable for any licence, permits or pass, including any consideration for the grant of any exclusive or other privilege granted u/s 24 or section 24-A or for storing of any intoxicant:

Provided that nothing contained in this clause shall be construed to prevent the State Government from levying by notification made from time to time, any fee, including vend fee, as part of consideration of the granting of any such privilege.

Explanation.--(1) Fees may be prescribed under this sub-clause at different rates for different classes of licenses, permits, passes or storage, and for different areas.

(2) The manner of fixing such fee or consideration includes any one or more of the following manners, namely:--

(i) auction,

(ii) invitation of tenders,

(iii) assessment on the basis of sales made or quota lifted under the license, permit or pass.

(d) regulating the time, place and manner of payment of any duty or;

(e) prescribing the restrictions under and the conditions on which any license, permit or pass may be granted, including provision for the following matters--

(i) the prohibition of the admixture with any intoxicant of any substance deemed to be noxious or objectionable;

(ii) the regulation or prohibition of the reduction of liquor by a licensed manufacturer or licensed vendor from a higher to a lower strength;

(iii) the fixing of the strength price or quantity in excess of or below which any intoxicant shall not be sold or supplied, and of the quantity in excess of which denatured spirit shall not be possessed, and the prescription of a standard of quality for any intoxicant;

(iv) the prohibition of sale except for cash;

(v) the fixing of the days and hours during which any licensed premises may or may not be kept open, and the closure of such premises on special occasions;

(vi) the specification of the nature of the premises in which any intoxicant may be sold and the notices to be exposed at such;

(vii) the form of accounts to be maintained and the returns to be submitted by license-holders; and

(viii) the regulation of the transfer of;

(f)

(i) declaring the process by which spirit manufactured in India shall be denatured;

(ii) for causing such spirit to be denatured through the agency or under the supervision of its own officers;

(iii) for ascertaining whether such spirit has been denatured;

(g) providing for the destruction or other disposal of any intoxicant deemed to be unfit for use;

(h) regulating the disposal of confiscated articles.

8. Rules 9 and 12 as it stood prior to amendment by the impugned notification provided for Excise Commissioner to appoint Officers in-charge of distilleries, hours of attendance and extra attendance of the staff. These rules 9 and 12 are quoted as below:

9. The Excise Commissioner to appoint Officers to the charge of distilleries.--The

Excise Commissioner will appoint such officers of the Excise Department as he may deem fit to the charge of distilleries. The pay of such officer will be met by the Government provided that when the annual establishment charges exceed 10 per cent, of the duty leviable on the issues made from the distillery during the year, this excess will be realized from the distiller.

12. Holidays.--Sundays; Republic day (26th January); Good Friday; Mahatma Gandhi Birthday (official; Independence Day; Christmas day; Holi (the day following the burning of Holi); Janam Asthami; Deshehra (principal day); Diwali (principal day); Idul Fitr (principal day); Idul Zuha; Moharram (10th day) and Shab-i-Barat.

Other gazetted holidays will only be allowed if the distilleries themselves close down on special grounds with the sanction of the Excise Commissioner.

In case, the Excise staff stationed at distillery is required to attend the distillery on any of the such holidays or in night the distillers shall be required to pay to the Government an amount, per hour or part thereof which shall not less than 15 minutes, equal to four times of average salary of the employee concerned. But such amount will be only two times of average salary of the employees concerned on overtime done during day time of working days.

The distillery may avail the services of the staff on holidays or in additional time only on deposition of amount due in the head ''0039 State Excise other receipts''.

9. The Excise Commissioner has to appoint such officers of the Excise Department as he may find it fit to be incharge of distilleries. The pay of such officers has to be met by the Government provided that when the annual establishment charges exceed 10 per cent, of the duty leviable on the issues made from the distillery during the year, this excess charge will be realised from the distiller.

10. Rule 11 provides for hours of attendance of excise officials to be fixed by the Assistant Excise Commissioner. Ordinarily each official will be on duty for a total period not exceeding eight hours a day. If a distiller wants to take work from the officials beyond the period of eight hours, it will only be with the permission of the Excise Officer on the request for permitting the officials to work beyond normal hours or for overtime purposes for which, they are required to be paid remuneration under rule 12 with reference to section 41 of the Excise Rules for grant of any exclusive or other privilege granted u/s 24 or section 24-A, or for storing any intoxicant.

11. The facts of the present case are clearly distinguishable from those of the judgment in Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, , in view of rule 12 as existed. The rates of overtime fee has not been amended for the last 45 years. Section 41 in our opinion clearly gives a statutory backing to rule 12 for imposing overtime charges. The rules are thus not ultra vires the Act.

12. The distillery is required to run during the working hours fixed by the Excise Commissioner. It is on the request of the distiller that overtime is permitted for extra production. The request has to be followed by the cost of such overtime work by the staff of the Excise Commissioner.

13. In the written argument filed by the learned standing counsel the details of the working of the distiller are given. The option under rule 12 has to be exercised by the licensee at such stages of the process of liquor in distillery, voluntarily at the place where the liquor is received from blend vats and is filled in bottle and where the bottle of liquor gets ready for issue. The licence is issued for not more than a period of one year. The distiller is free to take work from the workers under rule 11 for eight hours a day. Whenever distiller intends to carry out the activities beyond authorised normal fixed hours for their gain, they may move application for grant of permission for deputing officials or staff. Such an application is given by the distiller subject to the Rules which are included in the conditions of the license. In the case of Saraya Industries Limited in Writ Petition No. 317 of 2010 an application was moved by the petitioners to the Assistant Excise Commissioner, Saraya Distillery, Saraya on July 14, 2008 voluntarily to allow them for bottling the country made liquor from 5 p.m. to 10 p.m. (beyond normal working hours) due to alleged heavy demand of the market.

14. The overtime fee provided in rule 12 was never challenged by the petitioners for the last 45 years. There is presumption in favour of the constitutional validity of the statutory provisions including the Rules.

15. The rules made by way of supporting administration for supervision are not ultra vires the Act and are not so excessive that they may be treated to be unjust or arbitrary. These rules are reasonable in their operation and do not cause undue hardship to the distiller. The overtime fees is to be paid only if the distiller decides to run the distillery overtime.

16. In the present case, the rules have stood for the last 45 years. They have been amended by increasing the prescribed overtime fees for four times which is neither excessive nor can be treated to be excessive on the distiller makes huge profits in making production overtime.

17. For the aforesaid reasons, we do not find that any of the submissions, namely, the rules being ultra vires to the Act and not co-relative to the services rendered by the Department, or oppressive or harsh are established.

18. We may also observe that the prescription of overtime fees is the condition of the license and that by the nature of its imposition it is a fee connected with parting in the privilege to run the distillery. The writ petitions are dismissed.

