

(2011) 09 CAL CK 0083
In the Calcutta High Court
Case No : W.P.T.T. No. 17 of 2011

Shaw Wallace Distilleries Ltd. and Another	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Bengal Excise Act, 1909 — Section 54A, 86
Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 74
Industries (Development and Regulation) Act, 1951 — Section 18G
West Bengal Taxation Tribunal Act, 1987 — Section 27(1), 8

Citation : (2011) 4 CHN 674 : (2011) 188 ECR 258

Hon'ble Judges : Sambuddha Chakrabarti, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : J.P. Khaitan, Nirmalya Biswas and Anirban Dutta, for the Appellant; Pranab Dutta and Joytosh Majumder, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—By this writ-application under Article 226 of the Constitution of India, the writ-Petitioners, while challenging the order dated April 22, 2010 passed by the West Bengal Taxation Tribunal in R.N. No. 427 of 2004, has challenged Rule 14A of the Consolidated Rules framed u/s 86 of the Bengal Excise Act, 1909 so far as it relates to payment at the highest duty leviable on IMFL on unutilized cut spirit obtained after second re-distillation as ultra vires the provisions of the Bengal Excise Act, 1909 in addition to the prayer for direction upon the Respondent to cancel/rescind/withdraw the demand notice dated 23rd August, 2004 by which the Respondent imposed an amount of Rs. 1,74,63,538/- towards payment on unutilized cut spirit.

2. Since the writ-Petitioners challenged the aforesaid provision of the Rules as ultra vires the Act, a notice was given to the learned Advocate-General and consequently, Mr. Dutt, the learned Advocate, has appeared on behalf of the State to oppose the prayer for the writ-Petitioner.

3. The case made out by the writ-Petitioner No. 1 in the writ-application may be summed up thus:

a) The writ-Petitioner carries on business in manufacture, production and sale of India Made Foreign Liquor ("IMFL") at Bengal Distillery, P.S. Bhadrakali in the District-Hooghly.

b) At the material point of time and prior to the year 1995, the said Bengal Distillery used to import Rectified Spirit imported from outside the West Bengal and also used to purchase spirit already distilled once from other primary distillers for the purpose of manufacture of potable alcoholic drinks.

c) The Bengal Distillery at Bhadrakali was holding large stock of about 79887.50 bulk litre of cut spirit in their storage vats since 1995, 1996 and 1997, from which it was not at all possible to manufacture IMFL due to impurity and lower strength.

d) One M/s. Super Spirit Warehouse of 52-B, Hazra Road, Kolkata, pursuant to a letter written on 29th May, 2001 by Shaw Wallace wherein they had intimated that they were in a position to supply 85,000 bulk liters of cut spirit, replied in their letter dated 2nd July, 2001 that they intended to purchase the entire quantity for the purpose of manufacturing ordinary de-natured spirit at their bonded warehouse at Budge Budge subject to the permission of West Bengal Excise Authorities.

e) In response to the said request furnished by the said Super Spirit Warehouse, the writ-Petitioner had made communication with the Respondent through letter dated 13th July, 2001, inter alia, seeking approval for the above purposes to meet such request of M/S Super Spirit Warehouse.

f) The Petitioner No. 1 subsequently received a demand notice dated 31st July, 2001 purportedly imposing an amount of Rs. 1,25,38,799/-allegedly on unutilized cut spirit which was obtained after re-distillation in exercise of the power conferred under Sub-rule (4) of Rule 14A of the Consolidated Rules.

g) In response to the said demand notice, the writ-Petitioner by a letter dated 7th August, 2001 made representation to the District Magistrate and Collector seeking permission to allow them a period of 90 days to verify the records pertaining to the period against which the alleged wastage on re-distillation was made.

h) By a letter dated 18th October, 2001, the Superintendent of Excise through a letter had acceded to the said request and deferred the purported demand for three months.

i) By a letter dated 22nd October, 2001, the writ-Petitioner sent a representation to the Excise Authorities praying for the following documents/information:

1) The direction by the Collector of Hooghly to impose the aforesaid demand.

2) Whether they scrutiny of any record and register during the period when the alleged redistilled cut spirit was obtained, was done with the prior notice of M/s. Shaw Wallace and the following actions, in relation thereto.

3) To furnish the audit report on the basis of which such purported demand was made.

j) The Respondent-Excise Authority had not furnished the aforesaid documents or information to the writ-Petitioner and for nearly two years did not embark on the purported demand.

k) According to the writ-Petitioner, due to long lapse of time, it had reasonably inferred that the Excise Authorities on realizing that the demand was purported to have been made on a wrong and unfair premise had permanently withdrawn the same and absolved the writ Petitioner of all the allegations raised in the demand notice dated 31st July, 2001.

l) Thereafter on 10th April, 2003, an enquiry report was furnished to the Excise Commissioner with regard to an enquiry caused by the District Magistrate and Collector, Hooghly with respect to the alleged demand on unutilized cut spirit wherein the chargeable duty was modified to an amount of Rs. 84,78,852/-from the earlier demand of Rs. 1,25,38,799/-.

m) On 7th February, 2003, the Super Spirit Warehouse had sent a letter to the writ-Petitioner expressing their intentions to purchase the cut spirit and to meet such request, the Petitioner had prayed for necessary approval from the Excise Commissioner by a letter dated 11th May, 2004. In the said letter, the writ-Petitioner stated that they were holding a stock of 76894 bulk litre and cut spirit, the details of which was given therein since 1995-96 and 1996-97 and the consumption of which was not possible for them due to impurity and lower strength.

n) However, without offering their views on the prayer, the Additional District Magistrate vide memo dated 23rd August, 2004 had once again imposed a demand of Rs. 1,74,63,568/- towards accrued stock and cut spirit.

o) The writ-Petitioner being aggrieved by the said decision of issue of notice of demand challenged the same before the West Bengal Taxation Tribunal by invoking the jurisdiction u/s 8 of the West Bengal Taxation Tribunal Act and thereby challenged Rule 14A of the Consolidated Rules framed u/s 86 of the Bengal Excise Act.

p) According to the writ-Petitioner, after hearing the learned Counsel for the parties, the Tribunal verbally opined that due to existence of alternative remedy it was of the view that the writ-Petitioner should be granted liberty to approach Excise Commissioner and pray for condonation of excess wastage by showing satisfactory and reasonable cause and consequently, the learned Advocate for the Petitioner also did not seriously oppose such view expressed by the Tribunal. Thereafter on 22nd April, 2010, the Tribunal after a period of two years delivered

the judgment and on perusal of the same, it came to the notice of the writ-Petitioner that the Tribunal instead of restricting its view on the preliminary points decided the matter fully on merit and was pleased to reject the contention of the Petitioner in so far as the challenge was made on the vires of Rule 14A.

q) The Tribunal, however, stayed the operation of the impugned demand notice dated 23rd August, 2004 and granted liberty to the writ-Petitioner to submit appropriate application before the Commissioner within 15th June, 2010, failing which the Excise Authority was allowed to proceed against the Petitioner in accordance with law.

r) Being dissatisfied, the writ-Petitioner has come up with the present writ-application.

4. The aforesaid application u/s 8 of the West Bengal Taxation Tribunal Act was opposed by the Revenue by filing an affidavit-in-opposition and the defence of the Respondent may be summed up thus:

a) As per Section 27(1) of the Act, excise duty may be imposed at such rates as the State Government may direct on the excisable articles manufactured. The manner of levy of such duty is in Section 28 and according to Section 28(e)(ii), the levy of duty is to be as per the scale of equivalents prescribed by the Rules. Such equivalence is prescribed in Rule 14A(3)(i)(ii) and (iii). By the amendment of 1992, Clause (ia) was inserted after Rule 14A(1)(i), according to which, the second re-distillation is required to be made in such a way that no further faint spirit or cut spirit is left as residue. By the amendment, Clause (iii) was inserted in Rule 14A(2) and since the insertion of Clause (iii), the minimum limit of wastage allowance in the case of Clause (ia) of Rule 14(1) was prescribed.

b) Thus, the requirement of Rule 14A as per authorization of Section 28 is that after re-distillation no wastage should be left where such statutory requirement is violated and the wastage is shown, such wastage is contrary to the statutory prescription based on prescription and such statutory prescription is required to be given in its full effect.

c) The State has exclusive power in regard to intoxicating liquor by reason of List-II Entry 8 of the Seventh Schedule. The said Entry 8 is required to be read with other entries of List-II. These relevant entries in List-II of the Seventh Schedule vest regulatory power on the State in regard to industrial alcohol. The power contained in the aforesaid legislative Entry in the List-II is reinforced by the power conferred on the State under List-III Entry 33 of the Seventh Schedule which is under the Concurrent List.

d) The contention of the writ-Petitioner that such industrial alcohol being included under the Industries (Development and Regulation) Act, 1951 u/s 18G read with First Schedule Entry 36, the State has no regulatory power in respect of industrial alcohol is not tenable. As the rectified spirit in this case was exclusively meant for manufacturing potable liquor should be under the exclusive regulatory

control of the State from the moment it is cleared and removed from the distillery.

5. As indicated earlier, the learned Tribunal below by the order impugned herein held that the Rule 14A(4) is quite in conformity with the provisions of the Act and the State has full power to impose regulatory fee to prevent the loss of ultimate revenue.

6. Being dissatisfied, the writ-Petitioner has come up with the present application.

7. Mr. Khaitan, the learned Senior Advocate appearing on behalf of the writ-Petitioner, has, at the first instance, contended before us that the Rule impugned is ultra vires the Constitution of India in view of legislative incompetency of the State Legislature. According to Mr. Khaitan, the rectified spirit, the wastage of which has been alleged, giving rise to the monetary demand by taking aid of the impugned Rule, is industrial alcohol over which the State has no legislative competence to impose any amount of fee or even adopt any regulatory measure as the rectified spirit is not an item within the meaning of entry No. 51 of List II of the Seventh Schedule of the Constitution. According to Mr. Khaitan, the State Legislature has power to impose regulatory fees only in respect of potable intoxicant in terms of entry No. 51. Mr. Khaitan contends that rectified spirit is not a potable intoxicant and as such, the imposition of the so-called duty is not permissible. Mr. Khaitan further contends that the Bengal Excise Act, 1909 does not authorize imposition of any duty for wastage and thus, the impugned Rule framed in exercise of power u/s 86 of the Act giving authority to the state to impose duty on the ground of alleged wastage was illegal and without jurisdiction. According to Mr. Khaitan, the State, at the most, can impose a penalty not exceeding Rs. 5000/- for the alleged violation of the Rule 14A in terms of Section 54A of the Act. In support of his contention, Mr. Khaitan relies upon the following decisions:

1. Sona Chandi Oal Committee and Others Vs. State of Maharashtra,
2. Secunderabad Hyderabad Hotel Owners Association and Others Vs. Hyderabad Municipal Corporation, Hyderabad and Another,
3. Jindal Stainless Ltd. and Another Vs. State of Haryana and Others,
4. Hardev Motor Transport Vs. State of M.P. and Others,
5. Vijayalashmi Rice Mill and Others Vs. The Commercial Tax Officers, Palakol and Others,
6. Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others,
7. State of U.P. and Ors. v. Lalta Prasad Vaish, reported in (2008) 10 RC 197;
8. State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others,
9. Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others,

10. B.S.E. Brokers Forum, Bombay and Others etc. Vs. Securities and Exchange Board of India and Others etc.,

8. Mr. Dutt, the learned Advocate appearing on behalf of the State, has, on the other hand, opposed the aforesaid contention of Mr. Khaitan and by placing strong reliance upon the decision of the Supreme Court in the case of Bihar Distillery and Another Vs. Union of India (UOI) and Others, , has contended that the rectified spirit is the source of manufacture of all types of potable intoxicants and thus, the State has full authority to take regulatory measure for wastage of such article. Mr. Dutt contends that for the purpose of measuring the wastage, the State is required to employ huge number of competent officers and in the process, fixation of fees cannot be said to be excessive so as to strike down the said provision as ultra vires Act. Mr. Dutt further contends that the decision of the Supreme Court in the case of Bihar Distillery and Anr. (Supra) has been subsequently approved by other decisions of the Supreme Court. In support of his contention, Mr. Dutt relies upon the following decisions:

- 1) Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others,
- 2) State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.,
- 3) State of Bihar and Others Vs. Shree Baidyanath Ayurved Bhawan Private Ltd. and Others,

9. Even on merit Mr. Dutt contends that the writ-Petitioners have alternative remedy available before the Commissioner against the decision and without availing themselves of that remedy, there was no scope of moving the Tribunal and as such, the Tribunal rightly refused to enter into the merit. Mr. Dutt, therefore, prays for dismissal of the writ-application.

10. Therefore, the first question that arises for determination in this application is whether the imposition of duty for preventing wastage in the process of distillation of rectified spirit which is the prime material used for manufacture of all potable intoxicants is within the legislative competence of the State legislature and if the answer is in the affirmative, the next question is whether the imposition of such fees by way of delegated legislation is authorized under the Bengal Excise Act, 1909.

11. In order to appreciate the said question, the following provisions of the Constitution of India, the Bengal Excise Act and the Consolidated Rules framed u/s 86 of the Act are relevant and those are quoted below:

SEVENTH SCHEDULE [Article 246] List I-Union List

84. Duties of excise of tobacco and other goods manufactured or produced in India except -

(a) alcoholic liquors for human consumption,

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List II-State List

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

51. Duties of excise on the following goods manufactured or produced by Parliament by law countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

17. Payment of duty of removal from distillery, brewery, warehouse or other place of storage.-No intoxicant shall be removed from any distillery, brewery, warehouse or other place of storage licensed, established, authorized or continued under this Act, unless the duty or fee if any payable under Chapter V or Chapter VI has been paid or a bond has been executed for the payment thereof.

22. Grant of exclusive privilege of manufacture and sale of country liquor or intoxicating drugs.-(1) the State Government may grant to any person, on such conditions and for such period as it may think fit, the exclusive privilege-

(a) of manufacturing, or supplying by wholesale, or

(b) of manufacturing, and supplying by wholesale, or

(c) of selling, by wholesale or retail, or

(d) of manufacturing and supplying by wholesale and selling retail, and country liquor or intoxicating drug within any specified local area:

Provided that public notice shall be given of the intention to grant any such exclusive privilege, and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under Sub-section (1) shall exercise the same unless or until he has received a license in that behalf from the Collector or the Excise Commissioner.

27. Power to impose duty on import, export, transport and manufacture.-(1) An excise duty or a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally, or for any specified local area, on-

(a) any excisable article imported, or

- (b) any excisable article exported, or.
- (c) any excisable article transported, or
- (d) any excisable article (other than tari) manufactured under any license granted in respect of Clause (a) of Section 13, or
- (e) any hemp plant (*Cannabis sativa*) cultivated or any portion of such plant collected, under any license granted in respect of Clause (b) or Clause (c) of Section 13, or
- (f) any excisable article manufactured in any distillery or brewery licensed, established, authorized or continued under this Act.

Explanation- Duty may be imposed on any article under this Sub-section at different rates according to the purposes for which such article is intended to be used according to the place to which such article is to be removed for consumption, or according to the varying strengths and quality of such article.

(2) An excise duty *** at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on any tari.

(3) ****

38. Fees for terms, conditions and form of, and duration of, licenses, permits and passes.-(1) Every license, permit or pass granted under this Act-

(a) shall be granted-

(i) on payment of such fees if any, as the State Government may fix; and

(ii) subject to such restrictions and on such conditions, as the State Government may impose; and

(b) shall be in such form and contain such particular as the State Government may direct.

(2) Every license, permit or pass under this Act shall be granted for such period if ay as may be prescribed by rule made by the State Government u/s 85, Sub-section (2), Clause (c).

54A. Penalty for contravention of Sections 85 and 86 and conditions of license, etc.- if any holder of a license, permit or pass granted under this Act, or ay person in his employ and acting on his behalf,-

(a) in any case not provided for in Sections 46 and 46A willfully contravenes any rule made u/s 85 or Section 86, or

(b) willfully does any act, in breach of any of the conditions of the license, permit or pass, for which a penalty is not prescribed elsewhere in this Act,

shall be liable to fine which may extend to five thousand rupees.

85. Power of State Government to make rules.-(1) The State Government may make rules to carry out the objects of this Act or any other law for the time being in force relating to the excise-revenue.

(2) In particular, and, without prejudice to the generality of the foregoing provisions, the State Government may make rules

(a) for prescribing the powers and duties of officers of the Excise Department;

(b) for regulating the delegation of any powers *** the Commissioner of a Division, the Excise Commissioner or Collectors u/s 7, Sub-section (2), Clause (g);

(c) for declaring in what cases or classes of cases and to what authorities appeals shall lie from orders whether original or appellate, passed under this Act or under any rule made hereunder, and for prescribing the time and manner for presenting, and the procedure for dealing with, such appeals,

(d) for regulating the import, export, transport, sale, purchase, possession or consumption of any intoxicant;

(e) for regulating the periods for which licenses for the wholesale or retail vend of any intoxicant may be granted, and the number of such licenses which may be granted for any local area;

(f) for prohibiting the grant of licenses for the retail sale of any intoxicant at any place or within any local area described in the rules, or for defining the places in the vicinity of which shops for the retail sale of any intoxicant shall not ordinary be licensed;

(g) for prohibiting the grant to specified classes of persons of licenses of any particular kind or class;

(h) for declaring, either generally, or in respect of areas described in the rules, the persons or classes of persons to whom any intoxicant may or may not be sold;

(i) for prescribing restrictions subject to which a license, permit or pass granted under this Act may be cancelled or suspended;

(j) for regulating the procedure to be followed and prescribing the matters to be ascertained before any license for the wholesale or retail vend of any intoxicant is granted for any locality;

(k) for restricting the exercise of any of the powers conferred by Section 65, Sub-section (1), and Sections 66 and 67;

(l) for declaring the Excise Officers to whom, and the manner in which, information or aid should be given u/s 71;

(m) for the grant of expenses to witnesses;

(n) for the grant of compensation for loss of time to persons released by any Excise officer Under this Act on the ground that they have been improperly arrested, and to persons charged before a Magistrate with offences

punishable under this Act and subsequently acquitted; and

(o) for prescribing restrictions or modifications in the application to Excise Officers of the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to powers of Police Officers which are referred to in Section 74, Sub-section (1), of this Act.

(3) The powers conferred by this section for making rules are subject to the condition that the rules be made after previous publication:

Provided that any such rules may be made without previous publication if the State Government considers that they should be brought into force at once.

86. Further power of State Government to make rules.- The State Government may make rules-

(1) for regulating the manufacture, supply or storage of any intoxicant, and in particular, and without prejudice to the generality of this provision, may make rules for regulating-

(a) the establishment, inspection, supervision, management and control of any place for the manufacture, supply or storage of any intoxicant, and the provision and maintenance of fittings, implements and apparatus therein;

(b) the bottling of liquor for purposes of sale;

(c) the cultivation of the hemp plant (*Cannabis sativa*);

(d) the collection of portions of the hemp plant (*Cannabis sativa*) from which intoxicating drugs can be manufactured or produced, and the manufacture or production of intoxicating drugs therefrom;

(e) the tapping of tari-producing trees and the drawing of tari from trees;

(f) the tapping of tari-producing trees in areas notified in this behalf by the State Government, and the maintenance of such marks;

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

(3) for declaring how spirit manufactured in India shall be denatured;

(4) for causing spirit so manufactured to be denatured through the agency or under the supervision of servants of the Government;

(5) for ascertaining whether any spirit so manufactured has been denatured;

(6) for regulating the deposit of any intoxicant in a warehouse established, authorized or continued under this Act, and the removal of any intoxicant from any such warehouse or from any distillery or brewery;

(7) for prescribing the scale of fees or the manner of fixing the fees payable in respect of any exclusive privilege granted u/s 22 or any license, permit or pass granted under this Act, or in respect of the storing of any intoxicant;

(8) for regulating the time, place and manner of payment of such fees;

(9) for prescribing the restrictions under which or the conditions on which any license, permit or pass, may be granted, and in particular, and without prejudice to the generality of this provision, may make rule for -

(i) prohibiting the admixture with any intoxicant of any article deemed to be noxious or objectionable,

(ii) regulating or prohibiting the reduction of liquor by a licensed manufacturer or licensed vendor from a higher to a lower strength,

(iii) prescribing the nature and regulating the arrangement of the premises in which any intoxicant may be sold, and prescribing the notices to be exposed at such premises,

(iv) prohibiting or regulating the employment by the licensee of any person or class of persons to assist him in his business,

(v) prohibiting the sale of any intoxicant except for cash,

(vi) prescribing the days and hours during which any licensed premises may or may not be kept open, and providing for the closing of such premises on special occasions,

(vii) prescribing the accounts and registers (if any) to be maintained and the returns to be submitted by the licensees relating to their business, and

(viii) regulating the transfer of licenses;

(10) for prescribing the particulars to be contained in licenses, permits or passes granted under this Act;

(11) for the payment of compensation to licensees whose premises are closed u/s 26 or under any rule made under Sub-clause (vi) of Clause (9) of this section;

(12) for prescribing the time, place and manner of levying duty on intoxicants;

(13) for providing for the destruction or for the disposal in any other manner, of any intoxicant deemed to be unfit for use; and

(14) for regulating the disposal or destruction of articles or things confiscated or seized under the provisions of this Act.

Explanation I. -Fees may be prescribed under Clause (7) of this section at

different rates for different classes of exclusive privileges, licenses, permits, passes or storage, and for different areas. Explanation II.- The price of an intoxicant as fixed by rules made under Clause (2) of this section, shall be deemed to have always been exclusive of any tax, surcharge, additional surcharge or any other impost on the sale or purchase of such intoxicant levied under any law for the time being in force.

88. Publication and effect of rules and notifications. - All rules made, and notifications issued, under this Act shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

Rule 14A(1) Apart from simple rectification of weaker spirit produced in a pot still, re-distillation of spirit may undertake by a distiller:

(i) for the purpose of manufacture of "silent" spirit or spirit of special quality required for manufacture of foreign liquor with the permission of the Collector of the district;

(ia) for the purpose of manufacture of spirit for potable purposes from (i) above or from head-cut spirit obtained from primary distillation with the permission of the Excise Commissioner, West Bengal, provided that such second re-distillation shall be so made that no further feint spirit or cut spirit is left as residue;

(ii) for any reason other than those mentioned at Clause (i) with the written permission of the Commission.

(2) Due notice of requirement of re-distillation shall be given by the distiller to the Excise Officer-in-Charge at least 48 hours in advance so that the latter may take steps for proper supervision of the operation.

(3) The following are the maximum limits of a wastage on re-distillation that may be allowed, provided the Excise Officer-in-Charge is satisfied that no spirit was abused for extracted from the system except as provided in law:

(i) In case of re-distillation as mentioned in Clause (i) of Sub-rule (1)

Nature of still

Maximum Limit of wastage allowance

Patent still

2.0 per cent

Pot still

2.5 per cent

(ii) In case of re-distillation as mentioned in Clause (ii) of Sub-rule (1)

Nature of still

Maximum Limit of wastage allowance

Patent still

1.5 per cent

Pot still

2.0 per cent

(iii) in case of re-distillation as mentioned in Clause (ia) of Sub-rule 1-

Nature of still

Maximum Limit of wastage allowance

Patent still

7.5 per cent

Pot still

8.0 per cent

(4) For re-distillation wastage exceeding the minimum limit of allowance as mentioned above, or all wastages occurring due to abuse or unauthorized removal of spirit, if any, from the system during process of re-distillation duty shall be paid by the licensee at the highest rate leviable of foreign liquor immediately after completion of re-distillation and before taking up a fresh batch for re-distillation.

(5) The Excise Officer-in-Charge shall keep a separate account of all re-distillation cases showing therein the wastage with comments and particulars of realization of duty although the same may have been made by adjustment of the Personal Ledger Account of duty of the distiller.

(6) The Commissioner may, on an application made by the distiller, examine, any case of re-distillation wastage and may, if he is satisfied that the wastage occurred beyond control of the distiller and that no part of the wastage due to unauthorized removal of spirit from the system, condone the wastage and exempt the distiller from payment of duty of the same. On issue of such order by the Commissioner, duty already realized, if any on the chargeable wastage shall be refunded to the distiller by way of adjustment of the Personal Ledger Account of duty or otherwise, if necessary.

(Emphasis supplied by us)

12. After hearing the learned Counsel for the parties and going through the above materials on record, we find that there is no dispute that Rectified Spirit which contains 95% of Ethyl Alcohol is really called Industrial Alcohol and the same is not meant for human consumption in that form; but there is also no difference of opinion that all types of potable intoxicants meant for human consumption are made from Ethyl Alcohol itself and in any potable intoxicant for human consumption, the percentage of Ethyl Alcohol varies between 8% and

43% by volume. For instance, Beer, Wine etc. contains lower percentage of Ethyl Alcohol whereas hard drinks like Whisky, Brandy, Gin, Rum etc. mostly contain 43% of Ethyl Alcohol by volume. Thus, Rectified Spirit which contains 95% Ethyl Alcohol is not fit for human consumption in that form with such huge percentage of Ethyl Alcohol.

13. When a person gets license from the State Authority for manufacturing potable intoxicants for human consumption, he either prepares Ethyl Alcohol by himself in his distillery or imports Ethyl Alcohol as the basic material for preparation of Potable intoxicant for human consumption from elsewhere and then reduces the percentage of Ethyl Alcohol to the recommended percentage and mixes other ingredients of the intoxicants in the distillery for the manufacture of the final product. Thus, without Ethyl Alcohol one cannot manufacture Potable intoxicant meant for human consumption.

14. In the case before us, there is no dispute that the writ-Petitioner imports Ethyl Alcohol from outside West Bengal in the form of Rectified Spirit and also purchases from the other primary distillers spirits which has been once distilled. With that basic element of potable intoxicant and with the aid of other ingredients, it prepares the final product by way of further distillation of the imported Rectified Spirit or the "once-distilled-spirits" so purchased.

15. By virtue of Sub-rule (ia) of Rule 14A, one is authorized to manufacture spirit for potable purposes from the item mentioned in Sub-rule (i) or from head-cut-spirit obtained from primary distillation with the permission of Excise Commissioner, West Bengal on condition that such second re-distillation shall be made in such a way that no further feint spirit or cut spirit would be left as residue and if on such re-distillation, the wastage exceeds the limit specified in that sub-rule, maximum amount of duty prescribed for foreign liquor should be paid for such amount of wastage as provided in Sub-rule (4) thereof. By taking aid of the said Rule, the State Government has asked the writ-Petitioner to pay such a huge amount as indicated earlier as duty for wastage which is the subject-matter of dispute in this writ-application.

16. We are unable to accept the contention of Mr. Khaitan that the imposition of various restrictions provided in Rule 14A was made in exercise of the taxing power of the State. In our opinion, the said Rule contains various regulatory measures with the object of preventing wastage of residue in the process of manufacturing Potable intoxicant for human consumption. The language used in Rule 14A itself indicates that it is imposed to prevent wastage in the process of "second re-distillation" of head cut spirit or silent spirit leading to the manufacture of final product and although in Sub-rule (4), the imposition has been described as "duty", it is in essence, imposition of penalty for exceeding the limit of wastage by violating the norms fixed in exercise of power conferred u/s 86 of the Act. The said provision of the Rules is really intended in exercise of "Police Power of the State" and not in exercise of "Taxing power of the State".

17. However, for exercising such a police power, there are some conditions to be fulfilled by the State. We now propose to consider whether those conditions precedent have been satisfied in this case.

18. At this juncture, it will not be out of place to refer to a three-judge-bench decision of the Supreme Court in the case of Calcutta Municipal Corporation and Others Vs. Shrey Mercantile Pvt. Ltd. and Others, where the doctrine of police power of the State was discussed in details. The following observations of the court in that case will be relevant:

Therefore, the main difference between "a fee" and "a tax" is on account of the source of power. Although "police power" is not mentioned in the Constitution, we may rely upon it as a concept to bring out the difference between "a fee" and "a tax". The power to tax must be distinguished from an exercise of the police power. The "police power" is different from the "taxing power" in its essential principles. The power to regulate, control and prohibit with the main object of giving some special benefit to a specific class or group of persons is in the exercise of police power and the charge levied on that class to defray the costs of providing benefit to such a class is "a fee". Therefore, in the aforesaid judgment in Kesoram's case, it has been held that where Regulation is the primary purpose, its power is referable to the "police power". If the primary purpose in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the Government. But where the Government intends to raise revenue as the primary object, the imposition is a tax. In the case of Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, , it has been held that Regulation is a necessary concomitant of the police power of the State and that though the doctrine of police power is an American doctrine, the power to regulate is a part of the sovereign power of the State, exercisable by the competent legislature. However, as held in Kesoram's case (supra), in the garb of Regulation, any fee or levy which has no connection with the cost or expense of administering the Regulation cannot be imposed and only such levy can be justified which can be treated as part of regulatory measure. To that extent, the State's power to regulate as an expression of the sovereign power has its limitations. It is not plenary as in the case of the power of taxation.

(Emphasis supplied by us).

18. Therefore, in order to exercise such a regulatory power, it must be preceded by a competent legislation authorizing exercise of such power and secondly, under the garb of Regulation, any fee or levy which has no connection with the cost or expense of administering the Regulation cannot be imposed and only such levy can be justified which can be treated as part of the regulatory measures.

19. In the case before us, Clauses (1), (2) and (9) of Section 86 of the Bengal Excise Act give power to the State Government to make Rules relating to prevention of wastage in the process of distillation by imposing various

restrictions but in the process, no power has been given in that section or any other section of the Act to levy any amount for payment upon the manufacturer for enforcing those regulatory measures preventing wastage except the provisions of penalty contained in Section 54A nor is there any power conferred by the Act to impose any levy or any fee or duty for enforcing the preventive measures of wastage, whereas for enforcing the measures prescribed in Clause (7) of Section 86 which fall within the taxing power of the State, the legislature has given explicit power to impose fees at different rates as appearing in Explanation-1 to the said Section. Such power is conspicuously absent in case of enforcement of the measures provided in Clauses (1), (2) and (9) of that Section; on the other hand, Section 54A of the Act gives specific power of imposition of fine not exceeding Rs. 5000/- in case of violation of any of the Rules made in pursuance of the power conferred u/s 86 of the Act.

20. Therefore, it is clear that the legislature has not given authority to the State Government to levy any duty for violation of any of the measures provided in the Rules in exercise of power conferred under Clauses (1), (2) and (9) of Section 86 of the Act except imposition of fine not exceeding Rs. 5000/-.

21. Thus, the first essential condition for charging the so-called duty as provided in Rule 14A(4) is not authorized by the legislature and in the absence of such authorization, the second condition as to whether under the garb of Regulation, any excessive fee or levy which has no connection with the cost or expense of administering the Regulation need not be enquired into.

22. As pointed out by the Supreme Court in the case of Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, in a fiscal matter it will not be proper to hold that even in the absence of any express provision in the Act, a delegated authority can impose tax or fee. Such power of imposition of tax and/or fee by delegated authority, the Supreme Court held, must be very specific and there is no scope of implied authority for imposition of such tax or fee. Delegated authority, according to the said decision, must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power.

23. Applying the aforesaid principles to the facts of the present case, we hold that the State legislature has given power to the State Government only to impose penalty and that too, not exceeding Rupees five thousand for violation of the measures prescribed under the Rules framed in exercise of power conferred u/s 86 but no power has been given to charge any "duty" for violation of the Rules framed imposing regulatory measures as provided in Clauses (1), (2) and (9) of Section 86 of the Act.

23. Mr. Dutt, lastly made a desperate attempt to bring the case of imposition of duty under Sub-rule (4) of Rule 14A within the fold of Clause (12) of Section 86 of the Act. In our opinion, Clause (12) of Section 86 of the Act speaks of framing

rule in the exercise of taxing power of the State as would appear from the opening sentence of Section 28 of the Act which describes the ways of levying the duty in exercise of taxing power subject to such Clause 12. Therefore, Clause 12 has nothing to do with the regulatory power of the State to prevent misuse of materials in the process of distillation.

24. Although the learned Counsel for the parties argued in details on the question whether the State legislature has power to impose any duty or fees or tax on the Rectified Spirits within the taxing power of the State, in view of our finding that the power conferred under the Act for wastage of the materials in the process of manufacture of potable intoxicant was really regulatory in nature, we do not intend to deal with those decisions. Even Mr. Khaitan, the learned Senior Advocate appearing on behalf of the writ-Petitioners, did not dispute the existence of the police power of the State to impose restriction for prevention of the wastage of the materials leading to the ultimate manufacture of the potable intoxicants. In the decision of the Five-Judge-Bench of the Supreme Court in the case of Synthetics & Chemicals Limited v. State of U.P. (supra), strongly relied upon by Mr. Khaitan, such police power of the State over Ethyl Alcohol has been approved as would appear from the following observations:

We must accept the position that the States have the power to regulate the use of alcohol and that power must include power to make provisions to prevent and/or check industrial alcohol often being used as intoxicating or drinkable alcohol. The question is whether in the garb of Regulations a legislation which is in pith and substance, as we look upon the instant legislation, fee or levy which has no connection with the cost or expenses administering the Regulation, can be imposed purely as regulatory measure.

(Emphasis supplied by us).

25. We, therefore, hold that Sub-rule (4) of Rule 14A framed in exercise of the police power of the State conferred under Clauses (1), (2) and (9) Section 86 of the Act authorizing imposition of duty on wastage in the process of distillation at par with the highest rate of duty payable on IMFL is ultra vires the said Statute itself and thus, is liable to be struck down on that ground alone. We, however, do not dispute the power of the State to impose other regulatory measures prescribed in Rule 14A except imposition of duty prescribed therein in the absence of conferment of such power in the Act and the State would be free to enforce those regulatory measures by invoking Section 54A of the Act.

26. The writ-application, therefore, succeeds. Let there be a declaration in terms of prayers (a) to (c) of the writ-application.

27. In the facts and circumstances, there will be, however, no order as to costs.