(1985) 06 PAT CK 0003

In the Patna High Court

Case No : C.W.J.C. No''s. 1346 and 1347 of 1982

Shakti Distributors and Others — APPELLANT

Vs

State of Bihar and Others — RESPONDENT

Date of Decision : 12-06-1985

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : (1986) 34 BLJR 94 : (1985) PLJR 771

Hon'ble Judges : Uday Sinha, J;Ashwini Kumar Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Uday Sinha, J.—There are two applications under Articles 226 and 227 of the Constitution for quashing of demand notices issued to the petitioners. The spinal question calling for our decision in these two applications is whether the State is entitled to realise duty on foreign liquor lost in transit due to breakage of glass bottles. The relevant orders passed by the Excise Authorities being common (although the numbers are different in the two applications) reference to the annexures in C.W.J.C. No. 1346 of 1982 shall be made. The question falling for our consideration in the two applications being common, they are being disposed of by this common judgment.

2. The demand notice in C.W.J.C. No. 1348 of 1982 is Annexure-4 dated 26-9-1980 to this application. Annexure 4-A dated 22-3-1982 is reminder or warning that the petitioner''s licence was liable to be cancelled for failure to deposit in treasury the sum demanded by Annexure-4. By Annexure-5 dated 30-3-1982 the petitioners were informed by Excise Superintendent, Muzaffarpur that their licenece would not be renewed for the year 1982-83 until the penalty levied by Annexure-4 was not deposited. Annexure-3 dated 14-7-1981 is the order of Collector, Muzaffarpur by which he rejected the appeal of the petitioners (in C.W.J.C. No. 1346 of 1982). Annexure-2 dated 11-8-1981 and Annexure-1 dated 23-12-1981, respectively are the orders of Commissioner of Excise and

Board of Revenue, respectively.

3. The petitioners are licensees in respect of bonded warehouses in the town of Muzaffarpur. In terms of the licences the petitioners stored beer and India made foreign liquor (hereinafter referred to as T.M.F.L.''). They were granted separate licences in Form No. 1 prescribed by the rules made under the Bihar and Orissa Excise Act (hereinafter called ''the Act''). The petitioners were also granted licence in Form No. I-A which authorised them to deposit or keep, in approved warehouses liquor imported/ transported under bond. By Annexure-4 dated 26-9-1980 the duty on account of I.M.F.L. lost in transit to the tune of Rs. 26,810.94 and Rs. 26,961.90. These duties were damanded in respect of wastage of liquor during transit on account of breakage of glass bottles during the financial year 1979-80. The petitioners claimed before Collector, Muzaffarpur in appeal that they were entitled to exemption from payment of duty on liquor transported in casks and drums. The claim of the petitioners did not find favour with him. The appeals were, therefore, dismissed by a common order dated 14-7-1981 (Annexure-3). The appeals before the Commissioner of Excise and Member Board of Revenue met a similar fate. Their orders are Annexures-2 and 1, respectively. Hence the present applications for quashing the demand notices (Anncxures-4, 4-A and 5) and the orders of the Collector, the Commissioner and Member Board of Revenue.

4. The first submission urged on behalf of the petitioners is that the order contained in Annexure-4 calling upon the petitioners to deposit the duty on account of I.M.F.L. lost in transit was invalid, as it was passed in contravention of rules of natural justice. No notice having been issued to the petitioners to show cause why duty be not levied, the demand was invalid and fit to be quashed. Thus submitted learned Counsel for the petitioners.

5. Learned Counsel for the petitioner in support of his submission placed reliance upon a Full Bench decision of this Court in Ramnandan Prasad v. The State of Bihar 1983 P.L.J.R. 266 to which my learned brother was a party. I regret, the reliance placed upon that decision is entirely misplaced. That was a case of cancellation of a licence on the ground that the licensee was guilty of overdilution in spirit in some bottle and drums and short measuring in others. That case called for some sort of enquiry. In those circumstances, their Lordships held that the cancellation of the licence without the licensing authority calling upon the licensee to show cause was in contravention of the rules of natural justice. The present case is entirely different. This is not a case of imposition of penalty. It is a case of realisation of duty in terms of the agreement and the Bond executed by the petitioners. The duty was due from the petitioners and, therefore, there could be no question of affording to a licensee any opportunity of being heard. The precise question advanced before us was raised before the Supreme Court in State of Punjab and Others Vs. Ajudhia Nath and Another, where it was laid down as follows:

Thus, the proposition is by now well settled that although an opportunity of being heard has to be given to a liquor vendor when his licence is sought to be cancelled, the same principle of natural justice does not come into play when the demand is merely for payment of a sum becoming due under the conditions subject to which the licence was granted, and this proposition fully covers those appeals. The demands for payment of the amount o f still-head duty which had become due under the contracts accepted by the respondents and had remained unpaid were demands arising under condition No. 8 above extracted and had, therefore, resulted from the terms of those contracts. No question of affording to the respondents any opportunity of being heard thus arises and the impugned judgment is, therefore, liable to be reversed.

Thus the question of affording reasonable opportunity to show cause to the licensees in the instant cases does not arise. The case of Ajudhia Nath (supra) was cited before the Full Bench in the case of Ramandan Prasad case (supra). Their Lordships appreciated the distinction between a case of cancellation of licence from demand for realisation of duty under a Bond. There is no clash between the decision of the Supreme Court and the decision of the Full Bench of this Court. The case before us falls within the sparameter of the case of Ajudhia Nath (supra). The Full Bench decision of this Court in Ramandan Prasad''s case (supra), has no application. This submission urged on behalf of the petitioners must, therefore be rejected.

6. The second submission urged on behalf of the petitioners is that the petitioners were not liable to pay duty on account of loss in transit when the liquor is imported from outside Bihar. I regret, this submisssion is without any factual basis. There is not a whisper in these two petitions indicating that the duty had been levied on account of wastage of spirit in transit while being imported from outside Bihar. In the absence of any averment that the loss in transit took place while it was being transported from a place outside Bihar to the petitioners'' warehouses, it is difficult to hold that the Excise Authorities had no jurisdiction to realise such a duty. The submission cannot be taken seriously. Conceding for the time being, that the petitioners had imported spirit from outside this State in which loss in transit had taken place, that would not absolve the petitioners from payment of duty unless any exemption was granted to the petitioners. The petitioners had been granted licence in Form No. 1-A which permitted the licensees to import or transport foreign liquor under bond. The incidences of the bond are that duty will not be realised in the course of transportation or in the process of storing spirit in the warehouse. The bond is Annexure-A to the counter-affidavit filed on behalf of the respondents. The Bonds were executed by the petitioners in Form No. 158. The heading of the Bond is:

GENERAL BOND FOR IMPORT, EXPORT AND TRANSPORT EXCISABLE ARTICLES WITHOUT PAYMENT OF DUTY.

Clause 2 of the Bond reads as follows:

2. That Ram Lakhan Chaudhary or his/their legal representatives shall on each

occasion of import/export/transport of the said articles within the time mentioned in the pass or passes authorising such import/ export/transport granted under the rules for the time being in force furnish satisfactory proof to the officer granting the pass that the specific quantity of the said excisable article has been duly delivered in full to the officer in charge of the bonded warehouse or other authorised place of destination specified in the said pass and deposited thereof after the necessary examination, or in default thereof shall on demand pay or cause to be paid to the said Governor of Bihar at the Treasury/Sub-Treasury at Muzaffarpur a sum equal to the amount of duty payable on the said specified quantity or such portion thereof as shall not have been duly delivered at the rate prescribed there for u/s 27 of the Bihar and Orissa Excise Act, 1915 or any other amending Act for the time being in force.

From the above, it will be seen that the petitioners undertook to pay to the Governor of Bihar a sum equal to the amount of duty payable on the specified quantity of spirit as shall not have been duly delivered. The petitioners received the spirit under Bond. They must, therefore, fulfil the terms thereof. Having not delivered the full quantity of spirit received, it is patent that the petitioners would be liable to pay the duty on the spirit not delivered at the warehouse. Thus even if spirit is imported from outside Bihar and the loss occurs in course of transit, persons importing under a Bond in Form No. 158 would be liable to pay the duty on the short delivery. The second submission therefore, also is without substance and must be rejected.

7. Learned Counsel for the petitioners submitted thirdly that the obligation to make up the deficit duty under the Bond is not referable to any shortage falling during the course of transportation. I regret, I am unable to find any substance in this submission as well. The petitioners'' licenses in Form No. I-A must be read along with the Bond. Clause 1 of the licence requires the licensee to execute a bond. Clause 2 enjoins the licencee to comply with the rules relating to the import or transport of spirit under Bond. Clauses 1 and 2 read as follows:

1. That before depositing or indenting for any foreign liquor to be deposited or kept under this license, he shall execute a bond for such amount as may be fixed by the Commissioner of Excise in favour of the Collector of...for the payment of duty imposed by the Government notification in force at that time on all liquor deposited and kept in the warehouse and also for the due fulfilment of the condition of license.

2. That he shall comply with all the rules relating to the import or transport of spirit under bond, as the case may be.

From the above terms of the licence, it is patent that there is a nexus between the license and the bond. It thus admits of no doubt that the obligation under the contract or bond is referable to the shortage falling during the course of transportation.

8. Learned Counsel for the petitioners submitted that if loss in transit takes place

on account of accident to the vehicle trasporting the goods the contract did not envigage payment of duty on the shortage I regret, this submission again is untenable. By executing the bond the petitioners gave an unconditional and an equivocal undertaking that they would be liable to pay the duty over spirit which had not been delivered at the warehouse The circumstances in which the shortage takes place is entirely irrelevant. The petitioners having obtained license on the terms mentioned in the license and the bond, cannot resile from the undertaking whether the loss takes place on account of accident or of theft or of pilferage, is of no concern to the State The only eventuality which may probably exonerate the licensee (the proposer to the agreement) may be an Act of God. It is not essential for us to go into that question since this is not a case of contract being frustrated by Act of God.

9. Learned Counsel for the petitioners drew our attention to Rules 45 to 51, 61 and 62 to show the scheme of transportation of spirit to warehouse and urged that the petitioners were not liable to pay duty on short delivery of spirit. Rule 45 lays down that spirit intended for the warehouse conveyed thereto under bond, and at the sole risk and responsibility of the whole sale dealer. "The bond will stand discharged only when the spirit has been deposited in the warehouse. Rule 46 prohibits issue of spirit from a warehouse except under a pass. The casks or vats in the warehouse containing spirit must bear tickets showing the quantity of spirit contained therein, and the ticket shall bear the noting in regard to issues of spirit from time to time. Rule 47 reads as under:

47. Spirit intended for a warehouse must be conveyed in sound and watertight casks, the exact capacity of which must be branded or carved thereon. Rule 51 relates to storing of spirit in warehouse. In terms of this rule spirit has to be stored in casks, vats or iron tanks. I am somewhat at a loss how Rules 45 to 51 support the petitioners In terms of Rule 45 the risk and responsibility involved in transportation of spirit to a warehouse is on the licensee. He cannot, therefore, be absolved from the obligation under the bond.

10. It was lastly submitted that in terms of Rule 35 of the Bihar and Orissa Excise Rules, the petitioners were entitled to deduction of duty on transit wastage. Particular emphasis was laid on the opening Clause of Sub-rule (1) which reads as follows:

33(1) An allowance at a rate not exceeding in any case, the appropriate maximum specified in the following scales, shall be made for the loss in transit by leakage or evaporation of spirit which is transported or exported under bond by land.

In terms of Rule 33(1), learned Counsel for the petitioners submitted that the petitioners were entitled to exemption from payment of duty for losses in transit as mentioned in Rule 33(1). I regret, this submission is again fallacious. The Rule grants exemption for transit by leakage or evaporation only. It does not admit of any other eventuality. In terms of Rule 33(1) the petitioners are not entitled to any allowance. It will further be appreciated that the exemption rules do not permit transportation of spirit in glass bottles. Rule 47 quoted above specifically lays down that spirit intended for a warehouse must be conveyed in sound and watertight casks. Rule 51 enjoins specifically that the storing of spirit in warehouses must be in casks, vats or iron tanks. The Excise Law does not permit transportation or stogage in glass bottles. It is, therefore, difficult to visualise how the petitioners can claim any allowance for loss of spirit in course of transportation in glass bottles. In S.K.G. Sugar Ltd. v. The State of Bihar and Ors. 1980 B.B.C.J 512 it was laid down that the provisions of Rule 31 are regulatory in nature and, therefore, cannot be held to be ultra vires. Transportation in glass bottles not having been permitted, the petitioners cannot claim any allowance in terms of Rule 33, Clause 7(b) of the licence which permits wastages over one per cent on spirit kept in casks and over 0.5 per cent on it kept in metal drums also cannot be of any aid to the petitioners.

11. The short answer to all the submissions urged on behalf of the petitioners is, in the words of Chandrachud, J. (as he then was), "Those who contract with open eyes must accept the burdens of the contract along with its benefits...Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could have ever have a binding force". See at paragraph 16-- Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . The petitioners were granted licences and undertook obligations upon them under the licenses and a bond. They must be held to be bound by the terms of the Bond.

12. Having given my most anxious consideration to the submissions urged on behalf of the petitioners, I am definitely of the view that the petitioners are liable to pay duty on spirit lost in the course of transportation. The demand in terms of Annexure-4 is unassailable. That being so, the prayer for quashing of other annexure also must fail and is rejected accordingly.

13. The applications lack substance and are dismissed accordingly with costs. Hearing fee Rs. 250/ payable in each case by the petitioners to the State of Bihar.

Ashwini Kumar Sinha, J.

14. I agree.

